

# APPENDIX.

## PART I.

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### PERICULUM.

1806. *May 27.* ROSS'S ASSIGNEES *against* GALLOWAY and OTHERS.

Messrs LANCE, MILBURN and Company, insurance-brokers in Liverpool, received an order from Messrs William and Henry Ross, merchants there, to effect insurance to the amount of L. 1600, on the ship *Meliora* for Virginia. Being unable to do this at Liverpool, they, according to the practice on such occasions, handed the order to William Galloway, insurance-broker in Edinburgh, to make the insurance.

This was accordingly effected by Galloway, in the capacity of sub-broker, who corresponded with his employers, Lance, Milburn and Company, and entered the transaction in his books to their account; and retained the policy of insurance for the purpose of settling any loss that might arise.

The *Meliora* sailed of this date, (13th February 1801;) but having never afterward been heard of, was considered as a missing ship.

The underwriters on this vessel who resided in England, settled the loss as total about the middle of September.

Messrs William and Henry Ross became bankrupt in the month of October, at which time they stood considerably indebted to Lance, Milburn and Company.

Of this date, (11th December 1801), the necessary documents for settling the loss were transmitted to Galloway by Lance, Milburn and Company, which was accordingly done, (19th December 1801), by carrying to the credit of their account L. 1173, 14 s., and handing them a credit-note to that amount. At this time Lance, Milburn and Company were indebted.

#### NO. 1.

Where a broker commits the charge of effecting an insurance to a sub-broker, who retains the policy in his hands, he must remit the money he recovers, in the event of a loss, to the broker, who will be entitled to the same preference over it, as if he had effected the insurance himself.

NO. 1. to Galloway in an amount greater than the sum thus placed to their credit. During all this time, Galloway and the Messrs Ross never had any correspondence together.

Joseph Leay, assignee under Ross's commission of bankruptcy, brought an action against Galloway, and the underwriters employed by him, for the loss on the policy, *The Judge-Admiral* (17th December 1802), "repelled the defences." A bill of advocation was presented and passed.

The cause was taken to report by the Lord Ordinary, when the Court (28th November 1804), advocated the same, and decerned against the defenders.

Upon advising a reclaiming petition, with answers, (26th November 1805), the Court "recall and alter the interlocutor complained of, sustain the reasons of advocation, advocate the cause, assoilzie the defenders, and decern."

The pursuer reclaimed, and

Pleaded: An insurance-broker, although not a public officer, undertakes an office, in its nature public, having known and important duties attached to it, and in the execution of which obligations are incurred by him both to the assured and the insurers. The broker's general obligation, to the assured, is the faithful execution of this contract of mandate; to the underwriters he becomes bound in the payment of the premium. It is the broker who effects the insurance who is thus bound to the underwriters, and not any other broker who may have employed him: It is impossible that he can stand in a different relation to the insured; for it is quite inconsistent with the nature of the contract, that as to the one he should be broker, but as to the other, merely the agent of some other person, whose name does not appear in the policy, but who comes between him and the assured. The amount of each underwriter's subscription, in the event of a loss, is a debt directly due by them to the assured, and not to the broker; so that when the broker recovers a loss, he recovers it as the agent of the assured, to whom he is bound to remit the amount directly; and he ought not to attempt to create a preference in favour of any one else, by transmitting the money through the medium of another.

Answered: The right of a broker to retain a policy in security of debts due to him by the assured, where a loss is to be recovered, is such, that he is entitled to recover upon it whatever may be due, and without any authority or consent from the assured. If there be no loss, he may recover the premium from the assured, without any other warrant than the custody of the policy; and if there be a loss exceeding the premium, he stands between the assured and the underwriter, recovers the balance from the latter, and may apply it in payment of any debt due to him by the assured; Park on Insurance, p. 402. Now, the broker employed by the insured, although he may have

committed the charge of effecting the insurance to another person, and suffered him to retain the policy in his custody, did nothing to divest himself of the right of retention as a broker; the person by whom the insurance was effected acted as the agent or clerk of the broker; he was accountable solely to his employer; had no communication with the assured; and makes no claim whatever against them, in virtue of this policy. He and his employer are not both claiming an hypothec over it; for he claims nothing; it is only the broker who received the directions of the assured, and whose rights cannot differ from what they would have been, had he effected the insurance himself. The policy is held by the person he employed for his behoof; and it must give the broker all the rights which would have attached upon his own actual custody of it.

Upon this case, during all its different stages, the Court were much divided. But they finally adhered.

Lord Ordinary, *Polkemmet.*

Act. *Corbet.*

Agent, *Ja. Gilchrist, W. S.*

Alt. Solicitor-General *Blair, Cathcart.*

Agent, *Alex. Kidd.*

Clerk, *Mackenzie.*

*F.*

*Fac. Coll. No. 249. p. 558.*