

HOUSE OF LORDS.

Friday, November 17, 1893.

(Before the Lord Chancellor (Lord Herschell), and Lords Watson, Ashbourne, Shand, and Bowen.)

MUIRHEAD v. THE FORTH AND NORTH SEA STEAMBOAT MUTUAL INSURANCE ASSOCIATION.

(*Ante*, vol. xxx., p. 435, and 20 R. 442.)

Insurance, Marine—Mutual Insurance—Conditions in Policy—Articles of Association Imported into Policy—Whether Addition to Articles not Regularly Passed by Company was Good Condition.

A mutual steamboat insurance company passed a special resolution altering one of its articles of association by inserting a regulation that it should be a condition of any insurance effected by the company on any vessel that the assured should keep one-fifth of the value of such vessel uninsured. The resolution was confirmed on the same day as it was passed contrary to the provisions of section 51 of the Companies Act 1862, which require a fortnight to elapse between the passing and confirming of a special resolution. After the resolution was registered a shipowner insured a vessel with the company for £1000. The declared value of the vessel was £3750, and it was provided in the policy that the articles of association should be deemed part thereof. The shipowners subsequently insured the same vessel with another company for £3000.

In an action by the shipowner, *held (aff. the judgment of the First Division)* that as the regulation contained in the special resolution was not contrary to the original articles of association, and was perfectly legal in itself, it was quite within the power of the company to make it a condition of the policies issued by them; that though the regulation had not validly been made part of the articles of association, the pursuer having accepted it as part of his contract, and having violated the condition it contained, could not recover under his policy.

Insurance, Marine—Valued Policy—Declared Value.

A shipowner insured a steamer with an insurance company, the policy providing that the steamer for the purposes of the agreement between the insurers and the assured was and should be valued at £3750.

Held (aff. the judgment of the First Division) that in considering whether the assured had violated a condition of the policy which required him to keep one-fifth of the value of the steamer uninsured, the value of the steamer

must be taken to be the value declared in the policy.

This case is reported, *ante*, vol. xxx., p. 435, and 20 R. 442.

James Muirhead appealed.

At delivering judgment—

LORD CHANCELLOR—This is an appeal from an interlocutor of the Inner House affirming an interlocutor of the Lord Ordinary assailing the defenders from the conclusions of the summons in an action brought to recover the sum of £1000 upon a policy of insurance. There is no question about the loss of the vessel insured, but the question arose, whether, according to the terms and conditions of the policy, the assured was entitled to recover. Reliance was placed by the defenders upon an article which it was said contained a condition which was broken by the assured, and which therefore disentitled him to recover, the condition being that the assured should keep one-fifth of the value of the vessel uninsured.

It appeared that before the action was brought a discussion had taken place with regard to an insurance with another company, the Sunderland Insurance Company. This policy was a policy for £1000 upon a vessel valued at £3750. In the Sunderland policy as at first effected the vessel was also valued at £3750, and there was an insurance of £3000. The attention of the assured was called to the fact that this constituted an over-insurance, inasmuch as the two insurances together exceeded the limit up to which it was alleged the assured was entitled to insure as between the present respondents and himself. On the face of the correspondence there is shewn no contest by the appellant that there had been this over-insurance, and when the action was brought the point really argued by the present appellant was not that there had been this excess, but that, according to the true construction of the article on which reliance was placed by the company, all that he was bound to do was to abstain from insuring with them for more than four-fifths of the value of the vessel, and that it was quite immaterial what insurances he might have with other companies. That and that alone, so far as I understand it, was the contest between the parties at the time when the action was brought.

Now, dealing with that matter first, it appears to me to be scarcely capable of argument that the contention of the appellant could be sustained. The article provides that "the sum insured on any one steamer shall not exceed £1000 or such other sum as the directors may think prudent, but in no case to exceed four-fifths of the value of such steamer, including trawlgear; and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured." It seems to me to be impossible to put any other construction upon that than this, that he shall be his own insurer to the extent of one-fifth, so as to secure due attention and care on his part, and that it had not reference only to the transaction between himself and this

company. That disposes of the question which was really in dispute when this action was launched.

