Privy Council Appeal No. 80 *of* 1933.

Norwich Union Fire Insurance Society, Limited - - - *Appellants*

v.

Wm. H. Price, Limited - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1934.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD WRIGHT.
SIR LANCELOT SANDERSON.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD WRIGHT.]

The appellants, an English insurance company with branches in many parts of the world, including (amongst other places) Messina and Sydney, N.S.W., brought the action out of which this appeal arises, against the respondents, a company trading as produce brokers in Sydney, N.S.W., for the return, as money paid under a mistake of fact, of £453 11*s.* 3*d.*, which had been paid to the respondents by the appellants on the footing of a loss having occurred under a policy of marine insurance dated the 11th December, 1928; this policy had been issued by the appellants' branch at Messina to the shippers of 600 bushels of lemons on the steamship "Aagtekerk," and insured the lemons on the voyage from Messina to Sydney, N.S.W. The insurance was against the usual perils, including sea perils, and was f.p.a., unless in respect of damage caused by fire, sinking, collision, or stranding. The lemons were shipped at Messina in December, 1928, and the steamship proceeded

on her voyage ; at Smyrna, when entering the port, she struck a submerged object : the cargo stowed in No. 1 hold was damaged by sea water, but the lemons, being stowed in No. 2 hold, were undamaged. The steamship then went on to Gibraltar, where the surveyors ordered her to go to Holland for repairs, the cargo being either transhipped or disposed of at Gibraltar. The lemons were reported to be ripening and fit to be marketed " in about 14 days (limit) " and were sold for that reason about the 5th February, 1929, by the shipowners or their agents in Gibraltar, at the best price obtainable locally. They were not damaged by any peril insured against ; the sale was solely because of their condition.

It is clear on these facts that the respondents, who became, in due course, holders of the policy and endorsees of the bill of lading, had no claim on the policy ; any claim they might have, could only be against the shipowners for failure to deliver in accordance with the bill of lading or against the shippers for shipping goods inherently unfit for transport on the voyage.

The true state of facts was not, however, known either to the appellants or the respondents in Sydney until some time after the 25th March, 1929, the date when the payment in question was made in the circumstances now to be stated. The only information possessed in Sydney up to that date was derived from two documents : (1) a cable from the shippers to the respondents, produced by the respondents to the appellants about the 28th January, 1929, in the following terms :

> " Aagtekerk sailed nineteenth December had collision goods transhipped steamer Arendskerk laying Gibraltar act against Norwich Union Insurance for damage."

(2) a document called a short-landed certificate dated the 12th March, 1929, issued by the shipowners' Sydney branch to the respondents and produced by the respondents to the appellants, which was in the following terms :

> S.S. " AAGTEKERK "
>
> We beg to advise that the 600 cases Lemons consigned to you from Messina, and which were loaded by the above steamer, have been returned to Rotterdam for disposal.
>
> As you are no doubt aware the " Aagtekerk " struck a submerged rock in Smyrna Bay, which necessitated her returning to Rotterdam for repairs, and the delay caused by this forced us to dispose of the lemons at that port.
>
> Yours faithfully,
> HOLLAND AUSTRALIA LINE."

On the faith of these documents, the appellants paid the respondents £453 11*s.* 3*d.* on the 25th March, 1929, taking the following letter from the respondents

> " Sydney.
>
> To the
> Norwich Union Fire Insurance Society Ltd.
>
> In consideration of your agreeing to pay the sum of Four hundred and Fifty-three pounds 11/3d. under Policy of Insurance No. N 602 effected with you on the property mentioned in the schedule hereto we hereby agree

to assign transfer and abandon to you all right title and interest in and to the said property and the proceeds thereof and all that can or may be made saved or realised from the damage or loss reported to have occurred to the said property and all rights against the owners of the other cargo on board any vessel or other person whatsoever caused or arising by reason of the said damage or loss and to grant you full power to take and use all lawful ways and means in our or your name or otherwise—at your risk and expense—to save and realise the said property or its proceeds and hereby agree to subrogate you to the same rights as we have in consequence of or arising from the said loss or damage.

