1791.

LAIRD
v.
ROBERTSON,
&c.

[Mor. p. 7099.]

JOHN LAIRD, . . . *Appellant;*
MESSRS. ROBERTSON & Co. . *Respondents.*

House of Lords, 20th April 1791.

INSURANCE—DEVIATION.—A vessel was insured from Virginia to Rotterdam, "with liberty to call at a port in England." She sailed direct for Hull, and was lost on her voyage to that port. Held by the Court of Session, that a voyage from Virginia to Rotterdam, with liberty to call at a port in England, gave a liberty to call at any port in England, and therefore to call at Hull. Reversed in the House of Lords, and case remitted to pass the bill.

This was an insurance made of a ship and cargo from Virginia to Rotterdam, "with liberty to call at a port in

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ment, when there was a necessity of opening the outer door, and using the court house, or other outer apartments, no harm would have been done. A prison may be so constructed as that a court house, under the same roof, shall occasionally be used as part of the prison, and occasionally not.—But here Mr. Armstrong was allowed himself to use the court room when it was quite open, and the outer doors unlocked, to give free ingress and egress to suitors and others. Allowing him to sit as judge, and pronounce judgments in prison, was highly indecent. In fact, he was not then in prison, but in the court house when it was not a prison; and he was at all other times, from morning to night, at liberty, because there was no locked door upon him either above or below; and even in the night time he might have gone out at the window of the court house, upon which there were no iron bars nor guards without.

"No local practice can sanctify this, being against the law of the land. The practice at Dumfries different; for the magistrates take care to have a broader security to indemnify them in all events, whether he goes out of prison or not. But those who grant such a cautionary, are not perhaps aware of their danger.

"The practice of the burgh of Prestwick, where the prisoner keeps the key, and forfeits his freedom if he comes out. This may be a good security, but it is not legal imprisonment.

"The late case of the magistrates of Edinburgh, who were found liable, though the prisoner had obtained *cessio bonorum*, the decree

England." After the policy was drawn out, information was received that the vessel was not to go to Rotterdam, but to discharge at Hull in England. The insured obtained an indorsement on the policy to that effect, signed by all the insurers except the appellant, who declined.

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not being extracted. The rules of law cannot be got over in such cases.

" But a separate question occurs here, whether by the transaction in the *cessio bonorum*, the pursuer did not virtually give up her plea of illegal imprisonment? She had actually stated to the Court that Mr. A. was not legally imprisoned. This she ought to have stuck to; but, upon a compromise, she received £320 to pass from the objection, and to admit that he was in legal durance. This seems to bar her *personali exceptione* from recurring to that plea in the present shape, especially as the present action is subsidiary, and if she prevails, she is bound to make over her claim against Mr. A. to the magistrates. She ought therefore not to have consented to his liberation, but given them an opportunity of detaining him in prison.

" This brings the cause back to the first point, and I doubt if it can be affected by the proceedings in the *cessio*, for it does not appear that the pursuer was then in the knowledge of Mr. Armstrong's situation during the first night, and supposing the fact to have been known, yet if he was afterwards legally a month in prison, this was enough for the *cessio*.

" It ought to be inquired into, what right the pursuer has to the bill in question, for it was originally the money of Hunter of Clerkington and his creditors.

" Even as to the second point, I doubt, upon consideration, if it be a bar to the pursuer's present plea, that she withdrew her opposition to the *cessio*. She was not bound to defend at all against the *cessio*. She might have betaken herself at once to her demand against the magistrates; and it is so much the better for them that she has got payment of so much of the debt."

Lord Hailes.—" The imprisonment was illegal in both respects (points.)

Lord Monboddo.—" No law requires that a debtor should be immediately imprisoned. If he had made his escape from the public house, the magistrates would have been liable, but not otherwise. As to the other objection, it is not necessary to confine a prisoner to any particular room. He may have the liberty of the whole prison."

Lord Swinton.—" Of first opinion," (President Campbell's.)

