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*June 7.
*Dec. 12.

THE PROVINCIAL INSURANCE COMPANY OF CANADA..... } APPELLANTS;

AND

JAMES CONNOLLY..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

The appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1875, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*. The policy contained the following clause: "*J. C.*, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance, and cause three thousand dollars to be insured, lost or not lost, at and from *Quebec* to *Greenock*, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near *Indian Cove*, which forms part of the harbour of

* PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the *Traverse*. On an action upon the policy it was:

Held, (*Fournier* and *Henry* J. J., dissenting,) that the words "from *Quebec* to *Greenock*, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of *Quebec* on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.

Per Ritchie, C. J.: The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Per Gwynne, J.: The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily, at the date of the departure of the plaintiff's vessel, at least as far as the *Traverse*.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada*, (appeal side), maintaining the respondent's action on a marine policy against the appellant.

The declaration of the respondent alleged:

That the appellants issued a marine policy of insurance at *Toronto*, dated the 28th November, 1871, insuring, in favor of the respondent, $3,000 upon a cargo of wood-goods laden on board of the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*; that the vessel, while covered by the policy, was lost in the *St. Lawrence*, with her cargo; and that the respondent, who had fulfilled all the conditions of the policy, had sustained loss over and above the amount insured.

The defendants pleaded that the policy contained a warranty that the vessel should "go out in tow"; which meant, according to the usage at that season of the year, that the *Emigrant* was to proceed down the river with the aid of steam power, at least as far as the

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foot of the *Traverse;* and that the vessel had not gone out in tow.

The plaintiff, at the trial, tendered evidence of a conversation between him and the defendants' local agent at *Quebec*, previously to the issuing of the policy, as to the meaning to be put on the words "vessel to go out in tow," but this was rejected by the Judge presiding at *enquête*.

The Superior Court confirmed that ruling, and the plaintiff's action was dismissed upon the merits.

The judgment of the Court of Queen's Bench reversed the judgment of the Superior Court; three of the honorable Judges being in favor of the plaintiff, and two in favor of the defendants.

The loss of the plaintiff not being disputed, the question upon the whole case is whether or not the vessel did go out in tow, and whether a legal liability for the loss has attached to the defendants upon a proper construction of the words "vessel to go out in tow."

The evidence as to the usage is reviewed at length in the judgments hereinafter given.

Mr. *Irvine*, Q. C., for appellants:

The whole question in this case turns on the construction to be put on the words "to go out in tow." The rule of law in matters of this kind is that words ambiguous in a contract may be interpreted by usage.

It can hardly be asserted that the engagement to tow, although expressed in short and somewhat vague terms, did not present to the minds of both parties to the contract an act of a continuous nature, *materially affecting the risk.* The peculiar perils of the *St. Lawrence* at the end of the month of November, and the absence of sea room between *Quebec* and the foot of the *Traverse*, were elements of danger against which no

prudent insurer would fail to protect himself; and if the Court has before it, in evidence, the matters of fact which indicate the risk which the appellants were unwilling to assume, the means are afforded, in accordance with well known rules of evidence, of affixing to the words used their true meaning. The introduction of parol evidence, to explain those terms, was not opposed, and there is little or no contradiction as to the main facts which the parties have thought fit to present.

My contention is, that the evidence is conclusive to prove that the custom was, at that season of the year, to tow all vessels to the foot of the *Traverse*. But the appellants do not rely upon the meaning given by particular witnesses to the words so much as upon the *fact*, well known to all persons connected with shipping at *Quebec*, that, *as a general rule*, all vessels leaving late in the fall are towed to the foot of the *Traverse*, as the *minimum* distance. It is a matter of no consequence whether or not this amounted to a "*usage of trade, of universal notoriety;*" it is sufficient, if it was so general, as to serve as a basis of interpretation when the applicant for insurance stated that he intended "*towing out.*"

The parties must have had an intention, and the question is, have they expressed themselves sufficiently unambiguously? The mere towing into the stream would be of no avail, and the fact that the vessel was towed from her loading berth into the stream, within the harbor of *Quebec*, had nothing whatever to do with the question of insurance; and I contend that, in view of the circumstances and the custom, it is clear the intention of the parties was that the vessel was to be towed out of the harbor. The learned counsel cited *Greenleaf* on evidence (1), *Taylor* on evidence (2),

(1) 1 Vol. sec. 277 & 282. (2) Sec. 1082, 1085.

