Verdict—For the pursuer, damages L.300.

MILLS *v.* ALBION INSURANCE CO.

Cockburn and *D. M'Neill,* for the Pursuer.
Jeffrey and *Jardine,* for the Defender.

GLASGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

MILLS *v.* ALBION INSURANCE COMPANY.

1826. Sept. 20.

Finding that an English Insurance Company had agreed to insure a steam-vessel at sea.

THIS was an action brought to recover the sum of L.2000, insured on the Robert Bruce steam vessel.

DEFENCE.—The policy excluded the risk at sea.

ISSUE.

" It being admitted, that, on the 27th or
" 28th day 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

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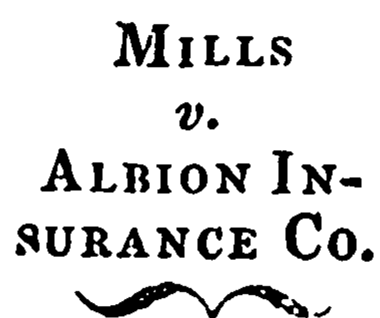

"damage which might be caused by fire to the "said steam vessel while at sea, as aforesaid, "and whether the defenders have failed to "perform the said promise and agreement, to "the loss and damage of the pursuers?"

The case was originally brought in the Admiralty Court, where the Insurance Company were assoilzied; but not having been found entitled to expences, they brought a reduction of the decree, which was remitted to the Jury Court, after mutual revised condescendences and answers had been put in.

Cockburn, for the owners, pursuers, opened the case, and stated, That Hamilton, the agent at Glasgow of the Insurance Company, had agreed to insure; and though they now say this was an English company, and not entitled to insure at sea, yet this was a Scotch risk, and the plea is not very reputable. All English companies take Scotch risks at sea, and we can prove the habit of the defenders. Upon this the Court will give you direction; but whatever is the law, the question here is on the fact, whether they did take this risk. This agreement was made in 1820, and the company say they wrote to their clerk not to renew the policy, and that it excludes the risk; but that policy

was not tendered till after the loss, and they were bound to send it to the pursuers. The premium paid covered a sea risk, and that is sufficient to render them liable, if nothing is said to the contrary.

On a question as to a promise to insure a steam-vessel belonging to several individuals, competent to give in evidence a receipt formerly granted to one of them for premium paid on his share.

In 1819 the proprietors of the vessel had insured their interest in the vessel separately at the same office. When the receipt for the premium paid by one of the owners was produced,

Hope, Sol.-Gen. said, I object to this evidence, and to almost the whole evidence to support the case of the pursuers. The action is founded on a *renewal* in 1821 of a particular policy, which is there described by its number; and that policy excludes the claim of the pursuers. What is now offered is a receipt granted to one of the pursuers; but these were all done away, and a general policy given for the whole. If the policies to the individual had excluded the sea risk, and the general policy had included it, we could not have founded on them as in any way affecting the general one.

Jeffrey, for the pursuers.—I admit, that, if the argument on the policy is well founded, our case is at an end; but if it is well founded, the case could not have been here, as it re-

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solves into a point of law; and there was no use for a condescendence. But sitting here the issue must be tried.

The general point is clear, but the case is still clearer in the particular circumstances. That the evidence is admissible there cannot be a doubt, as it is the same parties, the same vessel, and the same office. Suppose that in 1819 the office had agreed to insure at sea, and that the owners had come and desired the particular policies to be cancelled, and a general one to be made, can it be doubted that the transaction in 1819 would be admissible?

Hope, Sol.-Gen.—I do not say that writing may not be produced to control the policy, but I say that this writing cannot. This is a most important question in the law of insurance, and I mean to object to all evidence of opinion, and to all parol evidence, or evidence of circumstances, where a writing was intended and taken.

Lord Chief Commissioner.—It would have been more satisfactory to me, if I had been previously aware of this question, that I might have had more time for deliberation. But when a question of this kind does occur, a Judge try-

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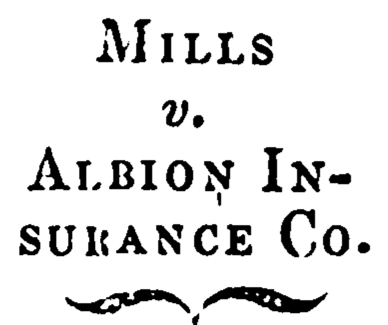

ing the cause must decide it to the best of his power, and according to the lights of which he is possessed; and it is a great satisfaction to know that there is the best possible opportunity of setting right the decision if it is wrong, and that this is not a case where it would be a hardship to carry it to the last resort.

The first policy is a private transaction with an individual owner in 1819, and there is a general one in July 1820, and a renewal of this in 1821.

