

THE BRITISH AMERICA ASSUR- } APPELLANTS;  
 ANCE COMPANY (DEFENDANTS).. }  
 AND  
 WILLIAM LAW & CO. AND } RESPONDENTS.  
 OTHERS (PLAINTIFFS)..... }

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 \*May 9.  
 \*Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Marine insurance—Subject of insurance—Insurance on advances—Wording of policy—Insurable interest.*

A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co. do cause to be insured, lost or not lost, the sum of \$2,000, *on advances*, upon the body, etc., of the Lizzie Perry. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which was not insurable.

*Held*, affirming the judgment of the court below, that the instrument must, if possible, be construed as valid and effectual and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiffs.

The action in this case was upon a policy of marine insurance which contained the following as the subject matter of the insurance: "William Law & Co., on account of owners, in case of loss to be paid to William Law & Co., do make insurance and cause to be insured, lost or not lost, the sum of two thousand dollars on advances upon the body, tackle, apparel and other

\*PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C. J. was present at the argument but died before judgment was delivered.)

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furniture of the good barque Lizzie Perry, etc. The only question involved in the appeal was as to the nature of the insurance effected owing to the use of the words "on advances," the insured being the owners of the vessel and the object of the insurance being to cover monies expended by them. The trial judge gave judgment for the plaintiffs and his decision was affirmed by the judges of the full court being equally divided on an appeal to that court. The judgments against the company proceeded on the ground that the insurance was really on the ship itself.

*Henry* Q.C., for the appellants, referred to *Lowndes on Insurance* (1).

*Borden* Q.C. for the respondents, cited *Williams v. Roger Williams Insurance Co.* (2); *Insurance Co. v. Baring* (3); *Hooper v. Robinson* (4).

**STRONG J.**—This is an action upon a policy of marine assurance bearing date the 28th October, 1887, for the sum of \$2,000 effected by the respondents with the appellants. The respondents were owners of the barque Lizzie Perry. The two first clauses of the policy are in the following words:—

William Law & Co., on account of owners in case of loss to be paid to William Law & Co. do make insurance and cause to be insured, lost or not lost, the sum of two thousand dollars on advances upon the body, tackle, apparel, and other furniture of the good barque Lizzie Perry, whereof \_\_\_\_\_ is master for the present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be called.

Beginning the adventure upon the said vessel, tackle and apparel, at and from Port Eads to Buenos Ayres against the risk of total loss of vessel only.

(1) 2 ed. p. 19.

(2) 107 Mass. 377.

(3) 20 Wall. 159.

(4) 98 U.S.R. 528.

The remainder of the policy, which is a printed form with the blanks filled in, is applicable to an insurance on the ship and on the ship only.

The vessel was totally lost on the voyage from Port Eads to Buenos Ayres.

The appellants by the 8th, 10th and 11th paragraphs of their statement of defence set up that the policy was not on the ship but on advances made by the insured (who were the owners) to the ship, and that such advances were not insurable and the policy was therefore void. The action was tried before Mr. Justice Meagher without a jury, who gave judgment for the respondents. Upon appeal to the Supreme Court in banc the learned judges who heard the appeal were equally divided in opinion. Weatherbe and Townsend JJ. agreed with Mr. Justice Meagher that the respondents were entitled to recover, whilst the Chief Justice and Mr. Justice Ritchie were of a contrary opinion. The appeal was therefore dismissed.

The difficulty in the construction of the policy is caused by the two words "on advances" in the first clause of the policy before set out. This is the only reference to "advances" contained in the policy. Each of the learned judges before whom the cause came in the courts below delivered a written judgment in which their different views are very ably presented. The majority, whose opinion prevailed, base their judgments on the argument that the words "on advances" when read in conjunction with the context and the rest of the policy and in the light of the surrounding circumstances as disclosed in the evidence, were so repugnant to the other parts of the instrument that they either ought to be rejected, or to be construed as indicating something different from their ordinary primary meaning. I am of opinion that this was the correct conclusion. The well established rule

