M'Intyre v. *M'Nab's Trustees*, July 8, 1831 (cited by the Sheriff-Substitute), and argued that the rent became due on the legal term, the 15th May, and was not postponed till the 28th. It followed, then, that the sequestration was good to attach the furniture here for rent payable at that term.

The appellant replied that though the rent for the year was only £13, the pursuer might under the sequestration seize goods which might exceed the sum of £25. The mere rent was not the test —*Shotts Iron Co.* v. *Kerr*, December 6, 1871, 10 Macph. 195; *Aberdeen* v. *Wilson*, July 16, 1862, 10 Macph. 971; *Cunningham* v. *Black*, January 9, 1883, 20 Scot. Law Rep. 295. (2) *On the merits*—Admitting that there was a duly concluded renewal of the lease for the year 1882–1883, his term of entry, under the 3d section of the Renewal Terms (Scotland) Act 1881, must be held to have been on the 28th of May. The furniture was removed from the dwelling-house on 24th May, and was not therefore on the premises during the period for which it had been sequestrated in security of the rent.

At advising—

Lord Rutherfurd Clark (who delivered the opinion of the Court)—The respondent maintained that this appeal is incompetent in respect that the value of the cause was less than £25. The ground of the objection is that the rent for which sequestration was used was £13, and that the appellant by paying this sum would be able to put an end to the process. In my opinion, however, the objection is not well founded, first, because the sequestration is said to entitle the respondent to seize goods which may exceed £25 in value; and second, because the petition contains conclusions for caution and removing.

There were other objections to the competency, but it is not necessary to notice them.

This process was raised on 29th June 1882. The material purpose the respondent had in view was to obtain a warrant to carry back to the premises certain articles of furniture which had been removed on 24th May 1882, and which as he contended were liable to be sequestrated for the rent current after that term.

The appellant had been tenant of the premises from year to year. It is alleged that in February 1882 he agreed to become tenant for another year. This allegation is denied on record, but it was conceded at the bar that the defender had agreed to become tenant for another year from Whitsunday 1882.

By the third section of the 44th and 45th Vict. c. 39, it is provided that when under any lease entered into after the passing of this Act, the term for the tenant's entry to or removal from houses within the limits of any burgh shall be one or other of the terms of Whitsunday or Martinmas, the term of such entry or removal shall, in the absence of express stipulation to the contrary, be held to be noon on the 28th May or 28th November according as entry is at Whitsunday or Martinmas. Here the premises are within burgh, and there was no stipulation to avoid the application of the Act. Hence the term of entry was 28th May 1882, and the possession in respect of which the rent was payable began on that day. But it is conceded that the articles which the respondent desires to bring within his sequestration were not in the premises at any time after 28th May. It follows in my opinion that they were not liable to be sequestrated for rent which was exigible for a period during no part of which they were in the premises, and that not being liable to sequestration no warrant could be issued to bring this upon them.

The Court sustained the appeal, recalled the Sheriff's judgment, and assoilzied the defender.

Counsel for Defender—Rhind. Agent—David Forsyth, S.S.C.

Counsel for Pursuer — Salvesen. Agents — Miller & Murray, W.S.

Tuesday, February 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HARVEY *v.* SELIGMANN.

Marine Insurance—Time Policy—Misrepresentation—Concealment of Facts material to Risk—Dangerous Roadstead—Iron Cargo in Wooden Ship.

A time policy of insurance to endure six months was executed on a wooden ship by brokers acting on the instructions of the agents of her owner. The ship was lost within the time specified in the policy. In an action for the sum assured, at the instance of the owner, the underwriters denied liability, on the ground that they had been induced to effect the policy at a low premium (1) by false and fraudulent misrepresentations made by one of the pursuer's brokers as to the voyage the ship was to take; and (2) by wilful concealment of facts material to the risk and known to the assured, viz., that the ship was to carry an exceptionally dangerous cargo for a wooden vessel to carry, and was intended to proceed to an exceptionally dangerous open roadstead. *Held*, on a proof, (1) that the alleged fraudulent representations were not proved; (2) that the port to which the vessel sailed was not one which was notoriously dangerous or of which the owner had any special knowledge; (3) that it was not proved that such a cargo as was carried was of such an exceptionally dangerous character for such a ship that its nature ought to have been disclosed to the underwriters; and therefore that the underwriters were liable under the policy.

