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only state generally to your Lordships, that after having looked with as much attention as I can into the subject, it appears to me that it is not made out in a manner satisfactory to my mind; at least it is not made out and established in evidence, that her husband carried on the business of a flesher for a period of five years and upwards; and that not being made out satisfactorily in point of evidence, the consequence is, that she cannot be entitled to claim more than the sum of five pounds a-year. I have read through the judgments of the Court of Session with respect to the question of fact: they came to the same conclusion after considering it most fully. I think their judgment in this respect is perfectly correct, and I should recommend to your Lordships, therefore, to confirm that part of the case.

With respect to the costs, the manner in which the costs have been arranged appears to me also to be fair and equitable—that part of the costs that arose out of the discussion of the question of right has been allowed to the widow, but she has not been considered by the Court below as entitled to those costs resulting out of the investigation of the question of fact, the decision of the fact having been against her; and I think your Lordships will be of opinion that they ought to be disallowed, provided your Lordships are of opinion the judgment of the Court on the other points ought to be affirmed. I should submit to your Lordships, therefore, upon the whole case, that the final judgment of the Court of Session below should be affirmed, and both appeals dismissed. There is an original appeal by the corporation, and there is a cross appeal by the widow; the decision, therefore, I should recommend to your Lordships is, to dismiss both appeals, and I think upon the whole it will be better that there should be costs on neither side.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMPSON,—Solicitors.

No. 9. ALBION FIRE AND LIFE INSURANCE COMPANY, Appellants.
Solicitor-General Tindal—Scarlett.

WILLIAM MILLS, and Others, Respondents.—*Adam—Brougham.*

Insurance—Stat. 6. *Geo. I. c.* 18.—An English Insurance Company having, through their agent in Glasgow, agreed to insure a steam-vessel at sea against fire,—Held, 1. (contrary to the judgment of the Court of Session), That such an insurance fell under the above statute; but, 2. That it was a Scotch contract, and that the statute did not apply to Scotland quoad hoc.

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2D DIVISION, Lord M'Kenzie, and Jury Court.

THE Albion Fire and Life Insurance Company, an English Company established in London for carrying on the business of insurance, had accredited agents in the chief provincial towns in

England and Scotland, authorized to receive orders of insurance, and to transmit these to the directors in London to be executed. The Company did not, however, (as they alleged), insure on ships or merchandise at sea, holding themselves prohibited from so doing by the statute 6. Geo. I. c. 18., establishing the monopoly of sea insurance in the two companies, the Royal Exchange and London Assurance Companies. Mills, residing in Glasgow, who was part-owner of the 'Robert Bruce' steam-boat, plying from the river Clyde to Liverpool, insured his share against fire with the Albion Insurance Company, at their office in Glasgow, where Hamilton was their agent, who thereon gave to Mills this receipt:—'Albion Fire and Life Office, Glasgow, 14th 'August 1819.—William Mills, Esq. having this day effected 'an insurance of L.200 with the undersigned on behalf of the 'Albion Fire and Life Insurance Company of London, on the 'property specified in the check corresponding with this memo-'randum, a policy will be forthwith prepared at the office in 'London for the said insurance, and such policy will be deliver-'ed to the assured, or to his, her, or their order, on the third 'Monday in the ensuing month, or on any subsequent day.

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'(Signed) *p.* THOMAS HAMILTON, agent for the Company,
'ROBERT MITCHELL.*

'Premium,	-	L.1 4 6
'Duty,	- -	0 7 0
		L.1 11 6

'Insured up to the 29th September 1820.'

On the back of the receipt was written, 'This receipt insures, 'viz. on the Robert Bruce steam-boat, at present plying between 'Glasgow and Liverpool, L. 200. (Signed) *p.* THO. HAMILTON, 'R. M.'

In the same form insurances by seven other individual proprietors were effected.

Afterwards the proprietors of the Robert Bruce put another steam-boat, the 'Superb,' into the trade, and effected a joint insurance for behoof of the whole owners, both on the 'Superb' and 'Robert Bruce,' with the same office, and received a similar acknowledgment, with this indorsement:—'This receipt insures 'as under, viz. on the steam-boat Robert Bruce, including

* Robert Mitchell was Mr Hamilton's clerk.

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‘ machinery and apparatus belonging thereto,	L. 3,000	0	0
‘ On the steam-boat Superb, as above-mentioned,	3,000	0	0
‘ Sum insured on the above by the Albion secre-			
‘ tary in London,* - - - -	4,000	0	0
	L. 10,000	0	0

‘ L. 5000 of the above-mentioned sum is insured on the Superb ‘ and L. 5000 on the Robert Bruce.’

