SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TASKER . . . . . *Appellant.*
CUNNINGHAME AND OTHERS . . . . . *Respondents.*

A determination made by an agent duly authorised or acknowledged not to sail upon the voyage insured, but upon a different voyage, is an abandonment, and discharges the underwriters.

Correspondents at Cadiz, of ship-owners in England, having received directions to ballast and freight a ship for the Clyde, suggest a slight variance as to the port of destination, which the owners adopt by insuring the ship and cargo for a voyage, including the port named and fixed by their agents. Soon afterwards, the agents at Cadiz informed the owners that, owing to a change of circumstances, and with the advice and concurrence of the captain, they have determined not to send the ship according to their former suggestion (*i. e.* upon the voyage insured), but direct to Newfoundland. Eight days after this new determination, the ship is stranded in the bay of Cadiz, and burnt by the French army. The several letters containing intelligence of the new alteration of the voyage and of the loss of the ship, arrived in England, and were received by the owners upon the same day.

The House of Lords reversing the judgments of the Court below, decided, that the correspondents at Cadiz were the agents of the Respondents; that the voyage insured was abandoned by their determination to send the ship on a different voyage, and therefore that the underwriters were not liable for the loss. The consequence of this decision being that the owners were bound to refund to the underwriters, with interest, monies which had been paid by them before they were apprised of the facts.

THE Respondents, who were engaged in the Newfoundland trade, expecting one of their vessels, called the Henrietta, to arrive with a cargo of fish, at Cadiz, in the beginning of the year

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1810, directed Messrs. Lynch and Co. their agents at that place, as soon as the cargo should be discharged, to ballast the vessel with salt, and to endeavour to procure freight *for her to Clyde.* The vessel arrived at Cadiz about the time expected, but the French army having taken possession of the salt-pans in that neighbourhood, it was not in the power of Lynch and Co. to comply with the Respondents' instructions. Under these circumstances, they resolved, with the approbation of the ship-master, to dispatch the vessel *for Liverpool,* in place of Clyde. Of this change in the destination of the vessel, Messrs. Lynch and Co. advised the Respondents, by a letter dated the 16th of January, 1810. By a letter dated the 10th of February, from the same persons to the Respondents, the cause of this variation is assigned in the following terms: "I have, at last, sold the Eliza-
" beth's cargo, at 3¾ per quintal, &c. As to the
" Henrietta's, I could not get a purchaser for the
" whole, so that begun to retail it at five dollars,
" at which I hope to run the whole off shortly.
" As the French have got possession of all the
" salt-pans in the neighbourhood, I cannot ship
" any salt in these vessels, so that will set them
" up for Liverpool (where can get salt) with a
" prospect of getting full freight without much
" delay."

It was necessary that a cargo of salt should be sent out to Newfoundland early in the spring, for the supply of the fishery, and salt could only be procured at the port of Liverpool. Messrs. Lynch's letter, acquainting the Respondents with their in-

tentions, was written while the fish cargo was yet on board. After the receipt of it, and upon the 12th of March, the Respondents effected a policy of insurance upon the voyage *at and from Cadiz* to her *port of discharge in St. George's Channel*, including Clyde, which was underwritten by the Appellant to the extent of 100*l.*

Circumstances afterwards occurred which induced Messrs. Lynch and the ship-master again to alter the destination of the vessel. The sale and delivery of the cargo had been protracted so long, as to give reason to apprehend that, if the vessel proceeded to Liverpool to load salt, the supply of that article would not reach Newfoundland at the proper season in spring; and, in the mean time, the French had retired from the salt-pans at Cadiz, so that a cargo of salt could readily be obtained there.

Messrs. Lynch and Co. therefore, after consulting with the master of the Henrietta, and with the master of another vessel belonging to the Respondents, deemed it for the interest of the Respondents to dispatch the Henrietta direct *to Newfoundland;* and as it was necessary to give immediate information to the Respondents, of this change in the destination of the vessel, to the end that they might effect insurance on the *new voyage*, they, on the 28th February, 1810, wrote to the Respondents in the following terms: "In consequence of the unprecedented want of small craft, "nay, the general confusion that has prevailed "since the French appeared in this neighbourhood, "the delivery of the Elizabeth's cargo has been

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" delayed until now; and as it is likely the Hen-
" rietta will be detained from the same causes,
" until the end of the month, *Captain Collins has,*
" after consulting with Captain Fields, *determined*
" *to return direct to St. John's,* with a cargo of
" salt, now to be had at double price, *which let*
" *serve for your Government.*" Eight days after the date of this letter, while the vessel was lying at Cadiz, she was driven on shore in a storm, and burnt by the French. The letter of the 28th of February, and another letter conveying the intelligence of the loss, were received by the Respondents on the same day, viz. upon the 21st of April, 1810.

