LLOYD'S LIST LAW REPORTS

Reprinted (with additions) from
"LLOYD'S LIST and SHIPPING GAZETTE."

EASTER AND TRINITY SITTINGS, 1924.

Edited by
J. A. EDWARDS,
of the Middle Temple, Barrister-at-Law.

Vol. 19.

LONDON:
PRINTED AND PUBLISHED BY LLOYD'S
AT THE ROYAL EXCHANGE, E.C. 3.
1924

CONTENTS.

NOTE :—These reports may be cited as "19 Ll. L. Rep."

CONTENTS—*continued.*

CONTENTS—*continued.*

CONTENTS—*continued.*

CONTENTS—*continued.*

LLOYD'S LIST LAW REPORTS.

REPRINTED (WITH ADDITIONS) FROM

LLOYD'S LIST

AND

SHIPPING GAZETTE.

Edited by J. A. EDWARDS, of the Middle Temple, Barrister-at-Law.

VOL. 19. No. 1] THURSDAY, MAY 22, 1924. [BY SUBSCRIPTION

HOUSE OF LORDS.

Thursday, May 1, 1924.

BOLANDS, LTD. v. LONDON & LANCASHIRE FIRE INSURANCE COMPANY, LTD.

Before Viscount FINLAY, Lord ATKINSON, Lord SUMNER, Lord BLANESBURGH and Lord DARLING.

Insurance—Burglary and theft—Loss in consequence of riots excepted — Incidents essential to constitute a riot.

Their Lordships to-day allowed the appeal of the London & Lancashire Fire Insurance Company, Ltd., which raised the question whether Bolands, Ltd., Dublin, were entitled to recover notwithstanding the exception of "riot" in a policy of insurance. Four armed men entered the respondents' premises, held up with revolvers the employees there present, and took possession of cash amounting to £1250.

A condition of the policy was that the insurance did not cover loss directly or indirectly caused by or happening through or in consequence of invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, &c. The arbitrators found that on the evidence it had been sufficiently proved that the loss did not in any way arise under or through civil commotion, but, being of opinion that the facts in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, found that the claimants were not entitled to recover. The King's Bench Division of the High Court of Justice in Southern Ireland held that the arbitrators were not justified in so finding. This decision was affirmed (13 Ll.L. Rep. 413) by the High Court of Appeal for Ireland.

Mr. S. L. Brown, K.C., and Mr. Herbert Samuels (instructed by Messrs. Hoey & Denning, Dublin, and Mr. W. C. Crocker, London) appeared for the appellants; respondents were represented by Mr. Gerald FitzGibbon, K.C., and Mr. T. G. Marnam (instructed by Messrs. D. & T. Fitzgerald, Dublin, Messrs. Dyson, Bell & Co., agents).

JUDGMENT.

Viscount FINLAY, in moving that the appeal should be allowed, said: My Lords, this is a case stated by arbitrators for the opinion of the Court; and it now comes before your Lordships by way of appeal. The action is one brought upon a policy of insurance. It is expressed to be a policy against loss by burglary, housebreaking and theft of certain cash mentioned in the policy, being £5,000 in cash in the cashier's office of the assured's bakery known as the City of Dublin Bakery. And then follows the proviso:—

> Provided that this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of (a) Invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power or martial law or the burning of property by the order of any public authority; (b) Incendiarism, directly or indirectly connected with any of the circumstances or causes above mentioned in (a).

Now, my Lords, the circumstances under which this loss occurred are compendiously stated in the case. The arbitrators set out the terms of the policy in the case; and then in par. 3 they state at some length the circumstances in which the loss occurred. They say that the watchman of the premises heard a knock at the side door. He opened it; and four men entered, none of whom was disguised, pushed in the watchman and ordered him to go down the yard. Then they searched him and one of them directed him to put up his hands and kept him in that position until the robbers left. The others rushed into the office, shouted

"Hands up," covering all who were present with revolvers; and then the names of those present were given. They asked where the telephone was, and cut it. The cashier, seeing a hand presenting a revolver at him from outside his office window, had left the cash office enclosure, but at the door of the outer office was held up by one of the armed men who ordered him to put up his hands and stand further up the room. Then the money was taken away by one of the men and certain other money which was being counted up. One of the armed men came to where the cashier had been directed to stand and asked him to point out the safe, saying: "Have the contents of this (revolver) or give me the keys of the safe." The cashier pointed out the safe, which was open. It had been locked before the last vanman had arrived but had been opened to put away the cash received. Two of the robbers went to the safe and took what money they found there but overlooked the larger banknotes and a quantity of Treasury notes. The robbery occupied about ten minutes; and the employees present were warned not to leave the premises for a quarter of an hour. The men were not disguised and the cashier thinks he can identify two of them.

Now, my Lords, the circumstances as there stated seem to me to constitute what in the legal sense of the term would be a riot. Whether one looks at the acts that were done or threatened, or at the number of persons present, or the whole surroundings, one is forced to the same conclusion that it would be perfectly impossible to say that all the essentials for the constitution of the offence of riot at law did not exist. There was a riot beyond all question.

