LLOYD'S LIST LAW REPORTS

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

EASTER SITTINGS, 1922.

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

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

VOL. XI. No. 1] THURSDAY, MAY 18, 1922. [BY SUBSCRIPTION

THE PRIVY COUNCIL.

Friday, May 5, 1922.

YORKSHIRE INSURANCE COMPANY AND COLONIAL MUTUAL FIRE INSURANCE COMPANY v. THOMAS CRAINE.

Before Lord BUCKMASTER, Lord ATKINSON, Lord SUMNER, Lord PARMOOR and Lord WRENBURY.

Insurance—General—Motor-Cars—Time to deliver Claim—Late Claim—Waiver or Estoppel by subsequent Conduct of Underwriters.

This appeal from the High Court of Australia arose out of actions brought by the respondent claiming on insurance policies for the loss of motor cars by fire. It was admitted that the claims were not delivered within the required time, and the question now raised was whether the insurance companies were estopped from pleading lateness of delivery by reason of their subsequent conduct.

Mr. R. A. Wright, K.C., and Mr. C. F. Lowenthal (instructed by Messrs. Gray & Dodsworth) were Counsel for the appellants, while Mr A. M. Langdon, K.C., and Sir Cassie Holden (instructed by Messrs. Brundrett, Whitmore & Randall) represented the respondents.

The case for the appellants stated :—

This is an appeal from a judgment of the High Court of Australia dated Aug. 31, 1920. The judgment was given on an appeal by the respondent to the High Court from a judgment of the Chief Justice of Victoria, given in favour of the appellants in two actions tried together before him sitting with a jury. The respondent was plaintiff in both actions, and the Yorkshire Insurance Company, Ltd., were defendants in one of the actions and the Colonial Mutual Fire Insurance Company, Ltd., were the defendants in the other. By the judgment of the High Court of Australia the judgment of the Chief Justice was reversed. The action against the Yorkshire Company was brought by the respondent to recover under three policies of insurance the loss alleged to have been suffered by the respondent by reason of the destruction by fire of certain motor cars. The action against the Colonial Company was to recover loss in respect of the destruction of three other cars. Defences based on fraud were (among other defences) raised by the appellants, but the only defence now material was a defence founded upon the non-compliance by the respondent with Condition 11 of the policies, whereby it was provided that a claim in writing for the loss must be delivered to the appellants within the time therein specified, and that no amount should be payable under the policy unless the terms of such condition have been complied with.

At the trial the claims under two of the policies issued by the Yorkshire Company were abandoned, and though all the claims against the Colonial Company were proceeded with, the jury found on the merits in favour of the company on one of them. At the conclusion of the trial the Chief Justice of Victoria held that non-compliance by the respondent with Condition 11 was fatal to his case, and gave judgment for the appellants. The respondent appealed to the High Court of Australia and that Court held that the appellants were estopped from alleging non-compliance with Condition 11 and gave judgment for the respondent accordingly. The main ground upon which the High Court held that the appellants were so estopped was that after the alleged loss and the late delivery of the claims the appellants had exercised certain rights conferred upon them by the conditions of the policy, and the effect of the decision of the High Court is, it is submitted, that if an insurance company, acting under such a policy as that in question, investigates a claim and exercises the rights conferred upon it for that purpose by the policy after there has to its knowledge been a breach of Condition 11, even

although it does so without prejudice, it will be estopped from alleging as a defence non-compliance with such a condition as Condition 11. It is further submitted in law that the High Court were wrong in treating this case as a case of estoppel, as contra-distinguished from waiver.

The decision is of very great general importance as affecting insurance companies and their assured, and it will have a very far-reaching effect. The conditions of the policy are common-form conditions and there are a large number of insurances in Australia the construction and effect of which will be governed by the decision.

In addition to the motor cars, certain stock-in-trade belonging to the respondent was destroyed or damaged in the fire. Such stock-in-trade was insured by the Yorkshire Company and the Royal Exchange Assurance Corporation under policies which contained conditions similar for all material purposes to the conditions of the policies on the motor cars.

After the fire the various insurance companies appointed Mr. F. F. Leslie, an assessor of fire losses, to act on their behalf in making the necessary investigations in connection with any claims that might arise, and on Oct. 5, 1917, Mr. Leslie, acting in exercise of the rights conferred by the conditions contained in each policy, entered into possession of the respondent's premises. Mr. Leslie had an interview with the respondent, at which he called his attention to the conditions of the policies, and by letter he confirmed this and requested compliance with the conditions, and also requested further information as to various points. On Oct. 13 Mr. Leslie wrote a letter to a Mr. Spry, who had been appointed by the respondent to act as his agent. The letter stated that what was proposed thereby was without prejudice and without creating a waiver of any of the rights of the insurance companies under the various policies. By letters passing between Mr. Leslie and Mr. Spry the time for furnishing the respondent's claims under the various policies was pursuant to Condition 11 extended by Mr. Leslie, at first, until 4 p.m. on Oct. 22, and afterwards until 12 o'clock noon on Oct. 26. The claims were not delivered until about 3 p.m. on Oct. 26.

Mr. Leslie sent a letter to Mr. Spry acknowledging the claims. This letter contained the following paragraph :—

> These claims should have been lodged not later than 12 o'clock noon of this date but were only left at my office without any covering letter after 3 o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions.

On Oct. 30 Mr. Leslie sent two letters to the respondent. One of them stated that no amounts under the policies were payable unless and until the respondent complied with the policy conditions. The other letter asked for compliance with certain requisitions previously made by him and for certain further information. This letter contained the following paragraph :—

> Claims. I have already acknowledged receipt of these without prejudice, and still under cover of this I now notify you that—

and then proceeded to point out certain irregularities in certain of the claims and to deal with other matters (including further requisitions) arising in connection with the fire.

