

THE NOVA SCOTIA MARINE IN- }
 SURANCE COMPANY, (LIMITED), } APPELLANTS; 1893
 (DEFENDANTS) } *Nov. 27.

AND

ROBERT STEVENSON, (Plaintiff).....RESPONDENT.

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 *Mar. 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Misrepresentation—Vessel “when built”—Repairs to old vessel—Change of name—Register.

Where payment of an insurance risk is resisted, on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made.

Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect.

Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired and given a new name and register but containing the original engine, boiler and machinery with some of the old material, is a misrepresentation and avoids the policy whether made with intent to deceive or not. Taschereau J. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment in favour of plaintiff at the trial.

The plaintiff bought the steamer “Effort,” built in 1868, and repaired her extensively, almost rebuilding but using some of the old materials and the engine, boiler and machinery that had been in the “Effort.” She was then given the name of “The Clansman” and received a new register. The plaintiff effected insurance of “The Clansman” and in answer to the question “when built,” in the application replied “in 1890” the year in which the repairs were effected. A

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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loss having occurred payment was resisted on the ground that this answer was a misrepresentation. Plaintiff obtained a verdict on the trial which was affirmed by the Supreme Court of Nova Scotia from whose decision the defendant company appealed.

Harris Q.C. for the appellant referred to *Ionides* v. *Pacific Insurance Company* (1); and *Rickards* v. *Murdoch* (2); in support of the contention that plaintiff had concealed a material fact.

Borden Q.C. for the respondent. The appeal depends on a question of fact, and the finding at the trial affirmed by the full court, will not be interfered with. *Allen* v. *Quebec Warehouse Company* (3); *Arpin* v. *The Queen* (4).

On the merits the learned Counsel cited *Lyon* v. *Stadacona Insurance Co.* (5); *Connecticut Insurance Co.* v. *Luchs* (6); *DeWolf* v. *New York Firemen Insurance Co.* (7); *Gandy* v. *Adelaide Marine Insurance Co.* (8).

The judgment of the majority of the court was delivered by :

KING J.—This is an appeal by defendants in an action on a policy of marine insurance upon the steamer “Clansman.” The policy was a time policy and contained an express warranty of seaworthiness. The defence relied upon was misrepresentation as to the age of the vessel. Application for insurance was on forms used by the insurers, requiring answers to certain questions. Two of the questions were: “When built?” and “present condition?” To the first the answer was “1890.” The second was not answered. It appeared upon the trial that in the fall of 1889 a

(1) L. R. 6 Q. B. 674.

(2) 10 B. & C. 527.

(3) 12 App. Cas. 101.

(4) 14 Can. S. C. R. 736.

(5) 44 U. C. Q. B. 472.

(6) 108 U. S. R. 498.

(7) 20 Johns (N.Y.) 214.

(8) 25 L. T. N. S. 742.

steamer called the "Effort" that had been built in 1868, was put on the marine slip at Port Hawkesbury, in order to be retopped. Finding that she needed large repairs the planks were taken off, new floor timbers put in where necessary, also new top timbers, stanchions, rails, deck beams and deck, new ceiling to the extent of a half or two-thirds, and she was newly planked. The shape of stern and bow above water were altered. The work cost about \$600 or \$700, and was completed in the spring of 1890. The engine and boiler were not disturbed during the progress of the work. A new register was somehow obtained for the vessel under the name of the "Clansman"; and soon afterwards she was sold to the plaintiff who knew of the facts above stated.

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It was found by Mr. Justice Ritchie that the representation that the vessel was built in 1890 was correct in point of fact, and this was upheld by the Supreme Court, McDonald C. J. and Weatherbe J., dissenting.

Where payment of a risk is resisted on the ground of misrepresentation it ought indeed to be made very clear that there has been such a misrepresentation. *Davies v. National Insurance Company of New Zealand* (1). With unfeigned respect for the opinion of the learned judges forming the majority, it is difficult to resist the reasoning and conclusions of the learned Chief Justice and Mr. Justice Weatherbe, that in this case there was such misrepresentation.

A representation is to be construed according to the fair and obvious import of words; and is equivalent to an express statement of all the inferences naturally and necessarily arising from it (2). It comprehends whatever would reasonably and necessarily be inferred by mercantile men from the language under the circum-

(1) [1891] A. C. 485.

(2) 1 Phillips on Insurance sec. 550.

