[PRIVY COUNCIL.]

MAURICE . . . . . APPELLANT;
PLAINTIFF,

AND

GOLDSBROUGH MORT AND COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1939.
May 5.
Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer.

Bailment—Goods consigned for sale on commission—Insurance by bailee—Destruction of goods before sale—Insurance moneys—Deduction by bailee of service charges and commission—Insurable interest—Subject matter of insurance.

The appellant, a wool grower, consigned certain wool to the respondent for sale upon terms entitling the respondent to payment for services rendered by it preparatory to the sale of the wool and to commission upon any sale. The respondent insured the wool, together with wool owned by itself and other growers, against loss by fire under a policy expressed to be "on interest as more particularly described in schedule attached hereto," the interest being described in the schedule as follows: "On merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire." After some only of the preparatory services had been rendered by the respondent, and prior to the sale of the wool, it was destroyed by fire. The respondent received from the insurance company in respect of the appellant's wool a sum representing its gross selling price. From this sum it deducted an amount representing its full charge for all preparatory services, and an amount representing commission upon sale, and accounted to the appellant for the balance.

Held that the respondent was not entitled to deduct from the insurance moneys commission on sale or charges for preparatory services beyond those performed before the destruction of the wool.

Decision of the High Court: *Goldsbrough Mort & Co. Ltd.* v. *Maurice*, (1937) 58 C.L.R. 773, reversed, and the decision of the Supreme Court of New South Wales (Full Court): *Maurice* v. *Goldsbrough Mort & Co. Ltd.*, (1937) 37 S.R. (N.S.W.) 76; 54 W.N. (N.S.W.) 16, restored.

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APPEAL from the High Court to the Privy Council.

This was an appeal by special leave from the decision of the High Court of Australia in *Goldsbrough Mort & Co. Ltd.* v. *Maurice* (1), reversing, by a majority, a decision given by the Supreme Court of New South Wales (Full Court) (2), in favour of the appellant.

The question in the appeal was: What were the rights of the appellant as wool grower and the respondent as wool-broker in respect of moneys collected by the broker under insurance policies effected by it on the appellant's wool, which the respondent held in its store at the time when it was destroyed by fire?

The respondent, as broker, claimed to make certain deductions, partly for expenses incurred and services rendered by it before the fire, and partly for prospective profits, such as commission on sale lost by it in consequence of the fire, and for charges or expenses which but for the fire would have been earned or expended and would have been deductible from the proceeds if the wool had been sold in the normal course instead of being destroyed.

Wilfrid Barton K.C. and *Kenelm Preedy*, for the appellant.

A. T. Miller K.C. and Hon. *H. L. Parker*, for the respondent.

LORD WRIGHT delivered the judgment of their Lordships, which was as follows:—

The question in this appeal is what are the rights of the appellant as wool grower and the respondents as wool-brokers in respect of moneys collected by the brokers under insurance policies effected by them on the appellant's wool, which the respondents held in their store at the time when it was destroyed by fire. The respondents as brokers claim to make certain deductions partly for expenses incurred and services rendered before the fire, and partly for prospective profits, such as commission on sale, lost by them in consequence of the fire and for charges or expenses which but for the fire would have been earned or expended and would have been deductible from the proceeds if the wool had been sold in the normal course, instead of being destroyed.

(1) (1937) 58 C.L.R. 773.
(2) (1937) 37 S.R. (N.S.W.) 76; 54 W.N. (N.S.W.) 16.

The facts are set out in a special case, to which are appended certain questions for the opinion of the court. The Supreme Court of New South Wales answered these questions in the appellant's favour (1). That decision was reversed by the High Court of Australia by a majority, *Latham* C.J. and *Evatt* J. dissenting (2).

The wool in question, 123 bales in all, was consigned by the appellant to the respondents during September 1935, and was lying in the respondents' store when it was destroyed by fire on 25th September 1935. According to the ordinary course of business between the respondents and their clients the respondents were not only to receive the wool into their store, but were to pay the expense of the road and rail carriage to the store, to prepare the wool for sale by weighing, lotting, valuing it, and so forth, and to sell the wool for a commission payable by the growers to the respondents. The net proceeds of sale after such deductions of charges and expenses were to be paid by the respondents to the growers. The special case does not in terms say that the respondents were bound to insure the wool, but it is clear and has been assumed throughout these proceedings that there was this obligation. The case states that the respondents, in their own name, had insured the appellant's wool and the wool of other clients, charging a flat rate of 1s. 6d. per cent to the growers. This charge was not based on the actual rate payable under the policies to the insurance companies. A specimen of the ordinary policies effected by the respondents was appended to the case. It was issued by the Western Assurance Co. in favour of the respondents as the insured for the sum of £5,000 for one year, and was against loss or damage by fire or lightning of the property described in the schedule. The description in the schedule was " on merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire," while lying in the respondents' store in Sydney. The course of business followed by the respondents in these insurances was not to cover specifically any particular lot or lots of wool, but to have a number of policies each for a lump sum, covering all the wool which the respondents held from time