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Arnould on Marine Insurance (1), *Maude & Pollock* on the law of Merchant Shipping (2).

Mr. *Fitzpatrick* for respondent:

The turning point in this case is this: Did the vessel go out in tow?

Now the phrase "vessel to go out in tow" is perfectly ambiguous and indefinite as to the distance of such towage, and being so, in case of doubt should be interpreted against the insurers, who made use of it and omitted to express themselves in words the meaning of which would be clear.

They had no right to make a stipulation in their own favor in words of questionable import, when the matter could easily have been placed beyond a doubt by a mention of the point in the river to which it was intended the ship should be towed. The only expressed idea is, that the ship was to go out in tow, and that she did go out in tow, is beyond all doubt. But the appellants, however, negative this by saying that according to the usage of the port of *Quebec*, this phrase imports that the vessel should be towed at least as far as the *Traverse*.

[The learned counsel then referred to the evidence, and contended that in cases where a vessel is towed out, there is no custom or universal understood usage amongst merchants whatever in the port to tow to any particular point, and none was proven to exist.]

The questions put to the witnesses only tend to elicit opinions and not the actual practice of trade, which alone can establish a usage.

The words used are the insurers own words, and they must be strictly construed against them. The vessel went out in tow from her loading berth, and the condi-

(1) 1 Vol. pp. 489, 493, 496, 502, 511.

(2) 3 Ed. p. 397.

tion of the policy has been complied with. There is not a word in the policy fixing the distance, and in the absence of proof of a general usage, the respondent is entitled to succeed.

Mr. *Irvine*, Q. C., in reply.

RITCHIE, C. J.:—

The case states that the declaration of the plaintiff below (respondent) alleged that the appellants issued a marine policy of insurance dated the 28th November, 1871, in his favor for $3,000 upon a cargo of wooden goods laden on board the barque *Emigrant*, on a voyage from *Quebec* to *Greenock*, and alleged that the vessel, while covered by the policy, was lost in the *St. Lawrence* with her cargo, and that respondent had fulfilled all the conditions of the policy and had sustained loss over and above the amount insured. That the defendants pleaded that the policy contained a warranty that the vessel should 'go out in tow,' which meant, according to the usage, at that season of the year, that the *Emigrant* was to proceed down the river with the aid of steam power as far as the foot of the *Traverse*; and that the vessel had not gone out in tow.

The circumstances of this case, as will be seen, I think, renders it wholly unnecessary to determine the *distance* the assured would be bound to tow, but simply whether the vessel did or did not "go out in tow."

The judgment of the Superior Court was in favor of the defendants, which judgment was reversed by the Court of Queen's Bench, three of the learned judges of that court being in favor of the plaintiff, and two in favor of the defendants. The case states: "The loss of the plaintiff not being disputed, the question upon the whole case is whether or not the vessel did 'go out in tow,' and whether the legal liability for the loss has

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attached to the defendants upon a proper construction of the words 'vessel to go out in tow.'"

The vessel did not go out of the harbour or port of *Quebec* in tow, and she was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the *Traverse*.

A good deal of evidence was given as to the custom of the port of *Quebec* in reference to the distance vessels were usually towed at the season of the year this vessel left; but under the circumstances, and in the view I take of this case, I think such evidence wholly unimportant, the only question being, as I have said, in the words of the case, "whether or not the vessel did go out in tow?" and not, if she had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent, in my opinion, on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Should it become necessary on any future occasion to decide this question, the very valuable and forcible observations of Mr. Justice *Casault* in his judgment on the point, and especially the reasons he assigns why a definite length of towage could not reasonably be fixed in a policy, will, in my opinion, be worthy of the greatest consideration by whomsoever the duty of discussing and determining the matter may be cast; as at present advised they commend themselves to my mind with great force.

