

it is to decide upon the points which are presented to you. I shall June 15. 1824.
humbly move your Lordships to come to some special findings on the
first appeal; and shall move your Lordships also to direct that the inter-
locutors in the second appeal be generally reversed; and if so, that will
establish the validity of the resolution of the creditors at that meeting;
and then, as I have already said, my Lords, I trust, at least I confi-
dently hope, this will put an end to the litigation, which has continued
so long to the vexation of these parties.

J. DUTHIE—

FRASER,—Solicitors.

(*Ap. Ca. No. 61.*)

ROBERT BROWN, Junior, Appellant.—*More.*

No. 47.

WILLIAM MAXWELL and Others, Trustees of Alexander Camp-
bell and James Campbell, Respondents.—*Adam—Ivory.*

Insurance.—An insurance having been made on goods to be exported from Leith to
Gottenburgh, (at a time when Sweden was at peace with Britain, but when the im-
portation of British goods was prohibited), with power to carry simulated papers,
and any flag whatever; and the vessel having sailed on the voyage, but having been
captured by a British ship under a mistake, and brought back to Leith; and having
afterwards been released; and having, after war was known to have been declared
by Sweden against Britain, again sailed to Gottenburgh; and having been captured
by the Danes, and, together with the goods, condemned;—Held, (reversing the
judgment of the Court of Session), That the underwriters were liable.

In the month of November 1810, the appellant, Robert Brown,
junior, a merchant in Glasgow, was desirous to export a quantity
of sugar from Leith to Gottenburgh. At this time Britain was
engaged in a most active war with France, and Buonaparte had
established the continental system with the view of excluding the
goods of British merchants from the continent of Europe. In
consequence of this, British merchants had recourse to simulated
papers, in order to get their goods landed on the continent and
sold; and the British Government was in the practice of grant-
ing licenses which protected them against seizure by the British
cruizers.* Sweden at this time stood in a position of neutrality,

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2D DIVISION.
Lord Pitmilley.

* The history and origin of these simulated papers were thus explained by the appel-
lant in one of his pleadings to the Court of Session:—‘ Certain Frenchmen, who had
‘ emigrated to America, and who were well acquainted with the forms of clearances
‘ used in the American custom-houses, and with the form of what was called a certifi-
‘ cate of origin, (being a document introduced by the French authorities for the pur-

June 15. 1824. but had entered into a treaty with Buonaparte, in consequence of which King Charles XIII. issued a proclamation, commanding
 ‘ that from and after the 24th April next no goods shall be im-
 ‘ ported, neither on paying the duties nor on transits, that belong
 ‘ to his majesty the King of Great Britain and Ireland, his colonies,
 ‘ or countries under the influence of the British Government, nor
 ‘ goods of any description whatsoever, loaded in vessels from
 ‘ Great Britain or any of her dependencies, be admitted into our
 ‘ ports; and that all vessels, under whatsoever flag, that shall be
 ‘ proved to carry such goods, and are not furnished with certifi-
 ‘ cates and documents to certify the origin and full particulars of
 ‘ their cargoes from their ports of loading, shall, when they arrive
 ‘ in our harbours, be ordered off; save and except such vessels
 ‘ as are solely loaded with salt, the importation of which, from
 ‘ all foreign countries, we permit, in vessels not belonging to His
 ‘ Britannic Majesty or his subjects.’ It therefore became neces-
 sary that Brown should adopt measures for evading the effect of
 this proclamation; and with that view he chartered the foreign
 ship *Maria Francisca*, commanded and manned by a foreign cap-
 tain and crew; and obtained a license from the British Govern-
 ment, authorizing him, for the period of four months, to export
 his goods to any port of Sweden, Denmark, or the Baltic. The
 sugars were then put on board the vessel, and were accompanied
 by simulated papers, which represented her as an American ship,
 sailing from an American port, and the goods as belonging to an
 American,—America being at peace with Sweden and the other
 European powers. He then, on the 2d of November 1810,
 entered into a policy of insurance with several underwriters in
 London, Leith, Glasgow, and other places, by which, in con-
 sideration of a premium of 12 guineas per cent, to return 2 per
 cent for sailing with convoy, they insured the goods to the extent
 of L. 1550, ‘ at and from Leith to Gottenburgh; with liberty to
 ‘ seek and join convoy, and to carry simulated papers and British