And we hereby undertake and agree to make and execute at your expense all such further deeds assignments and documents and to render such assistance as you may reasonably require for the purpose of carrying out this arrangement.

As witness our hands this Twenty-fifth day of March, 1929.

SCHEDULE OF PROPERTY.

As per Bill of Lading and Invoice per " Aagtekerk " bound from Messina to Sydney.

Witness Signature
JOHN B. FERGUSON. WM. H. PRICE LTD.
W. H. PRICE, Director."

Sometime afterwards, the appellants were first informed that the lemons had not been damaged by any peril insured against and discovered for the first time that they had made the payment under a mistake of fact. A claim was made for the return of the money, and when the return was refused, this action was brought.

It was ordered in the action that there should first be tried the question whether, on the assumption that the payment was made under a mistake of fact, the monies paid were recoverable. The Chief Justice stated in his judgment that when the appellants made their agreement of the 25th March, 1929, there is no doubt they believed that the lemons had been damaged by the collision : he added, " I have no doubt, too, that the defendant was under the same belief." It is not necessary here to consider whether in any subsequent proceeding in this case the respondents will be able to impugn this position. The present proceeding is based on that assumption. The Chief Justice went on to say, " It is clear that the payment of the insurance monies in consideration of the defendant's agreement to abandon its right to its property and its subrogation of those rights to the plaintiff was based on an underlying assumption by both parties that the lemons had been damaged by a peril insured against, that is, by collision with some submerged object." The Chief Justice accordingly held that at common law the appellants would be entitled to recover as for a payment made under a mistake of fact ; but he held that, notwithstanding, the appellants were debarred from recovering because there had been a notice of abandonment given and accepted within the meaning of section 68 (6) of the Australian Marine Insurance Act, 1909, so that a conclusive admission of liability for the loss was constituted as against the appellants. James, J., agreed with the Chief Justice : the decision of the

Trial Judge had been to the same effect, and was accordingly affirmed. Davidson, J., in the Full Court reached the same conclusion as his colleagues, but for other reasons; he did not agree that the claim was barred by the provisions of the Marine Insurance Act, but he held that the mistake was one of law.

Their Lordships agree with the Trial Judge and with the majority of the Full Court that for purposes of this appeal the mistake was one of fact and was fundamental to the transaction. On the assumptions on which this appeal proceeds, the misconception under which the payment was made was that there had been a loss by perils insured against; unless that were so, there was no liability under the policy: save for that misconception no payment could have been claimed and no payment would have been made. The facts which were misconceived were those which were essential to liability and were of such a nature that on well-established principles any agreement concluded under such mistake was void in law, so that any payment made under such mistake was recoverable. The mistake, being of the character that it was, prevented there being that intention which the common law regards as essential to the making of an agreement or the transfer of money or property. Thus, in *Kelly* v. *Solari*, 9 M. & W. 54, where money was paid under a mistake of fact, Baron Parke concludes his well-known statement of the law with these words: "If it (the money) is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it." The "fact" which Baron Parke is referring to is one "which would entitle the other to the money" if true. The reference to intention is crucial. In the same sense, in *R. E. Jones, Limited* v. *Waring and Gillow* [1926], A.C. 670, Lord Sumner at p. 696 says of *Kelly* v. *Solari*, "The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy and was making a mistake in paying again. If so, there was no real intention on the company's part to enrich her." Lord Sumner had just pointed out that passing of property is a question of intention, and just as much so in the case of a payment of money as in the transfer of a chattel. To the same effect, Lord Shaw in the same case, at p. 690, says in respect of mistakes, "The true facts may not have been known to the grantor or may have been misrepresented, with such a result that the mind of the grantor does not go with the transaction at all . . . his mind goes with another transaction and he is meaning to give effect to that other transaction, depending on facts different from those which were the true facts." Thus, in the present case the only transaction with which the mind of the appellants went was payment of a claim on the basis of the truth of facts which constituted a loss

by perils insured against: it never intended to pay on the basis of facts inconsistent with any such loss by perils insured against. The mistake was as vital as that in *Cooper* v. *Phibbs*, L.R. 2 H.L. 149, in respect of which Lord Westbury at p. 170 used these words: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded on a common mistake." At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell* v. *Lever*, [1932] A.C. 161.

