

1821.

DENNISTOUN
and others

v.

LILLIE
and others.

SCOTLAND.

COURT OF SESSION.

Messrs. DENNISTOUN, BUCHANAN
and Company, Merchants in } *Appellants.*
Glasgow - - - - - }

DAVID LILLIE and others, Under- } *Respondents.*
writers in Glasgow - - - - }

Agents of the owners of a ship, by a letter, saying, "The Brilliant will sail from Nassau for Clyde on the 1st of May, a running ship," instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23d of April. On the 11th of May she was captured. Held, in the court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.

UPON the 17th of June 1814 the Appellants, Messrs. Dennistoun, Buchanan and Company, merchants in Glasgow, received a letter of advice from Messrs. William Duff and Company, their correspondents at New Providence, dated 2d April 1814, containing copies of their letters to the Appellants of the 19th and 24th of March preceding.

The following are extracts of such parts of the letters as relate to the subject of insurance. By the

1821.

DENNISTOUN
and others
v.
LILLIE
and others.

letter of the 19th March the Appellants are informed thus: " 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. 9 $\frac{1}{2}$ d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner Brilliant, of 157 tons burthen, mounting six nine-pounders, to sail, *with or without convoy, about the first of May*; and on the value of which shipment you will please to make insurance. Messrs. Seton and Elliot will ship on board the Jessie 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. *They* also wish you to have insurance effected on the Brilliant from hence to Greenock, valuing her at 1,400*l.* sterling; to all of which we beg your attention." The letter of the 24th says, that the Brilliant would be cleared out as bound to Greenock and a port on the Continent. And in the letter of 2d April Messrs. Duff and Company state, towards the conclusion of the letter, which relates to a variety of other matters, " The Brilliant *will sail on the 1st of May*, a running vessel, in which the writer of this will take his passage."

Upon these advices an insurance was effected, *on ship and goods*, on the 18th of June, being the day after receiving the letters above quoted, although the contract or policy bears date on the 21st of June, three days later. At the time of entering into the contract the letters of advice were shown to the Respondents, who were some of the under-

1821.

DENNISTOUN
and others
v.
LILLIE
and others.

writers at Glasgow, with whom the insurance was effected.

The terms of the policy were, "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; 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.*"

About the 20th of April His Majesty's ship Martin came into the harbour of Nassau, and being bound for Halifax, the commander offered to take the Brilliant under his protection. This being considered a great advantage, as the risk of capture between Nassau and Halifax was imminent, extraordinary exertions were used to complete the loading of the Brilliant, and she sailed under convoy of the Martin on the 23d of April, being about eight days earlier than the date of sailing proposed in the foregoing letters.

Upon the 11th of May the Brilliant was captured by an American privateer, and carried into Boston.

When the intelligence of the capture arrived, the Appellants applied to the underwriters, *and many of them settled the loss.* But the Respondents resisted payment; whereupon the Appellants brought an action before the Court of Admiralty, concluding for payment of the sums respectively underwritten for them; and, after the usual pleading, the Judge Admiral pronounced the following interlocutor:—

1821.

DENNISTOUN
and others
v.LILLIE
and others.

“ The Judge Admiral, having advised the libel,
 “ defences, answers, replies, and writings produced,
 “ finds, that by a letter, dated the 19th of March
 “ 1814, from William Duff and Company, the cor-
 “ respondents of the pursuers, of New Providence,
 “ to them, they mentioned the ship Brilliant, a re-
 “ markable fast-sailing schooner, was to sail, with
 “ or without convoy, about the 1st of May; and
 “ that by an after letter dated the 2d of April last,
 “ 1814, the incorrectness of the word ‘ *about*’, as
 “ applicable to the 1st of May, was explained by
 “ the same correspondents informing the pursuers
 “ that the Brilliant was to sail for New Providence
 “ on the 1st of May, a running vessel, ‘ and in
 “ which the writer of this (William Duff) will take
 “ his passage :’ Finds it admitted, that these letters
 “ were communicated to the defenders, whereby
 “ they saw that the vessel was positively intended
 “ to remain in New Providence, and not to sail
 “ therefrom till the 1st of May last, and under this
 “ impression subscribed the policy in question :
 “ Finds, that the Brilliant sailed on the 23d of
 “ April from New Providence, and, for any thing
 “ known, may have been captured before the 1st
 “ day of May, when she was held forth to the de-
 “ fenders as remaining in the harbour: Finds,
 “ therefore, that although the representation made
 “ by the pursuers 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 assoilzies the defenders, and finds them
 “ entitled to expenses.”

