SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TENNANT and others (Underwriters)—*Appellants.*
HENDERSON and another (Merchants)—*Respondents.*

AND

HENDERSON and another (Merchants)—*Appellants.*
FETTES and others (Underwriters)—*Respondents.*

May 31, 1813.

INSURANCE.

INSURANCE on a ship engaged in the African wood and ivory trade, without stating her co-operation with another ship. This mutual co-operation or trading proved to have occasionally prevailed in African voyages, but the usage not so complete as to render it unnecessary to communicate the fact expressly to the underwriters. Decided that this was a concealment of a material fact, and fatal to the policies.

THIS was a question between the assured and underwriters, arising upon certain policies of insurance, effected upon the ship Imperial and her cargo, engaged in the African trade.

The original order of the insurance was as follows:—

Jan. 18, 1803. Letter—Henderson and Seller of Liverpool, to Messrs. Liddell, insurance-brokers, Leith.

"Please effect 2,000*l.* upon 5-6ths of the ship; "the whole valued at 10,000*l.*, per the Imperial, "Thomas Marshall, at and from Liverpool to the "coast of Africa and the African islands, during "her stay and trade there, and from thence back "to Liverpool, *with liberty to exchange goods with "other ships; at* 6*l. per cent.* The Imperial was

" lately built at South Shields, originally intended " for the service of the East India Company, is " 530 tons register, copper-fastened, and copper- " sheathed up to the bends, and intended to sail in " about a week. *Upwards of* 5,000*l.* *has been done* " *on her on these terms* TO-DAY *here. As your* " *underwriters may not be accustomed to these* " *risks*, it may be *necessary* to say, that *we purchase* " *no slaves*, nor does *the ship* go to the West In- " dies: *we barter the produce and manufactures of* " *this country for the produce of Africa*, dye- " wood, ivory, bees-wax, palm-oil, &c."

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Upon the faith of this representation, insurance to the extent of 2,000*l.* was, on the 21st of January, 1803, effected on the *ship* Imperial, " At " and from Liverpool to the *coast* of Africa and the " African islands, during her stay and trade there, " and from thence back to Liverpool, *with liberty* " *to exchange goods with other ships.*"

Insurances which were effected, Jan. 21, 1803, on ship;

The next insurance made was upon the *cargo*. The policy was dated 18th June, 1803, and was in these terms:—" At and from her arrival twenty- " four hours at her first place of trade on the coast " of Africa to Liverpool."

June 18, 1803, on cargo;

A third policy, also on the cargo, was effected 1st November, 1803, " At and from Africa and the " African islands to Liverpool."

also on cargo, Nov. 1, 1803.

The order upon which this insurance was made, was dated 29th October, and bore, that the Imperial " was *left well* at Old Calabar, on 12th June " last, *taking in her cargo*, and was *expected to* " *leave the coast in all October.*"

Order upon which this insurance was made, dated Oct. 29, 1803;

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INSURANCE. Fourth policy, also on cargo, Nov. 26, 1803.

A fourth policy, upon the cargo, was entered into on 26th November, 1803, "At and from Africa "and the African islands to Liverpool."

The representation upon which this last policy was entered into, and which was inserted in the slip, stated, "*By advices*, the Imperial is supposed "that she would leave Africa *about this time*, and "in July last she was described a new ship, cop- "per-fastened, and coppered to the bends, and had "six six-pounders and thirty-five *people*."

Plan of the voyage. Mutual trading by the George and Imperial, both belonging to the same parties.

It appeared that, according to a plan occasionally adopted in the African trade, the owners of the Imperial had, in October, 1802, sent out the George, a smaller vessel, to take a cargo for herself, and also contract for one for the Imperial. The George, pursuant to the instructions to the Master, proceeded to Gaboon, took in some barwood, contracted for more for the Imperial, which was expected to arrive in two months after, and then proceeded to the Cameroons and to Calabar, where she took in ivory, palm-oil, &c. The Imperial sailed in January, 1803, and, according to instructions, proceeded to Gaboon, where she took in a certain quantity of barwood and ivory, with which she proceeded to Calabar, where she met the George, on board which she put all her ivory and spare barwood, and received from the George all that remained of her outward cargo (the African trade being carried on by barter only) and superfluous stores; the object being, by means of the exertions of both ships, to dispatch the George with a full cargo, before the Imperial began to trade on her own account.

This fact of the mutual or combined trading was not communicated to the underwriters, and the consequent protracted stay of the ship in that pestilential climate, &c.

INSURANCE. The fact of the mutual trading not communicated to the underwriters.

