

THE PHOENIX INSURANCE COM- } APPELLANTS;
PANY (DEFENDANTS)..... }

1889
*Oct. 29.

AND

LEONARD J. MCGHEE (PLAINTIFF) .. RESPONDENT.

1890
*June 12.
*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine insurance—Total loss—Evidence—Right to recover for partial loss.

A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on October 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On Nov. 2nd a tug came to the place where the vessel was, the master of which, after examining the situation, refused to try and get her off the rocks. On Nov. 16th one of the owners and the captain went to the vessel and caused a survey to be had and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters and the owners brought an action on the policy claiming a total loss. The only evidence of loss given at the trial was that of the captain who related what the tug had done and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefitted the underwriters. On appeal from a judgment refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial.

Held, per Ritchie C. J. and Strong J., that there was evidence to justify the trial judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss, being one which reasonable men might have arrived at it should not be disturbed.

Per Taschereau, Gwynne and Patterson JJ., that the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss.

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

1889
 THE
 PHOENIX
 INS. CO.
 v.
 MCGHEE.

Held, Gwynne J. dissenting, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a non-suit could not be entered, but there should be a new trial unless the parties agreed on a reference to ascertain the amount of such damages.

Per Gwynne J.—That the plaintiff could not recover damages for a partial loss of which he offered no evidence at the trial but rested his claim wholly upon a total loss.

Held, per Strong J.—An appeal court exercises different functions in dealing with a case tried by a judge without a jury from those exercised in jury cases. In the former case, the court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter, the court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a non-suit or new trial.

The facts of the case are fully set out hereafter in the judgment of Mr. Justice Strong.

C. A. Palmer for the appellants.

Barker Q.C. for the respondents.

In June, 1890, the court proceeded to deliver judgment but no decision was pronounced as Mr. Justice Patterson wished to satisfy himself that the plaintiff could recover for a partial loss under the pleadings and the case stood over until October.

(June 12th, 1890.)

SIR W. J. RITCHIE C.J.—Two questions were discussed in this case. First, was there evidence of a total loss? Secondly, as to the preliminary proofs?

I think there was evidence to justify the learned judge in leaving the question to the jury whether the vessel was an actual total loss or not in these words:

Was this vessel when she was thrown upon the beach as described in the evidence, in your opinion, a complete wreck, that is, had she ceased to be a ship for any useful purpose or not?

In answer to this question the jury stated:

We find that the vessel was a total loss from the position in which we consider she was in.

I read these words to mean that the vessel was a complete wreck—a total loss—as she lay upon the shore, and therefore, no notice of abandonment was, in my opinion, necessary. The evidence of the captain fully justifies this conclusion (1).

1890
 THE
 PHOENIX
 INS. Co.
 v.
 MCGHEE.
 Ritchie C.J.

It is clear from this evidence that if the tug could have taken her off she would have done so, and, therefore, I think the jury were quite justified in finding that in the position she then was she was a total loss.

This finding of the jury shows that the ship, in the position in which she was, was physically irreparable and, therefore, she was an actual loss to the owner. In this case the jury must be taken to have found that there was no chance of the recovery of the vessel; that there was a total loss of the subject matter insured; that the vessel had become a wreck, and from the position she was in she was a mere congeries of planks, and, in the language of the Court of Exchequer in *Roux v Salvador* (2).

She was placed by reason of the perils of the seas, against which the underwriter insured the vessel, in such a position that it was wholly out of the power of the insured or of the underwriter to procure its arrival, and he is bound by the letter of his contract to pay the sum insured.

This case is cited in *Cossmán v. West* (3).

There having been sufficient evidence to justify the learned judge in so leaving that question to the jury I think their verdict should not be disturbed, more especially as the loss appears to have been, unquestionably, a *bonâ fide* loss. I am, therefore, less disposed to interfere with this finding.

As to the preliminary proof, the learned Chief Justice in the court below says:

(1) See p. 66

(2) 3 Bing. N. C. 267.

(3) 13 App. Cas. 174.

1890

THE
PHENIX
INS. CO.
v.
MCGHEE.

Ritchie C.J.

The defendants could not possibly be prejudiced by the variance between the preliminary proof of interest and the proof on the trial, and I should be very sorry to defeat a just and honest claim by an objection so purely technical, and which in no way whatever touches the merits of the case.

I think the appeal should be dismissed.

(Nov. 10th 1890.)

When the matter was formerly before the court my brother Strong was of my opinion that the appeal should be dismissed, but my brother Gwynne thought that a non-suit should be entered, and it has now become necessary to determine what form our judgment should take. I think a non-suit would be against the law laid down in New Brunswick decisions. I have looked into this point, and find that the courts of New Brunswick, on several occasions, have determined that where an action was brought for a constructive total loss, which has not been established for want of notice of abandonment, that it is not proper to non-suit, but that there should be a verdict at all events for nominal damages, or, as it was determined in one case, that there should be a new trial or a verdict for nominal damages.

