Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Colonial Insurance Company of New Zealand v. *the Adelaide Marine Insurance Company, from the Supreme Court of South Australia; delivered* 18*th December* 1886.

Present:

LORD BRAMWELL.
LORD HOBHOUSE.
LORD HERSCHELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

This is an appeal from a judgement of the Supreme Court of South Australia in a suit in which the Adelaide Marine and Fire Assurance Company, now the Respondents, were Plaintiffs, and the Colonial Insurance Company of New Zealand, and certain other persons to whom it is not now necessary to refer, were Defendants. In stating their reasons for the recommendation which their Lordships are about to make to Her Majesty in Council, they will, for the sake of clearness, speak of the parties to this appeal respectively as the Plaintiffs and the Defendants.

The suit was brought upon a contract of insurance alleged to have been entered into by the Defendants with the Plaintiffs.

It appeared that, on the 29th September 1881, Messrs. Morgan, Connor, and Glyde chartered a vessel called the "Duke of Sutherland" to proceed from Algoa Bay to a good and safe port in New Zealand, and there to load from the

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charterers a full and complete cargo of wheat in bags, and being so loaded to proceed direct to Queenstown, Falmouth, or Plymouth, at captain's option, for orders to be given within 48 hours, to any safe port in the United Kingdom or on the Continent, &c.

By the terms of the charterparty, all expenses of stowing were to be paid by the ship, freight to be payable at rates specified by charterparty, the cargo to be brought to and taken from alongside at merchants' risk and expense, thirty working days to be allowed for loading, the captain to sign bills of lading for the cargo, according to the custom of the port, at the current or any rate of freight, without prejudice to the charterparty, for which purpose he was to attend daily at the charterer's or agent's office during business hours if so required, and should the freight list according to bills of lading show a less sum on aggregate than chartered freight, the difference was to be paid in cash prior to the signing of bills of lading. The vessel to have a lien on cargo for freight and demurrage.

Subsequently Messrs. Morgan, Connor, and Glyde received a proposal in a letter, dated the 10th of March 1882, from the New Zealand Grain Agency, to supply a cargo of wheat for the said vessel at Timaru, at 4*s.* 7*d.*, free on board, provided she had sailed from Algoa Bay for that port, sacks 9*d.* Messrs. Morgan, Connor, and Glyde verbally accepted the proposal.

The "Duke of Sutherland" had sailed from Algoa Bay at the date of the proposal, and she arrived at Timaru before the 30th March 1882. The Plaintiffs having agreed with Messrs. Morgan, Connor, and Glyde to insure the cargo of wheat for a sum not exceeding 14,000*l.*, applied to the Defendants, by a letter dated the 30th of March 1882, to hold them covered for

not exceeding 2,000*l.*, being 2/14ths interest in cargo of wheat per "Duke of Sutherland," at and from Timaru to United Kingdom, or Continent, F.P.A. rate, charged to be that ruling in New Zealand for similar risks.

On the same day the Defendants by their local managers sent the following answer:—

"Marine Department.
"The Colonial Insurance Company of New Zealand.
"Fire and Marine.
"To Secretary of Adelaide Marine, &c., Assurance Co.
"Dear Sir, Adelaide Branch, 30th March 1882.
"In accordance with your written request of even date, you are hereby held provisionally insured in the sum of (not exceeding) 2,000*l.* (being 2/14ths interest) on wheat cargo now on board, or to be shipped in the 'Duke of Sutherland,' tons, from Timaru, New Zealand, to United Kingdom or Continent. Warranted F. P. A.
"Declarations to be made upon completion of shipment, and rate to be charged in New Zealand for similar risks.
"We are, dear Sirs, yours faithfully,
"J. EDWIN THOMAS, for Local Managers."

The delivery of the wheat by the New Zealand Grain Agency on board the "Duke of Sutherland" at Timaru commenced shortly after the 30th March 1882. Before the completion of the cargo, viz., on the 3rd of May 1882, the vessel and the wheat on board were lost by the stranding of the vessel during a gale at Timaru. It was admitted by the Defendants that the vessel was seaworthy, and that she was lost by perils of the seas. At the time of the loss 2,500 bags of wheat out of a total cargo of 13,000 remained to be delivered in order to complete the cargo.

