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No. 25 of 1939.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

30576

BETWEEN
CANADA RICE MILLS LIMITED (Plaintiff) - *Appellant*
AND
THE UNION MARINE AND GENERAL
INSURANCE COMPANY LIMITED (Defendant) *Respondent.*

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Case for the Respondent.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal for British Columbia setting aside a Judgment for the (plaintiff) Appellant in the Supreme Court, in an action tried by a special jury. p. 409.
2. The action was under an Open Marine Insurance Policy for loss by damage to part of a cargo of rice in transit from Burma to British Columbia on the S.S. "Segundo." Ex. 1, p. 413.
Ex. 5, p. 416.
3. The risk insured against, as material to this action, was "perils of the seas."
4. The statement of claim, paragraphs 9 and 10, record pp. 2 and 3 p. 2, l. 36.
20 alleged:—
 - "9. During the said voyage the said steamship encountered heavy seas, rains and weather amounting to a whole gale and by reason of such heavy seas, rains and weather it was necessary to batten down all hatches and ventilators."
 - "10. As a result thereof the said shipment was damaged by sweat and heat and alternatively by moisture and the plaintiff has suffered loss thereby exceeding three per cent. on each package."

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Ex. 6, p. 422.
Ex. 7, p. 423.

5. By consent the ship's log was put in at the trial and is the sole record of the weather and sea conditions during the voyage.

6. The learned trial judge submitted questions to the jury. The questions and answers, so far as material, are as follows:—

p. 371, l. 22.

“3. Was the said rice in good and sound condition when shipped? Answer: Yes.”

p. 371, l. 29.

“6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage? Answer: Yes.”

p. 371, l. 32.

“7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage? Answer: Yes.” 10

p. 371, l. 35.

“8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea? Answer: Yes.”

p. 371, l. 38.

“9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and sea? Answer: Heavy winds from 8th to 11th May, with high seas; from 11th to 17th, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to 20th; variable seas and weather 20 after that date.”

p. 386.

7. The learned trial judge gave judgment for the plaintiff on the jury's findings.

Reasons for
Judgment:
Martin, C.J., B.C.,
p. 391.
McQuarrie, J.A.,
p. 392.
Sloan, J.A., p. 399.

8. The defendant appealed to the Court of Appeal, who allowed the appeal, Mr. Justice McQuarrie dissenting. The appeal was allowed for the reasons:

First: That the plaintiff did not have a finding of the jury that the proximate cause as found was a peril of the sea, or that the peril of the sea as found was the proximate cause.

Second: (A) That the proximate cause as found was not a 30
peril of the sea,

or

(B) That the *peril of the sea* as found was not the proximate cause.

Third: That the peril of the sea as found was not in law a peril of the sea.

(This was not definitely decided by the Court.)

9. It is submitted that the Court of Appeal was right for the reasons given and for other reasons as hereinafter set forth.

10. *First*: There is no question and answer determining either, that the proximate cause as found (the closing of the ventilators and hatches) was a peril of the sea; or, that the peril of the sea as found (the condition of wind and weather) was the proximate cause.

(1) Answer to question No. 7 is in effect a finding that the wind and weather was not the proximate cause.

(2) By the contract and the Insurance Act the proximate cause must be a *peril of the sea*.

See Marine Insurance Act. Ch. 134 R.S.B.C. 1936.

10 "Section 57. (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

(3) That the proximate cause is a peril of the sea or that the peril of the sea is the proximate cause are questions of fact upon which the plaintiff must obtain findings by proper questions and answers.

McGovern *v.* Nimmo & Co. (1938) 107 L.J. P.C. 82, 83.

20 (4) At the trial draft sets of questions were submitted by both counsel and by the learned trial judge; By plaintiff Exhibit 35, Record p. 343; By Defendant Exhibit 36, page 344; by the Trial Judge, Exhibit 37, page 345. Comparing Exhibit 35 and Exhibit 36 it will be seen that the Defendant's Counsel submitted the correct question as to proximate cause—Exhibit 36, p. 345, paragraph 11 (D): "What was the proximate cause of the damage?" The question submitted by plaintiff's Counsel, Exhibit 35, p. 344, is paragraph 12—which limits proximate cause to closing of hatches and ventilators. This was the form adopted by the learned judge. In this connection Question 10 in Exhibit 35, p. 344, should be compared with Question 11 in Exhibit 37, p. 345. Neither was adequate but of the two, Question 11 in Exhibit 37 was the better. Plaintiff's Counsel objected to the learned Judge's proposal of 11 in Exhibit 37. See Record, page 351, line 13, and in the result both questions were omitted without objection by plaintiff's Counsel. Questions 8 and 9 as submitted by the learned Judge were acquiesced in by plaintiff's Counsel and no request was ever made by him to have a question put to the jury that the closing of the ventilators and hatches was a peril of the sea; or that wind and weather conditions were the proximate cause.