On Oct 31 Mr. Leslie had an interview with Mr. Doria, the respondent's solicitor, in the course of which he pointed out that certain of the declarations accompanying the claims were irregular. Mr. Doria took the declarations away and returned them re-declared the same day. In the month of November correspondence passed between Mr. Doria and Mr. Leslie and Messrs. Hodgson & Finlayson, solicitors to the various insurance companies. By a letter of Nov. 2, Mr. Doria asserted that the respondent had given all details of his claim and the respondent never did, after the letters of Oct. 26 and 30, comply or further comply with the requisitions referred to or made by those letters. In a letter of Nov. 5, from Messrs. Hodgson & Finlayson to Mr. Doria, they insisted upon the respondent answering the requisitions previously sent to him, and pointed out that unless the respondent complied with the conditions of the policies in all respects, no amount would be payable to him as he had already been informed. Statements to a similar effect were contained in letters from Messrs. Hodgson & Finlayson to Mr. Doria on Nov. 9 and 14. The latter letter, which was a reply to a letter from Mr. Doria to Mr. Leslie, asking what amounts the companies would be prepared to pay in settlement, stated that Mr. Leslie was not prepared to advise the companies to pay anything in settlement as the respondent had not yet complied with the terms of the policies and that nothing was payable until this was done.

The High Court appear to have attached importance to these letters, and in particular to the letter of Nov. 14, although it was not relied upon in the respondent's particulars, but it is respectfully submitted that these letters could not operate so as to create any waiver or estoppel even if the respondent had acted upon them to his prejudice, of which there was no evidence. It is submitted that read with the rest of the correspondence the letters merely indicated that no question of any payment could in any event be considered until the requisitions made had been complied with, and did not in any sense purport to waive or abandon the companies' rights in regard to the late delivery of the claims, and could not have been understood by the respondent as doing so, particularly in view of the fact that by the very letters by which after the late delivery of the claims compliance with the requisitions already made was insisted upon, and further requisi-

tions were made, notice was given to the respondent in view of the late delivery of the claims that this was without prejudice and without setting up any waiver.

Further correspondence passed, and on Feb. 2, 1918, the insurance companies repudiated liability under all the policies, and gave notice that they would withdraw from possession of the respondent's premises. In April, 1918, the respondent commenced the actions, and pleaded waiver and estoppel. The particulars of the alleged estoppel were the same as those of the alleged waiver, and such particulars as originally delivered did not rely upon the taking and retention of possession of the respondent's premises on behalf of the insurance companies as evidence of waiver or estoppel, but a paragraph raising this point was added to the particulars on the first day of the trial.

As regards the questions of waiver and estoppel, no evidence was given to show that the respondent had by reason of any representation made by or any conduct of the appellants or their agents altered his position to his prejudice or at all, nor was any question put to the jury nor was there any finding by the jury as to whether or not he had done so. Further, it was never suggested in evidence that the respondent would have abandoned his claim had he believed that the late delivery of the claims was to be relied upon, and, on the contrary, it was sought to be proved at the trial that the time for delivery of the claims had been extended up to the time of their delivery, and that the claims had been accepted as duly delivered, and that the delay in delivery had been waived. It is submitted that the appellants' rights under Condition 12 are separate and independent rights which continue so long as an assured person is persisting in a claim which has not been adjusted, and that there is no interdependence between Condition 11 and Condition 12.

The High Court appears to have dealt with the case on the footing that the question whether, assuming a representation to have been made, the respondent in reliance thereon had altered his position to his prejudice was not contested, but they at the same time held that in face of the submission by the respondent to the possession of his premises by the insurance companies this question could not have been contested, and that a finding that the respondent had not so acted could not be supported. It is respectfully submitted that both these views are altogether erroneous. It is true that the appellants' Counsel did not specifically deal with the question whether the respondent had been induced to alter his position to his prejudice, but as there was no evidence to that effect, and as no question was put to the jury upon it, and having regard also to the view taken by the judge, it is submitted that it never became necessary for him to do so. It is further submitted that it was the duty of the respondent's Counsel to see that evidence on this question if available was given, and that the question was left to the jury. As regards the view of the High Court that the question could not have been contested, it is respectfully submitted that the exact contrary is the case, and that on the evidence given a finding that the respondent had been induced to alter his position to his prejudice could not have been supported. As already indicated, the great importance of the decision is that in effect it determines that the exercise by the insurance companies of their rights under Condition 12 with knowledge that Condition 11 had not been complied with deprives them of the right to rely upon non-compliance with Condition 11.

The only question put to the jury relating to waiver or estoppel was as follows:—

> Did the defendants represent to the plaintiff that they did not intend to rely upon the claims having been put in late? And the verdict of the jury in answer thereto was, "Yes, they did waive their claim."

Subsequently the Chief Justice, acting in the exercise of his jurisdiction, directed judgment in both actions to be entered for the defendants (the appellants) on the ground that there was no evidence to support the finding of the jury, and on the further ground that the case was covered by Condition 19 and that there was no evidence that that condition had been waived.

The High Court reversed that judgment. It is submitted that the judgment of the High Court, which proceeds on the basis that the appellants are subject to an estoppel which debars them from relying on the breach of Condition 11, is erroneous in law. In the absence of compliance with the provisions as to waiver set out in Condition 19, the case could not be put as a case of waiver of Condition 11. But the suggested estoppel was treated as flowing from a representation by letters or conduct that the appellants did not intend to rely on the breach of Condition 11. This, however, is merely another way of expressing waiver, and even if stated (it is submitted incorrectly) as an estoppel is equally invalid as not being evidenced in the manner provided for by Condition 19. This point, which is fundamental to the judgment, affects the construction of all insurance policies which contain these common form conditions. It also involves the true legal conception of estoppel.

Mr. WRIGHT said that what happened after the receipt of the claims did not debar the appellants from relying upon Clause 11, and he strongly urged that in this case there was no question of estoppel.

