

*Judgement of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Cossman v. West and Cossman v. The British America Assurance Company, from the Supreme Court of Nova Scotia; delivered 15th November 1887.*

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Present :

LORD BRAMWELL.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

These are consolidated appeals from two judgements of the Supreme Court of Nova Scotia in actions in which the Appellant was the Plaintiff. The action against West was upon a time policy of insurance of the Ocean Marine Assurance Association, dated 28th November 1881, for \$4,000, upon the barque "L. E. Cann," a British ship valued at \$10,000, from the 28th of November 1881 to the 28th of November 1882. The perils insured against were, amongst others, perils of the seas, barratry of the master (unless in case of loss on goods or specie when the master is the consignee or supercargo thereof), and of mariners, and all other perils, losses, or misfortunes that should come to the hurt, detriment, or damage of the said vessel, or any part thereof, subject to the conditions and provisions contained in or referred to by clauses in the policy, none of which affect the present case. It was stipulated that no particular average or partial loss, unless in case of general average, was to be

paid unless the same should amount to five per cent., &c. The policy was underwritten for \$100, by West, the Defendant in the suit, who was a member of the Ocean Marine Insurance Association, and is the Respondent in the first appeal.

The policy on freight was effected by the Plaintiff, Appellant, on the 31st January 1882, and was for \$3,000 on freight at and from Mexico to New York upon all kinds of lawful goods and merchandise laden or to be laden on board the said barque "L. E. Cann." The policy contained the following words,—“the said goods and merchandise hereby insured are valued at \$6,000.” Their Lordships understand this policy to be a policy on freight of goods laden or to be laden valued at \$6,000. The perils insured against, so far as this case is concerned, may be treated as substantially the same as those in the other policy. The policy was effected with the British America Assurance Company, the Defendants in the second action and the Respondents in the second appeal.

In the policy on the barque it was provided that all losses and damage which should happen to the vessel should be paid within sixty days after proof made and exhibited of such at the office of the Association. In the policy on freight it was stipulated that all losses and damages which should happen should be adjusted in accordance with English practice and usage at Lloyd's, and should be paid within 60 days after proof of loss and adjustment and proof of interest in the said freight.

Each of the policies was effected in the name of the Plaintiff, and was stated to be on behalf of whom it may concern; and in the policy on freight it was added, “In case of loss to be paid to him,” *i.e.*, to the Plaintiff. In neither

policy was there any exemption of liability on the part of the insurers on account of charges, if any, which might be incurred for salvage.

A charterparty, dated the 6th January 1882, expressed to be made between Brooks, Master of the British barque "L. E. Cann," then lying in the harbour of Vera Cruz, of the first part, and Mr. Antonio Granes of the second part, was put in evidence in the second action. By that charterparty the said master agreed to the freighting and chartering of the whole of the said vessel, with the exception of the cabin and necessary room for the crew, and storage for provisions, sails, and cables, unto Granes for the voyage from Vera Cruz and Tucolota to New York, and it was agreed that the vessel should load at Vera Cruz one part of the cargo, and after signing bills of lading should proceed to Tucolota for loading the balance of the cargo, and thence to New York. Granes engaged to furnish a cargo of assorted produce, the charterer to have the privilege of loading cargo for other parties, and captain to sign bills of lading for same without prejudice to the charter, and Granes was to pay for the use of the vessel during the voyage the lump sum of \$6,000, payable at New York in the United States currency or gold, to advance sufficient money to the master at current rate on New York for ship's ordinary disbursements, that amount to be insured by charterer's agents at owner's risk, and to be deducted from the freight with insurance and five per cent. commission.

The Plaintiff claimed for a total loss in each case.

