THE NOVA SCOTIA MARINE INSURANCE COMPANY (DEFENDANTS)..... APPELLANTS;

AND

L. P. CHURCHILL & CO. (PLAINTIFFS)..RESPONDENTS.

1895
*Oct. 29, 30.
1896
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Constructive total loss—Notice of abandonment—Sale of vessel by master—Necessity for sale.

If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss.

If the ship is in a place of safety, but cannot be repaired where she is nor taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore and the probability of great deterioration in value during the delay will justify the master, when acting *bonâ fide* and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the verdict for the plaintiffs at the trial.

This was an action on a marine policy insuring the schooner "Knight Templar" for twelve months. The plaintiffs claimed for a total loss of the schooner.

The main questions for decision were whether or not notice of abandonment was necessary, and if so whether a sale of the schooner by the master was justified so as to excuse the giving of such notice. The facts relating to the loss and the proceedings on the trial are fully set out in the judgment of the court.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1895

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

The action was tried before a special jury and on their findings a verdict was entered for the plaintiffs which the full court refused to set aside.

Macdonald for the appellant. The sale by the master was not justified, the vessel neither being in imminent danger nor actually perishing. *Cobequid Marine Insurance Co.* v. *Barteaux* (1); *Gallagher* v. *Taylor* (2); *Phœnix Insurance Co.* v. *McGhee* (3).

The vessel must be a total loss before she can be sold. It is not sufficient that the master believes her to be such. *Kaltenbach* v. *Mackenzie* (4); *Leslie* v. *Taylor* (5); *Providence Washington Insurance Co.* v. *Corbett* (6).

Ritchie for the respondents: The court will not go behind the findings of the jury in favour of the respondents. *Aitken* v. *McMeckan* (7); *Council of Brisbane* v. *Martin* (8).

The circumstances created a necessity for the sale. *Lapraik* v. *Burrows* (9); *Read* v. *Bonham* (10).

TASCHEREAU J.—I would dismiss this appeal. I concur in the reasoning of Mr. Justice Graham.

GWYNNE J.—All difficulty in this case has arisen, I think, by reason of the answers given by the jury to some of the questions submitted to them which the circumstances of the case as in evidence did not require to be put. The evidence justified the jury in rendering a verdict that the injuries sustained by the vessel constituted an actual total loss, and this they have substantially found by their answers to some of the questions submitted to them, and that the sale by the master of the vessel as she was sold, was the only thing

(1) L.R. 6 P.C. 319.
(2) 5 Can. S.C.R. 368.
(3) 18 Can. S.C.R. 61.
(4) 3 C.P.D. 467.
(5) 10 N.S. Rep. (3 R. & C.) 352.
(6) 9 Can. S.C.R. 256.
(7) [1895] A.C. 310.
(8) [1894] A.C. 249.
(9) 13 Moo. P.C. 132.
(10) 3 Brod. & B. 147.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

Gwynne J.

that could have been done under the circumstances, for the benefit of all concerned. The evidence, I think, abundantly established that the sale was not only prudent, but a necessity, in order to realize anything, and was quite proper and justified. Upon the authority of the House of Lords in *Lapraik* v. *Burrows* (1), and of the Privy Council in *Cobequid Marine Insurance Company* v. *Barteaux* (2), the appeal must, therefore, be dismissed with costs.

KING J.—This is an action to recover for total loss on a policy of insurance for $2,800 upon the schooner "Knight Templar", valued at $3,200.

The vessel sailed from Grand Turk's Island, W. I., on 21st March, 1893, with a cargo of salt for Lockeport, N.S., where her owners resided. A few hours after sailing she ran into a heavy sea and sprung a leak. The leak increased through the night, and the next day she was put about and returned to Grand Turk. She was then nearly full of water. Men were engaged from the shore to assist in the pumping, but the water gained, and she was beached to prevent her sinking at her anchor. While at anchor she pounded somewhat on the bottom.

