LLOYD'S LIST LAW REPORTS

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

HILARY SITTINGS, 1925.

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

Vol. 21.

LONDON:
PRINTED AND PUBLISHED BY LLOYD'S
AT THE ROYAL EXCHANGE, E.C. 3.
1925.

CONTENTS.

NOTE:—These reports should be cited as "21 Ll. L. Rep."

CONTENTS—*continued.* PAGE

CONTENTS *continued.* PAGE

此为试读,需要完整PDF请访问: www.ertongbook.com

CONTENTS—*continued.* PAGE

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. 21. No. 1.] THURSDAY, FEBRUARY 5, 1925. [BY SUBSCRIPTION

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Thursday, Jan. 22, 1925.

McPHERSON AND ANOTHER v. FIDELITY PHŒNIX FIRE INSURANCE COMPANY OF NEW YORK.

Before Lord SHAW, Lord BLANESBURGH and Lord CARSON.

Insurance (Canada)—Statutory conditions of policy—Variation—Petition for leave to appeal dismissed.

This was a petition for special leave to appeal from a judgment of the Supreme Court of Canada given against the petitioners, the insurance company, in an action brought against them on a fire claim.

Mr. J. A. Mann, K.C., of the Canadian Bar, and the Hon. Geoffrey Lawrence (instructed by Messrs. Lawrence Jones & Co.) were Counsel for the petitioners; while the respondents were represented by Mr. A. C. Clauson, K.C., and Mr. R. J. T. Gibson (instructed by Messrs. Blake & Redden).

The petition stated that on May 31, 1921, the petitioners issued to the respondents a policy of fire insurance for the sum of 7500 dols. on railway ties. A fire having taken place on June 28, 1921, with a resultant loss of 80,002.85 dols., the respondents took action against petitioners for the sum of 6000.19 dols., being the proportion of the loss which petitioners would be obliged to pay the respondents if liable under the policy. The action having come on for trial before Mr. Justice Ives, at Edmonton, Alberta, judgment was entered in favour of the respondents for the sum of 6000.19 dols., which judgment was based on the ground that the words in the policy "Warranted by the assured that the property insured is not within 1000 ft. of any scrub or bush, nor within 50 ft. of any railway track or siding" did not constitute part of the description or limitation of the peril or risk insured against, but imported a condition imposed upon the assured which, not having been inserted as a variation of the statutory conditions, in red ink, did not bind the assured. Appeal from this judgment was taken to the Supreme Court of Alberta, Appellate Division, and judgment was entered in favour of respondents, dismissing petitioners' appeal for the same reasons as those given by the trial Judge.

The petitioners had intended to bring the case direct before the King in Council, but were unable to do so, and accordingly appealed to the Supreme Court of Canada. The judgment of that Court was based upon a previous case in the Supreme Court, Mackay v. British America Assurance Company (1923 S.C.R. 335), and upon the view that the previously quoted words of the policy were in the nature of an additional condition imposed upon the respondents, and, not having been inserted in statutory form, were, therefore, not binding upon them; instead of, as contended for by petitioners, being a statement of the presently existing condition, location and state of the subject-matter of the insurance, upon which considerations the premium was based.

As a result of this decision, insurers throughout all the provinces of Canada, in all of which provinces statutory conditions were in force, would be unable to rely upon any declaration or warranty as to a presently existing state of facts touching the nature, extent and scope of any risk, not only in the case of fire risks, but in those of hail, automobile, marine, life, casualty, and many other forms of insurance; nor would insurers be able to fix their premiums as based upon a declared existing state, location, or condition, and would, consequently, be obliged in all cases to charge to the public the highest premium rate, upon the assumption that a warranty or declaration as to an existing state of facts which otherwise would materially reduce the rate was to be con-

sidered as not legal and binding unless inserted in the form of a variation of the statutory conditions.

Their LORDSHIPS dismissed the petition with costs.

COURT OF APPEAL.

Jan. 13-15, 1925.

BANKERS' & SHIPPERS' INSURANCE COMPANY OF NEW YORK v. LIVERPOOL MARINE & GENERAL INSURANCE COMPANY, LTD.

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

Arbitration — Submission — Agreement to arbitrate contained in reinsurance treaty between American and English companies—Remedy under American Arbitration Act, 1920, in case of default by one party in appointing arbitrator.

In this case, the plaintiffs, the Bankers' & Shippers' Insurance Company of New York appealed from a judgment of the late Mr. Justice Bailhache (19 Ll.L.Rep. 335) in favour of the defendants, the Liverpool Marine & General Insurance Company, Ltd.

An application in this appeal was reported at 20 Ll.L.Rep. 163.

Mr. A. T. Miller, K.C., Mr. W. A. Greene, K.C., and Mr. S. L. Porter (instructed by Messrs. Parker, Garrett & Co.) appeared for the appellants; and Mr. R. A. Wright, K.C., Mr. F. T. Barrington-Ward, K.C., and Mr. H. du Parcq (instructed by Mr. A. E. Hewitt, of York, Messrs. K. Brown, Baker, Baker, agents) represented the respondents.

The plaintiffs brought the action claiming £107,000 odd as being payable to them by the defendants, being an amount fixed by an arbitration award dated June 29, 1922. The action arose out of a reinsurance treaty made between the parties, the defendants being the reinsurance company and the plaintiffs the assured. The treaty was signed on July 23, 1919, but it was afterwards considerably amended, the date of the amendment being Oct. 1, 1919. Heavy losses were incurred, and on Aug. 24, 1920, the defendants gave notice, as they were entitled to do under the contract, to terminate the treaty. The contract contained a clause referring all differences to arbitration. The clause provided that there should be two arbitrators, one to be chosen by each party, and that the two arbitrators should, when appointed, choose an umpire. The clause went on :—

> In default of either party appointing any arbitrator within one month of the other party requesting him to do so, the latter shall name both arbitrators, and they shall elect an umpire as above stipulated.

On Nov. 1, 1921, a demand for arbitration was put forward by the plaintiffs. No answer to the demand was given by the defendants, and in January, 1922, the plaintiffs, who had appointed one arbitrator, exercised their right under the contract to appoint a second arbitrator.

