COURT OF APPEAL.

June 12 and 18, 1934.

VERSICHERUNGS UND TRANSPORT A/G. DAUGAVA v. HENDERSON.

Before Lord Justice SCRUTTON, Lord Justice GREER and Lord Justice MAUGHAM.

Fire insurance — Reinsurance — Rate of exchange—Loss—Liability of plaintiffs under insurance policy covering certain buildings in Riga—Plaintiffs' right to indemnity under reinsurance policies issued by defendants—Insurance in Latvian currency—Dispute between original assured and plaintiffs—Action brought by assured—Sum awarded by Latvian Courts expressed in lats—Liability of defendants under reinsurance policy—Whether sum awarded by Latvian Courts should be converted into sterling at the rate of exchange at the date of the fire or at the date of the settlement of the plaintiffs' liability to the assured — "To follow the settlements of the" plaintiffs.

——— *Held, by* ROCHE, J., *that as the defendants were to follow the settlements of the plaintiffs, the defendants' liability should be calculated as at the date the settlement was made.*

——— *Held, by C.A., that a reinsurer was not liable under his reinsurance policy until the amount for which the reassured was liable to the assured was ascertained under the terms of his policy; and that therefore the conversion must be based on the rate of exchange at that date—Judgment of* ROCHE, J., *affirmed on more general grounds.*

This was an appeal from a decision of Mr. Justice Roche (48 Ll.L.Rep. 54) by Mr. Arthur Henry Henderson, an underwriting member of Lloyd's, the defendant in one of two actions which were tried together. The plaintiffs, the Versicherungs und Transport A/G. Daugava, of Riga, sued Mr. Henderson and Mr. William Charles Campbell, also an underwriting member at Lloyd's, in respect of loss under a contract of reinsurance against risk of damage by fire to buildings known as Weidendamm No. 27/31, in Riga. Both defendants denied liability. His Lordship dismissed the claim against Mr. Campbell, but found that Mr. Henderson was liable.

Sir Norman Raeburn, K.C., and Mr. W. L. McNair (instructed by Messrs. William A. Crump & Son) appeared for the appellant: Mr. S. L. Porter, K.C., and Mr. H. G. Robertson (instructed by Messrs. Simmons & Simmons) represented the respondents.

Sir NORMAN RAEBURN explained that the appeal was against one portion only of the judgment of Mr. Justice Roche. Mr. Henderson, with other Lloyd's underwriters, reinsured part of a risk on a factory in Riga. The original insurers were the plaintiffs in the action, who carried on business in Riga and who accepted the original fire risk on the factory and reinsured a portion of the risk with Mr. Henderson and other Lloyd's underwriters. The reinsurance was for twelve months beginning Feb. 17, 1930. On Apr. 11, 1930, fire occurred in the factory, which was seriously damaged. A claim was made in due course by the Daugava Company on the reinsurers. The point which arose was this. The insurance was in the Latvian currency, the unit of which is the lat. At the date of the fire the exchange as between lats and sterling was 25.22 lats to the £. The reinsurance policy was in lats. The date when after legal proceedings in Riga the Daugava Company paid their original assured was Jan. 13, 1932. At that date Great Britain had gone off the gold standard and the exchange rate was 17.19 lats to the £. The question in this appeal was which was the correct date of these two to take for the purpose of converting lats into sterling in order that judgment might be entered against Mr. Henderson in this country in sterling. The contention on behalf of Mr. Henderson was that it was the date of the fire. The plaintiffs' contention on the other side was that the correct date was the date when the plaintiffs paid their insured or some date early in 1932. Mr. Justice Roche upheld the plaintiffs' contention, since the reinsurance contract provided that the defendant was to follow the settlement of the plaintiffs, and found that, there being no settlement to follow till one had been made, and there being no settlement till the beginning of 1932, there was no cause of action against the reinsurers till then, and that was the correct date to take.

COUNSEL contended that that was an erroneous view of the meaning of the expression, and that the correct date to take when dealing with a contract of insurance was the date when the event happened which gave rise to the claim. What the reinsurers had insured was not the liability of the original insurers to their assured, but the building, and just as the liability of the Daugava Company under the original policy arose when the fire took place, so also the liability of the reinsurers arose when the fire took place. The original liability had to be discharged at the rate of exchange when the casualty occurred, but if the judgment of Mr. Justice Roche was right, there might be considerable delay between the discharge of the original liability and the liability under the reinsurance contract, when the rate of exchange might be quite different, and a much heavier liability might be imposed on the reinsurer.

Mr. PORTER, for the respondents, said that in an action for tort there was only one date that could be taken for the payment of damages, and that was the date when the damage took place. But in contract the matter was different, and it could be stipulated exactly when the money was to be paid. This was an action on contract, and the question was what, upon the true construction of the contract, was the date on which Daugava promised to pay their assured, and on which the reinsurers promised to pay Daugava. The matters of liability and what was the amount to be paid were quite separate and different matters. There was in the conditions of the contract between the parties a provision that before the time to pay arrived they must arrive by some means at the amount of damage. That could be done by agreement, by arbitration, or by an action at law. But until that moment arrived there was no liability to pay any particular amount, and therefore the *quantum* of damage was not fixed at the time the damage arose, but was fixed at some later time. Mr. Justice Roche was therefore right in holding that the rate of exchange must be calculated at the date when payment was made to their assured by Daugava in January, 1932.

JUDGMENT.

