Privy Council Appeal No. 10 of 1915.

The Union Insurance Society of Canton, Limited - - - - - - *Appellants.*

v.

George Wills and Company - - - *Respondents.*

FROM

THE SUPREME COURT OF THE STATE OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER 1915.

Present at the Hearing.

VISCOUNT HALDANE. LORD PARMOOR.

LORD WRENBURY.

Delivered by LORD PARMOOR.

On the 28th February 1911 the respondents effected a contract of marine insurance with the appellants, which was issued by their office at Perth in Western Australia. This contract has been treated throughout the proceedings as a policy, and it covered all shipments of merchandise of every description commencing to load at first port of loading, on or before the 28th February 1912, with the exception of full cargoes, at and from certain specified ports. There are differing rates of premium, but the rate applicable in the present instance was 10*s.* per cent. The policy contains a clause:—

"Declarations of interest to be made to this Society's "agent at port of shipment where practicable or Agent in "London or Perth as soon as possible after sailing of vessel "to which interest attaches."

The ship "Papanui" sailed from ports Liverpool, Glasgow, Avonmouth and London, leaving

London on the 21st August 1911. The respondents loaded cargo at each of these ports. On or about 12th September 1911, the "Papanui" was destroyed by fire at or near St. Helena, and all the respondents' goods were totally lost. The respondents did not forward a declaration of interest as soon as possible after sailing of the vessel, but there is no suggestion of any want of good faith on their part or that the reasons assigned by them for the delay are not genuine. The declaration of interest was forwarded on 13th September 1911, the day after the loss of the vessel.

By their writ issued on the 12th February 1912, the respondents claim the sum of 5,225*l.* for a loss under the policy. In their defence the appellants plead that the policy contained a condition or promissory warranty that a declaration of interest should be made and that such declaration was not made as soon as possible after the sailing of the steamship "Papanui." Alternatively they counterclaimed for damages, but this point was not argued before their Lordships, and it is unnecessary to refer further to it. The Acting Chief Justice of Western Australia gave judgment in favour of the respondents, and this judgment was affirmed by the Full Court of the Supreme Court of Western Australia on the 13th July 1914.

The question to be determined in this appeal is, whether the promise by the assured to make a declaration of interest as soon as possible after sailing of the vessel is a warranty, as that word is used and understood in the law of marine insurance, or a collateral stipulation, the breach of which would not avoid the contract but would only found a right to bring

a cross-action, or to counter-claim, for damages. If the promise amounts to a warranty it is immaterial for what purpose the warranty is introduced. The parties had a right to determine for themselves if they desired to introduce a warranty clause as a term of the policy. It has long been established in the common law of England that there is no liability on the insurer unless a warranty is exactly complied with. This principle is made statutory by section 39 of the Commonwealth Marine Insurance Act, No. 11, 1909, which corresponds with section 33 of the English Act, 1906. This section enacts that a warranty, as therein defined, is a condition which must be exactly complied with, whether it be material to the risk or not, and that if it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from his liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date. Sub-sections (1) and (2) of the same section enact that a warranty, in the following sections, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts, and that it may be expressed or implied. This provision does not operate to bring within the category of warranty, promises which in the construction of the contract are not intended by the parties to amount to warranties. In the present policy

the assured undertakes to do a particular thing, namely, to make a declaration as soon as possible after the sailing of a vessel, and the question is whether this undertaking amounts to a warranty. An express warranty may be in any form of words from which the intention to warrant can be inferred.

The policy is an open or floating policy under which the liability of the insurers in the first instance attaches before the sailing of the vessel, and therefore at a time before the declaration of interest is due to be made. It was referred to as "a warehouse to warehouse policy," but in any case it is clear that the declaration of interest is not a condition precedent in the sense, that a non-compliance therewith vitiates the whole policy *ab initio*. If, for instance, the merchandise insured had been destroyed by fire in port before the sailing of the vessel, the promise to make a declaration after the sailing of the vessel would not avoid the policy, and the insurers would be liable, if in other respects the conditions of the policy had been complied with. A condition, however, is not the less a warranty because it is a condition subsequent, and unless such a subsequent condition is complied with at the time when its performance is due under the contract, the insurer is discharged from liability as from the date of the breach. Their Lordships have already referred to section 39 (3) of the Commonwealth Marine Insurance Act, No. 11, 1909, which affirms the common law principle that this discharge is without prejudice to any liability incurred by the insurer before that date. This provision does not apply in the present case, since no liability had been incurred before the date at which the declaration of interest was due to be made.

