

“insured upon the ship and goods respectively, yet as that is a privilege and
 “indulgence which the owners are at liberty to use or not, and which when
 “used has no influence upon the real value of the ship and goods; and as in
 “this case the premium of insurance was not included in the sum insured either
 “upon ship or cargo; the charger did not stand insurer for these premiums,
 “nor is bound to contribute for them in making good the damages; and find,
 “that as the freight had no reality or existence either at the time when the
 “goods were put on board, or when the shipwreck happened in the course of the
 “homeward voyage, and was then only *in spe* or expectation upon the after
 “contingent event of the safe arrival of ship and cargo at the port of destination,
 “which event never took place by reason of the total wreck of ship and cargo,
 “whereby any claim which would otherwise have been competent for the sti-
 “pulated freight was effectually sopped, the same cannot come *in computo* as a
 “subject liable to any contribution in making good the damages, nor is the
 “charger to be stated as insurer of the freight; and find, that what was afterward
 “recovered of the wreck of the ship remained the property of the owners
 “of the ship, and that what was recovered of the wreck of the goods, did in
 “like manner remain the property of the owners of the goods, and consequently
 “that the sum of £76. 4s. 1d. Sterling, being the price at which the savings
 “from the wreck of the ship were sold, and the sum of £185. 9s. 3d. Sterling
 “being the price at which the savings from the wreck of the goods were sold,
 “must belong to the owners of the ship and goods respectively; and find,
 “that the sum of £447. 2s. 10d. Sterling, expended by the charger in endea-
 “vouring to save the ship and cargo, must be made good by the underwriters
 “conform to their respective interests, the charger contributing his proportion
 “to the extent of the short insurance for which he stands insurer; and remit
 “to the Ordinary to proceed accordingly, and further to do as he shall think
 “just.”

Both parties reclaimed. But the Court, upon advising their respective petitions and answers, adhered (2d December 1777) to the whole interlocutor, and found the underwriters liable in expenses.

Lord Ordinary, *Covington.* For the Assured, *Crosbie.* For the Underwriters, *Ilay*
Campbell, Rolland.

J. W.

1800. January 22.

JOHN CAMPBELL against ROBERT ALLAN, Agent for the Westminster Insurance Society.

JOHN CAMPBELL insured £2000 for one year, on the life of Thomas Allan, with his father Robert Allan, agent in Edinburgh for the Westminster Insurance Society, and paid £24. 18s. as the premium.

No. 2.

No. 3.
 Restitution of the premium refused, although the

No. 3.
policy was
null for want
of interest, in
terms of 14th
Geo. III.
C. 48.

Mr. Allan immediately after wrote the Society, 23th May 1798: "I now
"hand you orders from John Campbell, for his brother James Campbell of
"Calcutta, to insure £2000 for one year on the life of my son Thomas
"Allan, born 17th July 1777, aged near sixteen.

"My son is before me in the counting-house; I warrant him not sixteen,
"and in perfect health. Mr. Campbell has a purpose to serve, of which I
"know not; he named my son as being a good life, and least trouble attend-
"ing it."

Thomas Allan survived the year.

In 1798, Mr. Campbell raised an action against Mr. Allan for repetition of
the premium on the following statement:

The pursuer's object in entering into the policy in question was, as explained
to the defender at the time, to insure £2000 for a year on the life of his bro-
ther Dr. Campbell of Calcutta. In conversation with Mr. Allan on the sub-
ject, the pursuer learned that a policy on Dr. Campbell's life would be very
expensive; but the defender suggested, that the object might be effected by
insurance on the life of some indifferent person in this country, and proposed
his son, who happened to be in the office at the time. The pursuer agreed,
and paid the premium.

The pursuer was at this time shewn by Mr. Allan outlines of the rules of
the Society, from which it did not appear that the transaction was unsafe or
illegal. But it now turns out, that, as the pursuer had no interest in the life
of Thomas Allan, the policy was null from the beginning, by 14th Geo. III.
C. 48. of which the pursuer was then ignorant, but which was explained in a
small treatise, *afterward* published by the Society.

On that account, the pursuer could have recovered nothing if Thomas
Allan had died within the year, and is therefore entitled to restitution of the
premium, both because he was misled by Mr. Allan from his ignorance of the
law, or culpable inattention, and at any rate *condictione sine causa*, as no risk
has been run by the Society; Cowper's Reports, p. 666. &c. 18th November
1777, Tyrie against Fletcher; D. Lib. 12. Tit. 5. L. 2. § 2. L. 6. Lib. 12.
Tit. 7. L. 1. § 2, 3.

Mr. Allan admitted, that Mr. Campbell had at first mentioned his intention
of insuring on the life of Dr. Campbell, but added, that he did not explain the
nature of his interest; that from his readily going into the proposal of substi-
tuting the defender's son, the defender was led to believe, that the interest in
view would thereby be secured, and by instructions from the Society, who
sisted themselves as parties, he resisted the demand;

Contending: It would be extremely dangerous to the Society to admit
claims of repetition of premiums after the policy has expired, upon averments
of want of interest on the part of the insured, who must be held to have had,
at entering into the insurance, some substantial interest in view, best known to
themselves. In such case, there can be no concealment of fact on the part of

the Society, or their agents: And both parties are equally presumed to know the law. No. 3.

When a policy is originally effectual, but the risk does not take place in consequence of some intervening occurrence, the premium must be returned; but here the averment is, that the policy was illegal and null from the beginning, and, *in pari casu, melior est conditio possidentis*; Douglas, 468; King's Bench 1780, Laurie against Burdjan.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The pursuer had not sufficiently explained his object in making the insurance. He might have had an interest which might have been effectually secured by it, and the defender had no title to investigate its nature.

No bad intention has been established against him; and supposing the misapprehension to have been mutual, *in pari casu melior*, &c.

The Lords unanimously assolizied the defenders.

A petition containing reference to oath of Mr. Allan as to what passed at entering into the policy, was (18th February) refused, without answers; the questions proposed to be put to him having been considered as irrelevant.

Lord Reporter, Cullen.

Act. Ar. Campbell.

Alt. Thomson.

Clerk, Mannies.

D. D.

Fac. Coll. No. 158. p. 353.

1800. June 27.

HENDERSON, RIDDEL, and COMPANY, Attornies for Henderson, Ferguson, and Gibson, against GEORGE LOTHIAN and Others.

IN 1797, Henderson, Riddel, and Company, merchants in Glasgow, made insurance for behoof of Henderson, Ferguson, and Gibson, of Virginia, citizens of the United States of America, on tobacco, to be shipped in an *American vessel* called the *Catharine*. The voyage was to be from Virginia to Rotterdam; and the premium stipulated was ten guineas *per cent*.

Some doubts having arisen respecting the nature of the warranty, that the insured property was truly American, the following explanatory agreement was subscribed by the underwriters:

Glasgow, 20th April 1797.

“Whereas doubts have arisen, how far, by the insurance underwrote by us on tobacco for Messrs. Henderson, Ferguson and Gibson, *per* the enterprize, Two Sisters, and Catharine, *per* policies dated the 18th and 28th *ult.* there is a warranty of property, and what is to be understood by such a warranty: It is hereby declared, That in case of capture or seizure, Messrs. Henderson, Riddel, and Company, before they claim for a loss, must produce proofs of

No. 4.

An insurance was effected in this country, on a vessel and cargo belonging to certain persons, citizens of America, while that state was at peace with France; and by a memorandum subjoined to the policy, it was agreed, “That in case of capture or seizure, the insured, before