

1770. " give all necessary and proper directions for carrying this  
 " judgment into execution."

GRAHAME, &C.

v.

M'NAIR.

For Appellants, *J. Montgomery, John Madocks.*

For Respondent, *Al. Wedderburn, Thos. Lockhart.*

JOHN GRAHAME, JAMES COULTER, and Others, }  
 Underwriters of the Ship " The Jean," } *Appellants;*  
 and her Cargo, - - - - - }  
 ROBERT M'NAIR, - - - - - *Respondent.*

House of Lords, 29th March 1770.

MARINE INSURANCE—DEVIATION.—Held that deviation of the ship in the course of the voyage insured, must be wilful, in order to void the policy, and that accidental or involuntary deviation will not have that effect. Circumstances in which held wilful deviation not proven.

This was an action brought for a loss on a policy of insurance for £1000, effected on the ship Jean and her cargo, on her voyage from Virginia to Barbadoes. The ship, on proceeding on her voyage, struck on the island of Bermudus, and was lost.

When the insurance was effected in Glasgow the ship was then in Virginia, and the respondent's son was there in charge of her, as master, promising to sail in ten days.

She sailed on the 25th June, but, in consequence of losing an anchor, she put back, and again sailed on the 27th June.

June 27, 1750.

Of this latter date, the son wrote the respondent, his father, giving him a fresh account of what cargo was on board—the value thereof, and urging additional insurance, stating " be sure you do not neglect to insure the above  
 " value of yours in time; for there is an island called Ber-  
 " mudus, that lies betwixt Virginia and Barbadoes, that I  
 " am very much afraid of; and there is strange notions run  
 " into my head that I will meet with some accident about  
 " it."

This letter was shewn to one Jamieson of Glasgow, in order to effect a further insurance; but, upon reading it, he refused, assigning as his reason, that the goods were over-valued, and he did not like the dreaming part of it, which appeared to him to look like a waking dream.

The respondent then applied to Stalker, an insurance-broker, for an additional insurance, to the extent of £350,

but without shewing him this letter; and the insurance was effected accordingly.

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The ship struck on the Bermudus, and was lost. The appellants stated that this was intentionally done, by agreement between the master of the vessel and M'Nair's son, who was in charge of her, and consequently a deviation wilfully resorted to voided the policy. That Bermudus did not lie in the usual course of the voyage from Virginia to Barbadoes, but is a great many leagues out of the due and usual course of that voyage; and the questions chiefly urged, in reference to the policy for £1000, the additional one for £350 being given up, were—1st. Whether there was any deviation from the due usual course of the voyage insured? and, 2d. Supposing there was, whether such deviation was wilful or accidental?

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Proof was led by both parties; and, in addition to this, the appellants maintained that the above quoted letter of M'Nair's son, dated at Virginia, the 27th June 1750, imported at least *an intention to touch at Bermudus*, even before he sailed.

The proof led was conflicting. It was proved by Craig, who was chief mate on the voyage, that two or three days after she sailed on her voyage, M'Nair proposed to him to touch at Bermudus, but he refusing, owing to the danger of the coast, M'Nair told him that if the ship met with accident he should not be loser; and Craig then agreeing, the vessel's course was shaped for Bermudus, which course was continued until the morning of 3d July, when she struck on the Bermudus. Mathie, the second mate, had heard M'Nair say, that he had a good mind to call at Bermudus, as corn was selling there at 9 bits per bushel. That on 2d July, M'Nair, Craig, and Mathie, compared their reckonings. Mathie said to them, that, according to his reckoning, if the ship was steered as they were then steering her, they would see or feel the island of Bermudus before daylight. On the other hand, M'Nair's own journal, or log-book, contradicted this evidence, and shewed that, on the 2d July, the ship was 20 leagues distant from the island of Bermudus, and that the course steered was different from that deponed to by Mathie and Craig. The journal of M'Nair was, however, impeached. He, after the wreck, had got Craig's journal of the voyage to copy, and had mentioned to him that his reckonings made the ship to be too near the Bermudus when she was wrecked, and therefore he should make her farther

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from these islands. The several journals kept were submitted to the inspection of several able navigators, who, after an examination, in presence of M'Nair, Craig, and Mathie, afterwards deponed that these journals nearly corresponded for the whole voyage up to 2d July, when they widely differed as to the course the ship was steering. That if the courses had been followed according to M'Nair's journal, it was impossible for the ship to come nigh Bermudus, whereas, according to Craig's journal, there appeared a design to get sight of that island. That ships in their direct courses from Virginia to Barbadoes always keep at a great distance from the dangerous island of Bermudus, and seldom come nearer it than 20, 40, or 50 leagues to the northward, *except when wind and weather oblige them*. From these materials they made a chart, which showed that on 2d July Craig's journal made the ship steering in a direct course to the Bermudus, but that, according to M'Nair's journal, she was then about 20 leagues from that island, and steering a different course.

