

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Cobequid Marine Insurance Company v. Barteaux, from the Supreme Court of Halifax, Nova Scotia; delivered Thursday, March 18th, 1875.*

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Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR HENRY S. KEATING.

THIS was an action brought in Nova Scotia upon a policy of insurance effected with the present Appellants in favour of the Respondent. It was a time policy for twelve months upon a vessel called the "Foyle," which was a comparatively new vessel, being only three years old, and carrying somewhere about 400 tons. The Plaintiffs in the action below sought to make the insurers liable upon the ground of a total loss, and the total loss relied upon was the sale of the vessel under circumstances which, it was said, justified that sale, and so occasioned to the owners a total loss of the ship .

The cause was tried before the Chief Justice of the Supreme Court of Halifax, and he directed the jury that in order to justify the sale it was necessary that an urgent necessity for such sale should be shown ; and he left the question, accompanied by some strong remarks on the facts, to the jury as to whether that necessity existed. A verdict was found for the Plaintiff. Their Lordships do not think it necessary to inquire into the way in which the verdict was afterwards settled upon the

figures, because the verdict was only questioned in the Supreme Court upon the ground, first, that the Chief Justice had misdirected the jury, and next, that the verdict as found for the Plaintiff was against the weight of the evidence in the case. The whole Court were of opinion that there was no ground for imputing misdirection in the charge of the Chief Justice to the jury, and in that opinion their Lordships concur. But the majority of the Court were of opinion that the verdict of the jury was so far justified by the evidence that they refused to grant a new trial upon the ground that the verdict was against the weight of the evidence, and discharged a rule obtained for such new trial. One member of the Court took an opposite view, and the appeal comes up here as to how far the majority of the Court was right in refusing a new trial upon the ground that the verdict was against the weight of the evidence in the case.

With reference to the law upon the subject, there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarized in the work of Mr. Parsons at page 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two, and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In Arnold on Insurance the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support. Mr. Arnold says:—

“The exercise, however, of this power,”—that is, the power of the master to sell—“is most jealously watched by the English

Courts, and rigorously confined to cases of extreme necessity. Such a necessity, that is, as leaves the master no alternative as a prudent and skilful man acting *boná fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies; if he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling, even although the danger at the time appear exceedingly imminent."

That seems to be the true rule to apply in these cases, where it is most important to confine within strict limits the powers of a master to sell the ship.

Now, applying that rule to the circumstances of the present case, their Lordships come to the conclusion that this case ought to undergo a further inquiry.

It seems that this vessel, the "Foyle," being at a place called Lingan, in Nova Scotia, shipped a cargo of coals to the amount of 420 tons; but that quantity being too great to admit of her passing over the bar of the port, she was lightened, and having passed the bar, again re-shipped the coals which had been taken out of her. On the 16th June, 1869, at 11 A.M., she weighed her anchor, and in about thirty minutes afterwards ran upon a reef or ledge off the southern head of Lingan Bay, at a distance of about 300 yards from the shore, about three miles from Lingan, and about a mile from a place called Bridgport. It is material to consider the neighbourhood of that place, because that was a place from which it appears clearly on the evidence assistance could have been obtained. Having run upon this reef, the captain at first signalled for the tug-boat at Lingan; the tug came out and attempted to haul the vessel from the reef, but the hawser parted. Having repaired that hawser, it parted a second time. The hawser having parted a second time, the master of the tug, who was called as a witness, seems to have given very good advice, namely, that the ship should be lightened in order that further efforts should be made. The captain of the "Foyle" appears to have acted upon that advice to a certain extent, for about 10 tons were taken out of the vessel by the crew, and they worked at it up to about 9 o'clock that night. Whether that was a sufficient quantity or an insuffi-

cient quantity does not become, perhaps, in the result, very material. That was the only quantity that was got out up to that period. The master afterwards became anxious, because he was told that if the wind shifted to the north he would be in great peril. At 5 A.M. on the 17th he went on shore, and between 10 and 11 A.M. brought off three persons to make a survey of the vessel, and what is called a survey was thereupon made. The surveyors agreed that the vessel should be condemned, and at first were of opinion that the sale might be delayed until the 18th, but they seem suddenly to have changed that opinion and to have thought that the sale ought to take place on the 17th, and with a view to that sale they drew up the form of their survey. They stated that, having—

“ Carefully and particularly inspected, examined, and surveyed the said vessel, we find that the said vessel lies stranded off the southern head of Langan Bay, exposed to the storms of the Atlantic, making water, lying on a reef, and in a very dangerous position, considerably hogged on the port side, badly strained, rolling heavily on her bilge. We also find that the said vessel lies in such a dangerous position that should the wind happen to change and blow from the north-east, south-east, or east, she would probably go to pieces immediately ;”

and they recommend a sale to take place the same day.