On the next day (23rd March) a survey was held, and it was recommended that cargo be discharged. This was done as far as then practicable, and on the 25th March the surveyors again examined her. She was then aground on her starboard side with the water on the deck nearly up to the main hatchway, and was found to be leaking about three inches per hour. The surveyors employed a diver to examine the port side from the keel up, and he reported all to be in good order except the garboard seam, from which he brought about eight feet of oakum from a point just abaft the

(1) 13 Moo. P.C. 144. (2) L. R. 6 P.C. 327.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & Co.

King J.

main rigging. The starboard side being in the sand could not of course be examined. The surveyors recommended that she be pumped out and the remaining portion of the cargo taken out, and that she be kept from going further ashore as she was lightened. They visited her again on the 27th March and found her afloat, but making six inches an hour. There were still 800 or 1,000 bushels of salt in the hold. On further examination they could see no sign of strain or other damage and recommended that she be hove out if possible, the seam reported in the port garboard streak caulked, and every other damage found repaired, and if it should be found impossible to heave her out, that she take in proper ballast and proceed to a convenient port of repairs. Grand Turk is an open roadstead without docks or other facilities for repairing underwater damage, and although smaller vessels had been hove out under favourable circumstances, it did not appear that a vessel of this size could be sufficiently hove out to make repairs so low down as at the garboard, although this is disputed. The vessel was therefore sent around under canvass to a fairly protected anchorage known as the "Hawks Nest," four or five miles from Grand Turk roadstead, and kept afloat by pumping. The owner was communicated with, but before answer was received the master was taken ill of fever, and was laid up for several weeks unable to do anything. Upon his recovery in the latter part of May he sent to a neighbouring island, about 25 miles distant, and hired the only submarine diver in the neighbourhood. The vessel was then brought back under sail from the Hawks Nest, and moved into the shallow water of Grand Turk riding ground to be examined. The diver, who was also accustomed to do ship work under water, and the only one in the locality who

could do it, reported as to the condition of the vessel's bottom, that

> on both sides from about abreast the mainmast going all the way aft, the oakum of the garboard seam and of the next seam above it is either entirely gone, or hanging out in strips. In the next seam above the oakum is bulged out in several places. In a great many of the butts the plugs are gone from the spike heads, and in several places the ends of the treenails are below the surface of the plank a quarter of an inch or more. On the port side the strap connecting the keel and stern post is gone.

He added that the general appearance of her bottom indicated severe working and straining, and that he would not undertake to make her seaworthy.

His testimony in the case supports the statements of his report.

Then, upon the next day (May 30th) another survey was held with the following report:

> The hull, as far as we could see above water, and the spars, masts, sails, rigging, etc., are in fair order. We sounded the pump, waited 30 minutes, then sounded again, when we found that she leaked about two inches an hour. From the submarine diver's report herewith the vessel's bottom is not in the state for us to recommend her as seaworthy. But we are of opinion that if she could be hove out the greater portion of damage reported by said diver could be repaired and she could proceed with proper ballast on her homeward voyage.

This report was signed by C. R. Hinson, merchant, S. W. Norton, master mariner, and J. S. Barker, shipwright. Mr. Hinson was on the earlier surveys as well. With him on the second survey (25th and 27th March) were Captain Gilchrist, a shipmaster, and a shipwright named Bond. Of these several surveyors, Norton and Gilchrist were masters of vessels and they soon afterwards left the island and their testimony was not available. Hinson and Parker gave evidence, and Bond of the second survey was not called, and it does not appear what became of him.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

King J.

It will be noted that while the second survey recommended that if the vessel could not be hove out she might proceed in ballast to a port of repairs (although she was then making six inches of water), the final survey (when she was found to be only making two inches of water), recommended as the only recourse a heaving out, if this could be done, and temporary repairs.