No policies were delivered to the insured, but it appeared that policies had been executed in London and transmitted to the agent, containing, however, this proviso, that although the steam-boats should ‘ have liberty to lie or ply in any ‘ port, harbour, river, dock, or navigable canal in the united ‘ kingdom of Great Britain and Ireland, the insurance should ‘ be suspended and remain out of force during the time they ‘ may be at sea.’ Observing this limitation on the risk, the agent wrote to the London secretary thus:—‘ 31st August 1819. ‘ I am not disposed to think that the insurers on the “ Robert ‘ Bruce” steam-boat, as per fire orders, No. 14. to 22. inclusive, ‘ excepting No. 21.; will be satisfied with the introduction of the ‘ clause, “ but not while the same shall be at sea.” I think that ‘ in addition to the rivers the Channel ought to be admitted, as ‘ this vessel is expressly to ply between Clyde and Liverpool, ‘ and will be a great part of her time in the Channel.’ The secretary answered, (13th September 1819), ‘ In answer to ‘ your remark respecting the clause which exempts the Com- ‘ pany from loss on steam-boats while at sea, I have to state ‘ that it is a point on which we have no choice. The Royal ‘ Exchange and the London Assurance are the only companies ‘ which have a right, as companies, to undertake insurances on ‘ vessels while at sea, and no other company can lawfully ‘ undertake such risk. If, therefore, the proprietors of the ‘ Robert Bruce are not content to hold our policies with the ‘ exception complained of, I will thank you to advise me, and ‘ we shall then of course consider the insurance not to be ‘ renewed after the present.’

This correspondence, however, and the existence of the exception it related to, were never communicated to the insured,

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* This sum was to be taken by the Eagle Insurance Company of London.

who continued to pay, and the agent for the insurers to receive, the premium as it fell due. June 27. 1828.

When the joint insurance was about to expire, the owners effected a renewal for a twelvemonth from 24th June 1821; and the certificate bore, that 'the above policy has been renewed, 'and that the insurance granted thereby will continue in force 'from the 24th June 1821 to the 24th June 1822.'

The Robert Bruce, on 28th of August 1821, was destroyed by fire at sea, while on her voyage from Liverpool to Dublin, (a voyage undertaken by permission of the insurers). A demand for the amount insured having been made, the Companies refused to pay. Delivery was then required by the insured of their policies, which, when produced, were found to contain the clause suspending the policy during the time the boats happened to be at sea. The owners of the Robert Bruce (after using arrestment to found jurisdiction) then raised an action against the directors, proprietors, and secretary of the Albion Insurance Company, and against Hamilton their Glasgow agent,* concluding, as the summons bore, 'that in effecting the insurance for 'the said sum of L.10,000, the pursuers considered themselves 'as transacting with the said Albion Fire and Life Assurance 'Company, through the medium of their agent, the said Thomas 'Hamilton;' and concluded, 'that the Albion Fire and Life 'Insurance Company, and Thomas Hamilton, their agent in 'Glasgow, ought and should be decerned and ordained, con-'junctly and severally, by decreet of the Judge of our High 'Court of Admiralty in Scotland, immediately to furnish and 'deliver to the pursuers a valid and effectual policy of insurance 'upon the said steam-boats or packets, for the said sum of 'L.6000 sterling, and that for the period of one year, from the '24th day of June last 1821, when the premium therefor was 'paid; and containing the said policy the usual clauses, and 'an obligation of insurance against the usual risks as before 'specified, and, among others, an insurance against the risk of 'damage occasioned, or which may be occasioned to the said 'steam-boats or packets by fire, at any time, and any where, 'during the period aforesaid of the insurance; and whether such 'policy shall be furnished and delivered to the pursuers or not, 'or in whatever terms they may express, or have expressed the

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* An action was also raised against the members of the Eagle Insurance Company, but it had not been brought to a conclusion when the appeal in the question with the Albion Insurance Company was taken.

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'same, they, the said defenders, ought and should be decerned 'and ordained, by decree foresaid, conjunctly and severally, to 'make payment to the pursuers of the foresaid sum of L. 3000 'sterling, being the sum insured, as aforesaid, upon the said 'steam-boat or packet Robert Bruce, with the lawful interest 'thereof from the said 28th day of August last 1821, when the 'loss and damage was sustained, and in time coming till 'payment.'

The defenders maintained,—1. That by 6. Geo. I. c. 18., it was declared illegal for any others than the Royal Exchange Assurance Company, and the London Assurance Company, to insure any ship or ships, goods or merchandise, at sea or going to sea, and that every such policy of assurance shall be ipso facto void: 2. That, in point of fact, they had not undertaken to insure the Robert Bruce against fire at sea, but only when in port or harbour. The receipts for the premiums, which were filled up by the agent, and delivered to the insured, formed originally a portion of the same paper which contained the order to be transmitted to London; and these orders so transmitted bore the special exception, that the risk should not subsist while the steam-boat should be at sea. It was not alleged, however, that either these orders or the policies had been seen by the pursuers.