Mr. LOWENTHAL said the point to be decided was whether an insurance company might exercise its rights under Condition 12 and investigate the claim while still relying upon the contention that the claim was out of date. If insurance companies could not do that they would have to alter the clauses of their policies.

The hearing was adjourned.

COURT OF APPEAL.

Friday, Apr. 28, 1922.

PORT OF LONDON AUTHORITY v. COMMISSIONERS OF INLAND REVENUE.

Before the Master of the Rolls (Lord STERNDALE), Lord Justice SCRUTTON and Lord Justice YOUNGER.

Excess Profits Duty—Finance (No. 2) Act, 1915—Determination of Capital—Percentage on Assets or Average of two best pre-War Years.

In this case the Port of London Authority appealed from a decision (9 Ll.L.Rep. 229) of Mr. Justice Sankey, who held that for the purpose of Excess Profits Duty the standard to be taken was not a percentage on their capital but was the average of their two best pre-war years.

Sir John Simon, K.C., Mr. E. M. Konstam, K.C., and Mr. Edwardes Jones (instructed by Messrs. E. F. Turner & Sons) appeared for the Port of London Authority. The Attorney-General (Sir E. Pollock, K.C.), the Solicitor-General (Sir Leslie Scott, K.C.), and Mr. Reginald Scott (instructed by the Solicitor to the Inland Revenue) appeared for the Crown.

Sir JOHN SIMON explained that this appeal carried a stage further the old controversy which before the Court of Appeal was reported in [1920] 2 K.B., page 612.* That case decided that if the Special Commissioners had taken the view that the Port of London Authority did not make out that they had, for the purposes of Excess Profits Duty, a percentage standard which was better for them than the pre-war one, it was possible for the Court of Appeal to direct them to consider the matter again, on it appearing that that question turned on special considerations of law. Under that decision the matter had been back to the Special Commissioners, and now the question was whether in law the Port of London Authority did or did not establish that they had a better percentage standard than the pre-war standard. Mr. Justice Sankey held that they had not.

The position of the Port of London Authority was that when it came to fixing a datum line as compared with which they took the profits of the year of charge the datum line was what was known as the percentage standard rather than the pre-war standard. The Special Commissioners took a restricted view as to what was capital, and they thought it would not be better for the Port of London to take the percentage standard and refused to allow them to take it. In the other case the question was whether that decision was final. In that case the Court remitted the matter to the Special Commissioners for the latter to decide what was the proper basis of assessment, and whether the percentage standard properly calculated was really not greater than the profits standard. That was to give the Port of London Authority an opportunity of proving their case. They submitted they had done so.

The essence of their case was that the capital of the Port of London Authority consisted of an accumulation of physical assets, docks, wharves, and so on. The question then arose: what was the money value to be attributed to these? If they were right in their construction of the statutes they arrived at a figure of something like 20 millions, and 6 per cent. on that would be their datum line.

* 2 Ll.L.Rep. 544.

Monday, May 1, 1922.

The ATTORNEY-GENERAL submitted that the capital to be used for the purpose of the percentage calculation was the share capital of those who had associated themselves in a company as distinct from borrowed money or money interests from other sources than the contributions of the shareholders.

The MASTER OF THE ROLLS: Capital is assets, and the assets have to be ascertained on principles or considerations mentioned in the statute.

The ATTORNEY-GENERAL: The holder of port stock holds a great deal more than belongs to an ordinary shareholder. It is a debt which is redeemable.

For the purpose of the calculation, account has to be taken of the capital which belonged to the owner of the business. Account must not be taken of any capital in respect of which the lender has rights which put him in a different position from that of shareholder or partner.

The MASTER OF THE ROLLS: What is the exact difference between the holder of a mortgage stock and a shareholder? There is a statutory obligation on the Port of London to provide a fund out of which to pay the money. Is there anything more?

The ATTORNEY-GENERAL: There is a debt chargeable on the fund in respect of which, if the holders like to join together, they can exercise rights in respect of interests which are hostile to the company.

The MASTER OF THE ROLLS: If we are to say redeemable stock is a debt, we are departing from ordinary language.

The ATTORNEY-GENERAL: What I am contending is that the stock gives debenture rights to the holders, and because it gives debenture rights and because it is treated in that way it is a debt. It is all borrowed money and is not the money of the undertaking. The rights in respect of it are not in the Authority but in other people, and therefore the amount of the stock has to be deducted.

Tuesday, May 2, 1922.

The SOLICITOR-GENERAL argued that unless you could say: (1) that the capital could not be called in by any foreclosure

proceedings, (2) that the stock could not be paid off, there was a debt. The Port of London Authority stock was redeemable.

Judgment was reserved.

COURT OF APPEAL.

Friday, April 28, 1922.

COAL CONTROLLER v. LIVERPOOL GAS COMPANY.

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

Sale of Goods—Shipment of Coal supplied by Coal Controller—Demurrage as part of reasonable Price — Liability of Purchaser.

In this case the Liverpool Gas Company appealed from a judgment (9 Ll.L.Rep. 554) of Mr. Justice Roche by which they were held liable to pay £2304 for demurrage of the steamship *Levenpool*, diverted to the Mersey with a cargo of coal for the appellants during the Yorkshire coal strike of August, 1919.

Mr. W. J. Disturnal, K.C., and Mr. C. N. T. Davis (instructed by Messrs. McLeod, Eyre, Dowling & Co.) appeared for the appellants; the Attorney-General (Sir E. Pollock, K.C.) and Mr. W. Bowstead (instructed by the Solicitor to the Board of Trade) represented the Coal Controller.

Mr. DISTURNAL explained that the judgment complained of was given on an information of the Attorney-General brought to recover balance of price of a cargo of coal. The amount in dispute was £2304 paid by the Coal Controller for demurrage of the ship in discharging. The Judge held that was part of the price appellants had to pay.