Lord Justice Clerk.—" The magistrates, as keepers of the prison, have no *judicative* powers. Their powers are merely *ministerial*. No apology afforded here. The provost ought to have committed

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The vessel was lost on her voyage, and action was raised before the Court of Admiralty against the appellant for his part of the sum assured, and decree obtained. He offered a bill of suspension, arguing that, as the policy stood originally, and by which only he could be bound, the voyage insured was different from that on which the vessel sailed. It was answered, that the original policy contained liberty to call at a port in England, and that *a port* meant *any port* in England. The Lord Ordinary refused the bill of suspension, and, on reclaiming note, the Court adhered.*

June 2, 1790.
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him immediately. Duresse of imprisonment depends on the compulsion."

LORD ROCKVILLE.—" Of the same opinion."

LORD GARDENSTONE.—" The interlocutor is well founded. The act of Sederunt 16 February, speaks only *of escaping out of prison.* (*N.B.* This subjects them, even where there is a legal imprisonment, and an escape by violence, unless there be a particular precaution used by locked fast doors, besides watching. Vide also act 1701. Close imprisonment discharged.)"

LORD HENDERLAND.—" There was no imprisonment here at all. Courts must be held with open doors; and if the prisoner was allowed free liberty to hold courts, it cannot be said he was properly imprisoned. In order to this, there must be a restraint both on the body and the mind."

LORD ESKGROVE.—" The custody of the messenger was sufficient imprisonment, without actual commitment. There is no act of Parliament inflicting this penalty. See the other act of Sederunt. (N.B. This explained by decision in case of Breck in Dict. t. 2. p. 169.)"

LORD MONBODDO.—" Ought not to inflict penalties without act of Parliament or act of Sederunt."

LORD DREGHORN.—" Difficulty from bond, which was a compulsitor. I think the interlocutor should be altered so far on the second point—Whether it be a virtual discharge to her plea of illegal imprisonment, by withdrawing her appearance in the *cessio?*"

LORD JUSTICE CLERK.—" I agree with the general doctrine. But Lord Bankton carries it too far. Must not discharge the principal; but why should she be obliged to keep him in prison. Must I aliment him upon the act of grace? She may say I have good men bound to me. This case still less difficult: for here she does not liberate, but only gives up opposition."

From Lord President Campbell's Session Papers, lviii.

* LORD JUSTICE CLERK, ESKGROVE, and the other Judges, for adhering.

LORD PRESIDENT CAMPBELL (with whom was LORD HAILES) for

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The ground of the judgment below was this:—That liberty to call at a port in England implied a power to call at any port without distinction, whether such port might be in the course of the voyage to *Rotterdam* or not; that of consequence the policy gave a power to call at Hull. And, supposing this to be the case, a liberty to discharge at Hull must also be implied, as by this means the voyage would only be shortened, and the risk lessened. But the appellant maintains that this proceeds upon a mistake, in supposing that the liberty to call at a port in England gave a power to call at any port. In all policies, the line of the voyage to be insured is specified. If it is a trading voyage, the several ports are particularly mentioned. If it is not a trading voyage, the loading and discharging ports are the points or extremes; and the voyage insured is the usual line or course of navigation between these two. A liberty to call at other ports, sometimes in more limited, sometimes in more general terms, is given; which is often necessary for various purposes different from the unloading the cargo. It may be for leaving or receiving advices, or to put out, or take in passengers. But these import liberty only to call at some intermediate port in the course of the voyage, lying in the usual tract between the two ports specified as the two extremes. While, on the other hand, if it be intended to call at a port, not in the course of the voyage, that port must be mentioned in the policy. In the

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altering.—The Lord President said, "That it was a very general point, and ought to be reconsidered.—Doubt if the interlocutor right. It rather seems to have been a new voyage, and new adventure altogether; and of course that the first policy was discharged.—Mr. Gammell himself seems to have considered the matter in that light. The argument in the petition is very strong, and is not taken off by the answers.—I am satisfied that it was a new undertaking. The change in the printed part of the policy 'with liberty to call at any port or place,' is not regarded, unless a special place be named. *Vide* chapter, 'Deviation,' in Park on Insurance.—Carter and Townshend. The printed clauses are little attended to.—Meant for cases of necessity.—Besides, the vessel never set out upon the voyage insured; and no vessel would go from Hull in her way from Virginia to Rotterdam, which, in reality, would not be shortening the voyage." *Vide* President Campbell's Session Papers, vol. lix.

