JAMES RICHARDSON & SONS, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

STANDARD MARINE INSURANCE CO., LIMITED (DEFENDANT) ..... RESPONDENT.

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* Mar. 3.
* May 27.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Maritime law—Insurance—Wheat cargo—"Loss or damage for any external cause"—Grain deteriorated by moisture and reconditioned—Agreement as to its sale—Liability of insurer—Extent of loss—Method to be followed to determine it—Sue and labour clause—Act, 2535 C.C. —Marine Insurance Act, 1906, (Imp.) 6 Edw. VII, c. 41, s. 71.

The appellant company is a grain dealer and, in the course of its business, shipped grain cargoes from certain ports on the Great Lakes and on the St. Lawrence river to Montreal. The respondent insurance company, by a "lake cargo policy," insured on account of the appellant all shipments of grain on vessels sailing between named dates against the risk of "loss or damage from any external cause" occurring during the transportation of these cargoes. Under the terms of this floating policy, a valued marine certificate was issued on a cargo of no. 3 northern wheat valued at 65 cents per bushel. The grain was shipped at Fort William on board the "Anna C. Minch," and, after being transhipped at Kingston to a barge, was tendered to the Harbour Commissioners elevator at Montreal. After a small quantity had been taken out, the wheat was refused by the elevator authorities, as it was found that it had become "tough" due to excessive moisture and had therefore lost its classification as no. 3 northern wheat. The appellant company directed the Montreal Harbour Commission to turn and dry the grain, a process of reconditioning; and, as a result of the process, nearly all the wheat came back to a moisture content which permitted it to be again classified as no. 3 northern. As provided in the policy, the consignees or holders of the certificates of insurance gave immediate notice of the loss or damage to G.W.P. Ltd. who then reported to the underwriters, the respondent, for adjustments or settlement; and Hays S. & Co. were subsequently called in as cargo surveyors to act on behalf of the respondent. Later, the general manager of the appellant's insurance-brokerage firm, one Oldfin, suggested that bids be obtained for the wheat, and, as found by the trial judge and the majority of this Court, this was agreed to by the president of Hayes S. & Co. As a result of this arrangement, a grain broker, authorized by Oldfin, secured offers for the grain, amongst which was one from the appellant. At a meeting of all parties interested, it was agreed that the appellant's offer of the sum of $44,352.84 should be accepted. Later on, the reconditioned wheat was resold by the appellant company on a favourable market, the actual loss to the latter being $4,448.58, as contended by the respondent. The insured value of the cargo was $63,852.84. The appellant's action for "loss or damage" to the wheat cargo under the insurance policy was maintained in full by the trial judge, the

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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amount of $18,500 claimed and awarded being the difference between the insured value of the cargo and the amount of the sale of the reconditioned wheat to the appellant. The appellate court found the loss under the policy to be $4,448.58, representing the cost of turning and drying the wheat, warehouse storage charges and loss of bushels of grain that were not retained and dried.

Held, Davis J. dissenting in part, that the amount of the damage suffered by the appellant and for which the respondent is liable under the terms of the policy is $8,544.79; Cannon J. concurring with the judgment of the trial judge and Davis J. with that of the appellate court.

Per Rinfret, Crocket and Kerwin JJ.—The amount of the damage suffered by the appellant is the sum of $18,500 as found by the trial judge; but this is not the amount for which the respondent is liable under the terms of the policy and certificate. The loss to the appellant is a partial loss; and the agreement between the parties as to the sale of the reconditioned wheat did not purport to alter the rule of law in such a case as contained in art. 2535 C.C., the provisions of which are similar to those contained in sec. 71 of the *Marine Insurance Act,* 1906, (Imp.) c. 41. In accordance with these provisions, the amount for which the respondent is liable is ascertained as follows: the insured value of the cargo was $63,852.84; the gross produce of the damaged sales was $44,352.84; the sound value of the grain on the first day of unloading at Montreal was 52⅛ cents per bushel; the total sound value of the cargo is therefore $51,205.08; the difference between the sound and damaged values is $6,852.24, which is 13·382 per cent of the sound value; and the percentage of the insured value of the total quantity of wheat delivered at Montreal, i.e., $63,852.84, amounts to $8,544.79, which is the loss for which the respondent is liable. Cannon J. *contra.*

Per Rinfret, Crocket and Kerwin JJ.—The "sue and labour" clause contained in the policy, which would have applied otherwise, cannot be invoked by the respondent in view of the agreement arrived at between the representatives of the parties in this case.

Per Cannon J.—Under the terms and ambit of the policy and according to the written documents of record, the findings of the trial judge should not be disturbed; and the latter held that the damage was ascertained by agreement of all interested parties for the purpose of any future litigation and that the amount so determined should be considered as the damage recoverable under the policy. The loss in this case was not, strictly speaking, a partial nor a total loss of the cargo, but rather a deterioration of the whole cargo causing damage for only part of the sum insured; and the course adopted by the parties, the conduct of the case and the proven circumstances make inapplicable the percentage rule of art. 2535 C.C. in order to reduce the sound value of the wheat: the necessary elements are lacking to establish the proportion contemplated by the Code. The "sue and labour" clause would apply only in case of disaster during the voyage or adventure and not after the arrival of the ship at destination.

Per Davis J. (dissenting in part)—The "sue and labour" clause should be applied in this case in order to determine the amount of the "loss or damage" suffered by the appellant company; and, consequently the amount which the appellant is entitled to recover is the actual loss suffered by it amounting to $4,448.58, as held by the unanimous judgment of the appellate court.

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APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, modifying the judgment of the Superior Court, Loranger J., and reducing the amount of recovery in an action on a marine policy.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

W. F. Chipman K.C. and *Russell McKenzie K.C.* for the appellant.

Lucien Beauregard K.C. for the respondent.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The respondent insurance company, by lake cargo policy no. 120137, insured on account of the appellant all shipments of grain to be made by the appellant on vessels sailing between named dates, against the risk of "loss or damage from any external cause" arising between certain ports on the Great Lakes and on the St. Lawrence river. Under the terms of this floating policy a valued marine certificate was issued on a cargo of no. 3 northern wheat valued at 65 cents per bushel.

The grain was shipped on board the *Anna C. Minch* at the head of the Lakes and after being transhipped at Kingston was tendered to an elevator at Montreal. After a small quantity had been taken into the elevator, it was found that the wheat had become "tough" due to excessive moisture and had therefore lost its classification as no. 3 northern wheat. The appellant (plaintiff) alleged in its declaration that the wheat had been damaged by rain or some other external cause within the meaning of the policy and

during the transhipment of the said wheat at Kingston it rained causing the said wheat to become damp and tough.