The Judge-Admiral gave no judgment on the plea founded on the statute; but in respect of the qualification in the order and policies, assoilzied the defenders, but found no expenses due. The case was then brought by mutual reductions into the Court of Session, by whom they were remitted to the Jury Court, when this issue was sent to a jury:—'It being ad-'mitted, that on the 27th or 28th of August 1821, the steam 'vessel called the Robert Bruce, the property of the pursuers, 'was destroyed by fire while at sea, on her voyage betwixt 'Liverpool and Dublin,—Whether the defenders promised and 'agreed to insure the pursuers to the extent of L. 3000, or about 'that sum, from all loss and damage which might be caused by 'fire to the said steam vessel, while at sea as aforesaid? and, 'Whether the defenders have failed to perform the said promise 'and agreement, to the loss and damage of the pursuers? Dama-'ges laid at L. 3000.'

In support of their case, the pursuers relied on the certificates given to them by the Glasgow agent,— on the correspondence between him and the London Secretary; and adduced parole evidence that, in conversations between Mills and Mitchell, no notice was taken of any exception of loss while at sea: that the premium

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was equal to what was paid for sea risk, and that insurance offices were in the uniform habit of sending the policy to the insured, but which had not been done in the present instance. To this evidence the defenders excepted, but the objection was overruled. They also contended, that, even if they had undertaken as in the issue mentioned, the Lord Chief Commissioner should direct the jury that such undertaking being void by statute, no action could be maintained upon it; and that, at all events, a general verdict ought not to be given against all the defenders, but only against the Albion Company, the principals, or else against Hamilton the agent. But the Lord Chief Commissioner directed the jury, that if they were satisfied that the evidence was sufficient to support the promise and agreement, they should find a verdict for the pursuers against all the defenders. The defenders tendered a bill of exceptions. The jury returned a verdict for the pursuers, and the amount was extrajudicially fixed at L. 3000. The Court of Session, on the 11th July 1827,* disallowed the exceptions, and declared the verdict final and conclusive in terms of the statute. When, however, the pursuers moved the Court to have the verdict applied, the defenders craved to be heard on the plea in law, founded on the statute of Geo. I., and which had not been disposed of by the Judge-Admiral; which being permitted, the Court, on the 22d January 1828, in the action at the instance of the proprietors of the Robert Bruce, 'in respect the insurance in question is an insurance 'against the risk of fire on a steam vessel, which is not a marine 'insurance contemplated by the said Act,' found that the statute founded on 'does not apply to this case,' and repelled that as well as the other defences; found the defenders, conjunctly and severally, liable to the pursuers in the damages awarded, with interest, and expenses; and in the action of reduction at the instance of the Albion Insurance Company, sustained the defences.† The Jury Court also awarded the expenses incurred there to the pursuers.

The Albion Insurance Company appealed.

Appellants.—I. *(Exceptions).* It was against law to allow a written policy to be explained, enlarged, or contradicted by parole testimony, much more by mere conjecture and loose reference. The renewal referred to a policy by its number. Being

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* 5. Shaw and Dunlop, No. 462.

† 6. Shaw and Dunlop, No. 141., where the opinions of the Judges will be found.

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so marked out, the respondents could have consulted it, and seen what risks it covered; and if they refrained to do so, they have only themselves to blame. Even if the assured had no means of access to the policy, still the question would not have been, What did the assured mean or wish? but have, or have they not; been careless enough to contract in the dark? or has their agent (as in this instance) neglected common precaution? but, What did the underwriters by their policy undertake? It is no answer, that the respondents chose, without inquiry, to suppose that the terms were the most beneficial for themselves that could be desired. If they trusted to what might be, they did so suo periculo. There was no fraud on the part of the Company. They did not put upon the insured a contract different from what was intended. Indeed they never contemplated insuring sea risks. The issue sent to the jury was not, Whether there was fraud or mistake? but, What was the contract? and the terms of that contract is plain. The contract being in writing, and the terms distinct, and containing the exception, the jury should have been directed to return their verdict for the defender. If it had been parole; then, as it is not the habit or custom of the Company to bind themselves in that form, it would have become merely a contract with the agent, and he alone would have become bound. It is plain, from the words of the certificate, that it was not the duty of the appellants or their agent to send, but of the insured to apply for the policy. Besides, even if this risk had de facto been undertaken, the policy thereby (under the statute of Geo. I.) having become null and void, could not sustain an action; and, at all events, it was quite preposterous to direct that a verdict could competently be given both against the principals and against their agent. If the first assumed the contract, then the agent was not liable; and if the latter entered into the undertaking without authority, the Company are not bound. The presiding Judge, therefore, misdirected the jury, and the Court ought to have allowed the bill of exception.

II. *(Statute.)* It was illegal in the appellants to insure (if they did so) a sea risk, and equally so to agree to effect one. The distinction taken by the Court, that this is not a marine insurance, is too subtle to be sound. The statute is broadly worded, and will not admit that reading. Fire at sea is a maritime risk, and an insurance against it is a maritime insurance; and the statute 'prohibits assurance of or upon any ship or ships, goods or mer-'chandise, at sea, or going to sea.' It is plain that the statute extends to Scotland. That it makes the penalties recoverable in

any of his Majesty's Courts of Record at Westminster, cannot impair or limit the unqualified enacting words of the prohibition. If the contract were Scotch, the only result would follow, that the penalties could not be recovered in the Scotch Courts. But the contract was English in every sense of the word. The fictitious person created by a company possesses, exactly as an individual does, a domicile, and a forum; and the Albion Insurance Company's domicile and forum was England. It creates no substantial difference that they had an agent in Scotland. He held no greater power than his constituents; or rather he had no power until he had obtained the Company's ratification of the proposals to insure tendered to him. The insurance was made in London, (as is confessed in the summons), and the insured ought to have known that no other policy could be transmitted but what was allowed by the lex loci contractus. June 27. 1828.