The two arbitrators, before entering upon their duties, communicated with the defendants, and told them that they had been appointed. On Mar. 6, 1922, the defendants sent a cable in which they declined to have anything to do with the matter, and disputed the authority of the arbitrators. An umpire was appointed, the arbitration proceeded, and the award was eventually published, and upon that award this action was brought.

Mr. Justice Bailhache held that the award was a nullity according to the law of the State of New York, and that it could not be enforced in this country. The ground of the learned Judge's decision was that prior to the Arbitration Act, 1920, a New York statute, there was no remedy when a party refused to submit to arbitration; that the Act of 1920 did provide a remedy, but that the remedy was, if the other party still desired to go to arbitration, that he should do so after first obtaining the sanction of the Court to that effect; and that here the plaintiffs did not go through the initial preliminary step of getting the sanction of the Court.

Mr. MILLER, in support of the appeal, said that the whole point turned on a question of New York arbitration law and the construction of the statute of 1920. At the trial both sides called a number of eminent New York lawyers. Divergent views were expressed, and Mr. Justice Bailhache, exercising his own judgment, found in favour of the defendants on his view of the effect of the statute.

Lord Justice BANKES remarked that the trial happened to be proceeding when members of the American Bar were on a visit to this country, and that several of them gave evidence.

Mr. MILLER contended that the view taken by Mr. Justice Bailhache of the New York law was wrong, and that the object of the 1920 statute was to put the New York law with regard to arbitration on the same footing as the English law.

Mr. WRIGHT, for the respondents, supported the construction placed on the American law by Mr. Justice Bailhache.

Their LORDSHIPS reserved judgment.

COURT OF APPEAL.

Thursday, Jan. 15, 1925.

LIBERTY NATIONAL BANK OF NEW YORK v. BOLTON.

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

Insurance—Banker's policy guaranteeing against theft by bank's servants—Whether fraud by cheque (or only losses by physical abstraction of securities) covered by policy.

In this case the defendant, Mr. Louis Hamilton Bolton, an underwriting member of Lloyd's, appealed from a judgment of the late Mr. Justice Bailhache (19 Ll.L.Rep., 299) directing Mr. Bolton to pay to the plaintiffs, the Liberty National Bank of New York, his proper proportion of two sums, amounting to about £7600, under a policy of insurance known as the bankers' and brokers' "in and out" policy.

Sir H. Cassie Holden (instructed by Messrs. Parker, Garrett & Co.) appeared for the appellant; and Mr. W. N. Raeburn, K.C., and Mr. Stair Agnew (instructed by Messrs Ashurst, Morris, Crisp & Co.) represented the respondents.

Sir CASSIE HOLDEN said that the action was brought to recover a considerably larger sum than that for which judgment was obtained, by reason of losses incurred by the plaintiff bank through the fraudulent acts of a servant of theirs, by name James P. Miller, a security clerk. If the wrongful acts of Miller amounted to "abstraction" of securities from the coffers of the bank, they would fall within the policy, but the submission here was that the wrongful acts amounted to the obtaining of cheques by false pretences, and that therefore they did not come within the policy. The frauds unquestionably were committed and were discovered within the period of the policy, which was for twelve months from Nov. 13, 1915, to Nov. 13, 1916.

The clause under which it was sought to make the defendant liable was Clause I., in which the underwriters accepted liability during the period of the policy against

> all such losses as they the assured may during the said period suffer or sustain or discover that they have suffered or sustained by reason of any bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, cheques, bank notes, specie, . . . whether payable to bearer or otherwise, not including title deeds of landed property in which they are interested, or the custody of which they have undertaken . . . being lost, destroyed or otherwise made away with by robbery, theft, fire, embezzlement, burglary or abstraction or taken out of their possession or control by any fraudulent means, whether with or without violence, and whether from within or without and whether by the officers, clerks and servants of the said assured or any other person or by the negligence or fraud of the said officers, clerks or servants.

The defalcations were due to the fact that Miller, unfortunately for himself, was speculating in margins with a firm of stockbrokers in New York, and as this firm required payments from time to time, Miller got hold of certain bonds belonging to customers of the bank. In that sense, said COUNSEL, bonds were abstracted by Miller, but they were sold through the bank's brokers, and the brokers sent cheques to the bank. The cheques were sent forward through the proper collecting channel, but instead of crediting the customers to whom the bonds had belonged, Miller credited an impersonal account with the amounts. Only in one transaction did no part of the proceeds come back to the bank's coffers. That was how the matter stood with regard to the selling of securities. In another case Miller instructed the brokers to buy securities, and got the bank to pay a cheque for the amount. Counsel submitted that in the circumstances the losses did not fall within the policy.

Friday, Jan. 16, 1925.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: This is an appeal from a judgment of Bailhache, J.; and the judgment we propose to give is in the form of a declaratory judgment. It must be incorporated in minutes, the amounts to be agreed between the parties, if possible; and they must be inserted before anything in the nature of a money judgment is completed.

The facts, as far as material, may be stated in this way. The action was brought by bankers, a New York firm, under an "in-and-out" form of bankers' and brokers' policy; and they claim that owing to the defalcations of a man in their employ, one Miller, they have lost a large amount of money. The claim was formulated and the items included in the statement of claim and the particulars; and the items were ten in number. The action came to be tried before Bailhache, J., and he decided in favour of the underwriters in respect of a number of claims. He decided in favour of the plaintiffs in respect of certain other claims. The appeal before us is confined to a number of claims which have been identified as Nos. 5 and 6 (a), (b), (c), (d) and (e), and No. 2.

