[*5th March* 1833.]

NORTH BRITISH INSURANCE COMPANY, Appellants.— *Lord Advocate* (*Jeffrey*). No. 22.

JOHN BARKER, Respondent.—*Murray.*

Insurance—Loan.—A life insurance company lent a sum on condition that the debtor should insure his life with their office to the amount of the debt, and assign to them the policy of insurance; and they took the debtor and his cautioner bound to pay the principal and interest and premiums of insurance. After the debtor's death, they charged the cautioner to pay the sum lent, on the allegation that the policy had been allowed to fall by nonpayment of the premiums; and the cautioner alleged that the manager of the company had accepted from the debtor a bill for the premiums, and agreed to renew the policy. The Court of Session suspended the charge, but the House of Lords remitted, with directions to investigate the facts.

1ST DIVISION.
LORD COREHOUSE.

IN May 1825 the late Mr. James Lyon, writer in Edinburgh, applied to the appellants for a loan of 2,500*l.*, which they agreed to upon the following security:—first, of the personal engagement of himself and the respondent, John Barker, for payment of the debt; second, of an assignation of a remote and partly a contingent interest in the reversion of the succession of a Mr. Thomas Ferguson lately deceased, but which could be of no avail during the lifetime of his widow; thirdly, of an assignation of a policy of insurance upon Mr. Lyon's own life for 2,500*l.* In accordance with this arrange-

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ment, Mr. Lyon and the respondent granted their bond to the appellants for 2,500*l.*, and Mr. Lyon assigned his reversionary interest in Mr. Ferguson's estate to the appellants, and likewise the policy of insurance which had been effected with the appellants. The bond was in the following terms:—"I, James Lyon, solicitor before the "Supreme Courts of Scotland, grant me instantly to "have borrowed and received from the North British "Insurance Company, incorporated by royal charter "under that title, the principal sum of 2,500*l.* sterling, "whereof I hereby acknowledge the receipt, renoun- "cing all exceptions to the contrary; which sum of "2,500*l.* sterling I, the said James Lyon, as principal, "and I, John Barker, surgeon in Edinburgh, as cau- "tioner and surety, and full debtor for and with the "said James Lyon, hereby bind and oblige ourselves, "conjunctly and severally, and our respective heirs, "executors, and successors, to repay and again de- "liver to the said North British Insurance Company, "or to the assignees of that incorporation, and that at "the term of Martinmas next, with the sum of 500*l.* "of liquidated penalty, in case of failure, and the legal "interest of the said principal sum from the date "hereof to the foresaid term of payment, and there- "after during the notpayment of the said principal "sum," &c. It is then stated that "it was part "of the treaty for the said loan that I (the said James "Lyon) should insure my life during its whole period "for the amount of the said loan, and should assign "the policy of insurance to the said North British In- "surance Company in farther security thereof; and I, "having, in implement of the said arrangement, effected "a policy of insurance upon my life for the remainder

" thereof with the said North British Insurance Com-
" pany to the foresaid extent of 2,500*l.*, conform to
" policy No. 26., with participation of the profits, dated
" the 18th day of May 1825, by which policy the
" annual premium of the said insurance amounts to
" 73*l.* 0*s.* 5*d.*, and is payable upon the 4th day of May
" annually, therefore I do hereby transfer, assign, con-
" vey, and make over from me, my heirs, executors,
" and representatives whomsoever, to and in favour of
" the said North British Insurance Company and their
" assignees, the said policy of insurance, No. 26., &c.;
" and in order that the security afforded to the said
" North British Insurance Company and their assig-
" nees by the said policy of insurance under the fore-
" going assignation may not be lost, we, the said James
" Lyon and John Barker, hereby bind and oblige our-
" selves conjunctly and severally, and our respective
" foresaids, to pay the before-mentioned premium of
" 73*l.* 0*s.* 5*d.* upon the said policy of insurance annually,
" within fourteen days of the said 4th of May, so long
" as the whole or any part of the said sums above
" contracted to be paid shall remain unpaid; and I,
" the said James Lyon, have herewith delivered up the
" said policy of insurance to the said North British
" Insurance Company, to be kept and used by them
" and their assignees as their own proper writ and
" evident during the nonpayment of the said sums;
" and we both consent to the registration hereof in
" the books of Council and Session, or any other com-
" petent record, that letters of horning, on six days
" charge, and all other execution necessary, may pass
" upon a decree to be interponed hereto," &c.