In *Millidge v. Stymest* (1), the plaintiff claimed for a constructive total loss but the evidence showed a partial loss only the vessel having been repaired, but no evidence having been given of the cost of the repairs the plaintiff was non-suited. It was distinctly held that the non-suit was wrong, and that plaintiff was entitled to nominal damages at all events. So in the case of *Wood v. Stymest* (2), the plaintiff sought to recover for a total loss without giving notice of abandonment, which the court thought necessary; no evidence of damages on a partial loss was given, and it was very obvious could not be given as it would go against the party seeking to recover for a total loss. On motion

(1) 6 All. (N. B.) 164.

(2) 5 Allen (N.B.) 309

to enter a non-suit the court refused to make the rule absolute, but ordered a new trial unless the plaintiff should consent to have the damages reduced to one shilling, or unless both parties should agree to refer the estimate of liability on a partial loss to some competent person for adjudication. The case before us is in precisely the same condition.

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.
 Ritchie C.J.

I therefore think that in this case there should be a new trial ordered unless the parties agree to refer the matter to a competent accountant to take evidence of the amount of damages as on a partial loss, and then a verdict should be entered for that amount.

STRONG J.—This was an action on a policy of insurance, dated 2nd November, 1883, and underwritten by the appellants, effected sometime previously to the date in the name of the respondent for the sum of \$600 on the schooner “Betsey” lost or not lost at and on a voyage from St. John’s, Newfoundland, to coal ports in Cape Breton and return. The vessel was valued on the policy at \$4,000. The policy contained a clause in these words, “and in case of loss such loss to be paid within thirty days after proof of loss and proof of interest in said schooner,” and also a clause “that no partial loss or particular average should be paid unless amounting to 5 per cent.”

The vessel sailed from St. John’s on the 27th October, 1883, and went ashore on Wing and Point Beach inside of Guion Island, about five miles from Gabarus, Cape Breton, on the morning of the 30th October. The crew having got ashore the captain went in search of a settlement, the spot at which the vessel was beached being on a wild shore with no houses nearer than Gabarus. The captain not being able to find houses or settlement had to return to the vessel, but found her