I think the warranty had reference to the voyage and not to the position of the vessel in the harbour, that the primary meaning of the words "to go out in tow" is to go out from some limits, and that the words of the policy "from *Quebec* to *Greenock*, vessel to go

out in tow," meant that she was to go out in tow from the limits of the port or harbour of *Quebec* on said voyage, which she clearly did not do.

The captain in his protest says they got the pilot on board at 2 o'clock p.m (25th November), and proceeded in tow of a steamer from the loading berth to abreast of the town, where they came to anchor, the wind being contrary, the people being employed clearing up the decks and filling the water casks. On the 26th, at 7 a. m., they hove short, but the wind being light and variable from south-east to eastward, they remained at anchor during the day. The 27th commenced with light variable winds and snow; the wind increasing at 9 o'clock a.m. they got under way, and set all possible sail and proceeded down the river under the pilot's directions; that she subsequently got into the ice, and on the 30th November was abandoned.

The pilot who took the vessel down the river says:—

The *Emigrant* was lying at *Hall's* booms when I went on board. She was taken out from the booms by a steam tug. She had the same crew that she came into port with. None of her crew left her. She was moved out from the booms by one of the little harbour tugs that move ships out into the harbour. She was moved by the tug as far as Indian Cove, which was an hour and a half or two hours' work. There was a light easterly wind, and we cast anchor. The tug went back again, because with that tug we could not go any further; it was no use. That same evening the master went ashore to see if he could get a good steamer.

It was shown on the trial and admitted on the argument that the place where the vessel anchored and remained till the 27th November was in the harbour of *Quebec*, some four or five miles from its limit. It is, to my mind, very clear from this testimony that the vessel was towed from her loading berth to another part of the harbour where she came to anchor preparatory to proceeding on her voyage, and that she did not leave her loading berth with the intention then and

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there of commencing and continuing her voyage without further delay, but merely changed her position in the harbour with the intention of remaining in the port till everything was ready to enable her to go to sea, that is, until her water casks were filled and the captain had obtained, what he evidently thought could be got, a suitable steamer to tow him out. The captain says after she came to anchor in the harbour the men were employed filling the water casks, and it is clear without water the vessel could not have been in a seaworthy condition to proceed on her voyage, and the captain left the vessel and, in the words of the pilot, "went ashore to see if he could get a good steamer," that is, to get just what, in my opinion, the warranty in the policy required him to have, viz.: a steamer fit and competent to tow the vessel from the port and harbour of *Quebec* out on her voyage to *Greenock*, the harbour tug which had taken the vessel from her loading berth to another position in the harbour not being of sufficient capacity or ability to tow him out on his voyage, as the pilot says:—"the captain went back again, because with that tug we could not go any further, it was no use."

The unreasonableness of the construction contended for, that the towing out was only intended to be from the loading berth into the stream in the harbour, because of the uselessness of such a warranty to the assurer, is so forcibly pointed out in the judgment of Mr. Justice *Casault*, and with which I entirely agree, that further observations are not required from me.

As therefore, in my opinion, the vessel had never got under way with the *bonâ fide* intention of prosecuting her voyage at once and without any further delay until the 27th Nov., when she sailed out of the harbour and port of *Quebec*, with the then intent of commencing and prosecuting her said voyage, and as she did not then go out in tow there was a clear breach of the warranty,

and the plaintiff cannot recover. In other words, the towing from the loading berth to another part of the harbour was not a compliance with either the letter or the spirit of the warranty. I think the appeal should be allowed.

STRONG, J., was of opinion that the judgment of the Court below should be reversed, and read a written judgment stating his reasons for that conclusion.

FOURNIER, J., was of opinion that the judgment of the Court below should be affirmed.