In 1827 there was an arrear due to the appellants of

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135*l.* 10*s.* 5*d.*, being the half year's interest, and the premium of 73*l.* 0*s.* 5*d.* Mr. Lyon survived the 4th of August, (when the time for applying for a revival of the policy expired,) and died in London on the 25th of September. It was alleged by the respondent, that previous to his death Mr. Lyon had made arrangements for the renewal of the policy, and for that purpose had left with Mr. Brash, the manager for the appellants, a bill for 140*l.*, in payment of the premium. The appellants denied that any such arrangement had been entered into, and averred that the bill was left with Mr. Brash without their knowledge, and that Mr. Lyon had subsequently uplifted the money from the acceptor, and that he had spent the amount before his death.

Under these circumstances the appellants charged the respondent to pay the amount of the bond, and he brought a suspension. The Lord Ordinary made avizandum on cases to the Court; and the Court, before answer, ordained the appellants to give in a condescendence, stating the practice, as well in England as in Scotland, in transactions of that nature; and this having been complied with, the Court, on 2d July 1831, sustained the reasons of suspension, and found expenses due.*

Against this interlocutor the Insurance Company appealed.

Appellants.—The respondent, by becoming a party to the bond, incurred an effectual obligation to pay the

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* 9 S. D. 869.

debt to the appellants; and as the question is, whether he has shown that an extinction has taken place of his obligation, the onus probandi rests entirely upon him.

By the bond there were provided to the appellants four different sources for obtaining repayment of the sum which they advanced to Mr. Lyon: Mr. Lyon's own personal obligation to pay that money; a similar obligation undertaken by the respondent; Mr. Lyon's claim upon Ferguson's estate, which was assigned in security to the appellants; and the policy of insurance which Mr. Lyon himself effected upon his own life, and which also was assigned in security to the appellants, with a guarantee by Lyon and the respondent that the policy would be kept up during the subsistence of the loan. But implement of the obligation has not been obtained from any of these sources; and in particular, the policy of insurance was extinct before Lyon's death, he and the respondent having, in contravention of their obligation to preserve it from being lost during the subsistence of the loan, failed to preserve it in subsistence for more than two years.*

It was no doubt alleged by the respondent, that the premium had been duly paid, but this was denied by the appellants, and thus the parties were directly at issue on a matter of fact.

Respondent.—The contract entered into between the appellants and the respondent was of a somewhat anomalous description. On the one hand, the respon-

* Macqueen v. Fraser, Fac. Coll. 11th June 1811; Erskine, b. iii. t. 3. s. 66; Dalrymple, No. 167; Bankton, b. i. t. 10. s. 204–5; b. i. t. 23. s. 43; Stair, Alexander v. Gordon, 6th Dec. 1671; Stair, Allan v. Paterson, Dict. v. i. p. 125–6.

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dent undertook that while Mr. Lyon lived the 2,500*l.* should be payable to the appellants, and that, while this sum was outstanding, not merely the legal interest, but also the large additional annual sum of 73*l.* 0*s.* 5*d.*, should be paid to the appellants. On the other hand, the appellants, in respect of these obligations incumbent on the respondent, undertook that, in the event of Mr. Lyon's death, before the principal sum should be repaid, they should communicate to the respondent the benefit of a life insurance to the extent of 2,500*l.*, or, in other words, that they should cancel that obligation, in so far as he was concerned, for the repayment of the principal sum.

The respondent had no concern with any policy of insurance, or with any conditions expressed therein, which were not contained in the bond. The absolute and unconditional obligation under which he came to the appellants for the payment of the premium of 73*l.* 0*s.* 5*d.* yearly, in addition to the legal interest, while the principal sum remained unpaid, rendered it impossible that the counter obligation of insurance incumbent on the appellants could fall or become void as to him, and supersede, so far as the respondent was concerned, any conditions which might be inserted in the policy, or which might have been privately entered into with Mr. Lyon, whereby the insurance or the obligation of the appellants might have fallen by neglecting to pay the premium within a certain time, and therefore the claim now made is in contravention of the bonâ fide meaning of the agreement into which they and the respondent entered.

The respondent was merely a cautioner for Mr. Lyon, having no personal interest whatever in the advance

made to him, and became a cautioner, in reliance upon all the securities which were held out for his relief in the bond. The stipulation for the insurance, and particularly the clauses whereby the payment of the premium might have been enforced from Mr. Lyon, were intended for the benefit and security of the respondent more than of the appellants, and they were bound to have taken due steps for enforcing payment from Mr. Lyon of the premium of insurance. If they neglected to do so, they must themselves bear all the loss which has arisen in consequence of their own misconduct.*

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Besides, the appellants or their secretary, by taking and retaining the bill from Mr. Lyon for 140*l.*, must be held to have received payment of the premium of insurance in question, as it is impossible to conceive for what purpose the secretary of the appellants could receive and retain this bill, unless for the payment of the interest and of the premium of insurance.