I propose to deal quite shortly with the relevant facts upon which those claims depend. Miller was in the employ of the plaintiffs, and he defrauded them to a very substantial extent. The way he set about it and carried it out was this, shortly—and I do not think it is necessary for this purpose to complicate the matter by going into the entries which were in fact made in the bank's books in the process of the carry-

ing out by Miller of these frauds and as the result of his original fraud. What he did was this: he abstracted from the bank's custody a number of bonds. Those bonds he caused to be sold by a firm of brokers. The brokers paid the proceeds of these bonds by way of a cheque drawn in favour of Miller's employers. That cheque came into the possession of Miller's employers, and was dealt with in the ordinary way of business by entries in their books. But Miller, as part of his original scheme, so arranged matters that, almost immediately after the cheque had been received by his employers, he withdrew the moneys or portions of the moneys by getting the cashier, by means of a fraudulent misstatement, to draw a cheque the proceeds of which he was able to deal with, and did to a large extent deal with.

That, stated quite shortly, is the way in which Miller carried out these frauds. The terms of the policy, so far as they are material on this part of the case, are these. The underwriters undertook to be responsible to the extent of the loss

> . . . by reason of any bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, cheques, bank notes, specie, currency, coin or other similar securities, whether payable to bearer or otherwise (not including title deeds of landed property) in which they are interested or the custody of which they have undertaken . . . being lost, destroyed, or otherwise made away with by robbery, theft, fire, embezzlement, burglary or abstraction, or taken out of their possession or control by any fraudulent means.

The plaintiffs say in the first place that these losses they sustained were in fact the result of the abstraction by Miller of the bonds; and alternatively, if necessary, they say that the losses were at any rate to some extent the result of his taking out of their possession cheques which he induced their official, in the first instance, to draw, and then to hand over to him, which would enable him to fraudulently appropriate their money.

Bailhache, J.'s decision proceeded upon the view that all the losses which the plaintiffs could prove resulted from the original abstraction of the bonds; and he treated Miller's nefarious dealings as all part and parcel of the same fraudulent conduct, that you could not distinguish between the abstraction of the bonds and the subsequent conduct of Miller and the subsequent transactions which led to Miller's possessing himself to a large extent at any rate of the proceeds of the sale of the bonds.

Upon that the main point for the appellant is this. It is said: "True, the bank have lost their money, but that was not due to the abstraction of the bonds at all; it was due to an entirely different cause, and a cause which does not come within the policy. The cause was that after this preliminary fraud (if I may use that expression) of Miller in abstracting these bonds and selling them, the proceeds of those bonds got back into and under the control of the bank, and there they would have remained and no loss would have resulted but for Miller's subsequent fraud in inducing the assistant cashier by a fraudulent representation to draw a banker's draft by means of which, when Miller obtained possession of it, he was enabled to obtain possession of some portion of the proceeds of the sale of these bonds"; and it is said that that fraudulent conduct of Miller in obtaining those cheques in that way was conduct which quite truly in a sense resulted in loss to the plaintiffs, but was conduct which was not covered by the policy; and the case of the Century Bank of New York v. Mountain, 19 Com. Cas. 178; 20 Com. Cas. 90, was strongly relied on in support of that contention. It seems to me that, apart from anything else, there is a clear distinction between that case and the present, because the conclusion of fact to which the Court came there was that the loss complained of was not the result of any fraudulent conduct at all: the fraudulent conduct was an antecedent and independent act altogether, the result of which was that the lady was put in funds at her bankers, and, having been put in funds at her bankers, she then proceeded to draw out the money by means of cheques. It was said that the drawing out of the money by means of cheques was not a fraudulent act at all: it was an independent and entirely separate act from her previous fraudulent act by which she was placed in funds at the bank, and that she did not possess herself of any document by any fraudulent conduct.

It seems to me that there is a great distinction in this case, because Miller here made a representation, which representation induced the official of the bank to draw the cheque and to hand the document to Miller at practically one and the same time and in one and the same transaction The fraudulent representation directly resulted not only in drawing the cheque but in handing the document to Miller; and there is, I think, a clear distinction on the facts between Mountain's case and this case. From my point of view, Miller's action in abstracting the bonds, and his subsequent conduct, may really be likened to the case of a man who steals his master's securities, sells them, puts the proceeds in his master's coat pocket, and, before his master realises that they are there and is able to secure the proceeds for himself, the man takes the proceeds out of the pocket and applies them for his own purposes The only distinction between that case and this is that, owing to the fact that Miller was employed by the bank, and that he placed or caused to be placed the proceeds of the sale of these bonds in the bank's possession, certain entries were made in the bank's books, and, because of those entries and because of the course of the business, Miller had to make a fraudulent representation to an employee in order to get the pro-

ceeds out. But as between himself and his employers, it does not seem to me that there is any greater break in the continuity of his action than the simple case that I put of the servant who puts the proceeds of the stolen bonds in his master's pocket, where they remain just sufficiently long to show that they are in the master's possession, yet in such circumstances that the servant insures the possibility of his being able to abstract them when he desires.

On that ground I think the view taken in this case by Bailhache, J., is quite right, that the losses which the bank claimed were directly attributable to, and the result of, the abstraction of these bonds in the first instance by Miller.

That conclusion decides three of the six cases that have been brought to our attention by the appellant; it disposes of (a), (b) and (c) because the facts in each case there were that the proceeds of the bonds—though, owing to Miller's course of action, they came into the possession of the bank—were entirely and completely removed by Miller and appropriated to his own use.

There is a difference in the case of (d) and (e): the difference is just this, that in those two cases, although the proceeds of the bonds came into the possession of the bank, Miller did not draw out all the proceeds. In the case of (d), where the abstraction was of 10,000 dollars' worth of bonds nominal, they were sold for 9253.06 dols., and those 9253 dols. odd were paid into the bank, and Miller only drew out 459.56 dols. The balance therefore of 8793 dols. odd remained not only in the possession and custody of the bank for a time but under the control of the bank, and were used by the bank as their own money. In those circumstances I cannot see any answer to the case of the defendant that to that extent the bank have not suffered any loss at all. It is quite true that the bonds were stolen, but it is equally true that they were replaced to the extent of the 8793 dols. of money in place of the bonds. I think therefore that the appellant is entitled, in any judgment that is entered up against him in respect of these matters, to credit for that amount.

