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ties, viz. the landholder whose tithes were valued, and the titular who had right to these tithes; and, of course, had the primary and material interest to see them valued as high as possible. And, after so long a time, the general rule of law is, to presume that the procedure was conducted *rite et solemniter*. And therefore, on the same ground, to presume the minister's presence in the valuation.

After hearing counsel, it was
 Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *David Boyle, Wm. Alexander.*

For Respondent, *Sir Samuel Romilly, Henry Erskine,
 Gilbert Hutchison.*

[Fac. Coll. vol. xiii. p. 363.]

JAMES SMITH, Merchant in Leith, WILLIAM
 SIBBALD, Merchant there, and Others, } *Appellants;*
 Underwriters on the Cargo of the Ship
 Concordia, }

ROBERT BOGLE, Jun., Merchant in Glasgow, *Respondent.*

House of Lords, 16th March 1809.

INSURANCE—CONCEALMENT—UNSEAWORTHINESS.—In effecting an insurance on a certain cargo, the vessel in which the cargo was to be shipped from Jamaica to Clyde, was represented to be a very good vessel, and that no material damage had occurred from her touching on a rock in going into the harbour, while the letters which the insured had received from his correspondents in Jamaica, previous to effecting the insurance, gave a very different account of the vessel, and intimated doubts whether she would be fit to take any cargo, or sail with convoy at the time specified. On proceeding on her voyage with her cargo to Port Antonio to join convoy, she experienced rough weather—did not reach in time for convoy—was found disabled, and, after survey, was finally abandoned, as unfit to proceed on her voyage. Held the underwriters liable under the policy. Reversed in the House of Lords.

Wishing to effect insurance, the respondent wrote to his agents, Messrs. Scott, Smith, Stein and Co., the following letter: “Gentlemen, I find that sugars intended to have
 “been shipped per *Minerva*, on account of R. W. Fearon,
 “and on which you insured £1050, have not gone on board;
 “but that they are intended to be shipped in the *Concor-*
 “*dia*, Simpson, expected with the June fleet; I suppose

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“ your underwriters will not have any objection to the risk
 “ being declared on the Concordia in place of the Mi-
 “ nerva; the Concordia is a very good vessel; but it may be
 “ proper to mention, that, on her going into Morant Bay,
 “ she touched upon a rock, but from which, it is thought,
 “ that she did not receive any material damage; however,
 “ to prevent all accidents, her bottom was to be examined
 “ before any shipments were made in her. I therefore do
 “ not think that any additional risk can arise.”

In consequence of the information contained in this letter, the underwriters demurred to execute any policy on the Concordia.

But afterwards the respondent wrote again. “ You for- Sept. 6, 1799.
 “ merly mentioned that your underwriters were rather shy
 “ of the Concordia; I have got further orders for insurances
 “ on her, and as she has got a thorough repair, they may
 “ now be induced to take her, particularly as I now want
 “ dye-wood insured; if so, you may go the length of £1140,
 “ valuing at £20 per ton, at and from Jamaica to Clyde,
 “ with liberty to join convoy at the place of rendezvous;
 “ premium fifteen guineas per cent., to return six per cent.
 “ for convoy, and three per cent. if she sails by 1st of August.
 “ At these terms I have got considerable sums done; but
 “ as they charge in London sixteen guineas, with a return of
 “ 4 per cent. for sailing by 1st August, rather than not get
 “ done, would give that premium, say sixteen guineas to return
 “ 6 and 4.”—P. S. “ Letters of 14th July say, the captain,
 “ Simpson, was expected to clear out his ship the next day.”

In consequence of this letter, £1140 insurance was effect- Sept. 12, 1799.
 ed on the dye-wood on board the Concordia, “ at and from
 “ Jamaica to Clyde, with liberty to join convoy at the
 “ place of rendezvous.” And another insurance in same
 terms on the sugars to the extent of £300. After the acci-
 dent she had been surveyed and repaired, and an affidavit
 by the ship carpenters was produced, stating, “ That she is
 “ now a staunch vessel, and fit to carry the cargo to any
 “ port in Great Britain.”

She was to sail on the 15th of July, but, owing to delays in making her repairs, she did not proceed to sea until the 22d July. She did not arrive, from stress of weather, at Port Antonio, the place where she was to join convoy, until after convoy was left; and, owing to various accidents and damages sustained, she remained there several months, and was ultimately found unable to proceed to sea, and finally abandoned to the insurers.