Respondents.—I. *(Exceptions.)*—The real point in the case has not been raised by the appellants. The inquiry is not, whether the Albion Insurance Company did or did not take sea risks? but whether, in this instance, they or their agent, which is the same thing, contracted with the respondents, in such a manner as to lead the respondents to believe that the sea risk had been taken? The agent gave a certificate silent as to the exception, and so expressed as to cover sea risks; and when he knew that his constituent did not take a sea risk, he should have undeceived the insured, who were paying their premium on the belief that they were fully protected.

Lord Chancellor. You say that the policy renewed at midsummer 1821 was never shewn to you, and that the contract with the exception in it did not make the contract you entered into?

Adam. Precisely so, my Lord. Had the policy been handed over to us, we would have been effectually bound.

Lord Chancellor. And that you were not to assume that the agent or the company would make a policy different from your contract?

Adam. The respondents never suspected that the policy was not a sea policy. The objection raised by the appellants to the direction of the presiding Judge at the trial, proceeds on a mistaken view of the case. This was not an action on a policy, nor was parole evidence adduced to controul the express words of the policy forming the contract between the parties. It was an action for the policy that had been agreed upon, or for damages in lieu of the policy; and documentary and parole evidence was admis-

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sible to shew what that contract was, and what the policy should be. An engagement to furnish a policy is a lawful and necessary contract sui generis, and the terms of the contract, and consequently the terms of the policy, may be proved by parole, by writ, or by circumstances. The question before the jury was not, what was the meaning of the policy, which the appellants had kept in their hand, and out of sight of the respondents? but what was the policy bargained and paid for? And on this point the jury was properly directed. Besides, the facts proved to the jury would have been sufficient, on the ground of fraud in the insurers, and gross mistake in the insured, to have relieved the latter from the limitation, even had the policy thus limited been timeously handed to them. The statute of George the First had no bearing on the fact under trial. A resident agent of a foreign party is, by the law of Scotland, bound along with his constituent, and he binds his constituent to those with whom he in that character contracts, whatever may be his private instructions; and it was not shewn that he, in dealing with the respondents as he did, acted beyond his instructions.

II. *(Statute)*.—The Act of Geo. I. (commonly called the Bubble Act, and since repealed), had no relation to Scotland; and this is manifest from its object and structure, particularly from the Courts pointed out as having jurisdiction to try the cases arising upon it. The establishment in Glasgow was truly Scotch, carrying on that business which a Scotch company could have carried on. If the parent house in London have incurred penalties, they may be exigible; but that will not defeat the Scotch contract. It is besides manifest, that the Legislature could not have had steam-boats in contemplation. Indeed, the risk of fire is not properly, or in its own nature, a maritime risk, or naturally comprehended under the perils of the sea. Fire may be covered, according to the usual form, by a policy; but still the fundamental and radical risks are those properly arising from the perils of the sea, and policies relating to the true perils of the sea were what the statute regarded. At any rate, the insurers were informed that the insured would not be satisfied with the introduction of the clause; yet they remained silent, accepted the premium (suitable to a fire risk), and then, when the accident happened, endeavoured to escape on their own fraud and concealment.

The House of Lords pronounced this judgment:—'It is 'declared by the Lords Spiritual and Temporal in Parliament 'assembled, that although this House is of opinion that the

'insurance upon which the respondents sought to recover da- June 27. 1828.
'mages, is a species of insurance to which the statute 6. Geo. I.
'cap. 18. does apply, yet, inasmuch as this House is further of
'opinion, that the said statute, as to that part of it to which the
'interlocutor of the Court of Session of the 22d January 1828
'refers, does not extend to Scotland, the said appeal upon the
'facts of this case ought to be dismissed, and the interlocutors
'affirmed. It is therefore ordered and adjudged, that the said
'petition and appeal be, and the same is hereby dismissed this
'House; and, with the above declaration, that the several in-
'terlocutors therein complained of be, and the same are hereby
'affirmed.'