In July, 1919, there was a strike in the Yorkshire coalfields. The authorities no doubt feared that public utility undertakings might not be able to secure supplies. The *Levenpool* was in the Tyne with a cargo of coal for abroad. The Coal Controller took it over and offered it to the appellants, delivered at their works at Liverpool. That offer was accepted. The ship arrived on Aug. 1, and discharge was not completed until Aug. 14. The appellants paid the price of the coal and the freight. Afterwards they were asked to pay demurrage for 12 days 16½ hours at the rate of 9d. per ton. They knew nothing about the demurrage and asked to see a charter. At the end of October or the beginning of November a charter-party made months after delivery was sent to them. It purported to be made between the shipowners and the shipper acting on behalf of the appellants. There was no doubt it was really entered into by direction of the Coal Controller. Certainly, it was never made with the authority of the appellants, and they repudiated it as soon as they saw it.

Lord Justice BANKES: The question is whether, under the circumstances, demurrage is part of the reasonable price you have to pay in the same way as the freight.

Mr. DISTURNAL: I suppose, ultimately, that would be the question, but one could hardly say that damages for breach of a contract entered into by the Coal Controller was part of the price of the coal.

Lord Justice ATKIN: Was your contract made when the coal was in the Tyne?

Mr. DISTURNAL: Yes.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: I entirely agree with the conclusion at which Mr. Justice Roche arrived. The facts which give rise to the dispute had reference to the supply of coal to the defendants under very exceptional circumstances. It appears there was a strike in the Yorkshire coalfields, and the Coal Controller, acting in the interest of the defendants, diverted a steamer (which was already loaded under charter to carry coal abroad) to Garston. He told the defendant company what he had done, and they were very pleased to hear it. After the vessel arrived it rested with the gas company to make arrangements for the delivery of the coal, and if there had been any shortage of labour the expense of providing that labour would have fallen upon them. Without any objection whatever, the Coal Controller undertook the making of arrangements for the actual delivery at the nearest place to the gas company's depot at which delivery was desired.

As a result he had not only to pay the controlled price for the coal to the colliery, he had to pay charges of different sorts which are all set out in the last account rendered by the Coal Controller to the gas company. The gas company admit they are liable to pay all these items. What can the contract be under which that responsibility rests? It seems to me it can only be that which the judge has found to be the contract, namely, that in the exceptional circumstances of the case the contract, partly expressed and partly implied, was that the defendant would pay the controlled price for the coal and all the charges which the Coal Controller necessarily incurred and paid for conveying the coal to the destination at which the gas company desired to receive it.

The judge has negatived any suggestion that there was any default on the railway company's or the Coal Controller's part in taking delivery from the ship, or that there was any negligence as the result of which the discharging time was enlarged. Mr. Disturnal has urged the claim for demurrage as in the nature of a claim against the Coal Controller for damages, suggesting that, because it is damages, it must necessarily involve default or neglect on the part of the Coal Controller. I do not want to go into the question of what is the right view as to damages for demurrage beyond fixed lay days and damages for detention. Whether this claim is for detention or demurrage in respect of lay

days provided or whether it is a claim for both, or whether they are all properly described as damages, seems to me immaterial. They are all charges properly incurred in order to get the goods to their destination. Therefore, I think this appeal fails and should be dismissed with costs.

Lord Justice WARRINGTON and Lord Justice ATKIN concurred. The latter added: I only wish to say that I should not be prepared to acquiesce in the view that it was proper or might be proper on the part of the Coal Controller's Department to enter into a contract purporting to be made for the defendants and purporting to be signed by authority—which means made by the authority of the named charterer. That seems to me to be a very unusual and unfortunate course and has no effect at all in determining the legal rights of the defendants. But quite apart from that, I think the obligation of the defendants to pay for this demurrage arises from the considerations set out by the judge and stated by my lord.

COURT OF APPEAL.

Tuesday, May 2, 1922.

OWNERS OF CARGO EX "ATHENEE" v. "ATHENEE."

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

Conflict of Laws—French Bill of Lading—Provision to refer Disputes to Foreign Tribunal — Damage to Cargo — Implied Condition of Seaworthiness — Effect of Arbitration Act, 1889, Sect. 4.

This was an appeal by the defendants, the owners of the French steamship *Athenee*, from an order of the President of the Admiralty Division refusing to stay an action *in rem* brought against them by the receivers of a part cargo of onions, which it was alleged were damaged in course of carriage from Alexandria to Hull.

Mr. G. P. Langton (instructed by Messrs Ince, Colt, Ince & Roscoe) appeared for the appellants; and Mr. R. H. Balloch (instructed by Messrs. A. M. Jackson & Co., Hull, Messrs. Pritchard & Sons, agents) represented the respondents.

Mr. LANGTON, in support of the appeal, said that the goods were carried under a French bill of lading which contained a clause to the effect that any dispute arising under it should be brought before the Tribunal of Commerce at Marseilles. It was in view of that provision in the bill of lading that the defendants took out a summons before the President asking that the action should be stayed. The plaintiffs' case apparently was that the damage occasioned to the onions was due to the unseaworthiness of the vessel, and in order to succeed therefore the plaintiffs must establish that there was an implied condition of seaworthiness. Here the contract between the parties had to be construed according to French law.

Lord Justice ATKIN: Does the French law exclude the condition of seaworthiness?

Mr. LANGTON had no evidence on the point, but he was instructed that it did. If once a merchant had expressed his approval of a ship, he was precluded from saying she was not a good ship.

Lord Justice ATKIN: Unless you have evidence to the contrary, we must assume that the French law is the same as the English law.

Mr. LANGTON, replying to the Court, said he was moving to stay the action under Sect. 4 of the Arbitration Act, and he admitted, therefore, that the learned Judge had a discretion in the matter, but he submitted that the President had not exercised that discretion judicially.