The pleas set up several defences. The most material of them were, that there was not a total loss; that no proof, or no sufficient proof

of the loss was made before action brought; that there was concealment of material facts as to the condition of the vessel, and that the Respondent was induced to subscribe the policy by the fraud of the Appellant. In the action on the policy there was also a denial of interest as alleged. The following facts appeared in the evidence :—

In November 1881 the "L. E. Cann" was at Vera Cruz. Her captain was W. W. Brooks, who had commanded her since 1879 or 1880, and who had acquired a one-sixteenth share in her from the Appellant, the bill of sale being made to Ephraim Brooks, an uncle of W. W. Brooks. The interest of W. W. Brooks in the "L. E. Cann" was always kept insured by him, and in February 1882 he wrote to his agents desiring that his interest in freight should also be insured for \$500. This was, however, not done, because the insurance on freight was ordered early in 1882 by the Appellant for Brooks' interest as well as his own. At Vera Cruz W. W. Brooks, as he himself gave evidence at the trial, made an arrangement with a Spaniard named Campos, who transacted the business of the vessel, that Campos should ship a bogus or sham cargo, and that Brooks should make away with the vessel. Accordingly a cargo was shipped worth only 40 per cent. of that represented by the bills of lading, and a draft for \$1,709 40 was given by a man named Villa, with Campos' knowledge, to Edmund Miller, Brooks' father-in-law, for him, the arrangement being that Brooks was to receive \$2,000 at Vera Cruz on signing bills of lading, \$2,000 on signing bills of lading at Tueolota in Mexico, and \$2,000 more when the protest was presented. Granes was a party to these proceedings, and went with the "L. E. Cann" to Tueolota, which place the "L. E. Cann"

reached from Vera Cruz in January, and at Tucolota gave Brooks a further draft for \$2,000 in favour of Edmnd Miller, and put on board further cargo of much less value than appeared on the bills of lading. On 30th March 1882 the "L. E. Cann" left Tucolota, and on 27th April 1882, in the Gulf Stream, Brooks having previously signalled a passing schooner, the "George W. Lockner," went on board of her with all his crew, deserting the "L. E. Cann" and proceeded in the "George W. Lockner" to Philadelphia, where they arrived on 4th May. The "L. E. Cann" was, when deserted by her crew, rapidly filling with water. There can be no doubt that this was mainly caused by about 15 auger holes having been bored in her on both sides and the ceiling cut away over the auger holes. The "L. E. Cann," did not, however, sink, and on the 24th May she was found by the "Resolute," belonging to the Baker's Salvage Company, and was with the help of the "North America," a vessel belonging to the Insurance Company of North America, towed to Lynnhaven Bay. The Baker Salvage Company afterwards took her to the Port of Norfolk. On examination of the vessel there the auger holes and the cutting away of the ceiling above mentioned was discovered. In August 1882 the vessel was hauled up on the ways at Grave's ship yard at Norfolk. She was then (subject to the damage she had sustained in several respects from the storms) found to be sound. A suit for salvage was brought by the Baker's Salvage Company in the District Court of the United States for the Eastern District of Virginia (the Insurance Company of North America having waived their claim for salvage), and under orders of the Court in July and August 1882 the "L. E. Cann" and cargo were sold, producing \$3,183 net, and the said proceeds were paid to the Baker's

Salvage Company, it being stated in the later order that it appeared to the Court that the actual cost of the salvage service amounted to at least 5,000 dollars. The vessel was subsequently repaired and put into good condition.

The actions were both tried before the Chief Justice of the Supreme Court, who gave a verdict for the Plaintiff, without stating any reasons. In *Cossman v. West*, he said, "I think the Plaintiff has made out a case entitling him to judgement; I find there is a total loss by the perils insured against under the policy, and assess the damages at \$100, with interest, \$14; total \$114, for which judgement will be entered" (Record, p. 154); and judgement was entered accordingly (p. 155).

In the action on the policy on freight the Chief Justice said, "The Plaintiff has made out a case entitling him to recover for a total loss of freight under the policy declared upon. I find a judgement therefore for the Plaintiff, and assess damages at \$3,000, with interest, \$295; total, \$3,295, for which judgement will be entered." Judgement was entered accordingly.