It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty. Applying these principles to the present case, their Lordships find themselves so far in agreement with the opinions of the Courts below that the money paid is recoverable at common law. That leaves for consideration the point on which the decision went against the appellants, so that this appeal is brought.

It is first necessary to determine precisely what was the transaction of the 25th March, 1929, the nature of which must be ascertained from the document of that date. The Court below have held that it either constituted or evidenced a notice of abandonment as for a constructive total loss and an acceptance of that notice.

It was agreed before this Board that the rights between the parties must be ascertained in accordance with the municipal law of Australia, including the provisions of the Marine Insurance Act, 1909. That Act corresponds in substance with the English Marine Insurance Act 1906: thus section 4 of the former Act says that the rules of the common law, including the law merchant, save in so far as they are not inconsistent with the express provisions of the Act, shall apply to contracts of marine insurance: this section is identical with section 91 (2) of the latter Act. Similarly sections 62, 63, 66 and 67 of the Australian Act, correspond with sections 56, 57, 60 and 61 of the English Act, and define partial and total loss and actual and constructive total loss in identical terms: section 68 of the former Act which deals with notice of abandonment is identical with section 62 of the English Act. The policy, which was in Italian, did indeed contain special terms as to abandonment, but they are not material in this case.

Their Lordships cannot find in the document of the 25th March, 1929, any justification for reading it as a notice of abandonment or as an acceptance of such a notice or as dealing at all with a case of a constructive total loss. In their judgment, the document embodies an agreement for the immediate settlement on the basis of an actual total loss—together with the consequent abandonment to the appellants, upon payment of the amount of the total loss, of all rights or property surviving in respect of the loss. That this is its true meaning, follows both from the actual language of the document and the circumstances of the case as conceived by the parties. The information on which they acted was that the lemons had been actually sold ; the lemons had thus passed from the actual control and possession of the respondents, which had lost them irretrievably. There was thus an actual total loss within the definition in section 63 of the Act : no notice of abandonment need in such a case be given : indeed there could not be a notice of abandonment within section 68 (1) because that section only applies to an election to abandon the subject matter insured to the insurer, whereas, the lemons having been sold, there was nothing that the respondents could abandon. All their right of property in the lemons had gone ; it is not even clear that the lemons existed at all, since in all human probability they had been already consumed. The lemons had been sold, it seems, by the shipmaster or his agents, acting as agents of necessity : the sale was not the result of any sea damage or peril insured against affecting the lemons, but of their inherent vice or of delay : the sale, unless justifiable in consequence of perils insured against, gave no claim against the appellants : it could not on any view constitute a constructive total loss. The document in question is no doubt a usual form for purposes of subrogation, commonly used on payment of an actual total loss. The relevant words are transfer and abandon : they cannot be construed as involving notice of a claim to abandon which the appellants as underwriters were required to accept so that thereby there should be a constructive total loss. In *Rankin* v. *Potter*, L.R. 6 H.L. 83 at p. 155, Lord Chelmsford points out that " abandonment " and " notice of abandonment " are two separate and distinct things, though they are frequently confounded together in expression. The same distinction is developed by Brett L.J. in *Kaltenbach* v. *Mackenzie*, L.R. 3 C.P.D. 467 : he points out that abandonment is part of every contract of indemnity, whereas notice of abandonment is peculiar to marine insurance, just as constructive total loss (as distinguished from actual total loss) is also peculiar. As an instance of abandonment he cites the well-known case of *Roux* v. *Salvador*, 3 Bing. (N.C.) 266 ; that case shows, he says, that where goods had been totally lost, but something had been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. Brett L.J. adds : " But that abandonment takes place at the time of the settlement of the claim : it need not take place before."