The objection taken to the evidence, as I understand it, is, that the transaction with the individual owner is *res inter alios*.

If the objection was, that this does not relate to the agreement, the objection might be good, as evidence which does not relate to the matter in question is not relevant, and therefore not admissible. But the question here is, what was the promise and agreement of the defenders? and that is to be made out by facts and circumstances.

In this case it is difficult to decide on one point separate from the others, and this arises not only from the frame of the issue, but from the conduct of the parties as to the memorandum, check, and policy, the check not being in the hands of the assured till after the loss,

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—the dispute whether a policy was delivered to the individual in 1819,—the admission that in 1820 and 1821 the general policy was not,—the dispute as to whether it was the duty of the one party to send for the policy, or of the other to send it. Upon all these I cannot decide till I know more of the case. I must put the case in a position to try the issue sent by the Court of Session; and here is a point that will assist in getting at the facts. It is said that it is incompetent for the company to insure at sea, and that may afford a defence. But by admitting this evidence at present, I merely put the case in a situation for the pursuers to show the connection of this document with the cause; and if they do connect it, then it will form part of, and may materially affect the transaction of this office, which is the same in both transactions, though the assured may be different.

I admit the evidence, with power to withdraw it from the jury, if it comes out not to be connected with the company, so as to show their transactions.

A document mentioned by counsel in opening the case ought to be produced.

After proceeding farther in the case, the defenders called on the pursuers to produce the policy, but this was resisted, on the ground

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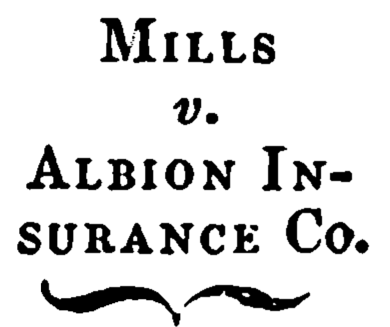

that it had not been founded on, or mentioned as part of the pursuers' case, but on the contrary, had been argued against.

LORD CHIEF COMMISSIONER.—It is clear, that, when a gentleman opens his case, and alludes to documents, he must put them in evidence.

Parol evidence admitted on a question of agreement to insure.

When a witness was called to prove what took place at the time the insurance was effected,

Donaldson *v.* Ewing. 2 Mur. 409.

Hope, Sol.-Gen. objects,—This contract being reduced to writing in a regular policy, it is incompetent to prove by parol evidence the nature of the insurance, an error of a clerk, or even an agreement to depart from the written contract. The certificate on which their claim rests refers to a policy by its number, and this instrument must prove the terms of the contract.

Tait, L. of Ev. 330. Ersk. iv. 2. § 20. Macfarlane *v.* Young, and Macleod *v.* Macleod. 3 Mur. 409,432. Hughes and Hamilton *v.* Gordon, 1 Bligh, 311. House of Lords, Millar *v.* Millar, July 30, 1822. 1 Shaw, 308. 1 Phillips, 529, 575, Woollam *v.* Hearn. 7. Vesey 211. Weston *v.* Emes, 1 Taunt. 115.

Even if the original agreement for the first year had been exclusive of the limitation, the renewal containing the restriction would bind the party for the second. He then entered largely into authorities to support his objection.

Jeffrey.—This is a renewal of the objection formerly taken, and if it is well founded, the

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Court of Session were bound to construe the writing, and decide the case.

It is said this was a renewal of a particular policy, and not of the agreement originally made by the terms of the policy. If no explanation is allowed we have no case. But the question is not the terms of the policy, but what was agreed. The question here is, whether the terms of the documents delivered to me, leaving the matter doubtful, I am entitled to explain this doubt by parol evidence of what the original bargain was? I do not bring witnesses to explain, control, or contradict the writings, but to prove facts in conformity with them.

The question is the same as if it had occurred before the renewal. The insurance was general, and they were bound to give me a policy in general terms. The transaction was inchoate, and the question is, what farther was to be done? The dictum in Tait applies *a fortiori* to insurance, as it may be proved by parol in Scotland.

Tait, L. of Ev. 348 and 349.

LORD CHIEF COMMISSIONER.—Since the former argument I have turned the subject much in my mind. There is no doubt, that, when the rights of parties depend on written instruments, touching these instruments is

touching the key-stone on which men's rights depend, and I trust that I shall not lay down any thing inconsistent with the principles stated from the books, or argued at the Bar.

But in the present, and indeed in every case, the question must be decided on the issue sent, and the whole circumstances.

It is of importance to have had this subject discussed; but the question in this case is not on a policy, otherwise it would have been admitted in the issue; but there is no reference to a policy in the issue, the conclusion from which is, not that the Court of Session should have decided this case, but that this is not a question on a written instrument, and as it is not on a written instrument, but on an agreement, parol evidence is competent.