Now it is said that the exception in the policy of loss by riot does not apply to this case because the riot was in truth the theft itself under another name. The theft was conducted by a number of persons after considerable violence and threats of greater violence; and it is contended that where riot is the very offence of theft itself owing to the manner in which it was carried out the exception does not apply. For the purpose of answering the question that arises on that, one must look at the words of the proviso: "Provided that this insurance does not cover loss directly or indirectly caused by happening through or in consequence of (a) invasions, hostilities, acts of foreign enemy. . . ." These are mentioned for the purpose of excluding all idea of anything done in the way of taking money by a foreign enemy or in the course of anything that might be described as an invasion, and in the case of hostilities generally for the purpose of excluding the idea that that would be a theft within the meaning of the policy. While that is perfectly true, it is also true that these words are introduced for the purpose of excluding thefts which might take place in the confusion incidental to any of the things that are there enumerated under the three heads to which I have just referred—invasion, hostilities, acts of foreign enemies—if they were directly or indirectly caused by or happened through or in consequence of any of these things.

Then we come to the head of riots. I pass that by for the moment but will return to it when I have run through the other heads.

"Strikes." Strikes are mentioned I presume because, unfortunately, strikes are sometimes attended with a good deal of disorder; and it may happen that thefts of money take place in the course of some disorder that originated out of a strike.

"Civil commotions." That we are not at liberty to deal with on this case, in my opinion, because the case is stated in a very special manner. The appellants deny liability on the ground of riot and civil commotion. As to the latter ground,

> We find (that is, the arbitrators) that on the evidence the claimants proved sufficiently that the loss did not in any way arise under or through civil commotion but being of opinion that the facts . . . hereof in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word . . .

they so find and award; and leave as a question for the Court whether upon the facts therein stated they were justified in so finding. That I take to mean this. The question for the Court is whether in point of law the arbitrators could come to the conclusion they did as to the effect of the clause so far as riot is concerned. I do not read the reference to the Court as extending at all to the question of civil commotion. That the arbitrators dealt with. They saw their way to decide that right off and they did not state any case with regard to the effect of the words "civil commotion"; and it is quite impossible for us in the absence of any reference to the Court as to whether in point of law the finding of the arbitrators can be supported, and in the absence of any power of the Court or of your Lordships' House to draw inferences of fact, to say whether in our opinion the arbitrators were right or wrong in the conclusion of fact to which they came. The question of civil commotion is entirely beyond the province assigned to your Lordships; and this appeal is one upon which we have to deal only with the question stated; and that is the question with regard to the word "riots." I have gone into that as my reason for not saying anything further about civil commotion as one of the heads in the proviso of the policy.

Then it goes on: "rebellion, incendiarism, military or usurped power or martial law or the burning of property by the order of any public authority." Then, "(b) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (a)." I need not go again through the considerations to which I have adverted in dealing with any of the earlier heads in this department. They equally apply to the heads to which I have just referred in the latter part of the paragraph.

Now, in those circumstances, the question put to the Court and with which your Lordships have on appeal to deal is whether on the facts herein stated the arbitrators were justified in finding that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy and the claimants are not entitled to recover any sums of money from the respondents in respect of the said loss. I certainly am not prepared to find that the arbitrators were not justified in coming to that conclusion. On the contrary, I think they were right. We have been told that the word "riot" should not be read in its legal sense. In the course of the arguments I myself asked several times that if we were not to take the legal sense of the word then what was the sense in which the word was to be read. I confess I have heard no satisfactory answer to that question put either by me or by the other members of your Lordships' House who have taken part in this consideration; and, so far from thinking or saying that the arbitrators were wrong, I am bound to say they were perfectly right. I do not see how it can be read satisfactorily in any other way.

Now, reference has been made to the very pointed passage delivered by Ronan, L.J., in the case of Boggan v. Motor Union Insurance Co., Ltd., [1922] 2 Ir. Rep. 184. at p. 189. The Lord Justice says this:—

> In dealing with this case we must consider whether the robbery occurred during a riot or whether we must take Clause 2 and Exception (c) together, and read Clause 2 as "loss or damage by burglary, housebreaking or theft, except where such burglary, housebreaking or theft constitutes a riot in law." That seems to me to be inconsistent with the policy as a whole. The meaning of the policy seems to be if while a riot is in progress or if there has been a riot and in consequence of it a theft takes place the company is free; but the mere fact that the crime of theft itself contains elements of riot at law does not exclude the right of the insured under the policy. In that case, every robbery for which on indictment the accused would technically be convicted also for riot would be outside the policy.

I confess I am quite unable to accept the view which the Lord Justice seems to indicate in this passage as being that to which he inclined. This policy was drawn at a time when it seems to have been apprehended that there might be disturbances of various kinds in the country in which the cash, the subject of the insurance, was situated; and it provides against the contingency of theft which was insured against occurring during or in consequence of various things, one of them being riots. As I have said, that there was a riot here in the circumstances in which this money was taken, I think it is perfectly impossible to doubt. Force was used; and it is clear that those who were conducting the operations felt that they had force behind them and that they could control the situation. That amounted to a riot. Why are we to say that the proviso does not apply? It seems to me that it does. Why should it apply only if the riot is a collateral event during which the theft takes place and not apply to a riot one object of which at all events was the actual committing of the theft. I cannot so cut down the nature of the policy. I read it as applying to the circumstances of the present case.