From the evidence of Mr. Hinson it is apparent that the reason of this was that, as he says, they thought from the diver's report that the damage was serious, and from it they concluded that the vessel ought to be hove out. By which I understand him to mean that in view of the diver's report this was essential if she was to proceed at all. He was still, however (although somewhat doubtfully), of opinion that she might have been sufficiently hove out.

> I do not see why she could not have been hove out. I think that the attempt should have been made. I cannot say if it would have succeeded. She could not have been hove out to her keel, but she might have been hove out sufficiently to see the extent of the damage at the garboard streak.

As the garboard streak is next to the keel this is not a very positive opinion regarding the feasibility of the operation.

The other party to the final survey was one Parker, a shipwright, who does the principal shipwright work at Grand Turk. He says that a vessel with her bottom in the state reported by the diver would go to the bottom before proceeding far, that there were no facilities at Grand Turk for heaving out a vessel of her size, nor indeed at any place to which she could be able to go, and that although the report which he signed said that the repairs could be made if the vessel could be hove out, he did not believe this latter could be done, although his co-surveyors thought it possible.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

King J.

After receiving this report the master says that he made inquiries from all who would be likely to know, and came to the conclusion that the vessel could neither be hove out nor the repairs made under water. As to the latter he was told that Dunham, the diver, was the only person who could make such repairs, and he had already reported that he could not undertake them. Being then of opinion that the vessel ought to be sold for the benefit of all concerned, and thinking it inadvisable to incur the expense necessary to keep the vessel afloat until the owners could be further communicated with, he beached and dismantled her and sold the hull and materials at auction.

There is a lack of evidence as to the particulars of the sale, the prices got, &c., but it appears that the vessel was bought by a blacksmith, who broke her up where she lay, doubtless for the metal in her. The owners heard of the vessel being in trouble about the middle of April, but did not learn the extent of the damage or know that it was sufficient to warrant a notice of abandonment until the arrival of the master at Lockeport on June 24th, bringing with him the information of the sale and the papers connected with it. They at once sent to the company at Halifax copies of the surveys, diver's report, protest, vouchers, etc., referring to the disposal of the vessel, and in a letter inclosing the documents expressed a hope that the company would find them "in order and satisfactory."

All questions of fact were closely contested at the trial, including the possibility of heaving the vessel out, of making under-water repairs by submarine divers to be sent from the owner's and insurer's ports, and of navigating the vessel without repairs to a possible port of repair.

The jury after a charge which is not, and cannot well be, objected to, found for the plaintiff.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & Co.

King J.

A number of questions were submitted which (so far as answered or material now) are, with the answers, as follows:

3. Could she have been temporarily repaired at Turk's Island so as to enable her to reach a port suitable for making the repairs she needed to render her seaworthy? No.

5. Could she, in the condition she was in at Turk's Island, have been taken to a port or place where repairs could have been effected, and if so state whether the repairs capable of being made at such port would be temporary or permanent? No.

7. Could she have been repaired at a cost less than her value when repaired, having regard to her situation and the surrounding circumstances? No.

10. Was the sale by the master justified by necessity and was it made with a due regard to the interests of all parties? Yes.

11. Was the necessity for such sale urgent? Yes.

12. Would a prudent owner uninsured have sold under the circumstances in proof? Yes.

13. Could anything have been done to extricate her from the situation in which she was, and make her a sea-going ship? Yes, if cost were not considered, which cost would, in our opinion, exceed her value.

14. Was the action of the captain in selling the ship done in the exercise of an honest discretion, and did he act fairly for the benefit of all concerned? Yes.

A motion was made to the Supreme Court of Nova Scotia for a new trial and to set aside the above findings (excepting the 13th). The motion was dismissed. Full and able judgments were delivered by Mr. Justice Graham and Mr. Justice Weatherbe.

The defendants' contention before the Supreme Court of Nova Scotia (so far as renewed here) is that there was no notice of abandonment, and that the evidence was entirely insufficient to show a valid sale. The finding in the 13th question was relied on to show that there was not an actual total loss.