‘ pose of accompanying cargoes of their own colonial produce), suggested an expedient
 ‘ to the British merchants, by which the effects of the decrees above-mentioned might
 ‘ be defeated, and British colonial produce introduced into the prohibited ports.’—
 ‘ The expedient suggested by the French emigrants was this:—They proposed, that
 ‘ vessels sailing with colonial produce from the ports of Great Britain should be man-
 ‘ ned by foreigners, and should be documented with papers, which they engaged to fab-
 ‘ ricate, purporting that they had cleared out from America, and were carrying French
 ‘ colonial produce. The great skill with which these emigrants were able to forge the
 ‘ signatures, and to imitate the seals of the officers whom they thus personated, enabled
 ‘ many a neutral ship to assume the appearance of having cleared out from a port in
 ‘ America, though she actually sailed from Great Britain.’

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‘ license, and to sail under any flag;’ the insurance to continue until ‘ the goods and merchandise whatsoever shall be arrived at Gottenburgh, and until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to this insurance.’ And further, the underwriters agreed, ‘ in case of loss, capture, seizure, or detention by any power whatever, or any cause whatever, to pay a loss within two months after receipt of advice by the assured, by a bill at four months, without waiting for official documents.’

On the 15th of November the *Maria Francisca* sailed from Leith on her voyage to Gottenburgh along with other vessels, under convoy of the *Childers*, a British sloop of war. She was, however, separated from the *Childers* in a storm; and after obtaining convoy under another British ship, the *Gluckstadt*, she was deprived of her protection by another storm in the course of the night, and was boarded by the British gun-brig *Bold*. The officer of this vessel, on coming aboard, conceived that the *Maria* was a Dane, and therefore addressed the master in the Danish language; and the master, supposing that the *Bold* was a Danish ship of war, acted upon that footing, and concealed his British license, in consequence of which she was captured and carried into Leith, where she arrived on the 31st of December. It was not alleged that there was any blame attachable to either party for this seizure.

In the meanwhile, Bernadotte had been elected Crown Prince of Sweden, and on the 12th of November war was declared against Britain, and a proclamation was issued prohibiting all British vessels from entering any of the Swedish ports, and ‘ all importation into the kingdom of such goods, or colonial goods, of whatever origin the same may be, or under whatever flag they may arrive, under pain of confiscation.’ Although the declaration and proclamation were issued prior to the sailing of the *Maria*, yet they were not known in Britain, nor for several days after she had been sent into Leith by the *Bold*. On her arrival there, the appellant intimated to the underwriters, that as the *Maria* had been seized, he held the condition of the policy to have come into existence, and therefore abandoned the cargo to them, and demanded payment of the loss. To this, however, they would not accede, but insisted that the voyage should be prosecuted. After some delay the *Maria* was released, and the appellant having obtained a new license, she

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again sailed from Leith on the 15th of April 1811, under convoy of the British gun-brig Archer, and three days thereafter the appellant notified this to the underwriters. By the appellant it was stated, that the declaration of war, instead of increasing the risk, had rather diminished it; that after that event premiums fell 50 per cent, and that if the underwriters had agreed to vacate the policies, (which he wished them to do), he could have insured the cargo at this diminished rate.

The ship still carried the same simulated papers as formerly, and after accompanying the convoy for some time, she was separated from it on the 23d of April in a gale of wind near Shetland, and was then captured by the Danish privateer Klempaa, and carried into Bergen, where the simulation of the papers having been detected, both the ship and cargo were condemned. Several of the underwriters immediately settled in terms of the policies; but the respondents, alleging that the second sailing constituted a new voyage, and that the declaration of war created a new risk, maintained that they were not liable for the loss.