Now in deciding the question how far the verdict was or was not against the weight of the evidence, Mr. Cohen would seem to be justified in saying that the case as made upon the part of the Plaintiff should alone be looked at, as he was entitled to assume that the jury might possibly have believed the case on the part of the Plaintiff and utterly disbelieved all the witnesses on the part of the Defendant, even though no proof is furnished that would justify a conclusion that such was the case. But even looking only to the case of the Plaintiff, and the evidence given upon his part, it appears to their Lordships that this report of the surveyor's was manifestly incorrect, and indeed wholly unfounded. There is no evidence that the ship was “ making water ;” or that she was “ considerably hogged on the port-side,” or hogged at all ; or that she was “ badly strained,” indeed the reverse was the case ; and it is of great importance to observe that these statements as to the vessel were statements

of facts which ought to have been apparent to the eye of the master himself how far they were correct or the reverse, as he states that he was present when the vessel was surveyed by the surveyors, and he says, "I saw no pumping, I did not know that she had suffered any injury." In that he was quite right, because, in fact, the vessel had not suffered any injury, and there was no necessity for pumping because the ship had made no water.

Now, in judging of the question how far the sale was justified by stringent necessity, of course the state of the vessel—that is, not the reported state but the true state of the vessel, becomes an important element for consideration. Here the vessel was, in fact, uninjured, as the master must or ought to have known, and yet with the exception of taking a very small quantity of her cargo out and hauling upon the kedge which he could not have supposed would be of any effect, he seems to have done nothing between the 16th and the sale, although it does not appear that all the means subsequently used by the purchasers, which floated her within a few hours, might not have been equally made available by himself for the same purpose had he endeavoured to obtain them. As to the state of weather, there is a conflict of evidence as between a calm and a breeze, but there is no evidence of anything like rough weather, and whilst the sale was going on, any wind that existed is admitted to have gone down.

The sale took place. It is not necessary to go into the particulars of the sale. The ship was sold of course very much below her value, and purchased by one of the surveyors, for his two nephews, who quickly took the means neglected by the master and floated her substantially uninjured in a few hours.

The Judges who formed the majority of the Court upon this occasion, professed themselves unable to understand or to collect from the evidence why further efforts had not been made.

"In the light of these facts I confess," says the learned Judge who delivers the judgment, which must be taken to be the judgment of the whole of the majority of the Court, "I cannot quite understand the conduct of the Master, nor why he did not pursue the course subsequently adopted by the purchasers after his first attempt had failed. The lightening of the vessel by the discharge of her cargo would seem the obvious course to be pursued, and

this, on consultation with the master of the tug, was determined upon. He did indeed employ his crew for a time in doing this; but if he really considered his vessel in jeopardy, and Hall, the master of the tug, had told him to get the coals out of her, for if the wind came from the north he would lose her, ought he not to have sought assistance from the shore, which he could have obtained as easily as the purchasers did? If I were asked whether in my opinion the master had done what was required of him I should be slow in arriving at the conclusion that he had resorted to all the measures within his reach, and had exerted himself with sufficient promptitude and energy so as to justify the sale of the vessel."

But the learned Judge added that it was a practical matter for the consideration of the Jury.

Now their Lordships entirely agree with the learned Judge in their inability to discover on the evidence for the Plaintiff himself why those efforts were not made; and inasmuch as to justify the sale those efforts ought to have been made, there seems to be strong reason for ascertaining how far another Jury would agree in the very sound and sensible opinions expressed by the majority of the Court themselves, or whether they would coincide in the view taken by the former Jury.

Of course their Lordships would be slow to advise a new trial where there was a substantial conflict of evidence. In the present case the Record does not disclose the fact whether the Lord Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way, that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict, their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. But in an ordinary case, although the non-expression of the dissatisfaction upon the part of the Judge is generally looked upon as forming a serious obstacle to ordering a new trial, yet at the same time, if it is plain that the evidence was such that there is ground for the belief that the Jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed.

In this case it would be too much to say that there was no evidence of the stringent necessity that would have justified a sale. Had there been no

evidence there would have been a misdirection ; but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is, a sale which should be valid as against the insurers,—that the verdict of the Jury as given was undoubtedly against the weight of the evidence. The learned Judge who dissented, Mr. Justice Wilkins, states—

“ That he gathered from the opinion expressed by a majority of the Court, that had the respective Judges who composed it been on the jury that tried the cause, they would not have found as the jury found. I should certainly, had I been in the jury box, not have concurred in such a finding. My opinion is, moreover, that wherever such a sentiment pervades the bench in relation to such a case as this, the result of investigation and deliberation that induces it ought to constitute a sufficient ground for setting the verdict aside.”

It is not necessary to pronounce an opinion as to how far that does or does not lay down the rule too broadly. It is sufficient to say that the verdict is against the weight of the evidence. The rule which is correctly laid down in *Arnold* seems to fit this case so completely as to render a new trial inevitable upon this evidence :—

“ If the master come to the conclusion to sell hastily, either without sufficient examination into the state of the ship or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, he will not be justified in selling even though the danger at the time appear exceedingly imminent.”

Not only in the opinion of the Judges forming the majority of the Court were not such efforts made, but they were unable to perceive even upon the evidence of the Plaintiff himself any reason why those efforts were not made. Their Lordships agree with that view ; and therefore they will humbly advise Her Majesty that the Judgment of the Court below, refusing to make the rule absolute for a new trial, be reversed, that the rule be made absolute for a new trial, and that the costs of the first trial and of this Appeal do abide the event.