Lord Wynford.—My Lords, the appellants in this case are the North British Insurance Company, who had instituted proceedings on a bond which had been given to them by Mr. Lyon and Mr. Barker for the sum of 2,500*l.* It appears that they had two or three securities for the payment of this money, but that, not being satisfied with those securities, they required Mr. Lyon, for whose benefit the money was originally advanced—Mr. Barker, the respondent, being merely what we

* Case of Want, 11th Feb. 1810, East's Rep. xii. 183; Marshall on Insurance, ii. 695; Fleming v. Thomson, 23d May 1826, ante vol. ii. p. 277; Mackenzie v. Macartney, Aug. 1831.

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should call here the surety, but in Scotland the cautioner, for the payment of the money by Mr. Lyon—the company required Mr. Lyon's life to be insured to the amount of this sum of 2,500*l.*, for which payment was to be made annually; and there was an insurance effected in consequence of this, by which 73*l.* 0*s.* 5*d.* was stipulated to be paid as the insurance for one year, and if the party lived beyond the year, there was a right, on paying within twenty-one days after the close of the year that 73*l.* 0*s.* 5*d.*, to continue the insurance for another year. If the party continued alive, and was in good health for three months, and paid it within that period, the directors were authorized to renew the insurance under the payment of a fine not exceeding 10*s.* per cent.; they might charge the party, therefore, with any fine from 1*d.* per cent. up to 10*s.* It appears that the company were putting in suit this bond; upon which the respondent, who is the cautioner, (Mr. Lyon being dead,) exhibited a proceeding called a process of suspension, the effect of which was to suspend the action on the bond, in consequence, as he said, of his being equitably discharged from the liability he was under to pay. The facts which he states, for the purpose of showing that he is discharged from the payment of that bond, arose out of this transaction of the insurance. He alleges that the insurance is in fact kept alive, and therefore, that the company being liable to the amount of this sum of 2,500*l.* insured, there is no pretence for proceeding upon the bond. The circumstances under which they insist that the insurance is kept alive are these:—They do not pretend to say that the 73*l.* 0*s.* 5*d.* was paid within the twenty-one days, nor do they say that it was paid at all within the three

months, except in the manner in which they state, but they insist that within those three months, Mr. Lyon, being anxious to prevent this gentleman who was his cautioner being rendered liable for this money, went to the office and deposited with them a note for 140*l.* Now, the circumstances under which the company state that note to have been deposited are the following:—" Mr. Lyon having deprived the chargers of " one of the securities upon which the loan had been " made to him, and having also failed to pay the " interest which fell due at Whitsunday 1827, became " alarmed lest the chargers should call up their money. " In the hope of saving himself and his cautioner from " such a demand, he, on the 24th June 1827, being a " month after the contract of insurance was at an end, " waited upon their secretary, Mr. Brash, and offered " to leave Mr. D. S. R. Dickson's acceptance, which is " mentioned by the suspender, with Mr. Brash, as an " additional security for the arrears of interest, and as " an earnest of his intention to apply for a revival of " the policy some time afterwards on his return from " London." Now, to be sure, if that is the true state of the case, there is an end of it; there is nothing like payment—it is not tendered as payment, it is tendered as an earnest that payment is at a future time to be made. They then state farther,—" Mr. Brash refused " to take the acceptance, or any thing but cash, even as " a payment of the interest, but consented to allow the " document to remain in his hands on the footing " which has been mentioned." What is that footing? not upon the footing of payment, but upon the footing of an earnest of payment in future. Now, the allegations in the answer to this article, it is said, are denied.

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The Court of Session have not thought fit to inquire whether they are true or false. If those allegations are true there is an end of the cause; if the tenth statement, which contains something very important, be true, as to the view of the case taken by the respondent as well as Mr. Brash, there is an end of the cause. "The "suspender, as well as Mr. Lyon himself, failed to take "any steps in order to obtain a renewal of the fore-"said policy within three months after its expiry. "Three months afterwards the suspender, however, "was in the full knowledge of Lyon having failed "either to renew it within three weeks after 4th May "1827,"—that is the twenty-one days,—"or to apply "for a revival of it within three months thereafter. "Indeed Mr. Brash, on the 25th May 1827, the very "day the policy expired, wrote a note to the suspender "mentioning the circumstance. This was not an official "notice (which the chargers did not require to give), "but only a private communication which Mr. Brash "made to the suspender in consequence of the latter "having requested as a favour that the former, with "whom he was personally acquainted, would inform "him whether Mr. Lyon took care to pay the premium "at that term. Next day the suspender called on "Mr. Brash, and thanked him for the information." To be sure, if that be true, there is an end of the case. There is no payment; and so far from that, this man, who comes to your Lordships and asks to have the proceedings upon this bond suspended, was told, "Unless "you do something more, there will be an end of your "claim in regard to this policy of insurance." But it has been argued, and argued with great talent and ingenuity, by Mr. Murray, on the part of the respondent, in sup-