The appellant then brought an action against them before the Admiralty Court, and on the 17th February 1814 the Judge-Admiral (Murray) pronounced this interlocutor:—‘ Finds, that a
 ‘ cargo of sugars on board the Maria Francisca was, by policy of
 ‘ insurance dated the 17th November 1810, insured at the value
 ‘ of L. 2300 sterling to the pursuer by the defenders, at and
 ‘ from Leith to Gottenburgh, until the safe landing of the sugars,
 ‘ with liberty to seek and join convoy, and carry simulated
 ‘ papers and British license, and to sail under any flag; and the
 ‘ underwriters likewise agreed, in case of loss, capture, seizure,
 ‘ or detention, by any power whatever, or any cause whatever, to
 ‘ pay a loss, within two months after receipt of advice by the in-
 ‘ sured, by bills at four months, without waiting for official do-
 ‘ cuments; and the premium was twelve guineas per cent, to re-
 ‘ turn two pounds per cent for sailing with convoy and arrival :
 ‘ Finds, that in November 1810 the Maria Francisca, with a
 ‘ British license and simulated American papers, sailed from
 ‘ Leith with the sugars on said voyage, under convoy of the
 ‘ sloop of war Childers; from which having been separated in a
 ‘ storm, she afterwards found convoy under the Gluckstadt, from
 ‘ which she was also separated in the night; and having been
 ‘ captured by the gun-brig Bold, was brought to Leith Roads,
 ‘ where she was some time afterwards restored to her owners;
 ‘ and that her being thus brought to Leith Roads was innocent-
 ‘ ly occasioned by her captain having been afraid to shew his

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' British license to the officer of the Bold, who came on board, owing to his suspecting him from his language to be a Dane, and, having thus concealed his license, was considered a lawful prize; and therefore finds, that this in no way annulled the policy: Finds, that in winter 1810-11 war was declared between Sweden and Great Britain, but that this made no difference on the insurance made on the said vessel; because British colonial property having been long before prohibited to be imported into Sweden, the sugars insured were to be covered by simulated American papers, with a British license; and as the property was understood, by both underwriters and insured, to be covered as apparently American, a declaration of war by Sweden against Great Britain made no difference on the risk;—and, 2dly, The declaration of war made no change in the real existing relations between Sweden and Britain, not only as præmia of insurance rather fell than rose after the declaration of war, but as Government allowed fleets to sail from the ports of Britain to Gottenburgh with British licenses, and under convoys, in precisely the same way after the war as before it was declared: Finds this latter fact fully proved by a certificate by John Wilson Croker, Secretary to the Board of Admiralty of Great Britain, dated 29th November 1813, and which also ascertains that the said Maria Francisca sailed again from Leith on the 15th of April 1811, under convoy of his Majesty's gun-brig Archer, commanded by Lieutenant James Lindsay Carnegie, for Gottenburgh in Sweden, and on all hands it is admitted, that the same cargo of sugar was on board: Finds, that the Maria Francisca, with the said sugars on board, was captured on said voyage by the Danes, and carried into Bergen, where she and her cargo were condemned as lawful prize of the captors; and, therefore, repels the defences.' The respondents having presented a petition, the Judge-Admiral refused it, and at the same time issued this note:—' That the Maria Francisca actually sailed for Gottenburgh, is proved by official documents. It is therefore asserted, contrary to evidence, that she did not sail for that port. It is believed, too, that after she sailed the underwriters got notice of her having sailed. They did not then declare the policy null. If they had done so, a new one might have been made, leaving open the question of premium due. They took their chance of the vessel performing her voyage, and, when lost, they refuse to indemnify the owners.' The respondents then brought the case under the review of the Court of Session by a suspension, and

