1780. *July* 4. JAMES WILSON and COMPANY *against* HENRY RITCHIE and OTHERS.

JURISDICTION

Of the Court of Session, in the first instance, in a question of Insurance on a Ship.

[*Faculty Collection, VIII.* 210; *Dictionary*, 7527.]

BRAXFIELD. As to the 1*st* point, prorogation, the Act 1681 lays an express injunction on the Judges of the Court of Session not to interfere in the first instance: and no person can make the law other than it is. As to the *2d* point, That the Articles of Union made an alteration in the law as to this particular,—I see no such thing. As to the *3d* point, Whether, by the Act 1681, a policy of insurance is a cause *purely* maritime?—I incline that it is not; and that the admiral has only a cumulative jurisdiction. It is not the place *where* the contract is entered into that regulates jurisdiction: A deed made at sea may be tried in the ordinary civil courts; and a deed made at land may be of such a nature as only to be triable before the admiral. The Act 1681 seems to mean, by *maritime*, such causes, with respect to which execution would naturally follow in the Court of Admiralty, as being within the Admiral's jurisdiction, and not at land. Now cases, as to policies of insurance, are generally among parties who reside at land,—merchant adventurers; and there seems no reason why such parties should be obliged to go before the Admiral in order to try causes, which, if of any consequence or difficulty, must be tried over again before the Court of Session.

HAILES. I think that there can be no prorogation here. The parties and the Judges of the Court of Session cannot make that cause to proceed, when an Act of Parliament has said the contrary, and *prohibited* the Court of Session to interfere. The mode of forcing a primary trial in the Court of Admiralty is no doubt inconvenient and expensive to suitors; but there is no help for it: we must submit to the commands of the Legislature. As to the notion that the Articles of the Union introduced a change, I see no evidence of it. The Union brought us into a better situation in many particulars, but in this it left us just where it found us. That a policy of insurance is a maritime cause, in terms of the Act 1681, I must still think; for the opinion of this Court, and the opinion and acquiescence of the nation lead to this conclusion. I would clip the Admiral's wings when he takes too wide a flight, but I cannot agree to pluck out all his feathers.

KAIMES. I should wish to interpret the statute so as to allow a cumulative jurisdiction, with consent of parties. The words in the statute are strong; but words without meaning are nothing; and the purpose of the statute, however expressed, was to benefit the lieges. Now, the cumulative jurisdiction benefits them, whereas, if the original jurisdiction is in the Admiral, the lieges must suffer loss by delay and fruitless expense. In many cases the Court has departed from the words of statutes, in order to give efficacy to their meaning.

MONBODDO. The parties cannot make a jurisdiction for this Court: *that* would be to confound all order of jurisdiction, and so a sheriff might judge of heritable rights, and the Court of Session of criminal cases. The Admiral has often encroached on the jurisdiction of this Court, but I am not inclined to make *reprisals.*

COVINGTON. I must lament that the Court was so late in discovering the objection. The *first* question is, Whether is this a maritime cause? And, *secondly,* Whether there is a cumulative jurisdiction in this Court? Supposing the cause to be maritime, the extending the jurisdiction of the Admiral is hurtful to the country, by inflaming expenses and protracting litigation; but I have doubts as to the opinion delivered by Lord Braxfield. In criminal matters, the Admiral's jurisdiction depends on the *locus delicti.* Originally, the Court of Session had a cumulative jurisdiction in maritime causes, and the Admiral was admitted to sit in that Court as a sort of assessor: this is a material link in the chain of argument, to prove that the jurisdiction remains with the Court of Session, if not expressly taken away. The Act 1681 gave no new jurisdiction to the Court of Session; and had this cause come in before the date of the Act, this Court might have judged of it. This is the first instance of a case of a policy of insurance being brought originally before the Court of Session. The nation, and all our lawyers, suppose it a maritime cause: and when words are general, they must be explained by the practice of the nation, and by the opinion of our lawyers. It is said that a policy of insurance must be extricated at land: if *that* makes it not a maritime cause, by the same rule bottomry-contracts are not maritime causes. In every commercial country where there is a code of maritime law, there is in it a chapter concerning insurances. A policy of insurance has no reference to any place, but it is maritime in its nature. Yet I think that the Court of Session may try this cause, for that Court has an original jurisdiction. The Act 1681 is calculated for the benefit of the lieges; and if the lieges judge it for their advantage to bring their causes to the Court where they can be best and most speedily tried, it is not the business of the Court to start objections to this.

JUSTICE-CLERK. There is no instance given of a policy of insurance having been ever tried by the Court of Session, in the first instance. Many inconveniences attend the privative jurisdiction of the Court of Admiralty, especially in causes which require dispatch; yet, if such is the law, there is no help for it. My own original notions revolt against the doctrine that an action on a policy of insurance is not a maritime cause. All lawyers, in all countries, hold it to be a maritime cause: it is such in its nature, because the obligation is to be performed at sea, and all the hazards undertaken are at sea, as against jetsom, letters of marque, barratry of master, &c.—all things which fall not within the common law; and did my opinion waver as to this, I should be confirmed in it by the universal practice. Yet I rather incline to sustain the jurisdiction of this Court, a jurisdiction which the Court has to a certain extent. The Act 1681 itself supposes that there is some jurisdiction in the Court.

ALVA. The words of the Act 1681 are strong, *prohibiting* this Court to interfere. But this is not a maritime cause or sea-faring contract; it is merely a contract among merchants and adventurers.

KENNET. This is a maritime cause, and so Mr Erskine has expressly laid

down; but, as the cause has proceeded so far before this Court, I think that this Court may determine it.

On the 4th July 1780, "The Lords sustained their jurisdiction in this cause."

Act. A. Crosbie. *Alt.* A. Murray.

Hearing in presence.

Diss. Stonefield, Hailes, Monboddo.

N. B.—It is hard to say what was the principle of this interlocutor, for the Judges who voted for the interlocutor went upon different and contrary grounds; yet the general question was fairly put, and no other question could have been fairly put.

1780. *November* 15. THOMAS HAY *against* WILLIAM WOOD.

CONDITION.

A Father granted a Bond of Provision to his Daughter, supposing her to be unmarried, to be null if she married without his consent. She had been previously married, at which her Father expressed dissatisfaction, though he received her into his family. The Bond found not exigible.

[*Fac. Coll. IX.* 12; *Dict.* 2982.]

KAIMES. Mr Wood would not have given his consent, had it been asked. He knew nothing of the marriage which had taken place: his intention only respected a future marriage.

BRAXFIELD. I should think it a hard case, if a sum intended for the young woman should go to the creditors of her husband. The question is not, Whether she is to be provided? for she is, at any rate, entitled to a handsome provision. The father made a gratuitous deed, and he was at liberty to adject any lawful condition to his gift. The condition was not only lawful, but rational.

COVINGTON. The condition is *irritating*, but the provision itself is *absolute*. All that the daughter could get by this bond was present money. [He quoted the civil law, as in the informations, which, as he said, determined this case, and he laid much stress on the ratification.]

KENNET. Great is the favour of marriage, but there is also favour due to the will of the parent. A gratuitous deed may be qualified by the will of the father as well as of a stranger. I go upon what was *actum et tractatum*. I do not dissect words; I take the whole together. The text of Pomponius, in the *Corpus Juris*, relates to the case of a father intending to give a sum to his daughter, should she marry, whether with or without his consent; and therefore the Roman lawyers thought that the phrase *si nupsisset* was not to be attended to.