WESTERN ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MICHAEL SCANLAN AND EDWARD O'CONNOR (PLAINTIFFS) ..... } RESPONDENTS.

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*Mar. 30 & 31.

*May 17.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Marine Insurance—Constructive total loss—Perils not insured against—Abandonment—Arts. 2538, 2541, 2544, *C. C. (P. Q.)*

On the 28th September, 1875, a steam barge, loaded with sand, sank while at anchor near Chateauguay, in the river St. Lawrence. The barge was raised and floated within a week after the disaster. It was shown that on the starboard side there was an auger hole in the bilge of the barge which had been plugged

*PRESENT—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry and Gwynne J.J.

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up with a little wooden plug, and that the plug had come out. The vessel was raised by the insurers under the salvage clause of the policy.

On the first October there was a formal protest, made at the request of the master and officers of the barge, setting forth all the details of the wreck.

On the 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice of abandonment concluding with the words: "It is hardly necessary for me, after your taking "possession of the vessel, to make any further declaration of "abandonment, but I now do so in order to put that fact for-"mally of record, and now again give you notice thereof."

The vessel was eventually sold by consent of all parties interested for $150.

In an action on the policy for a total loss,

Held, reversing the judgment of the court below, that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel.

Per Fournier J.—That the notice of abandonment was not given in conformity with the Art 2544 of the Civil Code, and not made within a reasonable time. Art. 2541 C. C.

APPEAL from the judgment of the Court of Queen's Bench Montreal confirming a judgment of the Superior Court by which the appellants were condemned to pay as for total loss of the steam barge "Westport" insured under policy No. 3,019 for the sum of $3,300, viz. $2,000 to the respondent O'Connor as the party to whom so much was made payable by the policy and the balance to respondent Scanlan proprietor of the vessel, with interest from 13th June, 1876, and costs.

The following special case was stated for the opinion and decision of the Supreme Court of Canada.

"The action is founded upon a policy of insurance issued by the appellants, dated the 1st May, 1875, whereby it is declared that the appellants, in consideration of a premium of one hundred and forty-eight dollars and fifty cents, insured respondent Scanlan's steam barge "Westport," in the sum of three thousand three hundred dollars, from noon of the said date, the 1st

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May, 1875, to noon on the 20th November, 1875.

"The policy stipulates that the company insures, on account of Michael Scanlan, loss, if any, payable to Edward O'Connor to the extent of two thousand dollars ($2,000.00) the said steam barge for the said period unless sooner terminated.

"That the said barge should be employed exclusively in the freighting and passenger business, and to navigate only between Montreal and Chateauguay and Papineauville on the Ottawa River.

"That the perils insured against are those of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, subject to the exceptions mentioned in said policy.

"On or about the 28th of September, 1875, the said steam barge sank in the River St Lawrence, at Chateauguay, and a claim was made on the insurers by the respondent Scanlan, for the amount of said policy.

"The appellants resisted payment, claiming that they were not liable in the circumstances, upon which the respondent Scanlan entered action, praying that the appellants be condemned to pay to him the said sum of three thousand three hundred dollars ($3,300.00) with interest.

"The appellants, besides a general answer, pleaded by different pleas, *inter alia*, breach of warranty, want of competent master, engineer and crew; that the vessel sank from inherent defects, and by acts of owner or crew, or both.

"The appellants submit:—

"1st. That there was no legal evidence of record to support a condemnation as for total loss, and none as to the extent of the injury done to the vessel, and that no judgment whatsoever ought to have been given against Appellants.

"2nd. That it is established that the vessel in any case

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sank from inherent defects or the acts or conduct of owner or crew, or both, for which appellants are not responsible.

"3rd. That respondent's evidence is contradictory and unreliable and insufficient to support the judgment appealed from.

"The respondents, by their answers to appellants' pleas, resist these pretentions.

"The respondent O'Connor, intervened in the case, alleging that by the terms of the policy the loss, if any, was payable to him to the extent of two thousand dollars ($2,000.00).

"The intervention was admitted by the respondent, Scanlan, but resisted by the appellants on the same grounds as the principal demand and by consent of the parties the evidence and documents of record were made common to both issues.

"The Superior Court on the 9th March, 1883, rendered judgment in favor of the respondents for the full amount claimed by them respectively, with interest and costs.

"From this judgment an appeal was taken to the Court of Queen's Bench (appeal side) by the judgment of which rendered on the 29th May, 1885, the judgment of the court below was confirmed.

"From this judgment the present appeal is taken.

"The question submitted to this court is whether the appellants are, under the pleadings, facts and circumstances, entitled to have the judgment of the Superior Court and Queen's Bench reversed."

The material facts as disclosed by the evidence are as follows: The vessel sank, at a place, where it was 10 or 12 feet deep, when at anchor and in comparatively smooth weather.

After the sinking of the vessel the appellants raised her under the salvage clause of the policy; the vessel

having sand in her at the time she sank, this had to be pumped out, but she was raised within a fortnight and put in a place of safety in the Lachine Canal and respondent Scanlan was notified that she was there subject to his order.