Messrs. Morgan, Connor, and Glyde paid the New Zealand Grain Agency for the wheat which they had put on board, and the Plaintiffs having paid Messrs. Morgan, Connor, and Glyde for the loss of the wheat, in accordance with their contract for insurance, called upon the Defendants to indemnify them, in accordance with their contract of cover. The Defendants denied

their liability, and the Plaintiffs commenced an action against them in the Supreme Court of South Australia. The cause was tried before the Honourable Samuel James Way, the learned Chief Justice of the Court, who gave judgement in favour of the Plaintiffs, and on motion by way of appeal to the Full Court the appeal was dismissed.

The present appeal is from the judgement of the Full Court. The reasons of the Chief Justice are fully set out, but no reasons for the judgement of the Full Court, which is the one from which this appeal has been preferred, have been communicated pursuant to the rule of the Judicial Committee of the 10th February 1845.

Their Lordships think it right to remark upon the absence of such reasons, as it is most desirable that the Judges in the colonies should always comply with the rule.

Upon the argument before their Lordships, the learned Counsel for the Defendants contended, 1st, that there was no contract of insurance; 2nd, that at the time of the loss the risk had not commenced; 3rd, that the Plaintiffs had no insurable interest.

As to the first point, they contended that the proposal by the Plaintiffs and the acceptance by the Defendants were not *ad idem*, the proposal being "at and from" and the acceptance only "from" Timaru; and also that the acceptance contained the words, "Declarations to be made "on completion of the shipment," which were not in the proposal.

The second point of contention was that, if there was a contract on the part of the Defendants, it was merely to insure a wheat cargo from Timaru, whereas the vessel was lost before the cargo was complete and before the commencement of her voyage from Timaru.

Parol evidence was admitted by the Chief

Justice to prove that the Defendants intended by the word "from" in their letter of the 30th March to insure at and from Timaru. One of the Plaintiffs' prayers in the suit was that the policy should, if necessary, be amended.

The Defendants contended that the evidence was inadmissible.

It is unnecessary to determine whether it was admissible or not, for their Lordships are of opinion that upon the true construction of the Defendants' letter, independently of any parol evidence, the contract was to insure at and from Timaru, and consequently that the first contention fails.

The proposal to the Defendants was to hold the Plaintiffs covered "at and from" Timaru; the Defendants' letter commenced, "In accordance "with your written request of even date, you "are hereby held provisionally insured 'from' "Timaru to United Kingdom," &c.

There could be no doubt entertained by the Defendants as to the meaning of the words "at "and from" contained in the proposal, and their Lordships are of opinion that the answer showed that their acceptance was intended to be in all respects in accordance and in conformity with the proposal, and that, notwithstanding they used only the word "from" they intended to accept the proposal at and from, and consequently that there was a binding contract to that effect.

As to the contention that the loss happened before the cargo was complete, the answer is that the word "cargo" is a word susceptible of different meanings and must be interpreted with reference to the context. The sellers were to supply a cargo of wheat free on board the "Duke of Sutherland" at Timaru, and the Defendants agreed, as a cover to the Plaintiffs, to insure, at and from Timaru, a wheat cargo then on board,

or to be shipped in the "Duke of Sutherland." Their Lordships interpret the meaning of the words "wheat cargo" or "cargo of wheat to be "shipped on board" to be such a quantity of wheat to be shipped at Timaru as the ship could properly carry, and as the Defendant's contract was to insure a wheat cargo then "on board or to be shipped in the 'Duke of Sutherland,'" &c., the insurance must be construed in the same manner as if it had been on 13,000 bags of wheat to be shipped, &c., at and from Timaru. The risk, therefore, in their Lordships' opinion, commenced as soon as any portion of the wheat was on board. If the sellers had neglected to supply the full quantity of 13,000 bags, and the vessel had been obliged to sail with only 1,050 bags, it could not possibly have been contended that, if the ship had been lost on the voyage, the risk had not commenced because only a part of the cargo had been put on board. Their Lordships hold that the risk had commenced before the loss was incurred.

The last objection, viz., that the Plaintiffs had not an insurable interest, was the most important one. It depends upon the question whether Messrs. Morgan, Connor, and Glyde had an insurable interest, for if they had not an insurable interest the Plaintiffs had not an insurable interest, and the payment by the Plaintiffs to them under their policy was a mere voluntary payment.

