

June 19, 24, as it related to the matter in question, is in these
1816. terms:—

INSURANCE.

—FRAUD.—

RETURN OF
PREMIUM.

Letters of ad-
vice, Dec. 22,
1798, received
Jan. 7, 1799.

“ Small vessels in general are become so scarce
“ that we really began to despair of finding an op-
“ portunity to comply with your orders; particu-
“ larly as no foreigner would venture going so far to
“ the north at this time of the year. We were,
“ indeed, most shamefully disappointed *per* last
“ convoy, when we had engaged room for sixty
“ chests, we meant on joint account; but, fortu-
“ nately, when we least expected it, we have had
“ the good luck of meeting with a charming
“ little schooner, the Nancy, Johnson, (*a prize,*
“ *going home for condemnation*) we calculate will
“ carry, &c.

“ Two or three days fine weather will put this
“ vessel ready for sea, her cargo being all made up,
“ This for your government regarding insurance,
“ *with or without convoy, for which she shall not*
“ *wait a single day.*

“ P. S. *We have determined on running with*
“ *the Nancy.*—To-morrow you may calculate will
“ sail about the 30th at farthest.”

On the same day, a letter was addressed to the Appellants, by Mac Andrew and Gill, another house at Lisbon, with which they corresponded, in the following terms: “ Gentlemen, We had this
“ honour the 7th instant, and have now to advise,
“ that we have procured freight for 100 chests
“ china oranges, and 150 frails figs, on board the
“ British vessel, Nancy, Captain Robert Johnson,
“ which we expect will sail in all this month, and
“ will carry for your account the above goods.

“ The amount of invoice for your government in
 “ insurance may be about 530//000. There being
 “ no convoy at present appointed for Britain, *the*
 “ *Nancy intends to run it.* However, should any
 “ partial convoy offer, she will naturally benefit of
 “ it.”

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Reid and Co. received these letters on January 7,
1799, and on the 16th gave their broker an order
for insurance in the following terms; quoting some
words from the first letter of advice, but omitting
the information that she was a prize going home for
condemnation: “ Sir, Please make insurance for
“ 200*l.* sterling *on fruit*, by the Nancy, Captain
“ Johnson, of and from Lisbon for Clyde, *premium*
“ *ten guineas, to return five per cent. for convoy*
“ *and arrival.* The Nancy is a charming little
“ schooner, and our friends advise, would be ready
“ for sea by 31st ultimo.”

Order for in-
surance, Jan.
16, 1799,
omitting in-
formation that
vessel was a
prize, &c.

A policy was accordingly opened, and under-
written by the Respondent Harvey and another.
The terms of the policy, as far as concerns the
present question were: “ The fruit and goods on
“ board the said ship, or schooner, Nancy, Robert
“ Johnson master, are insured in a voyage from
“ Lisbon to Clyde, the adventure to begin, &c.;
“ *the premium being at the rate of ten guineas per*
“ *cent., to return five per cent. for convoy and*
“ *arrival.*” The words in the first letter, “ with
“ or without convoy,” not being in the policy.

On January 5, 1799, Messrs. Robert Slack and
Co. again wrote to the Appellants, informing them,
that “ the Nancy only finished loading the day
“ before yesterday, when she immediately dropped

Other letters
of advice, Jan.
5, 1799, re-
ceived Jan.
22.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

“ down to Bellim, and, we hope, got over the bar
“ this morning. She is a nice little schooner, and
“ we doubt not will have *a safe and very short*
“ *run.*”

Messrs. M^cAndrew and Gill, wrote them also on the same day; “ We have now the pleasure to en-
“ close your bill of lading for your 100 chests
“ China oranges, and 150 frails figs, shipped for
“ your account on board the Nancy, Captain
“ Johnson, which we expect will sail to-morrow for
“ Greenock direct. The detention we did not ex-
“ pect, when wrote you last, would have been so
“ great, but could not be avoided, from the inter-
“ vention of our holidays, and indifferent weather.”