Mr. BALLOCH, for the respondents, was not called upon.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: I think the learned Judge was justified, upon the materials before him, in refusing to exercise his discretion. It is not disputed that this contract is one of the class in which a Judge of the Courts of this country has a discretion as to whether he will or will not stay the action to enable the parties to go to the tribunal which they selected. The learned Judge, in my opinion, is entitled to take all the circumstances into account, particularly the fact that the vessel is under arrest, and the fact of the dispute being in reference to the condition of the onions on arrival, and the fitness of the ship to carry them. Apparently there has been a survey at which both parties were represented; and the witnesses of the material facts are all in this country. I think there was an abundance of material upon which the learned Judge, if he thought right, could have exercised his discretion in the way he did.

Lord Justice WARRINGTON: I agree.

Lord Justice ATKIN: I agree, and I should like to add this. This is a clause by which the parties no doubt have agreed that disputes should be referred to a foreign tribunal. There is no indisposition on the part of the Courts of this country to give effect to such a bargain: but such a bargain is treated as equivalent to an arbitration clause. I desir to read a passage from the judgment of Lord Moulton in the case of the Bristol Corporation v. John Aird & Co., [1913] A.C. 241. There the learned Judge was dealing with a clause that disputes should be referred to the engineer of one of the parties. He says:—

> I always look upon these arbitration clauses as in a business point of view a substantial portion of the contract, and I think the Courts have acted quite rightly in requiring good reason to be shown why this part of a contract should not be strictly performed. But, my Lords, it must be remembered that these arbitration clauses must be taken to have been

inserted with due regard to the existing law of the land, and the law of the land as applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives to the Court the power to refuse its assistance in proper cases. Therefore, to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe the position. We are carrying out the bargain between the parties, because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so enforced.

I think that applies to a case of this kind. The question arises in respect of a clause to refer to a foreign tribunal as to a clause to refer to a domestic tribunal, whether there are proper reasons for not enforcing it. To my mind there were ample reasons for the learned President not enforcing it in this case. I think the balance of convenience and the substantial advantage which the plaintiffs have by suing in this country (and which they lose by not being able to proceed *in rem* against this ship), and many other advantages such as in respect of proof of loss, a matter which any commercial tribunal would wish should be decided, if possible, having regard to the evidence obtained at the time by inspection of the vessel and so on—all those grounds seem to me to afford ample reason for the learned President coming to the conclusion that, in the circumstances of this particular case, the clause in the contract should not be given effect to.

Lord Justice BANKES: The appeal will be dismissed with costs in any event.

COURT OF APPEAL.

Wednesday, May 3, 1922.

WHITE, CHILD & BENEY v. SIMMONS. SAME v. EAGLE STAR & BRITISH DOMINIONS INSURANCE COMPANY.

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

Insurance against Loss of Securities and Funds in Russian Bank by Riots—Confiscation or Destruction by Government excluded—Confiscation by Bolshevists—Status of Confiscators—Validity of Decree.

In these two cases the defendants, Mr. George Simmons, an underwriting member of Lloyd's, and the Eagle Star & British Dominions Insurance Company, Ltd., appealed from a judgment of Mr. Justice Roche (10 Ll. L. Rep. 278) in favour of the plaintiffs, Messrs. White, Child & Beney, Ltd., merchants and engineers of Westminster.

It appeared that part of the plaintiffs' business was transacted, at the material time, in Russia. For the purposes of their Russian business, the plaintiffs, through their London bankers, the London County Westminster & Parr's Bank, deposited moneys and Russian Treasury Bonds with the Petrograd branch of the Banque de Commerce de l'Azoff-Don. By a policy of insurance dated Jan. 24, 1917, and a Lloyd's policy dated April 27, 1917, they took out an insurance on the Treasury Bonds and their balance at the Petrograd bank, against (*inter alia*) loss or damage "directly caused by fire, rioters, civil commotions, war, civil war, revolutions, rebellions, military or usurped power." The policies excepted claims for "confiscation or destruction by the Government of the country in which the property is situated."

The risks insured against and excepted were set out in a clause attached to the policies known as the N.M.A. clause or the Non-Marine clause. In December, 1917, the Bolshevists took possession of the Petrograd Bank and everything in it, including the insured property. The plaintiffs accordingly brought these two actions, claiming losses under the policies.

Mr. Justice Roche held that the losses were losses within the meaning of the policies and that, in the absence of any material—whether supplied by the Foreign Office or otherwise—on which the Court could hold that the Russian Soviet Republic was at that time recognised as a Sovereign Government, the loss was a loss by "rebellions, military or usurped power" within the meaning of the policies. His Lordship, therefore, held that the plaintiffs were entitled to recover, and the defendants now appealed.

Mr. R. A. Wright, K.C., and Mr. H. Claughton Scott (instructed by Messrs. Simmons & Simmons) appeared for the appellants; and Mr. F. D. Mackinnon, K.C., Mr. C. Doughty and Mr. F. W. Beney (instructed by Messrs. Budd, Johnson, Jecks & Colclough) represented the respondents.

Mr. WRIGHT, in opening the appeal, said that two questions arose, (1) Was there any loss at all under the policy; (2) if so, was it a loss by perils insured against? What the policy covered was described both positively and negatively. His first point was that there were no acts operating at the material time which could be treated as coming within the positive risks set out in the clause. Secondly, he submitted that in any case what happened came within the negative part of the clause, and was covered by the exception, "Confiscation by the Government of the country" in which the property was situated.

Counsel argued that the decree for the nationalisation of banks in Russia, passed in December, 1917, under which the money and bonds in question were confiscated, was a decree passed by the present Soviet Government, and in support of this conten-

tion he referred to the decision of the Court of Appeal in Luther v. Sagor & Co., [1921] 3 K.B. 532 and 7 Ll.L.Rep. 218.

