

James Hamilton

29
No. 10
Not Reported
Insurance, whether

Short Roll

for Friday the
6th of August 1782

July 18. 1782.

UNTO THE RIGHT. HONOURABLE,

Adhere

The Lords of Council and Session,

the petitioner, the broker having insured at a higher rate than Mr. Craig's commission allowed. The Lord Ordinary, assigned the defendant, and the Court adhered to the petition, and the petitioner liable in expenses.

P E T I T I O N

Petition of James Hamilton
sent.

O F

JAMES HAMILTON senior, Insurance-Broker in Glasgow,

HUMBLY SHEWETH,

THAT, upon the 11th day of October 1780, the petitioner received the following letter from Robert Hunter and Company, merchants in Saltcoats. " We beg the favour of you to order insurance on the brigantine Hamilton, John Johnston master, at and from Memel, (from the date of Captain Johnston's last letter to us of the 5th ult. which you have here inclosed for your perusal), to any part in the frith of Clyde, or to any part in St George's Channel, not to the southward of Dublin, where she may discharge, with liberty to call at Saltcoats for orders, valuing the Hamilton, with all her materials and apparelling, in the policy, at L. 450, L. 250 on the freight, and L. 100 on the cargo, in all L. 800 Sterling; of which sum be pleased to insure L. 550, and L. 15 for Captain Johnston's cloaths, books, and instruments, we limiting you not to exceed eight guineas per cent, and as much under as possible, making no doubt but you will get it done by good men; expecting your answer in course, with Captain Johnston's letter, and, if insured, a note of the
A " underwriters

Oct. 10. 1780.

“ underwriters names. You will observe the Hamilton’s cargo
 “ is fir-timber, and the broken stowage filled up with staves.
 “ We are,” &c.

In consequence of this letter, the petitioner applied to many different underwriters at Glasgow, endeavouring to procure this insurance at the rate of eight guineas *per cent.* in terms of Mess. Hunter and Company’s letter; but this he found could not be done, as the premium of eight guineas was thought too low; the underwriters on the ship Maria, and other vessels from the Baltic to Clyde, in the same situation with the ship belonging to Mess. Hunter and Company, having received nine guineas of premium.

In order, however, to serve Mess. Hunter and Company, and secure their property against any risk, the petitioner did, upon the 11th of October, after a good deal of difficulty, procure insurance upon the brig Hamilton, in the terms mentioned in Mess. Hunter’s letter, excepting that instead of eight guineas the premium was declared to be nine; this being the very lowest rate at which the insurance could be got.

Upon the same day, the petitioner informed Mess. Hunter and Company of his having made this insurance, and explained to them the reason why the premium was one guinea *per cent.* higher than what these gentlemen seemed to expect it could have been got for. The petitioner’s letter is in these words: “ Gentlemen,
 Oa 11.1780. “ Your favour of yesterday’s date I received. I did my best endeavour to get your insurance on brigantine Hamilton done
 “ at eight guineas *per cent.* but without being able to effect it.
 “ Since my last to you, the underwriters have got nine guineas
 “ *per cent.* upon the Maria, and others, straight into Clyde.
 “ With very great difficulty I have got L. 550 done on the Hamilton, with the liberty of calling at Saltcoats for orders, and
 “ liberty to discharge in any port in the frith of Clyde, or at
 “ any port in St George’s Channel, not to the southward of
 “ Dublin, at nine guineas *per cent.* the policy to be vacated if you
 “ are not pleased upon your saying so, but this must be in course of post.
 “ Rather than correspond, I took upon me for you to give the
 “ one guinea additional on the above terms. The brigantine
 “ and furniture is valued, agreeable to your order, at L. 450
 “ Sterling, her freight at L. 250 Sterling, and her cargo at
 “ L. 100; but as you do not specify how much was to be done
 “ on each separately, only that L. 550 was to be done in whole,
 “ it

“ it is done promiscuously upon ship, freight, and cargo. Ex-
 “ pecting your answer in course, I am,” &c.

The meaning of this letter was, that as Mess. Hunter and Company had restricted the petitioner to eight guineas premium, and he had found it necessary, in order to get the ship insured, to do it at nine; so he left it in their option whether to approve of the additional guinea being given or not. If they approved of what had been done, then their ship was to have been considered as insured by them at the premium of nine guineas. If not, then they were to be considered as liable only in the premium of eight guineas; and as to the additional ninth guinea, the petitioner was willing to take the risk of it upon himself.

This letter of the petitioner's, which is dated the 11th of October, it is alledged by Mess. Hunter and Company, was not received by them till the 13th of that month; and between the 11th of October, the date of the insurance, and of the petitioner's letter, and the 13th, the ship insured arrived. Mess. Hunter and Company have now admitted, that they had, during this period, certain intelligence of their ship having arrived in the Fairley road in the frith of Clyde. At the same time, the pursuer has reason to believe that Mess. Hunter and Company did actually receive the pursuer's letter of the 11th, either late that evening, or in the morning of the 12th of October, and that they kept up their answer for a post, trusting to the chance of the ship's arriving, and which, your Lordships see, actually happened, and knowing that, in the event of a loss, their property was secure. In this situation, Mess. Hunter and Company formed the plan of getting free of the insurance altogether, and by that means of getting free of the premium due to the insurers.

