

1880 CHARLES GALLAGHER,..... APPELLANT ;

*Oct. 28, 29.

AND

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*Feb'y. 11. JOHN TAYLOR..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine policy—Total loss—Sale by master—Notice of abandonment.

T., respondent, was the owner of a vessel called the "Susan," insured for \$800 under a valued time policy of marine insurance, underwritten by *G.*, the appellant, and others. The vessel was stranded and sold, and *T.* brought an action against *G.* to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near *Port George*, in the County of *Antigonish*, adjoining the County of *Guysboro'*, *N. S.*, where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th July for \$105. The captain did not give any notice of abandonment, and did not endeavor to get off the vessel. The purchasers immediately got the vessel off, &c., had her made tight, and taken to *Pictou*, and repaired, and they afterwards used her in trading and carrying passengers.

Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to show any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total.

Per *Gwynne*, J., that it is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts.

THIS was an action brought by the respondent in the Supreme Court of *Nova Scotia*, against the appellant to recover the amount insured by the appellant, as one

*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

of the underwriters upon a policy of Marine Insurance issued by the Ocean Marine Insurance Association of *Halifax*, upon the schooner "*Susan*," belonging to the respondent, alleged to have been totally lost by a peril insured against.

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The appellant having appeared and pleaded in said action, the same was tried before the Honorable Mr. Justice *James*, one of the assistant Justices of said Court, at the sittings of said Court, at *Halifax*, in November, 1878, who gave judgment in favour of the Respondent for the amount claimed by him.

A rule *nisi* to set aside the judgment so given was taken out by the appellant, and at the last term of the Supreme Court at *Halifax* was argued before four of the Judges of that Court sitting *in banco*, a majority of whom subsequently gave judgment discharging said rule *nisi* with costs.

The material facts of the case are as follows :—

On the 6th of July, 1876, the vessel in question having been caught in a gale of wind, was driven on shore by the fury of the storm, and stranded at or near *Cape George* in the County of *Antigonish*, N.S., and at low water persons could walk round her.

The Captain immediately went off to *Antigonish* (four hours journey), noted his protest and telegraphed to Messrs. *Harrington & Co.*, of *Halifax*, who had acted as agents for the owners in effecting the insurance—"Schooner *Susan* on shore *Cape George*, likely a total wreck." Messrs. *Harrington* showed this telegram to the agents of the underwriters on the 7th of July.

On the 7th of July the Captain returned to the vessel, and caused her to be surveyed by three persons, who reported that it would be useless attempting to repair her or get her off, and thereupon condemned her as totally unseaworthy, and recommended that she and her

1880 hull and materials should be sold for the benefit of all
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The owner of the vessel resided at the time at *Isaac's Harbor*; this is in the County of *Guysborough*, *Nova Scotia*, the county adjoining that within which the vessel was stranded.

The place where the vessel was stranded was within from four to eight hours drive from the town of *Antigonish*, the shire town of the county of that name, which was in telegraphic communication with *Halifax*, and with *Pictou*, the shire town of the adjoining county of that name. There was also a tri-weekly mail to and from the town of *Antigonish*.

The vessel valued at \$1200, insured for \$800, was advertised on Saturday, July 8, to be sold, and was sold on Tuesday following, July 11th, for about \$105.

The weather continued fine from the day after the stranding until the sale; there was no evidence that any effort was made to save or get off the vessel before the sale, but on the other hand, the captain admits that he made no effort to get her off, and one of the surveyors, *Donald McEachren*, stated that "If weather kept fine, he allowed she could be got off."

The evidence as to the actual damage done to the vessel was conflicting; but she undoubtedly continued to exist as a vessel at the time of sale, and on that day a contract was made to take her off for \$35. She was got off by the following Saturday, July 15th. She was made tight on the shore and then taken to *Pictou* and there put on the Marine Slip; was repaired, and for over a year was used as a packet between *Antigonish* and *Pictou*, and made one trip to *Halifax*, during which time she carried freight and passengers.