At the trial it was proved that there was in starboard side an auger hole in the bilge of the barge; this hole had been made where a pipe had gone through the side of the vessel to supply water to the engine and boiler; the pipe had been shifted over from that place to another place a little distance from where that hole was and the hole had been plugged up with a little wooden peg, this plug of course had come out.

Nearly two months after the vessel had been so raised under the salvage clause of the policy and respondent Scanlon had been notified that she was in the canal and subject to his orders, he, on the 6th December, 1875, delivered to appellants' agent the letter of that date.

Montreal, 6th December, 1875.

Messrs. SIMPSON & BETHUNE,

General Agents of the Western Ass. Co.

Sirs,—I have to ask for an immediate settlement of the claims arising out of the loss of my steam barge "Westport," covered by policy No. 3019, in the Western Assurance Company, on the 1st May, 1875, which vessel was totally lost at Chateauguay on the 28th day of September last, and abandoned by me. It is hardly necessary for me, after your taking possession of the vessel, to make any further declaration of abandonment, but I now do so in order to put that fact formally of record, and now again give you notice thereof.

Your obdt. servt.,

(Sgd.) M. SCANLAN.

The vessel thereafter lay in the canal for several years, and on a consent being given by the parties a year and a half after this action was instituted, that the

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vessel should be sold and that the sale should not prejudice the rights of either party in the case which was "to be proceeded with to final judgment as if this "consent had never been made," she was sold for $150.

Laflamme Q.C. and *Trenholme* for the appellants.

The loss was not occasioned by any of the perils insured against, and the onus was on the plaintiff to show that the accident was caused by some external violence forcing the plug out of the hole. Moreover, the hole was not there at the time of the insurance, and there was negligence. Arts. 2509 C.C. and Parson's Marine Insurance (1); Arnould (2); *Dupeyre* v. *Western Marine and Fire Insurance Company* (3); Philipps on Insurance (4). Even if the vessel was lost by the perils insured against respondent was not entitled to recover, because there was no legal abandonment. Arts. 2538, 2541, 2544. The facts in evidence did not justify an abandonment. *Provincial Insurance Company* v. *Leduc* (5); *The Sun Mutual Insurance Company* v. *Masson* (6); *Anchor Marine Insurance Company* v. *Keith* (7).

The sale of the vessel cannot be invoked against appellant as it was made upon consent.

Davidson Q.C. for respondent:

This court should not reverse the decision of the court below on questions of fact.

The plaintiff (respondent) urges that the thing insured was "wholly destroyed or lost," and so became an absolute total loss. Art. 2,522 C. C. The same article defines a constructive total loss as occurring when "the thing, "though not wholly destroyed or lost, becomes of little "or no value to the insured."

(1) 1 Vol. p. 537.
(2) 2 Vol. 5th, Ed. 542.
(3) 2 Rob. (La.) p. 457.
(4) 1 Vol. p. 489 and seq.
(5) L. R. 6. P. C. 224.
(6) 4 L. C. Jur. 23.
(7) 9 Can. S. C. R. 483.

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Only in the latter case is abandonment necessary. Arts. 2,522, 2,538, 2,541 C. C. Surely there was practically a total effacement of the thing insured when salvage expenses of $1,930 only produced $150. Surely a vessel valued at $5,000 must be deemed "wholly destroyed" when, after such a disbursement, only $150 could be realized from her. She was not even of "little or no value to the insured," when, to have accepted the remains of her, would have imposed upon him a contribution by average adjustment very far beyond what he was receiving.

No precise form is required for a notice of abandonment; it is not even necessary that it should be in writing. Dixon's law of shipping (1).

Arnould (2) lays down the same principle.

How appellant can pretend that the loss was not total is difficult to understand. The vessel went down in eighteen feet of water. After efforts, extending over a fortnight, and an expenditure, according to the plea, of $1,930, the remains of the vessel were brought to the Lachine canal. She was raised to the surface with her cargo still in her. To go down as she did must have wrenched her badly, and dragging her to the surface laden with sand, to the extent of one-half or two-thirds of her capacity, completed her destruction as a vessel. Appellants subsequently selling the hulk for $150, in itself is a strikingly conclusive proof of the totality of the loss.

The learned counsel cited *The Quebec Marine Insurance Co.* v. *The Merchants' Bank of Canada* (3); *Lemelin* v. *The Montreal Insurance Company* (4); *Cambridge* v. *Anderton* (5); Philipps on Insurance (6); *Roux* v. *Salvador* (7).

(1) P. 575.
(2) P. 850.
(3) 13 L. C. Jur. 267.
(4) 1 Q. L. R. 337.
(5) 2 B. & C. 691.
(6) 2 Vol. No. 2302.
(7) 3 Bing. 266.

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With reference to the time when notice of abandonment should be given, the English law says, within a reasonable time. French law says within six months, twelve months. The courts have to say what a reasonable time is.

We also contend that the silence of the company, after the receipt of the letter of December the 6th, amounts to an acceptance of the abandonment. *Hudson* v. *Harrison* (1).