The Imperial, after having nearly completed her cargo, was, on the 14th of February, 1804, captured by a French privateer.

The Imperial captured.

The underwriters in Scotland having refused to settle the loss, actions were raised against them in the Court of Admiralty; one on the ship policy, and others on the three cargo policies, which last were conjoined by the Judge Admiral, who, in all the actions, pronounced in favour of the assured. The underwriters then carried the matter into the Court of Session, by two bills of suspension, which the Lord Ordinary conjoined, the question on all the policies being the same.

1st Cause. Underwriters refuse to settle loss, and actions by the assured.

Judge Admiral pronounces in favour of the assured.

The underwriters having been directed by the Lord Ordinary to give in a condescendance of the particulars on which they relied, they insisted chiefly upon this, that the ship *did* traffic in slaves, which was contrary to the representation; and that the Imperial was not entered at the Custom-House in terms of the 39th Geo. 3. cap. 80, sect. 1, for entitling her to trade in slaves. The underwriters did not, at this time, appear to be aware of the fact of the combined or mutual trading. The Lord Ordinary then ordered the Chargers (assured) to produce, upon oath, the instructions to the Captains of the Imperial and George, and the corre-

Underwriters ordered to give in a condescendance. Allegation that the ship dealt in slaves.

Underwriters not then aware of the mutual trading.

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spondence between them, with excerpts from entries in their books, as far as these documents related to the point of trafficking in slaves. These having been accordingly produced, the Lord Ordinary

Feb. 10, 1807. Averment, that the ship dealt in slaves, not proved. First cause decided in favour of the *assured*.

prononounced an interlocutor, "finding that the "Suspenders' (underwriters) averment, that the ship "Imperial *had been employed in the slave-trade* "during the course of the voyage insured was not "only not proved, but was clearly disproved." The underwriters, after representation to the Lord Ordinary, reclaimed to the whole Court; the interlocutors reclaimed against were adhered to, and the underwriters thereupon appealed.

2d Cause. Fact of mutual trading discovered. Suspension by the underwriters.

The combined trading having been discovered by the production of the documents mentioned in the above cause, some of the underwriters, in the mean time, presented a bill of suspension against a threatened charge under the policies. This new cause came to be discussed before Lord Meadowbank, as Ordinary. His Lordship, after some previous pro-

Dec. 12, 1809.

ceedings, pronounced an interlocutor, "allowing the "Chargers to prove that, *according to the under-* "*standing of those engaged in the African trade,* "*liberty to exchange goods with other ships, im-* "*ports a liberty not only to barter and sell, but to* "*aid another ship in providing her speedily with a* "*homeward cargo, without regard to any propor-* "*tion between the goods so delivered or received;* "and allows them a proof of all facts and circum- "stances relative thereto; allows the Suspenders a "conjunct probation." And on advising the proof with the whole case, this interlocutor was pro-

nounced: "Having resumed consideration of these "conjoined processes, and advised the proof, pro- "ductions, and debate, finds, that the privilege "specified in the different policies of insurance, "*with liberty to exchange goods with any other* "*ship or ships*; or, *with liberty to exchange goods* "*with every vessel or vessels*; *does not*, in com- "mon language, and without a peculiar conven- "tional meaning, import a liberty to exchange "goods, without regard to observing any proportion "in bulk or value between the goods so exchanged; "and *still less*, that the exchange may be so con- "ducted by the vessels insured, as that it should "retard the completing of her own cargo, and pro- "tract her own stay in the seas where it is to be "completed, and in order to hasten the accomplish- "ment of the voyage of other vessels, or another "vessel, and her or their speedy dispatch with a "competent cargo; and as the risks of sea hazard "are increased beyond an arithmetical proportion, "by the prolongation of the adventure, particularly "in the business of a coasting voyage to complete "a cargo, so enlarged a construction of the privilege "is more difficult to be entertained, where nothing "appears in the rate of insurance stipulated be- "tween the parties, indicating that such an eventual "augmentation of risk was in contemplation: finds "it nevertheless proved, that the enlarged construc- "tion of the privilege contended for by the Chargers, "was adopted by a great number of the dealers and "underwriters in the African trade, *but not uni-* "*formly in point of extent of such construction,* "*and not universally in any extent even at Liver-*

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Jan. 17, 1811.

Judgment of Lord Meadowbank, respecting the mutual trading.