These claims were denied by the respondent.

At the trial considerable evidence was heard as to the rainfall at Kingston when the grain was being transferred to the barge *Redhead* but it also appeared that the barge had been involved in an accident causing her to leak, although it was denied that this leak caused any damage to the grain. Certificates were produced which had been

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issued under the provisions of *The Canada Grain Act*, R.S.C. (1927), c. 86, and which stated that the grain shipped from the head of the Lakes was no. 3 northern. By virtue of section 27 of that Act these certificates were *prima facie* evidence of that fact. The appellant also led evidence by officials who had inspected and tested the grain which confirmed the grade stated in the certificates. The efforts of the respondent on this point were directed to showing that the wheat must have been tough when it started on its voyage, and that it was impossible for a sufficient quantity of rain to have damaged the grain in order to account for the difference in moisture contents at the head of the Lakes and at Montreal. On that branch of the case the learned trial judge found that the wheat when loaded was no. 3 northern and that it had been damaged while in transit through "an external cause." The Court of King's Bench (appeal side) agreed with that finding and a careful examination of the evidence leads me to the same conclusion. The respondent's cross-appeal should therefore be dismissed with costs.

At the trial the appellant was successful in obtaining judgment for the full amount of the damages claimed by it, but the Court of King's Bench reduced this amount considerably for reasons shortly to be explained.

The certificate of insurance provided that, in case of loss or damage, the consignees or holders of the certificates should give immediate notice to G. W. Price Limited of Montreal "who will report to the underwriters for adjustments and/or settlement." This was done and Hayes, Stuart & Company Limited were called in as cargo surveyors to act on behalf of the respondent underwriters. Captain Hayes, the president of Hayes, Stuart & Company Limited, called as a witness for the respondent, testified that he was notified by Mr. Barclay of the Price Company that the barge *Redhead* had some damaged cargo. This was on September 3rd, 1931, and from the information he then had, Captain Hayes understood that only a small quantity of grain, which he saw and which he estimated at 125 bushels, was in question. On September 8 or 9, he learned that a claim was being made by the appellant that all the grain had been damaged. He took the position that the loss could not have been caused by any external cause,

and that therefore, his principal, the respondent in this appeal, could not be liable.

The appellant's insurance broker was Commercial Insurance Agency Limited and its general manager, L. J. Oldfin, suggested that bids be obtained for the wheat and the trial judge found that this was agreed to by Captain Hayes. It is true that in giving evidence, Captain Hayes did say, when being examined by counsel for the respondent:

> This cargo was in the hands of James Richardson, the consignee: the cargo as far as I was concerned never left their possession. They were the owners of the cargo. Mr. Oldfin then, in course of time, telephoned that we should call for bids in order to find out what the market value of this grain was. They owned the cargo, they have a perfect right to call for bids for their own property.

However, the next question and answer are important as showing that the position he adopted in the witness box was not the same as that which he indicated to Mr. Oldfin at the time in question.

> Q. What did you say to that?
>
> A. As far as I was concerned and the underwriters I was quite agreeable, without prejudice to the underwriters' interest, and Mr. Oldfin calling for bids.

As a result of this arrangement, Mr. Oldfin authorized a grain broker, Joseph A. Byrne, to endeavour to secure offers for the wheat. After Mr. Byrne had secured offers, among which was one from the appellant, a meeting took place between Oldfin, Bryne and Eric Crocker, an officer or employee of Hayes, Stuart & Company Limited. Mr. Crocker attended as Captain Hayes was not available at the time. At that meeting it was agreed that the appellant's offer should be accepted, and this is borne out by two letters of September 29th, 1931, written by Mr. Oldfin to Hayes, Stuart & Company Limited, and the respondent respectively. These letters are important and are as follows:

EXHIBIT P. 8

Attention Mr. Crocker. Sept. 29, 1931.

Messrs. HAYES, STUART & Co. LIMITED,
Marine Surveyors,
410 St. Nicholas street,
Montreal.

Gentlemen:— *Re* Barge Read Head
Ex Anna C. Minch

We confirm conversation of yesterday in our office with Mr. Joseph Byrne, grain broker, and yourself, regarding the disposition of 98,099 bus. tf. no. 3 northern Manitoba wheat unloaded at Montreal.

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As authorized by you, we notified Messrs. James Richardson & Sons Limited, Winnipeg, that their bid was accepted for account of whom it may concern, without prejudice, on the basis of 46¼ cents per bushel C.I.F. Montreal, as this was the highest tender received by Mr. Byrne. Two other bids were received, one from Messrs. Turgeon Ltd. at 45 cents with a contingent warranty that he would only take delivery of 5,000 or 10,000 bushel lots at the rate of 20,000 bus. weekly; and one other bid from Toronto Elevators Limited, Toronto, which we understand was equal to about 42½ cents per bushel.

You will no doubt recall from Mr. Byrne's conversation, that it was with extreme difficulty that he was able to get any bids whatsoever on this wheat. Exporters stated that no demand was available for this grade of wheat, and from a domestic consumption viewpoint it would have to be carried for some time before it could be finally disposed of, and the carrying charges would probably amount to considerable. We are of the opinion that the tender put forward by Messrs. Richardson & Sons Limited is a very generous one.

Yours very truly,

W. General Manager.

EXHIBIT P. 7

Sept. 29, 1931.

Attention Mr. Owan, loss manager.
STANDARD MARINE INSURANCE CO. LIMITED,
71 William street,
New York City.

Gentlemen:—

Re Barge "Readhead"
Ex. "Anna C. Winch"

James Richardson & Sons Limited.

We confirm our telephone conversation of yesterday, and the writer did not call you back inasmuch as we had been in communication with your surveyor here, Mr. Crocker, representing Messrs. Hayes, Stuart & Co. Ltd., and *he advised us he had received a wire from you asking if he would recommend that Richardsons' bid be accepted, on account of it being the highest tender received.*

We had a meeting in our office, with Mr. Crocker, Mr. Joseph Byrne, grain broker, and the writer, and we are enclosing herewith copy of letter which we have to-day addressed to Messrs. Hayes, Stuart & Co. Ltd. on your behalf, for your records. We feel quite sure that this bid is a very good one, and inasmuch as the grain is sold, we trust to be able to get this claim cleared away as quickly as possible. Captain Hayes is expected back in the city to-morrow, and the writer will follow up with him the whole case, and trust that we will be able to assist him in obtaining the necessary information so he can recommend payment of our clients' claim, which we are of opinion is quite just.

Yours very truly,

W. General Manager.

Encl.

