THE MERCHANTS' MARINE INSURANCE COMP'Y OF CANADA (DEFENDANTS) .... } APPELLANTS;

AND

BENJAMIN A. RUMSEY AND GEO. R. JOHNSON (PLAINTIFFS)..... } RESPONDENTS.

1883
*Oct. 24.
1884
*Jan. 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine policy—Construction of—Trading voyage—Insurable Interest

The respondents (plaintiffs), by an arrangement with *M.*, who had chartered the schooner *Mabel Claire* for a trading voyage from *Nova Scotia* to *Labrador* and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining, to *S.* and others. In trad-

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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ing on the voyage *S.* and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at *Halifax* merchandize to an amount exceeding $6,000, and after having done so, and upon the day on which the vessel sailed from *Halifax*, effected with the appellants (defendants) the policy sued upon, and an extract from which is as follows :— "*Rumsey, Johnson & Co.* have this day effected an insurance to "the extent of $2,000 on the undermentioned property, from "*Halifax* to *Labrador* and back to *Halifax* on trading voyage. "Time not to exceed four(4)months,shipped in good order and well "conditioned on board the schooner *Mabel Claire*, whereof *Mouzar* "is master, this present voyage. Loss, if any, payable to *Rumsey*, "*Johnson & Co.* Said insurance to be subject to all the forms, "conditions, provisions and exceptions contained in the policies "of the company, copies of which are printed on the back hereof. "Description of goods insured, merchandise under deck, amount "$2,000, rate 5 per cent., premium $100 to return two (2) per cent., "if risk ends 1st October, and no loss claimed; additional insur- "ance of $5,000; warranted free from capture, seizure and deten- "tion, the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at *Liverpool, N. S.*, were not covered by this policy, and that it was not to cover the return cargo.

Held (affirming the judgment of the court below, discharging a rule *nisi* to set aside a verdict for the plaintiffs), that the policy covered not only goods put on board at *Halifax* but all the merchandize under deck shipped in good order on board said vessel during the period mentioned in the policy.

Held, also, that there was sufficient evidence to show that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* to set aside a verdict of $1,871.93, rendered by *Weatherbe*, J., without a jury, in favor of the respondents. The facts and pleadings sufficiently appear in the head note and in the judgments of *Ritchie*, C.J., and *Gwynne*, J., hereinafter given.

Mr. *Hatton*, for appellants, cited and relied on the following authorities: 1 *Arnold* on Marine Insurance (1); *Murray et al.* v. *Columbia Ins. Co.* (2); *Pugh* v. *Wylde* (3); *Outram* v. *Smith* (4); *Arnold* on Marine Insurance (5); *Bell* v. *Ansley* (6); *Cohen* v. *Hannan* (7); *Carruthers* v. *Sheddon* (8); *Powles* v. *Innes* (9); *Parsons* on Marine Insurance (10); *Graves* v. *Boston Mar. Ins. Co.* (11); *Russell* v. *New England Mar. Ins. Co.* (12); *Dumas* v. *Jones* (13); *Pearson* v. *Lord* (14); *Parsons* on Marine Insurance (15); *Arnold* on Marine Insurance (16); *Grant* v. *Paxton* (17); *Spitta* v. *Woodman* (18); *Nonnen* v. *Kettlewell* (19); *Murray et al.* v. *The Columbian Ins. Co.* (20); *Rickman* v. *Carstairs* (21); *Creighton* v. *Union Mar. Ins.* (22); *Carr et al.* v. *Sir Moses Montefiore* (23); *Joice* v. *Realm Ins. Co.* (24).

Mr. *Graham*, Q.C., on behalf of the respondents, cited and relied on the following authorities: *Columbian Ins. Co.* v. *Catlell* (25); *Parsons* on Marine Insurance (26); *Arnold* on Insurance (27); *Whitton* v. *Old Colony Co.* (28); *Hunter* v. *Leathley* (29); *Lucena* v. *Crawford* (30); *Clark* v. *Scottish, &c., Ins. Co.* (31); *Provincial Ins. Co.* v. *Leduc* (32).

