sumption is, in the absence of anything in the record to the contrary, that before it was rendered the court had become judicially satisfied that the property could not be returned. In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal.

JUDGMENT AFFIRMED.

HEARNE v. MARINE INSURANCE COMPANY.

1. Where, by the terms of a policy, a vessel is insured "to *a port in Cuba*, and at and thence to port of advice and discharge in Europe," and the vessel is lost in going from the port of discharge in Cuba, to another port in the same island for reloading, held on a suit on the policy for a loss that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading. [In the present case the court held that the evidence offered did not show such a usage.]
2. Where there has been a deviation in a voyage insured, no decree will be made for a return of any part of the premium. The deviation annuls the contract as to subsequent parts of the voyage and causes a forfeiture of the premium.

APPEAL in equity from the decree of the Circuit Court for the District of Massachusetts. Hearne filed a bill in the court below against the New England Mutual Marine Insurance Company to reform a contract of insurance, he alleging that the policy as made out did not conform to the agreement of the parties, taking that agreement with the usage or custom which he insisted entered into and formed a part of it.

The case was thus:

On the 7th of May, 1866, Hearne made his application by letter to the company for insurance. He said:

"The bark Maria Henry is chartered to go from Liverpool to Cuba and load for Europe, *via* Falmouth for orders where to discharge. Please insure $5000 on this charter valued at $16,000, provided you will not charge over 4 per cent. premium."

Statement of the case.

On the 9th of that month the company through its president replied:

"Your favor of the 7th is at hand. As requested we have entered $5000 on charter of bark Maria Henry, Liverpool to port in Cuba and thence to port of advice and discharge in Europe, at 4 per cent."

The policy was made out on the same day and described the voyage as follows:

"At and from Liverpool *to port in Cuba and at and thence to port of advice and discharge in Europe.*"

Thereafter the policy was delivered to the assured and received without objection. The vessel was loaded with coal at Liverpool and proceeded thence to St. Iago de Cuba. There she discharged her outward cargo. She went thence to Manzanillo, another port in Cuba, where she took on board a cargo of native woods. On the 13th of September, 1866, she sailed thence for Europe, intending to go by Falmouth for orders. Upon the 18th of that month, on her homeward voyage, she was lost by perils of the sea. Due notice was given of the loss, and it was admitted to have occurred as alleged in the bill. The company refused to pay, upon the ground that the voyage from St. Iago de Cuba to Manzanillo was a deviation from the voyage described in the policy, and, therefore, put an end to the liability of the insurers.

On the 7th of December, 1868, two years after the loss occurred, Hearne brought an action at law against the company. The court held that he was not entitled to recover by reason of the deviation before stated. He failed in the suit. On the 16th of January, 1871, he filed the bill in this case, and prayed therein to have the contract reformed so as to cover the elongated voyage from St. Iago to Manzanillo.

The bill averred that at the time of chartering the bark, and at the time of the issuing of the policy, there existed at Liverpool a general and uniform usage of trade, that all vessels chartered at said port for a round voyage from said port to the island of Cuba, and thence to return to

Europe, carrying coal as their outward cargo to Cuba, and bringing a return cargo thence to Europe, should visit one port in the said island for the purpose of discharging the outward cargo, and that they should then proceed to another port for the purpose of shipping a return cargo, and further that this usage was well known to all merchants, and others engaged in the trade between Liverpool and Cuba.

Evidence was introduced to establish the usage. It showed that about four-fifths of the vessels which go laden with coal to Cuba, take their return cargo elsewhere on the island than at the port of discharge, and that a few used the same port for both purposes. But it appeared also that the contract in both cases was expressed according to what the parties purposed.

The court below dismissed the bill, and from its action Hearne took this appeal.

Mr. Walter Curtis, for the appellant; Mr. H. C. Hutchins, contra.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court.

The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.*

The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points.† The

* Kerr on Fraud and Mistake, 419, 420.

† Beaumont *v.* Bramley, 1 Turner & Russell, 41–50; Marquis of Breadalbane *v.* Marquis of Chandos, 2 Mylne & Craig, 711; Fowler *v.* Fowler, 4 De

mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended.* A mistake on one side may be a ground for rescinding, but not for reforming, a contract.† Where the minds of the parties have not met there is no contract, and hence none to be rectified.‡

This jurisdiction is applied, where necessary and proper, to the reformation of contracts of insurance.§

Here the application was to insure on a charter "from Liverpool to Cuba, and load for Europe, *via* Falmouth," &c. This was indefinite as to Cuba, and may have been regarded by the company as ambiguous. The answer was, as "requested, we have entered $5000 on charter *to port in Cuba, and thence to* port of advice and discharge in Europe." This answer shows clearly two things: (1.) How the company understood the proposition. (2.) That they agreed to insure according to that understanding, and not otherwise.

There was no mistake nor misapprehension on their part. The circumstances show there could be none.

The correspondence between the parties constituted a preliminary agreement. The answer to Hearne's proposal was plain and explicit. It admitted but of one construction. He was bound carefully to read it, and it is to be presumed he did so. In that event there was as little room for misapprehension on his part as on the part of the company. Such a result was hardly possible. There is nothing in the evidence which tends to show that any occurred. The inference of full and correct knowledge is inevitable. It is

Gex & Jones, 255; Sells *v.* Sells, 1 Drewry & Smales, 42; Loyd *v.* Cocker, 19 Beavan, 144.

* Rooke *v.* Lord Kensington, 2 Kay & Johnson, 753; Eaton *v.* Bennett, 34 Beavan, 196.

† Mortimer *v.* Shortall, 2 Drury & Warren, 372; Sells *v.* Sells, *supra*.