1821.

DENNISTOUN
and othersv.
LILLIE
and others.

The Appellants brought the foregoing interlocutor under review of the Judge Admiral, by petition, and the interlocutor thereon was, “ The Judge
“ Admiral having advised this petition, and another
“ dated 23d February last, with the writings produced, remains of the same opinion, that the risk
“ which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May,
“ was perfectly different from one on a vessel which
“ sailed on the 23d 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, Refuses
“ this petition, and adheres to the interlocutor complained of.”

“ *Note.*—The petitioners 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 11th May. This, in real reasoning,
“ makes no difference, since it is a thousand chances
“ to one that if she had not sailed till 1st May she
“ would not have fallen in with the vessel which
“ took her. The case of a vessel sailing the day
“ before she is represented to sail is quite different
“ from that of a ship being detained 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.” And on the
19th of April 1815, the Judge Admiral modified the defenders account of expenses to £. 10. 1 s. 4 ½ d., and decerned against the Appellants for payment of the same, and for the fees of extracting the decree.

The Appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge Admiral. This action was discussed before Lord Pitmilley, Ordinary, who pronounced an interlocutor, repelling the reasons of reduction, &c.

1821.

DENNISTOUN
and others
v.
LILLIE
and others.

The Appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The Appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, &c.

The appeal was against the foregoing interlocutors.

On the part of the Appellants distinctions were taken between a warranty and a representation*, and it was contended that the letters exhibited did not amount to a warranty, or any thing more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation.—

Bowden v. Vaughan†; *Hubbard v. Glover*‡; *Barber v. Fletcher*§; *Bize v. Fletcher*||. It was

* *Pawson v. Watson*, Cowper, 790; Park on Insur. c. 10, 203, 205, c. 18, pp. 321, 322; Marsh on Insur. c. 9, s. 2, p. 342.

† 10 East, 415.

‡ 3 Camp. N. P. C. 313.

§ Doug. 305. In this case the word expected was used.

|| Doug. 271. See also Park, p.

1821.

DENNISTOUN
and others

v.

LILLIE
and others.

further argued, that the representation not being made *malâ fide*, the policy was not vitiated by such a misrepresentation.

For the Respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the Appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel having sailed on the 23d of April, was, at the time when the insurance was effected, what is termed "a missing ship."—*Ratcliffe v. Shoolbred** ; *Tillis v. Brutton* †.

For the Appellants, *The Attorney General*,
Mr. Abercrombie.

For the Respondents, *Mr. Wetherell*, *Mr. Denman*.

[In the course, and at the conclusion of the argument, the Lord Chancellor made the following observations.]

The second letter, in which it is expressed that the vessel will sail on the 1st of May, was shown to the underwriters, and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of *Barber v. Fletcher* the representation is, that the ship is *expected* to sail. If the accuracy of a representation as to time is to be given up, that doctrine must apply equally to the question

* Park, 180; Marshall, 1, 468. † Park, 182; Marshall, 467.

1821.

DENNISTOUN
and others
v.
LILLIE
and others.

of place. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of the Dart and the Jessie, but as to the Brilliant the statement is positive. Do the Appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or *malâ fides*, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, *malâ fides* is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the Appellant it is necessary to contend, that if the vessel had been captured on the 24th of April the underwriters would have been liable.

The *Lord Chancellor* :—This case resolves itself into two questions :—first, whether the representation was made, of which there is no doubt ; and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

19 March
1821.

I have formed an opinion upon the subject, but wish to give it further consideration ; and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of a judge as to the law applicable to those facts. The question for a jury would be, Was there in this case a misrepre-

1821.

KENNISTOUN
and othersv.
MILLIN
and others.

sentation of a material fact affecting the risk covered by the policy*.

The *Lord Chancellor* :—In the absence of the noble Lord†, who was present at the hearing of this appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship as well as goods. It is not therefore like the case of *Bowden v. Vaughan*, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

5 April
1821.

The *Lord Chancellor* [after stating the question on the appeal] :—There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive consideration of the case it appears to me that the judgment of the court below is right.

Judgment affirmed.

* Before the motion for judgment was finally made, the Lord Chancellor intimated that the House would (if desired) hear a further argument on the terms of the policy; but the proposal was declined by the agents.

† Redesdale.