LORD CHANCELLOR.—There is a case, my Lords, which stands for judgment, of the Albion Company against Mills. It was a case of this description, upon which at present, for a particular reason, I will say only a few words, as I wish, with respect to the question of form, to have an opportunity of further considering the course which ought to be adopted. The plaintiffs, the pursuers in the action below, were the proprietors of a steam-vessel called the Robert Bruce. There is an insurance company in London for fire and life insurance called the Albion Insurance Company. They have an establishment at Glasgow, a regular establishment and office there, and conducted by a person of the name of Hamilton. A considerable quantity of insurance business, on account of the London Insurance Company, was transacted at that office. The owners of the Robert Bruce applied at the office at Glasgow to have their vessel insured,—this vessel called the Robert Bruce. An agreement was entered into for the purpose by Mr Hamilton, the agent, and a policy was afterwards effected. Various questions have arisen, which were agitated in the Court below, and which have been much considered and discussed. One objection on the part of the Albion Insurance Company to pay this loss, was an objection arising out of the statute of 6. Geo. I. It was said, that any policy of insurance, or any agreement of the insurance entered into under the circumstances under which this particular insurance was effected, was, by means of that Act of Parliament, altogether void; and such argument was made use of both in the Court below and at the Bar here, for the purpose of determining this material and important question, whether this Act of 6. Geo. I. extends to Scotland, to contracts entered into and executed in that part of the united kingdom. The Court below were of opinion that the statute 6. Geo. I. did not apply to Scotland, and I am very much disposed to concur in that opinion.

But another most material and important question arose, much more complicated, and which was of this description, namely, whether the contract was a contract entered into in Scotland or in England; in other words, if the statute does not extend to Scotland, whether it was

June 27. 1828. a contract so entered into in Scotland as to render it valid and binding. The Court below appear to have differed with respect to that point, and they have come to no conclusion with respect to it; but they decided the question on another point quite wide of the decision of that question. They said, this was a case of loss that did not come within the Act; and I wish, for the purpose of directing the attention of your Lordships, and the parties in this case, to read the very terms of their judgment—the final judgment. (His Lordship then read it.)

Now, my Lords, I confess I am not disposed at all to concur in that judgment. I think it is impossible that that judgment, according to my apprehension and understanding, can be sustained. In the first place, If you look to the words of the Act of Parliament, they are most general and comprehensive. The words are, 'that if any person or 'persons described shall presume to grant, sign, or underwrite, after the 'four-and-twentieth day of June 1720, any such policy or policies, or 'make any such contract or contracts for assurance of or upon any 'ship or ships, goods or merchandises at sea, or going to sea, or take, 'or agree to take, any premium or other reward for such policy or 'policies, every such policy and policies of insurance of or upon any 'such ship or ships, goods or merchandises, shall be ipso facto void.' It is, in my opinion, impossible to say that an insurance on a steam-vessel against fire was not distinctly and precisely within the language of this Act of Parliament. And, my Lords, there is another circumstance to which I wish particularly to advert, which is this, that fire is one of the risks expressly mentioned in all policies of insurance, according to the form that now exists, and, as far as relates to that part of the case, existed at the time this Act of Parliament was passed. It not only comes expressly within the words of the Act of Parliament, but within the terms of the policy in use at the time. It appears to me, therefore, impossible, merely because some alteration has taken place with respect to the mode of propelling vessels of this description at sea, to say that cases of that kind do not come within the meaning and language of this Act of Parliament. It appears to me, with all respect and deference, (and I entertain the greatest respect and deference to the learned Judges by whom this is decided), to be a proposition which cannot be supported. But, my Lords, at the same time that I state that decision to be in my opinion erroneous, I do not undertake at this moment to say whether, on other grounds, the judgment may not be sustained; and if I should be of opinion, and your Lordships should be of opinion, that on other grounds the judgment may be sustained, whether still the House comes to decide at once upon the case as it at present stands, or whether it should be again remitted to the Court in Scotland, for the purpose of calling upon the tribunal there to come to a decision upon the point, which they seem to have avoided deciding, and to have cut the matter short by deciding the case upon the ground open to the objection, as it appears to me, to which I have referred—that is a question on which I have not yet made up my mind. I have had some consultation with a noble and

learned Lord, at present in the neighbourhood of this House. He thinks it is a question which deserves consideration; and I will endeavour to-morrow to give my opinion upon it, if I am in a condition with propriety to propose to your Lordships a judgment on the materials at present before you, without remitting the case to the Court below, and come to a determination and decision on the question whether this is to be considered as an English or a Scotch contract. If I am then, on the materials before me, authorized to propose to your Lordships a judgment, and it will be proper for this House to give a judgment on these materials without calling on the Court below to give their judgment, and pronounce a judgment upon it, I shall be ready to state my opinion. What that opinion will be, I will not at present anticipate, but I am at present ready and prepared to give that opinion. But on the point of form, I feel desirous that this case should stand over, for the purpose of giving me an opportunity of considering that question till to-morrow. June 27. 1828.

LORD CHANCELLOR.—There was a case in which the Albion Fire Insurance Company were the appellants, and William Mills, Esq. merchant in Glasgow, and others, were the respondents. I took the liberty of calling your Lordships' attention to this case yesterday, with respect to a particular point; and after looking at the papers, and attending to them throughout, I should recommend to your Lordships to decide, that on the ground upon which the Court below pronounced their judgment, it cannot, in point of law, be sustained; but, upon the whole, looking at all the papers, and the proceedings which have taken place in the Court below, and the transaction itself, there is, I conceive, sufficient to justify your Lordships in affirming the judgment, though on a different ground.

