

as agent for the Respondent—the accounts were so mixed, that it was impossible to distinguish what improvements had been made with the money of the Respondent, and what with the money of the Appellant; and that was the circumstance which induced him to send the matter to a farther inquiry: but he thought the bill ought to have been dismissed originally. The prayer of the bill; he saw, was, that the leases prepared by D'Esterre, Respondent's brother, might be perfected; and in these leases blanks had been left for the quantity of lands and the lives.

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AGREEMENT.  
—LEASE.

Decree of the Court below *affirmed*.

Judgment.

Agent for Appellant, J. PALMER.

Agent for Respondent, TYNEDALE.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HALL—*Appellant*.

BROWN—*Respondent*.

THE stipulations in a charter-party may be varied by subsequent instructions, which may amount to a new contract *pro tanto*; and an insurance of the freight upon the new voyage, though different from that described in the charter-party, may be good. Thus, where a British vessel was chartered for a voyage from Odessa to Rotterdam,—war having in the mean time broken out between Great Britain and Holland,—the Master was instructed by the freighter's agents at Odessa, in case he could not get to Rotterdam, to proceed to Hamburgh or Bremen; but to enter at London

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or Newcastle in the first instance, where he might receive different orders from the freighters,—the difference in the freight to be settled by arbitration. The vessel was captured among the Grecian Islands, and the Master made a declaration, attested on oath by three of the crew, of the capture, before the British Consul at Patras in the Morea; in which the ship was described as having been, when captured, on her voyage from Odessa to Rotterdam. An insurance had been effected on the freight for the particular voyage from Odessa to England; and it was held by the Court of Session and the House of Lords, that the underwriters were bound to settle the loss, on the ground that the instructions formed a new contract, under which the vessel was, at the time of the capture, on her voyage to England, where, on her arrival, freight would have been earned.

1802. Ship chartered for a voyage from Odessa to Rotterdam.

THE ship *Duchess of Buccleugh*, Brown Master and part owner, was chartered at Leghorn in 1802, by the agents of Ebel and Co. of Riga, for a voyage to *Odessa*, on the Black Sea, to carry a cargo from thence to *Rotterdam*. The cargo was accordingly taken on board at *Odessa*, and the bills of lading made out for *Rotterdam*. In July, 1803, the agents at Leghorn wrote to Brown, at *Odessa*, informing him that war had broken out between England and Holland—that it would be impossible for him to proceed to *Rotterdam*—and referring him for instructions to Messrs. Vander Schroeff, the agents of Ebel and Co. at *Odessa*; stating, that they (Vander Schroeffs) would propose *Hamburgh* or *Bremen*, but that they feared he would not be able to get into either of these places, owing to the French troops. The following instructions were afterwards prepared by Messrs. Vander Schroeff, and signed by Brown:—

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Aug. 15, 1803.

Letter of instructions by Messrs. Vander Schroeff to the Respondent, altering the destination of the vessel.

“ *Instructions pour le Capitaine John Brown, commandant le  
“ brigantin Anglois, La Duchesse de Buccleugh.*

“ La. declaration de guerre survenue entre l’An-  
“ gleterre et la France ayant obligé Messieurs  
“ *Vander Schroeff et Fils, etablis à Julosyn en*  
“ *Ukraine, se trouvant actuellement ici, de donner*  
“ UNE DESTINATION DIFFERENTE à la cargaison  
“ *chargée par eux à bord du brigantin susdit. Nous*  
“ sommes convenues avec le dit Capitaine John  
“ Brown, que si les circonstances ne lui permettent  
“ d’entrer à Rotterdam conformément à sa charte-  
“ partie passée le 28 Avril de cette année, à Livourne,  
“ entre le dit Capitaine et Messieurs Grant, Sib-  
“ bald, et Balfour, le Capitaine John Brown, en  
“ vertu des connoissemens signés aujourd’hui, s’oblige  
“ de se rendre à Bremen ou Hambourg.

“ Pouvant entrer en Hollande, le susdit Capitaine  
“ Brown livrera la cargaison à Messieurs Corne-  
“ lius Vander Hoeven et Fils, de Rotterdam; mais  
“ en cas que les circonstances ne lui permettent  
“ d’y entrer, le dit Capitaine Brown fera voile pour  
“ Bremen ou Hambourg, et livrera sa cargaison à  
“ Bremen à Monsieur Johan Matthias Larneyer, et  
“ à Hambourg à M. Martin Johan Jenisth, et tou-  
“ jours bien entendu pour autant que les ports de la  
“ Republic de Batave seront bloqués, et que les  
“ circonstances ne permettront Capitaine Brown  
“ d’y entrer.