It appears to me that any question that might arise as to what had occurred is set at rest by Captain Hayes' report to the respondent in which it is stated:

> The consignee requested the underwriters agreement to call for bids on the entire amount of 98,099 bushels to be sold for the benefit of whom it may concern. This was agreed to by underwriters without prejudice.
>
> Most favourable bid received from Messrs. James Richardson & Sons, Limited, Winnipeg, 46¼ cents less ¼ cent brokerage commission per bushel, and acceptance of same agreed to, on behalf of whom it may concern, and without prejudice as to underwriters' liability. Copy of confirmation received from consignee's representative.

It was apparently thought in the Court of King's Bench that the appellant was endeavouring to prove some custom, but a perusal of the evidence has satisfied me that, throughout, the appellant relied upon this definite arrangement, and that the evidence as to any custom was introduced merely to show that what was done here was common practice, although Captain Hayes testified that it was usual only when liability was admitted. I agree with the learned trial judge that the arrangement alleged by the appellant was in fact made with Hayes, Stuart & Company Limited, the respondent's surveyor. And in my opinion, its authority was sufficient for that purpose. It was not suggested by the respondent in its factum or in argument that, if the arrangement had been made, the surveyor had not a mandate, to agree on behalf of the respondent insurance company.

In any event, the letter of September 29/31 from Mr. Oldfin to the respondent (exhibit P-7), and particularly the part italicized shows that the question of accepting the appellant's offer for the damaged grain has been a matter of discussion with the United States head office of the respondent company. Mr. Oldfin testified that this letter and exhibit P-8 were correct reports of what had transpired. To neither letter was any reply ever sent, so that if there could be any doubt as to the antecedent authority of Hayes, Stuart & Company, Limited, the respondent must be taken to have adopted the actions of their surveyor.

It was contended that the appellant could not sell to itself, but whether the transactions could be called a sale or by any other name, it did serve to fix the value of the damaged grain. As a matter of fact, the appellant, by having the elevator company turn and dry the wheat,

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secured a greatly increased price for it when they ultimately sold, and it is urged that as the appellant was bound by the "sue and labour" clause of the policy to do all it could to minimize the damage, it would have to bring into the account the price thus secured. Undoubtedly, the "sue and labour" clause would have applied if it had not been for the agreement between the representatives of the parties, but in view of that agreement, I cannot see how the provisions of that clause may be invoked by the respondent. What would have been the attitude of the respondent in case the highest bidder for the damaged grain had been a third party, or in case the appellant had sold the re-conditioned wheat for very much less than the offer it made and the expense of turning and drying? No doubt under the latter circumstances, the respondent would have objected strenuously to any claim for extra loss after the value of the damaged grain had been fixed in the manner indicated.

The Court of King's Bench, considering that the appellant was alleging a custom under the circumstances to call for bids for the damaged grain, determined that no such custom had been proved. They therefore took into account the amount for which the appellant ultimately sold the re-conditioned grain and found the loss under the policy to be $4,448.58. For the reasons already indicated, I must respectfully disagree.

The amount of the damage, therefore, suffered by the appellant is the sum of $18,500 as found by the trial judge. However, in my opinion, this is not the amount for which the respondent is liable under the terms of the policy and certificate. This was a partial loss and according to article 2535 of the Quebec Civil Code:

> The amount for which the insurer is liable on a partial loss is ascertained by comparing the gross produce of the damaged sales with the gross produce of the sound sales and applying the percentage of difference to the value of the goods as specified in the policy, or established in the manner provided for by the last preceding article.

The agreement did not purport to alter this rule of law.

Article 2535 C.C. is similar to section 71 of the *Marine Insurance Act*, 1906 (Imp.) 6 Edw. VII, c. 41, and in accordance with these provisions the amount for which the respondent is liable is ascertained as follows: The insured value of the cargo was $63,852.84. According to appel-

lant's exhibit, P. 4 (which, for this purpose, is accepted by the respondent in its factum) the gross produce of the damaged sales was $44,352.84. The sound value of the grain on September 1st, 1931, the first day of unloading at Montreal, was 52⅛ cents per bushel. (With this figure the respondent agrees although in its factum it is erroneously stated to be the price on September 2nd). The total sound value of the cargo is therefore $51,205.08. The difference between the sound and damaged values is $6,852.24 which is 13·382% of the sound value. This percentage of the insured value of the total quantity of wheat delivered at Montreal $63,852.84 amounts to $8,544.79 which is the loss for which the respondent is liable.

For the judgment *a quo* I would substitute a declaration that the appellant is entitled to an indemnity of $8,544.79 which is totally compensated for by the sum of $11,938.42, admittedly owing by the appellant to respondent.

As the respondent disputed liability for any amount, the appellant is entitled to costs in the Superior Court. Justice would be done, in my opinion, if the respondent be given the costs of the appeal to the Court of King's Bench, and the appellant the costs of the appeal and, as already indicated, the costs of the cross-appeal, to this Court.

CANNON J.—The plaintiff-appellant have brought before this Court a judgment of the Court of King's Bench for the province of Quebec modifying a judgment of the Superior Court in their favour by reducing the recovery, under a marine insurance policy, from $18,500 to $4,448.58, which latter amount was declared compensated. The trial judgment assessed the damages to a grain cargo as it was determined by the parties on its arrival at Montreal, while the Court of King's Bench took the view that only the ultimate loss to the appellant had to be considered.

Both courts were unanimous in finding that the loss or damage came from an external cause and that the respondents were liable under the terms of the policy. This liability has been strenuously denied throughout; and even before us, in his factum, the respondent has reviewed all the facts in order to show that the grain must have been of inferior grade when first placed on board. This Court took the view, however, that these findings could not be

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challenged any longer; and the only question before us is the following: In point of time, under the terms of the policy, when and how was the damage to this cargo to be ascertained?

The respondent issued an open marine insurance policy by which the appellants' goods were insured on board vessels, boats

at and from ports and places to ports and places on a lawful and regular route and voyage, for the several amounts, and at the rates as hereon indorsed, subject to condition of this policy, or of any contract proposition covered by this policy, according to their true intent and meaning.

Beginning the *adventure* upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so *shall continue and endure until the same shall arrive and be safely landed at the port of destination and not to exceed forty-eight hours from the time of arrival.*

Touching the adventures and perils which this company is contented to bear and take upon itself, they are of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils or misfortunes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary to and for the insured or insurer, their agents, factors, servants, and assigns, to sue, labour and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges whereof the said company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and bullion, promissory notes, and other evidences of debt, books of accounts, written securities, deeds, or other evidences of title to property of any kind, are not covered by this policy unless expressly defined as so insured.