The Appellants laid great stress upon Anderson *v.* Morice, 1 Appeal Cases, 713. The Chief Justice considered that there was a striking resemblance between the facts of that case and those of the present. He proceeded, however, to consider three points which in his opinion constituted a difference between the two cases. Having discussed those points in an elaborate judgement, he arrived at the conclusion that they did not constitute any substantial difference in

favour of the Plaintiffs, and therefore, but for certain parol evidence which he had admitted on the trial, he would have held that neither Messrs. Morgan, Connor, and Glyde nor the Plaintiffs had an insurable interest. Acting, however, upon what he considered to be an admission made by Mr. Glyde during the loading to the effect that he understood that the wheat which had been shipped prior to the loss was at the buyers' risk as it was put on board, the Chief Justice found as a fact that the letters "f. o. b." in the particular contract were used with the meaning that the bags were to be at the buyers' risk immediately that they were put on board, and consequently that the buyers had an insurable interest.

Their Lordships are of opinion that Mr. Glyde's statement as to what he understood was not admissible. He did not prove any additional facts, but merely expressed his opinion, and that at most merely by inference, as to the effect of the contract with the sellers. He merely denied that the wheat was at the risk of the shippers before it was on board. Their Lordships must therefore determine whether or not, independently of what Mr. Glyde was proved to have said, the buyers had an insurable interest. Their Lordships differ from the Chief Justice in this respect, and are of opinion that they had an insurable interest.

In Anderson *v.* Morice it was held by the Exchequer Chamber, reversing a unanimous judgement of the Court of Common Pleas, that the property in the rice which was put on board the seller's vessel in the course of completing the cargo, and which was lost by perils of the sea before the cargo was complete, did not vest in Anderson under his agreement for purchase; that there was nothing to show that it was to be at his risk, and consequently that he had no

insurable interest. The decision of the Exchequer Chamber, from which one of the Judges, Mr. Justice Quain, dissented was appealed to the House of Lords, and affirmed, the noble Lords who heard the appeal being equally divided in opinion.

Their Lordships, notwithstanding the great diversity of opinions expressed in that case, are not prepared to throw any doubt as to the correctness of the decision. But admitting it as an authority to the fullest extent, they consider that it is not applicable to the circumstances of the present case.

In each of the cases the insurance was on a "cargo," a word which, as already pointed out, is susceptible of different meanings in different contracts, and which must be interpreted with reference to the context.

In Anderson *v.* Morice Anderson agreed with Messrs. Borradaile, Schiller, & Co. to purchase the cargo of new crop Rangoon rice per "Sunbeam" at 9*s.* 1½*d.* per cwt. cost and freight, expected to be March shipment. Payment by seller's draft on purchaser at six months' sight with documents attached. The cargo to be purchased in that case was an entire thing, and was not in existence at the time when the contract was entered into, and would not be in existence until the whole cargo should be put on board.

In the present case the vendors did not sell a particular cargo on board a ship chartered by them, but merely offered to supply a cargo of wheat for the "Duke of Sutherland" at 4*s.* 7*d.*, free on board at Timaru. No time or mode was fixed for payment, and nothing was said as to the place to which the cargo, when supplied and put on board, was to be carried, or to the effect that the sellers were to have anything to do with bills of lading or other shipping documents. The purchasers accepted the offer, they them-

selves being the charterers of the "Duke of Sutherland," whereas, in Anderson *v.* Morice, the firm who agreed to sell the cargo of rice by the "Sunbeam" were themselves the charterers of that vessel, and were to receive freight for the carriage of the rice, such freight being included in the purchase money. In putting the rice on board the "Sunbeam" the sellers were not delivering it to Anderson, but were putting it on board a vessel, of which they were the charterers, for the purpose of completing the cargo which they had agreed to sell. The master of the "Sunbeam" received it on their account, and not on account of the purchasers. The purchasers' right was to depend on the shipping documents which were to be under the direction of the sellers. In the present case, in putting the wheat on board the "Duke of Sutherland," the contractors were delivering it to the purchasers in pursuance of their contract to put it free on board, the master of the vessel which had been chartered by them being their agent to receive it on their account. The shipowners received it under the charterparty by which they bound themselves to load from the charterers a full and complete cargo, and to proceed with it, &c., as ordered by the charterers or their agents. The sellers had nothing to do with the wheat or the destination thereof after it was on board, and by putting it on board they did not render themselves liable to the owners of the ship for freight, demurrage, commission, or any other charges provided for by the charterparty. The master would not have been justified in returning to the sellers any portion of the wheat without the authority of the purchasers, who were entitled under the charterparty to have bills of lading signed for it as directed by them according to the terms stipulated by the charterparty. From the very

nature of the contract to supply a cargo of wheat for a ship of 1,047 tons register, and which it is admitted would consist of 13,000 bags of wheat, it could not have been intended that the whole supply should be completed at the same moment or even in a single day. By the charter 30 days were to be allowed for the loading, and upon a proper construction of the contract of sale, in which nothing was stipulated as to the time of delivery or payment, the sellers would have a reasonable time to deliver it on board. By the charterparty the cargo was to be brought to and taken from alongside at merchant's risk and expense. By the vendors' contract they were to put it free on board for the charterer, and when put on board the master would receive it for the purchasers and hold it for them.