The respondent next got up a chart—the object of which was to shew, that the influence of the current or gulph of Florida, frequently operates to throw vessels off their direct course in steering for Barbadoes. But evidence was adduced to shew that the force of this current was not felt so far as Bermudus. It was also proved by the respondent, that when the ship sailed from Virginia, she immediately encountered very bad weather and hard gales of wind. The wind during the first three days was at west and north-west; sometimes varying in squalls of rain and thunder to the extent of six points to west south-west. The course of the ship during these three days was east and east south-east, sometimes running before the wind, carrying no other sail than fore-sail, and sometimes in hard squalls under bare poles. On the fifth day the weather was so cloudy as to disable them from making any observation on which they could rely. That on the eight day the weather was more moderate, and a good observation had, and the ship's course steering from the south-east. About six o'clock of the evening they foresaw a squall of wind coming on, while the ship was sailing along as close to the wind as possible. That they had compared the reckonings already alluded to, and found them to differ—Mathie stating to M'Nair that if the ship was steered in her present course, they would see or feel the island of Bermudus before daylight. But the wit-

nesses also depone "that there was no foul play," that M'Nair was in great concern for the loss of the ship,—that the ship was not industriously cast away, but was cast away by accident—that there were three or four sloops wrecked on the same side of the island at the same time.

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The Lords of Council and Session, by a majority of six to five, found "it *not proven* that there was any wilful deviation in the voyage from Virginia to Barbadoes; find the policy of insurance does not, in this case, oblige the insurers to pay the sums at which the ship and cargo were insured, but only the real value of the ship and cargo; and find the value of the ship insured to be £456 Virginia currency, being the original price paid by James M'Nair for her; find that James M'Nair's invoice is no evidence of the value of the cargo, and remit to the Lord Ordinary to proceed accordingly." Feb. 8, 1765.

On reclaiming petition for the appellants, the Court altered, and held that *no action* lay on the policy in respect of *the deviation* in the course of the voyage; but the respondent reclaiming against this interlocutor, the Lords, by a majority of seven to six, returned to their first interlocutor, finding "it not proven that there was any wilful deviation." June 21, —  
Aug. 7, —

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—That there was clear deviation, considerably out of the usual course, in proceeding to Barbadoes, and this under circumstances which import a clear intention on the part of James M'Nair to do so; and deviation being made out, and no evidence adduced to shew that this was by the irresistible force of accident, storm, or through some other involuntary cause, the presumption was that it was wilful. In all such contracts, it is an implied warranty that the ship be steered in the usual due course, and if she is intentionally carried out of that course, the policy is then from that moment discharged, and the underwriters free. In this case there was intentional deviation, and the act of the master must be held as that of the owner, they standing in the relation of father and son.

*Pleaded for the Respondent.*—That no wilful or intentional deviation from the voyage was established by the evidence adduced—that deviation, in order to vacate the policy, must be wilful—that here every circumstance proved the reverse of an intentional deviation, and specially one for the purpose of casting away the ship. M'Nair had put back to

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replace a lost anchor. He had sold his large jolly boat, and took only a small boat, which was barely sufficient to hold the crew and save their lives. The witnesses had sworn to M'Nair being concerned for their and the ship's safety, and that there was no foul play. Besides, men of experience had sworn that had it been M'Nair's intention to have gone into the island, no man in his senses would have gone in upon the island in the night time, and in the manner he did, and consequently, that if there was any deviation at all, it was purely accidental and involuntary, arising from the stress of weather. That the ship was in the usual course, 20 leagues from the island, and steering to Barbadoes on the day before the wreck, and that it was about midnight thereof, when a squall came on, that she was lost. Even if there was fraud on the part of the master, which had not been established, that fraud was not traced to the respondent, his father, who was no way accessory or participant therein, and ignorant thereof. Besides, the respondent, by the policy, is expressly secured by the barratry of the master.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Appellants, *J. Dunning*.

For Respondent, *John Dalrymple, Ja. Montgomery, Al. Wedderburn, John Swinton, Jun.*

*Note.*—The only point upon which the appeal was brought to the House of Lords, was as to the wilful deviation from the due course of the voyage insured. The other point in the interlocutor of 8th February 1765, Whether the policy obliged the insurers to pay the sums at which the ship and cargo were insured, viz. £1000, or the value of the ship and cargo merely, as the same might be ascertained? formed an after branch of this case, which also went to the House of Lords, and where the judgment of the Court of Session on that point was *reversed*, 15th Feb. 1773. *Vide infra.*