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of construction applicable to all deeds and written instruments, and especially to policies of marine insurance which are mercantile deeds not prepared by lawyers, is that they should be so interpreted, if possible, as to be valid and effectual and not in such a way as to be void. An insurance upon advances made by the owners to their own ship would, of course, be a nullity, and such a policy would necessarily be void if strictly construed. What ever may be the terms used in mercantile book-keeping and generally by commercial men it is, in a legal point of view, not merely inaccurate but absurd to speak of the owner of a ship making advances to his own chattel. Therefore, to construe this policy as the appellants invite us to do as an attempt to insure that which never was nor could be insurable, and which could never by itself give rise to an insurable interest, namely, as an insurance of money expended in repairing and refitting the vessel, would be to declare that the policy which the appellants granted, and for which the respondents paid a premium, was an instrument upon its face void *ab initio*. Before we can do this we must be sure that no way is open by which such a result can be avoided. I think there is really no difficulty in doing this. Throughout the subsequent part of the policy the insurance is treated as one upon the ship herself and not upon any special or limited interest in her. In the second clause, before set forth, it is expressly said that the "adventure," that is the insurance contract embodied in the policy, is "upon the said vessel, tackle and apparel, at and from Port Eads to Buenos Ayres against the risk of total loss of vessel only," and all the usual provisions contained in a voyage policy upon the vessel are to be found in the instrument. It is true that these clauses are in a printed

form and that the words "on advances" are in writing, but I do not consider that this circumstance, which, no doubt, has weight in some questions of construction, is sufficient here to warrant us in treating the policy as absolutely void as it would be if it is to be considered as an insurance of advances only. Then there are two ways of avoiding such a result. First, we may, to use the words in which Mr. Justice Weatherbe has expressed himself in his clear and forcible judgment, say: "There is no such thing as advances by owners on their own ship and in the light of the circumstances shewn by the evidence the words 'on advances' may, if necessary, be expunged from the policy." Or we may read those words in a secondary way as mere immaterial words of reference to the inducement which led the owners to effect the insurance, as indicating that all they meant by those words was that having advanced or expended money upon the ship in repairing or refitting her they were, therefore, led to make the insurance in order that the enhancement in value of the vessel caused by such expenditure might be covered by insurance. By reading the words "on advances" as if in a parenthesis, there can, it appears to me, be no difficulty in adopting this construction. Or (and this is the view which I am inclined to think the more correct one) we may treat the policy as its language requires us to do as an insurance on the ship, and then read the words "on advances" as intended to indicate a special interest which the assured supposed they had entitling them to insure the ship, and not as limiting the insurance to the advances; read in this way they would be immaterial and irrelevant since their interest as owners of course entitled them to insure. If, however, none of these constructions were admissible, there would be no alternative, if we are to give effect to the rule *res magis valeat quam pereat* at all,

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but to reject the words in question altogether as being repugnant to the other parts of the policy and at variance with the clear intent of the parties to insure the ship and the ship only, which is apparent therefrom.

I am of opinion that the appeal must be dismissed with costs.

Since writing this judgment I have been referred to the case of *Providence Washington Insurance Co. v. Bowring* (1) decided in February last by the United States Circuit Court of Appeal for the second Circuit, in which the decision of the Supreme Court of Nova Scotia in the present case was cited. Judge Wallace, in his judgment in the case referred to, points out the distinction between the two cases; and the learned judge's concluding observations entirely confirm the opinion I have stated in the present judgment.

TASCHEREAU J. concurred.

