SCOTT, &c.
v.
MILLER & KERR

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.
March 22.

SCOTT & GIFFORD, *v* MILLER & KERR.

Insurance brokers found liable to an admitted owner of half a vessel for not having insured it in terms of the letter ordering the insurance. A registered owner found not the true owner of the other half of the vessel.

THIS was an action to recover from the defenders, insurance brokers, the sum of L. 1000, on the ground that they had failed to insure a vessel, in terms of a letter ordering the insurance.

DEFENCE.—A foreigner was owner of half the vessel, and not Gifford, the nominal pursuer. The pursuers did not object to the policy furnished.

ISSUES.

" It being admitted that the pursuer, Scott,
" was, on the 26th day of June 1821, proprie-
" tor of one-half of the vessel called the Earl
" of Dalhousie, and that, on the 4th day of
" July 1821, the said vessel sailed from the
" Clyde, and touched at Fort-William, in the
" north of Scotland, and, on her outward
" bound voyage, was totally lost on the 6th

" day of September 1821, on the side of the " Island of Anticosti, in the Gulf of St Lau- " rence :

" It being also admitted, that, by a policy " of Insurance, dated the 3d day of July 1821, " the Sea Insurance Company of Scotland in- " sured the said vessel on a voyage from Clyde " to Quebec, and ports of discharge and load- " ing in British North America, while there, " and back to Dundalk and Greenock, with " leave to call at Tobermory for passengers on " the voyage out :

" 1. Whether, on the 20th day of June " 1821, the pursuer, John Gifford, was owner " of the one-half of the said vessel ?

" 2. Whether the defenders, or any of " them, promised and agreed to insure, or to " get L. 1000 insured on the said vessel, on a " voyage, at and from Clyde to Quebec, (with " leave to call at a port in the Highlands, to " take in passengers,) while there, and thence " to Dundalk, and from Dundalk to Greenock, " in terms of a letter from Mr Joseph Manti- " cha, dated 16th June 1821, and whether " the defenders failed to perform the said pro- " mise and agreement, to the loss, injury, and " damage of the pursuers, or either of them ?

" Or,

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3. "Whether the pursuers accepted of the said "policy, dated 3d July 1821, as implement of "the promise and agreement foresaid, on the "part of the defenders?"

Russell opened the case for the pursuers, and said the action was founded on neglect of duty, and the defenders having failed to get an effectual insurance, must be held insurers. Instead of getting liberty for the vessel to call at *a port* in the Highlands, they had limited it to a particular place. They say we deviated on the coast of America from the voyage pointed out in the order for insurance; but we did not deviate from the voyage in the policy which they tendered to us.

When the insurance was found ineffectual, the defenders plead, and take an issue to prove that the owner was a foreigner, and that we accepted of the policy; but they must say that we did so knowing the defect in it.

Before a witness is asked whether he sold for another, his power to sell must be proved.

When a witness was asked if he sold the vessel, an objection was taken, that the power to sell must be proved before the sale.

LORD CHIEF COMMISSIONER.—If this person were the proprietor, you might ask whether he sold; but this was a sale by the witness, not for

himself but another; and you must first prove that he had power to sell.

Skene.—We do not dispute the general law, but they have admitted the power to sell in one of the parties.

Jeffrey, D. F.—The terms of the admission are, that Scott is owner, and it cannot be extended beyond its terms.

LORD CHIEF COMMISSIONER.—Was this in the view of the party at the time the admission was made? If it rested on the admission, I should say the objection was good; but something may also rest on the power of attorney being attested in America. I never could come to the conclusion, that an admission, that one party was owner, could be extended to prove the ownership of another party. But it has occurred on the Bench, that the manner in which this power is made up, and in which it comes here, may render this a probative document.

Jeffrey, D. F.—This is not probative either by the law of England or America. The law of England requires the attestation of a living witness. I admit that, if it would be received

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1 Phillipps, 411.

in the Court of Session, it must be so here, but I deny that a person taking the character of notary is sufficient. Tait, 104—26 Geo. III. c. 60, requires proof of the handwriting.

Cockburn.—The law of Scotland admits it if regularly executed.

LORD CHIEF COMMISSIONER.—The question on the law of Scotland may be thus stated. Whether that law admits a document in evidence which bears to be a notorial instrument? I cannot give evidence of the law of England, which is the only way in which it can go to the jury; but there is nothing in the passage in Phillipps to correct my memory on this subject. Every instrument executed in England requires a witness to prove it, but if a Scotch deed is produced, then a witness is not necessary to prove it good; but it is sufficient to prove that it is probative by the law of Scotland. In England it is necessary to call the subscribing witness to prove a bond, or; if he is dead, to call one to prove his writing; and there is no difference in this respect between a bond and power of attorney, if it was naked and stood alone; but in a foreign country, it is attested by a public officer to authenticate it, and to prevent the hardship of bringing a witness from

India or Nova Scotia. If the document is attested by a person who has authority, faith is given to the document by the law of England, and the *onus* is thrown on the other party. I therefore think we ought to receive this, subject to the observations of the Dean of Faculty.

The act of Parliament referred to was necessary, as deeds are found without attestation.

We admit this, and credit is to be given to it, unless it is proved false. It is regular; the seal is admitted; and there is no attempt to question this being the act of the notary.

The question was again raised, whether the deviation in America freed the defenders, when the Dean stated that it was an essential part of their case, because the order to insure was to Quebec, and if a policy had been granted in these terms, the pursuers could not have recovered.

LORD CHIEF COMMISSIONER.—Your plea is, that they had taken themselves out of the policy if it had been given. They object, that there was not a policy in terms of the letter, and you say they deviated on the coast of America from the voyage stated in the letter.