“ *Le Capitaine Brown, pour sa propre sureté et*  
“ *cella de cargaison, tachera partout de se procurer*  
“ *des convoys et d’entrer en Angleterre à Londres*  
“ *ou à Newcastle, ou il trouvera peut-être des*

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“ *ordres différents de la part de Messrs. Joachim  
Ebel et Co. de Riga.*

“ Pour meilleure intelligence du Capitaine Brown,  
“ il fera (à) son heureuse arrivée à Constantinople,  
“ traduire la present instruction en langue Angloise,  
“ dans la Chancellerie de l’Ambassade de sa Majestic  
“ Britannique.

“ A Odessa, le 3, 15, Août, 1803,

(Signé)

“ JOHN BROWN.

“ Le Capitaine Brown arrivant heureusement à  
“ Bremen ou Hambourg, *la difference du fret sera*  
“ *reglée par des arbitres* que le dit Capitaine  
“ Brown, et les maisons à qui il livrera sa cargaison,  
“ nommeront à cet effet. *Il en sera de même si le*  
“ *Capitaine Brown entre à Londres ou Newcastle.*  
“ A Odessa, le susdit.

(Signé)

“ JOHN BROWN.”

Ebel and Co. 9th September, 1803, wrote to their agents in London to insure the cargo from Odessa to London or Newcastle; and from this, as well as a letter soon after written, addressed to Brown, and intended to have been received by him on his arrival in England, it appeared that Ebel and Co. understood that the vessel was to come to England in the first instance, though they seemed to have still intended Rotterdam as the ultimate destination of the cargo; and, in the letter to Brown, spoke of freight not being due till the cargo was delivered at Rotterdam by a neutral ship or otherwise. This ultimate destination did not however appear to be a fixed purpose, and the agent here, in answer

to certain queries by the underwriters, stated that he would have sold the cargo in England. Letters were written by Brown from Odessa and Constantinople to this country, stating that he had been ordered to England, and directing insurance to a certain extent on the freight. These letters were received in evidence below. An order in these terms,—“ Insure 600*l.* on freight, valued at 1500*l.* per Duchess of Buccleugh, Brown Master, at “ and from Odessa to London or Newcastle, both “ or either, at 20 guineas per cent.,” &c.—was given to a broker in October, 1803, and a policy was prepared accordingly, which Hall underwrote for 100*l.*

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The vessel was captured by a French privateer among the Grecian Islands, and carried into *Coran*, in the *Morea*. Brown waited on the British Consul at *Patras*, who, on the 20th October, 1803, drew up a declaration of the capture, which was signed by Brown, and attested on oath by three of the crew. In this declaration, or protest, the statement was, that the Master had sailed with the vessel from Odessa for Rotterdam.

Capture of the vessel, and declaration, stating the voyage to be from Odessa to Rotterdam.

All the underwriters on the cargo settled the loss as on the voyage to England, and also all the underwriters on the freight, except Hall, against whom Brown brought his action before the Admiralty Court in Scotland. Decree was pronounced against Hall, and he having died, the Appellant, acting for his representatives, brought the matter by suspension before the Court of Session.

Hall, one of the underwriters on the freight, refuses to settle, and action in the Admiralty Court; and, Feb. 8, 1805, decree against Hall.

The grounds on which payment was resisted were,—1st, That the vessel at the time of the capture was engaged in a voyage to Rotterdam, whereas

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Interlocutors  
of the Court  
of Session,  
June 22, 1808;  
Feb. 1, July 4,  
11, 1809;  
Feb. 2, 1810.

Appeal.

the freight was insured on a voyage to England. 2d, That though the vessel had arrived at London or Newcastle, freight would not have been earned at either of those places; and that Brown had not therefore an insurable interest. Another point, but not relied upon in the House of Lords, was, that the cargo was enemies' property, and that this fact had not been communicated to the underwriters. The Court of Session at first found the letters orderly proceeded, but, on reclamation, altered that interlocutor, and sustained the reasons of suspension. They afterwards, however, returned to their first opinion, and to that judgment they adhered; upon which Hall appealed.

*Marshall* and, *Park* (for Appellant) contended for the reversal of the judgment on the two grounds, that the voyage on which the ship was sailing at the time of the capture was different from the voyage insured; and that, suppose the vessel were sailing for England, no freight could be earned till the arrival at Rotterdam, and the assured could not recover, as the loss of the freight was not the immediate consequence of the capture; for suppose the vessel had come to England, she might still not have been able to get to Rotterdam. As to the point of the sailing of the vessel for Rotterdam, that was proved by the charter-party, and the protest on oath. Brown's own letters had been received in evidence to contradict his declaration at Patras. (*Romilly*. They were never objected to.) But their Lordships would object to them; for, though the English rules of evidence, more excel-