My Lords,—The circumstances of the case are these:—There is a company in London, called the 'Albion Fire and Life Insurance 'Company.' That company is so constituted, that according to the law as it exists by virtue of the Act of 6. Geo. I. it is incompetent to effect insurances upon ships and merchandises at sea;—that is a point which is admitted in the case, and with respect to that it is not necessary I should make any further observation. This company has an establishment at Glasgow, and a regular office at Glasgow, called the 'Albion Fire and Life Insurance Office;' and they have a person attending there as an agent, a person of the name of Thomas Hamilton. They had been in the habit of entering into contracts and engagements to a considerable extent in Glasgow:—when I say they had been in the habit of entering into contracts and engagements to a considerable extent, I mean contracts and engagements similar to those which are the subject of the present inquiry. There were certain persons, who are the respondents in this appeal, residing in Scotland, who were the owners of a steam-vessel called the Robert Bruce. The owners of this vessel were desirous of insuring her; and they applied for that purpose to Mr Hamilton, at the office at Glasgow; and

June 27. 1828. upon their application at the office in Glasgow, the contract, to which I shall call your Lordships' attention, was entered into in these terms.—(His Lordship then read the contract.)

My Lords,—This contract was signed at Glasgow; it was drawn up at Glasgow, dated at Glasgow, and was signed at Glasgow by Hamilton, who was the agent for the company. According to the ordinary course of business, Hamilton communicated this transaction to his principals in London; and a policy of insurance was sent down to the office at Glasgow. It was not sent within the period limited by the contract; for it was not sent till the month of September, the contracts having been entered into in the month of July. Any person looking at that contract must see, that it is in its form a general contract of insurance; that is, a contract for a policy, which shall be a general policy of insurance. There is no limit whatever as to the places to which the contract is to extend. There is no exception in the contract; there is nothing expressing that, when the policy comes down, it shall contain a clause, that the insurance is to be suspended while the vessel is at sea. It is a general contract of insurance, or rather, they undertake that a general policy shall be executed. The policy of insurance that was sent down to the agent at Glasgow contained this clause: It was an insurance on the steam-vessel against fire; but there was this clause: 'This policy of in-'surance to be suspended and remain out of force during the time the 'steam-boat may be at sea.' Such policy of insurance, however, remained in the office of Hamilton. There is no evidence that it was ever shewn to the parties insured, nor any evidence to shew that the fact of this clause of exception was ever communicated to them. Thus the transaction went on for a year, the insurance being only for the period of a year.

At the expiration of the year, or shortly before that time, the assured applied to Hamilton the second time to extend the insurance another year. They paid Hamilton the premium of insurance for another year. There is no evidence to shew that the policy was communicated to them; there is no evidence whatever of that fact; on the contrary, there is evidence of a different description. There is no evidence to shew that the exception in the policy was, at that time, or at any previous time, communicated to the assured. The money was received by Hamilton, and a memorandum given that the policy had been renewed.

A short time after the renewal of the policy, the vessel was destroyed by fire, on her passage from Liverpool to Dublin; and the persons who thus considered themselves assured by this contract, applied to Hamilton for the payment of the loss. The answer they received was this: 'You are not entitled to recover; for, if you advert to 'the policy, you will find there is an exception in the policy, that the 'policy is not to have operation during the time the vessel is at sea.' The assured upon this commenced proceedings for the purpose of recovering the amount of the loss. Their proceedings were in the first

instance instituted before the Judge-Admiral, and the judgment was against the insured. It is unnecessary for me to enter into the terms of that judgment, for afterwards the proceeding came on before the Court of Session. June 27. 1828.

On this question coming before the Court of Session, it was considered that there were two points;—the one point was the question of fact, as to what the nature of the insurance was; the other was the question of law, to which I yesterday alluded, and to which I shall again call your Lordships' attention. It was conceived that the question should be remitted to the Jury Court. It was so remitted; and the issue I am about to read was that which was drawn up for the purpose of the trial, 'Whether the defenders promised and agreed to 'insure the pursuers to the extent of L. 3000, or about that sum, from 'all loss and damage which might be caused by fire to the said steam-'vessel while at sea as aforesaid, and whether the defenders have fail-'ed to perform the said promise and agreement, to the loss and 'damage of the pursuers?' Now your Lordships will perceive, that the question turned entirely upon this part of the issue, namely, Whether the agreement to insure extended to the period while the vessel was at sea? The cause came on for trial; the evidence was heard; and a verdict was found for the pursuers. Exceptions were taken to the evidence in the process of the trial. They were afterwards imbodied into a bill of exceptions, which was signed by the learned Judge who presided in the Court, and that has been printed in the papers which have come before your Lordships for your consideration.

