

1794. tion of fact, Whether the whale in question was loose or had got
 ———— free from the harpoon of the respondent's ship when struck by the
 CAMPBELL, & C. appellants? Having gone carefully over the whole evidence, I am
 v. quite free to say, that the evidence of the fish being loose at that
 RUSSELL, & C. time preponderated over that given on the part of the respondent;
 and therefore I move to reverse the judgment of the Court of Ses-
 sion, and affirm that of the Judge Admiral."

The LORD CHANCELLOR concurred with Lord Thurlow in this judgment.

It was ordered and adjudged that the interlocutors be *reversed*; and that the reasons of reduction of the sentence of the Judge Admiral be repelled.

For Appellants, *F. Erskine, W. Grant.*

For Respondent, *Sir J. Scott, J. Anstruther.*

NOTE.—This appears to be the case noticed by Professor Bell, and in Ivory's Erskine (note), under the name of Rose, 24th Nov. 1792. Vide Ersk. b. ii. tit. 1, § 11, note. Bell's Pr. § 1289, and Illus. vol. i. p. 374.

JOHN CAMPBELL and Another, Underwriters, *Appellants*;
 FRANCIS RUSSELL and Co., Saltcoats, *Respondents.*

House of Lords, 4th March 1794.

INSURANCE—CONCEALMENT—DEVIATION. — Held, where a vessel was insured on her voyage home from a foreign port, that the concealment of two letters of advice, which represented the vessel to be unseaworthy, and weakly manned, and that she had been boarded in a sinking state, were facts material to the risk, and not having been communicated, the policy was voided. Also, that the delay of the vessel at Elsinore and Stromness amounted to deviation.

The brigantine Russel, belonging to the respondents, being then at Stockholm, and loading iron there for Dublin, the captain wrote home of his being clear and ready for sea; and in another letter to the same effect, without making any allusion to insurance. After proceeding to sea, the vessel encountered a storm, and put into Airtholm, near Elsinour, in a

sinking state. She had been seen at sea by captain Slater bound for Elsineur, who, on arriving there, reported her, upon which Mr. Scott wrote a letter to the respondents, stating, that captain Slater, on boarding, found the vessel sinking, the crew exhausted with fatigue, working at the pumps, and that she was weakly manned, two of her men having left her at Stockholm. This letter, together with two others from the captain, were concealed from the underwriters, to whom the respondents applied to effect an insurance on the vessel for £700. Two of the letters from the captain merely referred to the sinking state of the vessel—to his narrow escape, and to his making preparation to repair her, and again proceed to sea. He advised insurance, if it could be got, but seemed to doubt it. His last letter, dated 30th September, from Airtholm, stated that she would be clear for sea in fourteen days, and again advised insurance. The following was the respondents' order for insurance :

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“ Saltcoats, 26th Sept. 1789.

“ Mr. Hugh Brown,

“ Sir,—When at Greenock, you will please get £700 sterling insured on the brigantine Russel, captain Kirkwood, valuing the vessel at £800; the vessel having sprung a leak in a gale of wind, has put in there to get the leak stopped, and is to heave the vessel down, having discharged his cargo by his letters to us, dated 30th ult., and *expects to be clear for sea in fourteen days.* We expect you'll get her insured at the common premium, at and from Airtholm to Dublin.—We are,

“ Francis Russell & Co.”

The vessel was insured accordingly. In the course of the voyage she put into Elsineur, to get more men and provisions. She left that, and put into Stromness, from which advices were received; but on her voyage from thence to Dublin she was lost on 7th September.

Action being raised for the sum in the policy before the Judge Admiral; and decree being obtained therein on the 9th July and 13th September 1790, this decree was brought under the review of the Court of Session by suspension.

In the letters alluded to from the captain were the following passages: 23d Sept. “ I determine to leave 20 tons of iron behind us at Elsineur, for fear of being wintered on the coast of Norway, which will attend to a great expense.