Thursday, May 4, 1922.

Mr. WRIGHT, continuing his case for the defendants and appellants, pointed out that the bonds and money in the Bank Azoff were removed and put into the vaults of the State bank, and that that was done in an orderly way. The plaintiffs would have to show that that constituted a direct physical loss, because the policies undoubtedly dealt with physical loss. Their loss was due to the fact that this was a legal operation done under the law of the country. If what occurred were a mere temporary irruption which could have been swept away, the Bank Azoff would have remained, and they would have been entitled to repossession of these bonds and moneys. No loss had been made out under the policies. The real trouble of the plaintiffs was that Russia had become subject to a form of government which was odious to our economic methods, and the position of the plaintiffs, who had suffered with many others, was that the bonds and roubles in question had been taken by the Bolshevist Government, which our Government had now recognised. Nothing that happened in December, 1917, had caused the loss of these bonds and moneys. What had caused the loss was Bolshevist legislation inspired by Communist ideas, and it was only because of that legislation that the Bank Azoff had ceased to exist.

Mr. MACKINNON, for the respondents, said if they went back to the time when the bargain of insurance was made and ascertained what was meant, they would find that the bargain was in regard to property stated to be deposited at Petrograd, and which, in order to be insured, must remain at Petrograd. The parties were insuring against risk of riot, revolution and rebellion. It was never contemplated that the success of those people against whose acts they were insuring, and the consequent increase of the very risks insured against, should at once cause the insurance to be ineffective. It did not follow that because a Government which came into existence, say, in June, 1920, and adopted and ratified and made its own something done before that date the Government was in existence at that date. Counsel called attention to the evidence given before Mr. Justice Roche as to the events in December, 1917, when the bonds and securities were removed from the Bank Azoff. One witness who was in Petrograd at the time said that the Government in Petrograd then was an incomplete Government which controlled certain branches of the administration. That was on Dec. 14. Counsel admitted that the Bolshevists might have had a majority of the men at arms about the place, and to that extent they might have been controlling affairs, but they were not a real government.

Lord Justice BANKES said at all events they nationalised the banks and the factories, and they made a decree on Dec. 14.

Lord Justice ATKIN: And established quite a new state of things in the management of the banks, and made a decree which has operated with certain legal effect ever since

Mr. MACKINNON: But it does not follow from that that they were the Government of the country at the time. Counsel then cited the case of the *Lomonosoff*, reported in 1921 Probate, page 97, in which he said a romantic and picturesque story was told of the salvage of a Russian ship by British and Belgian officers from the Bolshevists.

Friday, May 5, 1922.

Mr. MACKINNON, continuing his arguments against the appeal, said they had proved by evidence of people who were looking on that on a certain date, at 9 o'clock in the morning, armed marauders went to the Azoff Don Bank and looted it. Mr. Wright said that was a mis-description. With his forensic tongue in his forensic cheek he said this was an amalgamation of the Bank with a State Bank carried out by administrative officers. When one bank was amalgamated with another bank and took over its assets and liabilities they usually took over all the records. The evidence of the London County & Westminster Bank was that for years, at intervals of time, they had been making application to the Azoff Don Bank, at Petrograd, and no answer had ever been returned to them. Some of their letters had come back to them after a long interval of time.

His case was that it was marauders who looted these bonds. It was idle to call it an amalgamation. If there was an amalgamation it would seem that something had gone wrong because the so-called administrative officers had disappeared and no communication was forthcoming from them. That Court had held in Luther v. Sagor, *sup.*, that the Bolshevist Government came into power on Dec. 13. That was a finding of fact on the facts proved in that case, and if the facts proved in a subsequent case were different, the Court was not bound by its conclusions of fact in the previous case. They now had fresh information and quite different accounts from the Foreign Office, and it appeared that so far from the Constituent Assembly being dispersed finally by the Bolshevists on Dec. 13, it was postponed until a new election had taken place. The result of that election was that over 400 members were elected and the Bolshevists were in a considerable minority. Whereupon, having none of the sanction of public opinion, but having the greater amount of force at his disposal, Lenin published a bombastic Proclamation in effect saying that as the people elected

were not of his opinion he declared their election void.

Lord Justice BANKES: You are assuming that the Constituent Assembly was to assume the functions of Government. I cannot see any evidence of that. They were elected for the purpose of framing a constitution.

Mr. MACKINNON said he agreed, but all he was concerned about was that it was sufficient for him to show that on Dec. 14 there was no Government at all.

Lord Justice ATKIN: That does not follow, because you can have a provisional Government. Nobody knows who called the Constituent Assembly into being or on what basis it was elected.

Mr. MACKINNON said he did not know, nor was it for him to prove it. He proved that on a certain day armed marauders looted the bank, and he *prima facie* proved a loss within the policy. The plaintiffs set out to prove that despite that *prima facie* proof it was a confiscation by the Government of the country, and it was for them to prove the Bolshevists were the effective Government at that time. The Foreign Office documents proved that the Bolshevists only assumed power until the Constituent Assembly met and confirmed them. That threw the greatest possible doubt on the assertion that the Bolshevists were then the effective Government. It was certainly not established that they were the *de facto* Government. He had proved that there was an absolute state of anarchy, and he submitted that Mr. Justice Roche's decision was correct.

Mr. DOUGHTY followed on the same side, contending that the seizure of the bonds was a mere act of robbery which the Bolshevists afterwards endeavoured to regularise, and that the earliest date at which the Bolshevists could be said to have come into power was Jan. 19, 1918.

Without calling on counsel for appellants to reply, their Lordships gave judgment allowing the appeals, with costs.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: These are two actions in which the assured claim to recover from underwriters losses which they say they have sustained, and which were covered by the two policies on which the actions are brought.