GWYNNE J.—If the word “advances” as used in the policy be construed in the limited technical sense insisted upon by the learned counsel for the appellants then the policy was, in point of law, null and void from the beginning. We must impute to the parties knowledge of the law affecting the matter with which they were dealing, and it must follow as a necessary consequence that we must impute to them the intention, to the respondents to pay, and to the appellants to receive a sum of money by way of premium or consideration for the latter's entering into a contract of insurance with the former which both parties knew to be null and void. To avoid such a conclusion we must seek for some other explanation for the word “advances” being inserted in the policy than that in-

(1) 50 Fed. Rep. 613.

sisted upon by the appellants, and the question simply appears to be whether that suggested by the learned counsel for the respondent can be accepted, namely, that the relation of both parties to the contract was to insure the vessel on account of the owners as is expressed in the policy, but to the amount only of \$2,000 as part of a larger amount paid by the respondents, who were part owners, for advances made by them in payment of repairs on the vessel, such amount being by the policy made payable to the respondents in case of loss. *Ut res magis valeat quam pereat*. I think we may accept this explanation and hold the policy to be a valid policy upon the vessel and that the word "advances" was used unadvisedly, unguardedly, and not at all with the intention of its being taken in the sense now insisted upon by the appellants for the purpose of making their contract void. The appeal must therefore be dismissed with costs.

PATTERSON J.—The appellant company has not, in my opinion, shown any good reason for disturbing the judgment of the court below. The construction which we are asked to put upon the policy would not bring it into accord with any precedent cited to us, or with any recognized meaning of the word "advances," as far as I can gather from the treatises on the subject of Marine Insurance, while it would be contrary to what the evidence satisfies me was the real intention and understanding of the persons concerned in making the contract. The oral evidence is that of William Law alone, which I must say is expressed in several of his statements in terms that may seem to favour the contention of the appellants if the surrounding circumstances, and the facts appearing from documents and formal admissions, are not kept in view.

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The writers on insurance point out that the old printed form of policy which is adhered to by underwriters was framed for insurance on goods and on the hull, tackle, &c., of the ship, and that when freight, profits or other interests are to be insured they resort to the expedient of writing in the body, at the foot, or on the margin of the policy a statement of the real nature of the subject matter intended to be insured, (as e.g. "on profits," "on freight," "on bottomry," "on 100 bales of cotton marked, &c.") leaving the printed clause entirely unaltered. I take this language from Arnould on Marine Insurance (1), where it is added :

The written words thus inserted in the body, margin, or at the foot of the policy apply indefinitely to the whole instrument, and are considered as controlling the sense of the general printed clause applicable to ship and goods, and narrowing it in point of construction to the particular species of interest, whether "ship," "goods," "freight," "profits," &c., the name of which is so inserted.

This being so, we are not assisted in ascertaining the force of the words "on advances," in this policy by the circumstance to which Mr. Borden called attention that the word "advances" does not again occur, the ship alone being mentioned in the other clauses of the instrument.

A remark made by the learned Chief Justice in the court below to the effect that the words "advance" and "advances" are of frequent occurrence in insurance contracts, and have well defined meanings in insurance law, must, in my judgment, be taken with a slight qualification. I do not find the word used by itself as it is in this contract, though such an expression as "advances on freight" or "advances on bottomry" may now and then be found in insurance contracts, though when bottomry is insured it is more

(1) 5 ed. vol. 1 p. 239.

usual to find that term without the word "advances." The word "advances" in such situations as these is not ambiguous. It is obviously used in its ordinary meaning of money lent, and I find no authority for saying that in insurance contracts or with regard to insurance law it has any peculiar significance, or that it has the character of a technical term. The four cases noted by the learned Chief Justice certainly afford no such authority. In one of them in *Palmer v. Pratt* (1) the subject of the insurance was two bills of exchange. Another case *Briggs v. Merchant Traders Assn.* (2) related to salvage and general average, and another *Simonds v. Hodgson* (3) to an insurance on bottomry. In the fourth *Manfield v. Maitland* (4) the insurance was declared to be on a bill of exchange drawn by the master on the charterers. In none of the cases did the word "advances" occur in the policy. It is used in the discussion of the bills of exchange in the first case and in the fourth, the two bills in the first case having been given by the captain for money lent to him—or "advances"—to buy goods with, and the bill in the fourth case representing advances on freight. The cases are examples of discussion of the description of the subject of the insurance as written in the policy, but as explained by the details of the transaction. They do not in any more direct way touch the present questions.