June 15. 1824. after some proceedings before Lord Pitmilley, his Lordship remitted it to the Jury Court with a view to the preparation of issues. The case, however, was returned to his Lordship accompanied by a report from the clerk, stating, that the following points of law required to be settled in the first place:—‘ 1st, ‘ Whether the second sailing was the voyage insured by the ‘ policy? 2dly, Whether, if it was not, the policy could be ‘ extended by the verbal agreement, or by the mere understand- ‘ ing of the parties, as alleged by the charger?’ And it was added, ‘ If, in point of law, the voyage was ended by the deten- ‘ tion, and could not be continued by verbal agreement, there ‘ is no question of fact to try. If otherwise, then a special ver- ‘ dict upon the general issues would raise the question to be ‘ decided by the Court of Session with greater certainty than any ‘ attempt to attain that end by special issues previously settled. ‘ The strong probability being, that some omission in the issues ‘ might leave the question untried, and so render the proceeding ‘ abortive.’ After hearing parties on these points, his Lordship pronounced this interlocutor:—‘ Finds, with reference to the first ‘ point above stated, that long after the Swedish proclamation of ‘ April 1810, prohibiting the introduction of British colonial pro- ‘ duce into Sweden, the policy of insurance mentioned in the ‘ pleadings having been entered into, and the Maria Francisca ‘ having sailed on the 15th of November 1810, with a British ‘ license, and with simulated papers, on the voyage insured, she ‘ was, in the night betwixt the 5th and 6th of December 1810, ‘ after she had proceeded as far as the Scaw, taken possession of ‘ by the gun-brig Bold, and was brought back to Leith on the ‘ 31st of December; and finds, that according to the charger’s ‘ account of the facts, this seizure and detention of the ship hap- ‘ pened without any fault on the part of the master: Finds, that ‘ on the supposition of the master not having been to blame, with ‘ regard to the seizure of the vessel and her return to Leith, the ‘ circumstance of her having been so seized and sent back formed ‘ no legal bar to her afterwards prosecuting the voyage insured, ‘ any more than would have been the case if the ship had been ‘ detained, and had been driven into any other port by bad ‘ weather or other accident: Finds, that neither did the fact of the ‘ owners having intimated an intention to abandon the cargo to ‘ the insurers after the vessel had been forced back to Leith, and ‘ which fact is proved by the letter of 10th January 1811, form ‘ any legal bar to the vessel afterwards proceeding on the voy- ‘ age insured, when the owners learned that the insurers were

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‘ not disposed to acknowledge their right to abandon: That
 ‘ although the vessel remained in the port of Leith from the
 ‘ 31st of December 1810 till the 15th of April 1811, when she
 ‘ sailed under convoy for Gottenburgh, yet the fact of this long
 ‘ detention of the ship at Leith could not prevent the owners
 ‘ from prosecuting the voyage insured, it being proved that she
 ‘ had no opportunity, after she was brought back to Leith, of
 ‘ sailing with convoy earlier than the 15th of April: That
 ‘ the declaration of war between this country and Sweden dur-
 ‘ ing the time when the ship lay at Leith, after she had been
 ‘ brought back by the Bold gun-brig, and the fact of the owners
 ‘ of the goods insured and the master of the ship being in the
 ‘ knowledge of war having been declared between the two states,
 ‘ formed no legal bar to the Maria Francisca proceeding on her
 ‘ voyage, seeing that on this occasion she sailed with a British
 ‘ license, and with convoy, bound for the port of Gottenburgh,
 ‘ as is proved by the certificate of the Secretary of the Admi-
 ‘ ralty: Therefore, on the whole, with reference to the first
 ‘ point, finds, that the second sailing must be held to be a con-
 ‘ tinuation of the voyage insured by the policy, and which was
 ‘ begun on the 15th of November 1810; and that if the insurers
 ‘ are to continue to contest this point, it will be incumbent on
 ‘ them to undertake to prove that the seizure and detention of
 ‘ the ship by the Bold gun-brig happened through the fault of
 ‘ the master of the Maria Francisca, or that the detention at
 ‘ Leith, from the 31st of December 1810 to the 15th of April
 ‘ 1811, was owing to his fault, or that of the owners: That
 ‘ the above findings render it unnecessary to pronounce any
 ‘ decision on the second point of law, which is stated in the re-
 ‘ port of the clerk of the Jury Court; and appoints the parties
 ‘ to enrol the cause, in order that the suspenders may state whe-
 ‘ ther they will undertake to establish, by evidence, the matters
 ‘ of fact above referred to, viz. that the seizure and detention of
 ‘ the ship by the gun-brig Bold was occasioned by the fault of
 ‘ the master of the Maria Francisca, or that the detention at
 ‘ Leith, from the 31st of December 1810 to the 15th of April
 ‘ 1811, was owing to his fault, or that of the owners.’ The
 respondents having declined to undertake a proof of these facts,
 his Lordship repelled the reasons of suspension, and found the
 letters orderly proceeded. The respondents then reclaimed to
 the Inner-House, and their Lordships, after ordering a con-
 descendance ‘ of the facts they aver and offer to prove tending
 ‘ to establish the change of the voyage, and alteration of risk,

