

H. B. BAILEY AND COMPANY } (PLAINTIFFS).....	APPELLANTS ;	1890 ~~~~~ *Oct. 29, 30.
AND		
THE OCEAN MUTUAL MARINE IN- } SURANCE COMPANY (DEFEND- } ANTS).....	RESPONDENTS.	1891 ~~~~~ *May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Application—Promissory representation.

An application for insurance on a vessel in a foreign port, in answer to the questions : Where is the vessel ? When to sail ? contained the following : Was at “ Buenos Ayres or near port 3rd February bound up river ; would tow up and back.” The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk.

Held, affirming the judgment of the court below, that the words “ would tow up and back ” in the application did not express a mere expectation or belief on the part of the assured but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the defendants at the trial.

The action was on a policy of marine insurance. In the printed form of application for the policy there were two questions as follows :—

“ Where is the vessel ? ”

“ When to sail ? ”

And opposite these the applicant wrote :

“ Was at Buenos Ayres or near port 3rd February, bound up river ; would tow up and back.”

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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The damage to the vessel for which the action was brought occurred when she was coming down the river not in tow.

The policy insured the vessel for a year.

The only question decided in the court below, and the sole issue raised in the appellants' factum, is whether the above statement in the application was a promissory representation by the assured failure to carry out which would forfeit the policy, or was merely intended to afford information to the company of the movements of the vessel at the time. The judgment at the trial, which was affirmed by the full court, was for the defendants and was founded on the ground that the statement was a promissory representation. The plaintiffs appealed.

Henry Q.C. for the appellants. The words "would tow up and back" do not amount to a promissory representation. *Arnould on Marine Insurance* (1). If they do the policy is not void. *Brine v. Featherstone* (2).

W. B. Ritchie for the respondents cited *Harrower v. Hutchinson* (3); *Ex parte Dawes. In re Moon* (4); *Cleveland v. Fettyplace* (5).

Sir W. J. RITCHIE C.J.—In the application for insurance for appellant is asked "where is the vessel?" and the answer was "at Buenos Ayres or near port;" and to the question "when to sail?" the answer was "3rd February, bound up the river, would tow up and back." It is admitted that towing between Buenos Ayres and Corrientes, 750 miles up the river where the ship was to load, is a matter material to the risk of a voyage between these ports, and would materially decrease the perils to which a vessel would be exposed on such a

(1) 6 ed. vol. 1, p. 524.

(3) L. R. 5 Q. B. 584.

(2) 4 Taun. 869.

(4) 17 Q. B. D. 275.

(5) 3 Mass. 392.

voyage. If such is the case it is very clear that, in view of that voyage at any rate, the amount of premium would be materially affected, for it is clear this towing decreased the risk for that portion of the year during which this voyage up and down the river lasted, though the defendants would, no doubt, be liable for any voyage after the one contemplated in the application during the year.

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The ship did tow up but did not tow down the river. The damage now sought to be recovered for was sustained by the ship on her voyage down when not in tow. I am of opinion the representation was not a mere matter of expectation or belief, but a representation or affirmation of a positive fact that the ship would tow up and down, and I think all the surrounding circumstances show that the assured intended that assurers should so understand it.

The plaintiffs at the time of this application, in a letter to their brokers 21st March, 1885, say the "vessel was at Punta Lava near Buenos Ayres February 3rd, and was to leave the following day up the river to load and was to tow up and down." [His Lordship here referred to the evidence showing that the insured knew when the application was made that by the charter party the vessel was to tow up and down the river.]

I think we must take these words in their plain and obvious meaning, in that sense in which it is most reasonable to conclude they were understood by the underwriter.

It was a positive representation of an existing or future fact material to the risk; there was no representation of belief or expectation, but a positive engagement that she should or would be towed up and down the river. It would have been very easy in this case for the assured to have said it is expected she will be towed up

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and down, but this would not have answered his purpose. He had positive evidence that she was intended to be towed up and down, and, therefore, naturally wished to influence the underwriter by the positive statement that she would be. I think the nice distinction which, has been attempted to be drawn between

Ritchie C.J. "would" and "will," is too fine for the practical purposes of life in this connection. Suppose the assured had warranted in time of war that the ship would sail with convoy, would her not doing so be a breach of such a warranty? I can really see no distinction between a promissory representation and a warranty.

I think this was not matter of expectation but the promissory representation of a material fact; therefore I think the appeal should be dismissed.

STRONG J.—For the reasons given by the court below I am of opinion that this appeal should be dismissed.

FOURNIER J. concurred.

TASCHEREAU J.—This is a clear case for dismissal. I would call it a frivolous appeal and it should have been disposed of without calling on the respondents.

GWYNNE J.—The appeal in this case must, in my opinion, be dismissed with costs. It is admitted that whether the vessel proposed to be insured should or should not have been towed up the river La Plata and back was material to the risk. It is apparent from the letter written by the plaintiffs to their agent directing him to effect an insurance for them that they intended that their agent should, in order to effect the insurance, make the representation on their behalf that the vessel was to be towed up and down. In view of what might naturally have been supposed to

have been the state of things at the time when the policy was effected, the statement of the plaintiffs' agent to the defendants appears to me to read plainly enough that the vessel was to have left Buenos Ayres on the 3rd of February on a voyage up the river in tow up and back, and it was upon this representation that the defendants were asked to enter into the policy which was effected. The language so used is capable of being construed, and reasonably so, as a positive representation of the plaintiffs made for the purpose of effecting the insurance through their agents ; and the insurance company had reasonably a right so to understand the language, and as that representation was not fulfilled the policy is avoided.

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PATTERSON J.—I am of opinion that this appeal ought to be dismissed. The verbal criticism of the phrase “would tow up and back,” in the application for the insurance seems to me to be beside the question, having regard to the fact that the statement related to something that had happened or was understood to have happened six weeks or more before the date of the application. It is argued by counsel for the appellants that a material difference would have been made by using the words, “will tow up, &c.,” or “is to tow up, &c.,” or “towing up and down.” The first two of these forms of expression would have been inappropriate to the circumstances, and the third has, as I apprehend, its precise equivalent in the expression actually used.

The statement, expanded without altering its effect, may, I think, be put in this shape: “The vessel was, on the 5th of February, about to proceed up the river Parana, but with the precaution against the dangers of the river navigation of being towed up and down”; or in this form: “The vessel was about to be towed

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up and down the river"; or to bring in one of the forms of the phrase suggested by counsel: "The vessel was to sail up the river, towing up and back."

The representation naturally conveyed to the underwriter was that the vessel, though a sailing ship, would have or was to have for the trip up and down the river the security of being towed, and that representation was clearly a material one.

Its materiality can scarcely be more satisfactorily shown than by the letter of the 21st of March from the plaintiffs to their agent asking for rates for the insurance, in which they make a point of the towing. "This vessel was at Punta Lava near Buenos Ayres, February 3rd, and was to leave the following day up the river to load; was to tow up and down."

Appeal dismissed with costs.

Solicitor for appellants: *B. A. Weston.*

Solicitor for respondents: *N. F. Parker.*
