

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. 6.

No. 7.

What concealment vacates the policy?

No. 7. The voyage out was performed without any accident, but in going into Port Morant she run upon a reef of rocks, and sustained damage, of which Bogle was informed by a letter dated 17th April, received on 28th May 1799, from his consignees, mentioning, that although the damage was said by the Captain to be immaterial, that she must be surveyed before they could ship any goods on board.

The vessel was accordingly examined and repaired, and an affidavit made by two ship-carpenters (July 13, 1799), "That she is now a staunch vessel, and fit to carry a cargo to any port in Great Britain."

After ordering insurance, (July 13,) the consignees write: "We hope the Concordia will be ready to sail from Old Harbour on the 16th, with the other vessels, to join convoy at Port Antonio; yet we should not be surprised if this is not the case. We must advise you to take care how you engage again with such a captain and vessel."

The following letter was, in consequence of this, written by Bogle to the brokers, (September 6, 1799): "You formerly mentioned that your underwriters were shy of the Concordia. I have got further orders for insurances on her, and as she has got a thorough repair, they may now be induced to take her, particularly as I now want dyewood insured. If so, you may go the length of £1140, valuing at £20 per ton, at and from Jamaica to Clyde, with liberty to join convoy at the place of rendezvous; premium fifteen guineas per cent. to return 6 per cent. for convoy, and 3 per cent. if sails by 1st of August. At these terms I have considerable sums done; but as they charge in London sixteen guineas, with a return of four for sailing by the 1st of August, rather than not get it done, would give that premium; say, sixteen guineas, to return six and four. P. S. Letters of the 14th July say, that Captain Simpson was expected to clear out his ship the next day."

The insurance was accordingly effected. Instead of clearing out the 15th, she did not sail from Old Harbour till the 22d, so that she missed the convoy which sailed from Port Antonio; and owing to various accidents, the vessel was detained there for several months, when it was found (20th January 1800) "that she was unfit to proceed to sea, without undergoing repairs."

The estimate of repairs seemed so much beyond her value, that the insured abandoned, and claimed for a total loss. Bogle's correspondents immediately sold the cargo, by which means the price fell greatly short of the sum insured. For the difference, an action was brought in the Court of Admiralty by Bogle against James Smith, and other underwriters on the cargo. The defences were repelled, (4th March 1803) and expenses awarded.

Of this judgment, a bill of advocation was presented.

The Lord Ordinary ordered memorials, which he reported.

The Court chiefly confined themselves to the defence of concealment; on which it was urged by the underwriters, that the insured is bound to dis-

close every circumstance; consistent with his knowledge, which is material, of which there are none more so than the time of the vessel's sailing. Thus, in the present case, if the Concordia had sailed on the 15th, having ten days to reach the place of rendezvous, there could be little doubt of her arriving there in time to sail with the July fleet. If she was so far from being ready as not to be able to join the convoy till the 22d, then there was a great probability of her being disappointed of that fleet, and her voyage would necessarily be delayed till a time of the year the very worst for shipping. Though an express assurance is given of the time expected for her clearing out, the doubt as to this being the case is concealed; and it is even directly asserted, that the letter contained an expectation, which from the whole context, is not warranted by it. No. 7.

But, on the other hand, it was answered, and the Court held satisfactorily, that by virtue of the established law in such cases, it is not the concealment of any fact, which is material in the estimation of the risk, or which should be known to the underwriters themselves, which will vary the risk so as to vacate the policy; that no undue expectation was here held out as to the time of the vessel's sailing, as the terms of the policy expressly declare, that it was uncertain whether she would sail with or without convoy, and whether before or after 1st August. The intention of clearing out by a certain day might be conceived, but many things might render it abortive; and the order to insure was in such terms as to meet every event.

The bill was (26th January 1804) refused.

The Court adhered, (22d May), on advising a petition, with answers.

Lord Ordinary, *Glenlee.* Act. *Irving.* Agent, *Alex. Kidd.* Alt. *Campbell.*  
Agent, *Jo. Dillon.* Clerk, *Ferrier.*

F.

*Fac. Coll. No. 161. p. 363.*

1804 December 21. RHAND against ROBB and Others.

ON the ship Commerce, lying in the road of Basseterre, in the Island of St. Christopher's, an insurance was made, by which "the said ship, &c. goods and merchandise, &c. for so much as concerns the assureds, by agreement between the assureds and assurers in this policy, are and shall be valued at, ship £2000 Sterling, freight £2000 Sterling."

The ship began to load on 20th September 1802. On 8th November, when only about one-seventh of the cargo was put on board, the ship was driven on shore from her moorings, and wrecked.

The value of what was saved only amounted to £259. 18s. 10½d. for which, after deducting £170. 3s. 11d. for seamen's wages from 20th September to

No. 8.  
In a valued policy of insurance on freight, the whole is due, although the vessel has been wrecked when a part only of the cargo had been put on board.