June 15. 1824. 'alleged to have occurred in this case,' altered the interlocutor, and suspended the letters simpliciter, but found no expenses due; and, on advising a petition for the appellant, they adhered to this interlocutor, 14th May 1822, 'in respect that the petitioner 'does not distinctly offer to prove any consent on the part of the 'underwriters, before the vessel sailed from Leith on the 15th 'April 1811, to hold the voyage covered by the policy.'*

Against these judgments of the Inner-House, the appellant entered an appeal to the House of Lords, and contended that they were erroneous,—

1. Because the vessel and cargo were lost in the prosecution of the original voyage, and by one of the risks expressly insured against by the respondents and the other underwriters. In support of this proposition he maintained, that there had been only one, and not two voyages; that the voyage commenced when the vessel sailed in November from Leith; and that the circumstance of her having been detained and carried back to Leith by the *Bold*, was no more a termination of the voyage than if she had been sent into any other port, or as if she had been driven back by stress of weather: That if so, then the circumstance of war having been declared subsequent to her first sailing, could not deprive the appellant of the benefit of the policy, because, had it not been for the detention by the *Bold*, she would have proceeded on the voyage; and it was not alleged, that if, in the course of it, or on arrival at Gottenburgh, she had been seized and condemned, the underwriters would have been liberated. It was true, that before resuming the voyage in the month of April, a new license had been obtained; but this was necessary, both because the period of the first one had expired, and because, as Sweden was now a hostile power, it was requisite that the British Government should permit the trade to be carried on with the enemy. But this, so far from being prejudicial to the underwriters, was beneficial to them, seeing that without such a license she would have been liable to be seized by any British ship of war, and condemned for carrying on trade with the enemy, so that the risk was thereby diminished.

2. Because the declaration of war between Sweden and Great Britain, in point of fact, produced no difference in the risk of trading between the two countries from that which had pre-

* See 1. Shaw and Ballantine, No. 462.; and Fac. Coll. No. 173.; where the opinions of the Judges are given at full length; and from which it appears that all the Judges concurred in the interlocutor except Lord Craigie.

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viously existed; and, on the contrary, the importation of colonial produce, by means of simulated papers, was so much winked at by the Swedish Government after the declaration of war, that the risk actually was diminished, and insurances between Leith and Gottenburgh fell so low as two guineas per cent; so that the declaration was no addition to the risk, even supposing the respondents could relevantly found upon it.

3. Because, as the vessel was to sail under simulated papers, and from these papers she appeared to be an American carrying an American cargo, and the respondents had become bound to insure her safe arrival at Gottenburgh in that character, they truly came under an obligation of insurance, not upon a British ship or cargo, but on an American one; and therefore the declaration of war between Sweden and Britain could no more affect such an insurance, than if war had been declared between France and Turkey. And,

4. Because, as the vessel was condemned in respect of carrying simulated papers, and there was a special contract that she should safely sail under these simulated papers, and that she should not be affected by any laws or regulations proceeding from the British or Swedish Governments during the existence of the voyage, the respondents were liable under the policy.

