had not in August 1914, and never obtained before April 1915, magnesium chloride to an amount sufficient to supply the nineteen customers with the amounts which but for the suspension clause were deliverable under their contracts, or with more than a very small percentage of those amounts. If spot sales made after August 1914 are taken into consideration—and I see no reason why they should not—their ability in the above matter becomes less. This position was due to the war. In my opinion the contingency had happened that the war had caused a short supply of magnesium chloride which hindered the delivery of the article. The respondents say that the appellants had enough for delivery to them if they ignored their commitments to everyone else. Suppose they had. It remains that for their commitments the supply was short. The "delivery of the article" in condition 1 does not mean that the supply was insufficient to implement the respondents' contract, ignoring all others, but insufficient to a substantial and not an illusory amount to admit of delivery of "the article"—*i.e.*, magnesium chloride—to whomsoever was entitled to require delivery. Suppose that two of the nineteen purchasers had come simultaneously and asked delivery, that each was contractually entitled to delivery of 200 tons, and that the seller had 200 tons and no more. To the first the seller replies, "I am short." The purchaser rejoins, "No, you are not, There are the 200 tons. I shall take them." He, say the respondents, is entitled to take them, and he does so. To the second the seller replies again, "I am short." According to the respondents' contention the second purchaser could rejoin, "No, you are not, because you could have given me what you have just given to my neighbour. Pay me damages." The question answers itself. A trader is insolvent notwithstanding that he is able to satisfy one creditor if he is not able to satisfy all his creditors. A merchant has a short supply notwithstanding that he is able to satisfy one customer when he is not able to satisfy all.

I may add that I do not go with Neville, J., in thinking that the condition protects the seller from rise of price. There may be a rise of price without a shortage of supply. Rise of price is, I think, irrelevant except that it may be evidence when coupled with other facts that there is a short supply. The matter has to be determined upon the answer to the question whether at the date of suspension and subsequently down to the issue of the writ there was a short supply. In my opinion there was.

I have said nothing about the award which was made on the 30th November 1914, and that for two reasons. The parties have sought and obtained a decision from the Court notwithstanding that award, and before your Lordships they have desired that the correctness of that decision should be reviewed. This is a first reason for deciding the matter in this House as if there had been no award. The second reason is that there are not materials for determining what was the subject-matter of the arbitration. There is no evidence whatever as to the terms of the submission upon which the award was obtained, and further, as I think, there is great difficulty in saying what the award means. It may be, and I incline to think it is the fact, that the second paragraph of the award means no more than that 240 tons is the correct figure of tons still to be delivered, and that their delivery is subject to liability to be suspended in accordance with condition 1.

In my opinion the appeal succeeds, the judgment of Low, J., must be restored, and the respondents must pay the costs in the Court of Appeal and before this House.

Their Lordships allowed the appeal.

Counsel for the Appellants—Sir J. Simon, K.C.—Greer, K.C.—A. H. Maxwell. Agents—Rawle, Johnstone, & Company, London—Hill, Dickinson, & Company, Liverpool.

Counsel for the Respondents — Rigby Swift, K.C.—A. R. Kennedy. Agents—Pritchard, Englefield, & Company, London—Simpson, North, Harley, & Company, Liverpool.

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## HOUSE OF LORDS.

*Thursday, November* 1, 1917.

(Before Lords Atkinson, Parker, Parmoor, and Wrenbury.)

### MOORE & GALLOP *v.* EVANS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

*Insurance — War — "Loss of, Damage, or Misfortune to the Property"—Jewellery Consigned to Belgium and Germany on Sale or Return.*

The appellants, an English firm, insured their stock of jewellery with the respondent under a policy covering "loss of, damage, or misfortune to the property." Previous to 22nd July 1914 the appellants consigned part of their stock to customers in Brussels and Frankfort on sale or return. By reason of the outbreak of war with Germany and the occupation of Brussels by the Germans the return of the goods became temporarily impossible. There was evidence that the goods remained in the possession of the consignees or their bankers. *Held* that the doctrine of constructive loss applicable to marine policies does not apply to other policies of insurance.

At delivering judgment—

LORD ATKINSON—This is an appeal from an order of the Court of Appeal, dated the 15th December 1916, whereby the judgment of Rowlatt, J., in favour of the appellants, dated the 17th December 1915, was set aside and judgment was entered for the defendant with the costs of the action and of the appeal.