F. E. Harvey & Company, who acted as agents for Mr Francis Henwood, the owner of a vessel called the "Eunice," employed Messrs Leitch, Gilchrist, & Aird, marine insurance brokers, Glasgow, to effect an insurance on that vessel. A policy of insurance was executed on the 23d May 1881. By it the vessel was insured for six calendar months, commencing with the 23d day of May 1881 and ending with the 22d day of November 1881, as employment might offer, in port and at sea, in docks and on ways, at all times and in all places whatsoever or wheresoever. The policy was a valued one, the vessel being valued at £2500.

The premium of insurance was four guineas per cent. There was a special warranty, "No St Lawrence." The vessel was chartered in April 1881 for a cargo of railway bridge materials, chiefly iron, and sailed from Middlesbro' on 30th May 1881 for Imbituba in Brazil, where she arrived on the 29th August, and off which port she became a total loss by perils of the sea on 13th September 1881.

The underwriters denied liability for the loss.

This was an action on the policy of insurance raised in the Sheriff Court of Lanarkshire by Harvey & Co. against H. L. Seligmann, one of their number, for payment of his share of the sum assured.

The defence was misrepresentation and undue concealment of facts material to the risk on the part of the assured or of those for whom he was responsible. The averments in support of this may be shortly stated as follows:—On the 20th May 1881 when negotiations were in progress for the execution of the policy of insurance on the vessel, Mr Morton, the defender's broker, who was prohibited by the conditions of his employment with them from accepting any risk on wooden ships carrying iron cargoes, asked Mr Gilchrist, the pursuers' broker, on what voyage the vessel was intended to sail, and Mr Gilchrist replied that the vessel was going from Middlesbro' to Pernambuco with coals, and home with sugar. On the faith of these representations, Morton, on the defender's behalf, underwrote the risk at a premium of the rate of £4, 4s. per cent., and noted the representation in his insurance book at the same time. The same representation was made by Gilchrist to the other insurance brokers in Glasgow, who underwrote the vessel and her freight for the same period. The port of Imbituba (to which, as above narrated, the vessel sailed) was a dangerous open roadstead, where any vessel discharging cargo is obliged to ride at anchor without protection from storm or heavy sea. "The said representation made by Mr Gilchrist as to the intended voyage and cargo of the 'Eunice' related to material and essential facts affecting both the rate of premium and the taking of the risk. Farther, the concealment of the fact that the vessel was chartered to carry railway iron (which is a dangerous and trying cargo, especially for a wooden vessel) to a place like Imbituba from the knowledge of the defender's broker, was material in leading him to accept the risk. Although the policy was a time policy it was in reality only for the one voyage to the Brazils and home, said voyage usually taking about six months, and the negotiations were conducted on this footing. The cargo on the voyage and the port of destination were thus of the first importance in estimating the risk. If Mr Morton had known the true state of the facts he would not have taken the risk at any rate of premium, especially as it was one which he was precluded from accepting on behalf of the defender and his other underwriters. The said representations were made by the pursuers' broker in the knowledge that they were untrue, or at least were made recklessly and without due inquiry as to their truth, and for the purpose of inducing the defender's broker to accept the risk at the low rate of £4, 4s. per cent. premium, and the said material facts were concealed by him and by his principals, the present pursuers, with the same object."

The pursuers denied that any such representations as were alleged had been made. They averred that Gilchrist did not at the date of the policy know the destination of the ship, and had only said that her previous voyage had been to Pernambuco with coals and home with sugar. Farther, they averred that Imbituba was a usual port of discharge.

The defender pleaded that he was entitled to absolvitor in respect of his having been induced to accept the risk on the faith of representations which were material thereto and were false in fact, and his having been induced to accept the risk through concealment on the part of the pursuers' broker of material facts.

A proof was taken, the import of which was as follows:—The "Eunice" had been chartered for Imbituba in April, but this had not been communicated to the pursuers or to Mr Gilchrist. All that they could have known was that the owner had been desirous of effecting a voyage policy to the coast of Brazil with liberty to call at any port. With regard to the alleged misrepresentations relating to the vessel's destination and cargo, the evidence was that of the conversation between Mr Gilchrist, acting on behalf of the pursuers and the underwriters, and was somewhat vague and conflicting. Mr Gilchrist deponed that it was not usual in a time policy to ask the probable employment of a vessel. All that he represented to the underwriters was his knowledge of the past employment of the vessel. He said that it was possible the vessel might take a cargo of coals to Pernambuco as she had done before, but made no positive representations of any sort. Mr Morton, the defender's broker, deponed that on Gilchrist's representations he made an entry of the risk in his book in the following terms:—"May 20th, L. 'Eunice,' 15, 1874. Six months from 23d May, £100 at four guineas. . . . Warranted no St Lawrence . . . To go from Middlesbro', coals, Pernambuco, home sugar." Mr Russell, one of the underwriters, made a similar entry after his meeting with Gilchrist. "(Q) With this memorandum in your book, would you think yourself off the risk if the vessel went to Bahia instead of Pernambuco, and for a time policy?—(A) I never had occasion to dispute a thing before. I considered I was taking this out to Pernambuco and home; but if you ask whether I would dispute it if she had gone to Bahia, I am not prepared to say that I would have disputed it. I am not in a position to say whether these memoranda are always strictly conformed to." The underwriters examined deponed that in a time policy for so short a period as six months it was their custom to assume a special purpose for the employment during that period, and to make inquiries as to the voyage according, as if the policy were not a time policy. On this ground few special warranties were inserted in such policies.