In their Lordships' judgment, these latter words exactly describe the transaction between these parties which was recorded in the document of the 25th March, 1929. The parties having been informed that the lemons had been sold owing to delay and coupling that information with the previous cable which they understood to state that the lemons had been damaged as a consequence of the collision, not unnaturally understood the position as being that of a justifiable sale consequent on damage due to perils insured against and accordingly settled there and then as for an actual total loss, the appellants being subrogated to the proceeds of the sale.

On this footing and on the assumption that the parties acted under a mistake of fact, or that the payment was made by the appellants under a mistake of fact, there can, in their Lordships' judgment, be nothing in the Marine Insurance Act which affects the application of the common law rule laid down in *Kelly* v. *Solari* (*supra*). It therefore becomes unnecessary to consider the question so fully discussed in the judgments below as to the construction and effect of section 68 (6) of the Act. Their Lordships will only briefly point out with all respect that there may be other matters to be considered than the bare words of the subsection. No doubt it is not generally permissible in construing the words of the Act to read in conditions and qualifications which are not expressed ; and section 4 only permits the application of the rules of the common law and the law merchant so far as not inconsistent with the express provisions of the Act. But the operative effect of mistake or fraud or duress, in cases where it operates, is not inconsistent with the express words (to take the relevant instance) of section 68 (6), because mistake, if established, raises a preliminary or prior question, namely, whether there is in law a notice of abandonment at all, or an acceptance of such notice ; indeed section 68 (6) presupposes something which is not only in form but in reality a notice of abandonment or an acceptance thereof. Thus, if what appears to be the notice or acceptance is void and a nullity, the express words of section 68 (6) do not apply at all. Long ago when communications were slow and difficult, the position of a notice of abandonment based on false intelligence, was considered. That admirable writer on insurance law, Phillips, at section 1665 of his work, states : " Although an abandonment may be made on true intelligence of a total loss, yet if the intelligence proves to be false the abandonment will be a nullity." In *Bainbridge* v. *Neilson*, 10 East 329, at p. 341, Lord Ellenborough said : " The effect of an offer to abandon is that, if the offer appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a position to insist on his abandonment. But it is not enough that it was properly made upon the supposed facts, if it turn out that no such facts existed."

It would seem that a notice of abandonment which is itself a nullity, cannot become the basis of rights simply because

abandonment has been accepted by the underwriters. It further seems that on general principles, mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract.

It is unnecessary to repeat what has been said earlier in this judgment as to the effect of mistake, but it seems to follow that just as mistake may render a notice of abandonment a nullity, so in the same way it may render an acceptance of the notice a nullity. In other words, though the goods were in fact lost to the respondents, such a mistake as is here assumed throughout would prevent not only the notice of abandonment, but also the acceptance of abandonment, from being other than a nullity. No case would then exist for the application of the words of section 68 (6).

Their Lordships have felt it desirable to make some observations on the question of construction, out of respect to the opinions expressed in the Courts below, but it is not necessary in this case to express any final opinion. It is enough for the decision of the appeal that in their Lordships' judgment there was here no case of a notice of abandonment or an acceptance of such notice, but it was simply a case of money paid under a mistake of fact, so that the appellants who have paid are entitled to recover.

It follows that their Lordships' judgment is that the appeal should be allowed and the judgment and order appealed from be set aside: the appellants will have the costs of the hearings in the Courts below and of this appeal.

They will humbly so advise His Majesty accordingly.

In the Privy Council.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED

v.

WM. H. PRICE, LIMITED.

DELIVERED BY LORD WRIGHT.

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