port of this judgment, that it was the duty of this company to keep up these payments. I have looked through these papers, and cannot find any obligation upon them to keep up these payments. There is not a word contained in any part of the policy, or any other instrument that passed between them, imposing any such obligation. If they thought proper to keep it up, they might do so —that is to say, if they found it for their interest; but I apprehend it never could be their interest to keep it up, continuing their own liability to payment in case of the death of this party. Then it is further insisted by Mr. Murray that this is affected with usury. Now I confess I cannot find the least ground for stating to your Lordships that there is any thing like usury; to constitute usury more than legal interest must find its way into the pocket of the supposed usurer. If there had been any stipulation that any accumulations on this policy should be added, (and there are accumulations in the company to which I have before adverted,) that might have been so; but it is not to add to the reward, but merely to improve the security, without which these persons never would have lent the money. I do not consider that this can in any way amount to usury. Then it is further insisted, that (this bill being left under the circumstances stated in this condescendence) it was the duty of these persons to get this bill discounted and pay themselves. I can find no such obligation as that even stated. There are two modes of getting the value of a bill,—one by selling it, and another by discounting it. If you discount a bill, you must put your own name upon it. Now, is there any thing showing that this company ever intended to put their names upon this bill, and to make themselves liable?

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There is not a scintilla of proof of that having been ever contemplated by either of these parties. If the company went into the market and sold the bill, saying, "We will not make ourselves liable upon it," I do not think they would have received enough to pay the interest. This was the only way in which Mr. Murray could put it—a very ingenious way undoubtedly, but I conceive it is not well founded. I believe the law in Scotland, in respect of bills, is this,—that unless it appears that the bill is expressly taken in payment, it is never considered a payment until it becomes actually paid. In the present case this bill, except in the manner I have stated now, would not be actual payment till seven days after the time that the payment ought to have been made. It was left in their hands, but if they used ever so much diligence, they never could have transferred the proceeds of this bill till seven days after the payment ought to have been made, and till the policy was gone. It is upon this part of the case I have great difficulty, and I wish the question should be considered by the Court below, for they have never looked at the deed of copartnership by which this company is formed. I think it is highly desirable that it should be seen whether there is any thing in the deed of copartnership giving power to the directors beyond that they ordinarily possess; if not, I am not quite sure, not only that this gentleman, Mr. Brash, had not power to take this bill, but that the directors had not, and that the moment the three weeks had expired the policy was gone —that it was void. You cannot improve a thing which is void; you may set up a thing that is voidable, but you cannot deal with a thing that is void; you must make a new policy. You cannot ask the

directors to go beyond the authority conferred upon them; and if they do, their act is void. The directors are the servants of the company; and those directors could not, the policy being void, make a new agreement of a year. If they could do that one year, they might do it ten years after the policy had expired, when the insurance would be unquestionably not at the same rate of premium; but if you look to the table of premiums, you will see the rate of premium in this, as with every other office, increases year by year. If you are insured at thirty years of age at three per cent., you are insured at the age of thirty-one at three and a quarter per cent: This, therefore, would be reviving a policy completely at an end, and not on the terms on which alone the directors are authorized to treat the persons who apply to have their lives insured. This would be a revival upon the same terms as if Mr. Lyon, the person whose life was to be insured, had not moved on, but that the sun had stood still, and he was not a minute older. I doubt extremely whether the directors themselves had authority to make such a bargain; the directors have only such authority as the society at large have given them. It appears to me that the Court ought to have before them the deed, and to see the authority conferred upon them; and whatever belongs to the directors, unquestionably Mr. Brash had no such authority, and under no circumstances could it be done unless it was done by the directors. I doubt extremely whether even the directors had such power; but it may not, however, be necessary to settle that question; for whether the power belongs to the directors or not, unless that authority has been given to Mr. Brash, all which has taken place with respect to this bill is of no validity.