Mr. *Rigby*, Q.C., for appellant:

In view of the uncontradicted facts and under the

authority of *Knight v. Faith* (1) and *Kaltenback v. McKenzie* (2) I contend there was no total loss of the "Saisan," actual or constructive, no notice of abandonment having been given. It was for the plaintiff to make out all the elements, at the time the vessel was sold, of an actual total loss. In this he has entirely failed.

[*Ritchie*, C.J.: We will call on the other side to see if they can make out a case.]

Mr. *Gormully* and Mr. *Graham* for respondent:

It is submitted that this case turned, as appears by the opinion of the Court below, on questions of fact, such as, was the loss total or only constructively total; was the sale by the master justifiable under all the circumstances so as to pass the property in the wreck. Unless, therefore, this Court is of opinion that there was no evidence at all to support this verdict, this case is not appealable.

The objection and the only objection to the verdict, urged by the appellant in the Court below, was that the loss was not an actual total loss but a constructive total loss, that consequently to entitle the respondent to recover as for a total loss, it was necessary to prove notice of abandonment to the underwriters.

Now, whether the vessel in this case was an actual total loss or a constructive total loss, whether she was a mere wreck or still a ship, though in a damaged condition, was a question of fact which the tribunal of fact has disposed of in the respondent's favor. Having regard to the injuries the ship had received, her position on the rocks, the imminence of the danger of her complete destruction, there was ample evidence to go to the jury that she was an actual total loss. But if there were only a scintilla of evidence to go to the jury as to

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(1) 15 Ad. & E. N.S. 647.

(2) 3 C. P. D. 467.

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this fact then this Court cannot review the finding of the jury.

See *Cobequid Marine Insurance Co. v. Barteaux* (1); *Cambridge v. Anderdon* (2); *Roux v. Salvador* (3); *Farnworth v. Hyde* (4); *Kaltenbach v. Mackenzie* (5).

By the text writers and authorities there appears to be a sort of middle case between an actual total loss and a constructive total loss. This middle case arises where the ship, though something more than a mere *congeries* of planks is in a position of imminent peril, and where, by the Maritime law, an implied power to sell her for the benefit of all concerned is reposed in her master. *Arnold* treats such a case where a sale takes place, under actual total loss. The facts of the case bring it within this principle.

See *Arnold* (6); *Idle v. Royal* (7).

If it be found that the master was justified in selling the ship and the notice of the loss of the ship and the sale reached the owner at the same time, then we contend, on the latest authorities, that no notice of abandonment would be necessary. This also has been found as a fact.

RITCHIE, C. J.:—

The plaintiff seeks to claim in this case as for a total loss. I think the evidence most clearly shows that the sale was wholly unjustifiable. There was no such necessity as justified it. The master could, and clearly should, have communicated with his owners. I do not think it necessary to go through the evidence in this case, as my brother *Gwynne* has reviewed the evidence at length in his judgment, and

(1) L. R. 6 P. C. 327.

(4) L. R. 2 C. P. 204.

(2) 1 C. & P. 213.

(5) 3. C.P.D. 469.

(3) 3 Bing. N. C. 266.

(6) Vol. 2 p. 953,956.

(7) 8 Taunt. 755.

I entirely concur with him. It cannot be denied that there was not an actual total loss, and there being no justification for the sale, no abandonment, in fact nothing to make this a constructive total loss, the plaintiff, claiming a total loss, and declining to claim for a partial loss, should have been non-suited, or a verdict entered against him.

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FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:

I concur in the view expressed by the Chief Justice that there is no evidence to show there was a total loss. The vessel was lost in July, the Captain had an opportunity to communicate with the owners, he did not do so, but sold the vessel for a nominal sum. She was immediately got off and repaired, and afterwards carried freight and passengers.

Under such circumstances we must hold that notice of abandonment should have been given. The owner is always in such cases answerable for the neglect of the Captain. If the law left it to the owner to say that he had notice of the loss only after the sale, then all the owner need do, would be to instruct his captain to use his own judgment when a loss took place and never refer to him. Such is not the law. Under the circumstances of the case I am of opinion there is no evidence to justify the sale, in fact there is no evidence that the vessel was ever in actual danger.

