the 13th, I think he then became bound, as between himself and the plaintiffs, to enter the appearance on the 22nd. Evidently he was Hugo's attorney from the 13th. The facts show that he was equally the attorney of the other defendant. And I understand he makes this application as attorney for the defendants.

Then what suppose he had not entered an appearance, or never enters an appearance, he is still the attorney of the defendants; and the only ground upon which, as I take it, this service could be set aside, would be the actual want of authority in Mr. Holden to act as attorney.

I have regarded very strictly the application to set aside the service of this declaration, as I think it my duty under the circumstances; and as the summons is moved with costs, I must discharge it with costs.

## *NOVA SCOTIA.*

### IN THE SUPREME COURT.

**Avon Marine Insurance Co. v. Barteaux.**

[Halifax, Nova Scotia, 1870.]

This was a special case stated for the opinion of the Court, and involving questions of general and particular average. The latter was withdrawn in the course of the argument and the former turned upon the obligation of the underwriter to pay the general average upon a foreign adjustment. The defendant pleaded such an average by way of set-off to an action on the premium note, and the admitted facts are, that the defendant being a British subject, resident in this Province, and having insured his brigantine, "The Foyle," on a time-policy with the plaintiffs, the vessel on a voyage from Liverpool to New York, sustained damage, which was the subject of general average, and if adjusted at New York, would amount to a larger sum than if adjusted in Nova Scotia. The single point, therefore, for our determination is, by what law ought the general average to be ascertained—by the usage as it prevails in New York, or by the usage of our Province where the policy was made.

Although the weight of authority is in favor of foreign adjustment, this must still be considered one of the *vexatæ questiones* in mercantile law. In 1 Parsons on Maritime Law, 332, edit. 1859, he cites in note 4 a number both of English and American cases, where the adjustment made at a foreign port was held not to be binding on an insurer, and where it was held, that it was so binding. The latter case, however, being the later in point of time, and of the higher authority.

The leading English case which figured so largely at the argument is that of *Simonds* v. *White*, 2 Barn and Cres., 805, decided so far back as 1824, Lord Tenterden there puts it on the footing of a know maritime usage, which the shipper of goods must be taken to have tacitly if not expressly assented to, and by assenting to general average, he must be understood to assent also to its adjustment at the usual and proper place, that is at the home port or the port of destination and discharge. If the shipper is so bound it is plain that he will not be indemnified under his policy if the underwriters be not equally bound. In *Strong* v. *N. Y. Fire Insurance Company*, 11 Johns, 323, Van Ness, J., in giving the opinion of the Court, said:—"There is no principle more firmly established than that the insurers are bound to return the money which the insurer has been obliged to advance in consequence of any peril within the policy, provided it be fairly paid, and does not exceed the amount of the subscription."

Arnould,—in his treatise in Insurance 2—947,—argues with irresistible force that it seems impossible, on general principles, to arrive at any other conclusion. The law of England compels the owners of the several interests (that is the ship, cargo, &c.) to pay all general average charges assessed on them by foreign adjustment, if settled according to the law of the port where it is made, whether such charges would be allowed in England or not. Now it seems certain that the English underwriter must be bound by the very terms of his contract to reimburse to the assured their proportion of all such general average charges as they (the assured) have been compelled to pay by the law of England. If this be so, and it seems quite incontrovertible, then it follows by necessary inference, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment, if correctly settled according to the law of the port of adjustment.

Several of the cases cited at the argument rest upon distinctions which have no application here. A foreign adjustment, to be binding, must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and it would doubtless be set aside, or corrected for fraud or gross error.

The case in hand is relieved of all such inquiries, as we have merely to settle the principles on which the adjustment is to be made.

It was ingeniously argued by Mr. MacDonald, for the insurers, that, supposing the rule to be established on a voyage defined in the policy, and extending to foreign ports, where the operation of the rule might be fairly contemplated, it would not apply to a time policy, as in this case. But a time policy, unless there be special restrictions, confers the power of sailing for every port, domestic or foreign; and in our own Province, whose ships are to be found in every sea, and where the ship, once launched, often instantly embarks in foreign commerce, and never returns perhaps to her home port, foreign employment must be understood to be as much in the contemplation of the shipowner and insurer as domestic use. No authority, besides, was cited for this construction.

The only English case that seems to have touched this question since 1865 is that of *Fletcher* v. *Alexander*, 18 L. T. Rep, 434, decided in 1868. There Bovill C. J., observed "that different countries had adopted different rules, with regard to almost every point connected with the statement of averages. Upon the general principle all are agreed, but with those differences in the law of different countries, it became necessary to ascertain and determine what law