Insurance,
Jan. 22, 1799,
cancelled.

These letters were received on January 22, 1799, and on that day instructions were given for another insurance “ on goods *per* Nancy, Johnson, from
“ Lisbon to Clyde, - premium ten guineas per cent.,
“ to return five per cent. for convoy and arrival;”
and on this representation another policy was opened and underwritten by M^cCulloch and Millar; but they, on the next day, insisted on having the policy cancelled, as they had understood, when they underwrote it, that the vessel was to sail with convoy, whereas they had since learned that she was a running ship; and they were liberated.

Second insur-
ance, Jan. 24,
1799.

On January 24, the broker obtained instructions to procure insurance on goods “ *per* Nancy, John-
“ son, from Lisbon to Clyde; premium ten guineas
“ per cent., to return five per cent. for convoy and
“ arrival. The Nancy finished loading on 3d
“ instant, when she dropped down to Bellim, and
“ was expected to get over the bar on the 5th in-

“stant.” Another policy, in the same terms as before, was underwritten upon this by others of the Respondents.

A letter from Lisbon, to Reid and Co. dated January 12, and received on the 27th, stated:—

“*The Nancy, Johnson, sailed early on the 7th.*

“*The vessel we supposed would follow is now to*

“*wait convoy.*” Reid and Co. got a third policy

in the same terms, underwritten on the 28th, by Harvey and others, under similar instructions as

before, with this addition:—“By letter of the 12th

“instant, advice is had that the Nancy sailed the

“7th instant.”

The vessel was taken on January 12, by a Spanish Privateer. On February 14, whether before or

after advice of the loss did not appear, the underwriters took a formal protest against the assured,

and demanded to be relieved from the policies, on account of concealment of material facts and cir-

cumstances. The assured then commenced an action in the Court of Session against the under-

writers, for payment of the sums insured; but, after several proceedings and a proof taken, this

action was dismissed, as the cause ought to have originated in the Admiralty Court. Reid and Co.

accordingly brought an action in the Admiralty Court, and obtained decree in absence against the

underwriters, who then brought an action of reduction of this decree in the Court of Session. The

cause then was allowed to fall asleep, but was awakened in 1808. Though in this last action the

underwriters must have been the pursuers, yet, in the subsequent proceedings in the Court of Session,

June 19, 24,
1816.

INSURANCE.

—FRAUD.—

RETURN OF
PREMIUM.

Another letter of advice, dated Jan. 12, received 27th, stating that the vessel had actually sailed without convoy, and a third policy effected as before.

The vessel captured.

1800, 1801.
Proceedings
in Courts of
Session and
Admiralty.

June 19, 24,
1816,

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

the assured were described as the pursuers, and the underwriters as the Defenders, as in the original action. The circumstance was mentioned at the bar on appeal, but did not seem to be considered as material.

In the memorials and proceedings below there was much discussion as to the general principle of the law of insurance relative to communications by the assured to the underwriter, and, in addition to various passages quoted according to their practice from writers on insurance, the observations of Lord Mansfield, in *Carter v. Boehm*, were relied upon on both sides; and for the underwriters, the cases of *Fellowes v. Schneiders*, before Lord Kenyon; and *M'Adam v. M'Evoy*, before Lord Ellenborough; and the cases of *Keay v. Young*, in the Court of Session, November 1783, were also cited. And with respect to this particular case, the question was whether there was a wrong representation or a concealment of circumstances material to the risk, and in the knowledge of the assured at the time when the insurance was effected.

As to the matter of concealment, Macullock and Millar, whose insurance had been cancelled, were examined as witnesses, and stated that they had understood from the nature of the representation made to them that the vessel was to sail with convoy; and Macullock stated that after having seen the letters, he was confident no one would undertake the risk for less than twenty guineas.