It seems to me that the only conclusion that we can satisfactorily arrive at is that the arbitrators were right in the view which they took as to the construction of the policy and the facts relating to this robbery.

Lord ATKINSON: I concur. I have only a word to add. I think during a part of the argument one would have supposed that the words "riot" and "burglary" were mutually inconsistent terms. There is no doubt that riot may be committed in connection with burglary, or burglary in the course of riot, or riot may be indulged in for the very purpose of committing a burglary. It would appear to me clear that the loss of this money on this particular night was either caused directly or indirectly or happened through or in consequence of what was done by these people on June 1. It would appear to me that if the word "riot" was to be taken in its ordinary sense, what they did in bringing about that loss amounted to a riot. The arbitrators have construed the policy; and they have held that the word "riot" where it occurs in it means riot in the ordinary sense; and they have found that the evidence given before them entirely supports and sustains that conclusion. Indeed, Mr. Fitzgibbon himself admitted that the people who were engaged in this attack on the house could have been indicted and convicted on that evidence of a riot, taking the word in its ordinary sense. Therefore, if this appeal is not to succeed you must conclude that the word "riot" is used in the proviso in a sense different from its ordinary sense, because it is admitted by Counsel for the respondent that if it is to be interpreted in its ordinary sense the finding of the arbitrators cannot be disturbed. During the progress of the argument, I think all the different members of the House on different occasions have endeavoured to find out what is the sense in which it is to be read, if it is not the ordinary sense. What is this kind of diluted sense in which the word is to be read if not the ordinary sense? We have not been shown either directly or indirectly from the nature of the document or the context how the word is to be used in other than its ordinary meaning. I think it must receive the ordinary meaning. It has received the ordinary meaning at the hands of the arbitrators. I think their position was upheld by the evidence given before them and they came to the right conclusion; and I think this appeal must accordingly succeed.

Lord SUMNER: I agree. What was said

by your Lordships in the case of Boggan (16 Ll.L.Rep. 64) or by two at least of the noble and learned Lords, and apparently with the concurrence of the others present, would not itself prevent difficulties in the way of anyone who sought to distinguish that case from the present case. I should certainly have hesitated long before setting myself to that task; but without relying exclusively on that decision I think that on a consideration of the words of the contract in question the result must be the same and the appeal ought to succeed. There has been in this case quite clearly a loss of the cash described and insured by theft. Everything therefore turns upon the proviso relied upon by the appellants as excluding the loss in question from those losses which are covered under those terms by the policy. The material words "Provided that this insurance does not cover loss" (that is to say, loss of the cash described by them) "directly or indirectly by a riot." Can it be said that this loss was not either directly or indirectly caused by a riot? I think it cannot. Can it be said that the learned arbitrators, who were in agreement upon this question and who found and awarded that the loss was caused by riot upon the facts found and stated by them, were wrong? I do not question that the contention which has been urged on behalf of the respondents and, as far as I am concerned, urged in such a way as to incline me if that were possible in their favour, is not one which so far as it goes is borne out by the language of the proviso. The proviso no doubt does include those cases where theft is facilitated by an antecedent or simultaneous matter such as enumerated there, but it is not enough to say that it includes such cases. It is necessary to show that it is confined to them; and that I see no warrant for doing. It is true that the uninstructed layman probably does not think of the word "riot" in such a sense as described in the case stated. How he would describe it I know not: but he probably thinks of something, if not more picturesque, at any rate more noisy. But there is no warrant here for saying that when the proviso uses a word which is emphatically a term of art it is to be confined in the interpretation of the policy to circumstances which are within popular notions of the subject and are not within the technical meaning of the word. That clearly must be so with regard to martial law. That clearly must be so with regard to the acts of a foreign enemy; and I see no reason at all why the word "riot" should not include its technical meaning as clearly as burglary or housebreaking do.

Furthermore, the incidents out of which this occurred comply in my view with those very tests which are put forward to us as being essential to constitute a riot within the proviso. In broad daylight a gang of armed men, having obtained entrance into premises by a trick, cow if not terrorise a superior number of persons by running into the place and shouting to them to hold up their hands and threatening them with death if they failed to do what they were called upon to do. I should have thought that if the criminals should have had more hardihood and had had the courage to fire as apparently they had not when a couple of men of considerable nerve resisted them unarmed, not only the noise but the resulting disturbance generally might have extended very far. It appears to me that it was a tumult and certainly a disturbance of the public peace which to a layman as well as to a lawyer might well on consideration of these aspects of it be called a riot. And so it seems to have struck the learned arbitrators. Nor was it decided that had the case been tried by a jury there was a case to go to the jury on the application of the policy even in the sense of the word "riot" contended for by the respondents. It is also quite true that some of those enumerated and excepted matters are such as do not directly cause a theft, though they may do so indirectly. That is true, I take it, of strikes and burning of property by order of a public authority; and it is also true on the other hand that the direct cause of theft may be found among the enumerated matters not merely in the word riots, but also in the case of foreign enemies and also in the case of usurped powers, and I imagine also in the case of the words civil commotion. Therefore when you have a clause which is adapted to cover two classes of cases, one a class which can only operate indirectly and the other a class which can operate both directly and indirectly, the reason fails for suggesting that the proviso is really intended only to refer to circumstances which, as so well put, are circumstances in which the theft insured against was committed but are not relative to the nature or quality of the theft itself. I think, therefore, that on consideration of the construction it must be read against the assured.

