1787. *July* 17.

SHEDDAN and COMPANY *against* LOGAN, GILMOUR, and COMPANY.

No 19.
If deviation be alleged by the underwriter, on him lies the *onus probandi.*

LOGAN, Gilmour and Company, in 1775, made insurance, at Norfolk in Virginia, on a ship belonging to Sheddan and Company, 'from that port to the 'Island of Tobago, with liberty to call at two more islands while there, and 'from thence back to Norfolk.'

In 1784, action was brought for the insured values, before the High Court of Admiralty; the delay of that proceeding having probably been occasioned by the war, and the confusion that subsisted in the intervening period. The proof adduced shewed, that the vessel was captured by the enemy before its voyage was ended; but it did not ascertain, whether she had always continued in the precise course prescribed in the policy. Neither sentence of condemnation, nor protest by the shipmaster, appeared to have taken place. The cause having been removed into the Court of Session, it was

Pleaded for the defenders; It is incumbent on the insured, not only to prove a loss, but that it is precisely such an one as comes under the insurance. He alone, indeed, possesses the means of proof, while the insurer is in the situation of a stranger; Park's System, p. 464. It further behoves the insured to intimate the loss to the insurer without delay, that while circumstanees are recent he may the better obtain the requisite information; Wesket *v.* Claimed, Insured, Notice. Accordingly, in every trading nation of Europe, if Britain alone be not an exception, a prescription of this kind has been established, which in none of them exceeds the period of four years. *Vid.* Foreign ordinances, *penes Magens.* And it would be strange indeed, if, instead of four, our law were to admit no limitation short of forty years. If however, in this particular case, no prescription shall operate, the delay of action, which excludes the defender from every proper inquiry, should at least enforce the demand from the pursuers, of complete and satisfactory evidence. Yet the most essential piece of evidence is here a-wanting, there being nothing to shew that there happened no deviation in the course of the voyage insured. Nor can any supposed state of public affairs afford an excuse for the non-production of such documents as the shipmaster's protest and the sentence of condemnation.

Answered; Whatever rules may obtain in foreign states, it is certain, that in Scotland no short prescription is known of claims on policies of insurance; nor is there any special prescription of them in England, where they are left to the operation of the general statute of limitations. But in the present case, there could be no room for prescription, as the only delay which has happened was occasioned by the public calamities. That the capture in question was prior to the completing of the voyage, is indisputable; and if the defenders affirm that the voyage, as insured, was deviated from, the proof of such deviation must be incumbent on themselves.

THE LORD ORDINARY pronounced this interlocutor: 'in respect it is neither proved, nor offered to be proved, that the ship was lost in a voyage different from that prescribed in the policy, finds the defenders liable for the insured values.' No 19.

A reclaiming petition having been presented, to which answers were given in, 'THE LORDS adhered to the interlocutor of the LORD ORDINARY;' as they again did, on advising a second reclaiming petition and answers.

Lord Ordinary, *Braxfield.* Act. *Ross.* Alt. *Rolland.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 329. *Fac. Col. No* 339. *p.* 520.

1790. *November* 16.

ARCHIBALD and JAMES ROBERTSON *against* JOHN LAIRD.

No 20.
A ship was insured from Virginia to Rotterdam, with liberty to call at a port in England. Found, that the port must be in the line of the voyage, or not materially out of the direct course.

LAIRD, at the request of Archibald and James Robertson, insurance-brokers, underwrote, along with other insurers of Greenock, a policy as follows, viz. 'On tobacco, from the loading on board the Fanny, at her ports in Virginia, 'say her loading ports in Virginia, and to continue and endure until she shall 'arrive at Rotterdam, (*with leave to call at a port in England*), and until the 'tobacco be there safely landed.'

The owner afterwards intimated to the brokers, his having lately received a letter, from which it appeared probable, that instead of Rotterdam, the vessel would proceed to Hull in England, and there discharge her cargo; directing them at the same time, if the underwriters agreed to the alteration, to get them to subscribe an indorsement on the policy to that effect.

Such an indorsement was accordingly subscribed by the other underwriters, but not by Mr Laird.

The vessel was actually cleared out for Hull, and in the course of her voyage to that port she was wrecked.

The brokers, having paid to the owner the sum insured by Laird, with respect to whom they had not fulfilled the direction given to them, brought an action against him for re-payment.

Pleaded for the defender; The vessel was lost on a voyage, not to Rotterdam, according to the terms of the policy, but to Hull, a port that it did not comprehend. It bore, indeed, 'leave to call at a port in England;' but liberty to call at a port can only be understood of one situated in the line of the voyage. In the present case, this liberty might apply to some port in the English Channel, such as Plymouth, Falmouth, or Dover, all of which lie in the course from America to Holland, and at the last of which it is usual for vessels on this voyage to call, in order to get pilots for the Dutch coast; but it could never comprehend the port of Hull, which is so remote from the navigation. If not confined to the course of the voyage, no other limit could be set to such an al-