The slip for insurance, as initialed by the underwriters, was "£2500 on hull, etc., valued at £2500, per 'Eunice.' For 6 calendar months from 23 May /81, both days inclusive, Greenwich mean time, in port and at sea, in docks and on ways, at all times and places. Prem. 4 gs. °/₀ f. c. & s. C/c. docking F. G. A. clauses. In favour of F. E. Harvey & Co., *pro rata* returns cancelling. Warranted no St Lawrence."

It was proved that Imbituba was not a port known to Glasgow underwriters at the date of the policy. When it became known its reputation was bad, and one of the underwriters deponed that it was the "worst port in Brazil."

The result of the proof did not show that there was any generally accepted understanding in trading circles that such a cargo as that which the "Eunice" carried was of such a dangerous nature that it was only to be carried in iron ships. On this point Mr Morton, though he described the cargo as exceptional and trying, deponed —"It is for underwriters to judge. Some people may hold the cargo was good, but if in my experience as an underwriter it is bad I would refuse it." Another witness, Lees, deponed that the cargo was trying and might be "fully plenty."

The Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that the pursuers, acting for the owners of the barquantine 'Eunice,' for whose behoof they sue, insured that vessel for six months from 23d May 1881, conform to the policy upon which the defender is an underwriter to the amount of £50: Finds that the pursuers' broker represented at entering into said policy that the 'Eunice' was to sail to Pernambuco with coals and back with sugar: Finds that that voyage was such as to occupy the whole or the greater part of the period for which the insurance was made: Finds that, in fact, the 'Eunice' was at the date of the policy loaded with iron, and about to sail for Imbituba, a port in Brazil, where on 13th September 1881 she was totally lost: Finds that these representations were material to the risk, and were false: Finds, *separatim*, that the pursuers or their author, the owner of the 'Eunice, concealed from the defender, as insurer, the material fact that the 'Eunice,' being a wooden vessel of 256 tons register, was entirely loaded with iron: Therefore assoilzies the defender from the prayer of the petition, and decerns.

"*Note.*— . . . The question is, Whether the defender, as underwriter upon a time policy on the 'Eunice' for six months from 23d May 1881, is entitled to have the policy voided upon the ground that it was represented to him that the vessel was to be employed on a voyage from Middlesbro' to Pernambuco with coals and home with sugar, whereas she was loaded with iron, and chartered to Imbituba in Brazil, where she was lost; or, alternatively, on the ground that the pursuers concealed these facts, both the nature of the cargo and the destination being material to the risk?

"That the insuring brokers understood Mr Gilchrist, the pursuers' broker, to represent that the vessel was going to Pernambuco, is *prima facie* probable, from the entries which both Mr Morton and Mr Russell made in their books. Mr Morton further swears to the statement that the vessel was to be loaded with coals, and is corroborated by the entry in his books, and by Gilchrist's admission that he made such a representation with regard to the manner in which she had been employed previously, and that she might be so employed again. On the other hand, Mr Russell and Mr Spiers do not distinctly remember, and Mr Thomson, the first broker on the ship, is not called as a witness at all. It is probable, from the evidence and the productions, that Gilchrist was not fully informed as to the charter-party, but he knew from his correspondence with the owners or Messrs Harvey that she was going to Brazil, and Messrs Harvey, at least, knew that she was loading iron (not coals) at Middlesbro'. (Telegram, 4th May '81,). Upon the whole, I hardly think that much reliance can be placed on Mr Gilchrist's extremely indistinct recollection of what took place; and I am disposed to think that he did represent as the defenders aver.

