[HOUSE OF LORDS.]

H. L. (E.)
1882
July 11.

ARTHUR CHARLES BURNAND (ON BEHALF OF HIMSELF AND ALL OTHER THE UNDERWRITERS UPON THE POLICIES OF INSURANCE ON TOBACCO PER "LAMPLIGHTER" EFFECTED BY THE DEFENDANTS) . . . . . } APPELLANT;

AND

RODOCANACHI SONS & CO. . . . . RESPONDENTS.

Marine Insurance—Valued Policy—Loss—Salvage—Indemnity.

The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the *Alabama*, a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an Act of Congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the Act of Congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—

Held, affirming the decision of the Court of Appeal, that the underwriters were not entitled to recover the compensation from the respondents.

APPEAL from a judgment of the Court of Appeal in favour of the respondents (1) reversing a judgment of Lord Coleridge C.J. in favour of the appellant (2).

The facts are fully set out in the report of the case below.

July 10, 11. *Butt* Q.C. and *Cohen* Q.C. (*Hollams* with them for the appellant:—

The appellant having paid the respondents the total loss as agreed between him and them was subrogated to all their rights: *Randal* v. *Cochran* (3); *Blaauwpot* v. *De Costa* (4); *Gracie* v.

(1) 6 Q. B. D. 633.
(2) 5 C. P. D. 424.
(3) 1 Ves. Sen. 98.
(4) 1 Eden, 130.

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New York Insurance Co. (1); *North of England Insurance Association* v. *Armstrong* (2), per Cockburn C.J.; *Darrell* v. *Tibbits* (3). "Where one person has agreed to indemnify another he will on making good the indemnity be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss;" per Lord Cairns in *Simpson* v. *Thomson* (4). "The assured must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it; or rather such property vests in the underwriters;" per Lord Cottenham in *Stewart* v. *Greenock Marine Insurance Co.* (5). Though there was, at the time of insurance loss and payment, no fund out of which the compensation could be paid, there was at least a moral obligation on the United States Government to apply the fund to the benefit of the assured; and it was not a pure act of grace; nor like a bequest by a relative to compensate for a loss inadequately insured. If the cargo itself had come into the hands of the assured the appellant would clearly have been entitled to it; and there can be no difference in principle between the cargo itself and its value. The obligation to repay is as clear and binding as if it had been expressed in the policy, and no Act of Congress could take it away The valuation is conclusive for all purposes between insurer and assured except that of ascertaining whether there has been a constructive total loss.

Sir H. James A.G. and *Hon. A. E. Gathorne Hardy* for the respondents were not heard.

LORD SELBORNE L.C.:—

My Lords, this is a short, but interesting and important question. Your Lordships have heard a very able argument, and have had the benefit of considering the able opinions of the learned judges in both the Courts below, and I believe there is no doubt in the minds of any of your Lordships that the judgment under appeal is right.

(1) 8 John. N. Y. Rep. 237.
(2) Law Rep. 5 Q. B. 244, 248.
(3) 5 Q. B. D. 560.
(4) 3 App. Cas. 284.
(5) 2 H. L. C. 159, 183.

Now, if I may venture to do so, with that sincere respect which I always feel for everything which falls from judges so eminent as Lord Coleridge and Baggallay L.J. I will indicate what I think is the fallacy in the reasoning of those learned judges. It is this; they have taken the valuation of the policy as conclusive and as operating by way of estoppel between these parties for a purpose for which, as it appears to me, it is not conclusive and does not estop them. For the purpose of the contract of insurance and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and the effect of it may be that for those purposes the assured is not entitled to say "My loss has been greater than that which was covered by the policy." He cannot say that, for the purpose of withholding from the insurer any indemnity or right by way of subrogation or substitution to which by the true legal result of the contract the insurer is entitled. Whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it. It is admitted that that is the English law when it is attempted to use the valuation for the purpose of determining what is and what is not a constructive total loss.

Now it appears to me that for every other purpose collateral to the contract, for the purpose of every question as to whether a particular claim to something which has arisen aliunde is or is not within those rights which result in law from the contract, there is no more reason for holding the valuation to be conclusive between the parties or to operate by way of estoppel than there is in the case in which it is admitted that in England it does not so follow. The title to a particular indemnity granted in particular terms out of a particular fund at the disposal of the United States of America by an Act of the supreme legislature of the United States is not a title which I think can possibly result in law from the contract itself. If such a right exists, it must exist by the combined effect of the contract between the assurer and the assured, and the Act of Congress. It cannot follow from the contract of insurance alone without the Act of Congress.