1890
 ~~~~~  
 THE  
 PHOENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 \_\_\_\_\_  
 STRONG J.

pounding so badly that he could not get aboard and had to remain in the woods all night.

The next morning, the 31st, a man came down to them from a place called Firchete and told the crew where they were, and this man guided the master to Gabarus from whence, finding no telegraph there, he went on to Louisbourg, twenty miles further, and from thence telegraphed the owners, Messrs. S. March & Sons of St. John's, Newfoundland, informing them of the loss and received an answer telling him that the vessel was only half insured and directing him to use his best endeavors to get her off, and referring him to Messrs. Archibald & Co. of Sydney, Cape Breton, for assistance. Thereupon the master telegraphed Messrs. Archibald & Co. who the next day sent their tug "The Merrimac" to the wreck. The master also returned there. The master of the tug having arrived at the wreck and examined the situation of the vessel declined to attempt to pull her off, considering it useless to do so as from her position he considered that the tug could not have hauled her off. Nickerson the master of the schooner in his evidence gives the following account of what occurred on this occasion and of the situation of the vessel. He says :—

The tug came around and would not take hold of the schooner. The captain of the tug said he could do nothing to the vessel as she was too high up. She was at that time so high up that at high water it would only come half way up half her length. It was Archibald's tug "Merrimac," a large tug. Don't know her tonnage or power. Refused to take hold.

Then in answer to the question :

From nautical knowledge and experience could the tug in your opinion have pulled the vessel off? Answer—I don't think she could. She was too far up, was not water enough to float her. The ground she was on was no objection to pulling her off, but she was too high and dry. Went to Sydney and telegraphed the owners that the tug could not get the vessel off and that they had better come on themselves. No more correspondence until Levi March came on himself.

The very last time I saw her was last fall (September) I saw her ribs sticking up out of the sand. The last time before that about a fortnight after I went to Sydney, say about middle of November, 1883, she was pretty well used up then by pounding on the shoals. Her keel was twisted badly ; her treenails were sticking out of her ; the oakum sticking out of her seams and a hole was through her bottom ; her rudder traces were broken and the wheel was broken.\* \* \* No chance of getting the vessel off. Heavy waves, barren country, no roads, swamps, etc. No heavy woods within 15 or 20 miles, the vessel never was off the beach.

1890  
 THE  
 PHOENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

Then in cross examination the witness says :

If on the 1st or 2nd November I had had ways etc., she could not have been launched. The time of year and weather could not be depended upon. I took the carpenter down I think to try and launch the vessel. The tug did not take hold of her. If there was any chance of getting the vessel off, the tug could have taken hold of her. \* \* \* \*

Question.—How much more in your opinion were the hull and materials of the schooner “Betsey” worth on the 2nd of November than they were at the time of sale ?

Answer.—I don’t consider she was worth a great deal to any one after she struck.\* \* \* The only effort I made to get the vessel off was having tug come round.\* \* When I left hull in tug boat she was pretty badly strained.

The master returned to Sydney taking with him the crew with the exception of the mate whom he left in charge of the vessel.

About a fortnight after this Mr. Levi March came over from Newfoundland and he, together with Nickerson, Mr. Ross, who described himself as Surveyor for Lloyd’s agent, and Gordon the master of the tug “Mer-rimac,” went to Gabarus and from thence to the wreck which was found to have suffered much additional damage since the captain had been last there. Nickerson in his deposition says that at this time the vessel was in the state detailed by him in the extract before given from the evidence. A survey was then held by Mr. Ross and Gordon the captain of the tug who made the following report :—

We the undersigned Alexander C. Ross, of North Sydney C.B. agent and Surveyor Lloyd’s agent at North Sydney aforesaid, and James W.

1890  
 THE  
 PHOENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

Gordon, master of the steam tug "Merrimac," having been called upon by George Nickerson, master of the schooner "Betsey" 79 tons register of St. John's Newfoundland, to hold a survey upon the said vessel do hereby certify that on the day of the date hereof we proceeded together to the said vessel and after careful examination and survey report as follows:—We found the said vessel up on Wing and Point Beach inside of Guion Island near Gabarus, Cape Breton, but within reach of the sea at high water, and considering the dangerous and exposed condition of the said vessel on a barren coast several miles from any habitation, the lateness of the season, and the impracticability of procuring the necessary material and assistance for launching and floating the said vessel, we therefore condemn the said vessel and order her to be sold as she lies for the benefit of all whom it may concern.

Given under our hand at North Sydney, Cape Breton, this 2nd day of November 1883.

(Signed) ALEX. C. ROSS,  
 Surveyor for Lloyd's agent.  
 J. W. GORDON, Master Steamer  
 "Merrimac,"

The date of this document is clearly erroneous; instead of the 2nd of November, the date should have been the 14th or 15th of that month.

This document was proved by Nickerson on his examination and its admissibility in evidence does not appear to have been objected to, either then or subsequently when it was read at the trial.

Upon this the vessel was sold at auction on the 17th November, at Gabarus, for the sum of \$400, the net proceeds of sale, after deduction of expenses, being \$376, as appears from the account sales put in as an exhibit, and this amount being further diminished by the deduction of \$150, the amount of the Messrs. March expenditure for the survey, protest, tug service and telegrams, left \$226 to be distributed between the two sets of underwriters and the owners as self-assurers for the amount not covered by the policies, the proportion attributable to the appellants being some \$33.90.

The purchaser did not attempt to get the vessel off, but stripped her, taking out rigging and sails, and in

this condition left her on the beach, where Nickerson says he saw her remains in September, 1884, when "her ribs were sticking out of the sand."

Mr. Justice Fraser, who tried the case, refused to grant a motion for a non-suit but reserved leave to move in term, holding that there was evidence of an actual total loss and that the proofs of loss and interest furnished to the appellants were sufficient, and he left the case to the jury who, upon the question of actual loss, found for the respondent for \$625.53, and in answer to a question put by the learned judge the jury said :

We find the vessel was a total loss from the position in which we considered she was in.

The declaration, as amended under an order of a judge in chambers, averred interest in the owners S. March & Sons, a firm composed of Nathaniel March, Stephen R. March, and Levi March, as broker for whom the policy sued on had been effected by the plaintiff, and the interest so alleged was proved at the trial. It was, however, objected that the proofs of loss furnished to the defendants preliminary to the action, and as required by the policy, did not show the interest as thus alleged and proved.

A motion to enter a non-suit or for a new trial having subsequently been made in term a rule *nisi* was granted which was, after argument, discharged, Mr. Justice King and Mr. Justice Tuck being dissentients from the judgment of the court, and from that decision the present appeal has been brought.