Now as the plaintiff insisted on a total loss, he cannot succeed. He declined to recover for a partial loss. We must hold that he is not entitled to recover in this action for a total loss when no notice of abandonment was given, even if otherwise entitled to our judgment.

GWYNNE, J.:—

This case raises no question as to the weight to be

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attributed to the finding of a Judge, who tries a case without a Jury, upon matters of fact, for here the Judge's finding is the result of inferences drawn by him from evidence as to which there is no dispute, and in that case, inasmuch as the question is whether or not the inferences so drawn are the reasonable and proper inferences to be drawn from the facts proved, the rule is that this raises a point which is fairly open to inquiry in a court of appeal.

Now in this case, as it appears to me, the learned Judge before whom the trial took place and the Supreme Court of *Nova Scotia*, the majority of which Court sustained the verdict which was rendered for the plaintiff as in the case of a total loss, have proceeded upon the basis that the loss of the schooner was a *constructive* and not an *actual* total loss. The learned Judge who rendered the verdict says that he considered the vessel as she lay on the beach at *Cape George* before the sale, *taking into consideration the risk to which she was exposed*, to be of no value as a ship, and that therefore he was of opinion there was a total loss, and accordingly he found for the plaintiff for the amount claimed. In the judgment given by him in the court above, upon the rule *nisi* to set aside this verdict, he says :

Several defences were set out in the pleas, but the only question really at issue was whether the plaintiff was entitled to recover for a total or a partial loss. A partial loss was not denied, but the plaintiff's counsel contended that the circumstances of the case were such as to constitute a *constructive* total loss which was denied by the defendant's counsel.

And after repeating his opinion as above expressed in his verdict he explains his meaning more fully by adding :

She was a ship, it is true, in outward form after the accident, but never a good one. The purchasers made nothing of their bargain, and when she went on shore some eighteen months after, although she was insured and might have been got off she was not considered worth the expense,

And finally he says :

I think there is sufficient evidence given by the plaintiff that the vessel could not have been got off and repaired so as to be a good vessel except at an expense exceeding her value, if at all, and if not the Plaintiff had a right under the cases to treat her as a total loss.

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But for the words "*so as to be a good vessel*" the learned Judge would have in precise terms applied the test which distinguishes a *constructive* from an *actual* total loss, that question being whether the damage sustained can be so far repaired as to keep it a ship, though perhaps not so good a ship as it was before, without expending on it more than it was worth. If she was repairable there was no actual total loss, but if she was repairable only at an expense exceeding her value when repaired, then the loss was a *constructive*, not an actual total loss (1).

In view of the evidence, which excludes in this case all idea of an actual total loss, and of the above observations of the learned Judge in support of the opinion he had formed at the trial, we must fairly conclude that the learned Judge proceeded upon the basis of there having been established to his satisfaction a *constructive* total loss only. The learned Chief Justice of the Supreme Court of *Nova Scotia*, also plainly treated the case as one of *constructive* total loss only, and he was of opinion that the circumstances appearing in evidence constituted a waiver of notice of abandonment.

A point was argued before us which does not appear to have been discussed in the court below, namely : that the verdict for the plaintiff as for a total loss is sustainable upon the ground that the sale was justified under the circumstances appearing in evidence, and that the plaintiff did not receive notice of the loss until after the sale when he received notice of both at the same time, and that therefore notice of abandonment

(1) *Farnworth v. Hyde*, 18 C.B. N.S. 845 ; *Rankin v. Potter*, L. R. 6 H. L. 83.



1881 was useless and unnecessary. The loss, if total, being  
 GALLAGHER only *constructively* not *actually* so, it cannot be, and has  
 v. not been, disputed, that notice of abandonment was  
 TAYLOR. necessary to be given, unless the non giving it was  
 Gwynne, J. excused in law, or was waived in fact, by the defendants,  
 or must in law be treated as having been so waived,  
 under the circumstances appearing in evidence.

That notice of abandonment was not given is admitted.

The questions therefore which we have to determine appear to me to be, 1st. Was there any actual waiver by the defendant of notice of abandonment, or is it a proper inference to draw from the evidence that the defendant did waive such notice? 2nd. Does the evidence establish that the sale by the master was justified in view of the circumstances under which that sale took place?