"But even if there were no express representation, the defenders say that the concealment of the kind of cargo loaded and the destination is sufficient to void the policy. They say that such a cargo of iron as was carried was a dangerous cargo for the 'Eunice,' a wooden vessel, and that it materially increased the risk. They say also that Imbituba is a port formerly unknown, and now known to be an exposed and dangerous port. The pursuers contend that there was no obligation upon them, and that it is not usual to make such disclosures to insurers upon time policies, in which the insurers take the risk of any usual and reasonable employment within the period covered by the policy; and that time policies in this respect are to be broadly distinguished from voyage policies. In the nature of the thing there is undoubtedly a distinction of this description, for in a time policy, especially in one of the ordinary duration of twelve months, it is generally impossible for the insured to specify beforehand all the voyages to be undertaken. The policy is made for time just to obviate that necessity, and the insurer must be satisfied with a general representation as to the kind of trade to be engaged in, or may protect himself by inserting warranties in the policy. But the question whether certain facts represented or concealed by the insured are material to the risk may arise in regard to a time policy as well as a voyage policy, and in both it must be decided as a jury question, according to the evidence (*Stribley* v. *Imperial Marine Insurance Co.*, 1 Q.B.D. 507, 45 L.J., Q.B. 396), the only difference, so far as I can see, being that representations which are material in the one case may not be so in the other, having regard to the nature of the contract as a matter of fact. The rule is that all must be disclosed which would affect the judgment of a rational underwriter, governing himself by the principles and calculations on which underwriters do in practice act.—(*Joindes* v. *Peuder*, L.R., 9 Q.B. 531, 539, 43 L.J., Q.B. 227; *Rivaz* v. *Gerussi Bros. & Co.*, 50 L.J., Q.B. 176). Now, whatever difficulty I might have had in determining the abstract question, whether in insuring by a policy for twelve months these facts as to cargo and destination ought to have been disclosed, is entirely removed by finding it clearly ascertained by evidence, which is virtually uncontradicted—(1) That in this case a six months' policy for a voyage in the Brazilian trade hardly differs from a voyage policy, because the trade is so far defined by representations which are not in question that the insurance becomes really one for a voyage out to Brazil and home—that is to say, for a risk defined by certain known limits, and therefore presumably undertaken at a lower premium or upon easier conditions than it might otherwise have been; (2) That the cargo of iron was really an undue and excessive dead weight for a wooden vessel; so that the fact that the vessel was to be so loaded

would have a serious effect upon the mind of an underwriter; and (3) That Imbituba is an open and dangerous port, and was in May 1881 an unknown port to Glasgow underwriters, who would not have insured a vessel chartered to it in May last without inquiring as to its character, but not that the pursuers had any special knowledge of this port which they withheld from the defenders. I am therefore of opinion, upon the matter of concealment, that the pursuers were not bound to inform the insurers that the vessel was chartered for Imbituba, as they are not shown to have been aware of any peculiarity of the port; and it would have been within the time policy if we assume that no special representation was made as to destination, beyond the general understanding that the vessel was trading to Brazil — (See *Harrower* v. *Hutchinson*, 39 L.J., Q.B. 229, where the judgment in error turned on the withholding of specific information possessed by the insured as to the character of a port)—but that he was bound to disclose the peculiar nature of the cargo, and having failed to do so, that the policy is void. It appears to me that the evidence distinctly shows that the nature of the cargo materially affected the risk, and ought to have been disclosed to an insurer under such a time policy as this. Not even the real pursuer, Mr Henwood, contradicts the evidence upon this point. I am further of opinion that, assuming the representations that the vessel was going to Pernambuco, and with coals, to have been made, both these representations were material to the risk, and not having been complied with, the underwriters are not bound."

On appeal the Sheriff (CLARK) adhered.

The pursuers appealed, and argued—The underwriters were here liable for the loss under the policy. It was a time policy and not a voyage policy, and must be construed accordingly—*vide Gibson* v. *Small*, December 1852, 4 H. of L. Cases, p. 363, Lord Campbell's opinion, p. 422. In the former the insurers take the risk of any reasonable employment within the period covered by the policy, and it is not competent to bring evidence to contradict the exact terms of such a policy. To allow such evidence is just to destroy the distinctions well recognised between the two kinds of policy—*vide Dudgeon* v. *Pembroke*, February 1877, L.R., 2 App. Cases, 284. But assuming such evidence to be competent, there was no proof of any positive representation of any kind whatever made by the pursuers' broker to the underwriters. Their case merely depended on vague recollections of conversation and entries said to have been made on Gilchrist's representation. In any view, they must bring their case up to fraud, of which there was no evidence. In *Rivaz* v. *Gerussi* (cited *infra*) there was actual fraud; *Stribley* v. *Imperial Marine Insurance Company* (cited *infra*) is not in point. (2) On the question whether there was concealment of material facts—It was conceded that if the owner knew of an exceptional risk he was bound to disclose it, but there was no evidence to show that he did know of such, since the proof did not disclose any such knowledge in trading circles, or on the owner's part, of Imbituba being a dangerous roadstead, or iron being a very exceptionally dangerous cargo for a wooden ship to carry.

