

THE MILLVILLE MUTUAL MARINE }
 AND FIRE INS. CO (Defendants).. } APPELLANTS; 1884

AND

BARTHOLOMEW J. DRISCOLL AND }
 JOHN M. DRISCOLL (Plaintiffs). } RESPONDENTS. *Feb'y. 21, 22.
 *June 23.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Commission from Sup. Court of N. B.—Cons. Stats. ch. 37—Directed to two Commissioners—Return signed by one only—Failure to administer interrogatories.—Mar. Ins.—Total loss—Notice of abandonment—Waiver.

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed *ex parte* if the other neglected or refused to attend. Both commissioners attend.

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

1884

MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

ed the examination, and defendants' nominee cross-examined the witness, but refused to certify to the return, which was sent back to the Court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were put to the witnesses by the commissioners.

Held,—That the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received.

Per *Ritchie C.J.*, and *Strong, Fournier* and *Henry JJ.*, that the refusal of one commissioner to sign the return was merely directory, and did not vitiate it.

Per *Gwynne J.*, That the return should have been signed by both commissioners, and not having been so signed was void, and the evidence under it should not have been read.

On a voyage from Porto Rico to New Haven respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea.

Held, that there was no evidence to justify the jury in finding that the vessel was a total loss.

Owners of vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to Captain that they had abandoned and for him to proceed under the best advice.

Held, that this act of telegraphing to the Captain did not constitute a waiver of the notice of abandonment.

APPEAL from a judgment of the Supreme Court of New Brunswick, refusing to make absolute a rule *nisi* for a non-suit.

The action was upon two policies of insurance upon the hull and freight of the respondents' vessel ("The Star") for a voyage from Porto Rico to New Haven. After starting upon the voyage the vessel encountered heavy weather, and put into St. Thomas, where a survey was ordered, and made by parties admitted to be the most competent obtainable, appointed by the British Consul. The report of the surveyors

showed that it would cost \$4,500 to put the vessel in good repair, which was largely in excess of the captain's estimate of her value, and on notifying the owners, he was advised that they had abandoned to the underwriters, and directed to proceed under the best advice. It appeared on the trial that the agent of the underwriters refused to accept notice of abandonment. The captain then advertised the vessel, and sold her, the purchaser afterwards causing her to be repaired, at an expense of some \$1,300; and she was kept employed for some time after.

The evidence for the plaintiff was mostly taken under a commission issued out of the Supreme Court of New Brunswick, directed to two commissioners, one named by each party to the suit, the commission containing a provision, that should the commissioner named by the defendant neglect or refuse to attend the examination of witnesses thereunder, his co-commissioner could proceed *ex parte*, on giving two days notice of hearing to the other. On the commission being opened at the trial, it appeared that the return was signed by the plaintiffs' commissioner only, although the defendants' commissioner had attended the examination and cross-examined some of the witnesses; and also, that some of the interrogatories had not been put to the witnesses. No reason was alleged for the failure of the other commissioner to sign the return, and the judge at the trial allowed the evidence to be read, subject to the objection of defendants' counsel. A verdict having been found for the plaintiff, a motion was subsequently made to the court *in banc* to set the same aside and enter a non-suit, which was refused, the majority of the court holding the return to the commission to be regular, and that there was evidence of a total loss to go to the jury. From that judgment the defendants appealed.

1884

MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

1884

MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

Weldon Q.C. and Palmer for the appellants :

There was no evidence of a total loss. The vessel was in a harbor, a place of safety, and captain got no advice from his owners. *Wood v. Stymest* (1).

If the respondents were entitled to abandon, they had no right to interfere with the property after notice, and the telegram to the master was an interference, and a waiver of the abandonment. Then the sale by the master being unauthorized, and there being no evidence of a total loss, there was no notice of abandonment given in time to make it a constructive total loss.