In these circumstances the Respondents did not communicate to the Appellant, or the other underwriters, the letter which they had received from Lynch and Co. respecting the projected alteration of the voyage, but obtained payment from them for a total loss. The fact having afterwards come to the knowledge of the underwriters, they applied, by letter, to the Respondents for repetition (repayment) of the money so paid to them, which being refused, the Appellant brought an action before the High Court of Admiralty, in which he concluded, that " the said Cunning-
" hame, Stevenson, and Co. and John Bell,
" merchant, in Glasgow, an individual partner of
" the said company, should be deemed and or-
" dained, by decree and sentence of the Judge
" of our said High Court of Admiralty, to make
" payment, conjunctly and severally, to the com-
" plainer, of the sum of 94*l.* 10*s.* sterling, toge-

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" ther with the due and lawful interest of the said
" sum, from and since the 11th day of October,
" 1810, and while payment, and also for ex-
" pences."

After various proceedings in the suit, the Judge Admiral pronounced the following interlocutor.—" May 13, 1813, The Judge Admi-
" ral having advised the libel, the defences, an-
" swers, and whole writings produced, finds, that
" the defenders were concerned in the ship Hen-
" rietta, commanded by Captain Collins, expect-
" ed at Cadiz, with a cargo of fish, about January
" 1810; and that they gave orders in 1809, to
" Lynch and Co. their agents at Cadiz, to load
" the Henrietta with a cargo for Britain, as soon
" as her cargo of fish could be discharged: finds,
" that the defenders received letters from Lynch
" and Co. notifying that said vessel was to be
" loaded for Liverpool, in consequence of which
" the defenders insured her at and from Cadiz to
" Great Britain, and of course, the voyage then
" intended was *bonâ fide* insured: finds, that by
" the same post they received from Lynch and
" Co. a letter, dated the 28th of February, and
" another dated the 12th of March, both in the
" year 1810, the former announcing an intention
" in Captain Collins not to sail for Britain, but
" for Newfoundland, and the other intimating
" the total loss of the Henrietta, while still in the
" bay of Cadiz, and when a small part of her
" loading only had been delivered, and, of course,
" before she was in a state to sail on any voyage:
" finds, that as the projected voyage to New-

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" foundland might have been countermanded by " the defenders, or even as Captain Collins might " again have altered his intentions, without any " such orders, and the voyage insured might " have been commenced, if the vessel had not " been lost in the bay of Cadiz, there is no evi- " dence of an actual abandonment by the de- " fenders, nor even by their captain, of the " voyage insured, nor of *mala fides*, in any re- " spect, and, therefore, sustains the defences, " assoilzies the defenders, and finds them entitled " to expences."

The Appellant having brought this judgment under review of the Court of Session by process of suspension and reduction, and the cause having come before Lord Pitmilly, Ordinary, his Lordship, after various proceedings, pronounced the following interlocutor:—" The Lord Or-

Nov. 15th, 1814.

" dinary having considered the memorial of " the suspender, with the memorial of the de- " fenders in the conjoined actions, and whole " process; in respect the resolution taken by " the defenders' shipmaster, Captain Collins, " to return direct to St. John's, instead of pro- " ceeding on the voyage insured, as communi- " cated to the defenders by their agent, Mr. " Lynch, in his letter of 28th February, 1810, " was *not consented to, or judged of by the de-* " *fenders,* the owners, and insurers of the vessel; " and *no step whatever* was taken between the " date of the letter referred to, and the total loss " of the cargo (eight days thereafter), to carry " the captain's resolution into effect, very small

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" part only of the former cargo having been " landed, and no preparations having been made " for a new voyage in the intermediate period; " finds, that the circumstances founded on by the " pursuer, do not amount to an abandonment of " the voyage insured. Finds, therefore, that it is " unnecessary to allow a proof of the pursuer's " allegation, that where a particular voyage has " been insured, and afterwards abandoned, the " underwriter is not entitled to the premium. " In the reduction sustains the defences, and " assoilzies the defenders, and in the suspension " finds the letters orderly proceeded, and de- " cerns."

A representation was made by the Appellant; but the Lord Ordinary, by interlocutor, dated the 28th of February, 1815, adhered to his former decision.

