SECT. III.

Effect of the Bankruptcy of the Underwriter or Broker.

1785. *June* 28.

The CREDITORS of DAVID ELLIOT *against* WILLIAM MORISON and Company.

No 31.
The proprietors of three ships procured an insurance on all of them: Before the result of the voyage was known, but after one of the ships arrived at its destined port, the underwriter became bankrupt. On the safe arrival of the whole ships, his creditors raised an action against the insured for payment of the premium. The Court sustained the defence, that by the underwriter's bankruptcy, he becoming unable to fulfil his engement, the insured were entitled for their own security, immediately to re-insure.

WILLIAM MORISON and Company procured from David Elliot insurance on three ships belonging to them.

Before the result of the voyage was known, but after one of the ships had arrived at its destined port, David Elliot became bankrupt, and Morison and Company obtained from other underwriters a second insurance of their property. Afterwards, upon the safe arrival of all the three ships, they were sued for the premiums stipulated in the first insurance, by the Creditors of David Elliot, who

Pleaded; In the contract of insurance, as in every other mutual agreement, the supervening inability of one of the parties may entitle the other to demand a liberation from his engagement. For effectuating this, however, the concurrence of the person unable to perform is necessary; or if that cannot be had, an action must be brought, in which his creditors, if it appear to them a profitable adventure, shall have an opportunity, after fulfilling his part of the contract, to insist for reciprocal performance. And such measures must be indispensably requisite in a case like the present, where the obligation undertaken by the insurer having been in part implemented by the safe arrival of one of the vessels before his bankruptcy, the stipulated premiums had become due to him in a corresponding proportion.

Were the insurance-contract alone voidable at the will of one of the parties, that deviation from the ordinary rules must have been long ago fixed by innumerable precedents. The manner of indicating such a purpose must have been precisely defined, that he to whom this freedom is permitted, might not still hold the other bound, while every obligation on his part has been completely dissolved. Upon the bankruptcy of the insured, before payment of the premium, it would follow that the underwriter should reciprocally be allowed to recede from this contract. Nay, upon the insolvency of the insurer himself, his creditors should be at liberty to shake themselves loose from an engagement which they are no longer in a capacity to enforce.

In the practice of England, it is evident an insurance cannot be annulled in so summary a manner. By 19th Geo. II. c. 37. § 4. the assignees of a bankrupt-underwriter are authorised to make re-insurance, the peculiar situation of the parties being expressed in the policy; thus plainly intimating that the first in-

surance still remained obligatory. And by cap. 32. § 2. the insured are allowed to rank with the underwriter's other creditors for losses sustained after the bankruptcy. In the present case, therefore, where the insured made no attempt to obtain a dissolution of the bargain, and where, of course, they were entitled, in case of a loss, to draw a rateable proportion of the bankrupt estate, they ought not to be permitted, on the fortunate issue of the voyage, to with-hold the sums which in the policies they became bound to pay. No 31.

Answered for the defenders; In other agreements, there is no injustice in allowing to the creditors of a bankrupt an opportunity of fulfilling the engagement of their debtor. The difference between performance at the time specified in the contract and at a subsequent period may be very unimportant, and admits of an adequate reparation in damages, while, by retaining the thing to be given or performed on his part, the solvent person is sufficiently protected from loss. But in the contract of insurance, the smallest delay may be productive of consequences which are irremediable; as in the mean time the misfortune guarded against may have befallen the subject insured, after which, if known to the parties, no new insurance can be made. Hence, after the underwriter's bankruptcy, the insured are not obliged to suffer an hour to elapse, but may proceed instantly to reinsure, which at once puts an end to the former bargain.

The practice of foreign nations is agreeable to this reasoning; Ordinances of Hamburgh, tit. 18. p. 2; of Amsterdam, art. 25. In England, according to the opinion of some writers, even without any new policy, and though the adventure has been fortunate, the insured are entitled to a repetition of the premiums, which are there uniformly paid when the policy is subscribed; Magens, v. 1. p. 94; Wesket, *voce* Insurance, § 6. The statute, too, of the late King, which allows re-insurance to be made by the insured, in case of a bankruptcy, clearly shows this to be the sense of that nation; it being an established maxim there, That two valid insurances of the same interest in the same subject cannot subsist at one time. Neither is it of any consequence, that the creditors of an underwriter are permitted, by the statute quoted on the other side, to cover, by a new insurance, the hazard undertaken by him, which only proves the contract not to be *ipso facto* voided by his bankruptcy, and that it cannot be annulled either by the bankrupt or by his creditors; as that entitling the insured to rank for losses sustained after the bankruptcy, was solely meant to remove a peculiarity in the law of England, which allowed those creditors only to rank under a commission of bankruptcy, whose debts were fully due when the insolvency happened.

THE LORD ORDINARY sustained the defences; to which judgment, after advising a reclaiming petition for the pursuers, with answers for the defenders, the COURT, almost unanimously, adhered.

Lord Ordinary, *Esgrove.* Alt. *A. Campbell.* Alt. *Blair.* Clerk, *Home.*

C. *Fol. Dic. v. 3. p. 334. Fac. Col. No 217. p. 342.*