(1) 4 Ed. p. 62.
(2) 11 Johnson R. 302.
(3) 2 Russ. & Ches. N. S. R. 177.
(4) 2 Russ. & Ches. N. S. R. 187.
(5) 4 Ed. p. 1062.
(6) 16 East 141.
(7) 5 Taunt. 101.
(8) 6 Taunt. 14.
(9) 11 M. & W. 10.
(10) 573 note 1.
(11) 2 Cranch 419.
(12) 4 Mass. 82.
(13) 4 Mass. 647.
(14) 6 Mass. 81.
(15) P. 49, 52 and notes.
(16) 4th ed. pp. 162, 358, 359.
(17) 1 Taunt. 463.
(18) 2 Taunt. 416.
(19) 16 East 188.
(20) 11 Johnson R. 302.
(21) 5 B. & Ad. 651.
(22) 1 James N. S. R. 195.
(23) 5 B. & S. 407.
(24) L. R. 7, Q. B. 580.
(25) 12 Wheat. 383.
(26) 1 vol. p. 245, 518.
(27) P. 380.
(28) 2 Met. 347.
(29) 10 B. & C. 858.
(30) 3 B. & P. N. R. 75.
(31) 4 Can. S. C. R. 192, 706.
(32) L. R. 6 P. C. 225, 244.

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RITCHIE, C.J.:—

This was an action brought to recover insurance on merchandise on board the schooner *Mabel Claire*, from *Halifax* to *Labrador* and back to *Halifax* on a trading voyage. The loss of the vessel being admitted, this cause was tried before Mr. Justice *Weatherbe*, without a jury, who gave a judgment or verdict for the plaintiffs for the amount of claim, $1,871.93.

A rule *nisi* was taken on special grounds to set aside the verdict with power (by consent) for the court to direct a final judgment to be entered for either party, which was argued before Justices *McDonald*, *Smith* and *Weatherbe*.

Judgment was given on the tenth day of April, 1883; the only written judgment being that of Mr. Justice *Weatherbe*, in which the other judges concurred, discharging the rule *nisi* with costs.

The following is an extract from the policy:

THE MERCHANT'S MARINE INSURANCE COMPANY OF CANADA.

(Ocean Cargo or Freight Certificate.)

HEAD OFFICE, *Montreal.* No. 18,373.

Halifax, July 13, 1878.

Rumsey, Johnson & Co. have this day effected an insurance to the extent of two thousand dollars, on the undermentioned property, from *Halifax* to *Labrador* and back to *Halifax* on trading voyage—time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner *Mabel Clare* whereof *Mouzar* is master, this present voyage. Loss, if any, payable to *Rumsey, Johnson & Co.* ☞ said insurance to subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof.

J. V. Oswald,

C. J. Wylde, Agent. General Manager.

Description of goods insured, merchandize under deck, amount $2,000, rate 5 per cent., premium $100 to return two (2) per cent. if risk ends 1st October, and no loss claimed; additional insurance of five thousand (5,000) dollars, "Warranted free from capture, seizure and detention, the consequences of any attempt thereat."

Two points were raised in this case. First. Did the

policy cover only the goods laden at *Halifax*? Second. Have the respondents proved sufficient interest to entitle them to recover? As to the first point: This case seems to me abundantly clear, the policy was, in my opinion, unquestionably intended to cover, during the trading voyage from *Halifax* to *Labrador* and back, all "the merchandize under deck" on board said vessel during the period mentioned in the policy, viz., for four months from the 13th July, 1878, shipped in good order, and was not confined to the goods shipped at *Halifax* and brought back to *Halifax*. The policy dated 13th July, 1878, insures to

The extent of $2,000, on the undermentioned property, from *Halifax* to *Labrador* and back on trading voyage—Time not to exceed four months, shipped in good order and well conditioned on board the schooner *Mabel Claire*.

Then, what is the undermentioned property?

Description of goods insured, merchandize under deck, amount $2,000, rate 5 per cent., premium $100 to return two (2) if risk ends 1st October and no loss claimed.