The Lord Ordinary, and Court of Session (first division) by its first interlocutor found for the underwriters. By another interlocutor, the Court

3 Burr. 1905-
9. and 1
Blacks. Rep.
593.

found for the assured—but ultimately by interlocutors, June 27, 1812, and June 25, 1813, decided for the underwriters, and the assured appealed.

The question on the appeal was whether there was a wrong representation, or a concealment of facts and circumstances material to the risk, and in the knowledge of the assured at the time the insurance was effected by the suppression of these two particulars: 1st, That the vessel was a prize coming home for condemnation, and therefore not within the provisions of the convoy act, 38 Geo. III. cap. 76.—2d, That the vessel was intended to be a running ship.

Mr. Leach and *Mr. Horner* (for the Appellants) argued, as to the 1st point, that the circumstance whether the vessel was British or foreign, within or without the provisions of the convoy act, was one of those of which the underwriter took the knowledge upon himself; of which he might have informed himself by making proper inquiry, and as to which if he did not inquire, he must be considered as having waived any information. It was therefore a circumstance which, though within the knowledge of the assured, he was not bound to communicate, and the cases of *Long v. Duff*, and *Long v. Bolton*, were cited. As to the 2d point—whether the assured were bound to communicate the probability that the vessel would sail without convoy when they effected an insurance with these words in the policy after the long premium: “to return five per cent. for convoy and arrival,” there appeared to be no decided case.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

June 27, 1812.
June 25, 1813.

Judgment in
Court below
for the under-
writers. Ap-
peal.

Questions and
argument on
appeal.

2 Bos. Pull.
209.

June 19, 24,
1816.

INSURANCE.

—FRAUD.—

RETURN OF
PREMIUM.

Doug. 255.

applying exactly to that point in the present case, as the question in the case of *Simond v. Boydell* turned upon the point of arrival. That appeared to have been the first case in which this form of words in a policy were brought particularly under the notice of the Court, and the case was spoken of as one of great authority by Lord Kenyon and Sir James Mansfield.—Lord Mansfield there said, “ dangers
“ of the sea are the same in time of peace and of
“ war. But war introduces hazards of another sort
“ depending on a variety of circumstances, some
“ known, others not known, for which an additional
“ premium must be paid. Those hazards are dimi-
“ nished by the protection of convoy, and if the
“ insured will warrant a departure with convoy,
“ there is a diminution of the additional premium.
“ If the insured will not warrant a departure with
“ convoy, he pays the full premium, and in that
“ case, the underwriter says—if it turn out that the
“ ship departs with convoy, I will return part of the
premium.”—Now suppose the assured did know in this case that the vessel was to run without convoy, the question was whether it was material to the risk here insured. The contract was in its terms an insurance against all hazards of sea and war, with a proviso that in case the war risk should be diminished, there should be a diminution of the war premium. Then how could the concealment of the fact be material to the risk since there was a distinct contract on the face of the instrument applicable to the event of sailing without convoy? But the assured were apprized that if convoy offered, the vessel would naturally take the advantage of it, and there-

fore provided for that alternative. Then looking at the case, on the principle, where they had no decisions to guide them, this was a contract of indemnity against all hazards, where the parties looked at the whole risk, and distinctly provided against it; with the addition that if the whole risk did not take place, the premium should be proportionably diminished.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Sir Samuel Romilly and *Mr. Adam* (for the Respondents, the underwriters) argued as to the 1st point, that the fact of the vessel being a prize ship coming home for condemnation, was clearly material, and the case in C. P., *Long v. Duff*, did not touch upon the present case, because there it did not appear that the assured knew that it was a foreign ship—and though they had known it, the vessel was British owned, and the proper information might be procured at Lloyd's by the underwriter. There was a wide difference between that and a prize ship coming home for condemnation, which had never been in a British port—and by the words “from Lisbon to Clyde,” in the representation and policy they gave the underwriters reason to think that she was a British trader coming home to the Clyde. As to the 2d point, the inference from the words “premium ten guineas per cent. to return five per cent. for convoy and arrival,” must have been that there was a strong probability that she would sail with convoy, though there was a possibility that she might not. The observations of Lord Mansfield, in *Simond and Boydell*, did not apply here. The meaning of his Lordship's words

