

S E C T. II.

Incomplete or false information or concealment vacates the policy.

1779. *January 19.* JAMES STEWART *against* JAMES MORISON.

No 6.

A freighter of a ship, in October, informed the broker, that a vessel on which he intended to make an insurance was expected to be loaded between the 13th and 20th of September. He was at that time in possession of information that the ship was loaded and ready to sail on the 13th. The vessel having sailed on the 13th, and being wrecked on the 15th, the policy was found void.

JAMES MORISON in Leith freighted the ship the Three Brothers from Andrew Morison, for a voyage from the Frith of Forth to Koningsberg, there to take in a lading of wheat for the Frith. The vessel arrived at Koningsberg on 29th August 1774. Mrs Barclay, who had the charge of loading the vessel, wrote to James Morison 6th September, that she had purchased the wheat, adding, 'The whole, I expect, will be ready to ship to-morrow, so that you may now take your measures with regard to the insurance.'

On the 13th September, she again wrote to James Morison: 'I have here with the pleasure to cover you bill of loading and invoice of 39 bolls last wheat, shipped for your account *per* the Three Brothers, Captain John Maul. *Captain Maul is now quite ready to depart with first fair wind.*'

This letter was received by James Morison on the 30th September, and next day he wrote to Andrew Morison, informing him of the contents of it. On the 5th October Andrew Morison wrote to James to insure L. 200 for him upon the ship at 3 *per cent.* or lower, if possible. James, accordingly, on the 7th October wrote to an insurance-broker at Edinburgh to get this insurance done; and added, '*The vessel was expected to be loaded at Koningsberg betwixt the 13th and 20th September.*' On the same day the insurance was got done at 2 1-half *per cent.* James Stewart and others having underwrote the policy, which is declared to be 'upon the Three Brothers, at and from Koningsberg;' and, subjoined to the policy, are the words of the letter; 'said ship expected to be loaded,' &c.

On the 7th October likewise, Ellis Martin, at the desire of James Morison, wrote to another insurance-broker at Edinburgh, to get insured, on account of James Morison, L. 150 on goods by the Three Brothers; 'the ship warranted safe 13th *ultimo*, and no advice of her sailing.' On the 8th October, this policy was underwrote by Stewart and the same persons who had underwrote the former; and the policy bears, 'that the ship was warranted safe 13th *ult.* &c.

This vessel sailed from Pillaw, the port of Koningsberg, on 13th September, but run ashore on the island of Rugen two days after, and was there totally lost.—A demand was made on the insurers by James and Andrew Morison, upon which the insurers brought an action before the admiral court, for setting

aside both policies, on this ground, that there had been an undue concealment from them of the advices received by Messrs Morison previous to their making the insurances. The admiral assolizied the defenders, and the cause was brought into court by a reduction of the admiral's decree, at the instance of the insurers.

Pleaded for the pursuers; The principles of mercantile law on which this question depends, are stated as follows, in a case reported by Sir James Burrow, p. 1909, *Cater v. Bochen*, 12th May 1766. 'Insurance is a contract upon speculation; the special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstance in his knowledge to mislead the underwriters into a belief, that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.

'The keeping back such circumstance is a fraud; and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

'The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which the one privately knows, and the other is ignorant of, and has no reason to suspect. The question therefore must always be, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation, or a concealment, fraudulent, if designed, or though not designed, varying materially the object of the policy, and changing the risk understood to be run?" Sir William Blackstone states the same general doctrine, B. 2. c. 30. § 3.

In the present case, there was a concealment on the part of the insured, of a circumstance in their knowledge, which affected the object of the policy, and changed the risk. The information given to the broker for insuring the ship, and on which the policy was entered into, mentioned only, that the ship was 'safe on the 13th, and no advice of her sailing.' A material circumstance was concealed, which the defenders were in the knowledge of, by their letters from Koningsberg,—that the ship was completely loaded on the 11th, and ready to sail on the 13th with the first fair wind.

The information given by James Morison in his letter to the broker, on making the other insurance is still more fallacious; for he says, 'The vessel was expected to load betwixt the 13th and 20th September.' This tended to mislead the insurers, by lessening their idea of the risk; for, if the fact had been spoke out according to Morison's advices, that the vessel was completely loaded on the 11th, and ready to sail on the 13th, she must have been considered

No. 6. as a missing ship on the 7th October, as in the ordinary course of the voyage she ought to have arrived sooner. The defenders would not have insured her at all, or would have demanded a hazardous insurance. But, as Morison's letter imported, that the vessel had her cargo to take in betwixt the 13th and the 20th, and consequently that she was not to sail sooner than the 20th, according to his information, she was not to be considered as a missing ship.