The defenders replied—(1) As matter of fact the proof discloses the alleged wilful misrepresentation and concealment of facts material to the risk; and (2) As matter of law—Anything abnormal or material to risk must be disclosed by the insured as affecting the premium in the policy, whatever the nature of the policy—Arnold's Marine Insurance, vol. i. 367; *Stribley* v. *Imperial Marine Insurance Company*, February 12, 1876, L.R., 1 Q.B. Div. 507; *Joindes and Another* v. *Peuder*, May 27, 1874, L.R., 9 Q.B. Div. p. 531; *Rivaz* v. *Gerussi*, November 19, 1880, L.R., 6 Q.B. Div. p. 222; *Harrower and Others* v. *Hutchinson*, June 17, 1870, L.J., 37 Q.B. 229; *Anderson* v. *Pacific Fire and Marine Insurance Company*, January 15, 1872, 7 L.R., C.P., p. 65, *vide* Justice Willes' opinion, p. 68; *Carter* v. *Boehm*, 1766, Lord Mansfield's opinion, 3 Barron's Reports, 1909.

At advising—

LORD JUSTICE-CLERK—The policy of insurance sued on was effected by the pursuers on a vessel called the "Eunice" on the 23d of May 1881. It was a time policy, to last for six months, in the usual terms, from 23d May to 23d November. The vessel sailed from Middlesbro' with a cargo of wooden and iron railway materials on the 30th of May 1881, and arrived at Imbituba, a port on the coast of Brazil, on the 29th August, and there became, through stress of weather, totally lost on the 13th of September. This action has been brought by the pursuers, as representing the owner, to recover the sum assured under the policy, against the defender, who is one of the underwriters on the vessel.

The defence to the action is misrepresentation and undue concealment of facts material to the risk on the part of the assured, or of those for whom he is responsible. It is alleged—(1) That Mr Gilchrist, who acted as the owner's broker, represented to the defender that the destination of the vessel was Pernambuco, a port on the Brazilian coast, and that she was to take out a cargo of coal, and bring home sugar; that these representations were made by the pursuers' broker in the knowledge that they were untrue, or at least that they were made recklessly and without due inquiry into their truth, and for the purpose of inducing the defender's broker to accept the risk at the low rate of £4, 4s. per cent. premium. It is further said (2) that the cargo was exceptionally hazardous; and (3) that the port of Imbituba was a dangerous and open roadstead; and that these two facts were concealed from the knowledge of the defender's broker, although material to the risk, for the same fraudulent purpose.

The Sheriff-Substitute allowed a proof of these allegations, and has found the policy void, relying chiefly on the concealment of the nature of the cargo. The Sheriff has reached the same conclusion. We are now to give judgment on the appeal.

I. In regard to the alleged misrepresentation. Had the allegation been confined to the mere inaccuracy of the statement said to have been made by the pursuers' broker without the imputation of a fraudulent motive, I should have entertained some doubt whether the averment were relevant to overcome the written obligation contained in the policy, for, *prima facie*, knowledge of the

particular destination of the vessel was not material to an assurance of it on time. This being a time policy assured the vessel wherever she might happen to be within the time conditioned, provided she did not go to the St Lawrence. The premium paid was for that risk, and for nothing short of it. It does not appear how knowledge of the particular voyage contemplated, which the owner might alter at his pleasure, could be material to this general obligation unless the representation went further, and amounted to an engagement or warranty that the vessel should go to Pernambuco, which is inconsistent with the terms of the policy. I see that Mr Morton, the defender, speaking in his capacity of an expert, takes the last view of a six months time policy. He admits that in a time policy for twelve months it is in vain to ask the destination of the vessel, because that may be altered at any time, and an express warranty would be required. But he thinks that such a statement by the assured on a six months time policy is equivalent to a warranty that the vessel will go on the contemplated voyage, and that the assured thereby debars himself from altering that destination. But this is clearly adverse to the express terms of his obligation under the policy.