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My Lords, it appears to me there is another question which has not been much considered. If Mr. Brash had done any thing which he had not authority to do, he might be personally responsible, but they might lose his benefit of the bill; but the renewing the benefit of the policy is quite another question, which appears to me not to have been considered. Under all the circumstances of the case, I should submit to your Lordships that this case is scarcely ripe for final decision, and that it will be more satisfactory it should go down again. It had occurred to me at one time that it would be fit it should be sent down, with a direction that it should be sent to a jury, to ascertain first whether Mr. Brash had any such authority as it is supposed he acted under in this case; but perhaps it would be better to leave that to the Court, whether they will send it to a jury, or examine into it themselves by examining Mr. Brash. They will be best able to determine what is the most satisfactory mode. I should therefore submit to your Lordships that it will be proper this interlocutor should be reversed, and that this case should be sent down to the Court of Session with directions, which directions I will take care shall be put upon your Lordships minutes before it is remitted, to examine Mr. Brash according to the practice which prevails in Scotland—to examine into his authority to do that which it is denied that he ever did; to ascertain, first, whether he ever did it; and next, whether, if he did, he had any authority to do it. Perhaps it may not be necessary to go farther than that; but if it is, I am of opinion that they ought to look into the deed to see whether that would be done in such a case as this, without calling together the members of the company and obtaining their consent. I

have had my own life insured for thirty years in a company in this country, from which, I think, the North British Insurance Company borrowed their form of deed. I have not often attended, my time having been so much occupied; but I have been repeatedly summoned to attend meetings, in which it has been submitted to the company at large, whether the directors should be enabled to renew the engagement with a party who had slipped the time, at the annual payment at which he was before insured. If Mr. Brash did that which it is stated on the part of the respondent he did, then it will be necessary to inquire into his authority. It may, in some view of the case, be necessary to go further,—to look into the deed, and to see whether any thing could be done without the consent of the company. The Judges of the Court appear to have been led away by the idea that the insurance company ought not to be lenders of money; but I should beg to ask in what way this insurance company are to use their money if they do not lend it? It is, in my opinion, a practice perfectly consistent with the usage of these companies. It is as common for insurance companies as for individuals, where a man has the least interest, to require that his life should be insured, and that the rate of premium charged to the borrower of the money be precisely that rate of premium they would charge to the person to whom they lent their money; and I, for one, cannot see the least objection to an insurance company lending money, and insuring in their own office the life of the person to whom the money is so lent. If that is a contrivance that, under cover of that payment, they may be enabled to get more than five per cent., unquestionably that will be usurious;

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but usury is a crime; it is not to be inferred; it must be alleged in the pleadings, and it must be proved. I cannot see how there would be any pretence for supposing any thing unfair or improper, unless the borrower of the money was charged a higher rate for the policy of insurance in consequence of their being the lenders of the money. With these observations I would move your Lordships, that the judgment of the Court of Session be reversed, and the case sent again to the Court of Session, with directions to the effect which I have stated.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session, to consider whether it is consistent with the law and practice of Scotland to examine John Brash in this cause, and if they find that it is so consistent, then to ascertain, by the examination of the said John Brash, and from such other legal evidence (if any) as they may find applicable to the case, for what purpose the bill for 140*l.* in the pleadings mentioned was received by him, and particularly whether the said bill was received as payment of the premium which fell due on the 4th day of May 1827, for the continuance of an insurance for 2,500*l.* on the life of James Lyon, for one year from and subsequent to the said 4th day of May 1827, and which bill, being dated the 21st day of June 1827, and payable fifty days after date, fell due at a period subsequent to the expiry of three months from the time at which the said premium was payable; and in case the said Court shall find that such bill was received by the said John Brash as payment of the said premium, then the said Court shall consider and find whether the said John Brash had any and what authority so to receive such bill, and upon what instrument or evidence such authority (if any) is founded; and in case the said Court

shall find that the said John Brash had authority from the directors of the said company so to receive such bill, then the said Court shall consider whether under the contracts or agreements and charter constituting the said company the directors had any authority to receive or to authorize the receipt of such bill as payment of the said premium; and in case the said Court shall find that the said John Brash cannot, according to the law and practice of Scotland, be examined in this cause, or shall find either that the said John Brash did not in fact receive the said bill as payment of such premium as aforesaid, or that the said directors had no authority to receive or authorize such receipt, or that the said John Brash was not duly authorized to receive the said bill as such payment, then and in any of such cases it is further ordered, That the said Court shall find the letters orderly proceeded, and do further in the cause as shall seem just and consistent with this judgment.

MONCREIFF, WEBSTER, & THOMSON—J. BUTT, Solicitors.