* * *

And in case of loss or damage to the property hereby insured, this company, its agent or representative at or nearest the first port of discharge shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of damage, by personal inspection, appraisal, or sale of the damaged property.

Clause 10 of the schedule attached to the policy is to the effect that:

It is hereby specially understood and agreed that risks on grain while in elevators are in no case to be covered hereunder.

Under clause 12, the policy includes

the risk of winter storage at port of destination after the close of navigation and during the season of navigation, when required * * * such risks to be held covered until discharge at destination.

Clause 14:

14. It is understood and agreed that shipments insured hereunder are held covered *until discharged from vessel* for a period not exceeding eighteen (18) days after arrival. After seventy-two (72) hours an additional premium to be charged *pro rata* of the fifteen (15) day tariff rate as provided for under rate tariff.

Under this policy, the appellant shipped, on or about the 4th day of July, 1931, a cargo of no. 3 northern Manitoba wheat which was transhipped at the port of Kingston and was ultimately tendered to the Harbour Commissioners' elevator at Montreal, who refused it, on the ground that the wheat was out of condition, or had become "tough" after contact with water.

In my opinion, the risk incurred by the respondent was limited to the voyage; and the condition of the cargo had to be ascertained when it arrived at its destination. Was it, or was it not, at that time, in the same condition, or of the same grade, as when it was loaded at Fort William and its value fixed at $0.65 a bushel?

This must be answered in the negative. The parties, therefore, proceeded to determine the extent of the damages to the cargo. The appellants' insurance brokers were instructed to take up the matter; and the appellants eventually placed a valuation, or a bid of 46¼ cents with a grain broker, Mr. J. A. Byrne. The matter of investigating the loss and of assessing this damage has been placed by the insurance company respondent in the hands of Hayes, Stuart & Co. of Montreal. The insurance broker, Mr. Oldfin, states that these people represented the respondent company and he wrote the respondent, under date September 29th, 1931:

Sept. 29th, 1931

STANDARD MARINE INSURANCE CO. LIMITED,
Attention Mr. Owen, loss manager,
71 William street,
New York city.
Gentlemen:—

Re Barge "Readhead"
Ex "Anna C. Minch"
James Richardson & Sons Limited.

We confirm our telephone conversation of yesterday, and the writer did not call you back inasmuch as we had been in communication with your surveyor here, Mr. Crocker, representing Messrs. Hayes, Stuart & Co. Ltd., and he advised us he had received a wire from you asking if

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he would recommend that Richardsons' bid be accepted, on account of it being the highest tender received.

We had a meeting in our office, with Mr. Crocker, Mr. Joseph Byrne, grain broker, and the writer, and we are enclosing herewith copy of letter which we have to-day addressed to Messrs. Hayes, Stuart & Co. Ltd., on your behalf, for your records. We feel quite sure that this bid is a very good one, and inasmuch as the grain is sold, we trust to be able to get this claim cleared away as quickly as possible. Captain Hayes is expected back in the city to-morrow, and the writer will follow up with him the whole case, and trust that we will be able to assist him in obtaining the necessary information so he can recommend payment of our clients' claim, which we are of opinion is quite just.

He also enclosed copy of a letter addressed by him on the same date to Hayes, Stuart & Co. Limited:

Gentlemen:—

Re Barge "Redhead"
Ex "Anna C. Minch"

We confirm conversation of yesterday in our office with Mr. Joseph Byrne, grain broker, and yourself, regarding the disposition of 98,099 bus. Tf. no. 3 northern Manitoba wheat unloaded at Montreal.

As authorized by you, we notified Messrs. James Richardson & Sons Limited, Winnipeg, that their bid was accepted for account of whom it may concern, without prejudice, on the basis of 46¼ cents per bushel c.i.f. Montreal, as this was the highest tender received by Mr. Byrne. Two other bids were received, one from Messrs. Turgeon Ltd. of 45 cents with a contingent warranty that he would only take delivery of 5,000 or 10,000 bushel lots at the rate of 20,000 bus. weekly; and one other bid from Toronto Elevators Limited, Toronto, which we understand was equal to about 42½ cents per bushel.

You will no doubt recall from Mr. Byrne's conversation, that it was with extreme difficulty that he was able to get any bids whatsoever on this wheat; exporters stated that no demand was available for this grade of wheat, and from a domestic consumption viewpoint it would have to be carried for some time before it could be finally disposed of, and the carrying charges would probably amount to considerable. We are of the opinion that the tender put forward by Messrs. Richardson & Sons Limited is a very generous one.

Byrne, the grain broker, says:

A. I was approached by two parties; one was Mr. Crocker and the other representing the underwriters, as I understand, and Mr. Oldfin of the Commercial Insurance Agency. They asked me to canvas the trade and to see what price I could get for the wheat, not to make ready the sale of it, but to give them the figures when I would finally get my last figures in. These figures I obtained after working a few days on it. I don't just remember how many days, but the prices ranged from 43·167 to 45 and ¾ c.i.f., Montreal.

Q. How many bids did you get, and from whom?

A. I had four bids altogether. I had approached nine or ten different buyers. Not every buyer can handle that quantity of wheat and pay for it, so I approached the mills and they would not make a bid of any kind. I went to Mr. Turgeon and he bid, and he bid me 43 cents to be taken at his call, five or ten thousand bushels weekly or semi-monthly, he to pay all the charges until he would take final delivery.

Another firm was the A. N. Brown Grain Company. They offered me 45 and ¾, and I had the Toronto Elevators. They offered me 11 cents under the October option, and the October option at that time was 54. That would make a price of 43 cents. Those were the only three offers I could get out of the market.

Q. What was the best offer you got?

A. The best offer I had in Montreal was 45 and ¾.

Q. From whom did you receive that?

A. The A. N. Brown Grain Company.

Q. Did you accept that offer?

A. No, we did not accept that offer.

Q. What was the offer you accepted?

A. 46 and ¼ cents.

Q. That was the highest bid you received?

A. That was the highest bid I received.

Q. Were you in a position to sell this grain to anybody?

A. I was not in a position to sell it without first communicating with Mr. Crocker and Mr. Oldfin, the underwriters and the insurance agents.

Q. And that was the best offer you obtained?

A. That was the best figure I was able to obtain.

Q. Did you report that back to Mr. Crocker or to the representative of the Hayes Stuart Company?

A. I reported to both of them.

Q. And to Mr. Oldfin?

A. Yes.

William A. Barclay, average adjuster, manager of the claims department of G. U. Price Limited, who had placed this insurance, testifies that when, on September 9th, he was informed that quite a serious damage had been found in the cargo of the barge and that the elevator had refused to accept it as no. 3 northern and that it was held what they called "I.P." (to preserve its identity), he

advised Captain Hayes and called the respondent, in New York, over long distance; told them what I had been advised and told them that Captain Hayes was looking after it.