The plaintiffs contend that there was a valid sale in circumstances otherwise constituting a constructive total loss, by which the want of notice of abandonment was excused; and further, that there was an actual

total loss. It was also contended that there was a sufficient notice of abandonment.

The jury having found in answer to the 13th question that the vessel could have been extricated from her situation and be made a sea-going ship, if cost were not considered, but that the cost would exceed her value when repaired, the case is exactly within the terms of the rule expressed by Mr. Justice Willes in *Barker* v. *Janson* (1), which has ever since been regarded as correct, viz.:

> If the ship can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is notice of abandonment there is not even a constructive total loss.

Then coming to the question of the sale, the finding cannot be disputed here either as to the master's *bonâ fides*, or as to his having acted for the benefit of all concerned.

Then, with regard to the findings touching the damaged condition of the vessel, and as to what could be done with her in the way of rendering her seaworthy. First, as to the vessel being hove down. The surveyors who reported upon it (as already noticed) refer to it as doubtful, and the great preponderance of evidence appears to be against its feasibility. Much smaller vessels were indeed hove down at Grand Turk, but the master was not in default in not trying the costly and hazardous experiment which even Mr. Hinson, who recommended it, regards as doubtful.

Then as to the vessel proceeding as she was to a port of repair, there was the clear opinion of competent men that it was unsafe to attempt it if the report and testimony of the diver were correct as to her condition. The only alternative was to make such repairs to the bottom under water as might enable her to proceed to another port. A considerable body of evidence was

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

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

King J.

given tending to show that submarine divers accustomed to make repairs under water could have been readily sent from near the home port of the vessel, who could have made the repairs at an expense much less than the vessel's value when repaired, if opportunity had been given to the parties interested to attempt to save the vessel. This view, however, was materially affected by an important question of fact, viz.: whether or not the planks had started from the timbers, as stated by Dunham, the diver. Some of the witnesses called for the defendants based their conclusions that the repairs might be made in the way suggested upon the assumption that Dunham was mistaken. The point as to the starting of the planks was much contested, and from the references to it in the charge of the learned judge the jury must have found in accordance with the plaintiff's view upon this point. It must be taken, therefore, upon the evidence coupled with all the findings, that it was impossible by any means to repair the vessel except at a cost exceeding her value when repaired, and that a prudent uninsured owner would have sold under the circumstances.

It results that there was a condition of things which, if it had been followed by notice of abandonment, would have constituted a constructive total loss. There was, however, a sale by the master, and this becoming known to the owner simultaneously with his obtaining certain knowledge of the state of the vessel he was excused from giving notice of abandonment provided there was a valid sale, for in such case he would have nothing that he could abandon.

Two ingredients of a right sale have, as already stated, been found, on clearly sufficient evidence, viz., that the master acted *bonâ fide* and for the benefit of all concerned.

Then as to the necessity that justifies. This is described as a stringent necessity, or as an extreme or urgent necessity. The appellants contend that in view of the evidence the finding that there was such urgent necessity is unwarranted. They contend that to justify a master in selling, without communicating with his owners, there must be a great and imminent danger that the vessel will actually perish as a ship before the owner can be heard from. The respondents on the other hand contend that, as to the necessity, it is *inter alia* enough that the vessel is so damaged or so situated that the cost of repairing or extricating her would exceed her repaired value.

In *The Gipsy* (1), a case between owner and purchaser, Dr. Lushington says:

> No one can say what may be all the circumstances which will constitute a case of necessity. Some, however, may be stated. First, that the ship cannot be repaired in the place where she is, save at a ruinous cost. Secondly, that the master, if the repairs can be done at a cost not destructive to the interests of his owners, has not the means of so doing without a delay equally injurious to his owners. Thirdly, that if he has no such means, there cannot be a communication with his owners and in due time without exposing their property to imminent risk.

In *Lepraik* v. *Burrows* (2), also a case between owner and purchaser, their Lordships say:

> The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity.