The action out of which the appeal arises,

tried before Rowlatt, J., was brought by the appellants, on a Lloyd's policy dated the 14th January 1914, against the respondent, one of the underwriters, as well on his own behalf as on that of all the other underwriters, to recover, in the language of the writ, "the loss, damage, or misfortune sustained by them" and covered by the policy. There is substantially no dispute about the facts. The appellants are dealers in jewellery and precious stones, carrying on their business at No. 11 Hatton Garden, in the city of London. On different dates between the 16th June 1914 and the 22nd July 1914 they, in the ordinary course of their business, sent jewellery belonging to them to four customers in Germany and Brussels on sale or return.

These customers were Messrs Sturbelle & Company, Brussels, Messrs Haardt & Devos, Brussels, Mr L. Hentroch, Frankfort, and through the agency of Messrs Neresheimer & Company, Holborn Viaduct, in the city of London, Mr Robert Koch, of Frankfort. The documents sent by the appellants to their several customers relating to the dispatch of this jewellery contained on the face of them in each case a note to the following effect—"On sale for cash only or return. Goods had on sale or return remain the property of Moore & Gallop until invoiced by them. These goods must not leave your hands without our permission." In the absence of any special arrangements goods thus sent on approval remain, according to the ordinary course of business in the trade, with the consignee for two or three weeks to give him the chance of selling them. The jewels, which were in the aggregate valued at £8747, arrived at their respective destinations, the receipt of them being acknowledged by the respective consignees. They were not invoiced by the appellants to any of these consignees or to any other person. The condition as to the necessity of an invoice was not waived in any case. The jewellery therefore remained the property of the appellants. Save in the two cases hereinafter mentioned permission was never given by the appellants that the goods received should "leave the hands of any of the consignees." Nor was any special arrangement made with them that they should not be retained by the consignees in their hands longer than is customary in the trade.

On the 31st July 1914 the appellants wrote to Mr L. Hentroch, Frankfort, asking him to inform them if in view of the then political situation he had made any provision for the safe custody of the necklace (the jewel sent to him) in case of need, and requesting him, if he thought it perfectly safe to send by registered post, to return the necklace if he had already finished with it. No reply to this letter had, up to the hearing in the Court of Appeal, been received. On the 4th August 1914, the day upon which war was declared between England and Germany, the appellants sent to Messrs Sturbelle & Company a telegram in the words following—"Telegraph what done with our goods." In reply to which these gentlemen sent to the appellants on the 5th August a telegram in the following words—"Impossible send goods. Postal communication no longer assured since several days. Have placed in safety in bank. If you accept responsibility for returning will send you." On the same day appellants sent in reply to this latter telegram a telegram in the words following—"Leave goods in safety in bank."

It is not disputed that the German forces soon after this date took, and still retain, possession of Brussels, and have since they took it assumed the government and control of it, or that owing to the existence of the state of war between Germany and England neither the consignees of the goods nor the bank with which the necklace has been deposited could, while the war lasts, without the consent of the Crowns of both countries, lawfully return to the appellants the jewellery they have respectively received. There is no evidence that such consent has been obtained or applied for. The evidence given does not suggest that any of the consignees other than Messrs Sturbelle & Company or the bank have lost or alienated or placed in the hands of others any portion of the jewellery they have respectively received, nor that the said jewellery or any portion of it has been destroyed or in any way injured, nor that the German Government have confiscated or taken possession of or assumed any control over any portion of it. Neither does it suggest that the bank and the consignees above mentioned have not from the first retained, and still retain, possession of the goods in their hands, somewhat in the character of bailees for the appellants, and would not be ready and willing to return them to the appellants were it in their power lawfully to do so. It is not disputed that if peace came the appellants would be able by law to secure a return of their goods, or to recover damages for being deprived of them. By the policy of insurance the underwriters bind themselves to make good to the appellants "all such losses, damage, or misfortune, not exceeding £45,000 in all, as they might from time to time sustain from any of the causes or defects" thereinafter mentioned during the period from the 8th January 1914 to the 7th January 1915, within thirty days after the loss, damage, or misfortune is proved. The jewellery is then insured while it is (save as in the policy provided) in or upon any premises or place whatsoever, or being carried or in transit by land or water in the United Kingdom or any country in Europe, and also whilst it is being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe, provided always that the policy should not apply to the property while in Spain or Russia.