Then in regard to the evidence taken under commission, it is submitted that it should not have been read at the trial. By sec. 194 of chap. 37 Con. Stats., the return to the commission must be under the seal of the judge, commissioner or other person taking the same; and by chap. 118, relating to interpretation of terms, a word importing the singular may extend to several persons. Therefore, all commissioners named must sign the return. And more particularly so when the commission itself contained the only provision for one commissioner to act alone, and the facts were not in accordance with such provision.

Again, the commission itself was not executed according to the exigencies of the writ, some of the interrogatories not being put. On these grounds it is submitted that the judgment of the court below should be reversed and a non-suit entered.

Barker Q.C. for respondents :

It is not pretended by any one that there was an actual total loss of the vessel, but only a constructive total loss, and that was what the jury really found. The captain acted according to his best judgment, and as soon as possible communicated with the owners.

As to the notice of abandonment, that was given as soon as owners were in possession of the facts, and the telegram to the captain was clearly no waiver of the notice, but merely a notification to him of their course.

Then as to the commission, it is submitted that the return was sufficient ; but, if not, the objection goes only to a question of practice, and this court will not interfere. In fact, the application should have been made to a judge at chambers. *Grill v. General Iron Collier Co.* (1). As to the failure to administer the interrogatories, the appellants were represented at the examination, and not having then objected, it was too late to do so at the trial. *Robinson v. Davies* (2). The proper course for the appellants was to move to suppress the depositions, and for another commission to issue. For these reasons, I submit that the judgment of the court below must be sustained.

Weldon Q.C. in reply :

Grill v. The General Iron Collier Co. does not apply. By the practice in England the depositions are opened before the trial and copies furnished to the parties. As in New Brunswick the commission is not opened until the trial, it would be impossible to apply to a judge at chambers.

SIR W. J. RITCHIE C.J. :—

Under the practice and law in New Brunswick, I do not think it was the duty of the defendants to apply before trial to have the evidence under the commission suppressed. So far as my experience goes, such never was the practice in New Brunswick, and it is quite clear that no such motion could be made until the commission was opened, and its contents disclosed, and this could not be done before the trial by reason of the pro-

(1) L. R. 1 C. P. 600.

(2) 5 Q. B. Div. 26.

1884

MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.

v.

DRISCOLL.

Ritchie C.J.

vision of sec. 194, ch. 37 of the Consolidated Statutes of New Brunswick, which enacts that the commission shall not be opened before trial without the consent of the parties.

By section 194, no examination or deposition is to be read in evidence without consent of opposite party, unless it is made to appear that the examinant or deponent is out of the province or dead, or unable from sickness or other infirmity to attend the trial:

In all or any of which cases the examinations and depositions, certified under the hands of the judge, commissioner, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions; provided always, that such examinations or depositions shall be closed up under the seal of the judge, commissioner, or other person taking the same, and addressed to the Supreme Court, and endorsed with the title to the suit in which the same were taken, and shall not be opened before the trial without the consent of the parties to the suit.

Though the commissioners are named one by each party, when the commission is issued to the commissioners so named do they not become officers of the Court and in no sense agents of the parties, but both alike bound duly and properly to execute the commission, entirely irrespective of either party? Chapter 37 of the Consolidated Statutes makes no provision whatever for the nomination of the commissioners by the parties. On the contrary, section 188 simply provides that:

It shall be lawful for the court and the several judges thereof, in any action therein depending, upon the application of any of the parties to such suit, to order a commission to issue under the seal of the court for the examination of witnesses on oath at any place out of the province, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examinations.

On the face of the commission there is nothing to show that either of the parties had anything to do with

naming the commissioners; in fact, for aught that appears, they may have been nominated by the court or judge without reference to the parties at all, though, no doubt, in point of fact, as was stated on the argument, the names may have been suggested one by each party, as no doubt is usually done.

1884
MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

The commission in this case is simply addressed to Francisco Fontana, Esq., of St. Thomas West Indies, and Edmund T. Merrill, of the same place, merchant : Ritchie C.J.

Thus know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, full power and authority, diligently to examine, &c., upon interrogatories hereto annexed.

