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HENDERSON, &c. *v.* ALLAN, &c.

(Fac. Coll. p. 518.)

MESSRS. HENDERSON and SELLAR, Merchants in Liverpool, ... } *Appellants;*

ALEXANDER ALLAN and Others, Underwriters on the ship Imperial, on a voyage from Liverpool to Africa and back, and Others, Underwriters on the cargo, } *Respondents.*

House of Lords, 23d June 1813.

INSURANCE—DEVIATION—CONCEALMENT.—A policy of insurance, of a vessel and cargo to the African coast and back, bore, "with li- "berty to exchange goods with other ships, and to sail to, and touch "and stay at any port or ports or places whatsoever and where- "soever, without being a deviation." No mention was made that another vessel was to co-operate as a tender, and the ordinary premium of six per cent. was paid; Held that this co-operation ought to have been disclosed, as it changed the risk from the ordinary one of a single ship, and prolonged materially the length of the voyage.

The appellants were owners of five-sixths of the ship Imperial, of 500 tons, which, in the end of January 1803, set sail from Liverpool for the coast of Africa, and from thence to return direct to Liverpool with a cargo of palm oil, gold dust, ivory, and other produce of the country. The value of the vessel was £10,000, and the cargo upwards of £20,000.

To secure this interest, the appellants effected insurances in different English offices to a considerable amount; and, in prosecution of the same object, in *Scotland*, they addressed the following letter to Messrs. Liddle, insurance
Jan. 21, 1803. brokers, Leith: "Please effect two thousand pounds, per "the Imperial, Thomas Marshall, at and from Liverpool to "the coast of Africa, and the African islands, *during her stay "and trade there*, and from thence back to Liverpool, *with "liberty to exchange goods with other ships*, at six pounds per "cent. The Imperial was lately built at South Shields, "originally intended for the service of the East India Com- "pany, is five hundred and thirty tons register, copper- "fastened and copper-sheathed up to the bends, and intended "to sail in about a week. Upwards of £5000 has been "done on her on these terms to day here. As your under- "writers may not be accustomed to these risks, it may be "necessary to say, that we purchase no slaves, nor does the

" ship go to the West Indies: We barter the produce and " manufactures of this country for the produce of Africa."

In consequence of this letter, a policy to the extent of £2000 was effected on the 21st day of January 1803, " On " the ship Imperial, to and from Liverpool to the coast of " Africa, and the African islands, during her stay and trade " there, and from thence back to Liverpool, *with liberty to* " *exchange* goods with other ships: And it shall be lawful " for the said ship, in her voyage, *to proceed and sail to, and* " *touch and stay at any port or places whatsoever and* " *wheresoever*, without being a *deviation*, without prejudice " to the insurance. Total £10,000, premium 6 per cent."

Policies were also opened by the appellants on the goods per the said ship, all in the same terms, viz., " At and from " the vessel's arrival twenty-four hours at her first place of " trade on the coast of Africa, *during her stay and trade there,* " and from thence back to Liverpool: and the vessel was to " have liberty to touch and stay at any port or ports what- " soever, as before mentioned."

The Imperial, with her cargo, was worth £30,409. 4s., and, deducting the share of a Mr. Lightbody (owner to the extent of one-sixth), the appellants' interest amounted to £25,341. And, on the two interests of ship and cargo, policies were opened in England and in Scotland to the amount of £17,550, leaving uninsured £7791 sterling.

The appellants further explained the following circumstances in regard to this particular trade, and the usage which prevailed in regard to it, which they offered to prove by evidence:—That it was a trade conducted on the principles of barter. The inhabitants neither gave nor got credit, and no bills were granted for balances; but the outward bound cargoes of European vessels were exchanged for the produce of Africa, so that when any surplus of the outward bound cargo remains, it must either be sold to the masters of other European vessels on the coast, or brought home again. In the course of trading too with the natives, in consequence of their selecting some part and leaving another, the cargo usually got unassorted, which made it necessary to make up these deficiencies by exchanges with the masters of European vessels on the coast. Further, it was stated, that when two or more vessels in the same employ meet on the coast, it was customary for masters not only to aid each other by mutual exchanges, but to aid the dispatch of the one most forward, by assisting her with cargo homeward, and relieving her of outward cargo

