

July 17. 1822. *Appellants' Authorities.*—James, Jan. 1. 1709, (3433); Young, Feb. 27. 1816, (F. C.); Buller's N. P. 284; 4. T. R. 140. 144; 2. Vesey jun. 189; Peake's L. of Ev. 93. 94. 95; 2. Raym. 927; 1. Strange, 646; 2. Strange, 717. 1005. 1203; 1. Wilson, 104. 239.

SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 32.*)

No. 44. STIRLING and ROBERTSON, Appellants.—*Fullerton—Pollock.*
W. GODDARD, Respondent.—*Jardine—Ivory.*

Insurance—Representation.—A party having in April effected an insurance on a vessel from Hull to America and home again, on a representation that she was immediately to sail; and the vessel not having been then ready to sail, and not having sailed till June; and a war with America having been expected, and having been declared in July; and the vessel having been ~~in the mean-while~~ taken and destroyed in August by an American privateer—Held (affirming the judgment of the Court of Session) that the underwriters were not liable.

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1ST DIVISION.
Lord Alloway.

STIRLING and ROBERTSON, merchants in London, were proprietors of the ship *Royal Bounty*, of which John Robertson of Austin-Friars was the registered owner. In the spring of 1812 she was under repair in the port of Hull, and on the 18th of March Dopkin and Company, the carpenters, wrote to Stirling and Robertson, that 'you may rest perfectly satisfied no time shall be lost in getting the *Royal Bounty* away, but there is a great deal to do at her yet. I fear it will require the whole of the next month to get her to sea;' and on the 24th of that month they informed them that 'we have very bad weather just now, which is much against getting the *Royal Bounty* finished; but you may rely no exertions of ours shall be wanting to get her away as fast as possible.' The object of these repairs was to fit the vessel for a voyage from Hull to Prince Edward's Island or Bay of Chaleurs in America, and home again. On the 13th of April Stirling and Robertson wrote to Mr. Duncan, insurance-broker at Leith, stating—'Please insure £6000 on the hull and materials of the *Royal Bounty*, Captain H. Gambles, as may be afterwards valued, from Hull to her port or ports of loading in Prince Edward's Island, during her stay there, and from thence to her port or ports of discharge in Great Britain; the premium not to exceed seven guineas per cent.; and if a return can be obtained for sailing north about, or with convoy, you will of course get it inserted. The *Royal Bounty* has undergone a thorough repair at Hull, which has rendered her a substantial vessel, and she is in every respect properly equipped for the voyage. It is our intention to give her ten guns; but this, of

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‘ course, we do not warrant, but only mention for your govern-
 ‘ ment. We suppose you can have no objection to guarantee the
 ‘ underwriters for the usual commission of one half per cent.’

Mr. Duncan accordingly applied to several underwriters, and among others to Mr. Goddard, and on the 21st of April obtained an insurance on the vessel, ‘ lost or not lost from Hull to her port
 ‘ or ports of loading in Prince Edward’s Island or Bay of Chaleurs,
 ‘ during her stay there, and from thence to Clyde.’ Mr. Duncan having reason to believe that the vessel was ready for sea, and was immediately to proceed on her voyage, in (consequence of an order which he had received from a Mr. Campbell of Greenock, on the 30th of March, to send provisions to her, and of a letter from the Captain on the 3d of April, stating, that if they were immediately transmitted they would be in sufficient time,) had represented to several of the underwriters, who subscribed the policy before Mr. Goddard, that the vessel was ready to proceed to sea, and that he was so satisfied that she would sail without delay, that he had written to a friend of his at Hull to sell the provisions which he had shipped for the vessel, in case they should not have reached Hull before the vessel sailed. Accordingly, in a letter which he addressed at a subsequent period to Stirling and Robertson, he stated, that ‘ I gave some of the underwriters rea-
 ‘ son to think, from what I said to them at the time I effected the
 ‘ insurance, that the ship would soon be ready to sail, and I had
 ‘ every reason to think and to say what I did, as Mr. Campbell
 ‘ wrote to me of date 30th March, allowing me to ship provisions
 ‘ for her, on the condition that if the ship had sailed before they
 ‘ reached Hull, the provisions should lie to my account. That I
 ‘ might run no risk of the last, I wrote to Mr. Gambles, who re-
 ‘ plied to me of date the 3d April, saying, I might ship them per
 ‘ first trader, as they would be in time. Under these circum-
 ‘ stances, I consider I might say what I did with the greatest
 ‘ safety.’ It did not appear, however, that he had made this representation to Mr. Goddard.

