

ARCHIBALD NEWBIGGING and Others, Appellants.—*Romilly*— No. 26.
Ivory.

A. M'GREGOR and COMPANY and Others, Respondents.—
Scarlett—Greenshields.

Insurance.—A ship having, during the subsistence of the 'non-intercourse law with America, been insured from Liverpool to New Orleans, with liberty to call at any port in the course of the voyage, and part of the premium to be returned if the voyage terminated at Pensacola; and the ship having arrived safely at Pensacola, but being lost there three weeks thereafter, and there being evidence to show an intention of holding the voyage terminated—Found (reversing the judgment of the Court of Session, and affirming that of the Judge Admiral) that the insurers were not liable.

Park 63(I)

M'GREGOR and Company and others were proprietors of the ship *Earl Bathurst*, commanded by Captain Heron, and were in the practice of trading with the United States of America. In 1811, all British ships and merchandise were excluded from the ports of the United States by a non-intercourse law; in consequence of which, British merchants resorted to circuitous methods of conducting their speculations, so as to get their cargoes introduced into these States. With this view, they usually addressed their adventures to agents at some of the neighbouring ports in Spanish America. M'Gregor and others being desirous to send the *Earl Bathurst* to New Orleans with a cargo, and to bring home another, addressed a letter, on the 27th of June 1811, to their correspondents, Messrs. Urquharts, of that port, stating that, 'in the situation of matters at present, we are 'at a loss how to employ the *Earl Bathurst* otherwise than sending her to Pensacola, which we have concluded to do. On receipt of this, you will, if the laws of your country still preclude British ships from entering your port, send round, as before, a cargo of cotton in as short a time as possible; but, if the restrictions be removed, Captain Heron will only touch at Pensacola, and proceed to New Orleans.' On the 12th of July thereafter, M'Gregor and others effected a policy of insurance over the *Earl Bathurst* with Newbigging and others, by which the latter bound themselves to insure her 'at and from Liverpool 'to New Orleans, with leave to call at Pensacola for any purpose 'upon any kind of goods or merchandise, and also upon the 'body tackle, apparel, ordnance, munition, artillery, boat and 'other furniture of and in the good ship or vessel called the *Earl Bathurst*, beginning the adventure upon the said goods and 'merchandise from the loading thereof aboard the said ship, &c. 'at Liverpool, and so shall continue and endure during her abode

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 ' &c. shall be arrived at New Orleans, &c. until she hath moored
 ' at anchor 24 hours in good safety, and upon the goods and mer-
 ' chandise, until the same be there discharged and safely landed ;
 ' and it shall be lawful for the said ship, &c. in this voyage to pro-
 ' ceed and sail to, and touch and stay at any port or place what-
 ' soever as above described, without prejudice to the insurance.
 ' The said ship, &c., for so much as concerns the assureds by
 ' agreement between the assureds and assurers in this policy, are
 ' and shall be valued at £4000 sterling, being on the hull and ma-
 ' terials of the said Earl Bathurst, at and after the rate of £6. 6s.
 ' per cent., to return £1 sterling per cent. if the voyage end at
 ' Pensacola.' By written instructions delivered to the captain on
 the same day, M'Gregor and others, after directing him to pro-
 ceed to Pensacola, and on his arrival there to wait on John Forbes
 and Company of that port, stated—' Our friends Messrs. T. and
 ' D. Urquhart of New Orleans will no doubt have informed these
 ' gentlemen of your ship being expected, and have given them
 ' the necessary orders relative to your present cargo, and that of a
 ' return one. Should this be otherwise, and you learn that the
 ' ports of the United States are open to the entry of British ves-
 ' sels, you will without delay proceed to New Orleans, and put
 ' yourself under the charge of these gentlemen ; but if no entry is
 ' allowed into the United States, you will remain at Pensacola, and
 ' immediately write Messrs. Urquharts of your arrival there, to
 ' which, from the vicinity of the two places, you may have an answer
 ' in a few days.' In a letter to Forbes and Company they stated,
 that ' this will be handed by Captain Heron of the Earl Bathurst,
 ' who is instructed to remain under your care, provided the laws
 ' of the United States are still in force against British ships enter-
 ' ing their waters.' The ship accordingly sailed on the 17th of
 July, and arrived safely at Pensacola on the 17th of September
 thereafter. On her arrival, Captain Heron immediately wrote
 to Urquharts of New Orleans, stating, among other things, that
 ' as the political affairs of the United States and Great Britain are
 ' at present, cannot proceed to your port as formerly without your
 ' advice, though I am cleared for the same.' On the following
 day Forbes and Company also wrote to Urquharts, observing,
 that ' we presume there can be no other alternative, under exist-
 ' ing circumstances, than to have the cargo landed and disposed of
 ' here, as its character of British renders it inadmissible with you.'
 No answer was received to these letters from Urquharts, nor to
 several which were subsequently written,—a circumstance alleged
 to have been occasioned by the land post between New Orleans