If there was any fraud or gross negligence on the part of the pursuers, or any act they should have done to be acquainted with the policy, the situation would be different. But it is clear the pursuers were unacquainted with the policy, and, so far as appears at present, not from their fault.

The evidence is admissible, as it is not to vary the construction of a written instrument, but to ascertain whether this policy is not different from the agreement entered into by the

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parties. If the evidence went to explain a written contract, it would clearly be incompetent.

Evidence of what one of several pursuers said only admissible to render intelligible what is said by an agent of the defenders.

An objection was taken to proof of what Mills, a pursuer, said in conversation with Hamilton, the agent for the office.

LORD CHIEF COMMISSIONER.—The pursuers cannot prove what Mills said, except to make Hamilton's observation intelligible.

Evidence admitted of the practice of English Insurance Offices to take Scotch risks at sea.

A witness was asked whether two other vessels were insured at the same rate in another office, including the risk at sea.

LORD CHIEF COMMISSIONER.—That may be evidence of the rate of premium, but is not evidence of the contract. It may be an item of evidence that another office takes the same rate, and insures against the risk at sea.

It was then proposed to give in evidence the practice of other offices as to delivering policies.

LORD CHIEF COMMISSIONER.—I think this is evidence; but perhaps the best way is to begin with the office of the defenders, and then prove the practice of others.

Evidence of an insulated trans-

When another witness was called,

Hope, Sol.-Gen.—This is to prove a refusal to deliver a policy on the part of the agent on a false pretence, and the pursuer is not to make out his case by proof of fraud in a different transaction.

action with the agent of an office rejected in a question with the office.

Jeffrey.—The fraud is not the question here; but the practice of trade as to delivering policies being proved, and the policy in this case not being delivered, is it not competent for me to show that they had a reason for withholding it?

LORD CHIEF COMMISSIONER.—This is not evidence to establish the contract, but of the act of an agent to affect his principal; and relates to an insulated transaction, of which the defenders had no notice, it is incompetent.

Hope, Sol.-Gen. in opening for the defenders, said, By act of Parliament the defenders are prohibited from taking any insurance at sea, and their proposals all exclude it; but it is said the receipt does not; the check, however, does, and is referred to in the receipt.

In the opening it was not distinctly stated whether the company or the agent were liable. The company do not mean to separate themselves from the agent; but the question is, whether the company are to be liable for an

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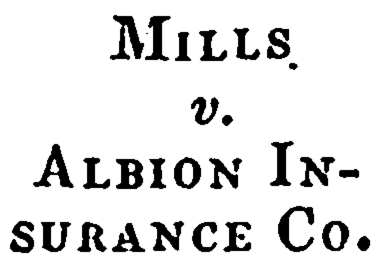

act of which they were ignorant, and which was contrary to the authority of the agent, and to act of Parliament. But it is necessary to know against whom the pursuers proceed, as, if Hamilton acted as agent, he is not personally responsible, and if he is personally responsible the company are not liable, as he did not act for them.

When the deposition of Mr Hamilton as a haver was mentioned, an objection was taken to any reference to it, and his Lordship held that it could only be read as to the papers, but not in proof of a fact.

Hope, Sol-Gen.—I submit to the Court, that by act of Parliament this contract is void, and that the sum is forfeited.

A question of law reserved, as it would have formed a bar to a verdict.

LORD CHIEF COMMISSIONER.—I do not know that I could direct a verdict on this ground. If the argument is well founded, it goes to show that the action has no foundation, and this rests on a pure point of law, upon which the Court of Session must decide. The only way I can deal with it is to put the question in the issue to the jury, and reserve the point. The law on the act of Parliament cannot be stated to the jury, as it is a bar to a verdict on the issue.

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A nephew rejected as a witness.
A clerk who may think himself interested admissible.

The first witness called for the defenders was a nephew to the defender, Hamilton, and an objection to his admissibility was sustained. The second was the clerk with whom part of the transaction, as to the insurance, had taken place, and to him it was objected that he was interested, as he could only tell one story with safety to himself.

LORD CHIEF COMMISSIONER.—That goes to credit, not competency.

The witness was then called; but from what he stated in his examination *in initialibus*, the defenders did not examine him, and rested the case on the written evidence.

Jeffrey, in reply.—The question here is, Whether there was an insurance from loss at sea? The pursuers paid the full premium for such an insurance, and had no motive to insure any where else, as the vessel is almost constantly at sea.