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(5) It is submitted therefore that the Court cannot now supply a missing answer to a question never submitted nor in the circumstances can there be a new trial.

See *McGovern v. Nimmo*, supra.

See also Sloan, J.A., Record P. 405, line 40.

p. 405, l. 40.

11. *Second* :

(A) The proximate cause as found (the closing of the hatches and ventilators) was not in fact or law a peril of the sea.

See Reasons for Judgment Sloan J.A. Record pp. 402-405.

p. 402 to p. 405.

(B) The peril of the seas as found (the conditions of wind and weather) were not in fact or law the *proximate cause* of the damage. 10

See Sloan J.A. pp. 400 to 402 Line 20 and cases there cited.

Between the wind and weather and the damage was the intervening act of the crew in voluntarily closing the hatches and ventilators. This was not done to save the ship, but to protect the cargo.

12. *Third* : The wind and weather conditions as found by the jury in questions 8 and 9 to be a peril of the sea did not in fact or law constitute a peril of the sea.

(1) See Sloan J.A. Page 402.

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(2) "Peril of the Seas" is defined by Scrutton on Charter Parties and Bills of Lading, 13th Edition, page 261.

"Any damage to the goods carried caused by sea, water, storms, collisions, stranding or other perils peculiar to the sea or to a ship at sea which could not be foreseen and guarded against by the ship-owner or his servants as necessary or probable incidents of the adventure."

(3) The Marine Insurance Act 1936 R.S.B.C. Ch. 134, Schedule Rule 7.

"The term perils of the sea refers only to ^{fortuitous accidents} ~~fortuitous accidents~~ or casualties of the seas and does not include the ordinary action of wind and waves." 30

(4) The evidence is that the weather was usual and normal for the time of year.

p. 264, ll. 14-31.
p. 336, l. 24.
p. 337, l. 2.
p. 113, ll. 12-14.

The conditions of weather and sea as found by the jury were taken from the ship's log. The jury's answer to question 9 is that the weather and sea referred to was "wind and high seas." The log shows that the ventilators were closed on account of the rain. Ex. No. 7, p. 423.
p. 442, l. 27.

13. The findings of the jury in answer to question 3 were based on evidence of the condition of the rice on shipment. It is submitted that this evidence in part is based on hearsay as to the identity of the rice and in part on the evidence of native witnesses taken on Commission, which is contrary to the established facts, and that there is no valid evidence to support the answer. p. 371, l. 22.

14. It is further submitted that there was no proper evidence to support the answer to question 10, and that the loss was not ascertained on a sound principle. p. 372, l. 4.

15. Attention is directed to the Judgment of Mr. Justice McQuarrie, Record Page 395, Lines 36 to 41. It is respectfully submitted that a perusal of the Record, pages 343 to 357, will show that His Lordship is mistaken. In any event the point is not whether the defendant took any objection. The question is—Did the plaintiff fail to have those issues decided which were necessary in order for him to hold a judgment?

20 Attention is also directed to his Lordship's judgment at Page 397, Lines 9 to 11. It is further respectfully submitted that a perusal of the Record, Page 352, Line 35; Page 353, Line 2; Page 354, Line 14; Page 357, Line 27; Page 373, Line 40; Page 381, Line 34; and Page 383, Line 30 to Page 385, Line 32, will show that His Lordship was mistaken and that serious objection was taken to the amount of damages allowed. The question was in fact argued before the Court of Appeal at length.

16. It is submitted that this appeal should be dismissed for the following

REASONS.

- 30 *One* : BECAUSE of the reasons given by the Chief Justice and Mr. Justice Sloan.
- Two* : BECAUSE there is no finding of fact by the jury that the proximate cause was a peril of the sea or that the peril of the sea as found was the proximate cause.
- Three* : BECAUSE the closing of the hatches and ventilators found to be the proximate cause was not a peril of the sea.

- Four* : BECAUSE the conditions of wind and weather found by the jury and as recorded in the log were not the proximate cause of the loss.
- Five* : BECAUSE the said conditions of wind and weather were not a peril of the sea.
- Six* : BECAUSE the plaintiff did not prove by proper evidence that the rice was in good condition when shipped and that the damage to the rice was not caused by the inherent vice of the commodity.
- Seven* : BECAUSE the plaintiff failed to prove that the 10 damage was over three per cent. on each package of the cargo damaged.
- Eight* : BECAUSE the loss was not ascertained on a proper basis and there was no evidence upon which loss could be properly ascertained.

J. W. DE B. FARRIS.

CYRIL MILLER

In the Privy Council.

ON APPEAL

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LIMITED** (Plaintiff) .. *Appellant*

AND

**THE UNION MARINE AND
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Case for the Respondent.

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