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*Feb. 24.

*May 17.

GEORGE J. TROOP AND WILLIAM J. LEWIS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE MERCHANTS MARINE INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mar. Ins.—Ins. on freight—Constructive total loss—Abandonment—Repairs by underwriters.

A vessel proceeding on a voyage from Arecibo to Acquim and thence to New York, encountered heavy weather, was dismasted and was towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage, and complete the voyage. The agent had the vessel repaired and brought her to New York, with the cargo.

On an action to recover the insurance on the freight,

Held, reversing the judgment of the Court below, Strong J. dissenting, that there being a constructive total loss of the ship the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering.

APPEAL from a Judgment of the Supreme Court of Nova Scotia (1) ordering that judgment be entered for the defendants on a special case stated by the parties. The said special case was as follows:

1st. This is an action brought to recover the sum of eight hundred dollars upon a policy of insurance issued by the defendant company to the plaintiffs, carrying on

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

(1) 6 Russ. & Geld. 323.

business under the name of Black Brothers and Co., upon the freight of the brigantine "Rebecca Neily," of which the plaintiffs were owners, upon a voyage at and from Arecibo to Acquim and thence to New York. The plaintiffs alone were interested in said freight.

2nd. Whilst prosecuting said voyage with her cargo on board, she encountered heavy weather, was dismasted, and towed into Guantanamo on or about the middle of November, A.D. 1881. The defendant company had also a policy on the hull of said vessel to the extent of two thousand five hundred dollars, dated the 10th day of May, A.D. 1881, which is the subject of the first count of the declaration herein.

3rd. It would have cost at least the amount of freight, payable under the charter-party hereinafter referred to from Acquim to New York, to send the cargo on from the said port of Guantanamo to New York by another ship.

J. F. Whitney & Co., commission merchants in New York, disbursed the said vessel and collected her freight, which was placed by them to credit of the "Rebecca Neily" and owners for account of disbursements paid by them, and after so crediting the sum received there was a balance left unpaid on disbursement account which was placed by them to the debit of said "Rebecca Neily" and owners. The said disbursement account was rendered by said J. F. Whitney & Co. to the defendant company by the authority of the latter, and the defendant company paid to said J. F. Whitney & Co. the said balance due to them. The said J F. Whitney & Co. also had other money transactions with the defendant company relative to said vessel after she was towed into Guantanamo and before her arrival at New York from Guantanamo aforesaid; and the said J. F. Whitney & Co. had made payments for said vessel by the authority of the defendant company, and the latter subsequently re-imbursed said

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J. F. Whitney & Co. for all the moneys which they had advanced or paid for said defendants.

4th. The printed case in an action brought by the plaintiffs above named against the Honorable Alfred G. Jones, and which is hereinafter more particularly referred to, together with the pleadings in this action, the policy of insurance granted by defendants upon said freight, the charter-party entered into on behalf of the plaintiffs for the carriage of the cargo on board said "Rebecca Neily" at the time of her loss shall form part of this case. The court shall consider the evidence in the said printed case herewith, and as to all questions of fact not admitted in this case the court shall be at liberty, and power is hereby given to them, to find all questions of fact and to draw all inferences of fact that a jury might.

5th. It is admitted that preliminary proofs were given in due form more than sixty days before this action was commenced.

6th. The said action brought by the said plaintiffs against said Honorable Alfred G. Jones, as will be seen on reference to the said printed case, was an action against said Jones as an underwriter upon a policy on the hull of the said "Rebecca Neily" to recover for a total loss of said vessel. On the trial of plaintiffs' said action against said Jones, the following verdict or finding was rendered by Mr. Justice Thompson, who tried the said cause:—

"I give the verdict for the plaintiffs for the amount "claimed, and interest. While recognizing the im- "portance of the questions involved in this suit, I do "not here state at large the views which I entertain "on these questions, because I conceive it will be only "useful for me to state the points on which my con- "clusions rested. I thought the abandonment justifi- "able, and the constructive total loss theory sustain- "able.

" 1st. By the vessel's condition and situation at
" the time of the abandonment, irrespective of
" subsequent events, confirmatory of this view
" 2nd. By the evidence of value after repaired.
" 3rd. By the actual cost of the repairs

" Having arrived at this conclusion, it seemed to me " that the plaintiffs were entitled to the verdict, not- " withstanding the repairs effected by the under- " writers, and the endeavours of the underwriters to re- " store the vessel to the plaintiffs."

7th. The defendants, upon said verdict of Mr. Justice Thompson being sustained by the court *in banco* upon appeal thereto, paid into court in this action, on or about the 31st day of July, A. D. 1884, under the count upon the said policy on hull, the amount due thereon as for a total loss of said vessel, with interest to the date of such payment.

8th. It is admitted that the foregoing findings of Mr. Justice Thompson were correct, and it is agreed that they shall form part of the case, and shall have the same effect herein as if found in this cause upon sufficient evidence in that behalf.