It should be mentioned that the Plaintiff was wholly exonerated from any participation in or knowledge of the disgraceful fraud on the part of Brooks, the master. Indeed, the Chief Justice stated that the villanous conduct of the master could not affect the owner, who is admittedly innocent of any collusion with his rascality. 2nd Record, p. 19.

A motion was made to the Full Court to set aside the verdicts and judgements. After argument, the learned Judges were divided in opinion, the majority holding that, as no notice of abandonment had been given, there was only a partial loss, and in each case the finding and judgement of the Chief Justice was set aside and reversed,

and judgement entered for the Defendants with costs, including the costs of the trial and the costs of the appeal. The Chief Justice adhered to his original opinion, and held that there was an actual total loss both of the ship and of the freight.

The present appeals have been preferred against the decrees founded upon the judgements of the majority of the Judges. The principal questions in each case are, whether there was an actual total loss, and whether sufficient preliminary proof of loss was given.

There seems to be no doubt that, after the abandonment of the barque by the master and crew, and when the owner first received notice thereof, the vessel was in such a hopeless condition that the risk and expenses of endeavouring to save her were such that no prudent uninsured owner would have incurred them. There was, consequently, a constructive total loss, and the Plaintiff might, when he first received notice of the loss, or within a reasonable time afterwards, have given notice of abandonment to the underwriters, in which case he could have recovered for a total loss. It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated

or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated. *Mullett v. Sheddon*, 13 East 304. In that case saltpetre, which had been insured, was seized in the course of the voyage, and condemned. It was thereupon taken out of the ship and sold under a decree of condemnation for the benefit of the captors. The sentence of condemnation was afterwards reversed on appeal, and the property ordered to be restored, or its value paid, for the use of the owner on payment of the expenses, on behalf of the captor and of His Majesty in the office of Admiralty in both Courts. It was held that the assured might recover as for a total loss, without notice of abandonment. In the course of the argument Lord Ellenborough remarked, "The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it;" and Bayley, J., "No circumstance has happened since the seizure to make the original detention less than a total loss." In delivering judgement Lord Ellenborough, C.J., said:—

"Then, as to the point of abandonment, if instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should



have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

The case of *Stringer v. The English and Scottish Marine Insurance Company, Limited*, 4 Law Reports, Q.B., 676, was referred to by the learned Chief Justice in the Court below. In that case goods were insured on a voyage against, amongst other perils, "takings at sea, arrests, " restraints, and detainment of all Kings, &c." While on the voyage, the ship and cargo were seized by an American cruiser and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged a lawful prize. The owners at that time elected to treat the seizure as a partial loss. On the 16th June 1864 the Prize Court gave judgement against the captors, and ordered restitution. On the 1st of July the captors appealed. On the 12th September the owners, who then for the first time knew that an appeal had been preferred, gave notice of abandonment, which the underwriters refused to accept. Subsequently, the owner informed the underwriters that the Prize Commissioner had offered to the Court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the Prize Court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The Plaintiffs and Defendants declined to take either of these steps, and on the 25th of May 1865 the ship and cargo were sold by order of the Court.

It was held by the Court of King's Bench that the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and

cargo were first libelled; that the appeal did not amount to such a change of facts as would justify the assured in changing their election, and that the assured could not, by their notice of abandonment, make the loss by the seizure and detention a total loss. But it was further held that the depositing of the full value of the goods in paper currency or the giving of bail for them were acts which a prudent uninsured owner would not have adopted to prevent a sale, and that the sale, therefore, occasioned by the seizure, caused a total loss, for which the Plaintiffs were entitled to recover.