(1) (1937) 37 S.R. (N.S.W.) 76; 54 W.N. (N.S.W.) 16.
(2) (1937) 58 C.L.R. 773

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to time, the total cover being reduced or diminished according to requirements at the close of each day. The total amount of the insurance was divided by mutual arrangement between the Western Assurance Co. and other companies, by way of direct insurance and not by way of reinsurance. When the fire occurred, the respondents had expended moneys in respect of the appellant's wool for railage from the station to the store and for insurance in transit and had charged for insurance at the rate of 1s. 6d. per cent, less ten per cent. But in the account which the respondents after the fire rendered to the appellant, headed "Account Sales of Realization by Insurance," they claimed to deduct from the insurance moneys which they had received in respect of the wool two further sums, £24 15s. for commission on sale and £36 11s. 10d. for receiving, weighing, lotting, appraising value, &c. These two further sums were disputed by the appellant on the ground as to the sale commission that it had not been and could not be earned, and as to the other charges that they were only deductible from the insurance moneys so far as they were referable to receiving the wool or any other services actually performed. This view was accepted by the Supreme Court. The amount which the respondents collected on the insurance policies was £1,980 0s. 7d., which was the figure as estimated by appraisers appointed for the purpose of appraising and valuing the wool, as on the basis of the gross selling price realizable by auction at the date of the fire. The issue in the action was as to the deductions which the respondents were entitled to make from the insurance moneys in settling with the appellant.

The policy contained a usual reinstatement clause and also made it a condition that a claim should be made within fifteen days of loss, stating in particular the amount of loss or damage, having regard to the value of the goods at the time of loss or damage "not including profit of any kind."

It is convenient first to determine what is the position between the respondents as insured and the Western Assurance Co. as insurers. What that is must depend on the contractual terms embodied in the policies. That the wool was covered by the policies was not in dispute, though there had been no appropriation of the particular parcels as between any of the lump-sum or block

policies. The sample policy, exhibited to the special case, defines the scope of the insurance. It is necessary, however, in examining the policy to distinguish between the subject matter which is insured and the assured's interest in the subject matter. The subject matter, for the purposes of the present policy, is the merchandise, that is, the wool, which is insured against the risk of physical loss or damage by fire. But while the subject matter of the insurance is the chattel, the basis of the insurance is that the assured stands in such relation to the chattel that he may be prejudiced by its loss or damage, in accordance with the various principles which have been settled for regulating what constitutes insurable interest. The subject matter of an insurance must be properly described. Thus, if the subject matter is a ship, the policy must so describe it, and, conversely, if it is freight which is insured, that must be so described as the subject matter of the insurance. Similarly, by English law at least, an insurance described as an insurance on goods, does not cover profits. "*Lucena* v. *Craufurd* (1) has always been treated as deciding that, though profits may be insured, they must be described as such, and we took time in this case, principally with a view to see what were the reasons for this decision, and whether they were applicable to such a case as the present." This is a quotation from the judgment of Lord *Cairns* L.C., *Blackburn* and *Brett* JJ., in *MacKenzie* v. *Whitworth* (2). The policy there was a policy of reinsurance; the subject matter was the ship, which was properly defined; it was held to be unnecessary to define the nature of the assured's interest. The contract was a contract by way of reinsurance. The assured's liability under the original policy gave him an insurable interest in the ship, which was the subject matter of the insurance. The contract was to indemnify the reassured against all the damage sustained by the ship in consequence of any of the perils insured against, his interest being that he was himself liable to indemnify the original assured. In the policy here in question, the subject matter is described as merchandise and the condition quoted above specifically states that the insured value is not to include profits of any kind. Hence it is the wool, not any profits, which the policy

(1) (1806) 2 B. & P. N.R. 269; 127 E.R. 630.
(2) (1875) 1 Ex. D. 36, at p. 43.