Trading voyages are well understood. The goods are constantly shifting. The idea is simply to barter the goods taken from *Halifax* between that place and *Labrador*, and to bring back to *Halifax* the goods obtained by such bartering, and the goods insured were all merchandize under deck on the trading voyage from *Halifax* to *Labrador*, and back, irrespective of where the same may be taken on board, whether on the voyage from *Halifax* or on its return, provided they were merchandise under deck on the trading voyage. I can discover nothing what ever to limit the subject-matter of the insurance contemplated by this policy to the original cargo on board at *Halifax*. There is nothing, in my opinion, in the terms used, on the most strict construction of the language, to justify such a conclusion—if we take the nature of the voyage—"a trading

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voyage"—the termini, "*Halifax* and *Labrador* and back to *Halifax*," that it is to be an insurance on a trading voyage from *Halifax* to *Labrador* and back to *Halifax*, the object of such a voyage being for trade and barter, that is, the exchange from time to time, and from place to place during the continuance of the voyage, of the delivered cargo for a return cargo, which, from the coast between *Halifax* and *Labrador*, we may take historical, if not judicial, notice, would be a fish cargo. Then the duration of the risk—four months, the rate, 5 per cent. —everything, in my opinion, indicates that it was never intended by the parties that there was to be an insurance on a single passage from *Halifax* to *Labrador*; nor can it be supposed that it was contemplated that the cargo taken from *Halifax* would be brought back in specie as shipped there. On the contrary, the cargo brought back would be obtained by barter or sale of the outward cargo, and from this a return cargo, and therefore unless the term "and back" referred to such return cargo, it would be meaningless. "From *Halifax* to *Labrador*" fix, in my opinion, merely the termini of the trading voyage, and the subject-matter of insurance "merchandize under deck," if shipped in good order and well conditioned on such "trading voyage."

There is no language in this policy such as "beginning the adventure from the loading thereof on board at *Halifax*," or any language intimating that the policy is only to attach on goods loaded at that port, which is the terminus *a quo* of the trading voyage insured, viz., "from *Halifax* to *Labrador* and back," and the reason is very obvious; any such language would be utterly inconsistent with the nature of the voyage, the provisions contained in the policy and the object the parties must have had in view in effecting the policy. Had it been the intention of the parties that the policy should be so restricted, I cannot doubt but that unequivocal language,

so limiting it, would have been used, and in its absence, bearing in mind the character of the voyage and the terms used, the irresistible inference is that no such limitation was contemplated.

In what in principle does this differ from the constant every day practice of insuring goods or stock-in-trade in a store for a given period, where the insured reproduce the same stock. Has it ever been doubted or questioned that a policy on a stock of goods covers such after acquired and substituted goods? According to defendant's contention, the return cargo in this case would not be covered at all. It cannot be supposed that either party could have contemplated that the trading voyage would be utterly fruitless, and that the goods taken from *Halifax* would not be used for the purpose for which they were shipped, but would be brought back to *Halifax*.

In the case of *Violett* v. *Allnut* (1), plaintiff declared upon a policy of insurance at and from *Plymouth* to *Malta*, with liberty to touch at *Penzance*, or any port in the channel to the westward, for any purpose whatever, upon goods by the ship *Lion*, beginning the adventure from the loading thereof on board the said ship as above. The ship sailed from *Plymouth* and touched at *Penzance* for the purpose of loading and taking in these other goods for *Malta*. The ship was stranded. The question was, whether by the terms of the policy defendant was liable for the loss of the goods taken on board at *Penzance*, his contention being that by the terms of the policy the insurance attached only the cargo to be loaded at *Plymouth*, but the court held there was no ground for the objection.

And in *Barclay* v. *Stirling* and another (2):

The defendants being owners of the ship *Neptune*, which was loaded at *Jamaica* in September, 1814, with a cargo on freight from

(1) 3 Taunt. 419. (2) 5 M. & S. 6.

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various shippers, and was bound to *London*, effected a policy of insurance for £1,200, on the freight of the said ship, valued at £4,200, which policy the plaintiff underwrote for £500. The voyage described in the policy was, "At or from port or ports of loading in *Jamaica*, to her port or ports of discharge of the *United Kingdom*, with leave to call at all, any, or every one of the British and Foreign *West India Islands*, to seek, join and exchange convoy, beginning the adventure upon the goods from the loading thereof aboard the said ship, as aforesaid." And in a subsequent part of the policy, after the usual declaration, that it should be lawful for the ship, in that voyage, to proceed and sail to, and touch and stay at any ports whatsoever, the following words were introduced:

"And wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at, or proceed to, without being deemed any deviation from, and without prejudice to this insurance."

The ship sailed from *Jamaica* on the 30th of October, 1814, with the said cargo; and on the 8th of November, in the course of her voyage, got on shore off the Island of *Cuba*. There she remained till the 18th of December, during which time part of the cargo was saved, but the greater part consisting of sugar, was washed away and lost. On the 20th December the ship reached the *Havannah*, and having received there such repairs as were necessary to enable her to proceed to *England*, took on board so much of her cargo as had been saved, and likewise a considerable quantity of fresh goods on freight, from the *Havannah* to *London*, and sailed the latter end of February, 1815.

Plaintiffs contended that it was clear from the terms of the policy, that it included freight, not only of such goods as were shipped at *Jamaica*, but also of all goods put on board at any of the *West India Islands* in the course of the voyage; for the policy contained a liberty to call at any such islands, and to discharge, exchange, and take on board goods at any place the ship might call, without being deemed a deviation, &c.

Defendants denied that the freight of the goods shipped at the *Havannah* was covered by the policy, for the policy is precise in describing the adventure to be, "at and from her ports of loading in *Jamaica*"; and that it shall begin "from the loading of the goods aboard as aforesaid," that is at *Jamaica*; and the leave given in a subsequent part of the policy to exchange and take on board goods at any places the ship might call at, was not intended to alter the adventure before described, but only to excuse a deviation. Therefore, though the loading of goods at the *Havannah* shall not avoid the

policy, by reason of the liberty contained in it, yet is it no part of the risk insured.

Lord *Ellenborough*, C.J., said:

The freight was earned in respect of goods loaded partly at *Jamaica*, and partly, owing to a mis-adventure in the voyage, at *Cuba;* and the whole has been received by the assured at the ship's port of discharge. First let us consider the freight insured. The policy runs thus: "At and from the port of loading in *Jamaica*, to her port of discharge, beginning the adventure from the loading on board the ship as aforesaid, that is, from the loading at *Jamaica*, with leave to call at all and every of the *West India Islands*." The ship being driven on the coast of *Cuba* by the accidents of the voyage, this became a part of the voyage. And without considering it as part of the voyage in the first instance, the liberty given to the assured to touch and take in goods at *Cuba*, incorporates this part of the adventure, by necessary construction, with the voyage. It is said, this liberty does no more than excuse a deviation; but the case of *Violett* v. *Allnutt* (1) shows that an intermediate port may be included within the policy, equally with the terminus *a quo* mentioned in it; and it is very material that it should be so.

Bayley, J.:

The first objection is, that this policy would only have attached on the freight of such goods as were put on board at *Jamaica*, but not elsewhere. But such a construction is contrary to the true intent of the policy; for the policy contains no words limiting it to the goods to be put on board at *Jamaica*. Tne two termini were *Jamaica*, and the ship's port of discharge in the *United Kingdom*, with leave to call at any of the *West India Islands;* and I think that any freight earned between these two termini, and within the limits of the lease specified, would have been covered by the policy. In a subsequent part of the policy, there is leave given to discharge, exchange, and take on board goods at any place the ship may call at; this was not deemed to be a deviation. Then, if the assured were to have full power to do this, how comes it that the freight of the goods thus taken on board, is not to be included in the policy?

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In principle and good sense, there can be no reason why this policy, which was intended to cover the freight upon the whole voyage, should not attach upon the freight of goods loaded at an intermediate port in the voyage. I therefore think the *Havannah*

(1) 3 Taunt. 419.

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freight was covered by the policy. It would be unjust to hold otherwise.

Holroyd, J.:

This is a policy not confined to freight on goods loaded at *Jamaica*, but is to be extended to goods loaded during the voyage from *Jamaica* to her ports of discharge. The leave to call at other ports, and load there, puts the freight arising from the goods loaded at the *Havannah*, upon the footing with the former freight, and brings it within the meaning of the policy. I agree with the court on the other point.

As to the second point that the plaintiffs have no insurable interest in the goods—the evidence, I may say the uncontradicted evidence on this point as to the transaction and plaintiff's interest in the goods lost is as follows:—

B. A. RUMSEY, sworn—My partner is *Johnston, Rumsey, Johnson & Co.* The schooner *Mable Claire* loaded most of cargo July, 1878. Value of cargo I think between $9000 and $10,000. Had arrangement with *Stephen C. Tupper*, to fit him out, a verbal arrangement. We were to supply most of cargo for trading voyage, we took bills of lading of it. The return cargo was to come back to us, we were to dispose of cargo and pay ourselves and pay them the balance. It was to be a trading voyage to *Newfoundland* and back.

The whole return cargo was to come back to us. This is the B. L. of cargo we put on board, only what we put on board. It is signed by the master of the schooner. (Put in and read, objected to, marked B. A. J.) Cargo was put on board by *Weir Brothers* and others which we paid for but it is not in this B. L. *Tupper* put in some of the cargo himself. The whole of it, including what *Tupper* put in was insured by us and was subject to the arrangement I have spoken of.

G. R. JOHNSON.—Partner in *R. J. & Co.* I made arrangements with *Tupper*. He wanted supplies for trading voyage to *Labrador*. Had chartered new schooner *Mable Claire*. He wanted us to supply. He applied to me at *Liverpool, N. S.*, through a friend of his who offered to give him a certain amount towards his supplies, and that as security to us he would allow that portion to go as security as a preference that ours should be paid first. I asked him what amount. He said probably ten thousand dollars. The arrangement was not made at *Liverpool*. I promised to telegraph to him what we would do. When I returned the vessel was here, and I made the arrange-

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ments for the firm with *Tupper* and *Mouzar*. We were to supply them and have complete control of all the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring goods back, and we would credit them with full price.

They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of cargo, and if there was not sufficient to pay everybody when they returned, we were to be paid first. They were our goods until they came back. When they went away they expected to make a profit on them. If they were successful they were to let us know what extra amount to price was needed for the benefit of the adventure.

To say that under this testimony the plaintiffs were merely unpaid vendors, with the rights only of unpaid vendors, is simply to ignore the evidence in the case and the agreement which it clearly establishes. The only evidence apparently relied on in the court below as displacing the effect of this evidence, is that of *Rumsey*, who on cross-examination, in answer evidently to a question put to him, says :—

If the goods had been lost on the voyage to *Newfoundland* without insurance, the loss I suppose would have been *Tupper's*.

I cannot see how this can possibly affect in any way the liability of the defendants to the plaintiffs. Plaintiffs had supplied *Tupper* and no doubt looked to him personally for payment, as well as to the goods over which it was agreed that they should retain the control for the purpose of securing such payment. But whatever may have been the relative liabilities of the parties as between themselves, it is quite clear that the plaintiffs had such a claim on these goods supplied and shipped as on the goods acquired and shipped in good order and well conditioned during such trading voyage as would have been enforceable against *Tupper*, had he endeavored to dispose of them and divert the proceeds from the plaintiffs contrary to the terms of the agreement.

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For these reasons I am of opinion that the appeal should be dismissed with costs.

STRONG, J.:—

I am of opinion that this appeal wholly fails. The policy was in terms upon "merchandise under deck on trading voyage from *Halifax* to *Labrador*, and back to *Halifax* on trading voyage." It is contended that these words only covered the original cargo shipped at *Halifax*. Such a proposition is wholly unsustainable. The policy must be construed according to the known course of trade, and according to that the only object of the voyage was to dispose of the original cargo and to substitute a return cargo for it. This is a much stronger case than that of *Columbian Insurance Co.* v. *Cattell* (1), cited for the respondent, for in the policy in that case the words "trading voyage" were not contained, and the court there held that the underwriters must be presumed to know what is here expressly stated in the definition of the risk. The English cases are clear to the same effect. In *Hill* v. *Patten* (2), Lord *Ellenborough* says:

> Yet it is not to be inferred that shipping on successive cargoes on board the same ship in the course of the same continued adventure as in the African and other trade out and home, may not properly be the subject of insurance under the word "goods," for in view of these cases the successive cargoes *i. e.* (1) of English goods (2) African articles of traffic, and lastly, West India produce are according to the course of such trading adventures construed subject matter of insurance under the one name of goods.

Upon the question of interest the evidence was ample to justify the verdict for the respondents, and the court below very properly held that there was sufficient evidence to show that the property in all the goods, as well those forming the original cargo as such as might be shipped in the course of the voyage, were to

(1) 12 Wheat. 383. (2) 8 East 373.

be vested in the respondents until the joint-adventure was finally wound up by a sale of the return cargo. The answer of *Rumsey* on cross-examination that he supposed "the loss would have been *Tupper's*" if the goods had been lost on the voyage to *Newfoundland* without insurance, was a mere inference of what the witness supposed would have been the legal rights of himself and his partner, and afforded no ground for a new trial.

The appeal should be dismissed with costs.

FOURNIER, J.:

En juillet 1878, *Stephen Tupper*, *William Mouser* et *A. W. Moren* affrétèrent la goëlette "*Mabel Claire*," pour un voyage de trafic au *Labrador*, dans lequel ils étaient tous intéressés. La goëlette partit de *Liverpool*, *N. S.*, où elle prit une partie de sa cargaison, valant environ $1,200; elle fit escale à *Halifax* où elle compléta sa cargaison avec des marchandises achetées des Intimés et d'autres personnes. Ces marchandises ne furent pas alors payées. La goëlette fit voile d'*Halifax*, le 13 juillet pour *Boone Bay* et *Labrador* avec une cargaison valant environ $9,000, y compris $1,300 en argent.

Tupper et *Mouzar* qui s'embarquèrent sur le vaisseau, le premier comme subrécargue et le deuxième comme capitaine, vendirent et échangèrent les marchandises et reçurent en retour du poisson, de la pelleterie, etc., qu'ils mirent à bord du vaisseau. Lorsqu'ils laissèrent *St: Augustin* pour le retour à *Halifax*, ils n'avaient plus que pour environ $1,000 des marchandises prises à *Liverpool* et *Halifax*.

Le 13 juillet les intimés assurèrent pour leur propre compte au bureau de l'appelante pour $2,000 de marchandises. La perte de la goëlette à son voyage de

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retour est admise ; l'assurance fut effectuée de la manière suivante.

[Ici l'honorable juge donne lecture du reçu ci-dessus cité.]

Les moyens de défense invoqués par l'appelante soulèvent deux questions desquelles doit dépendre la décision de cette cause. 1o. Les demandeurs intimés ont-ils un intérêt assurable (*insurable interest*) dans les marchandises comprises dans la police d'assurance effectuée en leur faveur? 2e. La police couvre-t-elle les risques du voyage de retour et les marchandises reçues en échange de celles prises et mises à bord à *Halifax* et à *Liverpool*?

Les marchandises fournies par les intimés pour le voyage de trafic dont il s'agit, l'ont été en vertu d'un arrangement particulier par lequel ils se sont réservés une propriété spéciale dans les marchandises qui devaient remplacer celles qui avaient été mises à bord à *Liverpool* et *Halifax*. Ils devaient en retenir la possession jusqu'au paiement de leur réclamation.

La preuve à ce sujet établit que les intimés devaient équiper *Tupper* (*to fit him out*). *Rumsey*, l'un d'eux, dit :

Had arrangements with *Stephen C. Tupper* to fit him out—a verbal arrangement. We were to supply most of cargo for trading voyage. We took bills of lading of it. The return cargo was to come back to us. We were to dispose of the cargo and pay ourselves, and pay them the balance. It was to be a trading voyage to *Newfoundland* and back. The whole return cargo was to come back to us. *Tupper* put in some of the cargo himself. The whole of it, including what *Tupper* put in, was insured by us and was subject to these arrangements I have spoken of.

L'autre intimé, *Johnson* dit :

I made arrangements with *Tupper*. He wanted supplies for a trading voyage to *Labrador*. He applied to us at *Liverpool, N. S.*, through a friend of his who offered to give him a certain amount towards his supplies, and that as security to us, he would allow that portion to go as security, as a preference that ours should be paid first. We were to supply them and have a complete control of all

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the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring goods back and we would credit them with full price. They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of cargo, and if there was not sufficient to pay every body when they returned, we were to be paid first. They were our goods until they came back.

La seule tentative faite pour diminuer la force de cette preuve est la réponse donnée par *Johnson* sur la question de savoir qui aurait supporté les risques, dans le cas de perte sans assurance, "*if the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's.*" Cette question avait pour but de faire voir que les intimés n'ont d'autre intérêt que celui de vendeur non payé, (*unpaid vendor*), ce qui ne constituerait pas un intérêt assurable. Mais le témoignage établit si positivement l'arrangement verbal entre *Rumsey* et *Tupper*, par lequel les intimés se sont réservés le contrôle absolu des marchandises afin de garantir leurs avances, et que ces avances n'ont été faites que sur la foi de cet arrangement qu'il faut nécessairement en conclure que les Intimés ont démontré qu'ils avaient un intérêt assurable, *an insurable interest.* Après la décision de la cause de *Clarke* v. *Scottish Imperial Insurance Co.* (1), dans laquelle cette question a été si complètement traitée, il serait inutile de revenir sur le sujet. Il suffit de référer à la savante dissertation de Sir *William Ritchie*, C. J., sur le sujet et aux nombreuses autorités qu'il a citées pour appuyer son opinion. Les prétentions des intimés à cet égard doivent donc être considérées comme parfaitement justifiées.