It appears to me, on looking at the exceptions, that there is only one material point to which it is necessary to call your Lordships' attention. It was said, and justly said, that where there is a written agreement to insure a preparatory agreement, and afterwards a policy of insurance is effected in pursuance of that agreement, it is the policy which is the contract between the parties. The ordinary course of proceeding in the city of London is, that a slip is in the first instance signed, and after that slip is signed a policy is effected; and it is the policy which is the contract, and the slip cannot be adverted to for the purpose of explaining the meaning of the parties. It was argued, that no contract had been entered at Glasgow, that it was an agreement for a policy, that the policy had been afterwards executed, and that that must be considered, having been sent down to Scotland, to be the agreement between the parties. But, my Lords, there was this fallacy in that argument, the pursuers brought their action upon the agreement as entered into by Hamilton, as signed by Hamilton. What was that agreement? There was an agreement for a general insurance. It was an agreement that a policy should be executed; that policy to be executed was to be conform to the agreement. The policy had, it is true, been sent down, and if the parties had agreed to it, that would have bound them: but that policy did not conform to the original agreement; it was never communicated to the parties that there was an alteration; and if the

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agent agreed to a general insurance, that being within his duty as agent, it was imperatively his duty under those circumstances to communicate to the assured, that the policy having come down, the parties in London did not conceive themselves authorized in executing a general policy, but only a policy with the exception to which I have referred. No such communication was made by Hamilton, and therefore the owners of the vessel never adopted that, for they never knew it. What, then, did they feel themselves justified in saying? It was this,—We have entered into an agreement with your agent at Glasgow for a policy of a particular description; you have never fulfilled that engagement; you have received our money, by which you bound yourselves to send down a general policy; instead of that you have sent down another policy, and we call upon you to fulfil that agreement. That was the nature of the action.

But, my Lords, this agreement was only for the year, and at the expiration of the year, as I have stated to your Lordships, an application was made to the company to renew the policy; and if the policy had been shewn at the time of the renewal, the policy would have been the contract; but when it was renewed nothing was said by Hamilton about the terms of it, nor was it shewn to the assured; therefore, when the money was paid for the renewal, according to every principle of equity—and the Court had jurisdiction both legally and equitably—according to every principle of law, and equity, and justice, this renewal had reference to the original agreement, and they ought therefore to have executed it conformably to the stipulations of the original agreement; and therefore, when it was contended, as it was strenuously in the Jury Court, that the Court had no authority to look into any thing but the policy, that was rightly overruled; and when it was repeated at your Lordships' Bar, it was impossible not at once to feel the fallacy of it, for it was clear that a policy of a different description was sent from that stipulated, and that it was not communicated to the parties that the agreement had not been fulfilled. The Jury therefore were, in my opinion, justified in the verdict they found; and when we dispose of this general question on the bill of exceptions, it appears to me unnecessary to refer your Lordships to the other grounds of objections stated in the bill of exceptions, because I think your Lordships will be of opinion, that if the way in which I am putting it is the correct mode of deciding it, they are of little consequence in the decision of this case.

The question of fact being disposed of, the next consideration was the question of law. It was said, that they could not recover on this policy. Why? Because, by the 6. Geo. I. the monopoly of insurance by companies on ships and merchandise at sea is given to two particular companies, namely, to the London Insurance Company, and to the Royal Exchange Assurance Company; and that therefore that contract was altogether void, whether it was an agreement for a policy, or a policy executed; that the Act of Parliament was a bar, the Act of

Parliament declaring, that all policies executed by six persons other than those companies shall be absolutely null and void. June 27. 1828.

My Lords,—The first question which arose in the discussion was this, and a very important general question it was, Does that Act extend to Scotland? that is, does that part of the Act to which I have referred extend to Scotland? The Act was passed with two views. It is the Act generally called the Bubble Act. It was an Act for the purpose of preventing those wild speculations which had currency at the period to which I have referred; and that part of the Act specifically extends to Scotland, for it is stated in the body of the Act, that the penalties which shall be imposed for the violation of that Act, shall be recovered in the Courts of Edinburgh, Dublin, or London. It is clear, therefore, that that part of the Act was intended to extend to Scotland. But, my Lords, with respect to the other it is quite different. In the first place, it is a little too strong to suppose that only these two English companies could be intended to have a right to insure, not confined to England only, but extending to other parts of the kingdom; but there is, in respect of that, this important distinction, that the penalties are recoverable only in the Courts of Westminster, and it is impossible not to see that that part of the Act of Parliament was intended to apply only to England. That point being decided, I conceive your Lordships will think yourselves justified in concurring in the judgment of the Court below.