But it was discovered in the course of the proceedings that, as was alleged, there had been certain irregularities in the manner in which this article had become one of the articles of the company, and it was contended therefore that it was in no way binding upon the assured, and that his policy was to be regarded as free altogether from this condition. An amendment of the pleadings was allowed to raise that point.

The policy no doubt provides that payment shall be made to the company in respect of this insurance according to the articles of association of the company, and that the conditions contained in the said articles of association shall be deemed and considered part of this policy. The argument on the part of the appellant is that "the articles of association" in the policy mean those articles of association which have been validly brought into existence according to the provisions under which the company was constituted and which regulate its proceedings, that is to say, under the original articles of association; and that no added article which has not been validly added according to the provisions of the original articles can be an article of association, and that, therefore, not being an article of association it is not one of the conditions incorporated in this policy. That is the argument on the part of the appellant.

Now, the foundation of fact for that argument is that the 66th article of association provides that "the company may from time to time, by special resolution passed in accordance with the provisions of the Companies Acts 1862 and 1867, or any subsisting statutory modification thereof, alter and make new provisions in lieu of or in addition to any of the regulations of the association contained in these articles." The Companies Act requires certain meetings to be held at a certain interval; and it is said that, although the company purported to alter its original articles of association by making the article upon which reliance is placed by the respondents, the statutory conditions were not complied with, and that it therefore never really did become an article of association of this company. Now, it is not in dispute that, so far as the matter of fact is concerned, that is established. The requirements of the Companies Act were not complied with, and this new article of association was not made in accordance with those requirements, and therefore was not in that sense a valid article. The original article 67, which was altered by that, enabled the company to insure only to one-half of the value of the vessel; but it contained, on the other hand, no condition such as I have read, that the assured shall keep one-fifth uninsured. The contention, therefore, on behalf of the appellant, is this—"Article 67 is the only article which can apply to my insurance; the insurance was within the powers and provisions of that article, and

that article does not contain a condition which is obnoxious to my claim, and therefore my case stands."

If by the words "articles of association" in the policy of insurance is to be understood articles of association which have been in accordance with the regulations of the company validly constituted, I think the appellant makes out his case. But I am unable to come to the conclusion that this is the true construction of the policy. If it were, it certainly would lead to some very strange results. It cannot be doubted that, although the article, according to the constitution of the company, might not have been validly made, yet nevertheless a person dealing with that company, on the faith that these were amongst the articles, would be entitled as against the company to treat them as binding. That is a well-established doctrine, wherever an article, which has not by reason of some defect in procedure been validly constituted, is one which it was competent for the company to make. The assured, therefore, might have insisted upon binding the assurer to the provisions of an article which *de facto* had existed and had been registered, whatever defects there might be in it *de jure*; and, on the other hand, if there is any stipulation favourable to the company in any of those articles which, though *de facto* amongst the registered articles, have not become articles, if I may say so, *de jure*, he may refuse to be bound by those provisions, and fall back upon the provision that the articles which are inserted in the policy are only those articles which have been lawfully and properly made. Now, that certainly would be a result in which one would be indisposed to acquiesce, unless one were compelled by the ordinary rules of construction so to construe this policy. I think one is not so compelled. The policy may well be, and ought as a business document to be, construed in this way—that by "the articles of association of the company" both parties must have intended those articles which had in fact been registered, and were the registered articles of the company, whatever defects there might have been in the procedure according to the regulations by which the company was bound. I am of opinion, therefore, that this article, upon which the contest turns, was an "article of association of the company" within the meaning of the policy.

But then it is said (and this, I think, is something of an afterthought) that the condition was not broken, inasmuch as the vessel was insured altogether for only £4000, and she was really worth £5000; and therefore she was only insured for four-fifths of her value, and one-fifth was at the risk of the assured. I am not at all sure that that, as matter of proof, is open to the appellant; but it is unnecessary to consider that, because it is clear that, as between the parties to this action the value of the vessel must be taken as £3750; and if she was insured for more than four-fifths of £3750, it appears to me that this condition was broken.