In delivering the judgement of the Court, Lord Blackburn, then Mr. Justice Blackburn, gave a clear and comprehensive view of the law. Speaking of the time when the cargo was detained under the seizure and the suit instituted in the Prize Court to have it condemned, he said, "It is clear that at this time the cargo was, by one of the perils insured against, entirely out of the control of the assured under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances the assured had a right to elect whether he would retain the property in himself and treat the loss as a partial one or abandon it to the underwriters and claim for a total loss." Having then proceeded to discuss the question whether a notice of abandonment had been given in time, and held that it had not, he went on to say, "But we think the sale by the Prize Court stands on a very different footing. If the Prize Court in America had wrongfully condemned the goods and they had been sold under that sentence, the case would have been identical with that of *Mullet v. Shedden*, where the very point decided was that by the sale the property was wholly lost to the owner, and

“ therefore that ‘ the necessity of any abandon-  
 “ ‘ ment was altogether done away.’ ” Again,  
 he says, “ But in the present case the sale  
 “ was not under a condemnation, but because  
 “ the assured did not give security to prevent the  
 “ sale. The Defendants (the underwriters) had  
 “ the fullest notice of what was about to happen,  
 “ and had ample opportunity to interfere and  
 “ give security to prevent the sale; still the  
 “ assured, if he by any means such as he could  
 “ reasonably be expected to use could have pre-  
 “ vented the sale, was bound to use them, and if  
 “ the sale was directly occasioned by his default,  
 “ though remotely by the seizure, he cannot  
 “ recover against the underwriters on account of  
 “ that sale. But the assured was not bound to  
 “ use unreasonable exertions in order to preserve  
 “ the thing insured, and if the giving of bail or  
 “ deposit would have exposed them to expense,  
 “ or risk of expense, beyond the value of the  
 “ object, or, as the same idea is often expressed,  
 “ if the steps necessary to prevent the sale were  
 “ such as a prudent uninsured owner would not  
 “ have adopted, we think they were not in  
 “ default, and the sale was then a total loss  
 “ occasioned by the seizure.” Having then  
 examined the evidence, his Lordship concluded,—  
 “ We come, therefore, to the conclusion of fact  
 “ that the assured could not, by any means  
 “ which they could reasonably be called on to  
 “ adopt, have prevented the sale by the American  
 “ Prize Court, which at once put an end to all  
 “ possibility of having the goods restored in  
 “ specie, and consequently entitled the assured  
 “ to come upon their insurers for a total loss.”

“ Even then the assured were not bound to do  
 “ so. If they had thought it was more for their  
 “ interest still to claim the proceeds of the sale  
 “ in the hands of the American Court as their  
 “ money, and come upon the underwriters only

“ for the partial loss, they might do so. It is  
 “ clear as a matter of fact that they elected to  
 “ come upon the insurers for an indemnity for  
 “ a total loss, and that by so doing the in-  
 “ surers, when they have indemnified them, will  
 “ be entitled to be subrogated for them and to  
 “ get what they can out of the hands of the  
 “ Americans for their own benefit.” His Lord-  
 ship then cited authorities in support of that  
 right on the part of the insurers.

The case was carried to the Exchequer Chamber by writ of error on a special case, and the judgement was affirmed. (5 Law Reports, 2 B, 599.) Chief Baron Kelly, in delivering his judgement, stated that, in his opinion, the Court of Queen's Bench were not only perfectly justified in coming to the conclusion, but that they could not have come to any other conclusion than that no prudent owner would have given the security necessary to prevent the sale. He then proceeded:—“ Such being the circumstances of the  
 “ case, the decree for sale and the sale itself  
 “ having taken place under circumstances in  
 “ which there was no default on the part of the  
 “ owner of the goods, we have to consider  
 “ whether that sale justified the Plaintiffs in  
 “ treating the case as one of total loss. I am  
 “ of opinion that the decree for the sale of  
 “ the goods, and the sale of the goods under that  
 “ decree, which for ever took out of the possession  
 “ of the owner the goods themselves, and took  
 “ away from him the power of ever repossessing  
 “ himself of the goods in specie, entitled the  
 “ Plaintiff to treat the case as one of total loss.  
 “ This loss of the goods arises, though not  
 “ directly, out of the original capture (which  
 “ was of itself, if so treated, a total loss), through  
 “ a series of consequences, viz., the institution,  
 “ the different steps, and the continuance of the  
 “ suit until the decree was pronounced. The

“ sale was, if I may use the expression, a completion of the total loss.”