The case of the pursuer rests on there being

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no policy to cover the vessel touching at Fort William. The defender is to make out that the deviation on the coast of America would have freed the insurer if a policy had been granted.

Jeffrey, D. F., opened for the defenders.—The question is, on whom this loss is to fall, but there is a preliminary question, whether the pursuer has a right to half the property, or whether he was not guilty of a sort of fraud by lending his name to a foreigner? In England, the register was held not *prima facie* evidence, and the case decided there was not so strong as the present, where the real party could not be owner.

Perie *v.* Anderson, 4 Taunt. 652.

The broker can only be liable as the underwriter would have been if a policy had been granted in the terms ordered. I admit the error, and that, if the vessel had sailed on the voyage mentioned in the letter, the pursuer might have recovered; but they cannot combine the policy they ordered with the one they got, and say that out of this combination the loss is covered.

Circumstances in which parol evidence was admitted to prove the contents of a writing.

An objection was taken to the production of the deposition of a haver to prove

that a letter could not be recovered; and it was proposed to prove the contents by a witness.

LORD CHIEF COMMISSIONER.—The evidence proves that a letter was written at the time, and that it is not to be found. When a principal writing is not to be found, a copy is the next best evidence, and then parol testimony. In this case I think sufficient has been proved to entitle the party to parol evidence of its contents.

The pursuers afterwards admitted that the vessel deviated, if they were limited to a voyage from the Highlands to Quebec without liberty to touch at port or ports.

Cockburn, in reply.—The defenders acted, and were paid, as brokers, and neglected the instructions given. The Court of Session held that the name of a person being in the register did not make him owner; but it is a circumstance along with the other evidence for your consideration, and you have had proof of his acting as owner, and of his granting bond and swearing to the fact. The defenders say he held it in trust; but this is inconsistent with the policy of the law, which holds the person in the register liable as owner.

On the second issue, the defenders have no

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right to talk of a deviation, having failed to send a copy of the policy.

LORD CHIEF COMMISSIONER.—The first subject of inquiry is, Whether Gifford was a true owner, or held the share in trust? but even if he was not owner, it is necessary to consider the second question with great attention. On the first point, nothing better can be stated than the interlocutor of the Court of Session, which finds that the register *per se* is not sufficient. This does not go quite so far as the English Courts have done, as it admits the register to be an ingredient of proof along with other evidence, and, therefore, the case has been sent here. You will therefore consider whether the pursuer, who is bound to make out the fact, has brought other evidence, and whether that evidence has been met by the defender. You have it proved that the vendition was made out without inquiry as to the ownership—you have also proof of certain acts by the pursuer, but whether as owner or clerk to another, does not clearly appear. In opposition to this, you have the testimony of a witness for the defender, proving the contents of a paper, in which the pursuer acknowledged that he acted for another; and if the memory

of this witness is correct, the evidence for the pursuer flies off. There were also other facts as to payment of money, which are not easily explained if the pursuer was the owner.

[It was here suggested that the registry acts do not admit of a ship being held in trust, but make the trustee owner.]

If this is the law, I cannot conceive how this case comes here, as the Court of Session had that act before them, and I am now bound to send it to the jury on the facts proved. If I am wrong, the party may move for a new trial, and tender a bill of exceptions. It is impossible, in the face of the terms of the interlocutor, for me to direct you (the jury) to find that the pursuer was trustee, leaving the question for argument in the Court of Session; but I am of opinion that you must find in the affirmative or negative of the issues.

The pursuer brings his action on a disobedience of the instructions given, and says he is entitled to recover, though he deviated by going to Fort William, as he did not deviate in America from the terms of the policy; the defender, on the other hand, says you abandoned this policy, and it is now waste paper, and you cannot rest on it where it is more favourable to you than your instructions. We

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have only to consider this on the question, Whether the defenders agreed, and whether they failed, and that to the loss of the pursuer? A broker is an interposed agent, and is to act according to instructions; and there is no doubt that the vessel having touched at a port in the Highlands, if she had sailed direct for Quebec and been lost, the pursuer would have recovered. The broker must have been the insurer; but here the single question is, Whether the non-recovery has been occasioned by the non-performance of the agreement? The broker will be relieved if the underwriter would have been relieved, and this is to be decided on the order, not on the policy. The deviation on the coast of America is admitted, and, as that deviation would have relieved the underwriter if a policy had been granted in terms of the order, the same law must be applied to the broker. On the second issue, the only verdict you can give consistent with the law, as it has been decided in this case in the Court of Session, is for the defenders. On the first, you will consider the evidence, and on the last, as it is given up, you will find for the pursuers.

Verdict—" Find for the defenders on the " first issue, and find for the pursuer on the

" second and third issues, and that the sum
" due to the pursuer, Scott, on the policy, is
" L. 500."

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

SIR WILLIAM FORBES & COMPANY *v.* EDIN-BURGH LIFE ASSURANCE COMPANY.

1830. March 23.

Finding that insurers were indebted in the sum insured on a life.

AN action, by assignees to a policy, for payment of the sum insured on a life.

DEFENCE.—Misrepresentation and non-statement of material facts.

ISSUE.

" It being admitted, that, on the 26th day
" of September 1826, the defenders granted
" the policy of insurance, No. 6 of process,
" whereby, in consideration of a certain pre-
" mium, the defenders agreed to pay to Wil-
" liam Inglis, W. S. the sum of L. 3000 Ster-
" ling, on the death of John Thomas Earl of
" Mar, and that the right to the said policy is
" now in the pursuers:

" It being also admitted, that on the 20th
" day of September 1828, the said Earl died: