

THE PROVIDENCE WASHINGTON }
 INSURANCE COMPANY (DEFEN- } APPELLANT. 1890
 DANT)..... } *Feb. 27, 38.
 *June 13.

AND

GEORGE W. GEROW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

Marine insurance—Construction of policy—Deviation—Loading port on west coast of South America—Guano Islands—Commercial usage.

The voyage specified in a marine policy included “a loading port on the western coast of South America,” and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, from twenty-five to forty miles off the coast. On the trial of an action to recover the insurance, evidence was given by shipowners and mariners to the effect that, according to commercial usage, the said description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy,

Held, affirming the judgment of the court below, that the words in the policy must be taken to have been used in a commercial sense and as understood by shippers, shipowners and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a guano freight being contemplated, the finding should not be disturbed.

APPPEAL from a decision of the Supreme Court of New Brunswick sustaining the verdict at the trial for the plaintiff and refusing a new trial.

The action in this case was upon a marine policy, insuring the “Minnie H. Gerow” in the sum of \$5,000 for a voyage from Melbourne to Valparaiso for orders,

* PRESENT: Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. Co.

thence to a loading port on the western coast of South America or San Francisco, thence to a port of call and discharge in the United Kingdom. * * *

The vessel sailed to Valparaiso in ballast and went from there to Lobos de Afuera, one of the Guano Islands on the western coast of South America, where she loaded with guano and sailed for Falmouth. Having encountered very severe weather soon after sailing the captain took the vessel to Valparaiso where a survey was ordered and, according to the surveyor's report, it would have cost more to repair her than she would be worth when repaired. The plaintiff, thereupon, gave notice of abandonment and claimed from defendant company payment under the policy for a constructive total loss.

The company resisted payment on a number of grounds, but the only one urged on this appeal was that of deviation from the voyage insured, it being contended that loading at an island some miles from the mainland of South America was not complying with the policy, which specified a loading port on the coast.

The action was twice tried. On the first trial the jury were directed, as a matter of law, that Lobos de Afuera was a port on the western coast of South America within the meaning of the policy. A verdict having been given for the plaintiff at that trial, and sustained by the full court in New Brunswick, the company appealed to the Supreme Court of Canada and obtained a new trial on the ground of misdirection in withdrawing from the jury whether or not the policy was complied with by the vessel loading at Lobos (1). On the second trial the matter was left to the jury by the following question being asked them: Is Lobos, a guano island, a loading port on the

(1) 14 Can. S.C.R. 731.

western coast of South America? To which they answered "yes." Evidence was given at this trial by shipowners and mariners to the effect that the policy would be understood, in the shipping trade, to allow loading at the guano islands, and the plaintiff swore that when the insurance was effected the company's agent offered to make the premium $\frac{1}{8}$ or $\frac{1}{4}$ less if he was assured that the vessel would load guano at one of the islands.

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. CO.

The second jury found a verdict for the plaintiff which was again sustained by the Supreme Court of New Brunswick. The company then brought this appeal.

Straton for the appellant. It is not sufficient in a case like this, to prove the usage of shipowners and charterers. It must be shown that the usage among underwriters would justify the voyage taken by plaintiff's vessel. *McGivern v. Provincial Ins. Co.* (1).

As to the proof of custom required see *Hall v. Benson* (2).

Weldon Q.C. for the respondent referred to *Robertson v. Clarke* (3).

SIR W. J. RITCHIE C.J.—This cause was before this court on a former occasion when a new trial was ordered on the ground that the only material question in the case, namely, whether Lobos, an island from 25 to 40 miles distant from the mainland of South America, was a loading port on the western coast of South America, under the policy which insured the vessel for a voyage from Melbourne to Valparaiso for orders, thence to a leading port on the western coast of South America or San Francisco, and then to a port of discharge in the United Kingdom, had been withdrawn from the jury.

(1) 4 All. (N.B.) 64.

(2) 7 C. & P. 714.

(3) 1 Bing. 445.

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. CO.
 Ritchie C.J.

On the second trial this question was distinctly left to the jury in these words "Is Lobos, a guano island, a loading port on the western coast of South America?" To which the jury answered, "Yes."

I think there can be no doubt that the evidence established that Lobos was a loading port, though an open roadstead where the loading of ships with guano cargoes took place, and to which vessels frequently resorted and used for the purpose of loading. The cases cited by Mr. Justice Fraser in his very able and exhaustive judgment clearly established this.