HENRY, J.:—

This is an action on a policy of insurance, and the respondent's right to recover is only contested on one point. The policy makes insurance to the extent of $3,000 on wooden goods on board the barque *Emigrant*, which sailed from *Quebec* to *Greenock* on the 24th November, 1871, "*the vessel to go out in tow.*" She took in her cargo and was towed out from her loading berth as far as *Indian Cove*. From that point she proceeded under sail, but was met by easterly storms and drift ice which effectually barred her further passage down the river, and she was subsequently in a few days lost. The loss of the respondent is admitted, and the question upon the case presented arises upon the issue raised by the appellants' plea, that the vessel did not *go out in tow*, within the terms of the contract as evidenced by the requirement of the policy in the words before stated. This defence does not arise upon any representation, written or verbal, of the respondent, nor need the words in question, although technically characterized as a warranty, be so construed We have no representation made by him, or any contract signed by him, and technical rules of construction of representations or warranties are not strictly applicable. In both they

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are in doubtful cases construed against the parties whose language is used. Their insertion in the policy operates simply, in my view, as a condition imposed by it, the failure to perform which would render it voidable. Its embodiment in the policy is no evidence that the respondent previous to its issue made any representation, promise or warranty whatever; but his acceptance of the policy amounts to an agreement on his part, that unless the condition be fulfilled the policy may be held void, and that his right to recover shall be contingent on the performance of the prescribed condition. There are cases where a transfer of the possession of property takes place, and where a party otherwise derives a benefit or advantage from the contract, and a condition imposed by the agreement is held to be a warranty, but that feature is absent from the present case, for the party has no insurance or other benefit, except that arising from the policy with the condition annexed to it. Although I have thought it proper to distinguish as I have done, I am not the less ready to say that in the shape of a condition precedent it is binding upon the respondent to the extent it legally goes. Taking then, the words in question as a condition precedent in the way I have stated, we must first ascertain their extent and meaning, and, in doing so, consider how the parties to be affected by them must be concluded to have used and understood them, if, from their vagueness, that is possible. It is not sufficient to arrive at a conclusion only as to how the insurer used them, as, the condition forming as it does a substantial part of the contract we must also see that the insured understood them in the same way. It cannot be a contract without the express or implied agreement of both parties to it.

The expression "to go out in tow" is, *per se*, unintelligible, and, in this case, the onus of proving its mean-

ing and application is upon the appellants. Failure on their part by legal evidence to establish an agreement, the breach of which is sufficient to avoid the contract, must enure to the success of the respondent.

Parol evidence is not admissible to vary, control, or contradict a written agreement; but is admitted, as in other cases of mercantile instruments, to explain the language of a policy according to the known usage of trade. Usages of trade are local as well as general, and are known, or presumed to be known, in any locality, to or by every one engaged in any particular trade or business to which they are applicable. So, particular terms, or provisions employed or made, have authoritative and prescribed application, and, when used in contracts, are as well understood as if specially recited or explained. That is why evidence of them is admitted. The well known and fully accepted technical meaning of such terms is properly assumed to have been in the minds of contracting parties when using them, and their presence in a contract manifests their intentions as fully as if stated at length, embracing, as it does, the principle that that is certain which can legitimately be made certain. The appellants' plea is that "'the vessel to go out in tow' meant, according to the usage in the port of *Quebec*, that the said vessel should be towed by a tug from *Quebec* to some point in the River *St. Lawrence below the Traverse.*" Has he proved that? I have read and studied the evidence he adduced in the trial, and so far from proving any usage of trade, it has shown that *no such usage existed.* The great majority of his witnesses distinctly say there was no such usage of trade. It appears that late in the season it was usual for vessels, *if a fair wind did not prevail*, to use a tug, sometimes below the *Traverse* (about 60 miles), other times to the *Brandy Pots* (about 100 miles), and again sometimes to *Bic* (about 150