Il en doit être de même sur la question de savoir si la police ne couvre seulement que les marchandises chargées à *Halifax.* Les mots de la police "*merchandize under deck,*" sont assez amples pour comprendre

(1) 4 Can. S. C. R., pp. 192 et 706.

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toute espèce de marchandises ou autres propriétés qui devaient se trouver sous le pont du vaisseau pendant toute la durée du voyage jusqu'au retour. Le voyage dont il s'agit étant un (*trading voyage*) voyage de trafic, à la connaissance de l'appelante qui dans tous les cas doit être présumée savoir que le trafic dans un tel voyage signifiait le troc ou échange des marchandises. Les parties au contrat d'assurance en question ayant les faits présents à l'esprit ont dû avoir l'intention de comprendre dans la police toutes les marchandises sous le pont en tout temps, depuis le départ d'*Halifax* jusqu'au *Labrador* et de ce dernier endroit jusqu'au retour à *Halifax*. Que signifieraient les mots *back to Halifax*, s'ils ne s'appliquait à la cargaison de retour ? Les mots *from Halifax* to *Labrador* dans la première partie de la police n'indique pas la provenance des marchandises et ne sont là que pour la description du voyage et non pas pour la désignation des marchandises assurées qui sont désignées par les expressions *merchandizes under deck*. Les principes énoncés par le savant juge *Story*, dans la cause de *Colombian Insurance Co.* v. *Cattell* (1), sont parfaitement applicables à la présente cause. Là comme ici la question était de savoir si l'assurance ne s'appliquait qu'à la cargaison ordinaire, ou bien si elle comprenait également les cargaisons successives qui étaient le produit du trafic de la première. La citation entière de cette autorité serait trop longue, je n'en donnerai qu'un court extrait.

The underwriters must be presumed equally with the assured to know the nature and course of such a voyage. It is for the purpose of trade and the exchange of the outward cargo by sale or barter for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging as it does intimately to the history and commercial policy of the nation itself as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in

(1) 12 Wheat. 383.

an exposition of the words with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage constituting the cargo. It would be pushing the argument to a most unreasonable extent to suppose that the parties deliberately contracted for risks on a homeward voyage on goods which, according to the known course of the trade and the very nature of the commodities, were not, and could not be, intended to be brought back to the *United States.*

Ces raisonnements s'appliquent parfaitement à la présente cause. On peut encore ici, invoquer le principe qui règle les assurances de fonds de commerce contre le feu. Ces fonds sont par leur nature destinés à être souvent renouvelés et remplacés. S'il n'y avait d'assuré en cas de perte que les marchandises qui se trouvaient en magasin lors de l'assurance, l'assurance serait une précaution vaine et illusoire, car le plus souvent on ne retrouverait pas les marchandises assurées. Aussi est-il de principe que :—

A policy covering merchandize in store, does not cover any special property, *but property comprising such a stock as may be on hand when a loss occurs,* although nothing is said in the policy concerning the matter. This is implied from the nature of the risk and the usages of the business covered by the policy.

Il serait plus facile qu'utile de multiplier les autorités à ce sujet.

En résumé je crois qu'il est bien établi en preuve que les intimés ont un intérêt assurable dans les marchandises comprises dans la police d'assurance, et que cette police doit être interprétée comme couvrant les risques sur la cargaison de retour reçue en échange des premières marchandises. Je me suis abstenu de prendre en considération quelques autres points, comme par exemple le défaut de mise en cause d'*Alfred W. More*, ne les pensant pas plus que la Cour Inférieure, nécessaires à la décision de cette cause.

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Pour ces motifs, je suis d'opinion que le jugement doit être confirmé.

HENRY, J.:

This case differs from some of those referred to, and therefore I have some doubt on the question raised, but not sufficient to induce me to dissent from the majority of the court. If the result were to be affected by my judgment, I should consider it necessary to give the question fuller investigation.