It then commands that, without delay, and at a certain place or places, at St. Thomas aforesaid, to be appointed by you, the said Francisco Fontana, for that purpose, you (the commissioners) cause the said witnesses for said plaintiffs to come before you at St. Thomas aforesaid, and then and there examine each of them upon the said interrogatories, &c. The words of the commission are :—

And that you do take such examinations and reduce them into writing in the English language, and that when you shall have taken the same, that you do without delay send and return the same certified by you, the said Francisco Fontana, and closed up under your seals, or the seal of you the said Francisco Fontana, you shall alone execute this commission, together with this writ, addressed to the Supreme Court and endorsed with the title to the said cause.

Provision is made that Francisco Fontana give at least two days' notice in writing of the time and place of executing commission to Edmund T. Merrill, and authorizes Francisco Fontana, in case Edmund T. Merrill refuses or neglects to attend, to proceed *ex parte* with the examination and execution of commission.

In this case the omission to put the questions was by no means an irregularity, but was a most sub-

1884
 MILLVILLE
 MUTUAL
 MARINE
 AND FIRE
 INS. CO.
 v.
 DRISCOLL.
 Ritchie C.J.

stantial objection affecting the merits ; an objection that has, as Mr. Justice Willes expresses it, " a solid foundation." And again, by reason of the express enactment of section 194, no application could be made till the commission was opened and the omission made apparent, which could only be on the trial ; and the absence of any such provision in the Imp. Statutes, 1 Wm. IV. ch. 22, entirely distinguishes *Grill v. Gen. Iron Screw Collier Co.* (1) from this case.

I do not think there is anything in the objection as to the certifying of the commission. I think this may be treated as merely directory, and not fatal to the reception. The certificate is in the terms of the commission, which directs Francisco Fontana, to certify ; if, under the statute, both commissioners must certify, as strictly speaking I think they should, the defendant should have had the commission altered in this respect.

The case of *Grill v. The General Iron Screw Collier Co.*, (1) is not applicable to this case. In that case there was at most a mere irregularity, and Willes, J., says he was not convinced there was any irregularity, and then says it is not necessary to decide whether the objections could be taken at the trial, or whether it should be taken before, and on application made at chambers to set aside the depositions, he says :—

No question, however, has been suggested which might have been asked with advantage to the defendants, and has been omitted, and it appears, therefore, that the objection has no solid foundation, but only amounts to this, that the questions were put *viva voce* instead of in writing.

Keating J. concurred.

Montague Smith J. went a little further, and certainly held that the proper course, when there is any irregularity in the mode of taking a commission, was to apply at chambers to have it suppressed.

In the *Boston Belting Co. v. Gabel* (1), Chief Justice Allen says :

The commissioners are officers of the court, though nominated by the parties. They are appointed for the purpose of seeing that the evidence of the witnesses, who are examined, is properly taken and certified; and I think they ought not to be treated as the agents of the parties while acting as commissioners, unless it is clear they are so.

1884
MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.
Ritchie C.J.

In the case of *Robinson & Co. v. Davies & Co.* (2), where the question arose as to the admissibility of evidence not objected to before the commissioners and—"one of the commissioners was the defendants' agent at "Hamburg and represented their interests"—the court held that the defendant should have objected, and not having done so, it was too late to do so on the trial. That case is entirely distinguishable from this. The appointment of Merrill, as commissioner, did not make him the defendants' agent and there is not the slightest evidence to show that he was in any way defendants' agent *de facto* or *de jure*.

Davis v. Nicholson (3) is if possible still more inapplicable, so much so that I do not think it necessary to take up further time in discussing it.

If all the interrogatories had been put to the witnesses, I should not have thought so much of the non-certifying of the second Commissioner, because by the terms of the commission it is directed to be certified by only one. A commission such as this may be irregular, but it was acquiesced in by defendant, or if he had any objections he should have applied to the judge to have it rectified before being sent for execution.