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miles; but the witnesses of the appellants, as well as those of the respondent, say there was no *usage of trade* applicable, or, indeed, any at all, on the subject of towing. After so stating, they were, as I think, very improperly permitted to give each his own interpretation of the words used. Some of them said the term "to tow out" meant below the *Traverse*, another "as far as the *Traverse*, *Brandy Pots* or *Bic*." The issue was not dependent on the ideas of those witnesses as to the application of the words, and the various views given even by the appellants' own witnesses show how absurd it was to have admitted such evidence at all. The condition is not to be affected by the mere opinions of witnesses as to its legal effect. The evidence must be sufficient to enable us to draw a necessary and irresistible conclusion as to the certainty of what was meant by the condition, arriving at it without any mere *speculations* as to the understanding of the parties to the contract, but on proof of the existence of a custom or usage. *Taylor* in his work on evidence (1) referring to the subject of customs and usages of trade, says:

> But in all these cases it is the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence, and that is without doubt the rule and law.

And at page 1024 says:—

> Before quitting this subject, it may be observed that much injustice is frequently occasioned by the daily habit of admitting evidence of usage, which though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is at variance with their real intentions. In this view some of the highest legal authorities, both in *England* and *America*, concur.

If then experience has shown injustice resulting from permitting evidence even of known custom and usage

(1) P. 1023.

to prevail in the construction of written documents, how much greater injustice might be fairly expected to result in cases where no such custom or usage existed, but decisions were to follow, as in this case, the mere opinion of witnesses as to the meaning of the condition set up by the appellants.

The appellants have undertaken in their plea to give satisfactory evidence of a custom or usage, but they have signally failed to do so. Their defence does not rest upon the mere *opinions* of witnesses, but upon evidence of a generally adopted and well recognised *usage of trade.*

The doctrine laid down by *Tindal*, C. J., in *Lewis* v. *Marshall* (1), as to the proof necessary in such cases entirely sustains the position I have taken:

> In order therefore to vary the ordinary meaning of such plain words and to make them comprise passengers and passage money as well as goods, we think the evidence ought to have been clear, cogent and irresistible. Whereas at the trial, although two witnesses spoke of the usual course and practice of the trade, the third spoke of his own judgment only; no instance *of such construction* is stated by any of the witnesses within his own knowledge. * * * *
> The fair inference to be drawn from their testimony at the trial appears to us to be—that it is customary, in calculating the earnings of a ship, or making up the account of the earnings, to include money paid for steerage passengers, but *there is no general usage* that in a contract of this description such meaning should prevail.

It will be observed that, although two witnesses "spoke of the usual course and practice of the trade," it was considered insufficient. In this case all the witnesses show there was no such usage at all.

We must in this case construe the word "out" from the position of the vessel at the time and from a consideration of the maritime features of the voyage she had to perform. If she were at anchor or at a wharf in a harbor within a few miles of the open sea, we would necessarily assume it to mean out side of that harbor

(1) 7 M. & G. 745.

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because there would be but one "out" that could have been intended, but "out" in reference to the passage of a vessel from her loading berth at *Quebec* from which vessels are usually towed to the main part of the *St. Lawrence* River, and thence down it, requires proof as to the meaning of the term, if anything more than towing out from the wharf into the stream is meant. One party using it might mean, as one of the appellants' witnesses stated, only from the loading berth into the stream. He says: "many times even in that season," referring to the last week in November, "they only get towed out from their berth into the stream, and if the wind is fair I do not see that they have any occasion to be towed further." What evidence have we, then, that either of the parties intended to prescribe for anything further? What evidence that even the insurer meant anything else? What twenty witnesses, or any number, might think the words meant cannot be used to bring home to the minds of the contracting parties when the policy was issued a similar understanding and use of them. The respondent does not rest his defence of the charge of the breach of the condition as construed by those witnesses, but on their and other evidence to sustain the allegation that the policy should be voidable by satisfactory proof of the existence *of the usage of trade at Quebec.*

One of the appellants' witnesses, *Alexander Frazer*, in his direct evidence, when asked about a "general usage as to the towing of vessels in the latter part of November," says:

> I do not know that there is any special distance regulated by usage. It is entirely a matter of bargain between the parties. The towage extends any distance you please.