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unexpended, without regard to any proportion between the goods so delivered or received; and that this mode tended greatly to facilitate the dispatch of both vessels. It was therefore common with traders in the African trade to dispatch two vessels within a short time of each other, giving the control to the most experienced master, and he in the subordinate command is dispatched from place to place as the other sees fit; and when a cargo has been collected sufficient to dispatch one of the vessels, he having this control fills her with a homeward cargo, and relieves her of her unexpended outward cargo, without regard to any proportion between the goods so delivered or received; and the vessel so loaded is dispatched homeward. This line of conduct is plainly beneficial to all interested, as it facilitates dispatch.

To obviate as much as possible the fatal consequences of delay in so complicated a trade, and in so barbarous a country, a smaller vessel is usually sent out before the larger one, with a valuable cargo, and orders to contract and pay for a sufficient quantity of wood to load both ships. She thus proceeds first to Gaboon, where the wood is got, contracts and pays for a large quantity of wood, and orders it to be brought down from the country to the coast, (a work of time), informing the traders that another ship is to call for part of it, she takes part herself on deck. Then she goes on to Calabar for her cargo of palm oil, for which she barters her cargo of salt, and also opens a trade for the other ship which is to follow. About the time the small ship is full of cargo the large ship arrives, after calling at Gaboon, and getting there her part of the wood on board, she then joins the small vessel at Calabar, puts her wood on board of her, and dispatches her home, and takes on board whatever part of her outward cargo remained undisposed of; and she remains to conclude her trade and complete her cargo. It was thus that the appellants did in the present case. They sent out the George sometime before the Imperial; and vessels so circumstanced are, in the African trade, said to be tenders to the other, and only pay half dues in consequence.

The plan of the voyage, as shown by the instructions given to the captains of the Imperial and George, was as above detailed; the Imperial, after getting her palm oil on board at Calabar, was to proceed to Cameroon, to finish her trade there, and in purchasing ivory, pepper, and bees' wax, and thence she was to go to Gaboon to fill up the ship with the wood which the George had contracted for.

Accordingly the Imperial sailed from Liverpool on Jan. 1803, with her assorted cargo for the voyage insured. She arrived at Gaboon on the 28th March, and took as much wood as she could stow, consistently with her out cargo still on board. A mutiny, and ultimate loss of some of the seamen, took place here, and detained the ship. She afterwards proceeded to Calabar, where she found the George nearly full of oil and barwood; and that ship sailed in a few days for Liverpool, having received on board the thirty tons of barwood which encumbered the deck of the Imperial, and delivered over in return to the latter ship the portion of her outward cargo still undisposed of. The Captain of the George, being an officer of greater experience, took the command of the Imperial, and the Captain of the Imperial went home with the George, after having supplied the Imperial with six of the George's men.

The Captain of the Imperial now finished his trade at Calabar. He next sailed for Cameroon, to finish his ivory trade, where he was detained sometime, owing to a quarrel between the natives and the crews of other vessels, which the natives, as usual, resented on all Europeans indiscriminately. Afterwards he proceeded with his trade, and having completed it, proceeded to Gaboon to complete his cargo of wood. Having been informed that a French privateer was expected at Gaboon in a few days, she, in consequence of this information, sailed as speedily as possible for Anabanca, a Portuguese settlement, where she was captured by a French privateer on 14th February 1804.

There being a total loss both of ship and cargo, the appellants made their claim against the underwriters. All of those offices in England, where insurances were effected, settled at once, with one or two exceptions, of persons who have since paid after litigation. The underwriters in Scotland refused, however, to settle the loss; and action was raised by the appellants in the Admiralty Court, where, after much procedure, judgment went in favour of the appellants, which decree was brought under review of the Court of Session by suspension. The defences stated by the respondents, were, 1. That instead of this being a voyage of seven or eight months, it was a voyage of much longer time, and that they had discovered the Imperial did deal in slaves. 2. That instead of "bartering the produce and manufactures "of this country for the produce of Africa," she was employed for no shorter a period than *three months* as a floating warehouse, or, in other words, in collecting and tran-

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sporting goods for behoof of another vessel belonging to the appellants, called the George, to procure the dispatch of which with a full cargo was in fact the primary object of her voyage. 3. That insurance to the extent of only £1000, and not £5000, as represented, was effected in Liverpool on the vessel. 4. That instead of the 29th October and 26th November, the time at which she was to leave the coast of Africa, it was known she could not leave until December thereafter. 5. That the crew never consisted of 35 men.