But assuming, even if we could, that each party is to be considered as represented by a commissioner, there is nothing on the face of this commission to show that Merrill, if he was the defendants' commissioner,

(1) 20 N. B. Reports (4 P. & B.) 349.
(2) 5 Q. B. Div. 26.
(3) 7 Bing. 358.

1884 of which I have no evidence, assented to it or had any
MILLVILLE power to assent; on the contrary, it appearing on the
MUTUAL face of the proceedings that he refused to sign the certi-
MARINE ficate of the examination that would show that he must
AND FIRE have been opposed to the way in which the commis-
INS. Co. sion was executed in reference to the examination.
v.
DRISCOLL.

Ritchie C.J. I do not think that the circumstance of the assured, after Temple's refusal to accept abandonment, telegraphing to the master that they had abandoned to the underwriters, and that he should follow the best advice in reference to the vessel, amounted, in any way, to a withdrawal or waiver of the abandonment, but amounted to no more than an intimation that they had abandoned the vessel, and he was not to look to them for further advice or assistance. It amounts, in other words, to a refusal to advise the captain, and an intimation that they had nothing more to do with the vessel. That they acted in perfect good faith is evidenced by the fact, that they, while adhering to the abandonment, showed the telegram to Temple before sending it, a statement Temple does not contradict, though he says he did not recollect the fact, whereby Temple was placed in a position to act on the abandonment if he chose, or to leave matters in the hands of the captain, whose duty under such circumstances was to act for the benefit of all concerned.

I am of opinion, that under the circumstances of the case, the vessel was not an actual total loss when she arrived at St. Thomas, and that there was no evidence to justify the jury in finding such to have been the case.

If the circumstances warranted a notice of abandonment, which was a question for the jury, and which I think in this case it must be assumed was found in favor of the plaintiff, then I think the notice given

was sufficient, but if there is any doubt as to this having been properly left to them, there should have been a new trial, but having found there was an actual total loss, there can be no doubt as to how they would have found as to this. I am therefore of the opinion that the appeal should be allowed.

1884
MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

Ritchie C.J.

STRONG, FOURNIER and HENRY JJ. concurred.

GWYNNE J.—The objection taken to the reception of the evidence taken under the commission obtained and issued in this case, by and on behalf of the plaintiffs, is, in my opinion, fatal.

The plaintiffs obtained a commission to issue out of the Supreme Court of New Brunswick, directed to Francisco Fontana, Esquire, of St. Thomas, in the West Indies, and Edward T. Merrill of the same place, merchant, appointing them as commissioners to examine certain witnesses to be produced before them, on the part of the plaintiffs in the action, upon interrogatories annexed to the commission; and the said Francisco Fontana was thereby authorized and empowered (in case the said Edward T. Merrill should refuse or neglect to attend at the time and place to be named in a notice in writing, which the said Francisco Fontana was directed to have served upon him, appointing a time and place for executing the commission, or at any adjourned meeting) to proceed *ex parte*, in the absence of him, the said Edward T. Merrill, with the examination of the said witnesses and the execution of the commission, the same as though he had attended and was present, and upon all the evidence being taken, the said Francisco Fontana was directed to return the commission closed up, under the seals of both of the commissioners, if they both should act, or under the seal of

1884
MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.
Gwynne J.

Francisco Fontana, if he alone should execute the commission, and addressed to the Supreme Court. Both of the commissioners acted together throughout the examination of the witnesses whose evidence was directed to be taken under the commission. Mr. Merrill however, for what reason did not appear, refused to sign and seal the commission, and the same was returned signed, sealed, and certified by Fontana alone, although both had acted in the execution of the commission. The reception of the evidence taken under the commission was, for this reason, objected to by the learned counsel for the defendants. By the 188th sec. of ch. 37 of the Consolidated Statutes of New Brunswick, the Supreme Court is empowered to issue commissions for the examination of witnesses upon interrogatories or otherwise, at any place out of the province. By the 194th section it is enacted that no examination or deposition to be taken by virtue of such commission shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, on proof by affidavit or *viva voce*, that the examinant or deponent is out of the province, or dead, or unable from sickness or other infirmity to attend the trial, in all or any of which cases, the examinations and depositions, certified under the hand of the judge, commissioner or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence saving all just exceptions; provided always, that such examinations or depositions shall be closed up under the seal of the judge, commissioner, or other person taking the same, and addressed to the Supreme Court and endorsed with the title of the suit in which the same were taken, and shall not be opened before the trial without the consent of the parties to the suit. The effect of this section, read in the light of the Inter-