The first question that arises is as to the construction of the policies. They are not in the same form, and they do not cover the same kind of property, but for the purposes of this appeal and my decision on it there is no really material distinction between them. The policy which I will deal with is the policy issued by the British Dominions General Assurance Co., Ltd. It purports for a premium which has been paid to cover the property which consisted of 100,000 roubles Russian Treasury Bonds, deposited with the Banque de Commerce de l'Azoff Don at Petrograd, and the risk covered is expressed in a clause in these terms:—

> This policy is to cover the risk of loss and/or damage to the property hereby insured directly caused by fire, rioters, civil commotions, war, civil war, revolutions, rebellions, military or usurped power.
>
> It goes on:—
>
> No claim to attach hereto for delay, deterioration, and/or loss of market, or for confiscation or destruction by the government of the country in which the property is situated.

It is said that the part of the clause referring to confiscation or destruction by the government of the country is an exception from the earlier part of the clause. I do not so read the clause. It seems to me that the clause is dealing with two sets of acts which are set in contrast. The contrast is between acts of the government of the country and acts of rioters or acts done during civil commotion, war, civil war, rebellions and so forth; and the effect of that part of the clause is to exclude altogether from being covered acts causing loss which are acts of confiscation or destruction by the government, and include only the other class of acts, namely, acts caused by fire, rioters, &c. If that is so it is plain that the first question to decide is whether the act which is said to have caused the loss was an act of the one class or the other; and the main contention between the parties here is whether the act which is said to have caused the loss was an act of the government of the country in which the property was situated or whether it was an act occurring as the result of civil commotion or revolution or usurped power. One contention in reference to this clause is, as I understand it, made on behalf of the assured that when the clause uses the word government it refers to the government in existence at the time of the issue of the policy. Mr. Justice Roche would not accept that contention, and in my view he was right. It seems to me that the government referred to in the clause must be the government in existence at the time of the act complained of causing the loss. The act complained of causing the loss here was a decree which was issued on Dec. 27, 1917 new style, Dec. 14 old style, which purports to have been issued by a body calling itself the Central Executive Committee, a decree which was published in No. 30 of the Gazette of the Provisional Workers' and Peasants' Government, dated Dec. 17, 1917. It is material to consider who the body was that issued that decree. The decree itself is one that declared that banking was a state monopoly, and that all banks in the form of companies limited by shares should now be united with the state bank; that the assets and liabilities of the concerns to be liquidated should be taken over by the state bank; and as a result of that decree on that date, Dec. 27, the premises of the Azoff-Don Bank in which these bonds were deposited were forcibly entered and taken possession of by armed men under the authority of that decree, and the whole of the Treasury bonds which were in the custody of the bank at that time were forcibly removed from the possesssion and

control of the bank and presumably taken to what in the decree was called the state bank. Mr. Justice Roche has decided, and in that I think he was quite right, that the effect of the decree and the action taken under the decree constituted a loss within the meaning of the policy of the subject-matter of the policy, namely, the bonds deposited by the assured.

The question then arises whether the act complained of was an act of government or an act of a usurped power within the meaning of the policy. The question as to the view that has to be taken of the position of matters in Russia, at or about this material time in December, and as to the view that is to be taken in reference to the action of what are generally spoken of as the Soviet authorities, has been under consideration in this Court recently; and so far as this Court came to any decision on that matter it would be binding in this case. Of course that decision was a decision only on the facts as they were laid before the Court in that action, and if different or further facts had been laid before the Court in this case it would have been open to the Court possibly to draw a distinction, and a material distinction, between the facts in that case and the facts in the present case. Mr. Justice Roche in a most careful judgment has come to the conclusion that the facts laid before him were so substantially different from those laid before the Court in Sagor's case, *sup.*, that he was justified in arriving at a conclusion different from that arrived at by this Court in Sagor's case; and he came to the conculsion that the insurance company had failed to establish that the act complained of on Dec. 27 was the act of a government within the meaning of the policy. I think that the best course. I can take is to deal first with what was before the Court in the Sagor case, and what the Court there decided.

The question in that case had reference to property in certain timber. The plaintiffs claimed that they were the owners of certain timber in Russia prior to June, 1918; and they claimed a declaration that they were entitled to that timber which had been shipped from Russia to England and was claimed by the defendants in that action as their property. The defendants claimed it on the ground that they had bought it from the then Russian Government and that the then Russian Government had a right to sell it to them because timber had been nationalised under a decree of the then Russian Government which was a valid and effective legislative act. The decree which nationalised the timber was dated June 30, 1918, and it purported to be a decree of the Council of Commissaries for the people. By Art. 1 of that decree all industrial and commercial establishments mentioned in a schedule with their capital and assets were declared the property of the Russian Socialist Federal Republic. The list included the timber establishment of the plaintiffs. The sale to the defendants by a person who claimed to be the representative of the Russian Socialist Federal Republic was made in August, 1920; and it was in March, 1921, that the trade agreement between this country and the Government of the Russian Socialist Federal Republic was made. That was a trade agreement made between H.M. Government and the Government of the Russian Socialist Federal Republic; and it is material to notice that in Clause 10 of that agreement the Russian Soviet Government undertook to make no claim to dispose in any way of the funds or other property of the late Imperial and the Provisional Russian Government in the United Kingdom. So far as this agreement was concerned three Russian Governments were referred to, the late Imperial Government, the Provisional Russian Government, and the Soviet Government. After that agreement had been entered into, the question was raised as to whether the government of this country recognised the Soviet Government as the *de facto* government of Russia as then existing; and in the Sagor case this Court had before it certain information derived from the Foreign Office, because in that case it was laid down as an accepted rule that the source from which to derive proper information as to whether the government had or had not, did or did not, recognise any foreign government was the Foreign Office. So application was made to the Foreign Office; and this Court had two letters, one Apr. 22 and the other May 4 of 1921, both from the Foreign Office addressed to different firms of solicitors. In the letter of Apr. 22 addressed to Messrs. Linklater, the Foreign Office said:—

> The Provisional Government (which is the one referred to in the trade agreement, generally known as Kerensky's Government) came into power Mar. 14, 1917. The executive authority of that government was seized by a military revolutionary committee on Nov. 7, 1917, and turned over to the All Russia Congress of Workmen, Soldiers and Peasants' deputies on the following day. The Constituent Assembly, however, remained in session until Dec. 13, 1917, when it was dispersed by the Soviet authorities.

