LORD DEAS—I concur. What appears to me conclusive is that the pursuers were bound to effect insurance in the usual terms.

LORD ARDMILLAN—I have no difficulty in this case. The words of the bought and sold notes are clear. I need not again read them. The meaning of them is admitted. The agreement of parties, which we must construe as now explained by the minute of admissions, was that the policy of insurance was to be effected by the sellers, who are the pursuers of the action, and was to be tendered to the buyers, the defenders, along with the shipping documents. It is manifest that there being no special stipulation in regard to the nature of the policy of insurance it was intended to be an insurance of the usual character known in mercantile practice, and of the usual scope and comprehensiveness.

Now, I have no doubt that according to sound principle, and to the settled equity of commercial and maritime law, capture by enemies in war is within the usual scope and comprehensiveness of a British policy of marine insurance. War, with its incidents, is a risk within the policy, and the insurers take the risk of war arising after the date of the contract. This is the law laid down by all the best authorities in this country and in America. But it is unnecessary to quote other authorities, for the authority of Lord Mansfield in the case of *Elder* v. *Parkinson* is conclusive on such a point. There can be no higher exposition of the equities of commercial and maritime law than the judicial opinion of Lord Mansfield.

Therefore the pursuers, as sellers, were bound to insure, and to insure against the war risk as well as against the storm risk, or the other perils of the sea.

It is scarcely less unreasonable to say that war risk is excepted when the contract is made in time of peace than it would be to say that storm risk is excepted when the contract is made in time of calm.

On the refusal of the pursuers to effect this insurance, including the war risk, which they were bound to do, I think that the defenders were entitled to cancel the contract in respect of the pursuers' failure to fulfil one of the contract obligations, and they did declare the contract at an end.

It has been argued by Mr Shand that the defenders afterwards agreed to an arrangement that an insurance against all perils, including war, should be effected at mutual expense, each party paying half the premium. I think that no such arrangement has been proved. And none such has been alleged. Indeed, in the 4th article of the condescendence the pursuers distinctly allege the contrary; and in the pursuers' letter of 10th September 1870 they make the same averments. That view, taken ingeniously, but without foundation, by Mr Shand, must accordingly be set aside.

The only remaining point to which it is necessary to advert is, that the pursuers plead that they were entitled to withhold the shipping documents till the arrival of the ship at the port of discharge, and they also pleaded that they were not even bound to indorse the documents. This is, in my opinion, a plea which raises a most serious question, on which important results might depend. I have given to it the deliberate attention to which Mr Shand's argument was well entitled. But I have without difficulty arrived at the conclusion that it is not well founded. The transmission of the shipping documents was the first duty of the sellers. No authority in support of the pursuers' plea, either by institutional writer or in decision, has been quoted; and it is, in my opinion, contrary to the true principles and the settled understanding of commercial law and practice. We have been referred on both sides to the correspondence.

I have read this correspondence carefully. There is nothing in it which creates an exception—nothing which to my mind prevents the application to this case of the principles of law and equity to which I have adverted. At the same time I think that the defenders have also been somewhat too contentious.

Whether the pursuers were bound in a time of peace to insure against the war risk was a fair, though not a doubtful question, which has been well raised and argued. I think that the pursuers were bound so to insure. They failed to do so. But that question being once settled, this case is at an end. It can only be decided in favour of the defenders. There is no other ground stated or urged on which the pursuers can possibly succeed.

I am accordingly of opinion that we should recall the interlocutor of the Lord Ordinary, and assoilzie the defenders.

LORD KINLOCH absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third and fourth pleas for the defenders, and assoilzied the defenders with expenses.

Agents for the Pursuers—Scarth & Scott, W.S.
Agents for the Defenders—Murdoch, Boyd, & Co., S.S.C.

Thursday, November 30.

SPECIAL CASE—M'CALL'S TRUSTEES AND OTHERS.

Assignation—Trust—Alimentary Liferent—Apportionment. Competition between two sets of trustees to whom a person had assigned her right in the same legacy.

By a trust-settlement Mr John M'Call, *inter alia*, directed his trustees to pay the sum of £1000 to each of the children of his sister Mrs M'Kerrell who should be alive at the death of the truster's widow. Mr M'Call died 18th October 1833.

In November 1838 Mary M'Kerrell, one of the children of the truster's sister Mrs M'Kerrell, was married to the late Donald Smith. By antenuptial contract she assigned to trustees her whole right and interest in the succession of her uncle John M'Call, as also her whole other means and estate to which she might succeed during the subsistence of the marriage, excepting her right and interest in the succession of her father. It was provided that the whole estate thus conveyed, together with £2000 which her father had bound himself to pay to the trustees, should be held by the trustees for her liferent use allenarly, and for the children of the marriage in fee. The trustees were directed to pay to her during her life, and to her husband if he should survive her, the free annual proceeds of the estate vested in them, under the declaration that the liferent in her favour should be purely alimentary, and that the same should not be assignable by her nor affectable by her debts and deeds. Upon the death of the

longest liver of the spouses, the trustees were to divide the estate among the children of the marriage in such proportions as Mary M'Kerrell might direct. The assignation was intimated to M'Call's trustees on 31st December 1869.

Mr Donald Smith died on 1st September 1855, survived by his widow and four children, all of whom are still alive. In November 1869 Mrs Donald Smith, on the occasion of her eldest son Alexander Smith's marriage, assigned her right to the £1000 to his marriage-contract trustees.