But no doubt the fraudulent intent alleged, if proved, may be held to bring the case within another category. The current of recent decisions has set in strongly against sustaining insurance obligations if any fraud has intervened in order to obtain them, and the rule seems now to be that if the statement was one on which a reasonable man might act in undertaking the risk, and was made fraudulently by the assured in order to obtain the policy, he shall not recover. In the present case I own it is difficult to see in what way the knowledge of an intention to send this vessel to Pernambuco could induce the underwriters to insure her against perils of the sea on whatever voyage she might be bound. In the meantime, however, the ground of action on this head is, that the underwriter was induced to undertake this risk by a positive representation that the vessel would go to Pernambuco, which representation was in itself false, and was made for the fraudulent purpose of obtaining the policy at a low rate of premium.

The proof offered of this serious allegation depends for its force on the recollection of the terms of casual conversations between underwriter and broker at the time at which the policy was effected. This at the best is a class of evidence to be tried by strict rules, for fraud may lurk in it on either side, and still more probably misunderstanding without fraud. The party who endeavours to escape from a written obligation, which is quite clear, on such evidence as this, must be put to prove his case in fact conclusively. The presumption is strongly against him.

There are two elements in the present instance which increase this presumption. In the first place, as I have pointed out, if the owner wished to obtain a policy on time he necessarily wished to have the choice of the voyage entirely in his own hands, and therefore it is in the highest degree improbable that his agent would do anything to limit that power. In the second place, it is certain that the broker knew nothing of the destination of the vessel when the policy was effected. The "Eunice" had been chartered for Imbituba, a port on the Brazilian coast, in the previous month of April, but that fact had not been communicated either to the pursuer, the owner's agent at Greenock, or to Mr Gilchrist, his broker. They did indeed know, or might have known, that the owner had been desirous of effecting a voyage policy to the coast of Brazil, with liberty to call at any port, for this appears from the correspondence, and it is possible that Mr Gilchrist knew this. But it was not until the 21st of May that the owner made up his mind to effect a time policy for six months, and not only did Mr Gilchrist believe that by effecting it the owner would be unfettered as to the voyage, and might change it at any time, but he was entirely ignorant of what that voyage was intended to be. His ignorance no doubt does not prove his good faith or exclude fraud, but it renders it improbable that a broker of respectability should volunteer a representation on a fact of which he was entirely ignorant, and the knowledge of which was immaterial, or at least not essential, to the discharge of the duty on which he was employed. He might no doubt surmise that the vessel was destined for the coast of Brazil, and he might say that such was his expectation as she had been at Pernambuco before, as indeed she had been. He could speak to nothing but his belief of present intention, and I should require very clear evidence that being quite ignorant on the subject he fraudulently pretended knowledge for the purpose of misleading the underwriters.

The evidence which relates to conversations at which no third party intervened is, as might be expected, conflicting. I was not prepossessed with that of Mr Gilchrist, whose memory of these details was more imperfect and treacherous than could be desired. But as he knew that he was not in a position to give any information as to the destination of the vessel, he might attach less importance to what passed than the defender. Mr Gilchrist, however, entirely denies that he made any representation whatever on the subject of the probable voyage of the "Eunice." He says that what he said about Pernambuco related to the previous history of the vessel; and that he was under the impression that her last voyage had been to that port. In point of fact, she had made a previous voyage to Pernambuco, although not immediately before. But the fraud alleged in this record is a representation in regard to the contemplated voyage, as to which he says he made no statement whatever.

On the other hand, I assume from the evidence of Mr Morton and Mr Russell that such was not the impression made on their minds. Mr Morton says positively that he asked Gilchrist what the destination of the vessel was, and was told by him that she was to take a cargo of coals to Pernambuco, and sugar home; and that he made an entry to this effect in his book at the time. His object in asking the question, although he does not seem to have said so, was, as he admits, and as his plea implies, to obtain a warranty which should control the contemplated obligation. Mr Russell, another of the underwriters is not so precise, but he also made an entry at the time of the transaction in the words "out to Pernambuco, and home."

I have no doubt, on the evidence, that the underwriters believed, from what Gilchrist said, that the probable destination of the "Eunice"

was Pernambuco. I think it not impossible that Gilchrist's impression was the same, if he had any on the subject. But I also think it extremely probable that the underwriters mistook an expression of expectation for a representation of a fact within his knowledge; and I think so because he had some ground for expectation, but had no knowledge whatever. I am not satisfied, on the evidence, that the underwriters relied on the vessel going to Pernambuco. I think they knew that whatever the owner contemplated, he could, under the time policy, change his intention when he pleased. It is clear that this was Mr Russell's view. He says—"I considered I was taking this out to Pernambuco and home, but if you ask whether I would dispute it if she had gone to Bahia, I am not prepared to say that I would have disputed it." "It would all have depended on whether the substituted port was an equally safe one or a dangerous one."