The question was, Whether the words in the policy, "from "Liverpool to the coast of Africa, and the African islands, "*during her stay there*, and from thence back to Liverpool, "*with liberty to exchange goods with other ship or ships*," and "also to *proceed and sail to, and touch and stay at any port* "*or places* whatsoever and wheresoever, *without being a de-* "*viation*," were to be construed in an enlarged sense of the privileges conferred, or in a more limited sense; and whether, from the facts proved, as above set forth, the appellants had exceeded the privileges allowed by the policy?

The cause came before Lord Meadowbank as Ordinary,

Nov. 14, 1809. and his Lordship pronounced this interlocutor: "Having con- "sidered the several memorials of the parties, ordains the "cause to be enrolled, and the chargers to state at the call- "ing, whether they are ready to undertake a proof that, "according to the understanding of those engaged in the "African trade, a liberty to exchange goods with other "ships, imports a liberty not only to barter or sell, but to "aid another ship in providing her speedily with a homeward "bound cargo, without regard to any proportion between "the goods so delivered or received."

Afterwards, on a minute and answers, his Lordship pro-

Dec. 12 1809. nounced this interlocutor:—Before answer, allows the "chargers to prove, that according to the understanding of "those engaged in the African trade, liberty to exchange goods "with other ships, imports a liberty not only to barter and "sell, but to aid another ship in providing her speedily with a "homeward cargo, without regard to any proportion between "the goods so delivered or received; and allows them a "proof of all facts and circumstances relative thereto; allows "the defenders a conjunct probation."

The proof having been completed, his Lordship pronounced

Jan. 17, 1811. this interlocutor:—"Having resumed consideration of these "conjoined processes, and advised the proof, finds that the "privilege specified in the different policies of insurance, "with liberty to exchange goods with any other ship or

" ships, or with liberty to exchange goods with every vessel " or vessels, does not, in common language, and without a " peculiar conventional meaning, import a liberty to exchange " goods, without regard to observing any proportion in bulk " or value between the goods so exchanged; and still less " that the exchange may be so conducted by the vessels in- " sured, as that it should retard the completing of her own " cargo, and protract her own stay in the seas where it is " to be completed, and in order to hasten the accomplish- " ment of the voyage of other vessels, or another vessel, and " her or their speedy dispatch with a competent cargo; and " as the risks of sea hazard are increased beyond an arith- " metical proportion by the prolongation of the adventure, " particularly in the business of a coasting voyage to com- " plete a cargo, so enlarged a construction of the privilege is " more difficult to be entertained, where nothing appears in " the rate of insurance stipulated between the parties, in- " dicating that such an eventual augmentation of risk was " in contemplation: Finds it nevertheless proved, that the " enlarged construction of the privilege contended for by " the chargers was adopted by a great number of the dealers " and underwriters in the African trade, but not uniformly " in point of extent of such construction, and not universally " in any extent even at Liverpool; and, amidst this diversity " of sentiments, being on the whole of opinion that, in apply- " ing for insurance at such an out-port as that of Leith, it " was the duty of the assured not to rely on a conventional " meaning so adverse to the natural meaning, and attended " with so much difficulty, while not established with absolute " universality among all versant in the trade, but to disclose " the retardment and increase of risk that might be expected " from the privilege stipulated; Suspends the letters *sim-* " *pliciter*, and decerns; but believing the chargers indivi- " dually may have proceeded *bona fide*, though on somewhat " too great confidence in their own practice, finds no expen- " ses due, and decerns." On a representation the Lord Ordinary adhered, adding the note below as the grounds of his decision.* On reclaiming petition to the Court, and answers, the Court adhered.