Against these interlocutors the Appellant reclaimed by two successive petitions to the second division of the court; but the court being of opinion, that there was no evidence that the voyage to Britain was abandoned, the Lords, by two successive interlocutors, dated respectively the 17th of January, and the 16th of February, 1816, adhered to the interlocutors complained of.

From these several interlocutors of the Judge Admiral, the Lord Ordinary, and the Second Division of the Court of Session, the Appellant presented his appeal to the House of Peers.

For the Appellants, *the Solicitor General* and *Mr. Adam.*—In this case there was a substitution

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of one voyage for another, made by persons having authority as agents by law and usage, and recognized by the Respondents. By the determination of the agent the voyage was altered, and the liability of the underwriters ceased. This is totally different from a case of intended deviation, where a loss happens before the ship arrives at the point of intended deviation. There can be no such deviation from a voyage which never was intended. Here the voyage insured was abandoned, and another was substituted. The abandonment once made operates immediately to release the underwriters. *Chitty v. Selwyn*, 2 *Atk.** No step taken towards the voyage is necessary. Intention is sufficient to constitute a new voyage. The voyage insured rested

* In *Chitty v. Selwyn*, the only matter decided was, that a commission should issue to examine witnesses abroad, and an injunction until, &c. But Lord Hardwicke C. *obiter* said, "When "a ship is insured at and from a place, and it arrives at that "place, as long as the ship is preparing for the voyage upon "which it is insured, the insurer is liable. But if all thoughts "of the voyage are laid aside, and the ship lies there five, six, "or seven years, with the owner's privity, it shall never be said "that the insurer is liable."

In *Way v. Modigliani*, the ship had actually proceeded on a different voyage. But there is a case, *Wooldridge v. Boydell*, Doug. Rep. 16, where, (according to the judgment of Buller, J. in the above case) "It was held, that if a ship insured for one "voyage sail upon another, and the track in the outset of the "voyage is the same, and she be taken before she arrive at the "dividing point of the two voyages, the policy is discharged." There it was no more than intention. If she had arrived at the dividing point, the original voyage, according to the original intention, might have been resumed, yet the right under the policy would not have revived.

merely in intention. Suppose the letter announcing the alteration had arrived before the intelligence of the loss, and an insurance had been made on the intended new voyage, the liability upon the original insurance would not have continued. *Way v. Modigliani,* 2 *T. R.* 30.

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After the determination to abandon the voyage insured, the underwriters could not have recovered the premium. *Long v. Allen,* B. R. Easter, 25 Geo. 3. That is the law and usage in Scotland, as well as England. The Respondents acknowledge the fact. It is alleged, and they have not denied it. But as the premium is the consideration for the insurance, if the right to the premium fails, the right to the indemnity must also fail.

The Appellant having paid the loss, when ignorant of the facts, the money is by law recoverable.

For the Respondents—*Mr. Scarlett* and *Mr. Wetherell.* The policy in this case attached from the moment when the ship moored at Cadiz. Where a policy once attaches, no intention to deviate or alter the voyage can affect the policy, if a loss happens before any act is done towards effectuating the intention. Intention, unaccompanied by an act, is in its nature mutable. Suppose the agents had afterwards, and before the cargo was discharged, announced a further intention to revert to the voyage insured; the owners in the mean time having effected a policy on or before the 12th of March, would the momentary intention have destroyed the policy? Policies continue binding so long as no act is done to com-

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mence a new risk. In *Way v. Modigliani*, the policy was to take effect from a given day, before which the ship had sailed on a different voyage, and the risk never commenced. The case of *Long v. Allen*,* rightly considered, is in favour of the Respondents. The policy in that case being upon a voyage *at* and from Jamaica, the risk commenced by virtue of the word "*at*." If the ship had been lost at Jamaica, the underwriters would have been liable; and therefore, on principle, they would on such a policy have been entitled to recover the whole premium. But the evidence of usage prevailed: an usage that, where the voyage is altered, $\frac{1}{2}$ per cent of the premium is to be retained. If the policy had not been *at* and from, &c. the underwriters would not have been entitled to any part of the premium. There is not a case to be found in the Reports, nor a principle in the text-writers to support the notion that a policy which has once attached can be dis-

* In *Long v. Allen*, the action was for a return of premium. The jury gave a special verdict, finding an usage, upon which the Court grounded their judgment when the case was argued. The finding of usage superseded the necessity of the question of apportionment. But Lord Mansfield observed, "The law is clear, that if the risk be commenced, there shall "be no return of premium. Hence questions arise of distinct "risks insured by one policy or instrument. My opinion has "been to divide the risks. I am aware, that there are great "difficulties in the way of apportionments, and therefore the "Court has sometimes leaned against them." See *Meyer v. Gregson*, Park on Insurance, p. 588, 7th edit.