Here, then, is a witness of the appellants who says he has "been doing business in *Quebec* as a marine insurance agent for upwards of twenty years, and

covered a great many risks *via* the *St. Lawrence*," and he never heard of *any such usage of trade*, and I ask who could have been placed in a more favorable position to have heard of and known it, had any such existed. Another witness (also an insurance agent for over 25 years) says: "The terms are ambiguous, and the ambiguity consists in no distance being mentioned;" and further as to policies: "*There is generally a point mentioned* to which the vessel should be towed. *In the absence of any distance being mentioned*, I would understand that the vessel should be towed clear of the wharf. I should understand the vessel was to be hauled out from her loading berth by a tug." Is the testimony of those two witnesses to prevail, or that of others who think the words of the condition would necessitate a towing as far, at least, as the *Traverse*? Or, in the uncertainty, what can we say was intended by the parties to the policy? Does it not, with such evidence, amount to the wildest speculation to declare in favor of such a position as that contended for by the appellants? Or, even if we could speculate satisfactorily, do not the rules of evidence and for the construction of written documents interpose wise and salutary bars against such a course? What is there in the whole evidence to show the insured intended to be bound to tow beyond the towing into the stream, or, if further, which of the other distances did the insurer mean? The latter desires by his plea to be governed by an alleged general usage of the port, which is proved not to exist. It is not the province of a court to make issues for parties, but to determine their rights under those submitted. Who can say, then, that the only issue tendered by defendant should not, on the evidence, entirely fail? But the former is not to be deprived of his insurance for which he paid, in the absence of clear proof that it is not in

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accordance with his agreement. The condition, in the bald state it appears, and the evidence produced, launch us upon a broad sea of doubtful and difficult speculation through the want of the necessary proper direction and reference; and we are left to find safety from the fogs and mist which the evidence has created by recourse to the only legitimate means open to us, and that is, to steer by rules wisely adopted for such cases. The abnormal atmosphere should never have been permitted to encompass or perplex us, but, having done so, we must shake off all improper influences and seek an atmosphere where legal lights and provisions will enable us to proceed more securely and satisfactorily.

In what I have already said is included the declaration that the greater portion of the evidence herein, besides having been improperly received, is wholly immaterial, as inapplicable to the issue; but if even we were permitted to consider it, we would not be justified in concluding that the weight of it is with the appellants. Taking it, as given, for both parties, the weight of it is wholly with the respondent. The insurer may, for argument's sake, be assumed to have meant that the towing "out" should be at least as far as the "*Traverse*;" but to bind the insured we must have evidence that *he* so understood it, for he may have considered it but as a provision for towing into the stream—for that would in the ordinary construction of the words be sufficient—and upon that understanding paid the premium and accepted the policy. The onus is therefore on the appellant to prove that the respondent must have understood the condition as requiring a towage at least *as far as the* "*Traverse*." The plea is not that the words "to go out" in tow mean a reasonable distance. If it were, we should consider what was a reasonable distance all things considered, but, not being so, the

question submitted does not permit us to consider that matter as the appellants have not asked us to consider it. We are asked what under such an issue would be legitimate, but not otherwise to consider the lateness of the season and the danger, not only of delay and the consequent impracticability of the voyage during the season, but the additional risk to insurers. There is, however, nothing in the evidence to show the existence of any custom or usage of trade applicable at all, and therefore no more so in November than in June. It is urged in favor of the appellants' contention that higher premiums are demanded during the late season, but as far as the evidence enlightens us we are justified in the conclusion that in this case the higher rate applicable was paid. It was received by the appellants, and the policy having been issued upon the condition in question, we are not justified, in construing it, to consider the nature or extent of the risk otherwise covered by it, or to give to words a construction they cannot otherwise bear. In the absence of any usage of trade specially applicable to the late season, as distinguished from the earlier and finer one, the words in question cannot have any application in November, that they would not have in June or July. We are not only not bound but prohibited from entering into any consideration of what might or might not possibly have been in the mind of the appellants when issuing the policy, but must be guided solely by the terms they have employed in it, and if they meant "out" to be as far as the *Traverse* they were bound to say so in definite terms to the respondent, and not leave him trusting for his insurance in case of loss to a contingency to arise from the conflicting speculative opinions or views either of witnesses, jurors, or judges, as to the meaning of the condition he attaches.