By the respondents, on the other hand, it was maintained,—

1. That at the period of the insurance, and when the vessel sailed in November, Britain and Sweden were at peace with each other; and the proclamation issued by the latter country declared, not that the ships carrying British goods should be confiscated, but only that they should ‘be ordered off,’ so that there was no danger of confiscation; and consequently, the risk which was undertaken was very different from that which must exist in a time of war: That before the second sailing, the appellant was perfectly aware of the declaration of war, and consequently, that the Swedish ships were anxiously searching the seas for vessels carrying British goods; but nevertheless the appellant, without entering into any new agreement with the respondents, sent off the vessel under this great change of circumstances; and therefore this must be held to have been a new voyage, and a new risk: That it was true that a new license had been obtained; but although this might protect the appellant from the pains of law for trading with an enemy, yet it could not affect the rights of the respondents.

2. That the declaration of war had further a most material effect upon the contract, because it was no longer possible to

June 15. 1824. approach the port of Gottenburgh: That the terminus ad quem of the voyage sailed upon was different from that of the voyage described in the policy; and accordingly it was proved, by a correspondence between the appellant and his agents at Gottenburgh, after the return of the ship to Leith, that as the importation of all colonial produce was prohibited, the only way in which it could be landed was, by hovering off the coast, and smuggling it ashore by boats and lighters.

3. That it was no doubt true, that the respondents had permitted the vessel to carry simulated papers; but that permission only had the effect of putting it in the appellant's power to pass off his goods as neutral, and to expose them to that particular species of risk to which a discovery that they were truly British goods might render them liable at a time when^t the two countries were at peace; but the respondents did not insure that the goods should be dealt with in all respects as American. And,

4. That as the second voyage and risk were different, the policy thereby came to an end; and consequently, the respondents could not be liable for the capture of the ship by the Danes.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be reversed, and that the reasons of 'suspension be repelled, and the letters be found orderly proceeded.'

LORD GIFFORD.—My Lords, There is a case which was lately heard before your Lordships—of *Brown v. Maxwell*. This was an appeal to your Lordships' House against an interlocutor of the Court of Session, which had been heard before them, arising out of a policy of insurance dated so long ago as the year 1810, by which the appellant, Mr Brown, who had shipped on board a vessel called the *Maria Francisca* a quantity of sugar, had insured the goods on board that vessel on a voyage from Leith to Gottenburgh, with liberty to carry simulated papers and a British license. My Lords, it is well known to your Lordships, that at that time endeavours were made by the French Government to prevent the importation of English goods and colonial produce into the continent, and that, in consequence of that, vessels at that time obtained licenses from the British Government to carry simulated papers, in order to enable them, if possible, to carry colonial produce, particularly to Sweden; and in this case a license was obtained from the English Government for this vessel to carry simulated papers on the voyage. My Lords, after this insurance had been effected, the vessel, on the 15th of November 1810, sailed from Leith for Gottenburgh; but in the course of her voyage, before she had arrived at her port of destination, she was detained by an English vessel called the *Bold*, suspecting her to be a Danish ship, and was brought back

by that English cruizer to the port of Leith, from which she had previously departed. My Lords, in the interim a declaration of war had been issued by Sweden against this country in the latter end of the month of November 1810, three days before the vessel had sailed from Leith for Gottenburgh. In consequence of her being brought back to Leith, from the season, and other circumstances, she was detained there for a considerable time. She was unable to sail again from thence until the following April. In the mean time, and with a view to her second departure, she had obtained a fresh license for the voyage, the former license having expired. On her first coming back to Leith there was an intention on the part of the assured, the appellant in this case, to abandon the cargo to the underwriters; but they refused to accept the abandonment, and in consequence of that the vessel subsequently sailed again from Leith. My Lords, after the second departure, and in the course of the voyage, she was captured by the enemy. A claim was then made on the underwriters, which was resisted; and in consequence of that resistance proceedings were commenced in the Court of Admiralty in Scotland by the assured, the present appellant, to recover, against the present respondents, the sum of money they had underwritten. My Lords, it is not necessary to trouble your Lordships with the judgment pronounced by the Judge-Admiral—the result was in favour of the assured. The cause was afterwards removed to the Court of Session; and the result of the decision of the Lords of Session was, that the underwriters had been exonerated from their liability in this policy; and it seems the principal ground on which the Court of Session have decided is, that the second departure from Leith was an entirely new voyage. They seem to have considered, and it was so argued at the Bar, that the voyage to Gottenburgh must be altered by the new situation of things between Great Britain and Sweden; and that, therefore, on the second departure from Leith, she did not sail on the voyage insured, and the underwriters are therefore freed. Another point was taken in the Court below, and argued at your Lordships' Bar, though not much relied upon, namely, that the situation of affairs between this country and Sweden, before her departure, being that of an actual war, that was such an alteration in the risk which the underwriters engaged to guarantee the assured against, that that was sufficient ground for exonerating the underwriters.