Mr. Baron Martin observed :—“ When the sale took place, the property in the goods was taken out of the owner, so that it became impossible for him to take the goods under his original ownership to the port of discharge, and upon that taking place the goods I will not say were totally lost, because I have complained of that being an ambiguous expression, but were taken entirely out of the owner’s dōminion and control, and were absolutely taken away from him, and, in my judgement, after that event took place, the word ‘abandonment,’ in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was that there was, in my judgement, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy.”

In *Holdsworth v. Wise*, 7 Barn and Cr., 794, and *Parry v. Aberdin*, 9 Barn and Cr., 411, there was an abandonment, and it was held that the subsequent recovery of the vessel did not convert that which had become a total loss by reason of a notice of abandonment into a partial loss. In *Roux v. Salvador*, 3 Bingh., New Cases, 267, it was held by the Court of Exchequer Chamber that, where goods were so injured by the perils of the sea that they would have been destroyed by putrefaction before they could arrive at their destination, and were consequently sold, the assured was at liberty to treat the loss as a total loss, without giving notice of abandonment. In that case, which is a leading one, Lord Abinger, in a very lucid and learned judgement, pointed out the distinction between a total and a partial loss; gave a clear and ex-

haustive exposition of the law, and laid down the principles upon which the whole doctrine of abandonment in our law was founded, and the consequences resulting from it. He said, "It is indeed satisfactory to know that however the laws of foreign States may differ from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the letter of his contract to pay the sum insured." His Lordship then went on and pointed out intermediate cases, in which notice of abandonment would be necessary before the assured could treat the loss as a total one, p. 285. Elsewhere in dealing with the case then before the Court, His Lordship said, p. 281, "In the case before us the jury have found that the hides were so far damaged by perils of the sea that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced a total destruction of them before their arrival at the port of destination became as inevitable as if they had been consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same

“time to the assured. Neither he nor the  
 “underwriters could at that time exercise any  
 “control over them, or by any interference alter  
 “the consequences. It appears to us, therefore,  
 “that this was not the case of what has been  
 “called a constructive loss, but of an absolute  
 “total loss of the goods. They never could  
 “arrive, and at the same moment when the  
 “intelligence of the loss arrived all speculation  
 “was at an end.” Again, on referring to Mellish  
 and Andrews, 15 East, 13, he said, “In the  
 “language of Lord Ellenborough, it is an  
 “established and familiar rule of insurance  
 “that when the thing insured exists in specie  
 “and there is a chance of its recovery there  
 “must be an abandonment; a party is not in  
 “any case obliged to abandon, neither will the  
 “want of an abandonment oust him of his  
 “claim for that which is, in fact, an average  
 “or a total loss, as the case may be.” Then,  
 referring to Mullet *v.* Sheddon, 13 East, he  
 says, “In that case the sentence under which  
 “the sale was made had been reversed, and the  
 “proceeds directed to be paid to the owner. So  
 “that there was a substitution of money for a  
 “portion at least of the matter insured.”

Again, his Lordship proceeds, “Both these  
 “cases are direct authorities that no abandon-  
 “ment is necessary when there is a total loss of  
 “the subject matter insured, to which may be  
 “added the cases of Green *v.* The Royal Ex-  
 “change Assurance Company, Idle *v.* The Royal  
 “Exchange Assurance Company, Robertson *v.*  
 “Clarke, and Cambridge *v.* Anderton. This  
 “last is on all fours with the present, and is an  
 “express decision that when the subject matter  
 “insured has, by a peril of the sea, lost its form  
 “and species, where a ship, for instance, has  
 “become a wreck or a mere congeries of planks,  
 “and has been *boná fide* sold in that state for a