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“ If you could cover the vessel from Stockholm would be better.” 24th Sept. he writes, “ But I hope you have insured her. If not, I hop you’ll endeavour to do so.”—
 “ I think there is no risk of getting the vessel insured, as you have advice from Stockholm, but that I leave to your judgment.” 30th Sept. “ I wrote you on our arrival here, and likewise 3 letters from Stockholm, which I hop you have insured the vessel from Stockholm.”

From these expressions the appellants contended that it was Kirkwood’s intention to make a fraudulent insurance, and their concealment, therefore, was material—that had they known that the captain was so devoid of honest principles as to insure a vessel after a loss had been sustained, they would not have underwritten the policy, and this fact being material to the risk, and being concealed from them, voided the policy. The intention too, of leaving part of her cargo behind, proved beyond doubt that the vessel was either overloaded, or so disabled as to be unfit to bring it home. That the leaving it there would occasion a delay of the vessel, and every delay of the vessel proceeding on her voyage, occasions additional risk. She was to be ready for sea in 14 days, according to the last advice, whereas she was not clear for sea for 10 days longer;—another cause of delay stated in the letter of 30th was, that she “ was in danger of being stopped till the expense of repairs were paid up.” And yet the letter containing all these facts, material to the risk, was concealed. 2. But Mr. Brown’s letter, written by Mr. Scott for him from Elsinour, apprising of captain Slater having made up with the Russel at sea, and of having boarded her in a sinking state, and also that part which acquainted him with the fact of her being weakly manned, two of her crew having left her at Stockholm, were suppressed. Before she sailed from Airtholm on the voyage insured, another of her men fell sick, and she proceeded from that place, and on the voyage insured, with only one man to supply the place of these three; and, 3. That there was deviation from her voyage. That instead of having proceeded direct to Dublin, she put into Elsinour, and for the purpose of procuring additional seamen to navigate the vessel, and other necessaries, and remained there 36 hours. Therefore, on three grounds, 1st. On concealment; 2d. Of the vessel being improperly manned and unseaworthy; and, 3d. Deviation,—the policy was void.

Dec. 15, 1790. The Lord Ordinary (Lord Justice Clerk), of this date,

suspended the letters simpliciter; and, on representations against this interlocutor, his Lordship adhered: Of these dates respectively. But, on reclaiming petition to the Court, these interlocutors were altered, and the suspenders found “ liable in payment to the pursuers of the sums annexed to “ their respective names in the policy of insurance founded “ on, with interest.”*

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And, on reclaiming petition, the Lords adhered.

June 5, 1792.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Fair dealing and representation, and full disclosure of every circumstance material to the risk, are inseparable and essential conditions of the contract of insurance. The underwriters therefore ought to be made acquainted with every circumstance known to the party proposing the insurance, so as to enable them to judge fairly of the proposal, and to say whether they will insure or not: Instead of this, the letter or order of insurance above quoted, was all the information, and every other circumstance was concealed. 1. The letters of the captain; 2. The letter of Mr. Scott; 3. The fraudulent designs of the shipmaster, *who was likewise a part owner of the vessel*; 4. The vessel being weakly manned; 5. Overloaded, or disabled from taking her cargo; and, 6. Delay on proceeding on her voyage, so as to increase the risk. That when she sailed from Airtholm on the voyage insured, she was defective in crew, and in want of necessaries, contrary to the implied warranty in all such contracts. These facts are proved beyond doubt. And that, instead of proceeding direct on her voyage, she deviated therefrom, and went into Elsineur. That, besides this being a deviation, it established also that she had proceeded on the voyage without being properly manned or provisioned, because the captain went in there for the purpose of getting more men and necessaries for the voyage. These circumstances are sufficient to void the policy.

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ 1. No material concealment. The insurance was *de facto* made in a proper manner from Airtholm. Mere intention to do wrong not sufficient even if the insured themselves had so intended. 2. Clear evidence that she was sufficiently manned upon the voyage insured. 3. The circumstances of the alleged deviation not explained. Stromness is in the direct course.”