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present case, the vessel was to load at Virginia, and discharge at Rotterdam. A liberty to call at any port in England, could only be understood a liberty to call at a port in the usual course of sailing between the two extremes of Virginia and Rotterdam—in other words, to call at some port in the English Channel, such as Plymouth, Falmouth, Dover, &c.

Pleaded for the Respondents.—The vessel having been ensured from her loading ports in Virginia to Rotterdam, with leave to call at a port in England, was lost on her voyage from Virginia to Hull, a port in England. The policy covered a voyage from Virginia to any port in England, without any view of proceeding further on arriving at that port, because a voyage may be shortened without vacating the policy, the only effect of shortening a voyage being to diminish the risk; and by liberty to call at a port is implied a power of discharging the whole, or a part of the cargo, at that port. The leave, therefore, in this case, to call at a port in England, gave power to call at *any* port in England; and such was the meaning of the parties.

After hearing counsel,

LORD CHANCELLOR THURLOW said:—

"MY LORDS,

"It appears to me very unaccountable, that merchants will persist in using the old form of policies, which were extremely ill worded, and gave occasion to so many law-suits, which might be avoided if clear and fixed expressions were used.—In the present case, I find it impossible to construe 'from Virginia to Holland (Rotterdam), with liberty to *call* at a port in England,' as giving liberty to go entirely out of the course of the voyage, and to call at Hull. If to Hull; why not to Liverpool or Whitehaven? But I need not enter deeply into the subject, because the question before the House was only,—Whether the Court of Session ought to have passed the bill of suspension? At same time, however, I believe it will *not* be an *easy* task to show, that a voyage from Virginia to Rotterdam, with liberty to call at a port in England, which was the risk undertaken by the appellant, is precisely the same thing with a voyage from Virginia to Hull, which was *that* the vessel intended and actually performed, and if the respondents did not make out that, the appellant certainly was not liable. I therefore move to reverse, and remit to pass the bill."

It was therefore ordered and adjudged that the interlocutors complained of be reversed, and that the cause

be remitted back to the Court of Session to pass the bill of suspension.

For Appellant, *T. Erskine, W. Adam.*
For Respondents, *Sir John Scott, W. Grant.*

WM. ELLIOT of Wells, Esq., one of the Free-holders of the County of Roxburgh, } *Appellant;*

COLONEL ROBERT PRINGLE, . . *Respondent.*

House of Lords, 5th March 1792.

ELECTION OF MEMBER OF PARLIAMENT—QUALIFICATION.—Held, where objection is stated to the title to be enrolled and to vote for a member of Parliament, the complaint must be followed up within four months, in terms of the act 16 Geo. II. c. 11.

The respondent was enrolled as a freeholder of the county of Roxburgh, in virtue of a conveyance to him for life of the lands of Bankhead, disponed to him by John Pringle of Clifton. The property was a part of the estate held by John Pringle under strict entail, and with strict prohibitions, &c. against alienation.

When he applied to be enrolled, it was well known, from Pringle having no power to alienate, that this qualification was fictitious, but no objection was taken at the time.

Thereafter, at a meeting of freeholders, for the purpose of electing a commissioner to serve in parliament, the appellant objected to the respondent's title as nominal and fictitious, and moved that he should take the oath, but previously that he should answer certain interrogatories, the tendency of which was to prove, by the respondent's own confession, that the qualification was fictitious.

The respondent expressed his willingness to take the oath, but declined to answer the interrogatories, because he considered the freeholders had no right to put them. It was answered, as by the case of the Aberdeenshire freeholders and Macpherson, it was determined in the House of Lords that the freeholders had a right to investigate the reality of the qualification by other means than putting the oath, he was not entitled to refuse. Reply. He was entitled to refuse, because the four months within which, by the act 16 Geo. II. c. 11, the