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and Pensacola having ceased to travel, and by the communication by sea being impeded by the state of the wind. In point of fact, the non-intercourse law still subsisted, and Captain Heron and Forbes and Company in their letters uniformly assumed that it would be necessary that the cargo should be landed at Pensacola, and that a return cargo should be sent from New Orleans to that port. After lying for 24 days at Pensacola, the Earl Bathurst was on the 12th of October totally wrecked by a violent hurricane; and it appeared from the subsequent correspondence on this subject, that M'Gregor and others considered it fortunate that the return cargo had not been forwarded from New Orleans to Pensacola. Having thereafter brought an action before the Court of Admiralty against Newbigging and others the underwriters, founding on the policy of insurance, the latter pleaded in defence, that the alternative risk of the voyage ending at Pensacola had been adopted by M'Gregor and others and their agents, and that, as she had been safely moored there for more than 24 hours, the insurance was terminated. To this it was answered, that leave was given by the policy to call at Pensacola for any purpose—that no period was limited—that the port at which the voyage was to end was to depend upon orders from Urquharts at New Orleans—and that the ship had been waiting at Pensacola for the purpose of receiving these orders when she was lost, and therefore the voyage could not be held as finished. The Judge Admiral, on the 1st of April 1813, found, ‘ That the ship Earl Bathurst was insured at ‘ and from Liverpool to New Orleans, with leave to call at Pensacola for any purpose; and the premium was thus expressed: ‘ Six ‘ guineas per cent. to return £1 sterling per cent. if the voyage end ‘ at Pensacola;’ and consequently, although the vessel was insured ‘ all the way to New Orleans, it was in the contemplation of all ‘ parties that the voyage might end at Pensacola: That the ship, ‘ commanded by Captain Heron, sailed from Liverpool on 17th ‘ July 1811, and arrived at Pensacola on 17th September thereafter: That on the 12th July, previously to the ship’s sailing, ‘ Captain Heron received written instructions for his government, ‘ wherein he is directed thus: ‘ We now instruct you to proceed to ‘ Pensacola, the place of her destination,’ &c. ; and in an after part ‘ of the instructions, he is farther directed, ‘ that if he learn that ‘ the ports of the United States are open to the entry of British ‘ vessels, he would without delay proceed to New Orleans:’ Therefore Pensacola was the direct port of destination for the Earl ‘ Bathurst, and she was to proceed to New Orleans, only in the ‘ event of British ships being admissible into the ports of the ‘ United States: That when the ship arrived at Pensacola, the

