

No 10. In a reclaiming petition, the pursuer having offered to prove, that the destined voyage was not for the purpose of fishing, but truly such as was described to the defender, the Court allowed the proof to be adduced.

Lord Ordinary, *Braxfield.* Act. *Cha. Hay.* Alt. *Rolland.* Clerk, *Home*
S. *Fol. Dic. v. 3. p. 326. Fac. Coll. No 126. p. 200.*

No 11.

Incomplete, though not fraudulent information, on the part of the insured, vacates the policy.

1783. November 28. WILLIAM KEAY *against* ROBERT YOUNG.

By a letter, dated at Elsineur on 9th August, 1780, William Keay directed his correspondent, at Borrowstounness, to make insurance of his ship and cargo from Elsineur to Leith, and mentioned his purpose of sailing that evening.

On 26th August, this letter, in course of post, reached the correspondent, who, on 27th, upon the insurance being made by Robert Young, mentioned to him the time when the letter was received, and that Keay's intention was to sail immediately, but omitted to inform him of the particular day specified in the letter.

The ship having been taken, and an action brought for the insured values, the underwriter

Pleaded in defence, It is the indispensable duty of the insured to communicate every circumstance which is material in estimating the risk, and at the same time cannot be known to the underwriter from other sources of intelligence; *Fac. Coll.* 19th January, 1779, Stewart against Morrison, No 6. p. 7080. Although the keeping back of such a circumstance should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because, the risk run is really different from the risk understood, and intended to be run, when the agreement was made; *Burrow's Reports*, p. 1909. Here, then, the policy in question was essentially defective. Had it been mentioned that the vessel was to sail on the 9th day of August, it must, on the 27th, have been reckoned a missing ship, which few underwriters would have ventured to insure.

Answered, The precise period of the ship's departure is not said to have been fraudulently concealed; nor was the intimation of that circumstance necessary. The insurer had no reason to imagine, that the orders to procure insurance had been conveyed in a manner more expeditious than usual. And, from the established intercourse by post between the towns on the Baltic and Scotland, he could not be ignorant, that a letter, received on the 26th day at Borrowstounness, could not have been written at Elsineur later than the beginning of the month. At all events, the defect in his information, which originated entirely from his own neglect in not making a further enquiry, is imputable to himself alone.

At first the LORD ORDINARY assoilzied the defender, "in respect proper information was not given."

Afterwards, on advising a representation for the pursuer, with answers for the defender, his Lordship recalled that judgment, and found the defender liable in the insured values, "in respect there was no fraudulent concealment of any circumstance of hazard, in order to deceive the underwriter."

The defender reclaimed; and the petition being followed with answers, the LORDS altered the Lord Ordinary's interlocutor; thus returning to the judgment first given.

Lord Ordinary, *Ellick.* Act. *Rolland.* Alt. *Blair.* Clerk, *Robertson.*

Fol. Dic. v. 3. p. 326. Fac. Coll. No 124. p. 196.

C.

1797. July 4.

JOHN NICOL against ANN BROWN.

JOHN NICOL at Lossiemouth, the port of Elgin, James Bates, and others, were owners of a ship, which they employed in trading voyages between the Moray Frith and Holland. Bates sailed as master of her.

In January 1790, the ship was lying at Findhorn, the port of Forres, ready to sail. Nicol, after having concerted with the owners at Elgin, on Tuesday, the 26th January, that he should get the vessel insured at Edinburgh, came that evening to Findhorn, to give Bates his final instructions for the voyage. It was then agreed, that Bates's share of the vessel should be included in the insurance. Indeed Bates had, on the 20th January, written to Nicol, requesting him to get his share insured. But this letter Nicol (as he afterwards alleged) had not received, at their meeting on the 26th, owing to his having been from home for some days.

Next morning, (*i. e.* Wednesday the 27th,) Nicol, accompanied by Bates for a small part of the road, set out for Lossiemouth, (which is about 18 miles from Findhorn,) where, after breakfasting with one friend, and dining with another, he arrived in the evening, but too late to dispatch a letter to Edinburgh, by the post from Elgin, which is six miles from Lossiemouth. The post at this time left Elgin on Monday, Wednesday, and Friday, at 5 o'clock in the evening.

On Thursday, the 28th, the vessel was seen passing Lossiemouth, with a fair wind. On the same day, Nicol wrote a letter for Edinburgh, ordering the insurance, which, early on Friday morning, he carried to Elgin, and put into the Post Office. The vessel was insured accordingly.

There had been a storm in the night between Thursday and Friday; and, soon after Nicol left home, a vessel was discovered from Lossiemouth in great distress, which, after labouring for some hours, overset, and all on board perished. A friend of Nicol immediately informed him, by express to Elgin, what had happened; that it was not known what ship it was; but that some suspected, (what afterwards turned out to be the fact,) that it was the one in which he was concerned.

Nicol did not communicate this information to the insurance-broker.

No 11.

No 12.

Strict diligence is required in the execution of a mandate to insure a ship.