

June 1, 1814. as matters stood, he did not see any other way of getting at the dry justice of the case.

ROAD ACTS.—
POWERS OF
TRUSTEES.
Judgment.

Cause remitted with a declaration as above.

Agent for Appellant, RICHARDSON.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH AND OTHERS—*Appellants*.

MACNEIL AND OTHERS—*Respondents*.

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

INSURANCE on some hogsheads of tobacco, from Greenock to Bremen :—vessel deviates from stress of weather, and puts into Korshaven, on the coast of Norway, Nov. 30, 1798; where she remains till April 24, 1799; then sails, and in three days arrives at Bremen, and delivers the tobacco, which was not examined till the 25th of May; when it was found that 40 hogsheads were damaged, and seven sound. The 40 hogsheads sold at $10\frac{1}{4}$ grots per lb.; the sound hogsheads (though instructions to sell had been sent) retained unsold in expectation of a better price; but valued by a broker at $17\frac{3}{4}$ grots per lb. The only evidence of the deviation being occasioned by stress of weather consisted of letters from the Consignees, stating that the master had written to a house at Bremen, that such was the fact; and a copy of a judicial examination of the master at Bremen; but no protest produced—no letter from the master. Held by the House of Lords, affirming a decision of the Court of Session, that the underwriters were liable for the partial loss, though on evidence which would not be admitted in England.

Sentiente Lord Eldon, that though the sale of both the sound

and damaged hogsheads might be the most certain way of ascertaining the difference, and calculating the amount of the loss; the valuing of the sound hogsheads by a regular broker, the parties acting *bonâ fide*, was sufficient.

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

THIS was an insurance upon a cargo of tobacco, valued at 43*l.* per hogshead, to be shipped on board a vessel called the *Fleece*, bound from Greenock, to Bremen.

The vessel sailed with a fair wind from Leith Roads, on Nov. 24, 1798. Having lost her convoy on the 27th, she abandoned her course for Bremen, and put into *Korshaven*, on the Norway Coast, where she arrived on the 30th. On the 24th of April following, she sailed under convoy from *Korshaven*, and in three days arrived at Bremen.

Deviation.

On the 22d of January 1799, *Tiel and Sons*, Consignees of the cargo at Bremen, wrote the insured, (Respondents,) stating that the master had written a letter, Dec. 22, 1798, to Messrs. Rotberg of that place; informing them, that on the separation of the fleet on the 27th of November, he had been obliged by a heavy gale to bear up for Norway, and put into *Korshaven*, with the loss of sails, &c.; but expressing his hope that the cargo had not suffered. Messrs. *Tiel and Sons* also stated, that the *Weser* was then almost covered with ice, and that no vessels could get in without great danger. The insured wrote to *Tiel and Sons*, on the 23d of March, expressing their hope that the *Fleece* had arrived, and their wish that the tobacco should be sold immediately. *Tiel and Sons* answered in April,

Evidence.—
Letters from
the Con-
signees.

March 23,
1799.

April 12, 1799.

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

stating that the Fleece had not arrived; “and as
“it was probable that part of the tobacco might
“have got damaged, they requested to be informed
“whether the Respondents were insured, and in
“what manner; and whether they were to sell the
“damaged tobacco on account of the underwri-
“ters.” In answer to this, the Respondents wrote
in these terms—

April 23, 1799,
Letter of Re-
spondents to
Messrs. Tiel
and Sons.

“Our tobacco per Fleece is insured. We are,
“however, considerably interested individually as
“underwriters. *As there is no clause in our policy*
“*for average* on separate packages, we cannot re-
“cover any loss unless it amount to five per cent.
“upon the whole, valued in policy at 43*l.* per hogs-
“head. We hope the tobacco may have escaped
“damage altogether; *but should not that be the*
“*case, and it amounts to five per cent., you will of*
“*course have it sold for behoof of the under-*
“*writers, and send us the documents.*”

April 27, 1799.
Arrival of the
vessel at Bre-
men.