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" *pool:* and, amidst this diversity of sentiments, " being, on the whole, of opinion, that in applying " for insurance at such an out-port as that of Leith, " it was the duty of the assured not to rely on a " conventional meaning so adverse to the natural " meaning, and attended with so much difficulty, " while not established with absolute universality " among all versant in the trade, but to disclose the " retardment and increase of risk that might be ex- " pected from the privilege stipulated; suspends " the letters *simpliciter*, and decerns; but believing " the chargers, individually, may have proceeded " *bona fide*, though on somewhat too great confi- " dence in their own practice, finds no expences " due, and decerns."

The Lord Ordinary, upon representation, adhered to his interlocutors, and gave the parties the following note of the ground of his decision:—

Note of Lord Ordinary.

" I certainly proceeded, in pronouncing the in- " terlocutor, on the opinion, that the long stay of " the Imperial, for so many months on the coast, " was not at all accounted for, but from her sub- " serviency to the George; and if the Chargers re- " claim, this seems to me essential to be obviated."

The assured reclaimed to the second division of the Court, but without effect, and then appealed.

The reasons on which the underwriters rested their case in both appeals, as well in the former, in which they were Appellants, as in the latter, in which they were Respondents, were these:—

Grounds on which the underwriters rested their case in both appeals.

1st, That the Imperial had been employed as *a floating warehouse*, or *tender*, to the George, a fact which had not been communicated to the un-

derwriters, though it materially varied the risk; and the case of *Hartley v. Buggen*, where it had been determined *that any unnecessary delay was equivalent to a deviation;* and that of *Lever v. Fletcher*, to the same effect, were cited.

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Marshall 409.
Park 313.
Marshall 54.
Park 237.

2d, The representation that 5,000*l.* had been done upon the ship at Liverpool, on the day then mentioned, was groundless; and that, in fact, only 1,000*l.* had been on that day underwritten on her.

3d, It was represented that the Imperial did not traffic in slaves; whereas she did actually deal in slaves, without being regularly entered as a slave-ship, so that the voyage was illegal; or, at least, the vessel, even by having *forfeited pawns* on board, was liable to seizure and detention, and the policy was thereby void, upon the principle which governed the decision in *Rich v. Parker*, and *Farmer v. Legg*.

Marshall 319.
7 T. R. 705.
Marshall 386.
7 T. R. 186.

4th, The misrepresentation relative to the ship had a reference to the policies on the cargo, and rendered them also void.

5th and 6th, The representations on which the policies of the 1st and 26th of November, 1803, were effected, were known to the owners, at the time, to be false in several particulars, as to the state of the vessel, the time of her expected arrival, and the number of men on board, &c.; and the policies were therefore clearly void, upon the principles laid down by Lord Mansfield, in *Fillis v. Brutton;* by Lord Kenyon, in *Rich v. Parker;* and by Lord Ellenborough, in *Edwards v. Portner.*

Park 182.
Marshall 320.
7 T. R. 705.
Cam. N P.C. 530.

The only point which appeared to be much relied upon, however, was that of the Imperial acting as

The *mutual trading* chiefly relied on by

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a tender to the George, and the consequent protracted stay of the former on the coast. The answer of the assured to this was, that the George, by contracting for a cargo for the Imperial, so long before the arrival of the latter, had, in reality, co-operated with, and assisted her, and, on the whole, accelerated rather than retarded the completion of her voyage. That this mutual co-operation was common in the African trade, and that this was, or ought to have been, known to the underwriters. The nature of the African trade consisting in barter sufficiently accounted for the length of time occupied by the Imperial in her voyage, without referring her protracted stay to her subserviency to the George. *(Freeland v. Glover.)*

Carter v. Bohem. 3 Bur. 1905. Plauchs v. Fletcher. Doug. 238.

7 East. 402.

The two appeals came on to be heard on the same day, beginning with that of *Tennant, &c. v. Henderson.*

1st Cause. (Proceedings on appeal.)

Mr. Nolan (for the Appellants) was proceeding to argue on the ground of the mutual trading, when he was interrupted by

Objection, in point of form, to the argument on the ground of the mutual trading, as applied to the first cause.

The Lord Chancellor, who observed, that this and several other points were introduced into the case without being in the original papers. The point relied upon by the underwriters in their condescendance in the present cause, as far as he could understand from the papers, (the condescendance itself not being produced,) was the trafficking in slaves. The new ground of the mutual trading was afterwards discovered; but instead of bringing this before the Lord Ordinary by a

new condescendance, they went on with the cause before the whole Court, who decided against them possibly upon the ground, that by their practice the Court could not take notice of the mutual trading, because it was not a point stated in the original condescendance. If such was the fact and the rule, the Counsel must now likewise confine themselves within the limits of the condescendance, and argue the case on the ground of dealing in slaves. May 31, 1813. INSURANCE.