My Lords,—Another question, very important in its nature, a question of law was raised. Here is an English company effecting an insurance by an English contract, and though this Act of Parliament may not extend to Scotland, this is an insurance by an English company; and therefore it is said, it would be mere evasion to say, that the parties in this case could recover on this in Scotland. My Lords, this turns entirely on the question, whether or not this was an English contract or a Scotch contract. The way in which it was argued at the Bar, and in the Court below, appears to me very fallacious. It was analogous to the argument to which I have already referred, which was raised in the Jury Court, that the policy is to be considered as the contract, and that the policy was executed here by the company; and if the policy were the ground of action, the proceeding on a policy so executed in London might admit of doubt and question. But, my Lords, that is not the case here. What is the nature of the action? Here is a contract entered into, not in London but in Glasgow, written in Glasgow, dated in Glasgow, and subscribed in Glasgow; the consideration paid in Glasgow at the office established, and for a long time established in Glasgow. Why is it then to be said, that that contract, I mean the original contract, was not a contract in Glasgow? If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered as mine where it is actually made. It is not an English contract, because I actually reside in England. If my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland. Therefore

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the original contract must be considered as a contract entered into in Scotland, and it was that original contract, and not the policy, which was the ground of the action; it was for the infringement of that my action was brought. You agreed to give me a general policy: You did not give me a general policy: I call upon you therefore for damages. It is said that the insurance company could not comply with that agreement, for that they could not execute a general policy. But if that is so, what had the assured to do with that? the agent stipulated to do it if the directors in London could not do it. It is my opinion, that the agent in Glasgow might have made a valid policy, but that if he could not have made a valid policy, they are bound to make compensation for the breach of that contract so entered into in Scotland,—they are bound, in my humble judgment, by that contract by which they engaged to effect a policy of a particular description, which they have not done; and not having done that, they are bound to make compensation to the party in respect of all the loss he has sustained by their not having done so, the party being entitled to consider the case precisely as if the agreement had been executed.

Then, my Lords, with respect to the renewal of the policy. What sort of renewal was that to be? Here is an agreement to execute a valid policy; the party insuring was entitled to consider that as a policy undertaking to do that which was to be done; the rule operates upon that which the party agreed to do, and which a Court of equity considers as already done; and therefore it is a renewal of a policy having effect in Scotland. I am happy to say, my Lords, that though the Court of Session were not unanimous upon this point, three of the Judges were of opinion that this was to be considered as a contract in Scotland; and the pursuers declared upon it as a contract so framed—a contract to be executed in Scotland. The other learned Judge seemed to entertain a contrary opinion; and it was in consequence of the learned Judges of the Court below differing in opinion upon this point, that they were led to do that which I think they were not justified in doing, namely, to decide the question on another point, which I consider as utterly untenable; because the Judges below have declared, that, according to their opinion, the construction of this Act of Parliament, which prohibits all companies from making insurances on ships and merchandises at sea, does not apply to the case of a steam-vessel. I stated to your Lordships yesterday my reasons for differing in opinion from these learned Judges with respect to that point, and I do that with the utmost deference and the utmost respect. From all I have seen as to the judgments of these learned Judges, I am led to entertain the highest respect for their knowledge and their attainments; but I am bound here, in advising your Lordships in reference to the judgment to be here pronounced, to give to you the result of my own opinion; and after paying every attention to the subject, I think that the grounds on which the learned Judges decided this case in the Court below cannot be sustained, but that, upon the proceedings and the

evidence, it is clear that the pursuers are entitled to recover, upon the principle of this being an agreement for an insurance entered into in Scotland, a contract entered into in Scotland,—the Act of 6. Geo. I. not extending to Scotland; and therefore the contract being a valid contract, the pursuers are entitled to recover damages, for the purpose of affording them compensation for the loss they have sustained by the breach of that agreement. On these grounds I should suggest, my Lords, that the judgment be affirmed, not in the terms in which it has been pronounced, but that, in your Lordships' opinion, the pursuers have made good their claim. The form of the judgment shall be prepared, and I will on a future day submit it for the opinion of your Lordships. June 27. 1828.

Respondents' Authorities.—Philip's Evidence, p. 550.; Fell on Guarantee, p. 58.; Marshall on Insurance, p. 349.; Stat. 6. Geo. I. c. 18.

TEESDALE, SYMES, and WESTON—SPOTTISWOODE and ROBERTSON,—Solicitors.

Sir NEIL MENZIES of Menzies, Bart. Appellant. No. 10.
D. of Fac. Moncreiff.
Earl of BREADALBANE and HOLLAND, Respondent.
Sol.-Gen. Tindal—Keay.

Property—River.—Held, (varying the judgment of the Court of Session), That an heritor was not entitled to erect a bulwark, or any other opus manufactum, on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.

July 4. 1828.

1ST DIVISION.
Lord Meadowbank.

THE river Tay, from the point where the water of Lyon joins it, runs eastward for some miles, and in that part of its course is bounded on the north by a plain about four miles long, and on an average about two-thirds of a mile broad, the property of Sir Neil Menzies. On the south the Tay is bounded by rising ground, occasionally very abrupt, and a flat, consisting of Bolfrax-haugh, nearly 21 acres, the property of the Earl of Breadalbane, and Farleyer Island, about 15 acres, the north half belonging to Sir Neil and the south half to the Earl. Bolfrax-haugh and the island are separated from each other by a slight hollow, now covered with a thick sward of grass, but which appears once to have been the ordinary channel of the river, and in floods is still the vent by which the swollen waters escape.