Then there comes the next case, which is identified as (e); and taken by itself it is the simplest of all the transactions. There was an abstraction by Miller of 10,000 dollars' worth of bonds nominal: they were sold for 9300 dols. odd — whatever the figure was—and that amount, representing the full amount of the proceeds, came into the possession of the bank and remained there, and was used by them as their money. Again I think, for the same reasons, the underwriters are entitled to say in respect of that amount that there has been no loss to the extent of the amount that I have mentioned. The story with regard to this item (e) was rather complicated, because it was introduced by the plaintiffs in connection with their claim, which was No. 2 in the list, and which related to an entirely different transaction. That transaction was a case where Miller had bought, without any authority whatever, bonds to the value of 125,000 dols. odd, and in order to pay for them he had induced the cashier or assistant cashier to draw a cheque for that amount and hand it to him; and he then proceeded to deal with that for his own purposes, and to a certain extent he applied it in reducing the previous defalcation and liability to the bank. But he did not reduce those defalcations by the amount of 21,000 dols.; and the way the plaintiffs treated the matter was this. They said: "There is a defalcation to the extent of 30,000 dols.; it is true we received 10,000 dols. in respect of transaction (e). By giving credit in respect of the amount we received in regard to the transaction, we arrive at a balance of 21,000 dols. odd"; and that was the amount of the claim under head 2. Bailhache, J., did not give the full amount, but he gave them a sum of 4000 odd dols., because he said: "I consider that they have lost to that extent at any rate by reason of the original abstraction of the bonds and the subsequent obtaining of the cheque for 125,000 dols." It may be, as Mr. Raeburn said, that the learned Judge ought to have given judgment for a larger amount than 4000 dols., but it does not seem to me that he would have been justified in giving judgment for 21,000 dols. either upon the ground that it resulted from the original obtaining of this 125,000 dols. cheque or from the obtaining of the bonds under head (e). I think therefore that the appellant is not entitled to any relief in respect of that 4000 dols.

The position of the Court therefore is that the judgment of the learned Judge will be varied by directing that the amount for which judgment will ultimately be given will be less than the amount which the learned Judge awarded by the two sums to which I have referred under heads (d) and (e). The form of the declaration must of course include a declaration that the amounts recoverable are amounts only in excess of the 10,000 dols. which is covered by the other policy; and there may be questions of course which will have to be decided as between two sets of underwriters. Those are matters which will have to be dealt with in the form of a declaration, which we ask the parties to settle and submit to the Court, and if possible to include in that declaration the net figures which will be inserted in the final judgment which the Court will give.

I think I have sufficiently indicated the view of the Court. I will deal with the costs of the appeal in a moment; and of course there will be liberty to apply.

Lord Justice SCRUTTON: This is an appeal by Lloyd's underwriters who have been held liable to an American bank on a Lloyd's policy, the form commonly known as the "in-and-out form," the general effect of which is to secure the bank against loss of their securities, using the term security in a wide sense, by the crime of their servants. The wording of the policy so far as it is material is that it insures against loss by reason of bonds, cheques, coin or other

此为试读,需要完整PDF请访问: www.ertongbook.com

similar securities, being lost by robbery, theft, embezzlement or taken out of their possession or control by any fraudulent means. The *modus operandi* of Miller, who was the servant of the bank and who was responsible for these losses, was, generally, this: he was securities clerk at the bank and had in his custody certain securities. He took out bonds from the securities envelope, sold them through the bank's brokers, purporting to sell them on behalf of the bank: received from the bank's brokers a cheque, the proceeds of the securities, paid it into the bank, but immediately got it out again by a cheque which he represented as a cheque to defray a *bona fide* liability of the bank. The learned Judge in the Court below relied on a decision of the Court of Appeal in the Century Bank of New York v. Mountain, 20 Com. Cas. 90, and excluded from his consideration the loss sustained by the fraudulent cheque being put forward. Pickford, J., had said (19 Com. Cas. 178, at p. 186) that the words of the policy which was in substantially the same form "only apply to cases in which coin has been taken"—of course coin includes securities—"out of their possession or control while on such premises directly by the fraud of somebody." The facts with which the learned Judge was dealing were that a person had come to the bank and by fraud induced them to buy a forged security and placed the proceeds to an account in which the person appeared as customer. Then the customer drew a cheque on the account which had resulted from this forged security being put forward and so got money. Pickford, J., and the Court of Appeal took the view that the money obtained by that cheque was not obtained directly by fraud. If you went back to see how the money got there it was the result of the original fraud by the sale to the bank, but the payment out of the cheque was a payment of an ordinary cheque drawn on the customer's account, and the fact that there was original fraud did not make the payment of the cheque a direct loss by fraud. I am bound by the decision of the Court of Appeal and I express no opinion except to say that I follow it.

But in this case the procedure adopted for getting the cheque itself is a fraud. The cheque which was used by Miller to obtain the money was fraudulently put forward as being a cheque to repay a liability of the bank when there was no such liability at all. There is a direct fraud in the putting forward and obtaining and cashing of the cheque. Consequently I should not have been able to agree with that part of the learned Judge's judgment which shuts out from his consideration all the cheque transactions and went back to the abstraction of the bonds. The respondents in this case have not entered any appeal, consequently while they can support the judgment of the learned Judge by reasons they cannot get any further relief from what the learned Judge has given them, because they have not appealed; and personally I think the underwriters are extraordinarily lucky that the plaintiffs have not appealed, because I think they would have had to pay considerably more in that case.

It is said that this is a serious matter for them and that they did not mean to insure this. All I can say is that if they do not mean to insure this they had better take out of their policies the words "taken out of their possession or control by any fraudulent means"; then if bankers continue to insure after they have taken this out they will be protected from the loss of which they are so apprehensive.