lent than those of any other European country, were not binding in Scotland; yet rules of evidence contrary to the first principles of justice ought not to prevail in Scotland or any where else. As to the second point, the letter of Ebel and Co. intended for the Respondent on his arrival in England, stated that the freight was not to be earned till the delivery of the cargo at Rotterdam; and therefore the loss was not a loss under the policy, the freight insured not being the freight to be earned; and they referred to the *Nisi Prius* case of *Murdoch v. Potts*. This was afterwards considered and impugned in *Taylor v. Wilson*; but it was submitted that the doctrine in *Murdoch v. Potts* was founded on the better reason. Part of a voyage might be insured, but freight was totally distinct from ship and cargo. It existed only in imagination—it was a mere expectation—it was not vested till earned. Nor could freight be due on the arrival in English ports, *pro rata itineris*. That was only due where part of the voyage was performed, and the completion, without any fault of the Master, had, by some intervening circumstance, become impossible. It would be dangerous to permit the Master to land the cargo where he thought proper, and then to claim freight *pro rata itineris*, unless there was an acceptance by the owner of the cargo. The case of *Hunter v. Princep* might be cited in their favour; and that of the *Copenhagen* was no authority against them. There was not a word in the policy of the alternatives mentioned in the instructions, which were signed only by Brown, who

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Murdoch v. Potts, Marshall, 396; Park.

Taylor v. Wilson, 15 East. 524.

Hunter v. Princep, 10 East. 378. Copenhagen, 1 Rob. A. R. 289.

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therefore gave instructions to himself. All the voyages in contemplation ought to have been communicated.

*Adam and Romilly* for Respondent. The instructions and letters proved that this was a direct voyage to England, in the first instance, where the freight was to be settled by arbitration; and if so, there was an end of the question. The declaration appeared to have been prepared by the Consul from the charter-party, without advertiᅡg to the instructions, which formed a new contract; and as the ultimate destination might, by orders after arrival at England, have been Rotterdam, there was no inconsistency between the protest and the rest of the evidence. Brown's letters, written without fraud, were, under the circumstances, the strongest evidence; and Hall was precluded from now objecting to them, by having adopted them below, and argued upon them. Their case was perfectly consistent with *Murdoch v. Potts*. Here there was an express agreement, that on the arrival of the vessel at England the owner should be entitled to freight *pro rata itineris*, supposing a farther destination of the cargo in view. Could there be a doubt as to this being an insurable interest? But suppose there had been no agreement, a circumstance (the war) had intervened, which rendered it impossible for the Master to complete the voyage to Rotterdam, and he would still, on coming to England, have been entitled to freight *pro rata itineris*. (*Copenhagen, Mening*, 1 Rob. Ad. R. 289.)



*Lord Eldon* (Chancellor.) He observed in this case one judgment by which the underwriter was held not liable to pay. In each of the judgments there had been much difference of opinion, and during a great part of the argument at the bar, he himself had conceived that the Appellant was in the right, though he had since changed that opinion.

First, as to whether the Respondent had an insurable interest:—It had been argued that Brown could not recover, inasmuch as the vessel had been captured upon a voyage to a place which, if she had reached, it did not follow that freight would have been earned, even *pro rata itineris*. But the answer was, that though it was admitted that the original intention was to proceed to Rotterdam, yet it had been found expedient to pay attention to the circumstance that she might not be able to enter that port. It was clear that the vessel was to proceed to England, either in the first instance, or in the event that she could not get into the other ports. By the instructions, which he considered as a new contract, it was agreed,—the freight as to Rotterdam having been already settled by the charter-party,—that on the arrival at Hamburgh, or Bremen, or in England, the difference should be settled by arbitration; and here indemnity was claimed for loss of freight insured as on the particular voyage.

The policy was on the freight to London or Newcastle, both or either; and if the real intention had been to sail to Rotterdam, it would be difficult under this policy, which said nothing as to Rotterdam, to support the claim. But on considering the instructions, it appeared clear that the intention

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Observations  
in Judgment.

The instructions altering the destination was so far a new contract.

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was to proceed in the first instance to London or Newcastle; and it was to be observed, that this voyage was covered as to the cargo by one insurance, and if the voyage was to be pursued farther, a distinct insurance, by a separate instrument, was to be effected.

Thus the claim appeared to be well founded, even without the letters of Brown, which here, indeed, would not have been admitted in evidence; but still, when they were made use of and relied upon on both sides; they must be received as evidence.

The Master's letters would not in England have been received in evidence for himself in his own cause; but in this case, having been relied on by both parties, they were to be taken as evidence.

Taking it then, that the voyage to England was the first voyage, the freight was to be settled by arbitration, and there was clearly an insurable interest. It was evident that this was the voyage on which the vessel sailed.

The original destination having been Rotterdam, and that having been changed for England by subsequent agreement, the protest was perfectly consistent with the letters in this view. He thought, therefore, that the judgment was right; but in a case where there had been so much difference of opinion among the Judges below, he did not think it was fitting to give costs.

Judgment.

Judgment *affirmed*.

Agent for Appellant, MUNDELL.

Agent for Respondent, CAMPBELL.