It is not pretended that there is any evidence of an express waiver by the defendants of notice of abandonment, but, as I understand the judgment of the learned Chief Justice of the Supreme Court of *Nova Scotia*, he rested his judgment that the notice was waived upon the ground that he found from the evidence—

That the defendants had a competent agent on the spot who was left without instructions though he wrote for them and was cognizant of all that was taking place.

Mr. Justice *James*, who tried the case, says, in his judgment upon this point :

The captain, after examining the vessel next morning and taking such advice as she could get on the spot, went to *Antigonish* where he noted his protest and telegraphed to the vessel's agents in Halifax who at once informed the defendant's company, *but did not give notice of abandonment*. They telegraphed to their agent, Mr. *Whidden*, who, on 8th July, proceeded to the wreck and examined her. He knew she had been examined by the Surveyors; saw the advertisement of sale; he also conversed with the captain and abstained from cautioning him that the vessel ought not to be sold; he and another witness (*McDonald*) while not differing materially from the five witnesses for plaintiff as to the facts expressed an opinion at the

trial that she could have been got off for a small sum and rendered perfectly tight, but at the time he expressed no such opinion to the Master as I think he as the agent of the underwriters ought to have done if he thought he was about to do wrong.

And again :

He promised Captain *Sullivan* to communicate with the Insurers by letter and by telegram. He telegraphed to them from *Antigonish* and if they had answered by telegraph instead of by letter *Whidden* could have been at the sale with their instructions ; as it was the master expected him and waited for him at the sale.

“ Apart from the other evidence,” he adds,

I consider that the conduct of the Insurers under the circumstances in neglecting to advise the master when their agent had virtually undertaken that they would do so, and had encouraged him to proceed with the sale by promising to be present, to be a very material circumstance for the consideration of a Jury. It appears to me that he had a right under the circumstances to assume that they agreed with him in his opinion as to the sale of the vessel and were satisfied that the sale should be held, and my opinion at the trial was and still is largely influenced by these facts.

It appeared in evidence that Mr. *Whidden* above referred to was only an agent for the defendants when specially employed *pro re nata*. No evidence was offered as to what was the nature or extent of his agency in the particular case. It may have been simply to inspect the damage as well as he could, advise his principals and to observe what was passing so as to enable his principals to form an opinion as to whether every thing had been done by the master that should have been done under the circumstances.

In the above observations the learned Judge, as it appears to me, indicates the nature of the enquiry which he considered the circumstances would have rendered proper to be submitted to a Jury by the impression which he says those circumstances had made upon his own mind, namely, that the master had a right to assume that the defendants agreed with him in his opinion as to the sale of the vessel and were satisfied

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that the sale should be held. If indeed the evidence had shewn that Mr. *Whidden* had been appointed by the defendants as their agent, not only to inspect the vessel, but invested with full power to act for them in accepting, if he should think fit, possession of the vessel as an abandoned wreck, and to do whatever he might think most for their interest, either by sale of the wreck or otherwise, and that under such circumstances he had assented to the sale taking place under the direction of the master, there might have arisen a proper question to be submitted to a Jury —whether the underwriters had not in fact accepted possession of the wreck to deal with it as they thought best for their own interests, and whether the subsequent sale by the master should not in fact be regarded as a sale by the underwriters themselves so as to preclude them from disavowing it in a suit by the owners upon the policy? But the evidence raised no such question; all that the evidence established was that the underwriters, having been notified of the fact that the vessel was aground, but having no intimation from the owner that he elected to abandon, appointed an agent to inspect the condition of the wreck who did not interfere with the master either by assenting or objecting to his proceedings. He seems to have left the master to exercise his own judgment, although informing him that he had written and telegraphed to his principals and would communicate to him any instructions he might receive, if he should receive any, before the sale which upon his own authority the master had advertised. No case has been cited in support of the proposition that under these circumstances there was any legal obligation imposed upon the defendants to notify the master whether they assented or objected to the proceedings taken by him. It was quite competent for them, if so disposed, to watch his proceedings, and the obligation rested upon him, in the event of his

employers setting up a claim for a total loss, to take care to be furnished with evidence that his proceedings were conducted legally and that a sale by him was strictly warranted by the circumstances of the case.