That is the general line of the case. The items on which the underwriters appeal are called Nos. 5 and 6 (a), (b), (c), (d) and (e), and No. 2. Items 5 and 6 (a), (b) and (c) are all cases where Miller having abstracted the bonds sold them and paid the proceeds back into the bank and immediately, by fraudulent cheques, drew out the whole of it in each case. In (a), in (b) and in (c), all the proceeds which came to the bank as the proceeds of the sale of the bonds went out by fraudulent cheques. The learned Judge has said there was the original abstraction of the bonds, the loss from which the underwriters are liable; and it is impossible in this continuous transaction of fraud to separate the cheques in the exact way by which the money was got by Miller from the original abstraction of the bonds. The loss from the cheques being cashed is loss due to the abstraction of the bonds. I do not dissent from that view at all. I think equally the underwriters would have been liable if it had been treated as a loss by taking the cheques out of the possession or the control of the bank by fraudulent means.

In passing I will deal in one sentence with the contention put forward in this Court and in the Court below that as these cheques were drawn by an officer of the bank itself they are not, according to the decision in Gordon's case, [1903] A.C. 240, to be treated as bills of exchange or cheques and therefore do not come within the policy. My first answer is that I think under criminal proceedings they would be treated as securities, the subject of the Larceny Act: and secondly that this policy refers to "other similar securities," and I am quite sure that these are "other similar securities" to a cheque.

Cases (d) and (e) stand on a different footing because, although Miller did extract bonds in the case of (e), all the proceeds came back into the bank; in the case of (d) all except 459 dols. was paid out to one Young. The fact that all (e) came back had the effect of cancelling the previous defalcations of Miller; but the fact of it having come back to the bank does not stop the bank, in my view, from saying that they have suffered loss. I think, therefore, that the learned Judge's judgment should be varied as regards (d) and (e) by restricting the loss to the amount which went out to Young in the case of (d).

The second head of the case comes under a different footing because it does not deal in a sense with the abstraction of bonds

at all. Miller purported to buy a number of shares and paid for them with a banker's cheque which was obtained by fraud. Having paid for them at a price, he sold them at a price some 4600 dols. less than he paid for them; and he put back in various ways a considerable amount of the money he had got by the proceeds; but it still left a balance not made good of some 30,000 dols., and he made good some 9000 dols. further of that by the proceeds of the bonds stolen in regard to (e), leaving ultimately a defalcation of 21,000 dols. The learned Judge, leaving out the transaction of the cheque on account of the view he took of the Century Bank case, to which I have already referred, said: "You, Miller, cannot say the bonds were not the bank's bonds when you were purporting to buy them; and what you have done is to cause a loss of 4600 dols., the difference between the price you bought them at and the price you sold them for the next day; and for that amount I give judgment." If I had been a Judge of first instance I think I should have given judgment for either the 21,000 or the 30,000 dols. — I do not say which; but the respondents have not appealed in this case, consequently I cannot do what I think ought to have been done and what I think the underwriters are lucky to escape. All I can do is to support the judgment for 4600 dollars on the ground that firstly I do not think he was wrong in taking that view if there was no other view to take, and secondly the underwriters were liable for that amount on the view I take as to the transaction with the cheque.

I suppose this case was too complicated, because when it was argued in the Court below nobody seems to have referred to certain words of the policy, which were that the insurers were only to pay claims in excess of the amount of the fidelity bond, and the judgment as drawn up pays no attention to that at all. There is no doubt that the judgment as worked out must only be for an amount in excess of the fidelity bond.

Then there will arise this complication which again was not argued out below. From some people concerned in the transactions moneys have been obtained which make good financially the loss. Questions of considerable difficulty may arise as to how those sums are to be borne as between the fidelity bond and these underwriters. I cannot say that we have had any assistance from Counsel as yet as to how it is to be done. All I can say is that the parties must work it out for themselves and must make up their minds on that point, or if they cannot agree upon an order then the Court will have to say which contention is right or whether neither of the contentions is right and that it is something different. We are not in a position to do that at present. First of all we say the clause must be taken into account which says that the insurance is only to be in excess of the fidelity bond; secondly, that the amounts received from various people have to be taken into account and possibly have to be apportioned in some way between the fidelity bond and Lloyd's underwriters. Consequently, while there must be a declaration on the lines of this judgment, the parties will have to work out the money result of that judgment; and, if they cannot do it, either this Court will do it or we will send it to somebody else so as to enable them to do it. The learned Judge himself has given a certain direction. Undoubtedly in giving that direction he does not seem to have had before him the words of the policy, and I think that that part of his judgment is inaccurate. Therefore, I do not think that the direction can stand; and, when the parties have worked out for themselves the contentions they put forward, we or some other tribunal will have to decide what is the correct way of working it out.

Lord Justice ATKIN: I agree; and on the first point of the claim, which I propose to speak of as the claim under Nos. 5 and 6 (a), (b), (c), I have nothing at all to add. It seems to me that the learned Judge was right in considering the position to be this: the bonds in question had been abstracted, and true it was that the proceeds of those bonds had been received by the bank, but the proceeds were received under these circumstances: the defaulting clerk Miller had arranged that, as part of the fraud under which he abstracted the bonds, the proceeds, when he received them, in the form of a cheque to the bank, should be so applied that he could at once withdraw them by committing a subsequent fraud and getting another cheque from the bank cashier. In those circumstances it seems to me, as part of the original fraud, that the bank never became possessed of the proceeds of the fraud, and therefore that they can rightly claim to have lost the full amount of the bonds by the abstraction.

But when it comes to (d) and (e) the position seems to be different. That seems to be the unfortunately not unusual case of a dishonest servant applying the property of his master for the purpose of seeking to cover up for the time being already existing defalcations; and the fact is that as to (d) and (e), although the bonds were undoubtedly abstracted, yet the bank did receive and get the benefit for themselves of the full amount of the proceeds. The bonds were sold by the bank's brokers in the name of the bank, and there came back to the bank as the result of that sale a cheque in the name of the bank. That cheque was cashed, and the proceeds of that cheque the bank were entitled to and did in fact retain. It is true that as a matter of book-keeping Miller was in a position to direct that the proceeds should be appropriated to a particular account, which would help to cloak his defalcations. Nevertheless, to my mind the bank have suffered no loss from the sale of those particular securities, because they received the full value for them. In these circumstances I think that they cannot recover. It appears to me to make no difference that the proceeds of the bonds were appropriated to some other

account, because it is quite plain that if that account was made good to the extent of the value to the bank, then the bank was to that extent benefited by the process; because it is not suggested that Miller was in a position to make good that liability or ever would make good that liability to the bank except out of the proceeds of the bonds in the way which he did. Therefore it appears to me that the bank have not established that they have suffered any loss from the abstraction of those bonds.