The only substantial questions which we are called upon to decide in order to determine this appeal are whether there was evidence to leave to the jury of an actual, as distinguished from a constructive, total loss; and if so, whether the verdict ought to be set aside as being against the weight of evidence.

1890  
 THE  
 PHENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

1890

THE  
PHOENIX  
INS. CO.

v.

MCGHEE.

Strong J.

No notice of abandonment was given and, therefore, the respondent is entirely precluded from recovering as for a constructive total loss.

A majority of the learned judges in the court below were of opinion that there was evidence proper for the consideration of the jury, and that Mr. Justice Fraser was right in leaving the question of an actual total loss to them. The learned Chief Justice, however, thought that although there was some evidence fit for the consideration of the jury yet it was weak and hardly satisfactory; but Mr. Justice Wetmore and Mr. Justice Fraser considered it amply sufficient to warrant the verdict.

It is a fact not without legitimate influence in the case, and therefore one not to be disregarded, that the claim in the present case is beyond all doubt or question a perfectly honest and legitimate one. The vessel was valued in the policy at \$4000, and besides the \$600 covered by the policy sued upon in the present action there was no insurance on the interest of Messrs. S. March & Sons except a policy for £275 (\$1100) underwritten by private insurers in Newfoundland.

The case must depend then altogether on the evidence of Nickerson, the captain of the schooner. This witness was unfortunately not examined before the court and jury, but his deposition taken by consent before an examiner was read at the trial.

Cases of high and unimpeachable authority have established that to constitute a total loss in the case of a ship the subject of insurance must be either such an entire wreck as to be reduced, as it is said, to a mere "congeries of planks," or if it still subsists in specie it must, as a result of perils insured against, be placed in such a situation that it is totally out of the power of the owner or the underwriter at any labor, and by means of any expenditure, to get it afloat and cause it

to be repaired and used again as a ship. The latter branch of the foregoing proposition is deducible from the following cases, viz. *Cambridge v. Anderton* (1); *Roux v. Salvador* (2); *Rankin v. Potter* (3); *Barker v. Janson* (5) and *Cossman v. West* (5). In *Roux v. Salvador* (2) Lord Abinger says:—

1890  
 THE  
 PHENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

If in the progress of the voyage the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound by the very terms of his contract to pay the whole sum assured.

And in *Rankin v. Potter* (3) Mr. Justice Blackburn in advising the house says:—

The decision of the Exchequer Chamber in *Roux v. Salvador* (2) was, as far as I can learn, received with general approbation. There was, however, one exception; Lord Campbell never could be brought to think it right. In the case of *Fleming v. Smith* (6), the counsel for the appellants, the Attorney General Jarvis and Sir F. Thesiger, argued, as I think logically from the decision in *Roux v. Salvador* (2), that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence, and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as I have already stated, is what I consider to be the law.

In the same case of *Rankin v. Potter* (3), the rule thus propounded by Mr. Justice Blackburn was accepted as a correct statement of the law and, so far as it was applicable to the circumstances of that case, acted upon by the House of Lords. In the case of *Anchor Marine Insurance Company v. Keith* (7), this court recognised and acted upon this view of the law and, adhering to what I said in the last named case, I am of opinion that it must now be considered a governing principle of the

(1) 2 B. & C. 691.

(2) 3 Bing. N.C. 386.

(3) L.R. 6 H. L. 83.

(4) L.R. 3 C.P. 303.

(5) 13 App. Cas. 160.

(6) 1 H. L. Cas. 513.

(7) 9 Can. S.C.R. 483.

1890  
 THE  
 PHOENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

law of marine insurance and that the case of *Knight v. Faith* (1), Lord Campbell's opinion in *Fleming v. Smith* (2), and the case of *Kaltenbach v. Mackenzie* (3) (unless, indeed, the latter case is to be distinguished upon its particular facts) are so inconsistent with the case of *Rankin v. Potter* (4) as to be of no authority.

That this rule is well founded appears very plain when we consider the object and purpose for which notice of abandonment is required as a preliminary condition to the right to claim for a constructive total loss. The reason for requiring such notice is not, as explained by the authorities already quoted, that the underwriters may thereby be subrogated to the rights of the assured in so much of the subject as still remains in specie ; the law alone, without any notice, effects such a subrogation upon payment of the loss.

The notice is required in order that the underwriters may have an option of doing that which the assured by the act of abandonment has announced his intention not to do, viz., an opportunity of reclaiming and rescuing the insured property and (in the case of a ship) repairing it, and reinstating it in its original condition. Then it is manifest that if such restoration is a physical impossibility the reason for requiring notice is inapplicable, and the assured who fails to give it does not, in legal contemplation, by his omission, cause prejudice to the underwriters.

The cardinal point for determination in the present case is therefore this : Was there any evidence which the judge could properly have submitted to the jury to show that the schooner could not, by means of the tug, or by the use of other appliances within reach, have been got off the shore on which she had been beached ?

(1) 15 Q.B. 649.

(2) 1 H.L. Cas. 513.

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

(4) L. R. 6 H. L. 83.

It is important to emphasize that the question we have to consider, in so much of the appeal as relates to entering a nonsuit, is not whether the proposition of fact just stated is established to our own satisfaction, but solely whether there was evidence of it proper for the consideration of the jury.

1890  
 THE  
 PHENIX  
 INS. CO.  
 v.  
 MCGHEE.  
 Strong J.

And as regards that part of the rule which asks for a new trial on the weight of evidence it is to be remarked that although issues of facts are now in some jurisdictions tried by a judge without a jury yet the functions of a court *in banc*, or an appellate court, in reviewing the findings in such cases on a motion for a new trial or on appeal, differ widely from those which are properly exercised in the case of a trial by jury. In the case of *Jones v. Hough* (1), Lord Bramwell said :—

A great difference exists between a finding by a judge and a finding by the jury. Where the jury find the facts the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury ; but where the judge finds the facts there the court of appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

It being the province of the court to determine if there is any evidence proper for submission to the jury, then if it is determined that there is such evidence a verdict based upon it is not, according to a late decision of the House of Lords, to be disturbed unless the court should think it such that reasonable men could not have found as the jury did. In the case referred to, *Metropolitan Railway Company v. Wright* (2), Lord Halsbury said :

If reasonable men might find (not “ought to,” as was said in *Solomon v. Bitton*), (3) the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to jurors, not to judges.

This decision of the House of Lords, though of so

(1) 5 Ex. D. 122.

(2) 11 App. Cas. 156.

(3) 8 Q. B. D. 176.

1890  
 ~~~~~  
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.