From these circumstances, there is reason to think, that this concealment was designed; but, upon the principles above-mentioned, it makes no difference as to the merits of this question, whether the concealment was designed and fraudulent, or proceeded from mistake. As the concealment was material in estimating the risk, the policy must be set aside.

Answered for the defenders; the circumstance said to be concealed is immaterial, and did not vary the risk to the insurers. When the insured is in the knowledge that the ship had sailed on a certain day, and conceals it from the insurer, there may be some reason for considering the ship as missing, if she remains out even for a few days after the time in which the voyage is commonly performed. But, in the present case, the defenders had not information on what day the ship sailed; and they knew no more than that she was ready to sail on the 13th. The time of her sailing was a matter of some uncertainty, depending on the winds and tides. Supposing the defenders, therefore, to have given their information to the insurers in the express words of the letter, the vessel could not have been accounted a missing ship, though remaining out a few days longer than she ought, if she had sailed precisely on the 13th; consequently nothing more than the ordinary insurance would have been demanded.

But the letters to the brokers, and the terms of the policy, did, in this case, import all that the defenders knew, material or immaterial; and it is sufficient that the substance of the information is given; for it is not necessary to produce the correspondence.

In one of the policies, 'The ship is warranted safe on the 13th September.' This, in mercantile language implied, that the insurers were to take the risk of the ship from that day. It was supposed in the policy she was to sail on the 13th; and the expression was the same, though in fewer words, as if the insured had told that she had taken in her cargo, had cleared at the custom-house, and was ready to sail. To the insurers in this policy, therefore, full information was given.

The Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered the mutual memorials, &c. is of opinion, that the person who applies for the insurance of a ship or cargo, in foreign parts, is not bound to produce or communicate all his letters of intelligence concerning the voyage or adventure; yet he is bound fully and fairly to communicate every material circumstance of his intelligence from which any probability of hazard may arise. The Lord Ordinary is also of opinion, that, in this case, the

the insured have either wilfully concealed, or inadvertently omitted very material circumstances of the hazard, in their information to the insurers. In one of the policies, dated 8th October, the ship is warranted safe on the 13th September, and no advice of her sailing. But these material circumstances of intelligence are suppressed or omitted, viz. that the ship had been completely loaded between the 6th and the 13th; that she was then ready to sail, and the bill of loading and invoices were transmitted; and the insured's information, on the other policy, dated 7th October, is still more exceptionable, as it intimates to the insurer, that the ship was only expected to be loaded betwixt the 13th and 20th September, though the insured had positive intelligence that she was actually loaded, as above, betwixt the 6th and 13th; and that the master, after delivering his bill of loading and invoices, was then ready to sail with the first fair wind, and, in fact, she did sail on that very day: Upon these grounds, the Lord Ordinary finds the insurance void; and decerns and declares accordingly." And to this interlocutor the Court adhered, upon advising a reclaiming petition and answers.

Lord Ordinary, *Gardenston.*

Act. *Ilay Campbell.*

Alt. *Crosbie.*

Clerk, *Tait.*

Fol. Dic. v. 3. p. 327. Fac. Col. No 57. p. 102.

1779. July 15.

GEORGE and JOHN BUCHANNAN *against* JAMES HUNTER-BLAIR, and Others.

IN spring 1772, George and John Buchannan, merchants in Glasgow, sent out two ships, the *Argyle* and the *Jeanie*, to the Bay of Honduras, consigned to the care of M'Aulay, their agent at St George's Key in that bay. M'Aulay was directed to load the ships with certain goods, and to send the *Argyle* to London, and the *Jeanie* to Bristol. But, on the 19th March, George Buchannan, with the knowledge of John Buchannan, wrote M'Aulay, desiring him to send *the ship Jeanie to London.*

Messrs Buchannan received letters from M'Aulay (September 1772), informing them of the arrival of these ships in the bay, and that they should *be sent agreeable to orders.* In November 1772, they got both cargo and freight of *the ship Jeanie* insured, to the extent of L. 1050, from the Bay of Honduras until she should arrive at *Bristol.* In the mean time M'Aulay had cleared out this ship from the Bay of Honduras for London. She sailed from the bay (4th September,) and in a few days was totally wrecked upon a rock about 18 leagues from St George's Key. The underwriters when called on, refused to pay their shares of the loss, on this ground, that an alteration had been made on the voyage insured, by clearing out the vessel to *London* instead of *Bristol.*

An action ensued before the admiral-court, at the instance of Messrs Buchannan, against the insurers, in which the judge-admiral, after some procedure, pronounced this judgment: "Having considered the whole circumstances of case, and, in particular, that the pursuers did not disclose and lay before the defenders, at the time of their underwriting the policy of insurance produced

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A vessel was insured from the Bay of Honduras to Bristol. The destination of the vessel was afterwards altered from Bristol to London, without the knowledge of the underwriters. The vessel being wrecked on the voyage, the policy was found null.