It is said I ought to have sent for the policy; but was my not doing so a neglect to be visited with so severe a penalty, especially when Hamilton entrapped me into the insurance by concealing a letter from the company in London? As I must have a verdict, I see no use in distinguishing between the agent and the

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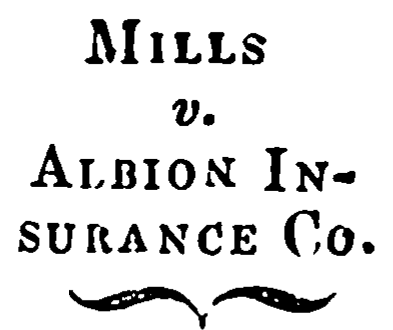
company; for, with respect to the pursuers, the company are foreigners, and the agent the only one against whom they can come.

As to the statute, the Judge in the Admiralty Court at first repelled the plea, but afterwards reserved it. I did not bring his judgment on this point into the Court of Session, and the other party only appealed on the point of expences.

LORD CHIEF COMMISSIONER.—With regard to this last point, it would be quite wrong, gentlemen, to embarrass your minds, as this is not the proper place for it, and if it proves an impediment to your verdict, it will be so dealt with in the proper place.

There has been much time occupied in discussions on evidence which required great attention, but every thing that has come out confirms me in thinking I was right in what I did. I shall therefore now call your attention to the history of the case, and the evidence in support of it.

On one side, I am sorry to say, there appears to have been much negligence, and perhaps there was negligence on both. It is for you to consider whether there should not have been more accuracy on the part of the pursuers; but



if the negligence was on the part of the agent for the defenders, it is impossible to visit the pursuers with the consequences of that negligence.

By the terms of the slip the policy is to be delivered to the party, or his order, but this does not fix that he must send for it. There was much evidence as to delivery of policies, and the obligation to send them, or to send for them. On this subject the letter from the company to Hamilton is important, though it was given in for a different purpose. This letter, suggesting to the agent, that, unless the pursuers agreed to the restriction, the policy should not be renewed, was an additional obligation on him to communicate the restriction; and it is admitted that these letters were not communicated to the pursuers till after the loss. The company are entitled to have the case well considered, as, by the negligence of their agent, this letter was not brought into view, and they had no opportunity of withdrawing their business and placing it in other hands, and no information was given to them at the time the united policy was substituted for the separate ones. The great feature of the case is concealment; and the question is, who is to suffer by that concealment? If the concealment is made

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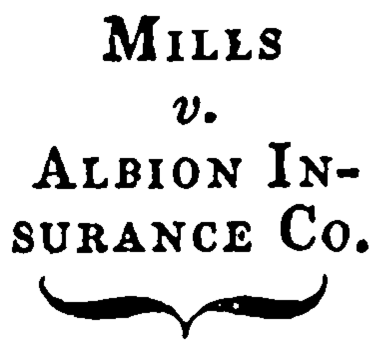

out to your satisfaction, that will warrant a verdict for the pursuers.

The policy was not sent in due time, and while the thing was in head, and the subject of attention, which is an alleviation of the negligence on the part of the pursuers. The question here is not whether, under the policy, the defenders are liable for the loss, but whether they are under an obligation on the facts of the transaction, to pay the loss, because they did not insure according to their promise and agreement?

If this had been a question on the policy, then no parol evidence could have been received; but the question upon the issue is, whether there was an agreement to insure against the risk at sea? and you are to say by your verdict whether the agreement is made out. To prove this, evidence of specific words is not necessary. It is sufficient if it is made out by facts and circumstances. It is an anomalous case, being an obligation to relieve from the loss of a vessel where there is no policy. In making out the case of an implied contract the rate of premium is most important, as the consideration paid is of the essence of the contract. In insurances the premium and indemnity go together. The premium is less if the risk is less, and *vice versa*.

ARROTT v. WHYTE, AND HAMILTON v. WHYTE.

In this case the premium was 10s. 6d., and there is a cloud of witnesses to prove that this was sufficient to cover the whole risk. The sea risk had a premium attached to it as much as in the case of war or peace. Without the risk at sea the premium is proved to be 3s.

The risk is taken by persons who say they had no power to take it; but they should have said so before. If you agree with me in the view I have taken, you will not make any distinction amongst the defenders, but find generally for the pursuers.

Verdict—" For the pursuers."

Forsyth, *Jeffrey*, and *Cockburn*, for the Pursuer.
Solicitor-General and *Jardine*, for the Defenders.
(Agents, *Ro. Rutherford*, w. s. *Daniel Fisher*, w. s.)

PRESENT,

LORDS GILLIES AND MACKENZIE.

ARROTT v. WHYTE, AND HAMILTON v. WHYTE.*

1826. Dec. 27.

Damages for a nuisance.

THESE were two actions to recover damages on

A view refused in a case of nuisance.

* These cases were set down for trial at Glasgow; and on the first day of the sittings (18th September 1826) an appli-