‡ Bentley *v.* McKay, 31 L. J. Chancery, 709; Baldwin et al. *v.* Milderberger, 2 Hall, 176; Coles *v.* Bowne, 10 Paige, 534; Calverley *v.* Williams, 1 Vesey, Jr., 211.

§ Harris *v.* Col. Co. Ins. Co., 18 Ohio, 116; Fireman's Insurance Co. *v.* Powell, 13 B. Monroe, 311; National Fire Insurance Co. *v.* Crane, 16 Maryland, 260.

as satisfactory to the judicial mind as direct evidence to the same effect would be.

So far, the complainant's case is as weak in equity as it was at law.

But it is said there was a usage that vessels going to Cuba might visit at least two ports—one for discharge and the other for reloading. It is insisted that this usage authorized the voyage to Manzanillo; that the voyage was not a deviation; that it in no wise affected the liability of the company in equity; and that hence, the contract of the parties in this particular should be reformed accordingly.

It is not necessary that the usage relied upon in cases like this should have been communicated or known to the assurers. Lord Mansfield said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and if he does not know it, he ought to inform himself."*

Usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract.† If the words employed have an established legal meaning, parol evidence that the parties intended to use them in a different sense will be rejected, unless if interpreted according to their legal acceptation, they would be insensible with reference to the context or the extrinsic facts.‡ If no such consequence is involved, proof of usage is wholly inadmissible to contradict or in any wise to vary their effect.§ In no case can it be received where it is inconsistent with, or repugnant to, the contract. Otherwise it would not explain, but contradict and change the contract which the parties have made—substituting for it another

* Noble *v.* Kennoway, 2 Douglas, 513; see also 1 Duer on Insurance, 266, and the cases there cited.

† Blackett *v.* Royal Exchange Assurance Co., 2 Crompton & Jervis, 250; Crofts *v.* Marshall, 7 Carrington & Payne, 607; Phillipps *v.* Briard, 1 Hurlstone & Norman, 21.

‡ Wigram on Wills, 11, 12.

§ Yates *v.* Pym, 6 Taunton, 446; Blackett *v.* Royal Exchange Assurance Co., *supra.*

and different one, which they did not make.* To establish such inconsistency it is not necessary that it should be excluded in express terms. It is sufficient if it appear that the parties intended to be governed by what is written and not by anything else.†

The principle of the admission of such testimony is that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the parties—the question being, what did they mean by the language they employed?‡ What is implied is as effectual as what is expressed.§ The expression and the implication in this case are equally clear. It is expressed that the vessel should proceed to a port in Cuba, and thence to Europe. It is implied that she should visit no other port in Cuba. *Expressum facit tacitum cessare.* Under these circumstances, usage can have no application, and proof of its existence is inadmissible. But the usage relied upon is not sustained by the evidence.

It appears that a large proportion of the vessels, perhaps four-fifths, which go laden with coal to Cuba, take on their return cargo elsewhere on the island than at the port of discharge. A few use the same port for both purposes. But the proof is also that the contract in all such cases is expressed according to the intent. There is no proof that where the policy is upon a voyage to one port and back, the vessel may proceed to another port before her return, and that by usage or otherwise, the latter voyage as well as the former shall be deemed to be within the policy.

Viewing the case in this aspect, we find nothing that would warrant the interposition of a court of equity.

We are asked, if we decline to reform the contract, to decree the return of the premium. This we cannot do.

* Holding *v.* Pigott, 7 Bingham, 465; Clarke *v.* Roystone, 13 Meeson & Welsby, 752; Trueman *v.* Loder, 11 Adolphus & Ellis, 589; Muncey *v.* Dennis, 1 Hurlstone & Norman, 216.

† Hutton *v.* Warren, 1 Meeson & Welsby, 477; Clarke *v.* Roystone, *supra.*

‡ 1 Greenleaf on Evidence, § 295*a*.

§ United States *v.* Babbit, 1 Black, 61.

We regard the case as one of mere deviation. It is essentially of that character. In that class of cases, the law annuls the contract as to the future, and forfeits the premium to the underwriter. Here equity must follow the law. We cannot apply a different rule.

DECREE AFFIRMED.

EQUITABLE INSURANCE COMPANY *v.* HEARNE.

Where a party proposed to insurers to insure his vessel on a "voyage from Liverpool *to Cuba* and to Europe *via* Falmouth," at a rate named, and the company offered to insure at a somewhat higher rate, saying, "It is worth something, you know, to cover the risk *at the port of loading* in Cuba," *held* that it was implied that "the port of loading" might be different from the port of discharge, and where the assured accepted this offer, and told the insurer to insure "at and from Liverpool *to Cuba* and to Europe *via* a market port," &c., *held* further, that a policy which insured "to port *of discharge* in Cuba, and to Europe *via* a market port," &c., did not conform to the contract, and was to be reformed so as to do so.

APPEAL from the Circuit Court for the District of Massachusetts.

The controversy in this case grew out of a contract of insurance upon the same charter-party as in the preceding case, though here the insurance was by a different company from the insurance there. The present case was thus:

On the 2d of May, 1866, Hearne addressed a letter to the Equitable Insurance Company as follows:

"Insure $4000 on the charter-party of the bark Maria Henry, valued at $16,000, if you will not charge me more than 3 per cent.; voyage from Liverpool to Cuba, and to Europe *via* Falmouth, for orders where to discharge. She will take her registered tonnage of coal."

On the 4th of the same month the company replied:

"We cannot write the charter of the bark Maria Henry at your rate, viz., 3 per cent., including coals, from Liverpool to