In pursuance of this plan they wrote the following letter to the petitioner. “ *Saltcoats, 13th October 1780.* Mr James Hamilton,
 “ Sir, Your favour of the 11th current we received this day, and
 “ observes you have got L. 550 insured on the Hamilton, &c.
 “ from Memel, to any port in the frith of Clyde, or at any port
 “ in St George's Channel, not to the southward of Dublin, at
 “ nine guineas *per cent.* the policy to be vacated if we are not
 “ pleased, upon our saying so in course. As you have gone past
 “ our limits, and that we were determined not to exceed eight
 “ guineas *per cent.* according to our letter, we therefore declare
 “ the policy void; but if customary, in such a case, to pay the
 “ 7 s. 6 d. for the policy and postage of letters, please let us
 “ know, and we will order payment accordingly. At the same
 “ time

“ time we are much obliged to you for your care and diligence in
“ this matter; and are,” &c.

It will be observed that in this letter the circumstance of Mess. Hunter and Company having got information of their ship's having arrived in Fairley road, is carefully concealed.

The petitioner, considering that, in consequence of the insurance which had been made, Mess. Hunter and Company were liable to the insurers, if not in the premium of nine, at least in that of eight guineas, and that he was liable to make the premium good, applied to Mess. Hunter and Company for payment of the premium; but they having refused, he brought an action against them, libelling for payment of the premium. The cause having come before Lord Braxfield Ordinary, the pursuer restricted his claim to eight guineas *per cent.*; and his Lordship, after
Dec. 14. 1781. hearing parties, gave the following deliverance. “ Ordains the
“ pursuer to give in a special condescendence of the grounds of
“ his action, and therein particularly to specify any undue de-
“ lay upon the part of the defenders in giving notice to the pur-
“ suer that they disapproved of the insurance made, and were not
“ to be bound by it; and when given in, ordains the defenders to
June 12. 1782. “ give in answers thereto.” And thereafter, of this date, his
Lordship pronounced the following interlocutor. “ The Lord
“ Ordinary having advised this condescendence, with answers,
“ affoilzies the defenders, and decerns.” And to this interlocu-
July 4. tor his Lordship adhered.

Of these interlocutors the petitioner humbly prays your Lordships review; and that the whole cause may be before the court, he has fully laid before your Lordships the letters of correspondence that have passed between the parties.

From the circumstances of the case, and the insurance which has been made, he humbly submits, that the defenders are liable in the premium of eight guineas *per cent.* It is very true, that the order of insurance limits the premium to eight guineas *per cent.* and that the insurance was made at nine; but though this may afford a reason for the defenders not being liable to the extent of the nine guineas, yet it can afford no good reason why they should not be liable to the extent of eight guineas, the sum fixed in their own order.

Although perhaps the petitioner might insist, upon equitable grounds, for the defenders being liable in the whole premium in-
fured,

fured, he is willing to wave his demand upon this head ; but he submits it to be clear, that the circumstance of the policy having been done at the premium of nine guineas, can be no reason for the defenders not being bound, in terms of their order, to the extent of the premium of eight guineas. The petitioner's demand being restricted to this sum, his action is founded upon the very terms of the defenders order, and of that order being executed by him. The circumstance of the petitioner's having exceeded his commission as to one guinea, can be no reason against his having a good right to insist against his employers, when he asks not the whole sum, but only the sum specified in the commission. This accordingly is clearly explained to be the doctrine in the Civil law, and is accordingly expressed in the following manner in the Institutes, § 8. "*De Mandato*, Is qui exequitur mandatum, non debet excedere fines mandati. Ut ecce si quis usque ad centum aureos mandaverit tibi, ut fundum emeris, vel ut pro Titio sponderes ; neque pluris emere debes, neque in ampliorum pecuniam fidejuberem ; alioqui non habebis cum eo mandati actionem. Adeo quidem, ut Sabino et Cassio placuerit, etiamsi usque ad centum aureos cum eo agere volueris, inutiliter te acturum : sed diversæ scholæ auctores recte usque ad centum aureos te acturum existimant ; quæ sententia sane benignior est. Quod si minoris emeris, habebis scilicet cum eo mandati actionem ; quoniam qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandasse intelligitur, ut minoris, si possit, emeretur." And Vinnius, in his commentary upon this part of the Civil law, observes, that though some of the doctors have differed upon this point, that yet the sound and just opinion is, that though the mandatory has exceeded the terms of his commission as to the sum, still he has an action to the extent of the sum authorised by the commission. His words are, "*Sed Nervæ et Proculo contra visum est, ut hujusmodi specie, saltem ad summam mandato expressam, mandatarius recte agere, quasi hæcenus non aliud sed quod rogatus est fecerit, mandatumque impleverit. Ut ecce, rogatus fundum emere centum aureis, eum emit centum et viginti ; qui autem centum et viginti emit, eum verum quoque est centum emisse, cum utique majori summæ semper insit et minor ; l. 1. § Si stipulanti, 4. De verb. obl.* Itaque consueverunt in hypothesei proposita, centum juxta mandatum impensa, atque hæcenus actionem mandatario recte dari :

