

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Browning v. the Provincial Insurance Company of Canada, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered 5th April, 1873.

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Court of Queen's Bench for Lower Canada, affirming a Judgment of the Superior Court for the Province, which dismissed the Appellant's suit.

The action was brought on a contract of insurance made with the Respondents on 1,063 barrels of flour shipped in the schooner "Babineau and Gaudry," on a voyage from Montreal to St. John's, Newfoundland.

The contract was in the name of Mr. Joel Leduc, who had purchased and shipped the flour for the Appellant.

Two objections have been made to the Appellant's right to maintain the action, viz., (1) that he cannot sue on the contract made in Leduc's name; and (2) that under a clause of limitation contained in the contract, his action is too late. The Judge of the Superior Court decided against the Appellant on the second objection. Upon the Appeal in the Court of Queen's Bench, three Judges held the action was brought in time, but that the Appellant could not sue in his own name; one Judge (Mr. Justice Badgley) alone upheld both objections.

The following general facts appeared on the evidence :—

The Appellant, who carried on business as a baker at St. John's, had for some time employed Mr. Leduc, a commission merchant, to make purchases at Montreal of flour and ship it to St. John's. In the usual course of this agency, Leduc, in November 1867, purchased 1,064 barrels of flour, shipped it on board the "Babineau and Gaudry" (a vessel owned by himself) for St. John's, and insured it for 7,000 dollars with the Respondents in the form and manner which will be hereafter stated. The bill of lading stated the flour to be shipped by Leduc deliverable to the Appellant or his assigns, and an invoice was sent by Leduc to the Appellant, debiting the latter with the price paid for the flour, commission, the expenses of cartage, cooperage and wharfage, and the premium on the insurance. Bills were drawn by Leduc on the Appellant for the amount of this invoice, which were duly accepted and paid.

The "Babineau and Gaudry" sailed from Montreal on the 16th November, 1867, and left Quebec on her voyage down the Gulf of St. Lawrence on the 20th. She was last seen, proceeding on her voyage, on the 22nd, and no more was heard of her until the middle of May, 1868, when the news reached Montreal that she was ashore on the Island of Anticosti in the Gulf of St. Lawrence. An agent of the Respondents reached the island in the middle of June, and found the schooner lying bottom up. None of the crew appear to have been saved. A hole had been cut in the ship, out of which part of her cargo, including some of the Appellant's flour had been taken, and some remained on board. The flour saved, or so much of it as could be recovered, viz., 547 barrels, was taken to Gaspé and sold by the Respondents' agent there, for the gross price of 1,796 dols. An account was made out by the agent, which, after debiting the flour with the share of salvage expenses, and other charges, showed the net proceeds to be 533 dols. The schooner was recovered and repaired.

It was contended in support of the first objection by the Respondent's counsel that the insurance was in fact made by Leduc on his own behalf to protect his own interest, or, at all events, partly on his own

behalf, and partly on that of the Appellant. Their Lordships, however, feel little difficulty in coming to the conclusion, upon the evidence in the case, that the insurance was effected by Leduc, as agent on behalf of the Appellant, his principal. Leduc, who was called as a witness by both parties, states that the Appellant from the purchase of the flour up to its loss was "le seul propriétaire, et le seul qui y avait intérêt." Again, when examined by the Respondent, he says in English, "the insurance was in my name, though it was really the plaintiff's." He, no doubt, also says that he made the insurance in his own name "in case of some accident, or that the Appellant should not have met his drafts;" but further explanation given by him shows that what he wanted to have, and considered he had, was a lien only on the policy which would end when his drafts were honoured. All the facts are consistent with what seems to be the effect of Leduc's evidence taken as a whole, viz., that the insurance was effected for the Appellant and that Leduc had a lien upon the policy. Having paid for the flour with his own money, Leduc might in the event of the Appellant's insolvency, have had the right, as a *quasi* vendor, to stop *in transitu*, but it nowhere appears that he kept any control over the bills of lading, under which the goods were deliverable to the Appellant or his assigns.