It is suggested that there is some ambiguity about them and that in these circumstances one should follow the principle laid down by well-known authorities and construe this proviso which is in favour of the insurance company adverse to them. That broad principle depends upon there being some ambiguity—that is to say, some choice of an expression for those who are responsible for putting forward the clause—which leaves you unable to decide which of the two is the right one. In the present case it is a question only of construction. There may be some difficulty; there may even be some difference of opinion on the construction of this question: but it is a question which is quite capable of being solved by the ordinary rules of grammar; and it appears to me that there is no ground for saying that there is such ambiguity as to warrant us in reading the clause otherwise than in accordance with the expressed terms; and therefore I agree with the motion which is about to be proposed from the Woolsack.

Lord BLANESBURGH: During the course of

the argument I was personally very much impressed with the view of the proviso as found in this policy taken by Ronan, L.J., in the passage of his judgment in Boggan v. Motor Union Insurance Co., *sup.*, which has been read by the noble Lord on the Woolsack. I am constrained, however, to come to the conclusion that the answer to that view of the proviso has just been stated by the noble Lord who preceded me; and accordingly, though not without some hesitation, I concur in the view which has been expressed by the other members of the House.

Lord DARLING: I merely desire to say that I concur with the conclusions which have been reached by the noble Lords who have spoken.

The appeal was allowed.

HOUSE OF LORDS.

Tuesday, May 6, 1924.

HARRIS v. McROBERT.

Before Viscount CAVE, Viscount FINLAY, Lord ATKINSON, Lord SUMNER and Lord WRENBURY.

Insurance—Brokers and agents—Authority of company's agent to alter terms of fire insurance policy—Insurance on goods "in the open . . . but warranted not within fifty feet of . . . building containing fire heat"—Agreement made by agent to alter policy to cover goods in shed built on site where goods previously stored—Agreement repudiated by company—Action by assured against agent.

Their Lordships to-day began the hearing of the appeal of William George Harris, scutch mill owner, carrying on business at Lisky Mills, Killinchy, Co. Down, from a judgment of the Court of Appeal in Northern Ireland affirming a judgment of Lord Justice Moore in favour of John McRobert, 13, Wellington Place, Belfast, a district agent of the Motor Union Insurance Company, Ltd.

On Sept. 26, 1917, the appellant made a proposal to the respondent as agent for the Motor Union Insurance Company, Ltd., to insure flax and tow in and about appellant's mill against loss by fire, and subsequently a policy was issued insuring the flax and tow for £1700 against destruction or damage by fire. The property was described in the policy as,

> flax and tow, the property of the insured or held by him in trust or on commission or for which he was responsible.

and the sum of £1000 was set opposite flax and tow

> in the open there, but warranted not within fifty feet of said mill or other building containing fire heat.

By Condition 2 of the policy, it was provided that

> If after the insurance has been effected the risk be increased from any cause whatsoever, or if any property hereby insured be removed from the building or place in which it is described as being contained without in every case the assent or sanction of the company signified by endorsement hereon the insurance as to the property thereby effected is void.

In October, 1918, the appellant erected a shed with a corrugated iron roof on the site on which was situated the flax and tow described in the policy as "in the open there" for the purpose of storing flax and tow therein. On Dec. 13, 1918, the appellant paid the respondent the premium for renewing the policy until Sept. 29, 1919, and the respondent agreed to alter the policy so as to cover the flax and tow in the shed. On Sept. 1, 1919, a fire took place at the appellant's mill, and a quantity of flax and tow, including five tons of tow stored in the shed, was destroyed. The insurance company repudiated all liability on the ground that the respondent was not their agent for the purpose of entering into the agreement for altering or agreeing to alter any of the terms of the policy, and that he had no authority for so doing.

The appellant issued a writ against the insurance company, but on becoming aware that the respondent had no authority to bind the company by the agreement made, the action was discontinued, and a writ was issued by the appellant against the respondent, McRobert. The action was tried before Lord Justice Moore and a jury, who found for the respondent.

The Court of Appeal in Northern Ireland affirmed this judgment on the ground that there was no evidence of authority in the respondent to agree to the alleged alteration, but that the appellant had sustained no damage and that the warranty as to the 50 feet remained.

The appellant was represented by Mr. Henry Hanna, K.C., Mr. W. Martin Whitaker, and Mr. Walter O. Hume (instructed by Messrs. H. Wallace & Co., Downpatrick, Mr. Herbert Z. Deane, agent).

The respondent was represented by Sir Leslie Scott, K.C., Mr. A. B. Babington, K.C., and Mr. S. L. Porter (instructed by Messrs. C. & H. Jefferson, Belfast, Messrs. Barlow, Lyde & Yates, agents).

Mr. HANNA, in opening the case for the appellant, submitted that respondent warranted that he had authority to enter into an agreement to alter the terms of the policy, whereas he had no authority to do so. The warranty on which the judgment appealed against was founded was not at any time relied upon by the respondent as a ground for avoiding the policy.