“ sum of money, the assured may recover for a  
“ total loss without any abandonment. In fact,  
“ when such a sale takes place, and in the  
“ opinion of a jury is justified by necessity and  
“ a due regard to the interests of all parties, it is  
“ made for the benefit of the party who is to  
“ sustain the loss, and if there be an insurance  
“ the net amount of the sale, after deducting the  
“ charges, becomes money had and received to  
“ the use of the underwriter, upon the payment  
“ by him of the total loss. It may be proper to  
“ remark, however, that the assured may pre-  
“ clude himself from recovering for a total loss if,  
“ by any view to his own interest, he voluntarily  
“ does or permits to be done any act whereby  
“ the interests of the underwriter may be pre-  
“ judiced in the recovery of that money.”

Nothing can be clearer than the doctrine thus enunciated. It has been always acted upon, and was followed in *Farnworth v. Hyde*, 18 Com. Bench Reports, 835, and in many other cases. The last-mentioned case was overruled in the Exchequer Chamber, 2 Law Reports, Com. Pleas, but merely upon a question of fact. The principle of law was not impugned. On the question as to the necessity of notice of abandonment, the Court of Exchequer Chamber expressly stated that they left the authority of the decision of the Court below untouched, neither confirmed nor weakened, *id.*, pp. 226, 227. It would be impossible to comment upon all the cases which were referred to in the course of the argument before their Lordships. Many of them were wholly inapplicable to the present case. For instance, *Cory v. Burr*, 8 Appeal Cases, 303, in which, in consequence of the barratrous act of the master, the ship was seized, it was held that the seizure and not the act of smuggling was the cause of the damage, and that, as “seizure” was excepted from the perils



insured against, the insurer could not recover against the underwriters. In that case the barratrous act of the master in taking the goods on board would not have caused any loss or damage if the vessel had not been seized, but as seizure was excepted from the perils, there was no loss by a peril insured against. If in the present case the policy had excepted all charges, if any, which may be incurred for salvage (an improbable exception, no doubt), the case would have had a bearing upon the present; but there was no such exception, and consequently no similarity between the two cases.

The cases above referred to of *Roux v. Salvador* and *Stringer v. The English and Scottish Insurance Company* are decisive upon the present case, unless a valid distinction can be drawn between a sale upon capture and the sale under the decree of the Court of Admiralty for the expenses of salvage services.

Two cases were cited to show that there is such a distinction; *Thornely v. Hebson*, 2 Barn. and Ald., 518, referred to by Mr. Justice Thompson in the Court below, and *De Mattos v. Saunders*, 7 Law Reports Common Pleas, 579.

In *Thornely v. Hebson*, 2 Barn. and Ald., 518, it was held, under the particular facts of the case, that the sale of a ship under a decree of a foreign Admiralty Court for salvage did not constitute a total loss. In that case, however, it appeared that the value of the vessel, even under a forced sale, exceeded the amount of the claim of the salvors, and that the owners were near enough to have acted in the business, and that it was not proved that they had used all the means in their power to prevent the sale. It is to be inferred from what fell from the learned Judges that if they had done so and were not in default in not preventing the sale they might have recovered for a total loss. Abbott, C. J., said,

“ If, in this case, it had appeared that the owners  
 “ had used all the means in their power and were  
 “ unable to have paid this salvage it would have  
 “ been very different ; but that is not so.” So  
 Bayley, J.,—“ Where a ship is captured she is  
 “ taken possession of by persons adversely to  
 “ the owner, and so it is in the case of barratry,  
 “ but here the ship was taken possession of by  
 “ persons acting *not adversely* but for the joint  
 “ benefit of the owners, and the latter were never  
 “ dispossessed of the vessel.”

In that case it appears that the crew of the  
 “ William ” were on board the “ Hyder Ali,”  
 from which the volunteer salvors were permitted  
 to go on board the vessel which was saved by their  
 exertions. The vessel, although the crew had left  
 her, could not be treated as a “ derelict ” and out  
 of the possession and control of the master, so  
 long as he was keeping by her in the “ Hyder Ali.”