 Strong J.

recent a date as 1886, has been so frequently referred to as to have become very familiar to the profession, so much so that it may seem superfluous to quote it. It appears to me, however, that in the present day, when courts and judges have so frequently to deal with facts in cases in which juries are dispensed with, that this important distinction between the widely different functions of the court in such cases, and in those in which upon a motion for a new trial its duty is limited to reviewing the verdict which the jury may have found in the exercise of its exclusive jurisdiction of finding the facts, and to annulling it if it should appear not to be such as reasonable men could, on the evidence, have found, cannot be too much dwelt upon. In the present case it may well be that if we had on this appeal to decide the question of fact we might find the evidence not satisfactory to show that it was impossible to have got the vessel off on the 2nd of November when the tug went to the scene of the wreck, but we have not here to pronounce upon any question of fact except so far as we are called upon to say: 1st. If there was any evidence of the loss of the schooner in the sense before mentioned, which the judge could submit to the jury; and 2nd. If there was, whether on that evidence reasonable men might find as the jury actually did find. Whatever opinion I might have come to if I had had to deal with the evidence absolutely as a judge of fact, I am of opinion that upon these two questions, which alone are properly before us, the conclusion of the court below was in all respects correct.

Upon the question of non-suit I think it clear that there are to be found in the evidence of Nickerson, the master, facts stated which were properly left to the jury. We have the fact sworn to that the captain of the tug, after having been brought at considerable ex-

pense to the spot where the vessel lay, and having every inducement, so far as self-interest was concerned, to endeavor to get her off, considered it so hopeless as not to be worth while making the attempt; and that in the judgment of the witness himself, who, as a nautical expert, gives his opinion that the vessel could not have been pulled off, this conclusion of the master of the tug was entirely correct. Then there is in addition the report of the surveyors, which appears to have been before the jury having been admitted in evidence without objection so far as appears from the record before us. Further, there is the evidence of Nickerson to show that except the tug other means and appliances for the rescue of the vessel were not within reach. On the whole, it seems impossible to say that these were not proper matters for the consideration of the jury, and that in the face of such evidence the judge would have been justified in granting the motion for a non-suit.

Then, as regards the alternative of the rule asking for a new trial, that, in my opinion, was also properly refused. It was, no doubt, open to remark that the captain of the tug was neither called nor his absence accounted for, but any presumption resulting from this is not, in my opinion, sufficient to neutralize the evidence of the facts stated by the master, and to warrant us in saying that in finding as they did the jury did not act as reasonable men. Upon this head it is also to be remembered that in the present case the value of the vessel was not covered by the insurance, and that the master, who seems to have been zealous for the interests of his owners, and to have done his best to protect them, knew this to be the fact. I am of opinion, therefore, that the verdict could not properly have been set aside as being against the weight of evidence.

Had I thought, however, that there was no evidence

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.
 Strong J.

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.
 Strong J.

of actual loss proper for the consideration of the jury I should have considered a new trial and not a non-suit to have been the proper disposition of the case. It is quite clear that though the declaration goes for a total loss yet upon such pleading a partial loss may be recovered for. Then there was, beyond all doubt or question, evidence of some loss from perils covered by the policy having been sustained by the assured, and although the exact amount of it had not been ascertained yet it seems to me it would have been reasonable to have permitted a new trial in order to ascertain the amount, unless the defendants had, to save expense, submitted to some less costly and more simple mode of arriving at the amount as by a reference to an officer of the court or other referee. It would have seemed to me a harsh decision to have precluded the assured from recovering any indemnity whatever in respect of the policy sued on, as must be the effect of a judgment entered upon this action for the defendants.

There was ample evidence of proofs of loss and of the interest of the assured having been forwarded to the appellants before action brought. The fact of loss was shown by the protest. As regards the interest no technical proof of that was required and the account furnished by the assured to the appellants, of the expenses incurred in which (as is pointed out by Mr. Justice King) the underwriters were charged as debtors to "S. March & Sons," would at once have been an intimation to any reasonable man that the latter firm claimed as owners, and that the insurance had been effected for their benefit.

The appeal must be dismissed with costs.

TASCHEREAU J.—The only question left for our determination is as to the necessity of the notice of abandonment. I am of opinion, for the reasons given by Tuck

and King JJ. in the court below, that such notice was necessary, and that none having been given in this case the appeal should, on this ground, be allowed.

I cannot see in the evidence that this ship was an actual total loss. As Arnould on Insurance (1) puts it:

An absolute total loss takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless. A constructive total loss takes place when the subject insured is not wholly destroyed but its destruction is highly probable, or the privation of it, although not quite irretrievable, is such that its recovery is either exceedingly doubtful or too expensive to be worth the attempt.

And to quote Tuck J. in the court below :

An absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription. A constructive total loss entitles him to make such claim, on condition of giving notice of the abandonment of all right and title to any part of the property that may still exist or may be recovered.

It is the duty of the assured if he means to abandon, in cases where abandonment is necessary, to give notice to the underwriters of his intention within a reasonable time after he gets intelligence of the loss.

If the first information is not sufficient to enable the owner to tell whether he ought to abandon or not, he may wait a reasonable time for further information as to the extent of the damage. He cannot wait an undue length of time to see which will be the more profitable for him to abandon or to claim for a partial loss. If the assured makes little or no effort to recover the property whilst it exists in specie, but lies by for weeks with knowledge of the disaster, and gives no notice of abandonment, he cannot recover for an actual total loss. The rule is that where there is anything to abandon, it must be abandoned; in case of an actual total loss, where nothing is left

1890

THE

PHOENIX
INS. CO.

v.