1809. Action was brought by the respondent on the policies, to which defences were lodged, alleging fraud and concealment of material circumstances in regard to the real condition of the Concordia. In particular, Bogle and Co. of Jamaica had written to Adam and Mathie on 15th April:
- April 15, 1799. "Should she, after being properly surveyed, be deemed seaworthy, we shall give her a full load home, &c.,—and we think that if the vessel is found worthy, that she will be ready to sail with the convoy appointed to sail the 30th April 17,— "June." Two days thereafter, Bogle and Co. wrote a letter of the same import *to the respondent*. On the 29th of same April 29,— month he received a letter, which declared that he "feels a reluctance in shipping on that vessel." And on the May 17, — 17th May following, Keith Jopp, a partner of Bogle and Co., wrote the respondent; "I fear she (Concordia) will not be able to go by the next fleet, which will be a great inconvenience to us, as we intended sending you a considerable remittance by her. If you have any money of her owners in your hands, I wish you would keep it, lest they should demur to the expenses, which I see will be great." Again, May 18, — on the 18th May, Bogle and Co. wrote to the respondent the following letter, which was received on the 6th July: "We are still in the same state of uncertainty respecting the Concordia as when we wrote you last. After various delays, she has at length discharged all her outward cargo, and has got to the hulks to be hove down, for the purpose of being surveyed. We are much disappointed that this has not taken place before now; we fully expected it; and think it might have been done some time ago, had Captain Simpson exerted himself with any degree of activity. He has received every assistance from us in discharging the cargo, and in getting his vessel ready for survey. *Should she be found sea-worthy, and in a condition to take in a cargo immediately, we think she will go with the first fleet appointed to leave the place of rendezvous about the 30th of June, the cargo being ready here and at Old Harbour; but, should she stand in need of repairs, we think her getting ready for that fleet very doubtful.*"
- May 19, — Again on the 19th May, received 6th July, "Owing to the most unaccountable negligence and delay in the captain, the Concordia has not yet been surveyed. I have said all I could without effect. Yesterday I carried up Shaw of the Adventurer, and Foote of the Maria; just as they got sight of the keel, some of the tackling gave way, and the vessel was obliged to be righted. They don't think any

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“ thing material is wrong, but to-morrow they see her
 “ again. I am afraid she won’t sail with the June fleet,
 “ though the greater part of her cargo is ready; this will
 “ be a disappointment both to you and us. If you owe the
 “ owners any money take care of it if you can, as I dare say
 “ they will make objections to our disbursements.” On the
 13th July another letter states: “ We cannot well say how
 “ much trouble and inconvenience we have been put to in
 “ the business of the Concordia, both from the misfortunes
 “ of the vessel and the extraordinary want of activity in the
 “ captain. We have been kept in a state of constant uncer-
 “ tainty as to the time she would be ready to sail.” The
 letter concludes: “ We must advise you to take care how
 “ you engage with such a captain and vessel.”

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July 13, 1799.

It was alleged by the appellants that all these letters were in the respondent’s hands when he wrote to the broker on 6th Sept. 1799 to effect the insurance, but which he concealed from the insurers.

On the 26th of June the ship was surveyed, and reported to be capable of carrying a cargo to Great Britain, on undergoing certain repairs therein specified. These repairs were completed on 13th July. Her cargo re-shipped on 22d July, and she sailed on that date for Port Antonio to join the next convoy, which was to leave on the 25th July. She ought to have arrived in time to sail with convoy, but did not reach Port Antonio till 3d August, five days after convoy had sailed. She experienced rough weather, lost her sails. Here the captain died. His successor, entertaining doubts of the ship’s capacity for the voyage, insisted on a survey, which being procured, the result was, that the surveyors reported her unfit for sea in her then condition. The extended repair was £2930. The new captain also died, whereupon Berry was appointed master, who insisting also on a survey, before he would go to sea with her, it was found that the repair required would be a great deal more than she would be worth after the repairs were done. Whereupon the insured abandoned, and claimed under the policy.

After proof, which was allowed, the Judge Admiral pronounced decree in terms of the libel for the sums insured. Mar. 4, 1803.

On bill of suspension, Lord Glenlee, after advising with the Lords, on report to them, refused the bill. On reclaiming petition to the whole Lords, they adhered.* Jan. 26, 1804.
 May 22, —

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said, “ The letter, p. 2 and 3, was

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

Pleaded for the Appellants.—The respondent, in effecting the insurances in question, concealed from the appellants several circumstances respecting the condition of vessel, materially affecting the risk, with which he was at the time acquainted. He not only concealed material circumstances, but actually misrepresented the information he received from his correspondents in Jamaica in several particulars. 1. In representing the Concordia as “a very good vessel,” when, from the above letters, the reverse was obvious. 2. That the Concordia had got a thorough repair after the accident of touching upon the reefs, whereas it turned out that this could only be partial; and, 3d. In representing that his advices say, “that Captain Simpson was “expected to clear out his ship next day;” whereas all the letters he received state doubts of the vessel being able to sail with convoy. It is further manifest, that the vessel was not sea worthy when the risk commenced. She sails from Port Antonio, after her repair, for to join the convoy, and she becomes so unnavigable as to occupy a whole fortnight in what is usually deemed a passage of two or three days. The hull got no damage in this passage, for it is admitted she received no injury, so that it must have been owing to some incapacity in the ship previously. She had remained at Port Antonio for seven or eight months, exposed to all the intense heat and heavy rains of that climate. There was unnecessary delay here, owing to the inefficiency of the

shown to the underwriters. As to the first point, namely, the allegation of concealment, I think there was no concealment of the condition of the ship. There is a little uncertainty in Mr. Bogle’s letter of 6th September to the broker, as to the time of sailing, but, by the policy itself, there was a considerable latitude as to the time of sailing.”