In the case now reported, the insurance was *at* and from Cadiz, &c.; but the destination was altered and the ship lost before the policy was underwritten.

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charged, but by actual deviation, or some act done to alter the risk, some act as contradistinguished from intention. In *Chitty v. Selwyn*, the ship was detained longer than was necessary to accomplish the voyage first insured. That was equivalent to an act. The underwriters were discharged by unreasonable delay. In that case, if the loss had happened before the discharge of the cargo, or before the time of necessary detention had elapsed, the underwriters would have remained liable. In our case, the cargo had not been delivered. If the ship had discharged her cargo, and taken new freight, that would have been an act sufficient to alter the voyage; but mere intention is insufficient. Call it determination, it is the same thing, if not carried into effect. Suppose the intention had not been communicated, but had rested in the mind of the agent, could that alter the voyage? But if it is not altered by the mere uncommunicated determination, how does the communication aid the case? Intention, determination, and communication are of the same nature; they are not acts.

The two letters having been received on the same day, the owner could have made no insurance upon the new risk, which would have been a great hardship. If the mere intention of a captain or agent can alter the risk and the voyage insured, an owner could never know whether he had effected a valid insurance. Such an intention, if carried into effect without the approbation of the owners, would be barratry in the captain. *Earle v. Rowcroft*, 8 East, 126.

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The Solicitor-General in reply.—To constitute barratry, the act of the captain must be fraudulent. Here it was for the benefit of the owners. Determination by persons duly authorised is sufficient to alter the voyage—subsequent acts are only proof of the intention. If the owners had insured the new voyage, the new underwriters would have been liable, yet this would not have been an act in any other sense than as the determination of the authorized agent is an act.

28 June, 1819. *The Lord Chancellor*.—The want of consent on the part of the owners cannot be suffered to stand as a reason for the interlocutor, pronounced by the Lord Ordinary, if the judgment itself could be affirmed. That no step was taken between the date of the letter, announcing the new voyage and the loss of the cargo; that a small part only of the former cargo was discharged, and no preparations made for the new voyage, are facts assumed in the Court below, as the ground of judgment. But there is no trace in the proceedings of any proof of these facts. It seems by the course of argument adopted in the cases, as if these facts were to be taken for granted. In the proceedings before the Judge Admiral, and in the letters of suspension, it is alleged that there was an arrangement as to the price of salt to be taken at Cadiz, and the means of taking it. But there is no proof to support those allegations.

Upon the question of barratry it is material to consider the instructions given, and how far, according to a literal construction, they sanction what was done by the parties acting under them.

By a passage in the letter of the 10th of February, it appears that the agents then had an opinion that the vessel would be very speedily unloaded. By the following passage of that letter, they intimate their intention of sending the vessel to Liverpool, and the owners adopt that determination by insuring accordingly for the Channel, comprehending Clyde. The Captain also apprises his owners of the same determination, and by an expression to be found in the letter of the 28th of February, it appears, that upon the new determination which the agents and captain had adopted again to alter the voyage, notice was communicated to their employers for the purpose of guiding them as to the insurance which it would be necessary to effect.

By a letter dated the 11th of Feb. omitted in the statement of the facts.

I do not at present enter upon the discussion of the difference between intention and determination. If the matter upon the evidence can be supposed to rest in mere intention, the interlocutor must be altered so far as it assumes actual consent of the owners to be necessary. For it appears throughout the correspondence, that the captain and the agents had taken upon themselves to direct or alter the destination of the ship, with the acquiescence at least of the owners. The risk here insured was not merely on the voyage, but *at* and *from* the port of Cadiz, &c. Upon such policies difficult questions arise as to the commencement of the risk, and the return of premium. But where the voyage has been abandoned before the commencement of the risk, it is impossible to contend that the premium could be claimed. What amounts to abandonment is a different question.

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When a ship is insured *at* and from a given port, the probable continuance of the ship in that port is in the contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run an additional risk if such a change of intention is not to affect the contract. The substantial question in this case is, whether any declaration is to be found in the correspondence that the voyage insured was in fact abandoned. I will not, at present, advise the House to proceed to the decision of a question upon which very nice distinctions have been taken. The judgment may be for a few days deferred, and in the mean time I will confer with a judge, whose attention has been much occupied with these subjects.