Q. Captain Hayes would be then acting as surveyor for the Standard Marine Insurance?

A. Yes.

He further states that he got in touch with Captain Hayes with the object "to report to the Standard Marine."

Captain Hayes himself, when examined by the respondent, testifies that his duties as surveyor consisted, on behalf of the underwriters, to look after all sorts of claims in connection with cargoes. He confirms that he was advised by Mr. Barclay, of G. U. Price Limited, that the barge had some damage at its cargo. And here is what he says:

Q. Well, now, was there any discussion between you and Mr. Oldfin in connection with the disposal of this cargo?

A. This cargo was in the hands of James Richardson, the consignee; the cargo as far as I was concerned never left their possession. They were

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the owners of the cargo. Mr. Oldfin then, in course of time, telephoned that we should call for bids in order to find out what the market value of this grain was. They owned the cargo, they have a perfect right to call for bids for their own property.

Q. What did you say to that?

A. As far as I was concerned and the underwriters, I was quite agreeable, without prejudice to the underwriters' interest, and Mr. Oldfin calling for bids.

And he points out clearly that the object of asking for bids was

to ascertain what the market price was for this damaged grain in order that he could then ascertain what the extent of the claim was if the underwriters were liable.

Crocker, who represented Captain Hayes when he went over to Mr. Oldfin's office to meet Mr. Byrne, said that he was agreeable to accept the highest bid of 46¼ cents per bushel, on condition there was no acknowledgment of liability on the part of the underwriters and that he would report to Captain Hayes.

The latter's written report of his survey says that he was acting at the request of the respondent and on its behalf when he attended on board the barge *Red Head* on September 3rd, 1931, in order to ascertain as to the nature and extent of the damage to this cargo of grain.

Hayes also reported that the consignees requested the underwriters' agreement to call for bids on the entire amount of 98,099 bushels to be sold for the benefit of whom it may concern. This was agreed to by underwriters without prejudice; and he enclosed a copy of the above quoted letter of 29th September, 1931, from Mr. Oldfin to the insurance company.

A careful study of the evidence and of the correspondence exchanged justifies the conclusion of the learned trial judge that, in order to assess the damage to the grain at the end of the voyage, all parties interested, under reserve of the determination of the question whether or not the damage had come from an external cause or from an inherent defect in the grain, ascertained what was the best obtainable price for the cargo as it then stood at the end of the voyage or adventure. I do not attach much importance to the technical objection that no sale could take place because the highest bid, which was accepted, came from the appellant. If any of the other three tenders had been accepted coming from outside, a sale would have taken

place. The appellants, by tendering 46¼ cents a bushel in reality figured out the amount of their claim to less than it would have been if they had sold the damaged grain to the other tenderers. When this figure was accepted by their Montreal representative, Captain Hayes, the respondent determined, for the purposes of this case, the quantum of damages suffered during the voyage and covered by the policy. It was never intended that the future fate or condition of the grain, after it was landed, should affect the rights or liability of either party under the policy. If the grain had further deteriorated after landing, the appellant would have had no recourse against the respondent, whose liability was limited to damages by external cause during the voyage.

The "sue and labour" clause relied upon by the Court of King's Bench applies during the existence of the risk, which is strictly limited, and endures until safely landed at the port of destination, and is "not to exceed forty-"eight hours from the time of arrival." After the cargo reached Montreal, nothing useful under the policy could be done for the defence, safeguard or recovery of the goods. The acts of the insured or insurers under that clause are confined to the recovering, saving and preserving the property in case of *disaster* during the voyage or adventure. There is no question of recovery after the arrival and assessment of damages.

With the terms and ambit of the policy, and the written documents of record, I cannot see how we could possibly disturb the findings of the learned trial judge that the damage was ascertained by agreement of all interested parties for the purpose of any future litigation, and that the amount so determined must be considered as the damage recoverable under the policy, if the other conditions thereof are complied with.

The Court of King's Bench gave to plaintiff what they never sued for. The declaration does not mention the disbursements made after the settlement, to recondition the wheat. These are not recoverable as damages but only if and when the "sue and labour" clause is applicable and invoked by the insured to make the insurer contribute to the expense incurred in such recovery—at a time and

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place within the scope of the policy, that inures to the benefit of the insurer. Nothing of the sort was alleged by the appellant.

Now as to the application of article 2535 C.C.

The issue of the certificate by the insurer fixed the value of the cargo at 65 cents per bushel. What was the effect of the issue of this certificate on the policy? Was it valued or unvalued?

According to Halsbury's Laws of England, 2nd ed. vbo. *Marine Insurance.* No. 316.

> A policy may be either valued or unvalued.
>
> A valued policy is one which specifies the agreed value of the subject-matter insured: an unvalued or, as it is frequently called, an open policy is one which does not specify the value of the subject-matter but, subject to the limit of the sum insured, leaves it to be subsequently ascertained.
>
> * * *
>
> The difference in legal effect between the two policies is that in the case of an unvalued policy the value of the subject-matter insured is not admitted but has to be subsequently ascertained, whereas in the case of a valued policy, unless it be voidable on the ground of fraud or for some other reason, the value fixed by the policy is as between the insurer and assured conclusive of the value of the subject intended to be insured.

Dalloz, Répertoire de Législation, vbo. Droit Maritime, says:

> 1722. En principe, l'évaluation des choses assurées est * * * fixée par la police * * *
>
> 1723. L'évaluation de la chose assurée, dans la police, a pour but d'éviter les débats relatifs à la valeur de cette chose. Elle ne produit cependant pas toujours ce résultat. En effet, l'évaluation donnée par la police a une portée, une efficacité plus ou moins grandes, suivant les conditions dans lesquelles elle a été faite. Souvent elle n'a d'effet qu'à l'égard de l'assuré; il en est ainsi, notamment, lorsque l'estimation des objets se présente sous la forme d'une simple indication de valeur et qu'elle émane de l'assuré seul, sans aucune adhésion ou acceptation de l'assureur. En pareil cas, l'évaluation oblige l'assuré en ce qu'elle fixe un maximum que ses prétentions ne peuvent jamais dépasser; mais l'assureur peut toujours exiger de lui qu'il prouve l'exactitude de sa réclamation. La simple déclaration de valeur ne change donc pas les règles sur la charge de la preuve, et les modes indiqués par l'art. 339 doivent toujours être employés (Trib. Marseille, 31 août 1866, Recueil de Marseille, 1866. 1.293; de Valroger, t. 3, no. 1109). Au contraire, lorsque l'estimation est présentée dans la police comme *valeur agréée* ou *valeur convenue,* les parties sont liées réciproquement par la convention synallagmatique, qui résulte de leur accord sur la valeur de la chose assurée; l'assureur, en acceptant cette évaluation, a, par là même, dispensé l'assuré de justifier de son exactitude, et ce serait à lui, s'il prétendait que la valeur a été exagérée, qu'incomberait la preuve de l'exagération. Cette clause *valeur agréée* ou *convenue de gré à gré,* ou toute autre clause équivalente, a donc pour effet de transporter la charge de la preuve de l'assuré à l'assureur.

