

determine upon any question upon which it might have been necessary to decide, if the subject upon which the insurance is declared in the policy to have been made, had been described in other terms; and it is therefore ordered, that the cause be remitted to the Court of Session, to review their interlocutors complained of, and to proceed consistent with this finding.

No. 5.

1804. May 22. ADAM and MATHIE, *against* MURRAY and Others.

THE ship Concordia, belonging to Adam and Mathie, merchants in Greenock, arrived at Jamaica in March 1799; but in going into harbour she run upon a reef, and sustained damage, information of which was received by the following letter from Bogle, Jopp, and Company, the consignees: '15th April 1799. We are sorry to inform you that the Concordia, in going into Port Morant, touched upon the reef, and met with some damage. Before we can engage to give her a cargo home, it will be necessary to have a survey upon her, to ascertain what damage she may have received. For this purpose, we have ordered Captain Simpson to bring her immediately down from Port Morant. Should she, after being properly surveyed, be deemed perfectly sea-worthy, we shall give her a full load home. We at present think she will load in part at this harbour, and proceed to Old Harbour, there to fit up. We think that if the vessel is found worthy, that she will be ready to sail with the convoy appointed to sail the 30th June.'

No. 6.

What concealment is sufficient to vacate the policy?

Another letter, of date 4th June 1799, says: 'We are sorry to inform you, that on a survey being made on the Concordia, it was found she had met with such damage as to require considerable repairs, which are now making. This will prevent her sailing with the convoy to depart on 30th instant.'

The vessel was repaired; and the next letter, 15th June 1799, says: 'The Concordia has now undergone the necessary repairs, and the captain informs us he will get the requisite certificate of her being fit for sea, and be ready to take on board the homeward cargo in the course of a day or two. We therefore hope there will be no doubt of her sailing with the convoy on 25th July.'

Next day (16th June) the captain wrote: 'Our cargo is all ready for us; and if the fleet don't sail till the 25th of this month from here, I hope we will be able to go with them; but it is talked they will leave this the 20th.'

These two last letters were received on 4th August; and on the 5th Adam and Mathie wrote the following letter to the broker at Glasgow: 'You may also do £2000 on freight of brig Concordia, Matthew Simpson master, valued at £2500, said freight at and from Jamaica to Clyde, at fifteen guineas, to return 8 per cent. for convoy. Our letter of 15th June from the master says: "Our cargo is all ready for us; and if the fleet don't sail till the 25th

No. 6. ' of this month from here, I hope we will be able to go with them ; but it is ' talked they will leave this the 20th." Bogle, Jopp and Company, of 15th June, say : ' We hope there will be no doubt of her sailing with the convoy ' 25th July.' Perhaps you may be able to get her done lower than these terms. ' We are,' &c.

A policy was therefore opened at Glasgow upon the freight of this vessel, valued at £2500, from Jamaica to Clyde. The insurance was effected ' at ' and after the rate of twelve guineas *per cent.* to return 6 *per cent.* for convoy ' and safe arrival, if in the June fleet, or fifteen guineas *per cent.* to return 8 ' *per cent* for convoy and safe arrival, if after that period.'

From the repairs which had been found necessary, and some delay about loading her cargo, the Concordia was not ready till 22d July, when she sailed from Old Harbour for Port Antonio to join the convoy, which was to sail from thence on 25th July. Owing to bad weather, she did not reach Port Antonio till 3d August, three days after the convoy sailed. With the next convoy she should have sailed in October, but the crew mutinied, and refused to navigate the ship. Three successive masters died, owing to which, she was still farther detained. Having now sustained all the injuries of the West India climate for many months, she was found unfit for the voyage without complete repairs. But upon a regular survey, made (11th March 1800) under the authority of the naval officer at Port Antonio, it was the opinion of the surveyors, that it would cost a great deal more to repair her than she would be worth. The Concordia was therefore abandoned to the underwriters.

The owners brought an action against the underwriters upon their policy for a total loss ; because, in her voyage from Old Harbour to Port Antonio, part of her voyage homeward, she met with the most tempestuous weather for fourteen days, which prevented her joining the convoy which sailed from thence in the end of July, and reaching this country along with it ; and because, when in October she was again ready to join convoy, she was prevented by the desertion or baratry of her crew ; and because the consequences of the vessel remaining loaded for so many months in that climate, were so ruinous as finally to render her unfit for performing the remainder of her voyage home.

The underwriters pleaded : 1. That there was a concealment sufficient to put an end to the contract of insurance.

2. That the Concordia never was sea-worthy after striking on the reef.

3. That the owners were not entitled to abandon, and claim for a total loss.

The Judge-Admiral (June 25th, 1802) repelled the defences, and found expenses due.

Against this judgment a bill of suspension was presented for Francis Murray and others, underwriters on the freight. The case was reported to the Court.

With respect to the two last defences, the Court seemed to entertain no doubt, that after sustaining the damage, the vessel had been completely repaired and made sea-worthy, which was proved by the usual affidavit to that effect; and that, in the circumstances of the case, the owners were entitled to abandon the whole to the underwriters, who must have been liable for a total loss, as the object of the voyage was completely defeated; (2. Burrows, p. 696; Douglas, p. 222,) provided there had been no concealment of the circumstances affecting the risk and rate of insurance.

On this point the underwriters

Pleaded: The order omits some circumstances very material for calculating the risk. There is no mention whatever of the damage received by the Concordia, or the necessity of any repairs, which might possibly prevent the ship from sailing at the time expected. The opinion of the captain indeed is given; but if the circumstances upon which this was founded had been detailed, this opinion must have appeared manifestly absurd. Now, every instance of misrepresentation or concealment on the part of the insured, if it varies the risk undertaken in the minutest particular, annuls the contract; Miller on Insurance, p. 45; Marshall, p. 347; and nothing could so much vary the risk, as the probability of the vessel being detained by any accident in a climate so peculiarly destructive to shipping.

Answered: It is not the practice, and cannot be necessary to inform underwriters of all the accidents which may have happened to a ship in the course of her various navigations since she was launched. It is part of their business to make themselves acquainted with the history of the various vessels on which they underwrite. In every policy, besides, there is an implied warranty that the ship is sea-worthy; Marshall, p. 355; Park, p. 229. The accident, too, which happened, was in her voyage out, before the risk commenced; and such is never communicated; Shouldbred *versus* Nutt, in Park, p. 229. But, again, how can it be alleged, that any part of the risk was concealed, when it is expressly stipulated upon the idea of her not being able to sail with the June convoy, that she should be still covered by insurance afterward, for which the highest or hurricane insurance was stipulated?

The bill was refused with expenses (January 17th, 1804); and on advising a petition with answers, the Court adhered (May 22.)

Lord Ordinary, Glenelg.

Act. Cathcart.

Agent, Jo. Tweedie, W. S.

Alt. Connell.

Agent, Jo. Tinning, W. S.

Bill-Chamber.

F.

Fac. Coll. No. 160. p. 360.

1804. May 22. BOGLE *against* SMITH, and Others.

The ship Concordia was freighted from the owners Adam and Mathie, merchants in Greenock, by Robert Bogle *jun.* merchant in Glasgow, to carry out a cargo to Jamaica, and to return from thence to the Clyde.

No. 7:

What concealment vacates the policy?