On the 27th of April the Fleece having arrived
at Bremen, on the 30th Messrs. Tiel and Sons wrote
the Respondents the following letter:

April 30, 1799,
Letter of
Messrs. Tiel
and Sons
thereupon.

“After referring to ours of the 12th instant, on
“which expect your answer. This serves to bring
“you *the pleasant news* of Captain Pinchon’s safe
“arrival; lighters are engaged for discharging the
“Fleece, and we hope to have your tobacco soon in
“town. We wish it may be without damage; but,
“as the Captain *made so long a voyage*, and had
“*dreadful weather at sea, it is rather probable that*

“ a part of the cargo may have got some damage,
 “ and therefore are desirous to hear if you are in-
 “ sured, and if we must sell the damaged tobacco
 “ for account of the underwriters. *It is a pity,*
 “ *indeed, this tobacco was such a long while coming,*
 “ *the best period for sale being passed, and prices*
 “ *about five grots less than our best sales in No-*
 “ *vember, without any appearances of an advance.*
 “ On the contrary, the large supplies that are ex-
 “ pected still make a *farther decline* not at all im-
 “ probable.”

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

On the 16th of May, (19 days after arrival of the
 Fleece at Bremen,) the master of the vessel, with
 certain of his crew, appeared in the Court Leet
 at Bremen, and gave an account of his proceed-
 ings, a copy of which was produced. It bore in
 general, that he had been obliged to put into Kor-
 shaven, by stress of weather, and the loss of con-
 voy; where he had made a *solemn sworn protest*,
 of the existence of which, however, there was no
 other evidence. “ After that they were detained in
 “ the said harbour through the strong frost and
 “ heavy gales, and through French privateers, till
 “ the 24th of the month of April, 1779; on which
 “ day they sailed, according to the order of the
 “ English consul, to Korshaven, from there, and
 “ joined his British Majesty’s armed ship the Es-
 “ peagle, as the convoy for the river Weser, for the
 “ destined port of Bremen. Then nothing material
 “ happened, and they arrived under the said
 “ convoy for the river Weser; and after that, with
 “ the aid from a Pilot here, at Brache, at her dis-

May 16, 1799,
Captain’s exam-
ination at
Bremen.

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

“ charging place, on the 27th instant, where they
“ have delivered in the following days the whole
“ cargo, in lighters, to transport for Bremen. Then
“ the appearants had adjoined, upon their oath,
“ that by the discharging from the above mentioned
“ cargo, as tobacco out her vessel, a *part of them*
“ *on the ground tiers a little wet.*

“ At the rest, they had pumped the ship out
“ every time when it was necessary; farther, the
“ Captain Samuel Pinchon, and his ship’s crew
“ mentioned here before, declared by a solemn oath
“ that they have acted honestly and sincerely with
“ the said cargo, nothing thereof sold, bartered,
“ pilfered, expended, embezzled, or let embezzle by
“ any of the above crew: but on the contrary, that
“ they have delivered the cargo *in such a manner as*
“ *they receive them.* If now any part of the cargo
“ should happen to be want, or any of it damaged,
“ it was not owing to the ship’s company but to the
“ bad weather, or to other causes which they knew
“ not.”

It appeared, that though the vessel had been un-
loaded immediately on her arrival, April 27th, the
cargo had not been examined till the 25th of May.
It was then found that 40 hogsheads were damaged,
and seven sound; the brokers declaring that it was
an old damage, but that it happened in the last
voyage. The 40 damaged hogsheads were sold at
10 $\frac{1}{4}$ grots per lb; and the examining brokers va-
lued the sound hogsheads at 17 $\frac{3}{4}$ grots per lb. The
sound tobacco was however afterwards sold, pro-
bably owing to the fall of the market at 10 $\frac{1}{4}$ grots.

The underwriters having refused to settle for the

Damage.