My Lords,—This case has been argued with great ability at your Lordships' Bar with reference to the law of Scotland, and with reference to the law of England; for the law of England upon this subject is undoubtedly the same as the law of Scotland: but, as your Lordships are aware, questions of this sort have been much more discussed in the courts of this country—there have been many more decisions in the courts of this country—and therefore reference has been made at the hearing to English cases upon this subject. My Lords, I apprehend that it has been established, and indeed must be so from the

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June 15. 1824. nature of the contract, that the mere increase of risk arising from circumstances over which the assured have no controul, and that were not in the contemplation of the parties at the time they entered into the contract, will not relieve the underwriters from the liability. . . The main question in this case is, Whether or not there was an abandonment of the original voyage from Leith to Gottenburgh? and whether, when she set out the second time, she set out with an intention of proceeding to Gottenburgh, or of proceeding to some other place not within the terms of the risk? My Lords, with respect to the mere circumstance of the vessel being brought back and detained at Leith by this overruling force, arising out of the conduct of the English ship the Bold, it is impossible to contend that that circumstance varied the voyage. Cases have been cited, *v. Borradaile* in the Common Pleas, and *Scott v. Thomson* in the King's Bench, which have decided, that circumstances like those which existed here are not sufficient to put an end to the policy; and therefore, when first she was brought back, and during her stay here, I think there is no question that she was covered by the policy. Indeed if, instead of being brought back here, she had been carried into any other port between Leith and Gottenburgh, and there detained, and had afterwards set out in prosecution of the original voyage, I apprehend no doubt can be entertained, that, having originally set out on the voyage insured, and having been detained in the way I have stated to your Lordships, and having then set out again a second time in the prosecution of her voyage, she would be considered as prosecuting the voyage originally intended.

But it has been argued at the Bar (not that there is any decisive evidence in this case) that the vessel had altered her destination; for that, from the circumstance of war having broken out, from the circumstance of Sweden having prohibited the entrance of all colonial articles into her ports, it is impossible that she could have it in her intention to go from Leith to Gottenburgh; and they rely in support of that view of the case on a letter which has been produced, dated 30th March 1811, which is a letter from Mr Brown, the appellant, to Messrs Carnegie and Company of Gottenburgh, the consignees of the cargo, in which he says, 'I shall instruct the captain to keep at a safe distance from the shore when he arrives, and inform you of his arrival.' In answer to that letter there was another from Messrs Carnegie and Company, which undoubtedly is no evidence in my view of the case; but in that letter they write as follows:—'We observe by your esteemed favour of the 30th ultimo, that you had resolved on letting the Maria Francisca proceed with the cargo, which we would not have advised; for though several cargoes have been smuggled on shore from the vessels in the Roads, it has been attended with great expense and danger. The risk will be much more in summer than in winter, when the long nights favour such business; and Government are now adopting severe measures to crush this clandestine

‘trade.’ Your Lordships will perceive the original voyage was, if I may use the expression, a smuggling voyage, because when the policy was underwritten it was impossible for a British ship to have gone to the port of Gottenburgh as a British vessel; the only chance she had was to carry simulated papers, affecting to belong to a different country, and affecting not to have brought the colonial produce from Great Britain. That was the original voyage contemplated by the policy: the risk was increased, most probably, by the declaration of war issued in the mean time by Sweden, and which issued during the progress of her original voyage from Leith to Sweden, and there was greater care taken to prevent the importation of colonial produce into Sweden; but they argue from these circumstances that it was impossible, under these circumstances, she could have intended to go to Gottenburgh. June 15. 1824.