MCGHEE.

Taschereau
J.

1890

THE
PHENIX
INS. CO.
v.
MCGHEE.

to abandon, there need be no abandonment, but when there is a constructive total loss it is necessary.

In *Kaltenbach v. Mackenzie* (1), Lord Justice Brett states the law thus :

Taschereau
J.

If he (the assured) hears that the ship is stranded and her back is broken, although she retains her character as a ship, if he gets the information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment.

If the information that he first receives is not sufficient to enable him to say whether there is immediate danger, then he has reasonable time to acquire full information as to the state and nature of the damage done to the ship. I also refer to Hilliard on Marine Insurance (2), Marshall (3) and 2 Phillips (4).

GWYNNE J.—Upon the 30th October, 1883, the insured vessel named the “Betsey” was cast ashore on the coast of Cape Breton, about twenty miles from the town of Louisburg, and on the 1st November her captain telegraphed from Louisburg to the owners at St. John’s, Newfoundland, as follows :—

LOUISBURG, 1st November, 1883.

S. MARCH & SONS.—“Betsey” stranded Tuesday’s gale, twenty miles west of Louisburg—wild shore—any insurance? Telegraph instructions immediately.

GEORGE NICKERSON.

Upon the same day March & Sons telegraphed to Nickerson in reply :

“Betsey” not half insured—use all possible means to get her off, and dock her if necessary. Have telegraphed Archibald, our agents, North Sydney to assist you. Consult them by wire. Employ tugs if necessary.

Upon the same day March & Sons telegraphed to Archibald as follows :—

Schooner “Betsey” ashore near Louisburg. Have telegraphed

(1) 3 C. P. D. 473.

(3) 5 ed. p. 446.

(2) Secs. 364 et seq.

(4) 5 ed. p. 225.

Captain Nickerson to wire you for advice and assistance. Vessel not half covered. Serious loss if abandoned. Make best possible arrangements. Keep us posted. Has "Mayflower" sailed?

1890

THE
PHENIX
INS. CO.
v.

McGHEE.

Gwynne J.

Nickerson also telegraphed to Archibald as he was directed in the telegram he had received from March & Sons. Archibald sent a tug down to the vessel upon the 2nd or 3rd November. The tug did not take hold of her or make any effort to take her off the shore where she was. Nickerson said that the captain of the tug had told him why nothing was done by him to take the vessel off; this evidence was objected to, and as it was inadmissible as evidence it is unnecessary to repeat what Nickerson said that the captain of the tug said to him. Nickerson himself, however, said that he thought the vessel was too far up ashore to have been hauled down; that the ground where she was offered no impediment to pulling her off, but that he thought she was too high and dry. On the same day that the tug came down to the vessel she returned to North Sidney with captain Nickerson and all his crew except the mate of the "Betsey" who was left in charge of her. Nickerson said that immediately after his arrival at Sydney he telegraphed again to March & Sons, the owners of the "Betsey," that the tug could not get the vessel off and that they had better come down themselves.

Whether Archibald, the agent of March & Sons, who had been directed by the telegram of the 1st November to keep March & Sons posted in the matter, sent any communication to them by telegram or letter did not appear; however, from Nickerson's telegram from Sydney to March & Sons on the 3rd or 4th November they must, I think, be held to have had sufficient reliable information to make reasonable men conclude that the vessel was then in imminent danger of becoming lost. That she then existed in specie as a ship there can be

1890

THE

PHENIX
INS. Co.

v.

MCGHEE.

Gwynne J.

no doubt, however perilous may have been the position in which she was. Then, therefore, was the time when, upon the authority of *Kaltenbach v. McKenzie* (1), it became imperative upon the owners, if ever they should claim as for a total loss, to have given immediate notice of abandonment to the underwriters. There is no suggestion that the vessel was in such a position and condition that she must have absolutely perished and disappeared before notice could be given to the underwriters, if that would have been a sufficient excuse for not having given notice of abandonment. From the information which the owners then had they had no right to keep secret in their own minds what they intended to do, namely, whether they would treat the loss as total, in which case notice of abandonment was necessary, or wait to see whether a change of circumstances might not make it more to their advantage to treat the loss as partial, thus keeping the underwriters in ignorance of the state of things and depriving them of the opportunity of doing what they might think best to be done in their interest, while the vessel was all the time left exposed to the violence of winds and waves and to increased damages and greater probability of eventual total loss. From the 3rd to the 18th November the vessel was left exposed to the violence of the winds and waves without any effort whatever being made to get her off. During this time she suffered additional damage. On the 18th, one of the owners went down to where she was and got the captain of the tug, who had gone down to her on the 2nd or 3rd of November and done nothing, and another man, to make a survey of the vessel as she then lay, and upon their report, which is not produced, sold the vessel. Nickerson says that between the time that he had left her on the 2nd or 3rd of November and his coming back with Mr.

(1) 3 C. P. D. 467.