[The further hearing of both causes was postponed till the condescendance should be produced.]

The first cause was not further proceeded in at the bar, but this day (June 21st) the second cause came on to be heard, in which the mutual trading was established. June 21, 1813. Proceedings on appeal in 2d cause.

Mr. Park, for the Appellants, (assured,) was proceeding to argue, that it was probable the underwriters knew of the usage of mutual trading in the African trade, though it was not communicated in express words.

Lord Chancellor. Then you must prove the usage as a fact.

Mr. Park. I was going to say that the voyage was not protracted by the mutual trading.

Lord Chancellor. It don't signify what the result was, if there was a deviation from the contract.

Mr. Park admitted that the usage was not proved as a fact. (*Vide* Interlocutor of Lord Meadowbank.)

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2d Cause.

Lord Chancellor. Then you have no case at all.

Judgment of the Court below, in favour of the underwriters, affirmed.

The judgment of the Court below, in the second cause, in favour of the underwriters, was accordingly affirmed.

July 20, 1813.

Observations and Judgment in 1st cause, (underwriters Appellants,) referring to 2d cause.

Lord Eldon, (Chancellor,) after stating the case. The question was, Whether, under all the circumstances, the underwriters were liable to pay. Their Lordships were of opinion in the other cause that they were not liable, and on this ground, that it

Ground of the judgment in the 2d cause.

appeared in evidence that the Imperial had been employed not only in procuring a cargo for herself, but also in finding a cargo for the George. This was unknown to the underwriters, and it was hardly contested at the bar, (indeed it could not,) but that this altered the nature of the voyage. If there had been nothing more than the usual exchanges in such a voyage, that would have raised a different question. But when two ships, belonging to the same parties, the George and Imperial, were sent out, and the Imperial was employed not only in providing her own cargo, but that of the *George* also, the risk was altered, and therefore the decision of the Court below, in favour of the underwriters, was affirmed.

Objection, in point of form, in the 1st cause.

In the other cause an objection of this sort arose. The Lord Ordinary had directed the underwriters to give in a condescendance of the facts and circumstances upon which they rested their non-liability to pay; and this fact of the mutual trading was not one of those offered to be given in evidence. It

was, however, established in the proof; but instead of stating this new ground to the Lord Ordinary, they submitted the cause at once to the whole Court, and the Court thought they were liable, either upon the whole merits of the case, or because the new point not having been regularly brought before the Lord Ordinary, they could not take notice of it; but on which of these views of the case they had decided their Lordships did not know. Their Lordships (as appeared from the judgment given in the other cause) thought the Court of Session was wrong, if it meant to say that the mutual trading did not vary the risk; but if their practice did not permit them to look at the new ground which had not been regularly brought before the Lord Ordinary, then the practice precluded the law, and there appeared no good ground to quarrel with their decision.

The decision of the Court of Session in the 1st cause, in favour of the *assured*, wrong, if they had in view the mutual trading; but if practice prevented their looking at that point, as not regularly brought before them, then their decision was right.

In order to show how the practice stood in this respect, certificates had been given in, stating that, under the circumstances of the case in question, it was competent to the Court to have taken the whole merits into consideration. These certificates were defective in this, however, that the fact did not appear to have been stated to the persons who signed them, that the Lord Ordinary had required this condescendance. The most proper mode of proceeding would therefore be, to remit the cause to the Court below for review. It would be seen from the judgment in the other cause, that their Lordships differed from the conclusion of the Judges below, if they had decided on the merits, and the judgment would of course be altered; but if they

Certificates as to the point of practice.

July 20, 1813. had decided on the point of form, then the judgment must remain as it was.

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Ordered and adjudged, that the cause be remitted to the Court of Session, to review the interlocutors complained of.

Agent for the Assured, CHALMER.
Agent for the Underwriters, MUNDELL.

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APPEAL FROM THE COURT OF SESSION.

WATSON and others—*Appellants.*
CLARK—*Respondent.*

May 12, 1813. INSURANCE on the Midsummer Blossom, an old ship, "at "and from Honduras to London." Ship sails on her voyage, and, in a few days after, without adequate cause, becomes so leaky as to compel the Master to return. Vessel strikes on a reef of rocks, and is lost. Decided that she was *not* sea-worthy at the commencement of the risk.

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THIS was a question of insurance upon the cargo of the ship Midsummer Blossom, of which the Respondent was owner. The vessel was lost in November, 1801, on a voyage from Belize river, in Honduras, to London; and the question was, Whether the ship was or was not *sea-worthy* at the time when she undertook to perform the voyage.