The result of the evidence is that the property in the flour passed to the Appellant, that it was shipped at his risk, insured at his cost, and that the insurance was effected by Leduc for him as the owner of it.

It was next urged that, if this were so, the Appellant could not sue on the contract effected in the name of his agent.

This objection makes it necessary to consider the form of the present contract, and how it was made. The chief office of the Respondents is at Toronto, and their agent at Montreal, in taking insurances there, issues what are called "certificates of insurance" of a provisional kind, signed by the agent, upon which policies under the seal of the Company are afterwards issued at Toronto.

The certificate in this case, dated on the 15th of November, 1867, commences as follows:—"Joel Leduc, Esq., has this day effected an insurance to

the extent of 7,000 dols. on the under-mentioned property from Montreal to St. Johns, Newfoundland, shipped on board the 'Babineau and Gaudry,' " &c. The property is described as "1,063 barrels flour." The certificate also states "the insurance to be subject to all the forms, conditions, provisions, and exceptions contained in the policy of the Company, copies of which are printed on the back hereof."

Routh, the agent of the Respondents at Montreal, proved the form of policy used by the Respondents, and it is set out in the Record. This form runs thus:—"A. B., as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain in part or in all," do make insurance, &c. These words are the same as those usually inserted in Lloyd's and other English policies. It was contended that the certificate was a complete contract, and that as it did not contain these words, the Appellant could not sue upon it. Some authorities, principally American, were cited for this proposition, and "Arnould on Marine Insurance" (vol. i, p. 223, 3rd edition), was also referred to. Mr. Arnould no doubt in this place states this to be so; but in another part of his book it is stated as a general rule that actions may be brought either by the broker whose name appears in the policy, or by the principal who instructed him to make it (vol. ii, p. 1032).

In England, policies are usually made in the name of the insurance broker, and it was long ago decided that the broker need not be described as agent to enable the principal to sue upon them (see *De Vignier v. Swanson*, 1 Bos. and Pul., 346 n.) In a recent case in which it was held that the Plaintiff under the circumstances there existing could not maintain an action on such a policy because the insurance could not be shown to have been made on his behalf, the right of the person who, in a case like the present, has been throughout the real principal, to sue on a policy made in the name of his agent, was not doubted (*Watson v. Swann*, 11 C.B., N.S., 759).

By the law of England, speaking generally, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent (see

Higgins v. Senior, 8 M. and W., 834; *Calder v. Dobell*, L. R., 6 C. B., 486).

There seems no sufficient ground for making a distinction in the case of marine policies of insurance, especially when having regard to the ordinary course of business, it must be known they are commonly made by agents. If, indeed, any particular interest were described in the policy to belong to the person named in it, an objection might arise founded on the rule that written contracts cannot be contradicted by parol evidence. This objection, however, does not occur in this case, where the insurance is general on the flour, and no interest is expressly described.

But if this were not the law in the case of a policy which did not contain the usual clause "as well in his own name, &c.," it is not denied that it would be so in the case of one which does; and their Lordships think that in this case the certificate ought to be construed with reference to the proved usage of the Respondents to treat such a document as provisional, entitling the assured to a policy in their common form, which would contain the above clause. This common form of the Respondent's policy clearly shows that in their contemplation the person named in the certificate might be contracting as an agent for another; and therefore, as against them, the contract ought to be interpreted as if the above clause were contained in it. It may be observed that the condition against assignment contained in the policy cannot affect the right of the Appellant, on whose behalf the contract was originally made.

The law of the Province does not appear to differ from that of England upon the question under discussion. The Code of Lower Canada allows policies to be made in the names of agents. Article 2492 commences as follows:—"The policy of marine insurance contains the name of the assured or of his agent," thus giving the express sanction of the law to well known mercantile usage.

It is right to observe that although it was suggested at the Bar that there might be defences available against Leduc, if the action had been brought by him, none were stated which could have been established against him.

For the above reasons their Lordships think that

the Judges of the Court of Queen's Bench were wrong in giving effect to the first objection.

The second objection, that the action was not brought in time, is founded upon the following clause endorsed on the certificate:—

“It is furthermore hereby expressly provided that no suit or action against the said Company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustained in any Court of Law or Chancery unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said Company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.”