In another part of his judgement Mr. J. Bayley  
 says, “ The sale (that is, the sale under the  
 “ decree for salvage) in order to constitute a  
 “ total loss, must have been found to have been  
 “ necessary and wholly without the fault of the  
 “ owners. Now, here a ship originally worth  
 “ 1,200*l.* is sold for 315*l.* only. It appears that  
 “ the owners were near enough to have acted in  
 “ the business at the time.”

Mr. J. Holroyd also considered that the taking  
 possession by the salvors was not adverse, but an  
 act done for the benefit of the owners, and there-  
 fore did not dispossess them ; that the custody  
 of the vessel was in the salvors till the salvage  
 was paid, but that the legal possession was still  
 in the owners. His Lordship added, “ I also  
 “ think that the sale will not amount to a total  
 “ loss if it was in the power of the owners to  
 “ prevent it, and it lies upon them to show that  
 “ they could not do so.”

In referring to this case in the case of

*Stringer v. The English and Scottish Marine Insurance Company*, 5 Law Reports, Q.B., 607, Mr. Baron Martin says, "Holroyd, J., "pointed out, as indeed did all the Judges, that "to hold that to be a total loss would be holding "that which was really a partial loss to be a "total loss, because the assured had not taken "a step to prevent the sale which he ought to "have taken."

The present case differs materially from *Thornely v. Hebson*, for here the salvage greatly exceeded the value of the property saved, and no prudent uninsured owner would have paid the salvage in order to redeem the ship. Besides, the proceedings in the Admiralty Court were against the ship, which was within its jurisdiction, the Plaintiff, the owner, was not, as in *Thornely and Hebson*, near enough to have acted. He was in Nova Scotia, and the ship was at Norfolk and the Admiralty Court in Virginia, and it did not even appear that he had notice of the proceedings in the Admiralty Court. He was not bound to follow his ship in its then state in the hands of the salvors wherever they might please to take it. Certainly the owner of the ship was not bound to redeem the cargo, which did not belong to him, in order that he might have a chance, a very remote one, that he might be able to send it to its destination by another vessel. Furthermore the insurers, by their agents, were present at Norfolk, they had notice of all the proceedings, and the Ocean Insurance Company, the insurers of the ship, had informed the owner in their letter of the 8th June 1882 that they had sent their marine inspector to look into the matter and report, and they did not report before the sale of the ship. They might (as stated by Mr. Justice Blackburn in *Stringer's* case, 4 L. Reports, 2 B., above referred to), if they had pleased, have redeemed

the ship and cargo. For the reasons above advanced, it appears clear that the owner was not in default in not preventing the sale of the ship and cargo by giving bail, or paying the salvage expenses

In *De Mattos v. Saunders*, 7 Law Reports, Common Pleas, 579, it was held that a partial loss of cargo caused by perils of the sea was not converted into a total loss by a sale under a decree of a Court of Admiralty in a suit instituted by salvors against the ship and cargo for the recovery of sums claimed for salvage services. The case was decided upon the ground that the acts and proceedings in the Admiralty Court were not, under the circumstances in that case, the natural consequence of a peril insured against. The late Mr. Justice Willes, in delivering the judgement of the Court, observed, "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequence of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in a Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss which would be absurd. There was no natural connection between the sea damage here and the sale under the decree of the Court of Admiralty. The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case, the original seizure is *prima facie* a total loss; all that follows is only the necessary

“ consequence of the seizure. It appears from  
“ the case that there was a considerable partial  
“ loss of the salt occasioned by perils of the sea.  
“ For the purposes of this cause we may call it  
“ either a total loss of part or a partial loss of  
“ the whole cargo; but whatever it is called it  
“ is not a loss within the policy so long as any  
“ substantial part of the salt remains, because of  
“ the memorandum whereby salt is warranted  
“ free from average, unless general, or the ship  
“ be stranded.”