It was long ago laid down by Lord Eldon, in an appeal from Scotland, that "there is a difference between a representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact represented be material" (3 Bligh. 302). If, therefore, Mr Gilchrist only expressed his expectation—and the underwriters knew he could not go further—I see no reason to think that the statement was not honestly made.

I place little reliance on the entries by the underwriters, because they were not within the knowledge or control of the brokers; nor did inspection of the entries alter my impression. It would I think be very hazardous to permit underwriters so to qualify their written obligations.

I find, therefore, on this ground of defence, 1st, that it is not proved that Mr Gilchrist made any fraudulent statement to the defenders, or had any fraudulent object in any representation he made; and 2d, that it is not proved that he made any representation whatever of a fact material to the risk.

II. The remaining ground of challenge divides into two branches. It is said that the owner Mr Henwood fraudulently concealed from the underwriters two facts which were material to the risk, namely, first, that the port of Imbituba was a dangerous open roadstead; and second, that the cargo of railway iron was exceptionally hazardous for a wooden ship like the "Eunice."

This matter depends entirely on the belief of the assured. The defender undertakes to prove that the owner knew the port to be a dangerous port, and the cargo to be an unusually hazardous cargo. Yet, singularly enough, not a single question is put to Mr Henwood on behalf of the defender on either subject, and as to the owner's individual knowledge or belief, on which his good faith depends, the evidence is a complete blank. Even apart from the other testimony, I should have thought this a serious omission. But I consider the proof on these two heads of challenge to be entirely insufficient to support so grave a charge.

(1) As to the port of Imbituba, the Sheriff-Substitute finds, quite soundly as I think, that there is no evidence that the owner had any special knowledge on that subject, But the same thing might be said of all the other witnesses. Not one of them has the slightest knowledge on the subject. No witness came forward who knew the port, or had ever seen it. A very slender proof of very limited repute is the utmost extent which the testimony reached, and it leaves the Court in absolute ignorance of what the fact is which it is said the owner knew and fraudulently concealed. If it had been proved by persons who themselves knew the port that it was exceptionally dangerous, and that this was so notorious among traders to the Brazilian coast that the owner in this case must have known it, the defender would have approached to the proof of his proposition. But for aught which appears on this proof the fact may be all the other way. Mr Russell indeed says, "Imbituba is the worst port in Brazil." It may be so, and yet very far indeed from being what the defender represents. (2) As regards the nature of the cargo shipped, the Sheriff-Substitute has held it proved that it was of a character unusually hazardous, and that its nature ought to have been disclosed. I think that here also the proof is insufficient. What the defender professed to prove was that no wooden ship can with safety load and carry a cargo of iron, and that doing so is so notoriously dangerous that the pursuers must have known it to be so, and were bound to have disclosed the fact. Before coming to so wide a conclusion in a matter affecting the trade of this country, I should have desired far more satisfactory evidence as to the practice as well as the opinion of merchants. I find no reason to think, from the evidence before us, that all iron cargoes are carried by iron ships or steamers. It certainly was not and could not have been so sixty or even thirty years ago, and in only the last case on insurance law which came before us (the case of *Dryer*) the vessel in question, which was a wooden ship, carried a cargo of iron from Cardiff. Of course a wooden ship may be overloaded with iron as well as with any other commodity, but I am not at all satisfied that a cargo of railway iron does not fairly and fully fall within the words of this policy, "any kind of goods or merchandises." Indeed the notion of there being any general assent in the trade or among merchants on this subject is virtually disclaimed by Mr Morton himself. He says—"It is for the underwriters to judge. Some people may hold the cargo as good, but if in my experience as an underwriter it is bad I would refuse it." But if "some people" may honestly hold it as good, so might the owner here, and if honestly so held there was no obligation to disclose. No other witness agrees with Mr Morton in thinking it improper to load a wooden ship with iron. Lees says the cargo is a trying one, and the weight "fully plenty;" and Galbraith also thinks the weight made it a special cargo; but no one gives any countenance to the opinion on which the defender's case proceeds that railway iron—apart from amount—is a cargo exceptionally dangerous for a wooden ship.

Lord Young—I am entirely of the same opinion, and have only this observation, which I daresay is superfluous, to make. With respect to the Sheriff-Substitute's ground of judgment, it seems to me to amount to this—that a time-policy upon a wooden ship is forfeited if the ship takes on board a cargo of iron, unless that intention so to load has been completely disclosed. Now, I consider that an altogether erroneous proposition.

