

and of her son, the present Earl, ought to remove all possible objections.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed, with £50 costs.

For Appellants, *Wm. Alexander, Ad. Gillies.*

For Respondents, *Ar. Colquhoun, Sir Sam. Romilly.*

1808.

SMITH, &c.
v.
ALLAN, &c.

JAMES SMITH, Merchant in Leith, and ALEX. M'CAUL, ALEX. STEWART, and WILLIAM M'NEIL, Merchants in Glasgow,	} <i>Appellants;</i>
ALEXANDER ALLAN, Merchant in Glasgow, ANDREW TEMPLETON, Merchant there, Trustee on his Sequestrated Estate,	
	} <i>Respondents.</i>

House of Lords, 21st June 1808.

INSURANCE—CONCEALMENT—SUBMISSION—PERSONALIS EXCEPTIO.

—In the insurance of a ship and cargo, the underwriters refused to pay, on the ground of concealment of circumstances. Held, that the circumstances were not such in their nature as to affect the validity of the policy, and not such as they were bound to communicate.

The ship *Bellona*, a letter of marque, belonging to the respondent, and commanded by Captain M'Gruer, cut out of the Bay of Campeachy, in the Gulf of Mexico, a Spanish ship laden with logwood. The ship papers were not on board at the time of capture, so that there were no legal means of *ascertaining her name*.

Upon the following letters of advice from the captain, an insurance was effected by the respondents. On the 19th November 1798, they received a letter, dated 18th Sept. preceding, from Captain M'Gruer, and which enclosed copy of one sent by him previously, dated 10th September, as follows:—

“ Ship *Bellona*, Charleston, 10th Sept. 1798.

“ Alexander Allan, Esq.

“ Dear Sir,

“ I did myself the pleasure of writing to you 26th ult.,

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 SMITH, & C. " the ship's repairs have gone on very slowly. This place
 v. " is for no despatch in the shipping line, as I expected.
 ALLAN, & C. " *When I wrote you last*, I expected to be clear by this
 " time, and now am much afraid will not be able to sail be-
 " fore the 20th instant.

" I have now made up my mind fully to send the Spanish
 " prize ship home to you, as am fully convinced her cargo
 " will sell much better in Glasgow than in Kingston, being
 " the best logwood, as the price current will appear. The
 " quantity on board, as I can find by the Spanish captain,
 " is 225 tons, but 250 to 260 tons. And the ship I expect
 " will sell, say for £1000, and tanned leather to the amount
 " of £200 sterling more or less. From this statement you
 " will be able to make insurance upon the ship and cargo, as
 " you will think best. I have called her the Kingston, as no
 " papers were found on board when cut out of Campeachy.
 " She is a stout able ship, about four years old, mounting
 " two four pounders, and shows six carriage guns, and sails
 " as well as the common run of merchant ships. I shall see
 " her properly fitted for the intended passage, that nothing
 " will be wanted, and intend to see her clear off this coast,
 " say 100 leagues. I will give the command of her to Mr.
 " Alexander Thomson, my present chief officer, who is well
 " known in Greenock. I have agreed to pay him £100 for
 " carrying the ship home, which you will please attend to,
 " as Mr. Thomson is to give his full attendance to the said
 " ship till disposed of, which you will get done as soon as
 " possible, as there must be a form of sale for the benefit of
 " the capturers; and you may look for the Kingston about
 " the 10th Nov. or earlier."

The letter in which the above duplicate was enclosed was
 in the following terms :

" Ship Bellona, Charleston, 18th Sept. 1798.

" Dear Sir,

" Enclosed is a copy of my letter to you, dated 10th
 " instant. I have little more to add at present, *but will*
 " *write you more fully* in a few days, how soon it is in my
 " power to collect all the ship's accounts in, which expect
 " will be the 21st inst. I embrace this opportunity by a
 " vessel bound to Falmouth."

His next letter announced that he had drawn bills for
 £1645. 17s. 8d. Sterling, in favour of Messrs. Canty, Henry

and Co., on account of their advances for the ships Bellona and Kingston. And, of same date, Messrs. Canty, Henry, and Co. wrote the respondents:—" We have now the pleasure " to advise that the Bellona and her prize are both ready " for sea. It has been a matter of great regret with us that " they have been so long delayed ; but the circumstances in " which they were placed, by the desertion of most of their " crew, made it unavoidable ; and the length of time taken " up and wasted in the numerous suits instituted against the " ships and captain is inconceivable." And, of this date, Oct. 4, 1798. the captain wrote : " Dear Sir, I have now, at three differ- " ent times before this date, wrote you fully of my intention " in sending the ship Kingston to you to Glasgow, which " now is the case ; and if, unfortunately, all my former let- " ters do not arrive safe, upon receipt of this please get in- " surance made upon the above ship Kingston and her " cargo, being Campeachy logwood, say 225 to 260 tons, " and tanned leather, say £200 worth. I forward this by " way of New York ; have not copied these few lines. The " Kingston is staunch and strong, well fitted, and manned " completely, and shows six carriage guns, but only two of " which is metal. Waiting for a wind to carry both ships " over the bar, and the pilot on board—I remain," &c.