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There is nothing in the evidence, in my opinion, from which an inference of fact or of law can be properly drawn that the defendants waived their right to receive from the owners notice of abandonment if the owners intended to claim for a total loss; or to estop the defendants from resisting such a claim upon the ground that they had no such notice; or from insisting that the evidence failed to establish that the sale by the master was justified. And this brings me to the consideration of that question.

Mr. Justice *Blackburn* in *Rankin vs. Potter* (1) says :

As has often been observed, a sale by the Master is not one of the underwriters' perils and is only material as shewing that there is no longer anything which can be done to save the thing sold for whom it may concern.

The effect of a valid sale being conclusively to determine that neither assurers nor assured could do anything, it is of the utmost importance that an imperative necessity for the sale should exist in order to justify it.

Accordingly, in *Robertson v. Clarke* (2), cited by Lord *Campbell*, C. J., delivering judgment in *Knight v. Faith* (3), it was held that it is not sufficient to shew that the sale was *bonâ fide* and for the benefit of all concerned, unless it also be shewn that there was urgent necessity for its being resorted to; and in *Farnworth vs. Hyde* (4) *Byles*, J., says :

In all cases of alleged constructive loss where the Captain takes upon himself to sell the ship, the necessity of so doing ought to be strictly proved and the jury are not at liberty to act upon conjecture.

Nor will it be enough to shew that to sell the vessel

(1) L. R. 6 H. L. at p. 122.

(2) 1 Bing. 445.

(3) 15 Q. B. 657.

(4) 18 C. B. N. S. 868.

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was a prudent course for the Master to pursue. In  
 GALLAGHER *Kaltenbach vs. McKenzie* (1) Lord Justice Thesiger  
 v.  
 TAYLOR. says :

Gwynne, J. If at any moment an assured who is entitled to treat a loss as a constructive total loss may at the same time absolve himself from giving notice of abandonment by selling the vessel, *which although a prudent course is not a necessary one*, it would lead to the greatest danger of frauds upon underwriters and, at all events, to very considerable inconvenience in reference to policies of marine insurance.

And referring to the particular circumstances of that case, he says :

Although it is admitted that the vessel was a constructive total loss in the sense that the cost of repairs would be greater than the value of the vessel when repaired, I cannot trace any evidence to the effect that if the sale of the vessel had been postponed for two or three or four months she would have ceased to exist in specie, or that the loss from a *constructive* would have become an *actual* total loss. If that be so, then upon principle and authority it appears to me the plaintiff is not entitled to use the fact of that sale as a reason for excusing himself from giving notice of abandonment.

And in *Lapraik v. Burrows* (2) the law is laid down by the Privy Council thus :

The law as we conceive it to be settled is this—that there must be a necessity for the sale, that when the master has no authority from his owner to sell he is not at liberty to sell merely because he deems it to be advantageous to his owner, but that there must be a necessity for the sale. The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired ; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done, except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity. We should be exceedingly reluctant to relax the law upon this head because it is of great importance that masters of ships should not divest their owners of their interest in those ships without due authority except they are strictly justified by the necessity of the case.

The like law prevails in the Courts of the *United States*, as will appear by reference to *Hall vs. Franklin*

(1) 3 C. P. D. at p. 486.

(2) 13 Moore P. C. at p. 144.

*Insurance Co.* (1) and *Bryant v. The Commonwealth Insurance Co* (2) and many other cases cited in *Prince v. The Ocean Insurance Co.* (3). 1881  
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As the authority of the master is not derived from express power to sell given to him by the owner, but from the necessity of the thing when placed in the position of being unable to consult with the owner, it is obviously of the first importance to enquire as to the opportunity the master had of consulting with the owner.