At this time there were considerable apprehensions that the war between this country and America, which subsequently took place, was about to break out. The vessel was not completely repaired till the 26th of May, and it appeared that she was a slow sailer. She remained in Hull till the 8th of June, when she sailed on her voyage; and some of the underwriters, having observed this from the newspapers, intimated to Mr. Duncan that they were not to be considered as responsible under the policy. To this he answered, that he had no power to free them from the risk which they had undertaken, and at the same time he com-

July 19. 1822. municated this circumstance by the above letter to Stirling and Robertson, and the representation which he had made to the underwriters.

War between this country and America was declared in the month of July, and the Royal Bounty was taken and burnt by an American privateer on the 1st of August, when she had almost reached her outward port of destination. The underwriters having refused to settle the loss, an action was brought against one of them, who resided in England, before the Court of Common Pleas, where a verdict passed against him, in consequence (as was alleged) of a defect in the evidence as to the representation which had been made. Some of them also settled extrajudicially; but Mr. Goddard having refused payment, an action was brought against him in 1815 by Stirling and Robertson before the Court of Admiralty. In defence he pleaded,—

1. That Stirling and Robertson were not the registered owners, but that the vessel was registered in name of John Robertson, and therefore they had no title to pursue.

2. That the representation that the vessel had, on the 13th of April, undergone a thorough repair, and was in every respect properly equipped at that time for the voyage, was not true, as the repairs were not completed till the month of June thereafter.

3. That the underwriters who subscribed the policy before him, had been induced to do so on the representation that the vessel was to sail in April, whereas she did not sail till June, and in the mean while lay in port, exposed to a greater danger of fire, &c. than at sea:—that if she had sailed in April, she might have been able to accomplish the voyage to America, and home again, before the equinoctial storms in September; whereas, by sailing in June, she must have been exposed, on her return home, either to them or to the tempestuous weather of winter, so that the risk was greatly increased:—and,

4. That if she had sailed in the month of April, she would have reached her port of destination before war was declared between this country and America, and might even have been able to return, or at least to clear the coast of America before hostilities were actually commenced, and therefore the risk was a different one from that which had been insured against.

To this it was answered,—

1. That although Mr. Robertson was the registered owner, yet the vessel truly belonged to Stirling and Robertson; but that, to obviate the defence, he had since been made a party to the action.

2. That the letter written by Stirling and Robertson to Mr. Duncan had been exhibited to the underwriters, and nothing was

there said as to the period at which the vessel was to sail; and that although it was there mentioned that she was equipped for the voyage, this had been done *bonâ fide*, in consequence of information from the carpenters to that effect;—and, July 19. 1822.

3. That the risks were not different from those which had been insured against, nor were they increased by the delay which had taken place in sailing. The Judge-Admiral appointed Stirling and Robertson to produce a copy of the proceedings in the Court of Common Pleas, and ordained Mr. Goddard to condescend specifically as to the representation which had been made by Mr. Duncan relative to the time at which the Royal Bounty was to sail; and at the same time he issued this note:—‘ By letter from Dopkin and Company ‘ to the pursuers, dated 18th March 1812, the latter were ‘ informed that the repairs of the Royal Bounty would, as the ‘ former feared, require nearly the whole of the next month; and ‘ by another letter, 24th same month, the pursuers were told that ‘ the weather was very bad, and retarded the work. Taking these ‘ in conjunction with all experience, that workmen never finish ‘ their work even in the time they appoint, the pursuers had ‘ surely no right, either in fact or in common reasoning, to write ‘ on the 13th April that the ship was fully repaired, ‘ and is in ‘ every respect equipped for the voyage.’ I cannot approve of ‘ this, nor can I think that any man could. I do not, however, say ‘ that this alone is enough to constitute a material misrepresenta- ‘ tion in point of law, because the issue turns not on the point ‘ whether the ship was then fully repaired and fully equipped in ‘ every respect for the voyage; but, when combined with another ‘ representation as to the time of sailing, (which no man can doubt ‘ is material,) may have some effect. I therefore desire to know ‘ the precise fact, which the defender will be accurate in giving; ‘ and certainly the trial before Sir Vicary Gibbs deserves the ‘ greatest respect, for which reason I wish to see it.’ A condescendence and answers were accordingly lodged, and the Judge-Admiral, on advising them, ‘ with a minute for Stirling and Robertson, and a letter from John Robertson of Austin-Friars, the ‘ registered owner of the ship Royal Bounty, sisting himself as a ‘ party to this action, and acknowledging that he gave authority ‘ for instituting it, held the said John Robertson as a party to it, ‘ and found that, in ordering insurance of said vessel, Stirling ‘ and Robertson, as acting for him, wrote to Mr. James Duncan ‘ of Leith, the broker who effected the insurance in question, a ‘ letter dated 13th April 1812, informing that the said ship was ‘ then fully repaired, and was in every respect equipped for her ‘ voyage from Hull to Prince Edward’s Island or Bay of Cha-