Lord *St. Leonards*, in one of his judgments, says :

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A policy ought to be so framed that he who runs may read. It ought to be framed with such deliberate care that no form of expresssion by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it. Nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be framed in a manner to perplex the judgments of the first judges in the land, and to lead to such serious differences of opinion amongst them.

In *Fitton* v. *Accidental Death Insurance Co.* (1), *Willes*, J., says:

It is extremely important, with reference to insurance, that there should be a tendency rather to hold for the assured than the company, where any ambiguity arises on the face of the policy.

The appellants in this case have inserted a condition in the most ambiguous terms. They, having put their own construction upon it in their plea, have estopped themselves from urging any other, but they have signally failed to sustain it by legal evidence.

To show, under the evidence, how ineffectual and uncertain the condition is, it is not amiss to make a further reference or two to its terms. It has been stated by some of the witnesses that it is sometimes considered necessary that a "tow out" should extend, not only to the *Traverse*, but to the *Brandy Pots*, and even as far as *Bic*. With the wind ahead, independently of the terms of any insurance policy, it would, no doubt, to hasten the voyage and lessen the risk, be often advisable to tow beyond the *Traverse*, or the *Brandy Pots*, or sometimes as far as *Bic*, or further, even; but the evidence clearly shows the course a straight one, and that with a leading wind no towing at all is absolutely necessary. There are no crooked channels to pass, and therefore in the ordinary state of things no absolute necessity for towing.

(1) 17 C. B. N. S. 122.

Suppose this vessel went altogether under sail from her place in the stream, got safely and expeditiously to the ocean and was subsequently lost on her voyage, it would seem hard that the insurer should have no recourse under his policy; but if the appellants contention is right he would have to suffer the loss—for the policy would be avoided in that case as in the present circumstances. Suppose, however, she had been towed so as to clear the *Traverse*, but the tug there left her and she, proceeding under sail, was lost before she reached the *Brandy Pots*, and to an action on the policy the insurer pleaded that she should according to general usage have been towed past the *Brandy Pots*, would not the evidence on this trial be wholly insufficient to sustain such a contention? Or why, if a good defence, as far as the "*Traverse*," or the "*Brandy Pots*," would it not in the absence of any controlling usage be as good as far as "*Bic*," or why limit it even to the latter, for that is still the river *St. Lawrence;* and, in the case of adverse wind or weather, it might be advisable, to shorten the voyage and lessen the risk, that the towing should be extended much further? These are very proper considerations for owners and navigators of ships in balancing the advantages against the necessary additional risk incurred. The insurer, who takes, to the amount of a policy, the place of the owner in that respect, has, no doubt, the right to prescribe his own conditions, and in doing so directs the owner as the latter would his sailing master. The latter is answerable for disobedience of his owner's orders when explicitly given, and if the master of this ship had received orders that the vessel should *go out in tow* merely without stating or limiting any point or distance, and that there existed no generally acknowledged usage of the port to fix the one or the other, the master might fairly assume the directions to be followed by a towing to the nearest

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usual point from his loading berth, where the voyage commenced. And, in case of loss or damage, if the owner sought legal redress, he would be very properly told that if he wished the towing to have extended further, he should have given directions to that end in unmistakable and unambiguous language. For similar reasons a like ruling should appear in our decision in this case.

The language of such a condition should be in itself certain, or be governed and explained by some existing usage by reference to which it would become certain. How can we say that if terms such as pleaded had been distinctly stated, the respondent would have agreed to them or accepted the policy on them?