March 6. 1822. ‘ ports of the United States were shut against British ships ; and
 ‘ throughout the whole correspondence, (particularly in that of
 ‘ Messrs. Urquhart and Company at New Orleans, to whom the
 ‘ cargo was consigned,) there does not appear the most distant
 ‘ surmise of the possibility of the Earl Bathurst proceeding to
 ‘ New Orleans, and time has since proved that at this hour the
 ‘ vessel could not have proceeded to that port ; therefore Pensacola
 ‘ must be held to have been the port of the vessel’s destination,
 ‘ and that although her cargo was kept aboard, this was merely be-
 ‘ cause it was, by the pursuers, put under the directions of Messrs.
 ‘ Urquhart and Company, from whom notice had not arrived
 ‘ how it should be disposed of ; and as the vessel lay in the har-
 ‘ bour there from the 17th of September to the 12th of October,
 ‘ when she was wrecked, the insurance in question, which was
 ‘ on the vessel only, was at an end ;’ and therefore assoilzied
 the underwriters, but found no expenses due.—This judgment
 M’Gregor and others brought under review of the Court of
 Session by a reduction ; and Lord Pitmilly reduced in terms
 of the libel, and decerned against the underwriters, ‘ in re-
 ‘ spect it appears from the letters of correspondence produced,
 ‘ that the resolution as to the voyage of the Earl Bathurst,
 ‘ whether it should terminate at Pensacola, or be continued
 ‘ from thence to New Orleans, was left by the owners, when the
 ‘ ship sailed from Liverpool, to be regulated by circumstances
 ‘ which could not be ascertained till the arrival of the vessel in
 ‘ America, and as to which the captain was referred to Messrs.
 ‘ Urquharts of New Orleans, the consignees of the cargo, under
 ‘ whose entire control he was to hold himself after reaching Pen-
 ‘ sacola, excepting in the single event of his learning positively,
 ‘ on his arrival there, that the ports of the United States were
 ‘ open for British vessels, in which case he was to proceed directly
 ‘ to New Orleans,—and in respect the ship was wrecked at Pensa-
 ‘ cola, while the captain, without having landed any part of the car-
 ‘ go, was waiting for instructions from Messrs. Urquhart, in answer
 ‘ to letters dispatched by him to them immediately after his arrival
 ‘ at that port,—that the voyage cannot be held to have ended at
 ‘ Pensacola before the loss of the ship, and the vessel cannot, on the
 ‘ ground of the voyage having terminated, be held to have been
 ‘ uninsured, while the captain was, in obedience to instructions from
 ‘ his owners, waiting, without any undue delay, for directions from
 ‘ the consignees as to the destination of the vessel and cargo.’—To
 this interlocutor the Court adhered on the 10th of December
 1816.* Newbigging and the other underwriters having then

* Not reported.

entered an appeal on the grounds already stated, the House of Lords ' Ordered and adjudged, that the interlocutors complained of be reversed, and that the decree of the Judge Admiral in Scotland be affirmed.' March 6. 1822.

J. CAMPBELL,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 8.*)

JOHN BOYES, Appellant,—*Clerk—Millar.*

No. 27.

Mrs. SCOTT WARING, Respondent.—*Gifford—Forsyth.*

Factor.—Circumstances in which it was held, (affirming the judgment of the Court of Session,) that the son and heir of a factor employed to uplift rents had no right to demand a recompense for his father's services, or for his own.

IN 1798, James Duke of Hamilton being desirous to make a provision in favour of the respondent (then Mrs. Esten,) and her daughter Miss Hamilton, executed two leases, by which he let to his factor, Captain Boyes, his heirs, assignees, and subtenants, certain farms in Lanarkshire and Linlithgowshire, for 19 and 21 years, at small rents. On the other hand, Captain Boyes granted two deeds declaratory of the nature and objects of these leases; and in particular declaring, ' That whatever advantages or rise of the money-rents can be obtained by subsetting the lands and farms before mentioned, or by assigning the said lease, or any part thereof, shall be held in trust for the use and behoof of the said Mrs. Harriet Pye Esten during her lifetime, and of Ann Douglas Hamilton, her daughter, and any other child or children that may be procreated between the said Duke and her, in manner underwritten: And she has further reposed in me the trust and charge of collecting the surplus money-rents to be obtained by subsetting, or the prices to be got by assignments: Therefore I hereby oblige myself and my heirs, or others succeeding to me in the said lease, to use all manner of diligence and pains in getting said lands and farms subset for the highest rents that can be got therefor, and to report my diligence and success therein to the said Mrs. Harriet Pye Esten, delivering to her a faithful and true account, from time to time, of the rises of rent that may be obtained by subsetting, and the prices or consideration to be obtained by assignment of the lease, or any part thereof; and, after paying the respective rents stipulated by the said leases, to pay over to the said Mrs. Harriet Pye Esten all

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