In the *American Insurance Co. vs. Center* (4) it is laid down, that the master is not authorized to sell except in a case of absolute necessity, when he is not in a situation to consult with his owner and when it is necessary for him to act as agent for whom it may concern; and in *Parsons on Marine Insurance* (5) the rule is laid down thus :

Nor is the master at liberty to sell without notice to, or the advice of, the owners, provided he be so near them that he can delay the sale for this purpose without endangering greater loss.

The law as laid down by Mr. *Parsons* is approved in the Privy Council in *Cobequid Marine Insurance Co. vs. Barteaux* (6) where Sir *Henry Keating*, delivering the judgment of the Privy Council, says :

With reference to the law upon the subject there seems now to be no doubt whatever ; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to as they are well summarised in the work of Mr. *Parsons* at page 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and *what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it.* He distin-

(1) 9 Pick. 478.

(2) 13 Pick. 543.

(3) 40 Maine 487.

(4) 4 Wendell 52.

(5) 2nd Vol., p. 142.

(6) L. R. 6 C. P. 327.

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guishes between them and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In *Arnold on Insurance* the circumstances that will justify the master in selling seem to be well and clearly put and to be quite borne out by the authorities that are cited in its support. Mr. *Arnold* says, the exercise however of this power, that is, the power of the master to sell, is most jealously watched by the English Courts and rigorously confined to cases of extreme necessity, such a necessity, that is, as leaves the master no alternative, as a prudent and skilful man acting *bonâ fide* for the best interest of all concerned and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies. If he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling her, although the danger at the time appear exceedingly imminent. That seems to be the true rule to apply in these cases where it is most important to confine within strict limits the power of a master to sell the ship.

Applying then the principle of these cases to the facts of this, we find that on the 6th July, 1876, the vessel while on her voyage from *Guysboro* to *Pictou* was stranded at *Cape George*, which is distant about 25 miles from *Pictou*, where a tug boat could have been procured if required; about 20 miles from *Antigonish*, where there was telegraphic communication with *Halifax*, and about 50 or 60 miles from *Isaac's Harbour* where the plaintiff resided. On the morning of the 7th July, the master went to *Antigonish* and telegraphed news of the disaster to the Messrs. *Harrington & Co.*, who as the plaintiff's agent had effected for him the insurance upon the vessel. It is not alleged that they had any authority from the plaintiff enabling them to bind him by a notice of abandonment, and if they had, it is plain that they did not exercise it, for no notice was given. On the same day the master placed the

vessel in the hands of one *Cunningham*, an auctioneer at *Antigonish*, as his, the master's agent. *Cunningham* appointed three persons named *Graham*, *McMillan* and *McEachren* to survey her, of these, two were called as witnesses upon the trial, one of whom, namely *McEachren*, although he said that he did not see any chance of getting the vessel off in the condition she was and taking the risk of the weather, admitted that if the weather kept fine she could have been got off. He, however, said that he did not see any broken timber or broken plank except where the hole was; the other, *McMillan*, who described himself as a *farmer*, said that he had had no experience with vessels, and he says that he saw no chance of getting her off. They all three, however, signed a report to the effect that

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There is no prospect of the said schooner ever being floated off where she now lies. That it would be useless to attempt repairing her or getting her off, and we therefore condemn the said schooner as totally unseaworthy and recommend that the said schooner, her hull and materials, be sold for the benefit of all concerned.

Upon this report, *Cunningham*, who describes himself as agent of the captain, whom he understood to be the owner, gave notice of sale of the vessel for the following Tuesday, the 11th July, when she was sold by *Cunningham* (acting as auctioneer) to one *Mullins*. The account given by *Cunningham* of the sale is as follows. He says :—

*John Graham* (the third surveyor) and I were owners of the vessel afterwards. I obtained an interest in her on the day of sale. The morning of the sale Capt. *Mullins* was lying off the wharf, and I asked him to buy her. He said he had no means. I had asked *Graham* before. My object was to sell to the best advantage. *Graham* did not agree to take an interest before the sale. I told *Mullins* if he bought her I would back him.