In respect of Claim 2 the position seems to be this. Miller obtained by fraudulent devices a cheque made out in the name of the bank's brokers for 125,000 dols., he representing that the cheque was required for the purpose of buying stock for a particular customer, and would be properly charged to that customer's account. Having got that cheque, what he did in fact was to buy stock, or he obtained the cheque in order to meet the obligation he was under for the stock. That stock was in fact delivered to Miller overnight, and the next day he sold it again, and the proceeds were received, again purporting to be for the bank—I think there can be no doubt on the facts—by a cheque drawn by the brokers in the name of the bank. Now is that a matter, as the Judge has held, of a loss arising from the abstraction of the stock? They are called "stock" in the statement of facts, and I assume therefore they were not bonds but were more likely certificates to bearer. Assuming it to be treated as a loss by abstraction of the stock, it appears to me that the bank were entitled to say: "This stock was bought by our servant with a cheque on our bank, and although he was not entitled to deal with it we were entitled to treat that stock in our possession as our property"—undoubtedly they were —"and when he sold it he fraudulently dealt with it and abstracted it. In these circumstances we are in the position of people who paid 125,000 dols. for stock, and we have only got 121,000 dols. in return; therefore we have lost by the transaction a sum of 4000 dols."

That is the view taken by the learned Judge, and I think that that view is correct, and therefore the judgment must stand for that amount. At the same time I share the view expressed by Scrutton, L.J., as to the construction of the policy. I do not think it is necessary to decide it, but inasmuch as it is an important matter, and has been argued by Sir Cassie Holden, who has told us that it is a matter of importance to the parties to know where they are, I think that a fraudulent action by the servant in this case would give rise to a loss under the policy, because it seems to me that the fraudulent taking by the cheque is a direct fraudulent taking and is covered by the words of the clause; and I should think that that is a sufficient fraudulent taking, and that the Century Bank case can quite plainly be distinguished on the ground that the taking by the cheque, which was authorised so far as the account was concerned, was not in itself a fraudulent taking, the fraud having consisted in an action by which the amounts were paid into the credit of the account.

In those circumstances it seems to me that the judgment is incorrect because, although it rightly deals with the amounts under (a), (b) and (c) of Nos. 5 and 6, and No. 2, it gives effect to a claim under (d) and (e) amounting altogether to about 18,000 odd dols. Therefore the exact declaration that must be made must undoubtedly be varied.

There is the further fact that the order as drawn does not seem to give effect to the policy, which says that the claims must be in excess of the fidelity bond: there was a fidelity bond for 10,000 dols.

In those circumstances there must be a variation of the judgment: the declaration must be in different terms, and, as to the order to give effect to the judgment on the rights of the parties, I think it would be much better that minutes should be prepared by Counsel, and submitted to this Court, who will determine what form it shall take.

Lord Justice BANKES: I think this would be the best form of entering our judgment. I think we had better set aside the judgment, because it would be difficult to cut it about. Set aside the judgment as entered, and enter it for the plaintiffs for a declaration that the plaintiffs are entitled to recover. Then the amount awarded by Bailhache, J., under heads 5 and 6 (a), (b) and (c); under head (d) 459.56 dols. only; under head (e) nothing. Then I think we shall have to add this: "In so far as these amounts are in excess of the American Society's fidelity bond, and subject to any credits or apportionments which may have to be made, with liberty to apply." We make no declaration as to what the credits or apportionments are to be, but we hope the parties will be able to agree as to that, and insert the agreed figures in the minutes. Of course, there will be liberty to apply. The majority of the Court think that the appellant should have the costs of the appeal. The parties understand that we ask them to prepare minutes and submit them to the Court?

Sir CASSIE HOLDEN: Yes, my Lord.

Lord Justice BANKES: Setting aside the judgment does not mean setting it aside as far as it refers to the costs below. The plaintiffs are entitled to the costs below. The judgment is set aside except as to costs.

COURT OF APPEAL.

Jan. 22-23, 1925.

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

EINAR BUGGE A/S v. W. H. BOWATER, LTD.

Sale of goods—Coal sold f.o.b. to be shipped in accordance with the custom of the port (Delagoa Bay)—Ship chartered by buyer to carry cargo—Delay in tendering cargo—Action to recover from seller demurrage paid by buyer to shipowner—Exception as to strikes in sale contract—Whether seller obliged to have sufficient coal available for use of tip appliance when ship's turn arrived.

In this case the defendants, Messrs. W. H. Bowater, Ltd., of Billiter Street, E.C., appealed from a judgment of Mr. Justice Rowlatt (20 Ll.L.Rep. 84) in favour of the plaintiffs, a Norwegian firm.

Mr. W. N. Raeburn, K.C., and Mr. D. N. Pritt (instructed by Messrs. Ince, Colt, Ince & Roscoe) appeared for the appellants; and Mr. R. A. Wright, K.C., and Mr. J. Dickinson (instructed by Messrs. W. A. Crump & Son) represented the respondents.

Mr. RAEBURN said that the action was one in which the respondents, who were buyers of a cargo of coal from the appellants, claimed damages from the sellers in the nature of demurrage or damages for detention in relation to the shipping of coal at the port of Delagoa Bay—a port which in recent years had given rise to much litigation in one form or another. The contract was on f.o.b. terms, by which the appellants agreed to sell to the respondents a quantity of 5000 to 6000 tons of coal from a particular colliery in the Transvaal, known as the Uitkyk Colliery, for shipment during September, 1920. In due course the buyers, whose duty it was, chartered the steamship *Tasmania Maru*, a Japanese vessel, to carry the coal, which was destined for Norway. The steamer was detained for some time at Delagoa Bay and her owners claimed damages against the present respondents, the charterers. That matter went to arbitration and the umpire awarded the shipowners £2600 demurrage. Thereupon the charterers, as buyers of the coal, brought the present action against the sellers, alleging that it was the latter's fault that the vessel was detained.