If the Act of Congress is consistent with such a right, having

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regard to the contract of insurance, still more if the Act of Congress fairly and equitably interpreted confers such a right, there is no reason whatever why the right should not receive full effect. But how is it possible that such an effect can be produced as to a right which could have no existence apart from the Act of Congress, if the Act of Congress itself expressly excludes it? I cannot for a moment understand the doctrine of moral right and obligation or implied trusts affecting supreme governments and independent states, as applied to a question of this kind. The rights resulting from the contract must be such as in point of law the contract makes: the rights resulting from the Act of Congress must be such as according to its true construction and legal effect the Act of Congress makes; and the rights resulting from both together must be such as are consistent with and flow from the legitimate operation of the whole. Here it is admitted that there is in the Act of Congress everything said and done which a supreme legislature could possibly say or do for the purpose of excluding the present claim and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part but to the unvalued part of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress. It was a true and bonâ fide valuation but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid.

Whatever views of moral obligation may be entertained with regard to the Act of Congress, I think it is correctly described by Brett L.J. as an act of pure gift from the American Government (1). We cannot go behind it and inquire into the motives for an act of a supreme legislature on a matter within their legislative powers; and that being so, I am entirely unable, for any practical purpose, to distinguish this case—in which the supreme Government of the United States having absolute power of disposition over this fund have by a solemn Act of their Congress declared that it should be given, not in respect of the loss which had been

(1) 6 Q. B. D. 643-5.

indemnified as between the assurers and the assured but in respect of the loss which the assured had suffered beyond that amount—from the case of a voluntary gift by an individual in the same terms. Mr. Butt, in his able argument, which was as candid I think as it was able, admitted that if a member of the family of the shipowner who had suffered the loss, or the owner of the cargo, had, after the insurers had paid the loss, made a will in the precise terms of this Act of the Congress of the United States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers could not have claimed the gift. I am unable to see, for any legal purpose, a distinction between such a case and the present.

It is a satisfaction to me to find that in taking that view of the matter I only differ from Baggallay L.J. so far as this: he thought that the cases of *Randal* v. *Cockran* (1) and *Blaauwpot* v. *Da Costa* (2), before Lord Hardwicke and Lord Northington, under the Order in Council of the 18th of June, 1741, were authorities in point and covering the present case. With the greatest respect for that very learned Judge I am unable to agree in that conclusion. I should not have had any difficulty at all in this case in upholding the claim of the appellant if the Act of Congress of the United States had been in terms similar to the terms of that proclamation (3). The difference is that when

(1) 1 Ves. Sen. 98.

(2) 1 Eden. 130.

(3) During the argument Lord Selborne L.C. sent for the *London Gazette* No. 8024 June 16 to June 20 1741 which contained the proclamation dated 18 June 1741. It was headed "By the Lords Justices, a Declaration appointing the distribution of Prizes taken by way of reprisal before His Majesty's declaration of War." It recited (inter alia) that whereas the king having taken into consideration the depredations and unjust seizures by Spanish ships contrary to the law of nations and in violation of the treaties between Great Britain and Spain, whereby the king's "trading subjects had sustained great losses," and having determined to take measures for vindicating the honour of his Crown and "for procuring reparation and satisfaction to his injured subjects," was pleased with the advice of his Privy Council on the 10th of July 1739 to order that general reprisals should be granted against the ships goods and subjects of the king of Spain; and whereas between that date and the king's declaration of war on the 19th of October following the king's ships had taken several ships vessels and goods belonging to the king

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the King of Great Britain came to distribute the fund which arose from the seizures of goods which had been taken, by way of reprisal, from Spain, the Crown directed it to be divided into moieties: one moiety was to go to the officers and sailors of the ships that had made the captures, but the other moiety was to be paid to and amongst such of His Majesty's subjects as had suffered by the unjust seizures and depredations of the Spaniards. There was no such exclusion of insurers as there is in the present case; in point of law and equity too, the true result of the contract of insurance was that the insurers had taken the loss upon themselves and were entitled to all indemnities received in respect of the loss; they were sufferers in equity at all events if not in the strictest legal sense from those depredations; they were to take the place of the original sufferers, and to have all their rights, and therefore, according to the true effect of that proclamation, it was a grant by the Crown in their favour. If anything of the same sort had been done by the Act of Congress in the present case, it would be very probable that your Lordships would come to the same conclusion. I see that Brett L.J. expresses some hesitation upon that subject. It is not necessary for me to say more about it, excepting that I do not myself share that hesitation. I put the matter entirely upon the ground that the terms of the grant in the cases which have been referred to not only impliedly but actually, according to their fair and legitimate construction in law and equity, operated in favour of the insurers, who having paid the loss were entitled to be recouped.