Sale.

difference, between $17\frac{3}{4}$ and $10\frac{1}{4}$ grots, the insured brought an action in the Admiralty Court, where judgment was given in their favour. This judgment was affirmed on suspension by the Court of Session; and the underwriters appealed.

Nov. 8, 1813;
July 26, 1814.

INSURANCE.

July 27, 1804.
1807.

It was contended for the underwriters,—1st, That there was no legal evidence that the deviation was occasioned by stress of weather; and if there had been such evidence, still the voyage of necessity had not been pursued in the shortest and most expeditious manner, the delay at Korshaven not being justified by any necessity. 2d, That there was no sufficient evidence to show that the damage had been occasioned by any of the perils insured against. 3d, That the principle on which the damage had been calculated was unjust; as the sound tobacco ought to have been sold pursuant to the instructions, which was the only certain and proper way of ascertaining the amount of the damage; as the mode of putting an imaginary value on the sound tobacco, and then claiming for the difference, might be made a cover for great injustice.

Lavabre v.
Walker.
Doug. 271.

Park and Nolan for Appellants.—No Counsel appeared for the Respondents.

Lord Eldon. (Chancellor) This was a question respecting a partial loss, on a small cargo of tobacco. The action was brought in 1802 or 1803; and in the Admiralty Court, in the Court of Session, and House of Lords, the cause had been depending till 1814. Mr. Park, who was so well conversant with subjects of this nature, had natu-

July 28, 1814.
Observations
in Judgment.

July 28, 1814.

INSURANCE.
Evidence.

rally dwelt on the insufficiency of the evidence; but in Scotland these letters, &c. might be evidence, though here they would not be admitted as such. The Respondent did not appear; and it turned out that he was insolvent, and could not afford the expense, and trusted his case to the care of their Lordships. When the cause came on for hearing, it appeared that one half of the papers had not been given in. They had however since been produced, and he had read them that morning.

The questions were chiefly questions of fact:—
1st, Whether the deviation was justified by necessity. 2d, What was the cause of the damage. 3d, Whether the loss had been properly calculated. And here he could not help saying, that this was one of those cases, which compelled one extremely to lament the want of inclination which prevailed in Scotland, to adopt the trial by Jury in civil proceedings. It might be introduced gradually—first, for instance, in questions relating to boundaries in great wastes. He would be a bold man who would say that this House was as competent to decide such questions as a Jury would be, who might be acquainted with all the *indiciæ* of these boundaries. It had often occurred to him in reading these cases, as it sometimes occurred to him in Westminster Hall, that if, instead of being confined to the deposition in his hand, he had a witness before him, he would ask him a hundred questions, in order to get at the whole of the case; and equity here in such cases might direct an issue, in order to get at the better mode of examination. If the action had been brought here, it would have been decided

Trial by Jury
in civil cases.

in the course of a few weeks by a Jury of merchants, perfectly competent to judge whether there was a necessity for the deviation, and whether the damage was occasioned by any of the perils insured against; whereas the cause, from the want of that advantage, had been depending for 12 years.

July 28, 1814.

INSURANCE.

He had said so much, on account of the defects which sometimes existed in these causes, from want of the means of accurate information as to the facts on which their Lordships could safely rely. With regard to this particular case, upon reading it with reference to the Scotch rules of evidence, it did not appear to him that there was sufficient ground to reverse the decision. He thought there was evidence as to the causes of the deviation and damage, sufficient to support the judgment. As to

the calculation, the only difference between the parties was, whether the sale of both the damaged and sound hogsheads would not have been the most accurate way of ascertaining the amount of the loss. But where persons under such circumstances, acting *bonâ fide*, retained the sound hogsheads unsold, in expectation of a better price at a future period, and took the most proper steps to have the sound portion fairly and accurately valued, he was not prepared to say that this was a valid objection.

Calculation.

Judgment *affirmed*.

Judgment.

Agent for Appellants, MUNDALL.

Agent for Respondent, BERRY.