“ quod amplius est, quia est extra mandatum, pro inutiliter ad-
 “ jecto habendum; quæ sententia merite recepta est. *D. l. 3. §.*
 “ *ult. junct. l. 4. l. rogatus 33. hoc tit.*”

But the defenders have laid their defence chiefly on the letter written by the petitioner on the 11th of October. They have said, that by this letter the insurance was to be vacated *in totum*, upon their saying so; that accordingly they did say so; and therefore that the insurance being to be considered as void, they cannot be found liable in any part of the premium.

But to this the answer is, That it was by no means the intention of this letter, that the insurance should be made void and null *in totum*, at the option of the defenders. The only meaning of it was, that as the petitioner had exceeded the terms of his order, as to the amount of the premium, the defenders should have it in their power to approve of this excess or not as they chose, to vacate the policy so far; and the petitioner was willing to take his risk of this; but did not mean that the whole, so far at least as the insurance was made conform to the order, should be made void. In this view therefore the defenders cannot avail themselves of this letter, to get free of being liable for the premium at eight guineas per cent.

The petitioner shall suppose, that between the 11th of October, when his letter was written, and the 13th, the date of the defenders answer, instead of accounts having come of the ship's having arrived in the Fairley road, accounts had been received of the ship and cargo's being lost or taken. In this event, it is clear what would have been the defenders conduct; they certainly would have approved of the insurance made, and would have insisted, that in consequence thereof they were intitled to recover the loss; and it is submitted, that they would have had right to do so. Their argument would have been, that they directed the insurance to be made; that it had been made; and though an option had been given them, of approving or not, on account of an excess as to the premium, that yet so far as the insurance had been made conform to the order, it must in all events stand good. And with regard to the additional guinea, it is probable also, that in this case they would have had no objection with regard to it, but would have approved of every thing that had been done.

If therefore the defenders would in such a case have been intitled to insist upon the insurance, and in consequence thereof
 would

would have recovered their loss against the insurers, it is submitted, that this affords a very strong argument in the present case, why, now that the ship has arrived safely, the premium stipulated to the insurers should be obtained. It is an established principle in law and equity, That in a mutual contract where there are stipulations and chances of loss or advantage on both sides, both parties should be bound, or neither; now, agreeably to this rule, if the insurers, in consequence of the policy subscribed, would have been bound to make good any loss that happened, it is submitted, that they in their turn are equally intitled, to insist in consequence of the ship's having arrived safely, to recover their premium upon the insurance. It would be the hardest case in the world, if it should be considered, that it was in the power of the owners to insist, in case of a loss, against the insurers for being indemnified, and yet that the insurers, or the broker in their name, in case of the ship's safe arrival should not be intitled to recover the premium, on account of which alone they agreed to insure against the loss.

But the petitioner will go one step further, and must submit to your Lordships, that even supposing the sense which the defenders have put on his letter of the 11th of October were to be received, that yet in the circumstances of this case, this would not free the defenders from being liable in the premium of eight guineas. Supposing the meaning of the letter to be, that the insurance was to be vacated *in totum*, upon the defenders saying so by a letter, if they chose it; yet still this vacating was not to take place till the defenders said so by letter. The words of the letter of the 11th of October are: "The policy to be vacated, if you are not pleased, upon your saying so; but this must be in course of post." Till therefore the defenders said this by letter, the insurance was not vacated. Till they did this, it certainly stood good. But the defenders did not do this till the 13th; between the period therefore of the 11th and the 13th of October, the insurance was not vacated in any respect. If therefore the ship had been lost during that time, the insurers would certainly have been bound to pay the loss; and upon the same grounds, it is submitted to be clear, that as the ship, during this time, arrived safe, the insurers, or the broker in their name, is intitled to recover the premium. In short, even upon the defenders view of this letter of the 11th of October, the insurance stood good till the letter of the 13th was written

written and received by the petitioner. Before this period the ship's arrival happened, and therefore the premium of eight guineas at least has been clearly gained.

May it therefore please your Lordships, to alter the interlocutors of the Lord Ordinary; assilzieing the defenders from this action and to find, that the defenders are liable in the premium of eight guineas per cent. upon the different sums insured.

According to justice, &c.

WILL. CRAIG.