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Il a été jugé, en conséquence, que, lorsque l'estimation portée au contrat d'assurance a été agréée par les assureurs et qu'ensuite ils opposent à la demande en validité du délaissement une prétendue exagération de la valeur, c'est à eux qu'il incombe d'en faire la preuve (Rouen, 2 juin 1870, aff. *Lloyd havrais,* D.P. 71.2.125, et sur pourvoi, Req. 20 fév. 1872, D.P. 72.1.250) et l'estimation des objets assurés, agréée entre les parties et contenue soit dans la police, soit dans un avenant, dispense l'assuré de toute preuve quant à la valeur des marchandises, même dans le cas où une clause imprimée de la police stipulerait que, nonobstant toute valeur agréée, les assureurs peuvent toujours demander la justification des valeurs réelles, et réduire, en cas d'exagération, la somme assurée (Req. 12 juin 1876, Benecke, D.P. 77.1.193). Cette dernière décision rejette ainsi la clause spéciale introduite dans la formule imprimée de la police d'assurance sur facultés, arrêtée en 1873 dans un congrès d'assureurs et connue sous le nom de *police française,* d'après laquelle "nonobstant toute valeur agréée, les assureurs peuvent toujours demander la justification des valeurs réelles, et réduire, en cas d'exagération la somme assurée * * * disposition qui avait pour but évident de laisser le fardeau de la preuve à la charge de l'assuré, malgré la déclaration de *valeur agréée* contenue dans la police. Il y aurait là, on le conçoit, une source de graves difficultés. L'intention évidente des parties en employant ces mots *valeur agréée* est de dispenser l'assuré de prouver la valeur des marchandises. S'il en était autrement, l'expression *valeur agréée* serait synonyme de *valeur déclarée,* ce qui est inadmissible.

The certificate dated Winnipeg, July 6th, 1931, is for $64,215 or on 98,792·20 bushels no. three (3) northern wheat valued as at sum insured of 65 cents per bushel shipped on board the *Anna C. Minch* sailing July 4th, 1931, at and from Fort William and Port Arthur to Montreal via Kingston, Ont., and is signed by the respondent and countersigned by Commercial Insurance Agency Ltd. and adds: "Full lake conditions. Average waived."

This is not, strictly speaking, a partial nor a total loss of the cargo but rather a deterioration of the whole cargo causing damage for only part of the sum insured.

Therefore, there was on board no sound wheat to be sold. There was no possibility, as required by article 2535 C.C., of ascertaining the gross produce of the sound sales to compare them with the gross produce of the damaged sales.

We must, therefore, in view of the peculiar circumstances of the case and the conduct of the parties, find:

1. The parties agreed, by the certificate of insurance, to value the goods at 65 cents to all intents and purposes and they acted on that basis;

2. The open policy, when the certificate issued, became a valued policy—and the parties accepted 0.65 a bushel as the value of the goods to the shipper if it reached destination in sound condition;

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3. The respondent pleaded and tried to prove that the wheat was overvalued because this cargo when loaded was not number three northern wheat; in this he has failed before all the courts. The value set by both parties as being that of sound no. 3 Manitoba wheat therefore, for the purposes of this litigation, is and must remain 0.65 a bushel.

4. Even if we could consider what was the price of sound no. 3 northern Manitoba on the 2nd of September, 1931, on the Montreal market, to satisfy the exigencies of article 2535 C.C., the evidence of record is not satisfactory being based on the telegram D12, which is not definite and states that the price quoted, 51¾ cents, might vary in Montreal to some extent. The evidence of Gratton, heard as respondent's witness, shows how complicated is the operation of fixing what was the value of sound no. 3 Manitoba northern when this cargo reached Montreal, and, also proves the wisdom of both the insured and insurer in agreeing to a valuation of this particular grain at a fixed price.

Si la totalité a été frappée d'avaries, on ne peut espérer y trouver un terme de comparaison. Il n'y aura donc d'autre parti à prendre que de faire déclarer par des experts, ce qu'ils pensent que pourraient être vendus les objets assurés, s'ils étaient restés dans l'état constaté par des factures et autres documents. Pardessus. Droit commercial, no. 858.

This, as stated above, has not been done in the premises. Moreover, as Pardessus remarks,

Il faut en revenir au principe sur l'assurance, savoir: que la valeur qu'avaient les choses, à leur départ, ou qui leur a été donnée par la police * * * est la seule mesure d'après laquelle l'indemnité doive être payée par l'assureur. Or, souvent les marchandises, au lieu de leur arrivée, valent beaucoup plus qu'à leur départ; il peut se faire aussi que, par l'effet de circonstances fréquentes dans le commerce, elles valent beaucoup moins. Ces chances ne peuvent influer sur le sort de l'assureur * * * Tout cela est la conséquence du principe qu'entre l'assureur et l'assuré, le règlement des avaries doit toujours avoir pour base le capital évalué dans la police, ou à défaut d'évaluation de ce capital, la valeur réelle au lieu de l'assurance.

This agrees with "Elridge on Marine Policies" (1924), p. 204 to 206, where he comments the 1906 English *Insurance Act*, which lays down certain rules, somewhat similar to our article, which apply, "subject to any express provisions in the policy." He says: "the loss must be estimated quite irrespective of the rise or fall at the port of destination," and he quoted Lord Mansfield in *Lewis* v. *Rucker*. (1)

(1) (1761) 2 Burr. 1167.

The defendant underwriter undertakes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or the damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy 30 (pounds): they are damaged but sell for 40 (pounds): if they were sound they would have sold for 50 (pounds)—the difference is a fifth: the insurer, then, must pay a fifth of the prime cost, or value in the policy—that is, 6 (pounds). *E. converso,* if they come to a losing market and sell for 10 (pounds) being damaged, but would have sold for 20 (pounds) if sound, the difference is one-half: the insurer must pay half the prime cost, or value on the policy—that is, 15 (pounds).