It was found as a fact in that case that the cost of repairs would have considerably exceeded the value of the vessel as repaired. But their Lordships went on to consider an objection that the owner should have been first communicated with, and say:

(1) 33 L.J. Ad. 195. (2) 13 Moo. P.C. 132.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & Co.

King J.

That argument wholly fails because, supposing the answer to be obtained in the shortest possible space of time, say in four months, the expenses during that period, it is obvious, would eat up the whole value of the ship, and it was impossible to have waited that period of time without the ship deteriorating to a very great extent in value, as well as incurring the great expenses which have been stated, *i.e.* the wages of the crew.

In the case of cargo the duty of communicating with the cargo-owner where practicable, and whatever the condition of the cargo, is explicit. *Australian Steam Navigation Co.* v. *Morse* (1) ; *Acatos* v. *Burns* (2). But, as stated in the former case, the practicability of the communication is to be determined by a consideration of all the circumstances of each case, including of course those which create the urgency for an early sale. It is also held that the rule as to the degree of necessity warranting a sale is more stringent as regards cargo than as regards the ship. *Tronson* v. *Dent* (3); *The Pontida* (4). But as the authority to sell the ship (as well as cargo) is created by law and founded upon necessity, the right of the owner to be consulted where reasonably practicable is fundamental.

Where a vessel is so much damaged that the cost of repairs would exceed the repaired value, but is in a place of safety, and neither subject to any material deterioration nor needing that substantial expense be incurred to preserve her, then, ordinarily, the rule of necessity would scarcely seem to require that the master should act at once without seeking the opinion of his owner. But where the case presented for the master's judgment is continually changing for the worse by the material deterioration in value of a vessel already not worth the cost of repairing, or by the necessity of incurring substantial expense to preserve

(1) L.R. 4 P.C. 222.
(2) 3 Ex. D. 282.
(3) 8 Moo. P.C. 420.
(4) 9 P.D. 102.

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

King J.

her, so that the owner, if he decides to act upon the master's judgment, will be materially deprived of the benefit of it by the delay, then it would clearly not be in the interests of the owner to delay. It could lead only to a material aggravation of the loss, and sound policy, which ordinarily would demand that the owner should have the chance of judging for himself where practicable, would in such a case call for immediate sale.

It is clear in the case before us that the vessel could only be kept afloat by pumping. A substantial expenditure was therefore requisite to prevent her perishing at once. We do not know the amount, but in the nature of things it would be considerable. Then, too, there was some risk of her being driven ashore, for although it was in the early summer months the protection was merely that afforded by low reefs, and the place could not be considered entirely safe. Besides, there was the probable deterioration (greater or less, but greater in the warm weather than at other seasons) from worms, the chances of which could not be altogether left out of account. There was, therefore, an urgency that the master should, without the delay of four or six weeks, proceed to carry into effect the judgment that he had honestly and (as appears by the finding of the jury) correctly formed.

So far the position of the insurer has not been alluded to. But (coming again to the facts of this case), if the vessel when repaired would not be worth the cost of repairs, a right sale which would bind the owners would of course excuse them from giving notice of abandonment, while if, for any reason whatever, the owners would not be bound the position of the underwriters would remain unaffected by the sale.

There was also a question as to whether the letter of 25th June amounted to notice of abandonment. The

1896

THE NOVA SCOTIA MARINE INSURANCE COMPANY v. CHURCHILL & CO.

King J.

case is not as strong as *King* v. *Walker* (1). But *Currie* v. *Bombay Native Insurance Company* (2) is not very greatly different. It is not, however, necessary to decide the point.

The result, therefore, is that the appeal should be dismissed.

SEDGEWICK and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellants: *MacDonald & Jones.*

Solicitors for the respondents: *Borden, Ritchie, Parker & Chisholm.*

---

(1) 3 H. & C. 209.

(2) L.R. 3 P.C. 72.