But the present case goes further than a claim for salvage, where a ship has not been abandoned at sea. In this case the vessel had been abandoned by the master and the crew when she was discovered and taken possession of by the salvors.

Their Lordships are of opinion that this case is distinguished from that of *De Mattos v. Saunders*. The passage above quoted shows that at the time when the salvage service was commenced in that case, there was not any loss for which the insurers were liable under the terms of the policy. In that case also the vessel does not appear to have been abandoned by the master and crew, whereas in this case the vessel was a derelict. There can be no doubt that the barque was at that time, in the eye of the law, a “ derelict,” a term legally applied to a ship which is abandoned and deserted at sea by the master and crew without any intention on their part of returning to her. It is not like the case of a vessel which is left by her master and crew temporarily with the distinct intention of returning to it. In such a case the ship is not abandoned, and therefore is not derelict, though the master may have given up the entire management to the salvors.

In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the

master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary, and the first salvors have no right to prevent other persons from rendering assistance if the master wishes such aid. So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him.

In the present case, the vessel being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the Court removed, as Lord Abinger remarked in *Roux v. Salvador*, all speculation upon that subject, and entitled the Plaintiff to treat the case as one of total loss without abandonment. As to the freight, the sale of the cargo clearly constituted a total loss, for after the sale the assured and underwriters in his place lost the right to carry on the cargo.

The salvage services, if not a peril insured against, were an immediate and necessary consequence of a peril insured against, whether of barratry or a peril of the sea; the immediate

consequence was that the ship was rendered liable for the salvage expenses and the proceedings in the Admiralty Court, the immediate and necessary consequence of the damages remaining unpaid.

It was urged at the bar that there was no valid or legal charterparty or contract for freight in consequence of the fraudulent arrangement made by Brooks, the master of the vessel, but this contention cannot be supported. There were two contracts, one the charterparty of the 6th of January 1882, made by the master on the part of the owner of the vessel, the other the fraudulent agreement on the part of the master on his own account to accept a bogus cargo, and to make away with the vessel. The latter did not vitiate the former, which might have been enforced if the master had refused or neglected to cause the loss of the ship.

Their Lordships concur with the Chief Justice that the Defendants cannot rely upon want of preliminary proof of loss. It was only the fact of the loss of which preliminary proof had to be given. The production of the master and mate could not be legally insisted upon by the insurers, and, in West's case, they asked for nothing more. In the suit upon the policy on freight there was, in addition to the facts relied upon by the Chief Justice, the declaration of the owner of the 14th February 1883, page 16 of the 2nd Record.

In the fourth plea and in the grounds of appeal in the action on the ship policy the Defendants relied upon want of preliminary proof of interest, as well as of loss, but the policy on the ship did not provide for preliminary proof of interest. In the action on the policy on freight, though the policy required preliminary proof of interest, the third plea relied only upon the absence of proof of loss. Their Lordships are of opinion that the absence of

preliminary proof of interest cannot avail either of the Respondents. The Defendants must also fail upon their defence founded upon the alleged fraudulent concealment that at the time of the insurance the ship was worm-eaten, unsound, and unfitted for the voyage. In the Respondent's own case it is stated that when the vessel was hauled up at Norfolk she was then, subject to the damage she had in several respects sustained from the storms, found to be sound. The Defendants, in their Lordships' opinion, must also fail on the defence that the Plaintiff was not interested as alleged.

Upon the whole their Lordships are of opinion that the judgements and orders of the Full Bench, dated the 4th of August 1885, ought to be reversed, and that the original judgements and decrees of the 6th of December 1884 respectively ought to be affirmed, and that the Defendants in each of the actions ought to pay the costs incurred in the Full Bench, and they will humbly advise Her Majesty accordingly.

The Respondents must respectively pay the costs of the appeals to Her Majesty in Council.

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