Those cases, then, appear to me to be clearly and broadly dis-

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of Spain or his subjects or inhabitants, the property whereof became vested in the king; the Lords Justices having taken the same into consideration "together with the great losses the king's subjects had sustained by the repeated depredations by the Spaniards for many years past for which they had received no reparation;" declared that the net produce arising from the sale or disposal of all the ships vessels and goods which had been so seized and taken and which had been or should be condemned, should be divided into two moieties, one "to be paid to and amongst such of the king's subjects as had suffered by the unjust seizures and depredations of the Spaniards, and to be distributed in such manner and proportions and under such regulations as the king should thereafter be pleased to appoint;" the other moiety to be paid to and amongst the officers and sailors of the king's ships who were concerned in the captures, to be divided in the manner provided.

tinguishable from the present case. I think that the view taken by the majority of the Court of Appeal is correct, and therefore I move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. The point, when one comes at it (and I should say, in justice to Mr. Butt, that he has avoided making any false points, and has brought it to us very clearly) is a very short one, and one upon which I have no doubt at all.

The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.

The first question is this. There had been a policy of insurance and a total loss by capture and destruction of the property insured and a payment of the full value insured—a payment of the total loss under that policy. Subsequently to that payment there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy; and the question, I apprehend, comes to be, Was that sum or was it not paid so as to be a reduction or diminution of their loss?

The cases which have been cited, *Randal* v. *Cockran* (1) and *Blaauwpot* v. *Da Costa* (2), bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming into the hands of the English Government; and the King was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures. It was, certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the

(1) 1 Ves. Sen. 98. (2) 1 Eden. 130.

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sufferers. But then I think that that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the King was bound to pay the money —he was not: it was not because there was a moral obligation to pay it—as if it had been said that our Government would have been shabby if they had not done it: it was because de facto there was a payment which prevented, or diminished pro tanto, the loss against which the insurers were bound to indemnify the assured.

There was a subsequent case, which has not been cited, which proceeded upon an error and has been since reversed (I mean the case of *Godsall* v. *Boldero* (1)) where a person had insured the life of Mr. Pitt, having no other interest in his life than as a creditor of Mr. Pitt, which gave him an interest, and the House of Commons voted out of pure grace and favour a large sum of money to pay Mr. Pitt's debts, and the executors paid this debt. The insurance company set up the defence that this was a contract of indemnity and that Mr. Pitt's debt having been paid there could not be a right to recover against them. Lord Ellenborough falling into a blunder which has been since corrected thought that the contract of life assurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been told by people connected with insurance companies and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than there was such an outcry that every one said he would never insure with a company which was capable of doing such a shabby thing. Consequently the insurance company instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so. Nevertheless Lord Ellenborough's decision stood until it was decided in the Exchequer Chamber (2) that that case went altogether upon a

(1) 9 East, 72; 2 Sm. L. C. 271, 8th ed.

(2) *Dalby* v. *India and London Life Insurance Co.*, 15 C. B. 365; 24 L. J. (C.P.) 2; 2 Sm. L. C. 282, 8th ed.

mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort. But if it had been a contract of indemnity the grant of Parliament to pay Mr. Pitt's debts would have prevented the man's sustaining any loss by the death of Mr. Pitt, and consequently the decision would have been right. I mention this merely to shew that the question is not whether the money was voluntarily paid or not voluntarily paid, but whether de facto the money which was paid did reduce the loss.

In the present case the Government of the United States did not pay it with the intention of reducing the loss. Lord Coleridge says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs deprive a man suing in this country of any right which he has. I quite agree in that; but I think that Lord Coleridge, if he had taken the same view as I do of the matter, would have seen that an Act of Congress of the United States might effectually prevent any such right arising. If once the right had vested to recover any such sum, of course an Act of Congress could not take it away; but when Congress in express terms say, "We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and a different purpose," it effectually prevents the right arising. Bramwell L.J. in his judgment has used the phrase, "It was not given as salvage" (1). I should myself prefer to use my own phrase expressing the same idea and to say that it was not paid in such a manner as to reduce the loss against which the plaintiffs had to indemnify the defendants; it is the same thing but rather differently expressed.

That, I think, would dispose of the case if it were not for a point which Mr. Butt has urged, or rather submitted (for I do not think he argued very strongly in favour of it) namely, that because this was a valued policy of insurance, the value being put at £15,000, the defendants could never under any circumstances, as against the plaintiffs, set up the fact, which is a fact, that the value of the property exceeded £15,000. Upon the statement of that point it looks so artificial when applied to these facts that

(1) 6 Q. B. D. 640.