The perils to the property insured against are "the loss of or damage or misfortune to the said goods or any part thereof arising from any cause whatsoever," whether arising on land or water, save and except loss by theft or dishonesty committed under circumstances named by certain agents of the assured, and also except

loss by theft or dishonesty committed by any broker or customer in respect of goods entrusted to them by the assured or their servants or agents unless such loss arises when goods are deposited for safe custody by the assured, their servants or agents, with such broker or customer. Theft or dishonesty on the part of any of the appellants' customers cannot, of course, be presumed, but if it did take place the appellants would not in the cases specified have any right to recover. In the enumeration of the perils insured against the words "damage to the property" must mean, I think, "physical injury" to the property, but it is difficult to attach any rational meaning to the words "misfortune to the property" other than "loss or physical injury." The detention of the appellants' goods abroad may be a misfortune to the appellants themselves; but it is difficult to see how it can be a misfortune to their goods, and, indeed, the main contention of the appellants has been that this detention, considering the commercial purposes for which the appellants had acquired and held these goods, amounted to a total loss of them within the meaning of the policy. They did not rely much upon the words "misfortune," &c. It is not pretended in this case that the policy is a marine policy on goods. It was not argued—it could not be argued rationally—that this being a non-marine policy, the appellant could recover for the loss or defeat of the adventure on which the goods were embarked. But the whole argument addressed to your Lordships on behalf of the appellants resolved itself into a sustained and elaborate endeavour to apply to the non-return of these goods the principles of the law of maritime insurance applicable to ships. The method pursued was this—Some passage from a judgment of a distinguished judge dealing with the loss of a ship or of the goods carried by her and covered by a marine policy was severed from the *subjectam materiam* and applied to the present case. A good illustration of this is afforded by the use made of a passage culled from the judgment of Lord Abinger in the case of *Roux* v. *Salvador*, 3 Bing. N.C. 266, at p. 279. That very learned lawyer was dealing with a case where the goods were by one of the perils of the sea insured against reduced to such a putrescent condition that they could not be carried to their journey's end. He said—"But if goods once damaged by perils of the sea and necessarily landed before the termination of the voyage are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be shipped into the same or any other vessel; if it be certain that before the termination of the voyage the species itself would disappear and the goods assume a new form, losing all their original character; if though unperishable they are in the hands of strangers not under the control of the assured; if by any circumstances over which he has no control they can never or within any assignable period be brought to their original destination—in any of these cases the circumstances thus existing in specie at the termination of that forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods whether his inability arises from their annihilation or from any other insuperable obstacle." And then this last paragraph is applied to the present case, and it is argued that here from the first no person could assign a period to the duration of the war; that during the twelvemonths covered by the policy, within which the loss must occur to give a cause of action on the policy, the goods were in the hands of strangers over whom the assured had no control; that the appellants owing to an insuperable obstacle, the state of war, cannot recover their goods, and therefore they are totally lost. To which is added the argument that the appellants are traders, the jewels were part of their stock-in-trade acquired by them for the purpose of sale or barter, that they have been for all this time disabled from disposing of them, that the goods are therefore lost to them since they cannot dispose of them in their trade, though they might not be so to an owner who merely acquired them for ornament. This, I think, is rather to confound loss of the goods with the loss of the market for them. If the goods were returned to the appellants to-morrow they would have lost the use of them in their trade since January 1914. Then cases such as *Shepherd* v. *Henderson*, 7 A.C. 49, were cited, which was a case of constructive to total loss, notice of abandonment having been duly served. In the present case no notice of abandonment has ever been served, so constructive to total loss is out of the question. It must be actual total loss or nothing.

It does not appear to me that there is any true analogy whatever between this case and the case of the loss of a ship or the goods it carries under a marine policy. I do not think the principles of the law of marine insurance apply, or that the numerous authorities which have been cited other than two with which I shall presently deal, afford any help to the construction of this non-marine policy, or to the ascertainment of the true meaning of the word "loss" used in it, for this reason — Marine insurance grew out of the necessities of maritime trade and commerce. It dealt with the hazardous enterprise of the navigation of the sea by ships carrying cargo for reward. The law dealing with it is a branch of the law maritime as well as of the law merchant. It is founded upon the practices of merchants who were themselves for long the expounders of its principles, which principles general convenience had established in order to regulate the dealings of merchants with each other in all countries. Its utility, according to Marshall on Shipping, vol. i, p. 3 *et seq.*, cannot be better expressed than in the words of the preamble of a very early statute—42 Eliz., cap. 12—which recites "that by means of policies of insurance it cometh to pass that upon loss or perishing of any ship there followeth not the undoeing of any man, but the loss lighteth rather easy upon many than heavy upon few, and rather on them that ventureth not than upon those that do

adventure, whereby all merchants, especially the younger sort, are allured to adventure more willingly and more freely." One can readily understand measures to ensure that those willing to adventure, who had possessed themselves of expensive but money-making chattels like ships for the purpose of their adventures, should, if they ensured, be protected as far as possible from having their capital locked up unprofitably in ships whose fate they were unable actually to ascertain and prove. Hence it was that ships which had sailed and had not been heard of for a length of time were presumed not merely to have been lost but to have foundered at sea, so that the owner would be at once entitled to recover the full amount under his policy.