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Of this date, Messrs. Canty, Henry, and Co. wrote:—" We " have now the satisfaction to advise that both she and the " Bellona passed our bar yesterday." Oct. 5, 1798.

The vessels sailed accordingly—the Bellona accompanied the Kingston for six days, till 11th October, when, judging her safe from capture, she made for Jamaica, and left the Kingston to pursue her voyage to the Clyde. The Kingston, however, was never again heard of ; and it was supposed that she had foundered at sea, and that all on board had perished.

Meantime, on the receipt of the above letters, an insurance was effected with the appellants for £700 ; and with other offices to the extent of £5500 on the ship and cargo. The value of ship and cargo was £11,000. All the offices paid the amount insured except the appellants ; and action was brought against them for payment, the appellants resisting, on the ground, that what they considered a material circumstance, namely, that part of Captain M'Gruer's letter which

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stated his *expectations* when it was likely the vessel would arrive in the Clyde (10th Nov.) was concealed. But, before action was raised, a reference had been made of the matter to Messrs. Denniston and Finlayson, who gave it as their opinion, after investigation, that they saw no ground for imputing undue concealment to Mr. Allan, and the whole underwriters, who subscribed this reference with the appellants, acquiesced, with the exception of the appellants.

Oct. 2, 1802. Action was then brought before the Admiralty Court, and the Judge Admiral found:—"It admitted and proven that
"the letter 10th Sept. 1798, or at least that part of it
"which related to the time when the ship in question might
"be expected in Clyde, was communicated to the referees,
"Messrs. Denniston and Finlayson, before they signed the
"agreement of 10th Oct. 1799; Find it admitted that the
"letter of reference to Messrs. Denniston and Finlayson
"was duly signed by or for the defenders, Messrs. James
"Smith, Charles Freebairn, Robert M'Caul, and Alexander
"Stewart; Find that, in consequence of this reference,
"these four defenders were barred *personali exceptione*
"from founding on the circumstance of alleged conceal-
"ment; further, find that the insured was not bound to
"communicate the information alleged to have been with-
"held, and that the alleged concealment was not of such a
"nature as to affect the validity of the policy; repelled the
"other defences; Find the defenders liable each respect-
"ively for the sums concluded for."

An action of reduction was brought of this decree.

June 25, 1803. The Lords sustained the defences, repelled the reasons of reduction, except as to giving expenses, the defences on that point being sustained. And, on reclaiming petition, Dec. 16, 1803. the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. The reference to Messrs. Denniston and Finlayson did not bar the present action, because that transaction was, in its nature, neither a reference, in the proper sense of that term, nor a submission. It was nothing more than a request to these gentlemen to investigate the transaction. But even if it were a submission, it could not bind Mr. Allan, as it is not mutually binding, nor meant to be so. It is not an award. It is a mere

note issued indicating an opinion, which the appellants bound themselves in no shape to adhere to. 2. There was concealment of the time when it was expressed the ship would arrive. A date was given for her probable arrival, when all who know the usual time occupied in such a voyage must have taken the ship to be a missing ship; and, therefore, it was a material circumstance, which being concealed, annulled the policy.

Pleaded for the Respondents.—1. The appellants are barred *personali exceptione* by the reference made to Messrs. Denniston and Finlayson, which they signed, from insisting in the present action. 2. The duty of the insured is only to disclose material facts, known and stated to him, which may affect the risk. He is not bound to reveal mere conjectures, expectations, and hopes of the captain. And all that the appellants complain of here as being concealed, is the hope or expectation of the captain that the vessel would arrive in Clyde on 10th November. But, as Lord Mansfield decided in *Barber v. Fletcher*, (Doug. Rep. vol. i. p. 305), “It was only an expectation, and the underwriters did not inquire into the ground of the expectation.” The fullest explanation has been afforded, not only to show how erroneous this expectation was, but also to satisfy that no undue concealment existed.

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Doug. Rep.
 vol. i. p. 305.

After hearing counsel, it was

Ordered and adjudged as follows: find, That it is immaterial to consider, in this case, whether the defenders were barred *personali exceptione* from founding on the alleged concealment; and that, without regard to that consideration, the judgment of the Court of Session ought to be affirmed: And it is therefore ordered and adjudged, That the said appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed with £50 of costs.

For Appellants, *Samuel Marshall, M. Nolan, Geo. Jos. Bell.*

For Respondents, *J. A. Park, John Greenshields.*

NOTE.—Unreported in the Court of Session.