But another point was raised for the first time, I believe, in this House. It was said that the vessel was insured with the Sunderland company under a policy similar in its terms to this, and that inasmuch as upon the true construction of this policy and the Sunderland policy no more could have been recovered by the assured than four-fifths of £3750, therefore the condition was not broken, because the assured had kept the vessel uninsured to the extent of one-fifth. I do not think that that point is open to the appellant. No proof was led; and having regard to the manner in which the questions have been raised, and to the correspondence which passed between the parties, I am of opinion it is not open to the appellant now to take such a point. But I may add that, even if it were, it does not seem to me necessary to dwell upon it, for the appellant really could not make good any such claim. By agreement before this loss took place, the valuation in the Sunderland policy was raised to £5000. Supposing, therefore, that the appellant were to have recovered £1000 upon this policy, and to have sued the Sunderland company for £3000, I am quite unable to see what answer the Sutherland company would have had upon their policy to that claim for £3000; and, inasmuch as the appellant could lawfully have recovered £4000, I am equally at a loss to see how it could be said that he had kept, as between himself and the respondent company, one-fifth uninsured.

For these reasons I move your Lordships that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON—I am also of opinion that according to the right construction of this contract the articles of association referred to in the policy must be taken to be those articles which had been duly registered, and under which the company was trading at the date of the contract. I am not prepared to hold that in a question with a person in the position of this appellant these articles were in any sense invalid; because there was no defect of power on the part of the company to make those regulations which are contained in article 67 for the guidance of the directors in conducting the business of the company. On account of an irregularity in the passing of the resolution, the article might be open to an exception that might be available to the members of the company in a question with their directors; but in a question between the company and those who *bona fide* traded with it through its directors, these articles were valid in this sense that the directors could bind the company, and the company could take no exception to a contract made on the ground that there had been an irregularity in the manner in which the resolutions were passed, and in which the article found its way into the articles of association.

Now, it is idle to suggest that when the directors are contracting, any distinction is to be drawn between the validity of a

stipulation which is not to the advantage of the company and the validity of a stipulation which is obviously for its advantage. All that can be suggested in the latter case is that the members of the company are much less likely to challenge it in the one case than in the other; but the question as between validity and invalidity arising from an irregularity is, from my point of view, purely a domestic matter; it is a matter which concerns the company and its directors, and not a matter which concerns the company dealing with *bona fide* third parties outside.

In this case the declaration of the policy is that those provisions in these articles of association shall so far as regards this insurance be as binding upon the assured as upon the person or persons effecting the insurance. The persons who effected it had power to pass it; it was binding upon them to its full extent even when effect was given to those stipulations which were irregularly entered in the articles of association. There was no defect of power on the part of the appellant; and why two parties, the one having authority from the company, and the other transacting for his own hand and on his own behoof, should not be able to make a contract effectually binding in terms upon both of them I am quite unable to understand.

With regard to the last point, which it was sought to raise here for the first time, I am of opinion that it would be *pessimi exempli* to allow an appellant who has conducted his case below upon the footing that the legal effect of a particular document was admitted, to traverse in this House the construction which has been put upon the document all along, even though he does not produce it at the bar, for the Sunderland policy, upon which so much has been said, is not in process.

LORD ASHBOURNE—I concur. I think the appellant has no case.

LORD SHAND—I am of the same opinion. The circumstances in which the question has arisen are these. In the first place, as regards the alteration which is said to be ineffectual, and which, if challenged timely by a member of this company, might have been held to be ineffectual because of the failure to observe the requirement of the Companies Act with regard to notice, this provision was registered so long as upwards of five years before this policy was entered into. In addition to that, we find that on the back of the policy the detail of the altered article is given, and the attention of the insurer is drawn to it by a printed note on the front of the policy, "See the other side." It is clear that the company for a period of five years have carried on their business in conformity with the provisions of the altered article by making their policies conform to it. Under these circumstances I am of opinion with your Lordships that it is clear that, looking at this as a document in a mercantile matter, the meaning of the words "according to the articles of association of the company" is, the articles

of association as those articles have been registered and acted upon by the company for so long a time. I think that that consideration is very much strengthened by what has been observed by my noble and learned friend opposite (Lord Watson) that the provision in the policy goes on to say "and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." For the reasons which my noble and learned friend has stated, there is no doubt whatever that this particular altered provision was binding upon the company who had granted this insurance.