In the letter of May 4 the Foreign Office stated that H.M. Government recognised the Soviet Government of Russia as the *de facto* government of that country on Mar. 16, 1921. Upon that information and in these circumstances, one question the Court had to look into and decided in Sagor's case was whether the Soviet Government, with whom the government of this country had made a trading agreement in March, 1921, and which it recognised as the *de facto* Government of Russia on that date, was or was not the *de facto* Government of Russia at all material dates for the purposes of the Sagor case, which covered a period to some date anterior to the date of the decree in June, 1918, which nationalised the timber factories. The conclusion which the Court came to was expressed by myself and Lord Justice Scrutton, [1921] 3 K.B. At page 544 I say this:—

> From the letter from the Foreign Office of Apr. 22, 1921, it appears that the Soviet

authorities dispersed the then Constituent Assembly on Dec. 13, 1917, from which date I think it must be accepted that the Soviet Government assumed the position of the sovereign government and purported to act as such.

So I think on the facts then before the Court, the Court did decide that the authority which dispersed the Constituent Assembly on Dec. 13, 1917, was the same authority which his Majesty's Government recognised as the *de facto* government in March, 1921. Mr. Justice Roche had some further information before him than was before the Court in that case; and I think that if the fuller information had been before the Court in Sagor's case I might have certainly expressed the conclusion at which I arrived in rather different language. But it would have been entirely the same conclusion after the further consideration which I have been able to give to the matter. The further information which Mr. Justice Roche had before him consisted of correspondence which was addressed to the Foreign Office by the solicitors to the assured in these two cases, in which, proceeding from the point which was dealt with in Sagor's case, the solicitors desired to obtain from the Foreign Office an expression of opinion as to when the Soviet Government came into actual existence as the government which was recognised as the *de facto* government by this country; and I think not unnaturally the Foreign Office felt themselves unable to give that information. But what they did do was to set out in tabular form a statement with reference to all the material events in Russia as known to the Foreign Office from which they said the Court could draw its own inference as to the date when this government should be said to have come into existence. Mr. Justice Roche, not satisfied with that, himself caused to be addressed a further letter to the Foreign Office which elicited further information which appears to be very material, and which clears up certain difficulties which are apparent on the surface owing to the different styles or titles under which some of these decrees have been issued.

There is one point to which I desire to refer in Mr. Justice Roche's judgment. It does not seem to me that the sources of information as to when a particular government came into existence as a government is a matter for the Foreign Office to determine. That must depend on the particular facts on which the Court must itself draw its own conclusion. Mr. Justice Roche has felt himself unable to decide when the Soviet Government came into existence, partly because the Foreign Office are unable to express any opinion on the point. That does not seem to me a true ground on which to form an opinion. In what is called an annexe to the Foreign Office letter of June 10, 1921, which gives a full statement of the material facts as known to the Foreign Office, it appears that a Republic was proclaimed by the Provisional Government in September, 1915; that the Bolshevist *coup d'état* in Petrograd occurred on Nov. 7, 1917, and on Nov. 13 the defeat of Kerensky forces and flight of Kerensky. On Nov. 14, the decree stipulating that the legislative power lay with commissaries of the people until the meeting of the Constituent Assembly was published. In a further letter from the Foreign Office to Mr. Justice Roche this important passage occurs. It is stated that the decree dissolving the Constituent Assembly issued on Saturday, Jan. 19, emanated from the Central Executive Committee of the Soviets. This body, so far as the Foreign Office could ascertain, provisionally elected commissaries of the people during the interval between the Bolshevist seizure of power on Nov. 7, 1917, and the passing of the new constitution in July, 1918, which formally vested this power in the Central Executive Committee. It seems from that information that the body which was exercising the executive authority in Petrograd from Nov. 14, 1917, until Jan. 19, 1918, was the Central Executive Committee of the Soviets.

I have already pointed out that the decree of Dec. 27, which was the decree nationalising the banks and causing this loss to the assured, was one passed at the meeting of the Central Executive Committee in December, 1917; and I have already pointed out that the decree which in this Court in Sagor's case was held to be a decree of the Soviet Government was a decree of the Council of Commissaries; and that council, according to the last statement from the Foreign Office, is the council which was elected provisionally by this same Central Executive Committee which seems to establish the identity of the authority which on Nov. 14 purported to act as the Government of Russia, exercising full executive authority or claiming to exercise full authority, and stipulating that the legislative power lay with commissaries of the people until the meeting of the Constituent Assembly. Then the statement of facts goes on to say that the Constituent Assembly was apparently elected from the whole of Russia, that the Constituent Assembly opened on Dec. 11, and was on Dec. 13 dispersed by armed force directed by this Central Executive Committee. Mr. Justice Roche seems to have assumed that this Constituent Assembly was to be the government of the country—the *de jure* government of the country; and upon the further information before him he appears to have come to the conclusion that this Court was insufficiently informed when it treated the dispersal of the Constituent Assembly on Dec. 13 as the final dispersal of the government as represented by the Constituent Assembly. It now appears that that dispersal on Dec. 13 was not the final dispersal of the Constituent Assembly, because another Constituent Assembly was summoned, and that was not finally dissolved until Jan. 19. But there is no evidence to show that this Constituent Assembly was within the meaning of the policy intended to be when assembled the government of the