In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, and it must frequently happen, as in contracts for supplies of provision for the Army or Navy, or any large establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat put on board from time to time until the whole cargo had been supplied ; but it does not follow that they had not an insurable interest before the price was paid or payable. It appears from what follows that a man may have an insurable interest in goods for which he has neither paid nor become liable to pay.

In the present case, if no loss had happened, and the sellers, without lawful excuse, had

neglected to supply a complete cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had, at the time of the loss, an interest in the part which had been put on board. In the one case, that they might be able to return it to excuse them from payment for it in the event of their electing to put an end to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay.

In Oxendale *v.* Wetherell, 9 Barn. and Cr., p. 387, it was correctly stated by Mr. Justice Parke, that "Where there is an entire contract "to deliver a large quantity of goods, con- "sisting of distinct parcels, within a specified "time, and the seller delivers part, he cannot "before the expiration of the time bring an "action to recover the price of the part de- "livered, because the purchaser may, if the "vendor fail to complete his contract, return "the part delivered. But if he retain the part "delivered after the seller has failed to perform "his contract, the latter may recover the value "of the goods which he has so delivered." In the case cited it was decided accordingly. Applying the law as laid down in that case to the present, the purchasers, if no loss had occurred, might, subject to the rights of the shipowners to their lien for freight under the charterparty, have returned the wheat which had been put on board if the contractors had, without any lawful excuse, refused to supply a full cargo within a reasonable time, but they would not have been obliged to do so; they might have retained and paid for the part delivered, and sued the contractors for damages for not completing their contract; on the other

hand it is clear that the sellers could not without the consent of the purchasers in the case supposed have taken out of the ship the whole of the wheat which they had put on board, and have compelled the ship to go empty away, because they themselves had failed to complete their contract.

In 2 Exchequer Reports, p. 699, it is correctly stated by Baron Parke that "a delivery "on board a purchaser's ship is a delivery to "him, but that where goods are shipped under "a bill of lading making them deliverable to the "shipper's own order, the property does not vest "in the consignee until the bill of lading has "been delivered to and accepted by him." In their Lordships' opinion the rule applies to a delivery of goods in part performance of a contract as well as to a delivery of the whole quantity contracted for. In the present case the sellers had no right to give any directions as to the persons to whom bills of lading should be made out, nor as to the place to which the wheat should be carried. So far as the goods delivered were concerned, the seller's obligation as to those goods ceased directly they were put on board. The purchasers might have sold them in New Zealand, and were not obliged, except as between them and the shipowners as regards the freight contracted for by the charter-party, to have had the wheat conveyed to the United Kingdom or the Continent. They had the same right to deal with the wheat which was put on board as they would have had to deal with the whole cargo if it had been completed. In Dunlop *v.* Lambert Lord Cottenham, then Lord Chancellor, said, "It is, no doubt, "true, as a general rule, that a delivery by a "consignor to a carrier is a delivery to the con-"signee. This is so if, without designating the "particular carrier, the consignee directs that

" the goods shall be sent by the ordinary con-
" veyance, and it is still more strongly so if the
" goods are sent by a carrier specially pointed
" out by the consignor, for such carrier then
" becomes the special agent." See 6 Cl. and Fin. Reports, 621.

In the present case there was a sale, a delivery, and a receipt by the purchasers of the wheat which was put on board. The charterers, and not the contractors, would have been liable to the shipowners for the freight if the wheat had been carried to its destination.

Their Lordships are of opinion that the delivery of the wheat from time to time was a delivery to the purchasers, that it vested in them the right of possession as well as the right of property, and that at the time of the loss it was at their risk. The right which they had to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, did not prevent them from having an insurable interest. The interest in this case was defeasible, not by the vendors, but at the option of the vendees in the event of the vendors not completing the contract.

For the above reasons their Lordships are of opinion that, without taking into consideration the statement made by Mr. Glyde, or the other parol evidence of the intention of the parties upon which the Chief Justice relied, Messrs. Morgan, Connor, and Glyde, and consequently the Plaintiffs, had an insurable interest.

They will, therefore, humbly recommend Her Majesty to affirm the judgement of the Full Bench, and to dismiss the appeal.

The Appellants must pay the costs of the appeal.