Feb. 15, 1811.

Feb. 22, 1812.

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* Note by the Lord Ordinary.—" I certainly proceeded, in pro- " nouncing the interlocutor, on the opinion that the long stay of the " Imperial, for so many months on the coast, was not at all accounted " for but from her subserviency to the George; and if the chargers " reclaim, this seems to me essential to be obviated."

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The words of the policy are so broad in their natural interpretation that they may include a voyage extending to any given period of time, and to transactions of exchange with other ships to any imaginable extent. They are (1.) "To the coast of Africa, and the "African islands, *during their stay and trade there*, and from "thence back to Liverpool." (2.) "With liberty *to ex-* "*change goods with other ships*;" and, (3.) "With license "to the said ship, &c. *to proceed, and sail to, and touch and* "*stay at any ports or places whatsoever and wheresoever*, "without being deemed a deviation."

As there is here an unbounded license in point of time, combined with the fullest power to exchange goods with other ships, so there is no rule of proportion laid down for regulating such exchange. It lies on the underwriter to restrict the sense of these words, either by mercantile usage or legal construction, so as to establish that the circumstances of the voyage in question are not fairly comprehended within their technical meaning. No doubt the underwriters say, that, taking only the small premium of six per cent., they calculated only on a voyage of seven or eight months, whereas the voyage in question was of a most extraordinary duration, even considered as an African voyage. But the answer to all this is, that a mercantile contract of this kind must be interpreted according to the usage that may have arisen, and that existed in regard to such voyage; and the underwriter must be held to have informed himself, wherever his residence may be, of all the peculiarities attending the contract. The voyage in question did not exceed the usual or necessary duration of a voyage in the wood and ivory trade. This sort of voyage is very seldom concluded within the year, and most commonly the ships remain in the rivers of Africa eighteen or twenty months. So well known in the trade is this long duration of the African wood and ivory voyages, that, in the case of Freeland *v.* Glover, decided 9th June 1806, the Judge said: "That no under- "writer is so little conversant with the African trade as not "to know that it consists in truck; and that the ships en- "gaged in it always continue for sometime upon the coast, "in some instances, as we learn from cases that have come "before the Courts, for above a year."

7 East's Rep. p. 402.

2d. Insurance is a contract of speculation; and the policy in question must be taken and construed, relatively to the

proposed voyage, according to the usual and approved method of conducting such voyage. The dealings had therefore with the George was in accordance with the usage of such voyage. If, therefore, there be nothing inconsistent with the known and approved nature of the contract, in the instructions given for the prosecution of the voyage, it would not avail the respondents though it could be shown that disappointments had arisen in the execution of these orders. Then, on comparing the voyage, as planned in the instructions with the usual course of such a voyage, as proved by those conversant in the trade, they will be found completely to accord, and it will further be found, that this plan of voyage is more favourable to expedition than that of a single ship unaided by another. Expedition is the necessary result of such an arrangement: namely, That the two ships co-operated with each other; and that, by such co-operation, the voyage of each was more accelerated than if she had been left unassisted in her traffic; and that this was the most approved method of carrying on the trade. Such was the bearing of the evidence, and, though some discrepancies appeared in the testimony of some witnesses, yet, as a whole, the custom founded on was established; and the fact, that fourteen different offices in England settled with the appellants their insurances on the ship and cargo, to the extent of £10,000, only gives additional weight to this part of the case.

Pleaded for the Respondents.—1st. For all the reasons stated in a case upon the table of the House, for William Tennant, Richard Bannatyne, and others, also underwriters on the said ship and cargo, in an appeal wherein they are appellants, and the present appellants are respondents, and to which case the respondents humbly beg leave to refer, they hope that the interlocutors will be affirmed. 2d. In addition to the reasons which have been there urged, there has been a proof led in this case before the Lords of Session, by which it has been established, in point of fact, that by the usage of the African trade, "a liberty to exchange "goods," which are the words employed in this policy, does not imply a traffic of that description in which the Imperial was actually engaged. The general principle of law which is to regulate the examination of the evidence upon this point, is stated justly and clearly in the interlocutor of the Lord Ordinary appealed from, and indeed there can be no doubt of its justice. To attach to a written contract a meaning different from what its terms plainly import, it is necessary that the usage upon which this plea rests, and by

Vide Dow's Reports, vol. i. p. 324.