2 Bos. Pul,
209.

Doug. 253.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

was this—if the assured will not *warrant* a departure with convoy, he must pay the full premium; but though the assured will not warrant, yet as there is a strong probability that she will sail with convoy, if she does in fact so depart, then the underwriter engages to return part of the premium.—The words “to return 5 per cent. for convoy and arrival,” were not mere words of style, but carried an intimation that the vessel would probably sail with convoy; and there was a representation too that the vessel had dropped down to Bellim, the place where vessels usually joined convoy. The assured knew all along, however that she was intended to be a running ship, and by the letter received previous to effecting the last insurance, they knew that she had actually so sailed, but did not communicate the circumstance. Now every circumstance which might affect the judgment of a prudent man, as to undertaking the risk, ought to be communicated, unless it was one of those which the underwriter himself might equally know, and must be presumed to know, or to have waived the information. The circumstance of her being a prize ship coming home for condemnation, would clearly vary the risk, on account both of her not being within the provisions of the convoy act, and the state of the vessel as to seaworthiness. The circumstance of her being intended to be a running ship would also clearly vary the risk—and therefore both circumstances ought to have been communicated; for though the underwriter, under the impression that the vessel was British, and that she would probably sail with convoy, undertook the alternative risk; it

did not follow that if he had known she was foreign, and was intended to be a running ship, that he would have undertaken the risk at the same premium, or that he would have undertaken it at all.

June 19, 24,
1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

Mr. Leach (in reply) still contended that the contract was in its nature an insurance against all hazards, with a note in favour of the insured, in case the hazard happened to be diminished.

Lord Eldon (C.) This is a case of insurance on goods "by the Nancy, Captain Johnson, from Lisbon to Clyde at a premium of ten guineas per cent., to return five per cent. for convoy and arrival." The appeal is brought against a judgment of the Court of Session, finally sustaining the defences and assoilzieing the defenders (the underwriters), holding in effect that there was a want of good faith on the part of the assured, and that the representation was wrong.

Judgment,
June 24, 1816.

Two objections were made to that representation; 1st, because it was not mentioned that the vessel was a prize ship coming home to be condemned. I would not be bound by any opinion I might state on that point, but as to the other objection I have no doubt that it is a good one, and that the Court of Session is right.

The information received by the Appellants was, that this was to be a running ship; they however did not affect an insurance of that nature, but got two or three policies underwritten, by instructions to their broker to make insurance on fruit or goods "by the Nancy, Captain Johnson, from Lisbon to

June 24, 1816.

INSURANCE.
—FRAUD.—
RETURN OF
PREMIUM.

“Clyde, premium ten guineas, to return five per cent. for convoy and arrival.” It is remarkable that in all the letters to the Appellants the vessel was described as a running ship. Yet after the Appellants knew that she had actually sailed without convoy one of the policies was effected on this sort of representation “premium ten guineas, to return five per cent. for convoy and arrival,” and it was impossible that these last words should not be considered as having some meaning.

Now I think the general understanding would be that vessels so insured would sail with convoy, though some might possibly sail without, and the underwriter says “I take the risk altogether, with the chance of the vessel sailing with convoy.” But if he had not this alternative and knew that she was to sail or had sailed without convoy, he might not take the risk at ten guineas, as he only took it at ten guineas with the chance of her sailing with convoy, though in that case and on arrival he was to return five per cent. - So that he takes the risk altogether, upon an understanding that there may be a sailing with convoy, whereas without that alternative he might not take the risk at ten guineas, or might not take it at all.

The underwriter made to believe that he undertook an alternative risk, whereas it was known to the assured at the time of insurance that there was no alternative.

Appeal dismissed, and Judgment *affirmed*.

Agent for Appellants, CAMPBELL.

Agent for Respondents, SPOTTISWOODE and ROBERTSON.