Thursday, May 8, 1924.

Sir LESLIE SCOTT contended for the respondent that to establish a breach it was necessary to show that the insurance company were under no obligation to the assured, but this had not been done. The Chancery action was abandoned, but either the appellant should never have commenced it or he should have continued it. If the appellant could recover from the company there had been no breach by the agent. If the agent had no warranty and the assured could not recover on other grounds, e.g., distance, then the appellant had suffered no loss, because even if the agent had full authority there was a breach of the insurance conditions. The appellant had misconceived his remedy from the start. He should have had his arbitration with the insurance company.

Judgment was reserved.

HOUSE OF LORDS.

Thursday, May 8, 1924.

ANGLO-SAXON PETROLEUM COMPANY, LTD. v. STEAUA ROMANA SOCIETE ANONYME POUR L'INDUSTRIE DU PETROLE AND OTHERS.

Before Viscount CAVE, Viscount FINLAY, Lord ATKINSON, Lord SUMNER and Lord WRENBURY.

Procedure—Service of writ outside jurisdiction—Contract—Sale of oil f.o.b.—Claim for repayment of money had and received—R.S.C. Order XI., r. 1 (e).

Their Lordships to-day began the hearing of the appeal of the Anglo-Saxon Petroleum Company, Ltd., London, against the Steaua Romana Société Anonyme pour l'Industrie du Pétrole and other petroleum companies. The appeal arose out of an application made by the appellants to Mr. Justice Roche for leave to serve out of jurisdiction a number of Rumanian companies and a Dutch company in respect of a contract made for the purchase of about 50,000 tons of oil. The issue to be decided is whether there is an arguable cause of action shown as falling within the provisions of Order XI. of the Rules of the Supreme Court, which authorises service of writs outside the jurisdiction of the Courts.

The contract provided for delivery of the oil in equal monthly instalments. There was also provision for the deposit of a sum of £400,000 in a bank in London towards payment. Certain deliveries exhausted £225,000 of the deposit, and the respondents made no further deliveries.

It was alleged by the appellants that both the failure to present documents in London in respect of oil in excess of the quantity prepaid by the deposit and the failure to repay the balance of £175,000, the consideration for which had failed, constituted breaches of contract in respect of which leave to serve out of jurisdiction could be granted.

The respondents contended that there had been no breach of contract within the jurisdiction; that an action for money received did not come within Order XI., Rule 1 (e); and that in any event the respondents never had or received any money at all on behalf of or to the use of the appellants.

Mr. Justice Roche accepted the appellants' contention, and dismissed the respondents' application, with costs. From this decision the respondents appealed (16 Ll.L.Rep. 3) to the Court of Appeal, who limited the writ in the action to a writ claiming money had and received on the ground that the appellants had a claim for damages in respect of the failure to deliver oil which had been paid for in advance, which could only be prosecuted in Rumania, and that it would not be right to allow the issue of a writ, the effect of which would be to split the claim for damages.

The appellants abandoned their claim for damages for non-delivery of the instalments of oil paid for in advance, and made appeal to the House of Lords, where the questions outstanding between the two parties are the right of the appellants to recover the sum of £175,000, and their right to recover damages in respect of the failure to present documents of title relating to the oil not paid for in advance.

The appellants were represented by Sir John Simon, K.C., Mr. W. A. Jowitt, K.C., and Mr. Lionel L. Cohen (instructed by Messrs. Waltons & Co.); Counsel for the respondents were Mr. R. A. Wright, K.C., and Mr. S. L. Porter (instructed by Messrs. E. F. Turner & Sons).

Sir JOHN SIMON, in opening the case for the appellants, said that the deposit of £400,000 would make about two-thirds of the total oil ordered. His case was that the respondents had never supplied quantities of oil up to the amount of £400,000, and that there was a balance of £175,000 representing oil which had been paid for but not delivered. The failure to present documents of title to the oil not paid for in advance constituted a breach of contract within the jurisdiction.

Friday, May 9, 1924.

Mr. WRIGHT, for the respondents, contended that the granting of leave to issue a writ for service out of the jurisdiction was a matter of discretion and not of right, and no ground had been shown for interfering with the discretion exercised by the Court of Appeal. By the contract between the parties the whole of the petroleum products were deliverable in Rumania, and therefore no part of the claim was within Order XI., rule 1, as to the serving of a

writ outside the jurisdiction. The only claim (if any) for damages for non-delivery was in respect of the oil already paid for by the deposit of £100,000. No claim had been made on the writ, or at all, for damages for failure to tender documents in London.

Their Lordships reserved judgment.

COURT OF APPEAL.

Wednesday, Apr. 30, 1924.

BJORNSTAD AND ANOTHER v. OUSE SHIPBUILDING COMPANY, LTD.

Before Lord Justice BANKES, Lord Justice WARRINGTON and Lord Justice SCRUTTON.

Arbitration—Shipbuilding contract containing arbitration clause — Application by Norwegian parties to Court for appointment of arbitrator under Arbitration Act, 1889, Sect. 5 — Appeal against appointment of arbitrator—Construction of statute—Discretion of Court held to be exercisable where applicant is a foreigner residing outside the jurisdiction.