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stances in which it was employed (1). What was proposed to be insured and what was being inquired about was a thing and not a name, the thing or vessel called the "Clansman." It was immaterial that she did not become the "Clansman" until 1890. The question was as to when she was built. Now vessels are ordinarily deemed to be built but once, and the question and answer in their fair and obvious import relate to the time when the vessel in question was first completed as a vessel; and the representation that she was built in 1890 is equivalent to an express statement that she was then a new vessel.

When the work on the "Effort" was begun she was a vessel, and there was no time in the progressive substitution of new for old when she ceased to be a vessel in course of repair and alteration. This follows upon a consideration both of what was made new and of what was left in place, and is further evidenced by the fact that the work was carried on with the engine and boiler in position. The result was something very different from a new vessel. Most important and vital parts of the structure were old, both in material and construction. Such were the keel, keelson stringers, waterways, stem, stern post and aprons. These were not only weakened in material and fastening by time, wear and working, but were also less fit to receive the new fastening that the new work would call for. Manifestly, too, portions of the new work could not be as effectually fastened as if the like work were done in the ordinary course of building. Doubtless the owner did the best he could, but he could not turn a twenty year old vessel into a new one. Repairing or restoration with minor alteration is the proper term to express what was done.

(1) Arnould on Marine Insurance p. 539.

One of the learned judges gave much weight to the statement of the new register that the "Clansman" was built in 1890, but that learned judge would probably be among the first to admit that the age of the vessel is to be decided upon the evidence at large, and that the opinion of those who were concerned in affecting such registration cannot avail against the proved facts.

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The proper conclusion upon the facts is that the "Clansman" was not a new vessel in the ordinary or indeed in any sense, nor a vessel built in 1890 in the ordinary or in any sense, but an old vessel with a new name, extensively repaired with minor alterations, and carrying about with her most considerable and essential portions of old material and construction. If the old name had been retained it would scarcely have occurred to any one to claim that it was anything else but the old vessel in a repaired state, and equally whether he knew or not, the underwriters were entitled to the facts in answer to their question.

Then as to the effect of the misrepresentation. If made with intent to deceive the misrepresentation vitiates the policy however trivial or immaterial to the nature of the risk. If honestly made it vitiates only if material and if substantially incorrect. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

The age of a vessel is a point material to the risk. *Ionides v. Pacific Ins. Co.* (1). And although many particulars respecting the age, condition or structure of the vessel which might reasonably affect the mind of the underwriter need not be disclosed unless asked

(1) L.R. 6 Q.B. 683.

1894 about, at least where they are included in a warranty
 THE NOVA of seaworthiness express or implied, if the underwriter
 SCOTIA asks questions about them the answers must be sub-
 MARINE stantially true or the effect is to avoid the policy.
 INSURANCE A question respecting the age of a vessel would
 COMPANY v. STEVENSON, *primâ facie* be taken to imply that the underwriter con-
 King J. sideres the answer material, and in such case the answer
 may be presumed to have influenced his mind.

In the case before us there is nothing to rebut this *primâ facie* presumption, and the representation is to be taken as material to the nature of the risk.

It is, however, a representation and not a warranty and, in the absence of intent to deceive, is satisfied by substantial compliance with fact. But a difference of twenty years is a very substantial difference in the age of a vessel and with the *primâ facie* presumption against him arising from the asking of the question, and the absence of anything tending (as in *Alexander v. Campbell* (1).) to rebut the presumption, the reasonable conclusion upon the facts in evidence is that had the truth been known the underwriter would not have underwritten the policy upon the same terms.

It is further the opinion of the majority of the court that the representation was made with intent to deceive.

The result is that the appeal is to be allowed and judgment to be entered for the defendants below.

TASCHEREAU J.—I would dismiss this appeal. The trial judge found, as a matter of fact, that the answer "1890" to the question "when built," was substantially correct. That finding is concurred in by the court *en banc*. Under these circumstances we cannot, in my opinion, entertain this appeal. I would go further and say that, as I read the evidence, coupled with the registry of the ship, the respondent would not have

given a true answer if he had said that the ship was built in 1868. It was not all new; old materials were certainly used, but she was nevertheless built, and came to life as "The Clansman" in 1890. I adopt the reasoning of Ritchie, Graham and Meagher JJ. in the court below.

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Appeal allowed with costs. Taschereau
J.

Solicitors for the appellants: *Harris & Henry.*

Solicitors for the respondent: *Borden, Ritchie, Parker
& Chisholm.*