So also, as soon as these marine policies came to be regarded as indemnities and not wagering policies, the law of constructive total loss based upon notice of abandonment was shaped and moulded by decisions of Lord Mansfield at the beginning of the nineteenth century. The doctrine had its origin in cases of capture. *Goss* v. *Withers*, 2 Burr. 694, and *Hamilton* v. *Mendes*, 2 Burr. 1209, 1 W. Black 276, were both cases of capture and recapture, and were apparently based upon the principle that the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not, but might upon capture proceed at once, and, after notice of abandonment, recover his capital, the value of his ship, from the underwriters, provided he was not aware of her recapture when he commenced his action.

I am quite unable to follow the line of reasoning by which the principles of a body of laws having such an origin and directed to such an end can be applicable to the insurance of a jeweller's stock-in-trade, or that the language used to describe what amounts to the loss of a ship or her cargo under a marine policy is necessarily adequate to describe a loss of this stock-in-trade under a non-marine policy. The only authorities cited which to any extent support the appellant's contention, are, first, *Mitsui* v. *Mumford*, 1915, 2 K.B. 27, and secondly, *Campbell & Phillips, Limited* v. *Denman*, 21 Com. Cas. 357. In the first, which was tried before Bailhache, J., without a jury, a policy was effected by the plaintiffs on timber belonging to them then warehoused in Antwerp waiting for sale, and watched by two foremen in the employment of the plaintiff's agent in Antwerp. The policy was dated the 5th August 1914, and was a three-months' policy from August to November 1914. The risks insured against were "loss of timber at Antwerp directly caused by war, military or usurped power, no claim to attach thereto for delay, deterioration or loss of market, or for confiscation by the government of the country in which the property is situated." The plaintiffs gave notice of abandonment on the 14th October 1914, and in their points of claim alleged they had suffered a total or constructive loss of the timber.

The German Government had not seized, confiscated, or interfered with the timber in any way. It remained stored in Mr Murberge's warehouse, watched by his men as it had been from the first, and was safe at the end of November 1914. The learned Judge, after stating that he could not judicially assume that the German Government would commit a breach of international law and confiscate the timber or take it for the necessities of war without paying for it, said—"Even if I make these assumptions which the plaintiffs desire, the timber is at present in the hands of the plaintiffs' agent, no loss by confiscation has happened, there has been no seizure by the Germans, and as the policy has expired without seizure the plaintiffs cannot lay any foundation to support this clause, and it fails. In my judgment there has not been a loss of timber, either actual or commercial." The *ratio decidendi* was the continued possession of the timber by the agent of the plaintiffs coupled with the absence of seizure by the Germans; but undoubtedly the learned Judge in the earlier portion of his judgment does lay down dicta which tend to support the arguments of the appellant's counsel. Yet though having regard to the ground of the decision they are merely *obiter dicta*, they are entitled to great weight coming from a learned Judge so familiar with maritime and commercial law.

After pointing out that on the authority of Brett, L.J., in *Kaltenbeck* v. *Mackenzie*, 3 C.P.D. 467, 471, the expression "constructive total loss" is never used except in reference to marine insurance, and that a notice of abandonment is confined to and is an integral part of a constructive total loss. He then proceeds—"It does not in my mind follow from this that actual deprivation of the timber is essential to this case. This is a business policy, and if the facts showed a loss of the timber in a commercial sense I should hold the plaintiffs entitled to succeed. If, for instance, the plaintiffs were unable owing to a peril insured against to deal with this timber, and were liable to be prevented for so long a time that the cost of warehousing would in all probability exceed the value of the timber before the plaintiffs could dispose of it, I should be prepared to hold that the plaintiffs should be entitled to succeed." It is not necessary in this case to pronounce agreement or disagreement with this expression of opinion, but I confess to me it looks very like an application of the constructive total loss principle. He then proceeds—"Since writing this judgment I have read over again some observations of Blackburn, J., in advising the House of Lords in *Rankin* v. *Potter*, L.R., 6 H.L. 83, at p. 119. I had forgotten them, and arrived at the conclusion indicated by me unaided by authority, but I am strengthened in my view by what Blackburn, J., then said. The result is that although I think it is wrong to use the expression 'constructive total loss' in connection with this policy and unnecessary to allege abandonment, yet it is right in considering whether there has been a loss under this policy to take into account similar considerations to those which one would take into account in determining a question