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which the interpretation is to be much affected, must be *clear*, *universal*, and unequivocal, admitting of no doubt or difference of opinion among those whose business it is to be acquainted with the nature of the trade in which the usage is alleged to exist. The evidence founded on by the appellants is of a description entirely different.

In the first place, there were in the Court below no fewer than sixteen witnesses examined as to the general practice being such as took place here; but, excepting four of these witnesses, their depositions do not go nearly to the extent necessary to make out the general custom pleaded by the appellants. In the second place, it will be observed, that wherever a question is applicable to the precise facts attending this case, *all* the witnesses gave testimony in favour of the respondents. Thus Hamlet Mullion depones, "That, as "an underwriter, he would certainly expect a higher pre- "mium for insuring a vessel that must, from the nature of "her voyage, remain twelve months on the coast, than he "would on insuring the same vessel to the same part of "Africa, that must not, from the nature of the voyage, be "detained longer than six months." So other two of the appellants' witnesses depone in like manner. Besides, the respondents' witnesses confirm this fact, and establish, besides, other material facts. Thomas Bushel depones, "That if a vessel "was sent out to Africa, for the purpose of running down "the coast, and collecting cargo for another ship then on "the coast, and despatching her speedily to a market, and "taking on board the unexpended part of the outward-bound "cargo of the vessel so despatched, and afterwards remain- "ing on the coast prosecuting her own voyage, he should "then consider such ship so remaining on the coast a factory "ship, and that she ought to be insured accordingly at a "much higher rate of premium." The respondents maintained, therefore, that this was not a plan of mere co-operation and assistance, but acting as a floating warehouse for the exclusive benefit of the other vessel. The case, Hartly *v.* Buggin must be taken as having decided the law in such cases, where Lord Mansfield laid down the doctrine in these words: "The single point here is, Whether there has not "been what is equivalent to a deviation? Whether the risk "has not been varied, no matter whether the risk has or "has not been thereby increased? If a ship, insured for "a trading voyage, be turned into a floating warehouse, "or a factory ship, the risk is different. It varies the stay;

Hartly *v.* Buggin. 2 Park Ins. p. 468; Marsh. Ins. i. p. 194; 3. Doug. 39.

Lord Mansfield's Opinion.

" for while she is used as a warehouse no cargo can be " bought for her. This is the law. The fact is, that though " this was not a regular *thatched* factory ship, yet she was " used as a thatched factory ship is used. This being clear, " it follows that the risk is different in point of length from " that which is generally understood in the trade, and, con- " sequently, from that which was insured."

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *J. A. Park*, *David Douglas*, *Geo. Jos. Bell.*

For the Respondents, *M. Nolan*, *Alex. Maconochie.*

HIS GRACE THE DUKE OF HAMILTON AND BRANDON, and other Heritors of Avondale, ... } *Appellants;*

REV. JOHN SCOTT, Minister of the said Parish of Avondale, . . . } *Respondent.*

House of Lords, 14th July 1813.

FREE MANSE—REPAIRS.—A manse had got into disrepair, and certain proceedings had been instituted before the presbytery with the view of having it repaired, which was ordered and done accordingly. Thereafter the heritors applied to have the manse declared a free manse. The presbytery declared the " manse and its offices are sufficient" as to the repair *then* ordered. The question was, Whether the manse, under this finding, was declared a free manse, so as to throw the burden of subesquent repairs on the minister during his incumbency? Held that the manse had not been declared a free manse, and that the heritors were liable in further repairs.

Opinion given, that even supposing the manse had been declared free, that this would not bar repairs arising from the waste of time.

The respondent's manse having been found in such disrepair as to compel him to leave it, he applied to the presbytery to order, in due form, his manse to be repaired, who appointed persons to inspect it, and report on its condition, Feb. 1787.