In this case, the Ouse Shipbuilding Company, Ltd., of Hook, near Goole, appealed from an order of Mr. Justice Talbot, affirming an order of Master Jelf, appointing Mr. D. C. Leck, K.C., as arbitrator in a dispute between the appellants and Messrs. Bjornstad & Braekhus (two Norwegians resident out of the jurisdiction) under a contract for the building of four ships. The contract contained an arbitration clause. After the ships were delivered to the Norwegians, Bjornstad, it was alleged, became bankrupt, and Braekhus took employment with another firm. They disposed of the ships, and then claimed arbitration under the terms of the building contract, alleging that the vessels were not of the contract carrying capacity. It was in these circumstances, upon an originating summons taken out by the respondents, that the order for the appointment of the arbitrator was made. For the appellants it was now submitted that under Sect. 5 of the Arbitration Act there was discretion in the Court to refuse to appoint an arbitrator and power in the Court to make it a condition of any such appointment that the foreign parties seeking the appointment should give security for costs.

Mr. Clement E. Davies (instructed by Messrs. A. M. Jackson & Co., of Hull, Messrs. Pritchard & Sons, agents) appeared for the appellants; and Mr. C. T. Le Quesne (instructed by Messrs. Sanderson & Co., of Hull, Messrs. Botterell & Roche, agents) represented the respondents.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: This appeal raises an important point. The parties are Norwegians on the one side and shipbuilders in this country on the other. An agreement was entered into in 1919 for the building of a number of ships by the shipbuilding company for the Norwegians. The agreement contained an arbitration clause. Disputes arose between the parties with reference to whether the ships were or were not of the contract carrying capacity; and the Norwegian parties claimed arbitration under the contract. The shipbuilding company refused to concur in the appointment of an arbitrator; and the Norwegians then made an application under Sect. 5 of the Arbitration Act, 1889, to the Court, by originating summons, asking the Court to appoint an arbitrator, all conditions precedent under the section having been complied with. That section, so far as it is material, provides:—

> In any of the following cases:—(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator: . . . any party may serve the other parties . . . with a written notice to appoint an arbitrator. . . .

That has been done in the present case. The section goes on:—

> If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator. . . .

Now, the language of the section itself, apart from any judicial decision upon it, would appear to indicate that the Court has discretion in reference to the appointment of an arbitrator, because the words used are "the Court may," which are the same words as those used in Sect. 4 of the same statute and which there is ample authority for saying gives the Court a discretion.

But our attention has been called to a decision of this Court in the case of *In re* Eyre and Corporation of Leicester, [1892] 1 Q.B. 136, as to the proper construction to be placed on the language of Sect. 5; and it is said that is a decision to the effect that the word "may" in Sect. 5 must always be read as "must," with the consequence that the Court, when called upon to exercise its powers under Sect. 5, has no discretion at all but must appoint an arbitrator if the conditions precedent have been complied with. Of course, if that is the effect of *In re* Eyre and Corporation of Leicester, we must follow the decision whether we agree with it or not: but in my opinion that decision does not cover the present case, and for this reason. The parties in Eyre's case were both resident in this country; and therefore the question which arises in the present case was not before the Court in Eyre's case. It may be that without that explanation the language used by Lopes, L.J., in particular, would seem to be language wide enough to cover every case; but when one considers the

facts of that case and the language used by Lord Esher, M.R., and Kay, L.J., I think it is plain that the intention of the Court was to confine its decision to the facts of that case, or, at any rate, not to deal with a case which contains the exceptional feature of the present case, namely, that it is a foreigner residing outside the jurisdiction who is seeking to claim the assistance of the Courts. Lord Esher (at p. 142) says this :—

> The parties have agreed with regard to certain matters to substitute arbitration by a single arbitrator for a trial in Court; it is admitted that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; and there has been a proper notice given which has not been complied with. What under these circumstances does the section provide that the Court is to do? It says that the Court "may" appoint an arbitrator. It is argued that under this provision the Court may say in this case, where it is admitted and the Court has decided that there is a dispute within the submission, that it will not force the corporation to go to arbitration, but will leave the contractor to bring an action—that is, that the Court has a discretion to say in such a case that, though one side has contracted to refer the matter to arbitration, they need not act according to their contract, and that the Court will relieve them from it, and the other side must bring their action. I do not think that that is so. I think that in such a case as this, "may" means "must," and that the Court is bound to appoint an arbitrator.

I think that those words, especially the last words, justify the Court in saying that Lord Esher was there confining his decision to the particular facts of that case. I think that Lopes, L.J., expresses himself in language which covers wider ground : but I do not think one ought to read that as language applicable to a case except the one before him. He says at p. 143 :—

> With regard to the language of the section, I think that in a case like the present where there is a dispute clearly within the submission and a failure to concur in the appointment of an arbitrator, and the proper notice has been given, the word "may" is equivalent to "must."

But when you come to the judgment of Kay, L.J., it seems to me very instructive. He says at pp. 143-4 :—

> I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case I do not think the Court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the Court ought to exercise any discretion, if it has any; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case the word "may" must be treated as equivalent to "must." But I do not wish to hold that in every case "may" in this section is equivalent to "must."