July 19. 1822. ‘ leurs in America, and desired him to endeavour to insure her
 ‘ on that voyage, and during her stay there and home again :
 ‘ That the said James Duncan effected the policy libelled on,
 ‘ dated 21st April, and was so impressed by the said letter, and
 ‘ other directions which he got respecting the vessel that she
 ‘ would sail immediately, that when he made his representation
 ‘ to some of the underwriters who subscribed the policy before
 ‘ the defender, he stated that the vessel was not only fit and ready
 ‘ for sea, but would sail so soon, that he was afraid that she would
 ‘ be gone before he could possibly forward some goods which he
 ‘ had for her: That this representation was totally unwarranted,
 ‘ as the ship was not then repaired, nor fit for sea, and did not
 ‘ leave the dry dock wherein she was repaired sooner than the
 ‘ 26th day of May following, and did not sail on her voyage till
 ‘ the 8th day of June ; and therefore found that the facts which
 ‘ occurred were very different from those which were represented
 ‘ to the underwriters ; and so much were they impressed with this,
 ‘ that they gave notice to Mr. Duncan, almost immediately after
 ‘ the departure of the vessel from Hull, that they considered
 ‘ themselves to be free from the risk, and which intimation was
 ‘ by Mr. Duncan communicated to the pursuers : That it was un-
 ‘ necessary to inquire whether any greater risk was incurred by
 ‘ the vessel having sailed so late as the 8th of June, than would
 ‘ have existed if the vessel had sailed in the end of April, as the
 ‘ underwriters were entitled to make their own contract, and did
 ‘ make it on a very different representation of facts from those
 ‘ which truly existed ; and therefore, although the risk of the
 ‘ vessel having sailed on the 8th of June was truly not greater,
 ‘ yet as it was not the risk which the defender undertook, assoil-
 ‘ zied him from the action, and found him entitled to expenses.’

Stirling and Robertson presented a petition against this judgment, in which they prayed to be allowed a proof by the opinion of skilful underwriters, that the alleged misrepresentation was not material to the effect of vacating the policy. The Judge-Admiral, accordingly, ‘ before answer, allowed the pursuers to prove that
 ‘ the detention of the Royal Bounty till the 8th of June 1812,
 ‘ when she sailed on her voyage to Prince Edward’s Island, made
 ‘ no difference on the risk of insuring that vessel, although it was
 ‘ represented to the underwriters, when they undertook that risk,
 ‘ that she was to sail in the end of April, and that the broker, who
 ‘ had at that time some provisions to send for her to Hull, was afraid
 ‘ that they might not arrive there from Leith before the departure
 ‘ of the vessel, and allowed to the defender a contrary proof.’ At the same time, he communicated his opinion in this note :—‘ Were