March, the owner, who went down to her on the 18th November she had sustained additional damage—that he could see that she had strained and had some water in her—that he did not know whose idea it was bringing Mr. Ross and the master of the tug from Sydney to hold survey—that Mr. March got them to hold survey, and that the vessel was sold the same day or the next day after the survey. He said :—

The men that held the survey, I suppose, went about to sell the vessel and she was sold the same day or next after survey.

The language of the Lords Justices in *Kaltenbach v. McKenzie* (1) is, to my mind, conclusive in the present case. Lord Justice Brett (2) says, speaking of the assured owner of a ship :—

If he hears that the ship is stranded, and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is that immediately the assured has reliable information of such damages to the subject matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there is some reason to the contrary, give notice of abandonment.

And again (3), he says :—

I am not prepared to say that if it could be shown that the subject matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him ; and although I do not say that what I have stated would excuse him, I am not prepared to say it would not ; that is the limit to which, I think, the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

Lord Justice Cotton (4) says :

(1) 3 C.P.D. 476.

(3) At p. 475.

(2) At p. 473.

(4) At p. 480.

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.
 Gwynne J.

The object of notice, which is entirely different from abandonment, is, that he (the assured) may tell the underwriters at once what he has done, and not keep it secret in his mind to see if there will be a change of circumstances. There is another reason : the thing in various ways may be profitably dealt with ; therefore the second reason for requiring notice of abandonment to be given to the underwriters is that they may do, if they think fit, what in their opinion is best and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to. How then can the plaintiff say that it was not necessary in the present case to give notice of abandonment ?

And referring to *Rankin v. Potter* (1), he says :

It was suggested that it followed from *Rankin v. Potter* (1) that if the notice of abandonment was of no use to the underwriters the assured was excused from giving it, but in my opinion nothing that was said by the learned lord who moved the judgment of the House of Lords, or by any of the judges, supports that contention.

And again :

There is nothing in the observations of Blackburn J. which can possibly be construed to mean, that where the assured has in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters. On principle, ought we to carry what was laid down in *Rankin v. Potter* (1), further than that case has carried it? In my opinion, no. All the grounds upon which the rule requiring notice of abandonment to be given is based apply equally in this case, even although the jury might find that in the ultimate result notice of abandonment would have produced no good result to the underwriters. The object is, as I have pointed out before, to communicate to the underwriters that decision at which the assured has arrived at the earliest possible moment, so as to render it impossible for him having formed that decision to retract it, and in order that he must not be allowed to run the chance of events, and to abstain from giving notice and afterwards excuse himself by saying ; " if I had given notice the underwriters would have got no benefit from it," and from the other ground on which notice is required it equally follows that it must not be left to the jury to say whether or no notice would be useful.

Then Lord Justice Thesiger, after quoting largely from the judgments of the learned law lords in *Rankin*

(1) L. R. 6 H. L. 83.

v. *Potter* (1), and referring to the opinion of Blackburn J. in that case given to the House of Lords, says (2) :

In the first place it is to be observed that the opinion of Blackburn J. delivered to the House of Lords is not a binding authority upon us, and although the opinion is very valuable for the purpose of guiding us, we have to look at the opinions of the lords and not the opinion of the judges given to the lords ; but, at the same time, I think I may also say that when the whole opinion of Blackburn J. is looked at it does not justify the contention on behalf of the plaintiff, and without taking up time by reading passages from that opinion I would say that it goes no further than the opinions of the lords themselves, that where at the time that the assured receives notice of the loss, and has to exercise his election to abandon, there is no part of the subject matter of the insurance to abandon, and therefore no possibility of advantage to the underwriters if they did receive the notice, in that case the assured may be discharged from the *onus* which otherwise would be upon him of giving a notice of abandonment.

Now how can it be held that the judgment in that case is not conclusive upon the present ? Here, upon 3rd or 4th November, at latest, the owners of the insured vessel had reliable information that she lay ashore where she had stranded, in imminent peril of becoming a total loss, which made it their imperative duty then to elect whether they would treat the vessel as a total loss, or should regard their loss as partial only. In the former case it was absolutely necessary for them to give notice of abandonment to the underwriters in order to enable them to recover as for a total loss. The vessel was, beyond all question, then in existence as a vessel, and capable of being abandoned to the underwriters as the subject insured by them, and *Kaltenbach v. MacKenzie* (3) is a conclusive authority, therefore, that in the absence of notice of abandonment the assured cannot recover as for a total loss.

In my opinion the conduct of the assured in doing nothing whatever with the vessel for the purpose of extricating her after receiving Nickerson's telegram of

(1) L. R. 6 H. L. 83.

(2) At p. 486.

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

1890

THE

PHENIX
INS. CO.

v.

MCGHEE.

Gwynne J.

the 3rd November, and in suffering her to be exposed to further damage from the violence of the winds and waves without giving notice of abandonment to the underwriters, affords abundant evidence that they did elect to regard their loss as partial, and to run all risks themselves of extricating the vessel; the conduct of the owners is not, I think, otherwise susceptible of a reasonable construction.

It has been contended that this case comes within the principle of the *Anchor Marine Insurance Company v. Keith* (1), which proceeded upon the opinion expressed by Willes J. in *Barker v. Janson* (2), namely, that

when a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship.