In the present policy the word "warranty" is not used, but their Lordships are of opinion that, on the construction of the contract as a whole, the parties did intend that the promise to make a declaration as soon as possible after sailing of the vessel should be a warranty, and that, in the events that have happened, there is no liability upon the insurers. There is no difficulty in construing the terms of the promise which the assured have made, and there is no question that this promise has not been complied with. The object of the promise is to protect the interests of the insurer. The question arises whether this object is so material to the risk, and has such a material bearing on the bargain, that it forms a substantive condition of the contract, as contrasted with a collateral stipulation for the breach of which damages—if they could be proved—might be claimed by cross-action or by way of counterclaim. If evidence is necessary, the underwriter of the appellants in London, whose evidence was taken on commission, states that the insurers can only arrive at their line of insurances if the declarations of interest are promptly made, and that this information is required to enable insurers to regulate what line they wish to keep, and what amount they may desire to reinsure, and that the amount of line varies very much by particular vessels. It is true that insurers are automatically protected by handing on to other people the excess of liability beyond a certain amount by a class of steamers; but this does not affect their practice of further reducing the amount of their liability in respect of special vessels by effecting special reinsurances. It was suggested that the business might be carried on in some different way which would render the promise to make prompt

declarations of less materiality, but the witness denied that the suggestion was practical, and there is no reason for thinking that the business is not carried on according to business experience, so as to avoid, as far as possible, unnecessary risks. It is immaterial to the construction of the contract to consider subsequent events. The intention of the parties must be gathered from the language of the contract, the subject matter, and the circumstances in existence at the time it was made. It appears to their Lordships that the declaration did directly affect the question of reinsurance, and in this respect was clearly material to the risk and constituted a substantive condition of the contract. It follows that the nonfulfilment of the warranty discharges the insurer from liability as from the date of the breach, and that the insurer is not relegated to such remedy as might be open to him by way of cross-action or counterclaim.

A number of cases were referred to in the course of the argument before their Lordships, but it is only necessary to refer to three of them. It is unnecessary to analyse them in detail, since they mainly depend on the terms of the particular policy on which the litigation has arisen. In *Thompson* v. *Weems and Others* (9 App. Ca., p. 671) the question arose, on a a life policy, whether the policy was void on a warranty. Lord Blackburn, in giving his opinion, makes the following general statement of law :—

" It is competent to the contracting parties, if both agree " to it and sufficiently express their intention so to agree, " to make the actual existence of anything a condition " precedent to the inception of any contract ; and if they " do so the non-existence of that thing is a good defence. " And it is not of any importance whether the existence

" of that thing was or was not material ; the parties would " not have made it a part of the contract if they had not " thought it material, and they have a right to determine " for themselves what they shall deem material. In policies " of marine insurance I think it is settled by authority " that any statement of a fact bearing upon the risk intro- " duced into the written policy is, by whatever words and " in whatever place, to be construed as a warranty, and, " *primâ facie*, at least that the compliance with that " warranty is a condition precedent to the attaching of " the risk."

There is no difference in principle in this respect between a statement of fact and an undertaking that some particular thing shall be done. Their Lordships have already stated their opinion that the promise to make a declaration as soon as possible after sailing of a vessel is a matter bearing upon the risk, and therefore a warranty within the opinion expressed by Lord Blackburn.

Counsel for the respondents referred at some length to the case of *Davies and Another* v. *National Fire and Marine Insurance Company of New Zealand* (1891, App. Ca., p. 485). In this case it was held that under the terms of the contract two declarations were necessary, and their Lordships cannot find that it supports in any way the contention put forward on behalf of the respondents.

In the case of *Stephens* v. *The Australasian Insurance Company* (L.R. 8, C.P., p. 18), it was held that in accordance with the custom therein stated, and according to the usage of merchants and underwriters as recognised by the courts without formal proof in each case, a declaration of interest, which it is the right of the assured to make without the consent of the underwriters, may be altered even after the loss is known, if it be altered at a time, when it can be, and is, altered innocently and without fraud. This principle is now recognised by statute in section

35 (3) of the Commonwealth Marine Insurance Act, No. 11, 1909, and in the corresponding section 29 (3) of the English Act :—

"Unless the policy otherwise provides, the declarations "must be made in order of despatch or shipment. They "must, in the case of goods, comprise all consignments "within the terms of the policy, and the value of the "goods or other property must be honestly stated, but "an omission or erroneous declaration may be rectified "even after loss or arrival, provided the omission or "declaration was made in good faith."

The provision that an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration has been made in good faith, does not apply to the circumstances which exist in the present appeal. It is not a case of omission or error in a declaration which may be rectified even after loss or arrival if there is good faith, but a case in which no declaration has been made within the terms of the contract. To extend the provision to a case like the present would be in effect to deprive the insurers of the benefits of an express warranty in such cases and to abrogate the principle that the insurers are not liable unless the warranty has been exactly complied with.

Their Lordships will humbly advise His Majesty to allow the appeal with costs here and in the courts below, and that judgment be entered for the appellants.

In the Privy Council.

THE UNION INSURANCE SOCIETY OF CANTON, LIMITED

v.

GEORGE WILLS AND COMPANY.

DELIVERED BY LORD PARMOOR.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1915.