President Campbell's Session Papers, No. 65.

1794. *Pleaded for the Respondents.*—The whole circumstances embraced in the letters upon which the appellants found their charge of concealment refer evidently not to the voyage insured, but to the state of the vessel on her passage from Stockholm to Airtholm. The leakage, and the loss of two of her crew, referred to this part of the voyage; but it is not thence to be inferred that these facts were material circumstances to the voyage to be insured from Airtholm to Dublin. On the contrary, it was to be presumed, that when repaired, she would proceed on her voyage, with the proper complement of men from that place; but, supposing the facts in these letters were really material to the risk, and therefore believed to be known by the underwriters; then it is incontestible that all the facts in these letters necessary to be disclosed, were communicated in the order for insurance. In that order, they refer to the captain's last letter, 30th Sept., the leakage, the discharge of the cargo for repairs, and that she could be ready for sea in fourteen days. The part of the letter not disclosed, namely, leaving part of her cargo, was a circumstance favourable for the underwriters, and not material for the risk. And again, as to her not being sufficiently manned when she sailed from Airtholm to Elsinour, it is proved beyond doubt that she had eight able seamen on board, and from Elsinour, to the place where she was wrecked, she had nine, which was more than sufficient for a ship of her burden. What has been called a deviation from the voyage by calling at Elsinour, was no more than a necessary and indispensable duty, namely, to pay the duties. It was quite involuntary on his part, and by it the ship was not detained thirty-six hours on her voyage.

After hearing Counsel,

LORD THURLOW said:

“MY LORDS,

“With respect to the concealment, it appears to me that the letters in the possession of the respondents, stated the leak to be a much more serious damage to the vessel than the order for insurance had communicated. From these letters, there could be no doubt that the vessel was overloaded, and insufficiently manned, all which, were material circumstances in the risk, and ought to have been communicated to the underwriters. I also think the delay at Elsinour and at Stromness, amounted to a deviation. Therefore, I move that the interlocutor of the Court of Session be reversed, and that of the Lord Ordinary affirmed.”

It was ordered and adjudged that the interlocutor complained of be *reversed*. And it is further ordered that the interlocutors of Lord Justice Clerk, Ordinary there, of the 15th and 24th Dec. 1790, and 11th March 1791 be affirmed.

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NEWNHAM, &c.
v.
STUART.

For Appellants, *Wm. Adam, John Clerk.*

For Respondents, *W. Grant, Wm. Tait.*

NOTE.—Unreported in Court of Session.

[M. 1158 et 1236.]

Messrs. NEWNHAM, EVERETT & Co., . . . *Appellants* ;
DAVID STUART, Esq., Trustee on James Stein's Estate, } *Respondents.*

House of Lords, 25th March 1791.*

House of Lords, 10th March, 1794.

HERITABLE SECURITY—ACT 1696, c. 5—INDEFINITE SECURITY.—

In the *first* appeal in this cause : Held, that an heritable security, granted for future advances, was of no force for sums advanced subsequent to the date of the infestment. This security for a cash credit, consisted of an assignation and conveyance to a former heritable security for the sum of £12,000, but the estate vested by that security was assigned indefinitely, without any mention being made of the extent of the cash credit, in security of which it was so conveyed : Held in the *second* appeal, that the security was of no force or effect even for the advances made before the infestment, in consequence of its being a security for an indefinite amount.

James Stein stood infest in an annual rent of £600, leviable out of the lands of Kincaple, and on that estate itself, for security of a principal sum of £12,000, due by virtue of an heritable bond, granted by Robert Stein of Kincaple.

James Stein being concerned in the firm of Buchanan and Co., merchants in Kincardine, applied to the appellants, bankers in London, for a credit to the extent of £12,000. This was agreed to, on condition of obtaining a conveyance of the Kincaple security, which was done accordingly. But, in the conveyance, there was no definite sum mentioned, for

Jan 7, 1788.

* The first appeal in this cause, is reported here, along with the appeal which followed, after coming back from the House of Lords.