In that case it was held that a valid sale for the benefit of all concerned might be made, and no notice of abandonment would be necessary. The principle involved in such a case is, that as there was a physical impossibility under the circumstances that the vessel ever could be used again as a ship she had ceased to be a ship, and could not be transferred to the underwriters as the thing which was the subject of insurance by them. It is unnecessary to inquire whether a ship stranded, but not otherwise damaged, and which retains her character of a ship in specie and is capable of being abandoned to the underwriters as the very thing insured by them, presents a case at all analogous to the case suggested by Willes J. in *Barker v. Janson* (2), which was the very case of *The Anchor Marine Insurance Company v. Keith* (1), for there was in the present case no evidence whatever that there was any physical impossibility in the insured vessel being put

(1) 9 Can. S. C. R. 484.

(2) L. R. 3 C. P. 305.

to sea again. It was suggested that from the fact of the tug having gone down on the 2nd or 3rd November, and nothing having been done, it might be inferred that it was physically impossible that anything could be done—but from such a premise no such inference could be drawn. It might be that the tug had not the necessary appliances, or that the expense of getting the vessel down to sea again was thought to be greater than she was worth, or that the tug master could give no rational account of his inaction and, therefore, was not called by the plaintiff. But, in truth, the case of the plaintiff was not one to be established by any such inferences as were suggested. He had undertaken to excuse his not giving a notice of abandonment to the underwriters upon the ground that it was physically impossible to get the vessel down to sea again. If that could afford an excuse, while the thing insured remained in existence in specie the fact had to be proved by the assured by clear and conclusive testimony, and in point of fact none such was, in my opinion, offered. The plaintiff should, therefore, have been non-suited.

Finally, it has been suggested that as there was undoubtedly a partial loss the plaintiff could not be non-suited. This suggestion has proceeded from one of the learned judges in the court below, not from the plaintiff either in the court below or here, and it appears that at the trial the plaintiff, repudiating all idea of claiming as for a partial loss, abstained from offering any evidence in support of such a claim, and insisted wholly upon an actual total loss which he failed to prove. The appeal, therefore, in my opinion, should be allowed with costs, and judgment of non-suit be ordered to be entered in the court below.

PATTERSON J.—I have had an opportunity of read-

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.
 Gwynne J.

1890

THE
PHENIX
INS. CO.

v.

MCGHEE.

Patterson J.

ing the opinion prepared by my brother Gwynne, and agreeing as I do with the views he has expressed I shall not repeat what he has said.

The result of that opinion is to overrule the judgment pronounced by a majority of three against two in the court below, but when I read the opinions of the learned judges who formed the majority I cannot avoid the impression that if the second discussion, which is one advantage of an appeal, had taken place in the court below there would have been at least a majority of that court in favor of a judgment of nonsuit.

The learned Chief Justice formed his opinion with hesitation, being pressed by the slight evidence of inability to get the vessel off the rocks, there being really no evidence of any attempt to do so and no evidence of the reason why the tug did not make the attempt, and Mr. Justice Wetmore seems to have been influenced by what I conceive to be a misapprehension of remarks of my brother Strong in *Providence Washington Insurance Company v. Corbett* (1). He applies to this case, in which the vessel when surveyed and sold was in far worse condition than when the tug was there, the rule stated and illustrated in Corbett's case that the right to abandon the vessel must, under English law, be tested by the condition of the vessel at the time of action brought. But the discussion in Corbett's case was on a very different matter. It related to the case of notice of abandonment being given under circumstances that justified it—as *e. g.* when the vessel had been captured by an enemy's cruiser. but afterwards came back to the possession of the assured, as in the event of a rescue by an English frigate—and the point discussed was whether under such circumstances the notice of abandonment could

(1) 9 Can. S. C. R. 246.

be insisted on. Nothing was said in that case at all inconsistent with the doctrines quoted by my brother Gwynne from the observations of the lords justices in *Kaltenback v. Mackenzie* (1) as to the necessity for prompt notice of abandonment.

1890
 THE
 PHENIX
 INS. CO.
 v.
 MCGHEE.

I agree that the plaintiff ought to have been non-suited and that the appeal should therefore be allowed. Patterson J.

(Nov. 10th, 1890.)

Our judgment in this case upon the merits when the court formerly proceeded to deliver judgment was to enter a nonsuit, taking the view of two judges of the court below, but it was suggested in this court that a new trial would be more proper under the circumstances. I was not prepared at the time to pronounce an opinion upon that, as I wished to be quite satisfied that upon the pleadings it was competent for the plaintiff to recover for the partial loss. I am now satisfied that he has a right to do so. It was competent after evidence of partial loss, which I think there is in this case, for the plaintiff to recover for a partial loss on his claim on the record for a total loss. I therefore agree that our judgment should be for a new trial instead of entering judgment of nonsuit. I do not think it should affect the question of costs of the appeal as the judgment of the majority of the court is against the decision appealed from. If a new trial is had it should be on terms of paying the costs of the former trial.

*Appeal allowed and case remitted to
 court below to make rule absolute
 for new trial on payment of costs.*

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

Solicitors for respondent : *G. C. & C. J. Cosler.*

(1) 3 C.P.D. 467.