We have to construe this policy in accordance with the rules applicable to written instruments in general.

"Such" said Lord Ellenborough in *Robertson v. French* (5) as apply to all other instruments apply equally to this, viz., that it is to be construed according to its sense and meaning; that the terms of it are to be understood in their plain, ordinary and popular acceptance, unless by the known usage of trade they have acquired some pecu-

(1) 2 Bing. 185.

(2) 13 Q. B. 167.

(3) 6 Bing. 114.

(4) 4 B. &amp; Ald. 582.

(5) 4 East 135.

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liar and appropriate meaning, or unless the context evidently shows that they must, in the particular instance, and to effectuate the manifest intention of the parties, be understood in some other special and peculiar sense.

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Here we have the words "on advances" in writing, and we have the printed words of the form "upon the body," etc. The term "on advances," by itself, is an incomplete expression and very indefinite. If read with the following words:

On advances upon the body, tackle, apparel and other furniture of the good barque Lizzie Perry—

it makes an intelligible sentence and imports a loan on the security of the ship which ought to create in the lender an insurable interest. ° There are reasons, however, for not so reading the document, and some of those reasons are furnished by the context. From the context it appears that the insurance is on account of the owners of the vessel, and is effected by William Law & Co., to whom, in case of loss, the insurance money is to be paid. We learn from other evidence that the persons trading under the firm of William Law & Co. were among the owners of the vessel and were the managing owners. We learn further that several owners had insurances on their respective shares in the vessel, amounting together to something over \$20,000, and that Law & Co. had, on behalf of all the owners, expended \$6,000 or thereabouts in connection with the vessel, the firm obtaining the money from the bank and being liable for it to the bank, but raising it, as Mr. Law says, "on the credit of the vessel and the owners" whatever the exact meaning of that may

be. Four thousand dollars and upwards, out of the \$6,000, was expended in repairs upon the vessel. The insurance of \$2,000 was in respect of these moneys which are what the policy designates as "advances." The premium for that insurance was \$40 and was contributed, or refunded to Law & Co., by all the owners ratably according to their proportionate interests in the vessel, the owners who had not previously insured their individual shares being interested with the others in this joint insurance and paying their share of the premium. They would, of course, be interested in the insurance money in case of loss in the proportion of their respective shares in the vessel, and in the meantime those shares were enhanced in value by the expenditure in the same ratio.

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The word "advances" requiring, as we have seen, some added word to give it a definite meaning what can it reasonably be supposed to have in this instance conveyed to the underwriters? The owners on whose account the insurance is effected cannot have been understood to say that they have lent money which is to be repaid to them in money, as advances on freight by a stranger or a loan on bottomry is to be repaid.

In the cases referred to, such as *Palmer v. Pratt* (1), or *Manfield v. Maitland* (2), or others of that class, where a loan of money for purposes connected with a vessel or her cargo or freight was held not to create an insurable interest, that result followed from the loan resting on the personal credit of the borrower.

Here we have no lender or borrower, as we might have had if the bank that advanced the money to pay the disbursements had assumed to effect the insurance. We have simply the owners insuring their own property. The occurrence of the word "advances" may be accounted for by the history of the transaction. It

(1) 2 Bing 185.

(2) 4 B. & Ald. 582.

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is not a well chosen word and does not serve any purpose in connection with the contract, yet it is not entirely inapt as a concise allusion to the reason for effecting this joint insurance by or for the owners who had not joined in the insurances previously effected. There is no legal or technical force in the word, nor is there a suggestion that the underwriters were misled by it, to require us to treat it as describing the subject of the insurance. On the other hand it is impossible to assign to it, when read with the context, any meaning which the underwriters can be supposed to have attached to it, and which, if not descriptive of an interest in the vessel, would describe any other subject of insurance.

I agree with the learned judges in the courts below who held that the insurance is upon the ship, and am of opinion that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for appellants: *Henry, Harris & Henry.*

Solicitors for respondents: *Borden, Ritchie, Parker & Chisholm.*

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