9th. The question for the consideration of the Court is whether or not the plaintiffs can, under the circumstances, recover the insurance on said freight.

Judgment to be entered for the successful party with the costs upon and incident to the claim upon the freight policy.

The following facts also were presented by the printed case in appeal.

SUPPLEMENTARY PARAGRAPH.

The defendants sent an agent, one Lewis Anderson, from Halifax to Guantanamo to look after their interests.

He left Halifax 7th December, 1881, and arrived at Guantanamo the 22nd of December, 1881. In respect to this matter certain correspondence took place

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between the parties thereto in reference to Anderson's mission, the owners claiming that they had abandoned the ship and had no further interest in her.

The plaintiffs had in the meantime sent the following telegrams to J. F. Whitney & Co., which were communicated by letter to Whittier.

December, 1881.

To J. F. Whitney & Co., New York.

Write Whittier Saturday's mail. Abandoned to underwriters seventeenth of November. Pay crew to that date. Underwriters sending Anderson. On arrival give up charge to him. If Anderson wants your services or crew must employ you himself. Keep charge chronometer, have estimates in writing, make no drafts. Let Anderson pay all disbursements.

BLACK BROS. & CO.

HALIFAX, December 9th, 1881.

To J. F. Whitney & Co., New York.

Add to Whitter's letter, if Anderson proposes to outfit vessel from material of "valmes" raise no objection and be careful to express no opinion as to its quality or suitableness. Be careful in every way not to commit owners to anything Anderson does.

BLACK BROS. & CO.

Whittier refused to repair, although requested so to do by Anderson, and informed Anderson he was going to give up charge to him. He and the crew left the vessel, and thenceforth ceased to have any connection with her.

Anderson put a man in charge of the vessel. Materials for repairs were ordered from New York by defendants, and Anderson commenced repairing the ship, and paid off salvage claims and other expenses on the ship. He placed Captain Stevens and another crew on board at Guantanamo, and they took part in repairing. When the vessel was temporarily repaired, the cargo, consisting of 270 tons of logwood, was again

taken on board The vessel in charge of Stevens and his crew left there 11th March, 1882, and arrived in New York the 2nd of April, 1882. Stevens went to J. F. Whitney & Co., and gave them the ship's papers to do the ship's business. Stevens and crew were paid by defendants. The vessel was repaired further in New York and tendered back, but after action brought.

On the argument of the special case the Supreme Court of Nova Scotia, McDonald C. J. dissenting, directed that judgment be entered for the defendants. The plaintiffs appealed from this decision to the Supreme Court of Canada

Graham Q. C. for the appellants.

The freight was not earned before this action was brought. *Providence Washington Ins. Co.* v. *Corbett* (1).

Shepherd v. *Henderson* (2) shows the distinction between actions before freight earned and actions after.

The fact of the underwriters having earned the freight will not prevent us from recovering. The very definition of insurance on freight is against such a contention, for we could not earn the freight ourselves so as to bring it within the cases in the House of Lords. *Scottish American Ins. Co.* v. *Turner* (3), and *Stewart* v. *Greenock Marine Ins. Co* (4).

See also *Sea Ins. Co.* v. *Hadden* (5).

Henry Q. C. for the respondents.

The rights of the underwriter cannot be defeated by the bringing of the action before the proper time. The underwriters undertook to repair, and if the vessel was worth repairing there was no constructive total loss.

There is no distinction between this case and the *Scottish American Ins. Co.* v. *Turner* (6). See *Simpson* v. *Thomson* (7).

The following cases also were cited:

(1) 9 Can. S. C. R. 256.
(2) 7 App. Cas. 49.
(3) 1 Macq. H. L. Cas. 334.
(4) 1 Macq. H. L. Cas. 328.
(5) 13 Q. B. D. 706.
(6) 1 Macq. H. L. Cas. 337.
(7) 3 App. Cas. 279.

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Keith v. *Burrows* (1); *Miller* v. *Woodfall* (2).

Sir W. J. RITCHIE C. J.—If the abandonment was justifiable and accepted, and there was therefore a constructive total loss of the vessel, was there not therefore at that moment a loss of freight to the owners for which they would then and there have had a right of action against the underwriters on freight? If so, how could that right be affected by anything the underwriters on the ship may do with the vessel after she became their property? The moment the total loss of the ship took place was there not necessarily, then and there, a loss of the freight, and does it make any difference as regards the insurance on freight, whether that total loss was actual or constructive? The ship was, in both cases, lost to the owners, and in both cases the freight was equally lost to the owners. To make a good constructive total loss the position of the ship must be such that a prudent owner would not repair; if then he did not repair the voyage would be lost and the freight not earned, and in establishing this state of matters the underwriters on the freight would, I presume, unquestionably be liable for the loss of the freight and this by reason of the ship being incapacitated from earning freight by the perils insured against. Does it not follow, so far as the owner is concerned, that the moment he was justified in abandoning the ship by reason of the perils of the seas, that moment he was entitled to recover for all loss which those perils occasioned, whether of vessel or freight; in other words, was not the freight, against the loss of which the insurers undertook to indemnify the insured, a loss to him by the perils insured against, and therefore should they not make their indemnification good? Before any freight had been earned, as in *Benson* v. *Chapman* (3) there was a damage so serious

(1) 1 C. P. D. 722; 2 App. Cas. 636.