of constructive total loss under a marine policy." If that means that principles of the law as to constructive total loss are to be applied in effect though not in name, but under an alias as it were to a loss under a non-marine policy, I respectfully dissent from the learned Judge's opinion. Blackburn, J., did not, I think, lay down anything in the passage of his judgment referred to which supports such a conclusion. He was dealing with the equitable doctrine, not peculiar to marine insurance, that he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him cede all his rights in respect of that for which he obtains indemnity to that person, such, for instance, as the transfer of the salvage under a fire insurance. At p. 119 he deals with the point that where the party indemnified having a right to an indemnity has elected to enforce his claim he is bound by his election.

In the second case tried before Bray, J., without a jury, the goods insured were stored in a warehouse at Antwerp. They were insured for three months from the 27th July 1914 against loss or damage directly caused by war. Antwerp was occupied by the German forces on the 9th October 1914, during the currency of the policy, on the 18th October a proclamation was published by the German Government to the effect that till the requirements of the army were ascertained the sale or purchase of goods of the class insured was prohibited. On the 21st October 1914 there was a further proclamation published prohibiting the shifting, working, or handling these goods in any way without permission. On the 25th October the owner of the warehouse sent in a list of the goods to the German Government. In December 1914 the German Government requisitioned the goods. Notice of abandonment had been given on the 15th October 1914. The learned Judge held, following *Mitsui* v. *Mumford*, that as the plaintiff's agent, the owner of the warehouse, had not been deprived of possession of the goods, though it was uncertain whether the owner would recover the goods, yet he could not say it was unlikely that he would recover them, and decided against him. The strange thing is that the learned Judge seems to have treated the Marine Insurance Act of 1906 as applicable to the case, and used the definitions given in it of the actual and constructive total loss to help him to decide whether there was a loss under the policy or not, although that statute is expressly confined to marine insurance. In my opinion that statute had no application whatever to the policy in that case. The actual decisions, however, in both these cases make against the appellants' case rather than support it. The bank is in a position closely resembling that of the warehouse-keepers if as I think the evidence suggests, that Messrs Sturbelle & Company placed the goods with the bank to be safely kept for the appellants, and so informed the bank. The bank then became the gratuitous bailees of the appellants. The consignees, other than Sturbelle & Company, are also on the evidence in the position of bailees for the appellants. The time during which they might have exercised their option to purchase expired during the twelve months covered by the policy. They hold the appellants' goods under an obligation to return them. The laws of the two countries forbid the discharge of this obligation save with the consent of both Sovereigns, but that disability to discharge this obligation does not relieve them of the other obligation to keep the goods safely for the plaintiffs till the termination of the war, or till by the consent of both Sovereigns they are permitted to return them earlier. On the evidence as it stands I think the appellants have failed on every point. The decision of the Court of Appeal was in my opinion absolutely right, and the appeal should be dismissed with costs.

LORD PARKER—I agree. It appears to me impossible to say that the goods in question were during the currency of the policy "lost" within the ordinary meaning of that word, and there is no evidence whatever of any damage or misfortune having occurred to the goods themselves. So far as the evidence goes the goods remain safe and undamaged in the custody of persons who are in the position of bailees for the appellants, but who cannot at present return them because of the war. It is only by introducing, in the construction of a non-marine policy, considerations which by the custom of merchants are no doubt material in construing a marine policy, that the case for the appellants becomes in any way arguable. For the reasons given by my noble and learned friend Lord Atkinson and by Bankes, L.J., in the Court of Appeal I do not think that such introduction is admissible. In my opinion therefore the appeal fails.

LORD PARMOOR and LORD WRENBURY concurred.

Their Lordships dismissed the appeal.

Counsel for the Appellants — L. Scott, K.C.—D. Hogg, K.C.—Gallop. Agents—W. Hurd & Son, Solicitors.

Counsel for the Respondent—Sir J. Simon, K.C.—A. Roche, K.C.—P. Hastings. Agents —Windybank, Samuell, & Lawrence, Solicitors.

## HOUSE OF LORDS.

*Monday, November* 26, 1917.

(Before the Lord Chancellor (Lord Finlay), Lords Dunedin, Atkinson, and Parmoor.)

### METROPOLITAN WATER BOARD *v.* DICK, KERR, & COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

*Contract—War—Rescission—Impossibility of Fulfilment.*

In July 1914 the appellants contracted with the respondents, a firm of contractors, for the construction of a reservoir