Lord Justice **SCRUTTON**: This appeal raises a very short point of construction on very short agreed facts, and has been dealt with by Mr. Justice Roche in a very short judgment. The point is this. An English underwriter has reinsured a Latvian insurance company against their liability on a fire insurance policy on buildings in Riga. The English Courts have given judgment against the reinsurer, ordering him to indemnify the insurer against a sum which has been ascertained by agreement or settlement between assured and insurer embodied in a judgment of the Latvian Courts, of course expressed in lats, the Latvian currency. Is that sum to be turned into sterling at the exchange at the date of the fire, or at the exchange at the date of the settlement of the insurer's liability? As between assured and the Latvian insurer, their policy provides (Clauses 27 and 28) that the assured must make his claim within 15 days and the insurer complete his examination within 30 days of the fire. If the assessors of the two sides disagree (Clause 30) there must be an arbitration, and, if arbitration is impracticable, legal proceedings. The insurer must pay (Clause 33) within one month of the agreement of amount or its ascertainment by legal decision.

This is what happened. The two assessors did not agree, and the amount was settled between insurer and assured, the amount being embodied in a legal decision and paid within one month of that decision. The reinsurer had initialled a slip which reinsured "buildings as per original policy, full reinsurance clause." That clause read: "being a reinsurance of and warranted same gross rates, terms and conditions as and to follow the settlements of Daugava Insurance Company." The fire was on Apr. 11, 1930; the settlement and payment by the insurer in January, 1932.

I am of opinion that the latter date fixes the rate of exchange to be applied. I do not understand how the reinsurer can be liable to pay an amount till it has been fixed between insurer and assured. It is then that the insurer pays and the reinsurer is bound to indemnify him. If the rate of exchange is fixed at a date before the insurer's liability to pay is quantified and satisfied, the insurer may, as in the present case, recover more than an indemnity, which is contrary to all principles of insurance indemnity.

This view leads to the same result as Mr. Justice Roche has reached, but he appears to have reached his result by means of the clause "to follow the settlements of." It is not necessary to decide whether this is correct or not, and I should wish to reserve the question. Underwriters have

always desired to bind their reinsurers by their settlements, the business transaction resting on mutual confidence. One usual term is "to pay as may be paid thereon" (Chippendale v. Holt, 1 Com. Cas. 197). Mr. Justice Mathew held this to mean "to be properly paid thereon," "to pay on proved or agreed liability." This decision has not as far as I know been questioned since it was given. Another clause is, "to follow the settlement of." Mr. Justice Bigham thought in Western Assurance Company (Toronto) v. Poole, [1903] 1 K.B. 376, that this meant that liability must be proved, but if proved an honest settlement of the amount by the insurer would bind the reassurer, and repeated this statement in Beauchamp v. Faber, 3 Com. Cas. 308, where he said (at p. 311):—

> It was a condition precedent to the plaintiff's right to recover on the Lloyd's policy that there should have been a settlement of the claim by the company, and that condition precedent has not been performed.

If this is correct, it would determine this case, as it would be a condition precedent to the reinsurer's liability that the amount should be settled, and he would not be liable till it was settled.

The reinsurer frequently insures only total and constructive total loss, leaving the insurer to bear partial loss. What is to happen if the insurer on a claim for total loss settles for an amount less than the claim for total loss? Is it a partial loss or a settlement of a claim for total loss to be followed by the reinsurer? Street v. Royal Exchange Assurance, 19 Com. Cas. 339, and Gurney v. Grimmer, 43 Ll.L.Rep. 481; (C.A.) 44 Ll.L.Rep. 189, show the difficulties which arise.

There is no privity between the original assured and the reinsurer. The liability of the latter is only to indemnify the insurer, the reassured, in respect of a loss for which he is liable to the assured by reason of his insurance policy, which gives him an interest in the ship. If the insurer is so liable, and the amount of his liability is ascertained, he can recover against the reinsurer though he has not paid the assured, for he is liable for an ascertained amount and the reinsurer must indemnify him. (See *In re* Eddystone Marine Insurance Company; *Ex parte* Western Insurance Company, [1892] 2 Ch. 423.) But the insurer is not liable to pay the assured till the amount of his liability has been ascertained in accordance with the terms of his policy; so the reinsurer is not liable to pay the reassured until the amount of his liability is ascertained under the terms of his policy, which may or may not be the same as the terms of the original policy. In the present case they were the same, but the time for payment did not come till liability and amount were agreed or settled.

The appeal must be dismissed, with costs.

Lord Justice GREER: I agree.

Lord Justice MAUGHAM: I agree, and I will only add two or three sentences. A policy of reinsurance is an agreement by way of complete or partial indemnity of the insurer. That has long been settled and has been stated in more than one case. Like every contract of indemnity, it can only operate if the liability of the debtor, the insurer, is established, and it is necessarily contingent on that liability being established. It follows that the insurer has no cause of action against the reinsurer until the loss for which the former is liable (if any) has been ascertained. I observe there is the passage in a speech of Lord Macnaghten in the case of the Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company, [1907] A.C. 59, which seems to me to recognise what I have stated to the full. It was a case where there was a clause prohibiting legal proceedings after a limited period contained in the original insurance policy, and the question was whether that was a reasonable provision as between the insurer and the reinsurer; and Lord Macnaghten, in his speech, observes (at p. 64):

> In a case of reinsurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene.

The law with regard to settlements does not in the least, at any rate, diminish the force of that contention; and, agreeing as I do with the whole of the judgment to which we have just listened, I concur in the view that this appeal should be dismissed.