The value of goods adopted as a basis for ascertaining the loss is the valuation in the policy if the policy be a valued one.

In this case, in the absence of sound sales or of the evidence of what sound sales would have fetched on the 28th of September, date of the unsound sale alleged and proven, we must, therefore, take the valuation agreed upon by the parties and deduct therefrom the value of the injured grain delivered. This would confirm, on this particular point of the value of the sound cargo, the view of the trial judge and of all the judges in appeal, who have agreed in taking first the fixed value of the cargo in order to determine the depreciation of goods caused by the damage.

The certificate has the words: "Average waived." Do they refer to a general average or particular average loss? The record does not disclose a sufficient answer. However, it may explain the meaning of a part of Captain Hayes' testimony:

Q. And you established that claim by looking at the value of that policy and subtracting from it the amount of the salvage: is it not what you do?

Witness: It is absolutely wrong.

Q. What do you do?

A. This low grade insurance is settled, it is customary to settle it on a *salvage basis* and not on a P.A. basis. It is customary. I am not saying that it is right.

The course adopted by the parties, the conduct of the case and the proven circumstances seem to make it impossible for us to adopt the subsidiary point raised here by the respondent, pressing for the application of the percentage rule of art. 2535 C.C. in order to reduce the sound value of the wheat. The necessary elements are lacking to establish the proportion contemplated by the code.

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Therefore, I would allow the appeal and restore the judgment of the Superior Court with costs throughout against the respondent, and would dismiss the latter's cross-appeal with costs.

CROCKET J.—I agree with my brothers Cannon and Kerwin that, whether the acceptance of the appellant's bid of 46¼ cents per bushel, c.i.f., Montreal, for the damaged grain constituted a valid sale to it or not, the calling for bids by Byrne, the grain broker, must be treated as having been fully authorized by the respondent as the best means for ascertaining the saleable value of the damaged wheat for adjustment and settlement of the loss or damage under the certificate of insurance, and that the acceptance of that bid must be taken also as having been agreed to with the full knowledge and approval of the respondent. The testimony of Captain Hayes, the president of Hayes, Stuart & Co., Limited, who was called in to act as cargo surveyor in behalf of the respondent, the letters of the general manager of the Commercial Insurance Agency, Limited, to both Hayes, Stuart & Co., Limited, and to the respondent itself, of September 29th, 1931, and Captain Hayes' own report to the respondent, quoted in both my brothers' reasons, are, I think, conclusive, not only upon that question, but upon the question of the perfect *bona fides* of the whole matter of the calling for bids and the acceptance of the tender. It is true that this arrangement, to which the respondent was thus a party, was stated by Captain Hayes in his testimony as well as in the letters and report referred to, to have been made without prejudice to the Underwriters' liability, but this reservation of the right of the company, notwithstanding its acceptance of the appellant's bid, to still dispute the question of its liability on the certificate of insurance, cannot, I think, in the circumstances fairly or justly be relied upon to dispute the genuineness or validity of the method which was adopted to fix the amount of the loss or damage, if any loss or damage did in fact arise from any external cause under the terms of the certificate.

I think also that my brother Kerwin has adopted the correct basis for determining the difference between the sound and damaged values and agree with him that

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$8,544.79 represents the real loss for which the respondent is liable under the terms of the certificate and that the judgment of the Court of King's Bench should be altered by substituting for it a declaration to that effect.

I agree entirely with the disposition he has made of both the appeal and the cross-appeal.

DAVIS J. (dissenting in part)—The appellant James Richardson & Sons Limited, shipped by water in July, 1931, a cargo of approximately 100,000 bushels of grain from Port Arthur to Montreal. At the point of shipment the grain was certified by Government officials to be of the quality of no. 3 northern, that is, with a maximum moisture content not in excess of 14·5%. When the grain was unloaded in Montreal on September 1st and 2nd (it having arrived on July 13th but remained in the barge *Redhead* in harbour till the days of its unloading) it was refused by the harbour officials as no. 3 northern because it then had a moisture content in excess of 14·5% and was thereupon classified as a cheaper grade of grain. The excess moisture was attributed by the Richardson Company to a rainfall at Kingston on the day that the grain in transit was at that place transferred from the vessel which had carried it down the Great Lakes to the barge *Redhead* which was used to carry it down the St. Lawrence and through the canals to Montreal. The Richardson Company directed the Montreal Harbour Commission to turn and dry the grain, a process of reconditioning, and as a result of the process the grain came back to a moisture content which permitted it to be again classified as no. 3 northern and during the months of October and November the grain was sold by the Richardson Company on a favourable market and the actual loss suffered amounted to $4,448.58. This represented the cost of turning and drying, warehouse storage charges and the loss of a few bushels that were not retained and dried. The Richardson Company had covered the risk of "loss or damage from any external cause" in shipment by a valued marine certificate under a floating policy of marine insurance issued to it by the respondent, Standard Marine Insurance Company Limited, of Liverpool, England, which carried on business in Montreal. The use of marine insurance certificates in connection

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with floating policies is a comparatively recent development and the history and purpose of such certificates are discussed in a recent number of the Harvard Law Review, Vol. XLIX, 239.

There is no dispute between the parties as to the amount of the actual loss. The Richardson Company, however, sued the respondent for the sum of $18,500 on the allegation that it had "sold" the grain, with the knowledge and consent of the respondent, at a price which had resulted in a loss within the meaning of the policy and certificate at that amount. This sale was alleged to have taken place on September 28th, 1931. The learned trial judge found that the respondent had by its agents consented to the sale of the damaged grain without prejudice to its right to dispute its liability and he found it ill became the respondent to complain of this sale since it was made for its own benefit. He therefore found the loss or damage on the basis of this alleged sale at $18,500. Upon appeal the Court of King's Bench unanimously reversed the judgment as in their opinion there had been no such sale as alleged and they fixed the loss or damage at the amount actually sustained, $4,448.58.