My Lords,—I ought to state two propositions of law which were advanced, and which are not disputed in this country or Scotland:—That where a vessel sets out on a voyage insured, and an intention is formed to deviate from that voyage, but before the intention to deviate has been carried into execution, the vessel is taken, the policy is not affected: Where, however, she sails on a particular voyage, and that voyage has afterwards been changed, though in the second voyage she may set out on a route which would be the same route as far as she had proceeded to the original place of her destination, still, if the voyage be actually changed before she set out, the policy is gone: whereas, if she has an intention at a certain point to deviate from the voyage, but before she comes to the deviating point she is taken, the policy is still in force. Now the question is, Whether, before she set out the second time, this policy having attached,—for she had set out originally on her voyage to Gottenburgh,—whether when she set out the second time her intention was this—Get to Gottenburgh if you can, but if you cannot, you must remain off Gottenburgh, and dispose of your goods as well as you can? If that was her intention, but before she arrived at that place at which it was necessary to decide, she was taken, the case comes within those principles, that she had an intention, under certain circumstances, to deviate from the voyage insured, or not to complete the voyage insured, but that, before it was necessary to come to a determination, she was taken. Then it appears to me, that, consistently with all the authorities, that would not be sufficient to vitiate the policy. She had set out on the voyage insured; she had been unavoidably detained in Leith, still in the prosecution of her voyage, until she set out in April, when she still had the intention of prosecuting the voyage. She obtained a fresh license,—it is called a renewed license,—and she set out, as this license shews, to go to Gottenburgh. Undoubtedly if she had arrived near Gottenburgh, and finding the risk too great, attempted to unship her cargo into boats to smuggle them into Gottenburgh, that would have varied the case; but before she arrived at that point where it was necessary to decide what

June 15. 1824. should be done, she was actually taken. Then the question is, Whether she was in the prosecution of that voyage which was contemplated? The Judge-Admiral appears to be of that opinion; but the Court of Session undoubtedly seems to have thought that that was not the case. On the best attention I have been able to pay to this case, it appears to me that the Court of Session have come to a wrong conclusion, and therefore it will be my duty to move your Lordships that this interlocutor shall be reversed. I will not move your Lordships this morning, because it may be necessary to introduce some special findings.

My Lords,—We heard at your Lordships' Bar that this was a case in which the party had been kept out of his money so long, that it was proper, if your Lordships should think that the interlocutor should be reversed, that your Lordships should give interest on the money. Looking at the circumstances of this case, I do not think it is a case in which the Court ought to exercise that power, which undoubtedly it possesses, of adding the interest. I will take the liberty of handing to your Lordships in the course of this day, or to-morrow morning, the minutes of the judgment which I will move your Lordships to adopt in this case: the principle of it undoubtedly will be to reverse the judgment in the Court of Session, affirming by that the decision of the Judge-Admiral.

Appellant's Authority.—Planch v. Fletcher, 1. Douglas, 251.

Respondents' Authorities.—1. Park, 266. and Cases there; Marshall, 184. and 326.; 1. Bligh's Reports, 87.

J. RICHARDSON—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 62.*)

No. 48. MAGISTRATES of LANARK, Appellants.—*Brougham*—*Robert Bell*.

ROBERT HUTCHISON and Others, Respondents.—*Forsyth*—*Skene*.

Process—*Jury Court.*—A case having been remitted to the Jury Court by the Inner-House, and thereafter transmitted back to decide certain points of law;—Held, (affirming the judgment of the Court of Session), That it was competent, notwithstanding, to order the proof to be taken on commission.

June 15. 1824.

2D DIVISION.

IN the month of November 1821, Hutchison and others, Trades' Councillors of the burgh of Lanark, presented a petition and complaint to the Court of Session, complaining of the election of the Magistrates and Councillors of that burgh at Michaelmas 1821, on various grounds, and particularly, that an illegal compact had been entered into, and reduced to writing, by which the mem-