GWYNNE, J.:

Stephen C. Tupper and *William Mouzar* chartered the schooner "*Mabel Claire*" for a trading voyage from *Nova Scotia* to *Labrador* and back, and, not having sufficient means themselves to load the vessel with merchandize for the voyage, made an arrangement with the plaintiffs to supply them with a cargo.

Application for this arrangement was first made to the plaintiffs at *Liverpool*, where the vessel then was, by *Tupper*, through a friend of his, who had agreed to give him a certain amount towards his supplies, and that such portion should stand as security to the plaintiffs that they should be paid first. The arrangement was not then completed, but *Tupper* put goods on the vessel at *Liverpool* to the amount of $1,200.00 and took the vessel to *Halifax*, where the arrangement with the plaintiffs was completed, by which it was agreed between *Tupper* and *Mouzar* and the plaintiffs, that the plaintiffs should furnish the greater part of the cargo for the trading voyage and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay them-

selves for their advances and pay over any balance remaining to *Tupper* and *Mouzar*. In trading on the voyage *Tupper* and *Mouzar* were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of so as to obtain a return cargo in lieu thereof, accordingly the plaintiffs put on board the vessel at *Halifax* merchandize to an amount exceeding $6,000, and, after having done so, and, upon the day on which the vessel sailed from *Halifax* effected with the defendants the policy of insurance sued upon to the amount of $2,000 on merchandize under deck, from *Halifax* to *Labrador* and back to *Halifax* on trading voyage—time not to exceed four months—shipped in good order and well conditioned on board schooner *Mabel Claire*, beginning the adventure upon the said goods and merchandize from and immediately following the loading thereof on board said vessel, and to continue and endure until the said goods should be safely discharged and landed. On the 13th July, 1878, the vessel sailed on her voyage with *Mouzar*, as master, and *Tupper*, as super-cargo. In the course of the voyage they disposed of all the goods which had been laden on the vessel, with the exception of goods to the value of about $1,000, with which on board, together with a large return cargo, the vessel, when on her return voyage to *Halifax*, within the four months named in the policy, together with her cargo, was lost by the perils insured against.

Against the plaintiffs right to recovery upon this policy it is contended, first, that they were merely unpaid vendors and had no insurable interest, and that the goods put on board at *Liverpool* were not covered by the policy, and the value of the goods put on board at *Halifax* that were lost does not amount to $1,871 the amount of the verdict, and that the policy does not

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cover the return cargo. Some other objections were suggested but it is unnecessary to refer to them.

That the plaintiffs had an insurable interest under the agreement in evidence, as well upon all the goods which were on board the vessel when the policy was effected, including those which had been put on board at *Liverpool*, as also upon such goods as should be put on board as return cargo in pursuance of the agreement, cannot, I think, admit of a doubt. The only material question, therefore, is whether such interest is to its full extent covered by the policy. I quite agree with the view taken by the appellants in their factum to the effect that the underwriters, as is made clear by the policy, intended to insure all the goods then already loaded; the words "on the undermentioned property" which by the policy is declared to be "merchandize under deck," shipped in good order and well conditioned on board the schooner "*Mabel Claire*," seem, I think, sufficiently clearly to establish this contention of the appellants. But it seems to me to be also clear that as the appellants knew that the voyage during which the policy on cargo was to have effect, was to be a trading voyage from *Halifax* to *Labrador* and back to *Halifax* (not to exceed four months), they never could have supposed that all the goods leaving *Halifax* were expected to be brought back to *Halifax;* what must have been in their contemplation was that what usually takes place on a trading voyage should take place, namely, that other goods obtained at the points of destination of the vessel on her trading voyage, should be brought back in exchange for, or in lieu of, those taken from the port of departure of the vessel at the commencement of her voyage. The words then "beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof," &c., &c., &c., can be given effect

to by applying them to determine the time when the policy should begin to have effect upon the return cargo without interfering with the contention of the appellants that they were not intended to apply to the loading at *Halifax* which was already completed before the policy was effected. The policy being construed to apply to the return cargo, in which, under the agreement in evidence, the plaintiff had an undoubted insurable interest when obtained and loaded on the vessel, it is clear that the interest of the plaintiffs in the goods lost was abundantly sufficient to support the verdict, which ought, therefore, to be upheld, and this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants : *J. N. & T. Ritchie.*

Solicitors for respondents : *Meagher, Chisholm & Ritchie.*