Addison in his work on contracts says (1):

> Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. * * * And parol evidence thereof may consequently be brought in aid of the written instrument. * * * The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication and tacit understanding all those general and *unvarying* incidents, which a *uniform* usage would annex, and according to which they must be considered to contract, unless they expressly exclude them.

And cites eight authorities to which it is unnecessary to refer.

In this doctrine is contained the rule of law by which we and parties interested are bound.

The appellants were bound under the plea to have shown those "unvarying incidents which a uniform usage would annex" to the words of the condition, and having totally failed to do so, I think the appeal should

(1) 7th Ed. vol. 1, p. 184.

be disallowed and the judgment of the Court below affirmed with costs.

TASCHEREAU, J.:—

I am of opinion that this appeal should be allowed. The facts of the case have been fully gone into by the judgments of the other members of the court, and I will not enter into useless repetitions. I fully concur in the opinion that the words "vessel to go out in tow" in this policy constituted an engagement *affecting the risk*. Now, it is not, and cannot be pretended, that the mere moving out of the vessel from her loading berth to any other place within the harbour was an act by which the risk was in any manner affected. I cannot bring my mind to believe that the insurance company inserted these words in the policy for the mere purpose of obliging *Connolly* to have the ship towed from her wharf into the stream, and that *Connolly* can ever have been under the impression that he, by these words, merely warranted that the ship should be towed out a few hundred feet from her wharf, or to any place within the harbour. I am of opinion to allow the appeal with costs.

GWYNNE, J.:—

I confess it appears to me that we have only to regard the nature and subject of the contract, and the season of the year when it was entered into, to enable us to pronounce our judgment that it was not the intention of the parties to the contract that the condition contained in the policy, that the ship insured upon her intended voyage from *Quebec* to *Greenock* should "go out in tow," should be satisfied by her being towed out from her berth at the quay or dock where she lay into the middle of the river. We can have no difficulty in saying that nothing short of her being towed out of the harbour of *Quebec* would be sufficient. If she had been

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towed out of the harbor, the question would have arisen whether towing her just out of the limits of the harbor and leaving her there would have satisfied the condition, but, as she was not towed even so far, there can be no doubt that the condition was not fulfilled, and that the defendants were entitled to judgment. The defendants pleaded to the action on the policy that the words, "the vessel to go out in tow," meant, and was a warranty that, according to the usage of trade in the port of *Quebec*, the vessel should be towed by a tug from *Quebec* to some point on the river *St. Lawrence* below the *Traverse*, and that the vessel did not go out in tow. The question involved in this issue was,—whether or not at the particular season of the year, namely the 25th Nov., the latest date at which risks are assumed at all, there was a usage in the Port of *Quebec* that vessels going to sea should be towed out of the harbour, and for some distance down the river on their way? That question being answered in the affirmative, it is for the court to construe the contract, in the light of that usage, as one of the circumstances surrounding the contract. The plaintiff in the court below, wholly, as it appears to me, misapprehended the issue. By the manner in which he interrogated his own, and cross-interrogated the defendants' witnesses,it is apparent that his object was to establish that the words "the vessel to go out in tow" have acquired no special meaning in mercantile phraseology requiring a vessel to be towed *to any particular point* down the river; but whether they had or not was not the question; the sole and simple question was: at the particular season of the year when this policy was effected, was there any usage prevailing at *Quebec* that vessels going to sea should be towed down the river on their voyage? That there was such a usage was established, I must say, by what appears to me the most

undoubted, and almost uncontradicted, evidence, and that the usage was to tow down as far as might be deemed necessary having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily at the date of the departure of the plaintiff's vessel at least as far as the *Traverse*.

I have no difficulty whatever upon the evidence in finding as a fact such to be the usage; and so finding, it follows, as a point of law that the condition subject to which the policy was granted was not fulfilled, and that the judgment of the Superior Court in favor of the defendants should be affirmed.

Appeal allowed with costs.

Solicitors for appellants—*Holt, Irvine & Pemberton.*

Solicitors for respondent—*Andrews, Caron & Andrews.*