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one might almost rest there and say, "It cannot be." I think it is plain that the reasons for which the value has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether the principle was rightly applied in the case of the *North of England Insurance Association* v. *Armstrong* (1) it is not necessary now to say. I own that if I had a similar case to decide sitting in the Court of Error, I should pause before I said that it was rightly decided, but whether that decision was right or wrong it is not at all necessary to consider here. It is plain to to my mind that the valuation being only for the purpose of the policy of insurance and for the purpose of binding the defendants to admit it in favour of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had contracted to indemnify them. The circumstance that by agreement between the parties the amount they had contracted to pay was not to exceed £15,000 appears to me quite immaterial.

For these reasons I agree that the judgment as it stands is right and ought to be affirmed.

LORD WATSON:—

My Lords, I have come to the same opinion as your Lordships upon this point, which is one of novelty but not of great difficulty, and which arises, I think, entirely upon the terms of the Act of Congress. If compensation has, under that statute, been awarded by the American Congress to the respondents in respect of their losses, then I take it that the same rule would be followed as was adopted by the Courts in the two cases which have been referred to of *Randal* v. *Cockran* (2) and *Blaauwpot* v. *Da Costa* (3). In that case the money voted would have been received by the respondents towards indemnification for the loss against which they were insured; and upon the principle that one who has been already indemnified against that loss must impart to those who have indemnified him any benefits which he subsequently obtains of that description the appellant would have been entitled to judgment. But in this case the Act of Congress declares in very express terms, when you take the whole of sect. 12 together, in

(1) Law Rep. 5 Q. B. 244. (2) 1 Ves. Sen. 98. (3) 1 Eden. 130.

the first place that no compensation is to be given by the commissioners on account of loss which has been insured against or covered by insurance, and secondly that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to any claimant must be given to compensate him for any loss either from want of insurance or from being under-insured. In the present case it is perfectly obvious from the statements made by the parties, upon which they agreed, that compensation was awarded to the respondents upon the second of these grounds, namely, in respect that the insurance which they effected fell short of protection against the whole loss which they sustained.

It is conceded that compensation might be given to the respondents in these very terms and upon this footing by any benevolent individual, who being under no obligation to give it, chose to indemnify the respondents; and it is conceded that in the event of his doing so no claim would lie to that money at the instance of the underwriters. Why the American Congress were not in a position to do the same as any third party might have done, not being under any obligation to do so, I have not been able to understand in the course of this argument; and I do not think that any cause whatever has been shewn why they should not do so. Legal obligation is out of the question; but we have heard something about moral obligation. I do not at all understand what that means. I think that this fund was entirely at the disposal of the legislature of the United States, that it was an act of grace on their part to assign it, and give it either to one or to the other of the losers by the acts of the *Alabama*, and that in giving it as they have done, they were attaching a condition to the gift, which condition was not only entirely within their power but which they might attach without violating any legal responsibility or moral obligation.

Those being my views, I entirely concur in the disposal of this case in the manner which your Lordships suggest.

LORD FITZGERALD :—

My Lords, I concur in the judgment pronounced by the noble and learned Lord on the woolsack, and in the reasons he has

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pressed for that judgment. I adopt also his criticisms on the authorities cited and his limitation to the rule which was contended for by the appellant as the result of some of those authorities, viz. that on a valued policy the value agreed on was as between the parties conclusive under all circumstances and for all purposes, whether incidental to the contract or collateral and subsequent. I hope that I am not exceeding my province in saying that I should have thought this a very plain case if it had not been that I was induced to hesitate on reading the judgments of Lord Coleridge and Baggallay L.J., whose opinions are of such weight and justly entitled to so much respect.

The case presented itself to my mind thus—this is really the old action for money had and received. The parties have expanded by their pleadings the facts on which they respectively rest. The plaintiff alleges that the defendant has received a sum of money which in equity and good conscience he ought not to retain, but should pay over to the plaintiff. The defendant admits he received the sum in controversy through the judgment of the American tribunal, but denies the plaintiff's equity.

I have been wholly unable to discover on what the plaintiff's supposed equity rests. I agree with Brett L.J. that the United States Government might have done as it pleased with the whole £3,100,000, and that when it was devoted to the purposes specified in the Act of Congress it may be regarded as a free gift for those purposes.

The 12th section prohibits its application to such a claim as the plaintiffs'. The whole matter is well expressed by Bramwell L.J. when he says in effect that the defendant received the money under the Act of Congress and judgment of the American Court to keep for himself, and not to pay it over to the plaintiff.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 11th July 1882.

Solicitors for appellant: *Waltons Bubb & Walton.*
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