‘ the Judge to be the ultimate arbiter of this question, he would July 19. 1822.
 ‘ not allow any proof by others, whether the representation that a
 ‘ ship was to sail in April made no difference on the insurance when
 ‘ she did not sail till June. His idea is, that the underwriters in
 ‘ the policy are the sole judges of this. They underwrote on the
 ‘ representation that the ship was to sail in April; and if it be
 ‘ said it is no matter whether she sailed then, or not till June, as
 ‘ to the risk, it probably may be so; but their answer in law seems
 ‘ to be, that this may be the opinion of others, but it is not the
 ‘ contract they made, nor the risk they undertook. If, in repre-
 ‘ sentation, any material misstatement being made annuls the
 ‘ policy—and this is held to be law—I cannot consider any one
 ‘ thing to be more important than the time of a vessel’s sailing,
 ‘ particularly on such a voyage as the one in question, and at the
 ‘ particular period when it occurred.’ A proof was accordingly
 taken by both parties, on advising which, the Judge adhered to
 his interlocutor assoilzieing the defender, and at the same time
 explained his views in the following note :—‘ The Judge-Admiral
 ‘ continues of the same opinion that he was before, that whether
 ‘ the risk was or was not increased by the Royal Bounty not sail-
 ‘ ing till the 8th of June, instead of having sailed in the end of
 ‘ April, is of no importance, because it was not the risk under-
 ‘ taken by the defenders; and so much were they impressed with
 ‘ this opinion, that they declared themselves free of the risk soon
 ‘ after the sailing of the ship, whereby the pursuers could easily
 ‘ have got others to underwrite, if the risk was not increased.
 ‘ Some witnesses say that the risk was not increased, and these
 ‘ seem chiefly to refer to or understand a risk in general, without
 ‘ respect to the particular ship in question, or to the expected
 ‘ American war; others say that the risk was increased on the
 ‘ same general principle; and a third class, that it was increased
 ‘ both in the general, and with reference to the said ship, and the
 ‘ year in which she sailed, owing to the expected American war.
 ‘ In deciding between these opinions, the Judge has no difficulty
 ‘ in adopting the last, that the risk was much increased, both
 ‘ from the fear of war, and from the ship itself being one of heavy
 ‘ burden, and being known to be a very slow sailer; and he
 ‘ cannot lay out of his view the circumstance already mentioned,
 ‘ that the underwriters declared themselves off from the risk im-
 ‘ mediately on the vessel sailing so late as the 8th of June;
 ‘ and if the risk had not been increased, the pursuers would have
 ‘ accepted their declinature to abide by the contract, and procured
 ‘ other subscriptions, which they did not attempt.’

A charge having been given for payment of the expenses,

July 19. 1822. Stirling and Robertson presented a bill of suspension, on advising which, with answers, the Second Division of the Court, on 27th February 1817, refused it.*

Stirling and Robertson then brought an action of reduction, on the grounds which they had mentioned in the Court of Admiralty; but the Lord Ordinary assoilzied Goddard. Against this judgment they reclaimed to the First Division, who, on the 3d of February 1819, adhered, and found them liable in expenses.†

Stirling and Robertson having appealed, the House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

Respondent's Authority.—Marshall on Ins. 457. 463. 459. 450.

BOURDILLON and HEWITT,—SPOTTISWOODE and ROBERTSON,—
Solicitors.

(*Ap. Ca. No. 33.*)

No. 45. JOHNSTON, SHARP, and COMPANY, Appellants.—*Gifford—Moncreiff—Buchanan.*

JOHN PHILLIPS, Respondent.—*Warren—Forsyth.*

Partnership—Bill of Exchange.—Circumstances under which it was held, (reversing the judgment of the Court of Session,) that a bill granted by a partner under the partnership firm for a private debt, but whereby it was alleged an advantage was derived by the Company, was not binding on it.

July 24. 1822. JAMES JOHNSTON junior, merchant in Glasgow, carried on business in his own name, and as a partner of Thomas Phillips and Company. In December 1813, a partnership was established between him and T. P. Sharp of Glasgow, and John Davidson of London, under the firm of Johnston, Sharp, and Company, merchants in Glasgow. Davidson continued to reside in London, and transacted the business of the company there, while Sharp

1st DIVISION.
Lord Alloway.

* Not reported. In the case for the respondent it is stated that this judgment was unanimous, and that 'their Lordships all severally delivered their opinions, that there was a sufficient alteration in the risk, by the delay of the voyage, to authorize the judgment which had been pronounced in the Court of Admiralty.'

† Not reported. In the case for the respondent it is stated, that 'their Lordships of the First Division, upon considering the appellants' petition, with answers, entertained the same view of the case as that which had been successively adopted by the Judge-Admiral, by their Lordships of the Second Division, and by the Lord Ordinary.'