It was expressly stated in this Special Case that at this time Mrs Donald Smith had no recollection of the terms of her own marriage-contract, and believed that she was entitled to dispose of the £1000 as she thought fit. The assignation to Alexander Smith's marriage-contract trustees was intimated to M'Call's trustees on the 26th December 1870, about a year subsequent to the intimation of the assignation to the trustees of Mr and Mrs Donald Smith.

Mrs M'Call, the widow of the truster, died 8th February 1871, and a question arose to which set of trustees the legacy was payable. A Special Case was presented, to which the parties were—(1) M'Call's trustees, (2) Mrs D. Smith, (3) Mr and Mrs D. Smith's marriage trustees, (4) Mr and Mrs A. Smith's marriage trustees. The question submitted to the Court was, Whether Mr and Mrs Donald Smith's marriage-contract trustees or Mr and Mrs Alexander Smith's trustees were alone entitled to receive payment of the legacy of £1000?

KINNEAR for Mr and Mrs Donald Smith's trustees.

JOHNSTONE, for Mr and Mrs Alexander Smith's trustees, did not dispute that effect must be given to the assignation to Mr and Mrs Donald Smith's trustees, as first in date and first intimated, but he argued that the assignation of the £1000 to her son's trustees by Mrs Donald Smith might be regarded as an exercise of the power of apportionment given her by her own marriage-contract. She was entitled to pass from her own liferent for an onerous cause.

At advising—

LORD PRESIDENT—The argument for Mr and Mrs Alexander Smith's trustees is ingenious, but it must be considered in connection with the fact stated in the case that Mrs Donald Smith had no recollection of the terms of her marriage-contract. Persons have been held to have exercised a power of apportionment without reciting the power or expressly referring to it, but I never heard of an exercise of a power when the person did not know that he possessed the power. But further, Mr and Mrs Donald Smith's trustees are directed to hold for certain purposes irrespective of the ultimate destination of the fund. The liferent given to Mrs Donald Smith is alimentary and not assignable. To secure this alimentary liferent, if for no other purpose, her marriage-contract trustees would be entitled to hold the fund.

LORD ARDMILLAN concurred.

LORD KINLOCH observed that the question of apportionment could not be raised in this Special Case, the younger children of Mrs Donald Smith not being parties.

LORD DEAS—We have neither the materials nor the parties before us necessary to give an opinion on the question of apportionment, and on that ground I concur with your Lordships.

The Court held that Mr and Mrs Donald Smith's marriage-contract trustees were alone entitled to receive payment of the legacy, and to discharge the same.

Agents for Mr and Mrs Donald Smith's Trustees, as also for M'Call's Trustees and Mrs Donald Smith—Hamilton, Kinnear, & Beatson, W.S.

Agents for Mr and Mrs Alexander Smith's Marriage Trustees—Hope & Mackay, W.S.

Tuesday, November 28.

SECOND DIVISION.

TENNANT *v.* CADELL, *et e contra.*

Arbiter—Award—Reduction. Circumstances which *held*, on a proof, not sufficient to justify an action for reduction of the award of an arbiter.

These were two conjoined actions, the one at the instance of H. F. Cadell, Esq., Cockenzie, calling for payment from the defender Robert Tennant, Esq., Tranent, of the sum fixed by the award of an arbiter as the value of certain machinery, plant, &c., sold by the pursuer to the defender, and the other at the instance of Mr Tennant calling for reduction for several reasons of the decreet-arbitral.

The facts sufficiently appear from the following interlocutor and note of the Lord Ordinary:—

"*Edinburgh, 18th July* 1871.—The Lord Ordinary repels the reasons of reduction, and assoilzies the defender Hew Francis Cadell from the whole conclusions of the said action of reduction, and decerns; and in the petitory action at the instance of the said Hew Francis Cadell, decerns against the defender in said action, Robert Tennant, Esquire in terms of the conclusions of the said petitory action: Finds the said Hew Francis Cadell entitled to expenses in both actions, and in the conjoined actions, and remits the account thereof to the Auditor of Court to tax the same, and to report.

"*Note.*—The whole question in these conjoined processes is, Whether the award pronounced by Messrs John Geddes, mining engineer, Edinburgh, and Henry Cadell of Grange, dated 5th December 1870, is or is not binding upon Robert Tennant, who is defender in the petitory action, and pursuer in the action of reduction? If the award is valid and binding it must be enforced, and decree pronounced in conformity therewith. If it is invalid and not binding, Mr Tennant is entitled to have it reduced and set aside in terms of the conclusions of the action of reduction at his instance.

"In reality, therefore, the action of reduction is the leading action, and under it the whole question really falls to be tried.

"The award in question was pronounced by the referees appointed under a formal agreement between the pursuer and defender, dated 19th and 24th February 1870. The agreement is No. 14, and the award is No. 15, of the conjoined processes. Mr Tennant, the pursuer in the reduction, will be treated as pursuer in the conjoined processes, and Mr Cadell as defender.

"The grounds upon which the award is challenged are explained at length in the pursuer's record and pleas, which latter are twelve in number The grounds of reduction, however, resolve themselves into three—(1) That the award is *ultra vires compromissi*, that the referees have decided matters not referred to them, and not embraced in the submission; (2) That the referees have failed to ex-