That there was no sale as alleged is perfectly plain. The grain was at all times the property of the Richardson Company and it sold and delivered the grain to third parties for the first time during October and November. A grain broker was asked by the adjuster for the Richardson Company to obtain bids toward the end of September on the damaged shipment. Three bids are said to have been obtained either by telephone or in writing but there is very little evidence about these bids because they were really not in issue in the action as framed. The Richardson Company is said to have bid itself the highest price and its own property is treated as having been sold to and bought in by itself. It is absurd to even contend that there was a sale. When the case came to this Court, counsel for the Richardson Company very wisely abandoned the contention that there had been a sale, though its pleading was founded and the judgment at the trial based upon the alleged sale. It was argued that, however ineffective the calling for bids was to establish any actual sale, the calling for bids had been adopted as a

reasonable method of ascertaining at the time the real value of the damaged grain and consequently the amount of the loss or damage. No custom of the trade having been pleaded, counsel for the Richardson Company were forced to treat the fictitious sale as something that had been agreed to by the insurance company for the purpose of arriving at the amount of the loss or damage. This was not the case that had been pleaded or made against the insurance company but in any event the evidence falls short in my view of proof of authority by the insurance company to Hayes, its local adjuster, to do other than investigate and report. A mandate to Hayes to enter into an agreement is now sought to be established by the appellant extracting a few words from one sentence in the respondent's factum—"and respondent in turn had placed the matter in the hands of Hayes, Stuart & Company". No admission of any such mandate can be taken from those words in the factum. Nor can I read the evidence of Hayes and Crocker as substantially saying any more than that liability in any sum under the policy was denied from the moment the merits of the claim had been investigated but that the Richardson Company persisting in its claim was told that so far as the insurance company was concerned, it could do what it liked. Quite apart from the absence of proof of authority to enter into any binding agreement, that is, I think, the real effect of the evidence.

The "sue and labour" clause in the policy before us is substantially the same as in Lloyd's policy (see p. 136, 4th edition, 1932, Chalmer's Insurance Act 1906) except that the policy in this case adds the words "and necessary" after the words "it shall be lawful." The English statute, sec. 78 (4), expressly provides with reference to the sue and labour clause that it is the duty of the insured and his agents in all cases to take such measures as may be reasonable for the purpose of averting or minimizing the loss. Sue and labour clauses in marine insurance have for their object the encouragement of the insurer and the insured to do work to preserve, after an accident, the property covered by the policy and to make the best of a bad state of affairs. Should they do so, the waiver clause provides that their respective rights shall be in no wise prejudiced by any acts done in pursuance of such object

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and that the insured shall be entitled to obtain his expenses consequent on the work from the insurers. Under such a clause it is the duty of the insured to take reasonable measures to avert loss.

Arnould on Marine Insurance, 11th ed., Vol. 2, p. 1131, in discussing the proper effect of the usual sue and labour clause, says that prevention of loss is the very object in view and that the clause contemplates the benefit of the insurers only and the insurers on that account undertake for the expenditure. The illustration of Willes J. in *Kidston* v. *Empire Ins. Co.* (1) is adopted for the purpose of shewing that cases do frequently occur in which the insurers by the operation of this clause are saved from loss and the damage done is thrown upon the assured.

> For instance, under a policy on goods warranted free from average under 5 per cent, the goods, suppose, have been wetted by sea water; the damage to them, unless they are taken out and dried, would go on increasing beyond the 5 per cent, till it threatened the cargo with destruction; but they are dried at an expense of 3, 2 or 1 per cent, and the damage done is less than 5 per cent. The insurers bear the cost of drying, and the assured the loss by sea damage.

The case of *Meyer* v. *Ralli* (2) is discussed in Arnould at p. 1133 as a good illustration of the principles established by the previous decisions. There a cargo of rye was insured by a policy warranted free of particular average. The voyage was necessarily abandoned, owing to perils of the sea; part of the rye was so damaged that it had to be sold at once, the rest could have been profitably reconditioned and forwarded to its destination. This course, however, the captain neglected to take, so that a substantial portion remained in warehouses for more than a year, subject to charges. It was held that the plaintiffs, under the suing and labouring clause, were entitled to recover the expenses of unshipping the whole and conveying it to a warehouse, and of the separation of the comparatively sound part from that which was irreparably damaged, and of the expense of reconditioning the former—all these being expenses necessary in order to avert a total loss. In Halsbury, 2nd edition, Vol. 18, p. 363, note (*b*), it is said:

> It is clear, however, that if the total loss, whether actual or constructive, is before action brought adeemed by the acts of the assured or his servants, the assured cannot recover for a total loss, but is entitled

(1) (1866) L.R. 1 C.P., 535, at 543, 544.

(2) (1876) L.R. 1 C.P.D. 358.

to be recouped, under the suing and labouring clause, the expenses incurred in saving the subject-matter insured,

and the *Kidston* case (1) is cited in support of the statement.

In any event, marine insurance is a contract of indemnity and the actual loss sustained by the appellant is not in dispute and for that amount it has recovered judgment but now seeks in this Court to increase the amount of its recovery from its actual loss of $4,448.58 to the sum of $18,500 on the grounds above outlined. In *Castellain* v. *Preston* (2), Brett, L.J., said:

> The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

It may be that notwithstanding the sue and labour clause the insured would have been entitled to have the loss or damage measured at the date of the unloading of the cargo and was not bound to run the risks incidental to reconditioning and holding the grain for a favourable market, if it had dealt with the grain and commenced its action upon that basis and evidence of bona fide sales and real values had been directly put in issue and established. But it is unnecessary in my view to determine that point in this case.

In the result I agree with the amount of the loss fixed by the unanimous judgment of the Court of King's Bench and the appeal of the Richardson Company therefrom in my view should be dismissed with costs.

The respondent the insurance company cross appealed, however, on the question of liability. It contends that the evidence does not establish as a fact that there was any loss or damage caused "from any external cause" within the meaning of the policy and that the action should have been dismissed. The contention is that having regard to the quantity of grain and the amount of the rainfall at

(1) (1866) L.R. 1 C.P. 535. (2) (1883) 11 Q.B.D. 380 at 386

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Kingston the day in question, it was physically impossible for the quantity of water necessary to increase the content of moisture in the grain from that certified at Port Arthur to that found on the arrival of the grain at Montreal to have reached the grain during the rainfall at Kingston and that the Richardson Company having pleaded only the rainfall at Kingston as the cause of the damage, it must be concluded that the grain was not of the moisture content it was certified to have been when it left Port Arthur and that the certificate being only *prima facie* evidence, the weight of the evidence at the trial was sufficient to rebut it. I must confess that a careful reading of the evidence leads me to believe that a strong defence was made out by the respondent on the question of liability but the trial judge and the Court of King's Bench are in agreement that liability was as a matter of fact established and I cannot say that they are so clearly wrong as to entitle us to interfere with that concurrent finding. The cross-appeal of the respondent therefore should also be dismissed with costs.

Appeal allowed in part with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant and cross-respondent: *Brown, Montgomery and McMichael.*

Solicitors for the respondent and cross-appellant: *Beauregard, Phillimore & St. Germain.*