The action was brought on the 3rd March, 1869, which it is said was more than twelve months after the loss.

It appears that the “Babineau and Gaudry” left Quebec on the 20th November, 1867, in company with a vessel, the “B. L. George.” The latter anchored at Les Eboulements, and whilst there the “Babineau and Gaudry” passed that place on her voyage down the Gulf of St. Lawrence. This was on the 22nd November, and nothing was heard of her at Montreal from that day until the middle of May 1868, when news came of her being ashore at Anticosti. It was proved that on the 29th November a violent storm raged in the Gulf which continued until the 1st December, and a strong probability is raised by the evidence that the schooner was capsized and driven on shore during that gale. But although this probability is, in their Lordships' opinion, exceedingly strong, they do not find it necessary, in their view of the case, to determine whether the evidence affords a presumption of fact of such strength that the majority of the Court of Queen's Bench were wrong in refusing, as they did, to act upon it.

For, in this case, the insurance was not on the ship but on goods, and the point of time to be considered is not when the peril was encountered and the vessel driven ashore, but when the loss on

the flour, for which indemnity is sought, accrued. It must often be uncertain whether the damage done to cargo by a peril insured against will result in a partial or total loss, and the assured is not bound in such cases to make his election how to treat it as soon as some incipient damage has occurred. It is obvious that, in many cases, there must be some lapse of time, greater or less according to circumstances, before the extent of the damage is developed, and that the assured must in the nature of things wait until it can be ascertained what the ultimate loss for which he is entitled to claim indemnity will really be. In the present case the disaster to the ship was not known either to the assured or the Respondents until May 1868, and when the Agent for the Respondents reached the ship he found a hole had been cut in her side by the inhabitants of the island, through which they had taken out some of the flour. Part of the flour so taken out he recovered, and some barrels he took from the ship; the total quantity saved amounted to 547 barrels. The flour so saved existed in specie, and was sold as flour realizing the gross sum of 1,796 dollars. It must be taken as against the Respondents, by whose agent the sale was made, that the flour saved could not have been taken on to St. John's, and that the sale of it was necessary.

It results from these facts that a part only of the flour having perished, and more than one half having been saved, the loss was not in its inception total, and only became so when, by the course of events consequent upon the peril encountered, it was found to be impossible from the state of the flour to carry it to its destination, and that it was necessary to sell it. The sale under this necessity at an intermediate port caused a total loss of the flour to the assured, whether actual or constructive is immaterial as regards the present point; for not until that time were the facts constituting a total loss ascertained, and the right of the assured to claim indemnity for such a loss matured. The present suit was commenced within a year afterwards, and the condition, which must receive a reasonable interpretation, was therefore in their Lordship's opinion complied with. (See with reference to this subject *Roux v. Salvador*, 3 Bing., N. C. 266. Farnworth

v. Hyde 18 C. B. N. S. 835. *Stringer v. English and Scottish Marine Insurance Company, L. R.*, 6 Q. B., 676. Canada Code, Articles 2521, 2522, 2541, 2544.)

In the result their Lordships are of opinion that no valid objection can be opposed to the right of the Appellant to maintain the present action, to which, it may be observed, there is no defence whatever on the merits.

It appears from the English authorities above-referred to that the sale, supervening upon the existing state of things, would cause an actual, and not merely a constructive, loss of the flour. Whether this would be so under Article 2522 of the Canada Code need not be considered, for no objection was taken for the want of notice of abandonment. Both parties at the Bar assumed there had been a total loss of one kind or the other, and no question having been made that the flour was not worth the sum insured, the Appellant is entitled to recover the full amount of the insurance, the Respondents taking the salvage, *i.e.*, the proceeds of the sale.

Their Lordships will humbly advise Her Majesty that the Judgments of the Courts in Lower Canada ought to be reversed, and that Judgment in the action ought to be entered for the Plaintiff for the sum of 7,000 dollars, with interest, according to the practice of the Courts below, and that the Appellant ought to be paid his costs in the Courts below by the Respondents. They must also pay the costs of this Appeal.