7th July, 1819. *Lord Chancellor.*—The interlocutor in this case, is in substance, that the assured is intitled to recover against the underwriters for a loss of the ship. The question arises upon a policy of insurance effected by the Respondents, on the ship Henrietta, *at and from* Cadiz. The Respondents, on the 24th of November, 1809, wrote to their correspondents at Cadiz, Messrs. T. and H. Lynch and Co. a letter containing instructions respecting the Henrietta. Lynch and Co., by their answer, dated the 16th of January, for a cause explained in a subsequent letter, suggest that the destination of the vessel on its homeward voyage should be varied. By a letter dated the 10th of February,

they inform the Respondents that "as the French "have got possession of all the salt-pans in the "neighbourhood of Cadiz, they will set up the "vessels (one of which is the Henrietta) for Li-"verpool," where salt may be procured. The captain also, by a letter of the 11th of February, informs his owners, the Respondents, that, for the reason before assigned, the agents mean to load the vessel for Liverpool. It appears, therefore, that the agents advise their principals that they do not intend to follow their instructions. These two letters* of the 10th and 11th of February reached Port Glasgow the 9th of March. On the 12th of March the Respondents effect a policy of insurance upon the vessel, adopting this variance in the destination. The insurance is effected on the vessel, "at and from Cadiz to her port of dis-"charge in St. George's Channel, &c." comprehending Clyde. Without adverting to the cases of apportionment, it is clear, that though a ship is insured *at and from* a certain port, it is insured with a view to the probable continuance of the vessel at that port, and the voyage on which it is to be employed. For, according to the voyage, the continuance and delay in port may differ. Upon the 28th of February, these same agents dispatched another letter to the Respondents, whereby, after noticing the delay which, contrary to their expectations, had already taken place, and the further delay in the delivery of the cargo,

* The Lord Chancellor read the letters in moving judgment; but as the letter of the agents has already been given in the statement of the facts of the case, it is not here repeated. The letter of the captain was to the same effect.

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which was likely to ensue, they add this important passage:—"*Captain C. has determined* to return "direct to St. John's with a cargo of salt, now "to be had at double the usual price, *which let* "*serve for your government.*" By a letter dated the 12th of March, and which came to hand on the same day as the letter of the 28th of February, the Respondents received advice of the loss of the ship insured. The interlocutor of the Lord Ordinary contains a declaration which is now given up as untenable, viz. that the owners had not consented to the alteration of the voyage. As the letter announcing the change came to hand after the loss of the ship, they could not give actual consent. But the agents and captain had, on a former occasion, made alterations respecting the voyage, and the owners acquiesced in, and acted upon their advice and determination. The owners had therefore undoubtedly constituted them agents, with authority to alter the destination of the ship. It is alleged that a small part only of the cargo was delivered before the loss; and it is contended, that as there was nothing to alter the voyage, but intention, which might have been again varied, and as there was no progress made in unloading the cargo, nor any other act done towards a change of voyage; this is to be considered as resting in mere intention, and that the loss must be considered as a loss under the policy. Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have, than that those who were authorised had determined to change the

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voyage. In my opinion the voyage was abandoned; and I have the highest authority in Westminster Hall to confirm that opinion. Suppose they had gone upon the second voyage, and the ship had been lost after insurance for that voyage, on which of the two policies could they have claimed and recovered? Certainly not on the first. Upon the letters of the agents and the captain, it must clearly be considered an abandonment.

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The Lords found, that the voyage ought to be considered as having been abandoned before the loss of the vessel,—and the interlocutors were reversed.

*** Upon the question, when a risk commences under the word "*at*," the case of Lambert *v.* Liddiard, 5 Taunt. 480, makes the nearest approach to the case reported. In Lambert *v.* Liddiard, it was held that the risk had commenced upon the ground that the ship had *prepared for the voyage*, by inquiring for a cargo. Where the contract is, that the beginning of the adventure shall be "immediately *from* and after the arrival of "the ship at," &c.; or "*from* the departure," the difficulty is removed. In the common case where it is "at and from," &c. without any special words to restrict the meaning of the word "*at*," the beginning to load the cargo, or preparing for the voyage, seem to be the principal circumstances to determine the commencement of the risk. In the case above reported, it may be material to note, that a very small proportion of the cargo brought into the port of Cadiz had been discharged when the ship was lost; and that the owners had received from the underwriters on that cargo the amount of their loss, upon the ground that the risk was not at an end when the loss happened. Upon the question of abandonment, the case of Driscoll *v.* Bovill, 1 Bos. & Pul. 313, is the nearest to (but far short of) the case reported. For in that case the captain had written a letter, asking advice of the broker; but he had reserved his determination, and afterwards sailed upon a voyage which, in the opinion of the Court, was within the terms of the original policy.