

Mur. 19. 1821. *Appellant's Authorities*.—9. Dig. 3. 1; 1. Blackstone, c. 14. ad fin.; 1669, c. 16; Innes, Feb. 6. 1798, (13189); Black, Feb. 9. 1804, (13905); Brown. Feb. 25 1813, (F. C.); L. Keith, June 10. 1812, (F. C.); M'Manus, Nov. 26. 1800, (East's Rep.)

*Respondent's Authorities*.—9. Dig. 2. 30; 1. Bank. 2. 30; 1. St. 9. 5.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 13.)

No. 7. DENNISTOUN, BUCHANAN, and COMPANY, Appellants.—*Sol.-Gen. Wedderburn—Romilly—Cranstoun.*

D. LILLIE and Others, Respondents.—*Wetherell—Denman.*

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*Insurance*.—Held (affirming the judgment of the Court of Session,) that although it was innocently represented to insurers that a vessel was to sail from New Providence on the 1st of May, and a policy was thereupon executed; yet, as she actually sailed on the 23d of April preceding, and was captured on the 11th of May, this was a material misrepresentation to the effect of liberating the insurers.

April 5. 1821.

2<sup>D</sup> DIVISION.  
 Lord Pitmilley.

ON the 19th of March 1814, William Duff and Company, merchants at New Providence, addressed a letter to Dennistoun, Buchanan, and Company, merchants in Glasgow, in which they stated, that 'at a prize sale of a South Sea whaler, and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast sailing schooner Brilliant of 157 tons burden, mounting six nine-pounders, to sail, with or without convoy, about the 1st of May, and on the value of which shipment you will please to make insurance;' and they ordered insurance on the Brilliant herself to Greenock for £1400. In another letter of the 24th, they mentioned that the Brilliant would be cleared out as bound to Greenock and a port on the continent. Copies of these letters (the originals of which had been transmitted, but not received) were inclosed in one of the 2d of April, in which it was stated, that 'the Brilliant will sail on the 1st of May, a running vessel, and in which the writer of this (one of the partners) will take his passage.' These letters were received by Dennistoun, Buchanan, and Company on the 17th of June thereafter, and on the following day they effected a policy of insurance with Lillie and others 'from Nassau to Clyde, with leave to call at all ports and places whatsoever for convoy, or for any other purpose whatever, without being deemed a deviation,

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‘ and with or without letters of marque, leave to chase, capture,  
‘ man, and convoy, or send into port or ports any vessel or vessels.’  
The insurance was done at the rate of six guineas per cent., to  
return three pounds per cent. ‘ for convoy for the voyage, or two  
‘ pounds per cent. for partial convoy and arrival.’ At that time  
this country was engaged in war with America; and, on the 23d  
of April, the Brilliant sailed under convoy of His Majesty’s ship  
Martin for Halifax. She was captured on the 11th of May by  
an American privateer, and carried as a prize into Boston. Den-  
nistoun, Buchanan, and Company having demanded implement  
of the policy from Lillie and others, and this being refused, they  
brought an action against them before the Court of Admiralty.  
In defence it was pleaded, that the nature and extent of the risk  
had been misrepresented; that it appeared from the letter of the  
2d of April that the Brilliant was to sail on the 1st of May,  
whereas she had sailed on the 23d of April, which fact was mate-  
rial, because the vessel had thus been 56 days at sea instead of  
49, as was supposed when the contract was entered into, and so  
would have been considered a missing ship; and that in this ques-  
tion it was unimportant that the misrepresentation was uninten-  
tional. To this it was answered, That there was no warranty as  
to the period when the vessel was to sail; that the letters had  
been exhibited, so that the insurers were put in possession of all  
the information which Dennistoun, Buchanan, and Company had  
obtained; and that these letters represented nothing more than  
that it was the intention of Duff and Company to dispatch the  
vessel on the 1st of May, without, however, fixing themselves  
down to that day, or preventing themselves from taking advan-  
tage of a convoy in the mean while. The Judge-Admiral, after  
alluding to the terms of the letters, found ‘ it admitted that these  
‘ letters were communicated to the defenders, whereby they saw  
‘ that the vessel was positively intended to remain in New Provi-  
‘ dence, and not to sail therefrom till the 1st of May, and under  
‘ this impression subscribed the policy in question; that the Bril-  
‘ liant sailed on the 23d of April from New Providence, and, for  
‘ any thing known, may have been captured before the 1st of  
‘ May, when she was held forth to the defenders as remaining in  
‘ the harbour; that although the representation made by the pur-  
‘ suers was absolutely innocent on their part, the fact stated by  
‘ them to the defenders was not verified, and a material change  
‘ was thereby made in the risk undertaken by the latter;’ and  
therefore assoilzied Lillie and others, and found them entitled to  
expenses. To this interlocutor he adhered, in respect ‘ that the  
‘ risk which the underwriters undertook being confessedly that

April 5. 1821. ‘ on a vessel to sail on the 1st of May, was perfectly different from  
 ‘ one on a vessel which sailed on the 23d of April, inasmuch as  
 ‘ the defenders undertook a risk on a vessel understood to be in  
 ‘ the harbour and safe on the 1st of May, when, in fact, she had  
 ‘ been eight days at sea.’ He accompanied this interlocutor with  
 a note, in which he observed, that ‘ the petitioners (D. B. and Co.)  
 ‘ do not seem to dispute, that if the vessel had been taken before  
 ‘ the 1st of May, they would have had no argument. They,  
 ‘ however, state that the vessel was not captured till the 11th of  
 ‘ May. This, in real reasoning, makes no difference, since it is  
 ‘ a thousand chances to one, that if she had not sailed till the 1st  
 ‘ of May, she would not have fallen in with the vessel which took  
 ‘ her. The case of a vessel sailing the day before she is repre-  
 ‘ sented to sail, is quite different from that of a ship being de-  
 ‘ tained by unavoidable accidents beyond that day. In fact, it  
 ‘ is an insurance on a vessel in jeopardy, when she is represented  
 ‘ to be comparatively safe.’ Dennistoun, Buchanan, and Com-  
 pany having brought these judgments under review of the Court  
 of Session by reduction, Lord Pitmilley repelled the reasons, and  
 assoilzied Lillie and others; and to this interlocutor the Court  
 adhered on the 21st of May 1816, and 22d May 1817.\*

Dennistoun, Buchanan, and Company then appealed; but  
 the House of Lords ‘ Ordered and adjudged that the appeal be  
 ‘ dismissed, and the interlocutors complained of affirmed.’

*Appellants’ Authorities.*—Park, 321. 322; Marshall, 342; Park, 203, 205.

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 16.*)

No. 8.

Dr. JAMES R. BARCLAY, Appellant.—*Moncreiff—Keay.*  
 Right Hon. W. ADAM, Respondent.—*Clerk—Irvine—Cranstoun.*

*Tailzie.*—Held (affirming the judgment of the Court of Session,) that an entail, which  
 inter alia prohibited sales, and thereafter all facts and deeds, civil or criminal,  
 whereby the lands might be evicted, but in which the irritant clause mentioned  
 only facts and deeds, without specifying sales or alienations, did not prevent the heir  
 of entail in possession from selling.

May 18. 1821.

1st DIVISION.  
 Lord Gillies.

ON the 11th of December 1804, the respondent executed an  
 entail of the estate of Blair-Adam, in terms of a deed of entail  
 made in 1758 by Alexander Littlejohn, and in pursuance of a  
 statute of the 43d Geo. III. By the prohibitory clause it was

\* Not reported.