I think the Lord Justice is there expressing his own opinion and is explaining what, in his view, is the meaning of the language used by the other members of the Court, when he says that in such a case he did not think the Court had any discretion because he considered its duty was ministerial, but he was not prepared to say that in every circumstance the Court had no discretion.

Speaking for myself, I do not think this decision does bind us where in a case, as here, the person invoking the assistance of the Court is a foreigner resident outside the jurisdiction. With regard to such persons it is clear that Order 65, r. 6, gives the Court power to order security for costs in any cause or matter, but it may be that we should have no right to make such an order in an arbitration directly affecting the costs of that arbitration or to order that security should be given in an arbitration : but I think it is a very different matter if one has power to refuse to appoint an arbitrator at all—it is a very different matter when one comes to consider the terms on which one should exercise that discretion in favour of the applicant if it is to be exercised at all.

Therefore I begin by saying that in this particular case the Court has discretion to refuse to appoint an arbitrator in the circumstances of the case and to refuse because the applicant is a foreigner resident outside the jurisdiction. If the Court has that discretion, it seems to me it can attach any reasonable condition to the granting of the application in the exercise of its discretion.

The order of the Court will be that if the respondents within one month give security to the satisfaction of a master for the costs of the arbitration and of this appeal, then the order of Master Jelf shall stand : but, if security be not given, then the orders of Master Jelf and Talbot, J., shall be discharged. The appellants will have the costs here and before the Judge and Master in any event.

Lord Justice WARRINGTON and Lord Justice SCRUTTON concurred.

COURT OF APPEAL.

Wednesday, Apr. 30, 1924.

ANGLO-POLISH STEAMSHIP LINE, LTD. v. VICKERS, LTD., AND OTHERS.

Before Lord Justice BANKES, Lord Justice WARRINGTON and Lord Justice SCRUTTON.

Procedure—Postponement of trial—Application granted on conditions including payment by applicants of cost of warehousing cargo during postponement—Discretion of Trial Judge.

In this case one of three defendants, Grohnke & Co. (a German corporation), appealed from part of an order of Mr. Justice Greer postponing the trial of the action upon certain terms.

Mr. G. P. Langton (instructed by Messrs. Thomas Cooper & Co.) appeared for the appellants; and Mr. Clement E. Davies (instructed by Messrs. Lawrence Jones & Co.) represented the respondents.

Mr. LANGTON said that Mr. Justice Greer, on the application of the appellants, postponed the trial from Apr. 9 till May 18, but imposed as a condition that they should pay the costs of and occasioned by the postponement in any event, including the costs of warehousing cargo between the original date of trial and the new date of trial. The appeal was against the latter part of this order relating to the costs of warehousing the goods, which consisted of submarine mines and high explosives, and of which the appellants were the consignees.

The goods were shipped in October, 1923, by the defendants, Vickers, Limited, and the Anglo-Dutch Development Company, Ltd., on board the plaintiffs' steamship *Warszawa*, in the Thames for carriage to Danafjord, Gothenburg, or as near thereto as the vessel could safely get. The ship, in fact, went to Rifofjord, the reason alleged being that Danafjord was dangerous. While at Rifofjord the vessel drifted ashore, and certain salvage and, what were said to be general average expenses, were incurred. Ultimately, the cargo was brought back to this country and warehoused in London. The parties had, pending the trial of action, been unable to agree upon terms as to the release of the goods, upon which the plaintiffs claimed to have a lien.

Lord Justice SCRUTTON: Did you offer to substitute money for the goods?

Mr. LANGTON: Yes, we offered to give security for £15,000. Counsel submitted that it ought not to be a term of the postponement of the trial that the appellants should pay the costs of warehousing the goods, thus preserving the plaintiffs' lien upon them. The appellants had since offered to give security up to £18,000.

Mr. DAVIES, for the respondents, submitted that it was purely a question of the Judge's discretion. If the appellants would bring £15,000 into Court, the plaintiffs would give them delivery orders in respect of the goods.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: We cannot interfere with the discretion exercised by Mr. Justice Greer in this case. The appeal will be dismissed with costs.

Lord Justice WARRINGTON and Lord Justice SCRUTTON concurred.

COURT OF APPEAL.

Thursday, May 1, 1924.

MARITIME SALVORS, LTD. v. PELTON STEAMSHIP COMPANY, LTD. (THE "ZELO").

Before Lord Justice BANKES, Lord Justice WARRINGTON and Lord Justice SCRUTTON.

Collision with sunken wreck—Assessment of damages — Objections to Registrar's report—Value of expectation of salving wreck.

In this case the defendants, owners of the Newcastle steamship *Zelo*, appealed from a judgment (18 Ll.L.Rep. 257) of the President of the Admiralty Division (Sir Henry Duke) in substance affirming a second report of the Admiralty Registrar awarding damages to the plaintiffs, the Maritime Salvors, Ltd., upon the ground that their chance of salving the wreck of the Finnish steamship *Merkur* and her cargo in Barry Roads, in September, 1920, had been frustrated by the *Zelo* negligently colliding with the wreck.

Mr. A. D. Bateson, K.C., and Mr. R. H. Balloch (instructed by Messrs. Botterell, Roche & Temperley, of Newcastle, Messrs. Botterell & Roche, agents) appeared for the appellants; and Mr. A. T. Miller, K.C., and Mr. Lewis Noad (instructed by Messrs. Constant & Constant) represented the respondents.