Mr. Justice Rowlatt found that the sellers had been in breach of their obligation under the contract of sale and that the detention was due to their fault, and he awarded the respondents by way of damages the sum which had been awarded by the umpire, together with the costs incurred by the respondents in the arbitration. If the appellants were liable it was not suggested that the measure of damages adopted by the learned Judge was wrong. The sole question on the appeal was whether the sellers had broken the contract of sale. The case for the appellants was that there had been a strike on part of the railway serving Delagoa Bay, and that although the strike was over it had caused railway derangement, and added to an already existing shortage of trucks; that the detention was due to these and other causes beyond the sellers' control, and that therefore the case fell within the exceptions to this effect contained in the contract of sale. It was also contended that the vessel was berthed and loaded in the customary turn and manner, within the meaning of the contract.

The hearing was adjourned.

ADMIRALTY DIVISION.

Monday, Jan. 12, 1925.

THE "OEHRINGEN."

Before the President (Lord MERRIVALE).

Collision—Limitation of liability.

In this case, the plaintiffs, as owners of the Norwegian steamship *Elg*, sought to limit their liability, under the provisions of the Merchant Shipping Acts, in respect of damages arising out of a collision between the *Elg* and the London steamship *Oehringen*, in the River Thames, on Nov. 20, 1924. There was no loss of life or personal injury in consequence of the casualty. The plaintiffs admitted liability for the collision, which, however, they said occurred without their actual fault or privity. They asked that their liability should be limited to £8589 15s. 2d., the aggregate amount of £8 per ton on 1073.72 tons, the registered tonnage of the *Elg* ascertained in accordance with the Merchant Shipping Acts.

Mr. J. V. Naisby (instructed by Messrs. Thomas Cooper & Co.) appeared for the plaintiffs; and Mr. E. A. Digby (instructed by Messrs. Lawrence Jones & Co.) represented the defendants.

The PRESIDENT granted a decree of limitation as prayed.

ADMIRALTY DIVISION.

Monday, Jan. 12, 1925.

THE "LITTORAL."

Before the President (Lord MERRIVALE).

Salvage—Late appearance.

This was a motion on behalf of the plaintiffs in a salvage action asking for judgment in default of appearance and for an

order for the appraisement and sale of the salved vessel, the French motor ship *Littoral*.

Mr. G. P. LANGTON (instructed by Messrs. Lowless & Co.) appeared for the plaintiffs, Henry Meakins, and others, the owners and crew of the motor boat *Lady Beatty*, of Deal. The services, said Counsel, were rendered in the Downs on Nov. 27 and 28, 1924. The *Littoral* was taken to Ramsgate, where she was arrested, the writ being issued on Nov. 29. A statement of claim in default of appearance was duly filed on Dec. 31. He was now instructed that an appearance had been entered that morning on behalf of the defendants, the owners of the *Littoral*, her cargo and freight.

Mr. E. W. BRIGHTMAN (instructed by Messrs. Rowe & Maw), for the defendants, applied that they should be at liberty to defend the action, and have time in which to put in a defence.

Mr. LANGTON said he did not oppose the application, but contended that the defendants ought to pay the costs thrown away.

The PRESIDENT: The order of the Court will be as follows: The case to stand out generally, the appearance to stand, leave to the defendants to deliver a defence within a week, and liberty to apply. The question of costs will be reserved.

ADMIRALTY DIVISION.

Monday, Jan. 12, 1925.

THE "PUFFIN."

Before the President (Lord MERRIVALE) and Mr. Justice HORRIDGE, sitting with Captain T. GOLDING, C.B.E., and Captain G. GREGORY, C.B.E., D.S.O., Elder Brethren of Trinity House.

Collision between steamship and dredger in River Mersey—Steamship zigzagging to avoid her own smoke — Disputed courses and place of collision — Manœuvres of dredger in crossing channel—Mersey Rule No. 10.

In this case, which involved cross-claims for damages, the defendants, the owners of the Liverpool steamship *Puffin*, appealed from a judgment of Judge Dowdall, K.C., in the Liverpool County Court, pronouncing this vessel alone to blame for a collision between her and the plaintiffs' steam dredger *Rhyl*, of Liverpool. The occurrence took place in the Rock Channel, River Mersey, at about 12 25 p.m. on Jan. 8, 1924. The *Rhyl*, 988 tons gross, belonging to the London Midland and Scottish Railway, was on a return trip from the deposit grounds in Liverpool Bay. The *Puffin*, 371 tons gross, was outward bound from Garston for Dublin with coal. Judge Dowdall, who was assisted by nautical assessors, said that the Court could only account for the accident by supposing that the *Puffin* was dodging her own smoke in order to see where she was going, and that it believed the evidence from the *Rhyl* that the *Puffin* zigzagged and that at the time she came out of the smoke the collision was inevitable. For the appellants it was now contended that the *Rhyl* ought to be pronounced solely in fault for, among other things, improper helm action.

Mr. A. D. Bateson, K.C., and Mr. Lewis Noad (instructed by Messrs. Batesons & Co., Liverpool) appeared for the appellants; and Mr. W. N. Raeburn, K.C., and Mr. John B. Aspinall (instructed by Mr. H. L. Thornhill) represented the respondents.

Tuesday, Jan. 13, 1925.

JUDGMENT.

The PRESIDENT, in giving judgment, said: This appeal has been powerfully argued, as was to be expected; and what has emerged in the course of the argument has been that if the Court below had accepted the case of the *Puffin* the *Puffin* would have succeeded both in its defence and in its counterclaim. The Court below did not do so; and the question is whether the judgment of the Court below ought to be displaced on any of the various grounds which have been presented to us.