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insures. But the policy also describes the interest of the assured which is covered as being the assured's own property in the wool, and also wool held by the respondents in trust or on commission for which they may be liable in the event of loss or damage by fire while lying in the specified stores. That form of cover for the use of warehousemen and other bailees has long been familiar. Its history was discussed in *North British and Mercantile Insurance Co.* v. *Moffatt* (1). It was there stated in the judgment of the court (2) that *Waters* v. *Monarch Fire and Life Assurance Co.* (3) and *London and North Western Railway Co.* v. *Glyn* (4) were cases in which "goods held by the plaintiffs as bailees were insured by them under policies the conditions of which provided that goods held in trust would not be covered by the policies unless they were insured as such. The goods accordingly were insured expressly as goods held in trust by the assured. The offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover to the amount of such liens. But the court held in each case that the plaintiffs were entitled to recover to the full amount insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected." After this, insurance companies limited as in the present policy the extent of the risk they were taking. A warehouseman who has assumed the obligation to insure the goods while in his possession has an insurable interest, because he will be bound to answer in damages to the bailor if he has not insured and the goods have been destroyed or damaged, though apart from the special contract the warehouseman would not be responsible in respect of goods accidentally destroyed or damaged by fire while in his warehouse. So far as concerns the respondents' claim against the insurers there was no need to distinguish between the respective interests of the appellant and respondents in the wool. The respondents were entitled to recover in full from the insurer for the insured value of the wool, which was determined by appraisement in accordance with the policy as being £1,980 0s. 7d., as stated

(1) (1871) L.R. 7 C.P. 25.
(2) (1871) L.R. 7 C.P., at p. 31.
(3) (1856) 5 E. & B. 870; 119 E.R. 705.
(4) (1859) 1 E. & E. 652; 120 E.R. 1054.

above. The correctness of that appraisement being accepted by all parties, the position is for practical purposes the same as if the wool had been originally valued at that figure in the policy. The respondents did not insure as agents for the appellant. They insured the subject matter, the wool, on account of their own insurable interest in that subject matter.

The respondents have not disputed the right of the appellant to claim from the respondents an account of the moneys collected under the policy. The dispute, as already stated, is as to what share of these moneys the respondents are entitled to retain. One possible view, suggested by *Evatt* J., is that as the respondents have agreed to insure the appellant's wool, the appellant is entitled to the whole of the moneys collected on the policy, though the respondents are entitled to set off, simply as a debt, whatever may be due to them from the appellant. The special case, however, does not set out the bargain as to insurance, and that way of looking at the matter may be disregarded, especially as in their Lordships' opinion, for reasons to be stated, it would in this case make no practical difference. The appellant rests his case on the ground that the respondents are not entitled to deduct any part of the proceeds of the policy, except to the extent that at the date of the fire they had a lien for services rendered or expenses paid. On the other hand the respondents claim that they are also entitled to deduct the commission which they would have earned and the charges which they would have been entitled to make for receiving, weighing, lotting, valuing, &c., just as if the wool had not been destroyed by the fire. They claim that these are profits which they have lost by the fire and that they had an insurable interest in these profits. That they had an insurable interest in their prospective profits on the wool in store may be conceded. But it was an insurable interest in a different subject matter, namely, in profits, and not in the wool itself. The policy, as already stated, did not insure profits. If the respondents had desired to insure profits, they might have insured them by an insurance on the profits so described. Perhaps they did, though whether they did or not is immaterial. In a policy such as this on merchandise, the right to recover must be based on an insurable interest in the goods themselves, whether a special property

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like a lien, or the general property, or some other insurable interest, such as liability in case of loss of the goods. The position of the warehousemen is well stated by *Crompton* J. in *Waters' Case* (1):— "I cannot entertain the least doubt that in these policies the words 'in trust' are used without any reference to a subpœna in Chancery. The parties meant to insure these goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to their bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods." *Wightman* J. says: "They" (sc., the bailees) "had a lien on them" (sc., the goods) "subject to which they were accountable to the owners who had entrusted them with the goods" (2).

These learned judges are upholding the right of the assured to recover the whole value from the insurers, because of their insurable interest either on the ground of lien or responsibility, the apportionment of what is recovered being left to be settled between bailor and bailee, the bailees' interest being defined by their lien. That this is so in the present case is also confirmed by the terms of the policy which insures the wool so far as it is the assured's own property, that is, to the extent of their lien or special property, and as to the residue refers to the property as held on trust. In effect in a policy of this nature, the policy moneys represent the goods when the goods are destroyed by fire, and the rights in these moneys are apportionable accordingly to the respective interests or property rights in the goods themselves.

The respondents, however, strongly relied on certain observations in *Ebsworth* v. *Alliance Marine Insurance Co.* (3). In that case the plaintiffs claimed on a policy on cotton from Bombay to London. The cotton was totally lost by sea perils. The plaintiffs were consignees for sale, and had advanced £3,000 on the security of the cotton, but had insured the whole value, which was £5,000. The jury found a verdict for £5,000, subject to leave reserved to reduce

(1) (1856) 5 E. & B., at p. 882; 119 E.R., at p. 709.

(2) (1856) 5 E. & B., at pp. 881, 882; 119 E.R., at p. 709.