When this case originally came before the Registrar he took the view that even if the *Zelo* had not collided with the wreck the *Merkur* and her cargo would never have been salved, but on appeal the President held that at the time of the collision the undertaking was not a hopeless one in the sense that a reasonable man would then have forthwith abandoned it, and his Lordship gave the plaintiffs leave to present an amended claim to the Registrar. At the second hearing the Registrar made a report in the plaintiffs' favour of £27,500 for the *Merkur* and £9681 for her cargo.

Upon a further appeal to the President he held on the main issue that there was no ground for interfering with this second report of the Registrar, which he accordingly affirmed except as to £4500, being 50 per cent. of the estimated cost of docking the salved wreck, and of the extra ex-

pense which would have been involved by the suggested recovery being postponed by one month. Hence the present appeal of the defendants, on whose behalf it was argued that upon all the evidence, including that given at the second reference to the Registrar, the original conclusion was right that the *Zelo* had not destroyed any chance which the plaintiffs had of salving wreck and cargo.

Friday, May 2, 1924.

With the leave of the Court the notice of appeal was amended so as to extend the appeal to the first judgment (14 Ll.L.Rep. 266) of the President, whereby he had sent the case back to the Registrar, who originally had reported against the plaintiffs' claim.

Mr. BATESON, in further argument on behalf of the appellants, contended that this original report ought to be restored.

Monday, May 5, 1924.

Mr. MILLER, for the respondents, said the submissions for the appellants were based upon a reading of the evidence with which he entirely disagreed, and upon an erroneous view of the whole circumstances of the case. The *Merkur*, when struck by the *Zelo*, was lying on a favourable bottom near to the shore in the Bristol Channel, and she had a small external puncture in her side. She was then in charge of extremely competent salvors, equipped with efficient salving plant. In these circumstances the answer of the wrongdoers to the present claim was, "She could not have been salved, or, at any rate, you, the plaintiffs, could not have salved her." That, submitted Counsel, was absolute rubbish.

On the question of *quantum*, Mr. MILLER argued that at the date when the tort was committed the wreck was worth salving and that the point of falling values of ships did not arise.

Mr. BATESON replied, and their LORDSHIPS reserved judgement.

COURT OF APPEAL.

Wednesday, May 7, 1924.

CHARTERED TRUST AND EXECUTOR COMPANY v. LONDON & SCOTTISH ASSURANCE CORPORATION.

Before Lord Justice BANKES, Lord Justice SCRUTTON and Lord Justice ATKIN.

Insurance (Marine)—Loss by scuttling—Judgment in favour of innocent mortgagees set aside by consent.

An application was made in this case which arose out of the loss of the steamship *General Turner*, and in which an appeal had been entered by the defendants, the underwriters, and cross-notice of appeal as to *quantum* had been given by the plaintiffs, the innocent mortgagees, from a judgment of Mr. Justice Roche (16 Ll.L.Rep. 150).

Mr. S. L PORTER (instructed by Messrs. Parker, Garrett & Co.), for the appellants, said that originally there were two actions, one by the owners of the *General Turner* and the other by the innocent mortgagees. Mr. Justice Roche gave judgment against the shipowners, finding that the vessel had been scuttled, but in favour of the innocent mortgagees. The appeal and cross-appeal were against that judgment, the cross-appeal being on the question of amount. Since that judgment the House of Lords had given their judgment in the case of the *Gregorios* (13 Ll.L.Rep. 211), holding that the loss in such circumstances was not by a marine risk. In view of that ruling the plaintiffs, the innocent mortgagees, had consented to the judgment of Mr. Justice Roche in their favour being set aside, and the present application was made by consent to obtain an order of the Court to that effect.

Lord Justice BANKES: By consent the appeal of the defendants will be allowed, with costs, and the cross-appeal of the plaintiffs dismissed with costs.

ADMIRALTY DIVISION.

(IN PRIZE.)

Wednesday, Apr. 30, 1924.

STEAMSHIP "AJAX" AND OTHER VESSELS (CONSIGNMENTS TO ALOIS SCHWEIGER & CO.).

Before the President (the Right Hon. SIR HENRY DUKE).

Prize—Goods imported by enemy domiciled in England—Part goods imported before outbreak of war—Part at sea at outbreak of war and afterwards delivered to and sold by enemy firm—Part permitted by Controller to pass into commercial use.

Mr. CECIL W. LILLEY, instructed by the Treasury Solicitor, appearing for the Procurator-General, applied for the condemnation of a sum of approximately £20,000, being the proceeds of the sale of goods laden on the *Ajax*, *Berbera*, *Chyebassa*, *Clan Grant*, *Clan Macfadyen*, *Gascon*, *Golcondu*, *Greenland*, *Llandovery Castle*, *Manora*, *Malda*, *Mashobra*, *Mombassa*, *Nevasa*, *Nyanza*, *Poland*, *Stentor* and *Zealand*, and seized under a writ. The ground of the claim was that the goods and their proceeds were enemy property. Schweiger & Co. carried on business from a head office in Vienna and had branches in Mombassa, Turin, Manchester and other places. The names of the ships, parcels of goods and the proceeds were set out in schedules