LORD BOWEN—I have nothing to add to what has already fallen from those of your Lordships who have spoken.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellant—The Solicitor-General for Scotland (Asher, Q.C.)—Geo. Watt. Agents—Traill & Howell, for R. & R. Denholm, S.S.C.

Counsel for the Respondents—The Lord Advocate (Balfour, Q.C.)—Salvesen. Agent—A. Beveridge, for Beveridge, Sutherland, & Smith, S.S.C.

VALUATION APPEAL COURT.

Wednesday, February 14, 1894.

(Before Lord Wellwood and Lord
Kyllachy).

COLVILLE'S TRUSTEES v. ASSESSOR FOR FIFE.

*Valuation Cases—Lease—Cumulo Rent—
Deduction—Cost of Upkeep—Mode of
Valuation.*

A lease of a mansion-house and grounds to a yearly tenant at a *cumulo* rent provided that the tenant should have the use of the furniture in the mansion-house and the garden produce, the cost of upkeep being paid by the landlord.

Held that the mansion-house and grounds were property assessed for the year of the tenant's occupation at the value at which they had previously been entered in the roll while unlet and in the occupation of the owner. Case of *Middleton v. Assessor for Ross-shire*, 10 R. 28, distinguished.

This was an appeal by the trustees of the late Eden Colville of Craigflower against a determination of the Valuation Committee of the County Council of Fife. The appellants took exception to the following entries in the valuation roll for 1893-94:—

"Craigflower House, offices, and gardens - - - - -	£140 0 0
Woodlands, lawn, and shrub- beries - - - - -	55 0 0
	£195 0 0"

They claimed that the entries should be:—

"House, offices, garden, lawn, and shrubberies - - - -	£100 0 0
Woodlands - - - - -	20 0 0
	£120 0 0"

From the case it appeared that the mansion-house, offices, garden, lawn, and shrubberies, together with the shootings (which were entered separately at a rent of £20), had been let for one year from Whitsunday 1893 to Mr Frederick Pitman, W.S., at a gross rental of £500.

The terms of the lease, which were contained in a missive letter, were as follows—“(1) The lease to be for one year from Whitsunday 1893. (2) The rent to be £500 per annum, payable Martinmas and Whitsunday. (3) The whole wages of gardeners and cost of upkeep of gardens and grounds to be paid by proprietors. The tenant to have whole produce of garden. (4) The proprietor need not supply a gamekeeper, it being understood that the head-gardener continues to act as such, and to supply a man to carry game bags when required. (5) The proprietor to make cottage in village into a laundry by introduction of water, mangle, fixed washtubs, &c. (6) Some furniture to be put into coachman's house. (7) The furniture in mansion-house to be handed over to tenant, per inventory.”

The appellants maintained, on the authority of the case of *Middleton*, 10 R. 28, that as the subjects were actually let the rent should be taken as the basis of the valuation under deduction of the annual cost of the furnishings and services provided by the proprietor, and falling to be valued as lands and heritages. In accordance with this principle they submitted a statement to the Valuation Committee showing that the valuation of the house, garden, and grounds, including the shootings, should be £93 only, but they expressed their willingness to consent to the mansion-house, garden, and grounds, exclusive of the shootings, being entered at £100. The statement submitted was as follows:—

"Rent payable by Mr Frederick Pitman for year - - - -	£500 0 0
<i>Deductions—</i>	
Use of furniture - - - -	£75 0 0
Rates and taxes, includ- ing house-duty - - - -	20 0 0
Wages of head-gardener, £80 per annum, &ths - -	60 0 0
Wages of under-gar- deners, attendance at bothy, and milk, £209, &ths - - - - -	157 0 0
Coals, manure, seeds, and furnishings, say . -	50 0 0
Services of horse for mowing and work in connection with garden and approaches, £60 &ths - - - - -	45 0 0
	407 0 0
	£93 0 0"

With reference to this statement and the deductions claimed, the appellants explained that only three-fourths of the