pretation Act whereby the singular number imports also the plural, is, that without the consent of the party against whom any evidence taken under a commission shall be offered, the same shall not be received and read in evidence unless the examinations and depositions are certified under the hands, and closed up under the seals, of the Commissioners, where there are more than one, or where there is only one, the commissioner taking the same, and so signed and sealed, are returned to the Supreme Court, endorsed with the title of the suit in which the same were taken. Mr. Merrill having joined with Mr. Fontana in taking all the examinations and depositions of the witnesses examined under the commission, his signature and seal was, by the statute, made as necessary to the reception of the evidence as the signature and seal of Mr. Fontana, and this being a statutory requirement, constituting a condition precedent to the reception of the evidence, cannot be dispensed with by the court against the will of the party against whom the evidence is tendered. Non-compliance with this condition precedent is not a mere irregularity, as was the subject of objection in *Grill v. General Iron Screw Collier Co.*, (1) but a defect which cannot, as it appears to me, be got over without the consent of the parties to the suit.

That the objection is not technical only and one of mere form, but that it is one touching the merits of the case, is apparent from the fact that upon the commission being opened, and the evidence in it read, as it was against the will of the defendants, it appeared that some of the interrogatories in chief and of the cross-interrogatories, being those which touched the very marrow and substance of the case, were either not answered at all, or quite insufficiently; and some, for anything appearing upon the commission, were not put

1884
MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.
Gwynne J.

(1) L. R. 1 C. P. 600.

1884

MILLVILLEMUTUAL
MARINE
AND FIRE
INS. CO.

v.

DRISCOLL.Gwynne J.

to the witnesses at all ; these questions were pointed to an enquiry into the nature of the damage done to the vessel insured, for the purpose of ascertaining the nature and extent of it, and of determining whether it was such as to constitute a constructive total loss, or to justify the sale of the vessel, for that she was not an actual total loss, but was in perfect sailing condition, and to all appearance, except in her sails, in the same condition in which she was before receiving the alleged damage, having upon her no visible sign of having undergone recent repairs, but having visible repairs which had been done to her before she sailed upon the voyage in which she received the damage sued for, was abundantly apparent from the evidence of witnesses examined *viva voce* at the trial. Even if, as was suggested, Mr. Merrill was to be regarded as the agent of the defendants at the examination, a position in support of which there does not appear anything in the evidence, still, that would not have authorized the Commissioners to dispense with putting the interrogatories and executing the commission by taking the examination of the witnesses as they were directed and required by the commission to do ; nor, in disregard of the provisions of the Statute and against the will of the defendants, would it have authorized the reception and reading of evidence taken under a commission so imperfectly executed. It is impossible, as it appears to me, that any judgment in favor of the plaintiffs can be rendered upon the merits of the case, in the absence of a searching inquiry into the facts as to the actual extent of the damage done to the vessel and attending its sale and the alleged subsequent repair of the vessel, and under the circumstances of imperfection attending the execution of the commission, I am of opinion that what evidence was taken under it should not have been

received and read as evidence for the plaintiffs, and that they should therefore have been non-suited.

1884

MILLVILLE
MUTUAL
MARINE
AND FIRE
INS. CO.
v.
DRISCOLL.

Appeal allowed with costs.

Solicitor for Appellant: *C. A. Palmer.*

Solicitor for Respondents: *F. E. Barker.*