Then, was this a loading port on the west coast of South America within the terms of the policy? There was evidence given to show that in a commercial sense the terms a "loading port on the western coast of South America" would include the guano islands; the contention appears to have been that no island whatever could be such a loading port; that the terms used could only mean the mainland of South America. This was certainly a question to be determined by the usages of trade and the meaning put on them by the mercantile world, and in this case evidence was admitted to show that in mercantile acceptation "a loading port on the western coast of South America" included the loading ports at the guano islands, which formed a part of the territorial possessions of Peru or Chili, a portion of territory comprised under the general words South America.

There was the evidence of Captain Lordly, who says: "From Valparaiso we went to Lobos de Afuera, a port on the western coast of South America." Captain Thompson who had been twice at different guano islands says: "I think Lobos was a loading port on the western coast of South America." Captain Moran, who had loaded several times at the guano islands, considered the guano islands as loading ports on the

western coast of South America. Then there was the evidence of a member of the firm of Troop & Son and of George F. Smith, large shipowners and charterers, who very clearly showed that, in a commercial point of view, a loading port on the west coast of South America would include the mainland and islands, and that the principal cargoes shipped were nitrate and guano, nitrate from the mainland and guano from the islands; and the evidence that Ranney, when the policy was effected, said to Gerow that if he would assure him that the cargo to be carried was guano instead of nitrate he would do the insurance an eighth or a quarter less, clearly showing that Ranney fully understood that the vessel had the right to load guano which could only be done at one of the guano islands.

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. CO.
 Ritchie C.J.

I know of no persons more competent to speak on this subject than experienced ship-owners and charterers and ship masters. Mr. Justice Fraser shows very clearly that there was a constructive total loss. There is nothing in the objection as to want of preliminary proof and if there was it was clearly waived.

Mr. Justice Fraser's very able and exhaustive judgment relieves me from the necessity of discussing at greater length this case. I quite agree with the court below that the verdict should not be disturbed.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The only question remaining on this action, which is one upon a policy of marine insurance for the loss of a ship of the plaintiff insured by the appellants, (a point as to whether there was a constructive total loss having been abandoned by the appellants at the hearing), is whether or not the Island of Lobos, which is a guano island, lying west of the Peruvian Coast, in South America, is a "loading port on

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. CO.
 Gwynne J.

the west coast of South America," and whether the loading of the ship with guano there would be a deviation from the voyage for which the vessel was insured, namely, "from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America or San Francisco, then and thence to a port of call and discharge in the United Kingdom, &c.

The question thus raised is one of fact merely, and the rule to be applied is that in construing such a contract its terms must be taken to have been used "in their business sense," as is the expression of some judges, or "in their common and ordinary sense," in relation to the subject matter, as is the expression of others, or, "in their popular and commercial sense," which is the expression of others, all of which Brett, Master of the Rolls, in *Sailing Ship Garston Co. v. Hickey* (1), deemed to be equivalent phrases. The language of Lord Herschell in *Hunter v. Northern Marine Insurance Co.* (2), as applied to the term "port," is precisely applicable to the present—and as so applied will read:

I agree with the view which has been more than once expressed by learned judges that in construing such a contract as that with which we are dealing the [words] must be taken to have been used in [their] popular or commercial sense, that is to say, as [they] would be understood by shippers, shipowners and underwriters. Where there is a common understanding among such persons as to the [application of the terms used] the matter is free from difficulty.

Now, the evidence is abundant, that among such persons there is such a common understanding which (founded apparently upon the fact that guano is one of the chief articles of export from the west coast of South America, and that it is got only upon islands such as Lobos), is that the terms used in the policy sued upon do cover a voyage to Lobos for guano and loading there. In the present case there is this further

(1) 15 Q. B. D. 586.

(2) 13 App. Cas. 726.

evidence, that at the time of the insurance being effected the guano islands were spoken of by the plaintiff as places to which the vessel he was insuring might be sent for guano, and that the defendants offered to insure him for a less premium than he paid if he would limit the vessel to loading with guano alone, which he could not undertake to do for she was going to Valparaiso for orders. It must, therefore, be held that the going from Valparaiso to Lobos and loading there with guano, did not constitute a deviation from the voyage for which the vessel was insured; the plaintiff, therefore, is entitled to retain his verdict, and this appeal must be dismissed with costs.

1890
 GEROW
 v.
 THE
 PROVIDENCE
 WASHINGTON
 INS. CO.
 Gwynne J.

PATTERSON J.—I agree that this appeal should be dismissed and the judgment affirmed on the grounds fully and ably discussed in the judgment of Mr. Justice Fraser in the court below, and expressed in that now delivered by my brother Gwynne.

Appeal dismissed with costs.

Solicitors for appellants: *Gilbert & Straton.*

Solicitors for respondent: *Weldon & McLean.*