LORD CULLEN.—“I am for adhering.”

LORD HERMAND.—“I am for altering.”

LORD BALMUTO.—“I am for the same.”

LORD CRAIG.—“I am for adhering.”

LORD PRESIDENT CAMPBELL further said, on petition for Brown, “The insurance here was effected on 13th August. The respondent had then got the letters 19th and 29th April, 18th May and 19th May, and 13th July. One of these is not favourable to the respondent, and ought to have been shown to the underwriters.”

captain, and this delay was tantamount to a deviation, and did actually result in misfortune, and ultimate loss and abandonment of the vessel.

Pleaded for the Respondent.—The first objection made is, that there was concealment. In answer to this, the respondent contends, that there was no concealment here of any one material circumstance. The law does not require that the assured shall give information to the underwriters of every circumstance respecting the vessel or cargo, or persons connected with the ship. It is only of material circumstances, such as may vary the nature of the contract, and the risk undertaken. In this case, there was no such concealment, nor any which, according to the law laid down by Lord Mansfield in *Schollbred v. Nutt* at N. P. after Hill Term, would vacate the policy. The accident which had befallen the vessel was communicated to the underwriters. Concealment of circumstances, as to the time of sailing, no doubt is material, but the 25th July was mentioned here with no positive assurance held out that she would sail at that time; and, indeed, had it not been for the bad weather, the ship, after she left Old Harbour, would have arrived at Port Antonio in time to sail with convoy on the 25th July. Nor was the respondent bound to communicate the information as to the inactivity of the captain, as this goes only to the character of the captain, not to the essentials of the policy. But, 2d. It has been objected, that the ship must have been unseaworthy at the time she sailed. This is founded on the circumstance, that, soon after commencing the voyage, she became unmanageable without any visible or adequate cause. The answer to this is, that she got a thorough repair before leaving Old Harbour. That she was surveyed and declared tight, staunch, and strong, and capable of taking a cargo to England. She did not become leaky in a day or two after she sailed, and her misfortunes, so far from arising without any visible or adequate cause, were accounted for by events which it is impossible to foresee. On this voyage she bore a fortnight of uncommon bad weather without any leak. By this bad weather she missed the convoy; and the cause of subsequent disaster in the harbour of Port Antonio arose solely from exposure to intense heat and heavy rains of the climate, which are commonly very destructive to ships. 3. The steps taken there, in disposing of the cargo, and in the abandonment, were quite justifiable in the circumstances; for after the ship was declared

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Vide Marshall on Insurance, p. 354.

Vide Park, vol. i. p. 493.

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unfit to proceed on her voyage, it was the best course for all parties, without waiting to give notice, as is contended for by the appellants.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed, and that the defenders be assoilzied.

For Appellants, *Wm. Adam, David Williamson, M. Nolan.*

For Respondents, *Thomas Plumer, J. A. Park.*

NOTE.—The reversal in this case upsets the judgment in the Court of Session, given in *Adam and Mathie v. Murray*, Mor. App. Insurance, No. 6 as arising out of the same circumstances and risk; and will not support the doctrine laid down by Professor Bell in his Commentaries, founded on both cases, as decided in the Court of Session, Com. vol. i. p. 620.

THE PROVOST, MAGISTRATES, and TOWN-	}	<i>Appellants;</i>
COUNCIL of Kirkcudbright, . . .		
ARCHIBALD AFFLECK, . . .		<i>Respondent.</i>

House of Lords, 20th March 1809.

DEBTOR'S ESCAPE FROM PRISON—LIABILITY OF MAGISTRATES.—In this case, the prison was alleged to be strong and sufficient in all respects, and the magistrates pleaded that there was no defect, no *culpa* on their part, no carelessness nor want of vigilance on the part of the jailor, but that the escape was effected only by the most powerful instruments and forces having been applied. Held, nevertheless, that they were liable.

Action was raised by the respondent against the appellants, as responsible for the escape from prison of his debtor, William Herries, cattle dealer, imprisoned for debt in the prison of Kirkcudbright.

The escape was effected by the use of tools, used in cutting a hole in the ceiling of his chamber, and wrenching a strong bar out of a window.