(3) (1873) L.R. 8 C.P. 596.

the damages to £3,000 in the event of the court being of opinion that the interest proved and the plaintiffs' right to recover was limited to £3,000. The court was equally divided, *Bovill* C.J. and *Denman* J. being of opinion that the verdict was right, the plaintiffs not being limited to their own beneficial interest in the goods, *Brett* and *Keating* JJ. being of opinion that the plaintiffs were not entitled to recover anything beyond £3,000, being their actual advance. As the court was equally divided the case was inconclusive, and does not become less so when it is remembered, as is recorded in a note (1), that when the case came to the Exchequer Chamber, the parties by arrangement agreed that the judgment should be reversed and the damages entered for the plaintiffs should be reduced to a sum representing the personal pecuniary interest of the plaintiffs and no other person. How this arrangement came to be made does not appear, nor does it appear how the personal pecuniary interest of the plaintiffs was assessed.

It is, however, clear that no question was raised in the case whether the plaintiffs could recover anything beyond their advances, if they were limited to their own beneficial interest. Mr. *Miller*, however, strongly relied on a passage in the judgment of *Brett* and *Keating* JJ. (2) :—" The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of £3,000, their advance, and their expenses and expected commission." But, as the report shows, the only contest was whether they were to recover £3,000 or £5,000. Indeed, two years before, *Brett* and *Keating* JJ., along with *Willes* J., had, in *Moffatt's Case* (3) treated the parties' personal interest as limited to their liens on the goods. Mr. *Miller* also relied on a passage from the judgment of *Bovill* C.J. and *Denman* J. in *Ebsworth's Case* (4), quoting from *Parsons* on *Insurance* (1868), p. 50, to the effect that the bailee can recover not only to the extent of his lien for charges, commission, &c., but to the full value of the goods and the balance will be held in trust for the owner of the goods. This cannot mean that he will recover beyond the full value, by adding to it charges and commission, but in any case the statement is expressly limited

(1) (1873) 43 L.J. C.P., at p. 394.
(2) (1873) L.R. 8 C.P., at p. 637.
(3) (1871) L.R. 7 C.P. 25.
(4) (1873) L.R. 8 C.P., at pp. 628, 629.

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to liens. Again at p. 201 the same author is quoted to the same effect. Reference was also made to a case in the New-York court, *De Forest* v. *Fulton Fire Insurance Co.* (1), where the allowance not only of the bailee's advances, but also of mercantile commission and charges was only based on an admission and was not the subject of decision. Their Lordships find it impossible to recognize these citations as outweighing the authorities quoted above or as overriding the terms of the policy in this particular case. In America, it seems to have been held in certain cases that a policy on property might cover a right to a certain share in a cargo as profits. But *Phillips* on *Insurance*, 4th ed. (1854), sec. 462, states that an insurance on ship or goods specifically without any indication that another subject is intended cannot be applied to expected profits. *Arnould* on *Marine Insurance*, 10th ed. (1921), sec. 241, stated the English rule in the same terms. In their Lordships' opinion the policy in question here does not cover profits.

It was, however, contended by the respondents that the decision of the Supreme Court of New South Wales would infringe the principle of indemnity, which is the fundamental principle of insurance law. It was said that the appellant was awarded by that decision more than an indemnity, because he got the gross selling value of the goods, whereas, if the goods had not been lost by the fire, the appellant would have received no more than the net proceeds, after deduction of the respondents' charges and commission. There are many answers to this objection. In the first place, insurance does not necessarily give a perfect indemnity, but gives sometimes more and sometimes less. This may happen in several cases, but particularly in the case of a valued policy, where the measure of indemnity is fixed by the value, which is in effect the position under the present policy, as already pointed out. In fact, if there had been no fire, but the wool had been sold in the usual course, the amounts realized might have been either greater or less than the appraisement made actually as at the date of the fire. Again, if it is said that the respondents have by reason of the fire lost their commission and charges without being indemnified, the answer is that the policy provided no indemnity for that loss. It is outside

(1) (1828) 1 Hall (N.Y.) 94.

the purview of this insurance. Further, if it is said that the appellant gets a sum for the goods which includes the value of the brokers' services for which they have not paid, but without paying which they could not have realized the selling price by an actual sale, the answer is what the policy covers is the agreed value of the wool, and it is immaterial what costs, whether of production or marketing, go into that value. Thus, for instance, the appraised value is not affected by considering that one lot may have cost more to produce than another. The position in the event of the loss must depend on the terms of the contract and on the value as appraised as determined by the terms of the contract and similarly the apportionment of that value between the appellant and the respondents must depend on the respective rights of property which the parties had in the wool at the date of the fire.

In the result their Lordships are of opinion that the appeal should be allowed and the judgment of the Supreme Court of New South Wales (1) should be restored. The appellant will have the costs of this appeal and also their costs in the courts in Australia.

They will humbly so advise His Majesty.

Solicitors for the appellant, *Waterhouse & Co.*

Solicitors for the respondent, *Linklaters & Paines.*

(1) (1937) 37 S.R. (N.S.W.) 76; 54 W.N. (N.S.W.) 16.