That Mr. *Cunningham* did not think he was selling the vessel as a wreck, but as a vessel capable of navig-



1881     ating the Ocean appears from his own statement; for he  
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 GALLAGHER says :

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 TAYLOR. After the sale I induced *Graham* to take an interest, as he and I
 _____ had some business requiring a vessel of that class. *Mullins* was to
 Gwynne, J. have an interest too : this was arranged after the sale on the same
 _____ day.

She was accordingly sold by *Cunningham* to *Mullins* for \$157.50 leaving after the deduction of all charges the sum of \$52.53 in the hands of *Cunningham* after the sale, and on the same day *Mullins* gave up to *Cunningham* and *Graham* the interest which he had acquired by the sale to him. He in fact, as shewn by the evidence, purchased for *Cunningham* and at his request. As to the damage which the vessel had in fact sustained *Cunningham* says :

I don't think she was very much logged, can't tell if her timbers were affected. I think 3 or 4 of the butts were started. There was a hole in her forward where she struck a rock, don't know of any other damages.

And he adds :

On the same afternoon as the sale had taken place we employed *McDougall* to take her off for \$35 for labor only, we supplying all materials, they gathered some of the stuff that day, Tuesday, and she was got off by Saturday.

It thus appears that with the appliances there at hand she was got off at an expense of \$35. What it cost to repair is not stated ; but from the above description of the damage, and from what *Cunningham* further says, the expense does not appear to have been great. He says :

Some of the repairs were done before she was got off. She was caulked on the shore, then taken to a wharf and partly repaired, then taken to *Pictou* and put on the slip. Her timbers were not rotten—her bottom was perfectly sound and good when we tried her and bored into her upper timbers the next year.

He adds :

The started butts were spiked down again and a new piece of plank was put where there was found a hole from striking on the rock.

Then it appears that *Cunningham* and *Graham* used her that season and the following one as a packet between *Antigonish* and *Pictou*, and she was lost in October, 1877, and as *Cunningham* did not know the vessel before she was stranded in July, 1876, he cannot say whether after the repairs then done to her she was or not in as good condition as she had been in before she was stranded.

The Master in his evidence admits that he did not make any effort to get her off. Nor did he try to get assistance to get her off, neither did he communicate with his owner, and he does not give any reason in excuse of his not having done so. Thus it appears that although the vessel lay from the 6th to the 11th July on the beach from which she could have been and in fact was removed at an expense of \$35, the Master made no attempt whatever to get her off and made no communication to the owner, who was distant only about 50 or 60 miles from the place where the vessel lay.

Now, wholly irrespective of the above evidence as to the circumstances attending the conduct of the sale, which, whatever may have been the motive for such conduct, can only be mentioned to be condemned; but wholly apart from that, it is apparent that the evidence fails to shew any excuse for the master not communicating with his owner, so as to enable him to give notice of abandonment if he intended to rely upon the loss as total; it fails to shew that, having regard to the cost of repairs, the loss could have been converted from a partial into a constructive total loss, or that notice of abandonment would in this case, any more than in *Knight v. Faith*, have entitled the plaintiff to recover as for a total loss, or have deprived the defendant of the right to dispute the validity of the sale; it utterly failed in short to shew those attendant circumstances which are absolutely

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1881 necessary to establish that urgent necessity for the sale
 GALLAGHER which alone can justify a sale by the Master so as to
 v. subject the insurers to liability as for a total loss.
 TAYLOR.

— The Appeal must therefore be allowed and the rule in
 Gwynne, J. the Court below made absolute for a new trial, and as it
 — is not suggested that any better evidence could be given,
 and as it appears that the insurers have been always
 willing to deal liberally with the plaintiff upon the
 basis of a partial loss, which is all that under the
 evidence he is entitled to, I think that the appellant
 should have the costs of this his successful appeal and
 that the rule in the Court below should be for a new
 trial without costs.

The circumstances of this case differ from those of
Cobequid Marine Insurance Co. v. Barleaux (1) where
 both sets of costs were ordered to abide the event of
 the new trial, because the verdict there was deemed to
 be only against the weight of the evidence. Here the
 evidence wholly fails to justify the sale.

Appeal allowed with costs.

Solicitor for appellant: *S. G. Rigby.*

Solicitor for respondent: *N. H. Meagher.*