The case is this. The *Puffin*, a small trading vessel, was coming down the Rock Channel of the River Mersey, shortly after mid-day, on a day which was somewhat hazy; but the haze had nothing to do with the collision. The *Rhyl* is a dredging craft. She had been upon one of her customary dredging trips to deposit spoil at a point which is indicated seaward of the entrance to the Rock Channel; and at the material time she was on her return trip to her dredging ground; and the *Puffin* was on her outward-bound voyage.

The cases of the contending litigants were quite well developed. The case of the *Rhyl* was that coming back to the dredging ground she steered a course, which was her usual course under the circumstances, for black buoy No. 2—the buoy on the north side of the entrance to the Rock Channel—and passed that buoy at about 20 ft. off with the intention of then changing her course to S.E. ¾ E.—a course which she knew particularly well by constant use of the channel—taking that course of S.E. ¾ E. with the intention not only of crossing the channel, but higher up of taking advantage of the high tide so as to cut an angle behind one of the buoys there.

Now that intention has a direct bearing upon the case. Her case was that she approached black buoy No. 2 with the intention of passing it at a short distance—I suppose as close as was prudent—and with the intention of making any further manœuvre by which she would reach the other side of the channel; and that she did these things—that she passed black buoy No. 2 at a convenient distance of about 20 ft.; that she straightened herself up by some helm action; and that she was laid on her course of S.E. ¾ E. and crossed to

the other side. She says that as she was at black buoy No. 2 she saw the *Puffin* rounding red buoy No. 2, which is one of the buoys marking the next reach of the channel. There is a bend in the channel and at that point there is a red buoy on the opposite side—of course on the south side — to that on which the *Rhyl* entered. It is said that while seeing the *Puffin* rounding she continued her course, gave port helm signals—without much effect in port helm action but with a little port helm action—and proceeded, but that she lost sight of the *Puffin* because the *Puffin* was emitting clouds of black smoke and creating, for all practical purposes, a smoke screen; and that when she had effected her transit of the channel and was upon her own starboard side the *Puffin*, I think upon a second reappearance, emerged from the screen into a position in which there was imminent danger; and that then starboard helm action was taken with a view of avoiding collision; but that the *Puffin* took converse action with the result that a collision ensued. That was the case of the *Rhyl*.

The case of the *Puffin* was that her master and look-out saw the *Rhyl* when she was on her way from the deposit ground to black buoy No. 2, and that the *Rhyl* was shaping to come over the bank—not to go in between the buoys at the entrance of the channel but to go in over the bank; that the *Puffin* took some slight starboard helm action then, not with regard to the *Rhyl* but with regard to her alignment with the position; and that she proceeded upon a course which would have kept her well on her own starboard side as an out-going vessel, and in proceeding that way, under some disadvantage—because of the emission of smoke from her stack—she found herself when the smoke cleared in perilous proximity to the *Rhyl*; and although she took such helm action as seemed advisable a collision occurred; and that it occurred off the sand spit on the northern side of the channel.

Those are the conflicting cases, and there is a good deal of evidence on both sides. Anybody who may take the trouble to make a kind of patchwork of pieces of the evidence can construct a case for either of the parties. This Court is a Court of Appeal; and the learned Judge below came to a conclusion with the assistance of his Assessors. Comment was made on the fact that he expressed those conclusions with the plural pronoun "we." I do not know that the opinion of the learned Judge is any weaker by having been confirmed by the assistance of the view of two expert mariners upon questions of fact. At any rate it is clear that the Assessors in the Court below took the view which was the learned Judge's view.

Now it was this, that in substance the case of the *Rhyl* was the true case—that the *Rhyl* in fact passed black buoy No. 2 at about the distance it was stated on her part that she passed it; that she was laid upon the course which in substance was the course which she claimed to have followed; and that the collision occurred when she was on that course, on her starboard side of the channel. Those were the findings of the Court.

Now it is said that they are not clear upon the shorthand note. I am satisfied upon the shorthand note that the learned Judge accepted substantially the evidence of the master and mate. He believed that the case of the *Rhyl* was a case which contained the truth. No doubt there were discrepancies and difficulties created sometimes by uncertainty of expression, and sometimes by successful cross-examination, but the case of the *Rhyl* stood.

That being so, the matter is practically over except with regard to one question to which I must advert and on which we had some argument this morning. The place of the collision as ascertained by the evidence of the *Rhyl* is a place of collision upon her course of S.E. ¾ E., and upon her starboard side of the channel where, if she was travelling on her side of the channel, she ought to be. It gives a flat contradiction to any attempt to establish the contradictory case set up by the *Puffin*. The collision did not take place at the end of the sand spit on the north side, and the *Puffin* was not pursuing her course close up to the line of the buoys on the north side, but on the contrary by some starboard helm action she had got over to her port side and on to her wrong side of the water. If the evidence is looked at, reasons are seen why it may well be, in the difficulties in which the master of the *Puffin* was, he thought he would get on to that side. He had become aware of the *Rhyl* before she reached black buoy No. 2. He was in the smoke and he, having lost sight of her, jumped to the conclusion that she would come in where for a good while I believe he believed she was coming in—that was, on the outside of the black buoy—and that not knowing where she was coming in, and being embarrassed by the smoke, it may well be that he was minded to give her what he thought was a wide berth and that with starboard helm action he brought himself to the point of collision. I see no difficulty in it at all, if that was the course which was taken. I do not say that that is what took place. It is not my duty to ascertain what did take place. The learned Judge has found how the collision took place; and that is the mode in which it seems to me that it could have happened. There is evidence of belief on the part of the master of the *Puffin* of some action on the part of the master of the *Rhyl* which fell short of what would have produced this result, but which if sufficiently continued would have produced this result; so that the *Rhyl* establishes her case as to course and as to point of departure and place of collision.

Now it is said that the *Rhyl* is to blame, no matter what blame may attach to the *Puffin*, because the *Rhyl* was prohibited by Rule 10 of the Mersey Rules from coming in where she did come in and from crossing the channel as she did cross it; that by so doing she hampered the *Puffin;* and that the collision was due at any rate in part

此为试读,需要完整PDF请访问: www.ertongbook.com