On the question of negligence the learned counsel relied on art. 2509 C. C. (P.Q.), and *Cross* v. *British America Ins. Co.* (2); *Provincial Ins. Co* v. *Leduc* (3).

Trenholme in reply stated the evidence had been taken at *enquête*, and this court was therefore quite as competent to come to a conclusion as the courts below on the questions of fact, as to whether it was a loss falling within any of the perils insured against, citing *Phillips* v. *Barber* (4).

Sir W. J. RITCHIE C. J.—I think, in this case, that the parties have failed to show that there was a total, or constructive total, loss, and that there was no ground for sustaining the allegation that the vessel was lost by the perils of the seas. There was a hole in her bottom, but not a hole caused by the winds and the waves. There was nothing whatever to show that when this vessel was raised, and the hole plugged up, she would not be as good a vessel as ever.

STRONG J.—The policy sued upon in this action is not the ordinary marine policy, but one of a very special form, applicable to vessels navigating the inland waters of Canada,—the River St. Lawrence from Quebec westward, and the Great Lakes. It contains amongst others, the following stipulation: "Further,

(1) 3 Brod. & Bing. 97.
(2) 22 L. C. Jur. 10.
(3) L. R. 6 P. C. 224.
(4) 5 B. & Al. 161.

"the insured shall not have a right to abandon the "vessel in any case unless the amount the insurers "would be liable to pay under an adjustment as of a "partial loss shall exceed half the amount insured." This special clause makes the question of the respondents' right to recover as for a constructive total loss a very different one from that which it would have been under the general law as enacted in the Civil Code, if the insurance had been effected by the ordinary marine policy without any special stipulation of this kind. It is manifest that there can be no right to recover as for a constructive total loss unless it is proved that the amount of the loss would, if valued as a partial average loss exceed the sum of $1,650, being one half of the whole amount insured It was for the respondents to have poved that the amount of the loss did exceed this sum, but this they have wholly failed to do, and as the amount of the loss could only have been the expense of raising the vessel and the restoration of the machinery by repairing the damage caused by he submerging, which could not have amounted to any such sum as that mentioned, it plainly appears that the plaintiff could not have made any such proof. At all events it is sufficient to say that he has not by his proofs brought himself within this condition, and so cannot recover for a constructive total loss.

It is out of the question to say that the company waived this condition by taking possession and repairing; as they had a right to do this according to the express terms of the policy under the salvage cfause.

According to English practice however, a plaintiff suing on a marine policy for a constructive total loss, may, if it turns out that he is disentitled to recover for the loss suffered as a total loss, fall back on his right to recover as for a partial or average loss, and I assume, in

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the respondent's favor, that he would be considered to have the same right in the courts of the province of Quebec. Then is the plaintiff entitled to recover here for a partial loss? Upon the evidence I am clearly of opinion that he is not. The inevitable conclusion from the evidence must be that the sinking of the barge would not have occurred but for the auger hole in the bottom which had been bored apparently for the purposes of an injection pipe to supply the boiler with water. This might and ought to have been secured otherwise than by a wooden plug, liable to be displaced by the action of the water, as it is shewn that many other devices existed by which this hole might have been securely plugged, and which would have been resorted to by any prudent owner. It is impossible to believe that whilst this hole below the water line in the side or bottom existed in the insecure state disclosed by the evidence the barge was seaworthy. Then the loss being most satisfactorily demonstrated to have been consequent upon this unseaworthy condition of the vessel, it was within the exception of the policy which expressly excludes from the insurance, losses consequent upon "rotten-"ness, inherent defects, overloading and all other un-"seaworthiness."

I have heard no argument or reason suggested which furnishes an answer to this objection to the plaintiff's right to recover in this action, and I can think of none which could be suggested and it must, therefore, in my judgment prevail. There are other defences pleaded which I think are also maintained, but these it is not necessary to notice the foregoing reasons being sufficient grounds for reversing the judgment of the courts below. This must be done with costs to the respondent here, and in the Court of Queen's Bench, and the action and the intervention in the Superior Court must

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both be dismissed with costs.

FOURNIER J.—The vessel sank in six feet of water; she was raised by the company under the Salvage clause in the policy, was put in the dock, and the contention now is that the company took possession of the vessel as if she had been regularly abandoned. But that was not the fact; it was only notifying the party that the vessel was raised. Both parties agreed in having her sold.

This is certainly not, under the circumstances, a constructive total loss. It was set up that there was an abandonment, but there was no abandonment which the code requires to be made within a reasonable time. Notice was given to the company but not in conformity with the statute. All the circumstances must be stated in the notice of abandonment. I think the appeal should be dismissed.

HENRY J.—I entirely concur in the view that there was no total loss here, or anything amounting to it. The vessel sank, with every prospect of being raised again. She sustained literally no damage. She was raised and pumped out by the company, and I think the respondent produced no evidence to sustain the claim for a total loss.

GWYNNE J. concurred with Sir J. W. RITCHIE C. J.

Appeal allowed with costs.

Solicitors for appellants: *Trenholme, Taylor, Dickson & Buchan.*

Solicitors for respondents: *Davidson & Fitzpatrick.*