(2) 8 E. & B. 493.

(3) 6 M. & G. 792.

as to justify the owner in treating it as a total loss and abandoning the ship to the underwriters. By this total loss he lost his ship by the perils insured against, and by the same loss he lost his freight by reason of the same perils. The insurers of the ship indemnified him against the one, and I cannot understand why the insurers of the freight should not indemnify him against the other. The total loss of the ship carried with it the total loss of the freight. The damage, as between the insured and underwriters, amounted to a total loss and the freight was never earned by the ship. The moment this total loss took place the insured was prevented by the perils mentioned in the policy from performing the voyage insured, and when it was so prevented that the underwriter bound himself to indemnify the insured.

I think *Benson* v. *Chapman* (1); *Stewart* v. *Greenock Marine Ins. Co* (2); *Scottish Marine* v. *Turner* (3) and *Rankin* v. *Potter* (4) conclusive of this case.

In *Stewart* v. *The Greenock Marine Insurance Company* (5) The Lord Chancellor says:—

In *Benson* v. *Chapman* (1), the ship, soon after leaving the port of loading, sustained damage sufficient to entitle the owner to recover as for a total loss, but the captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned, but the court held that the total loss of the ship carried with it the total loss of the freight. Chief Justice Tindal says: "The assured has sustained a total loss of his freight, if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." The damage amounting, as between the assured and the underwriters, to a total loss, the abandonment did not alter the relative rights of the parties, and the principle of that decision was that the plaintiff, the owner, was entitled to recover against the underwriters on freight as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight, and

(1) 6 M. & G. 792.
(2) 1 Macq. H. L. Cas. 328.
(3) 1 Macq. H. L. Cas. 334.
(4) L. R. 6 H. L. 83.
(5) 1 Macq. H. L. Cas. 332.

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though the freight was afterwards earned it did not belong to the owners, but to the underwriters on ship.

In *The Scottish Marine Insurance Company of Glasgow* v. *Turner* (1), we find the following:

The Lord Chancellor:

It was to this state of circumstances that Chief Justice Tindal referred in *Chapman* v. *Benson* (2), where he said:—"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight or the possibility of ever receiving it, if earned, such freight going to the underwriters on ship." But there the very learned Chief Justice had in contemplation what was then treated as a total loss and abandonment before the freight was earned.

Lord Truro (3):

To determine whether there has been a loss of freight within the meaning of the policy on freight, we must consider what are the obligations which the underwriter takes upon himself by that policy. My noble and learned friend has, I think, stated them most correctly. I conceive that the underwriter on freight binds himself to indemnify the insured when prevented from performing the voyage insured by any of the perils mentioned in the policy.

The decision of the Court of Common Pleas in *Benson* v. *Chapman* proceeded upon the distinct ground that the voyage had been lost—that is to say, that the ship had been reduced to such a state of damage by the perils insured against that she could not be put into a condition to perform the voyage without an outlay such as no uninsured prudent owner would incur; for the owner, in order to save the underwriters, would not be bound to do that, greatly to his injury, which he would not do if uninsured.

That judgment was indeed reversed in the Exchequer Chamber, and the reversal of the Exchequer Chamber was sustained by this House; but nobody uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. The judgment was reversed because the Court of Error could not draw that conclusion of fact upon the special verdict which the Court of Common Pleas had drawn upon the special case; the law being perfectly unimpugned both in the Exchequer Chamber and in this House.

I think, therefore, that in this case there was a total loss of freight in consequence of damage by sea perils being so great that the shipowner was not bound to repair the ship and that there was an actual total loss of the

(1) 1 Macq. H. L. Cas. 337. (2) 6 Man. & Gr. 792.
(3) P. 340.

freight by the constructive total loss of the ship. Therefore I think the appeal in this case should be allowed with costs.

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STRONG J.—Dissented.

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FOURNIER J.—I agree with the Chief Justice that the appeal should be allowed.

HENRY J.—I think the plaintiff is entitled to recover. There was a total loss of freight within the meaning of the contract. The vessel was lost by the perils insured against and was placed in the situation that it would require more money to repair her than she was worth.

I think, therefore, the appeal should be allowed with costs.

TASCHEREAU J.—Concurred.

Appeal allowed with costs.

Solicitors for Appellants: *Meagher, Drysdale & Newcombe.*

Solicitors for Respondents: *Henry, Ritchie & Weston.*