Lord Craighill—I concur in the opinion delivered by your Lordship in the chair, both as regards the judgment that has been proposed and the reasons given for that judgment; and I am well pleased that this is the result which has been reached. I will add only one observation.

Even if there had been such a representation relative to Pernambuco as has been alleged by the defenders, there was no reason that I can discover why the relative condition thence arising should not have been introduced into the policy. This precaution would not have disparaged the doctrine that insurance is a contract of exuberant good faith. The practice which was followed on the present occasion by the defenders putting a part of the contract into the policy, and putting that which was alleged also to be a part of the contract into the memorandum-book, or reserving it in the memory of the insurer, is not only anomalous but extremely inconvenient. Had the alleged condition relative to Pernambuco, upon which the defenders are said to have relied, been a part of the policy, this litigation, at any rate, would have been avoided, because the contract would have been so fixed as to be beyond controversy, evidenced as it would have wholly been by the policy.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor :—

"Find in fact—(1) That the pursuers in behalf of the barquantine 'Eunice' insured that vessel from 23d May to 22d November 1881 inclusive, as employment might offer, in port and at sea, in docks and in ways, at all times and in all places whatsoever or wheresoever, conform to the policy libelled, granted in behalf of 122 underwriters, of whom the defender was one, undertaking £50 of £2500, the sum-total insured; (2) That on 30th May 1881 the said vessel sailed with a cargo of iron from Middlesbro' to Imbituba, a port on the coast of Brazil, and was wrecked and totally lost there on 13th September thereafter; (3) That it is not proved that there was any fraudulent misrepresentation or fraudulent concealment of any fact material to the risk on the part of the pursuers on entering into the said policy: Find in law, that the defender is liable to the pursuers to the extent underwritten by him as aforesaid, for the damage sustained by them in the loss of the said vessel: Therefore sustain the appeal; recal the judgments of the Sheriff-Substitute and of the Sheriff appealed against, and decern in terms of the conclusion of the action: Find the pursuers entitled to expenses in the Inferior Court and in this Court, and remit," &c.

Counsel for Appellants (Pursuers) — Trayner —Graham Murray. Agents—Smith & Mason, S.S.C.

Counsel for Respondent — Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, February 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

TYTLER *v.* WALKER AND OTHERS.

Bankrupt—Voting in Sequestration—Voucher—Conjunct and Confident—Bankruptcy (Scotland) Act 1856, *sec.* 49.

Held (*diss.* Lord Deas) that there is a distinction in the case of conjunct and confident persons as to what constitute sufficient vouchers to entitle a creditor to vote in a sequestration.

In a sequestration awarded in November 1880 there was lodged in January 1882 a claim by two brothers of the bankrupt, founded on promissory-notes bearing to be for value and to be dated in March 1876, and to be payable in March 1877. They had never been discounted, and had lain in the claimants' hands from their date till they were lodged with their claim. *Held* that the claim was insufficiently vouched, and that the claimants were not entitled to vote in the sequestration.

There was also produced a claim by the bankrupt's law-agents for the amount of a promissory-note given them in payment of their business account. The account itself was not produced. *Held* that the proper voucher was the account itself, and that the claim was therefore insufficiently vouched to entitle the claimant to vote.

This was an appeal under the Bankruptcy (Scotland) Act 1856 at the instance of James Tytler, chartered accountant, Aberdeen, trustee on the sequestrated estates of John Walker, Polwarth Terrace, Edinburgh, against a resolution adopted by a majority of the creditors of the bankrupt at a meeting held in Aberdeen on 15th July 1882, "that James Tytler, chartered accountant, Aberdeen, be now removed from the office of trustee in the sequestration."

The estates of John Walker were sequestrated by the Lord Ordinary officiating on the Bills on 3d November 1880, and the appellant was confirmed trustee in the sequestration on 18th November 1880. John Walker had previously, on 28th August 1880, granted in favour of the appellant a trust-disposition for behoof of his creditors.

The total amount of the claims of the creditors who supported the motion for the appellant's removal declared to be carried at the meeting on 15th July 1882 was £20,755, 1s., while the total amount of claims against the resolution was £10,244, 14s. 10d., and the only question raised in this case was whether the votes of the majority in favour of the resolution were legal or not.

The appellant in his condescendence objected to eleven votes tendered in support of the resolution, amounting to £19,427, 10s. 7d.

The Lord Ordinary (Kinnear) sustained the objections to two votes only, amounting to £4810 (being Nos. 7 and 8 of the votes objected to), and therefore found that the resolution complained of was carried by a majority of the creditors entitled to vote, and dismissed the appeal.

The appellant then reclaimed, and in the Inner House the case turned upon the validity of two