Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ellis v. *The South British Fire and Marine Insurance Company of New Zealand, from the Supreme Court of New South Wales; delivered* 16*th December* 1892.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Hannen.*]

This is an appeal from an order of the Supreme Court of New South Wales, setting aside a verdict found for the Plaintiff and directing a new trial.

The action was brought by the present Appellant upon a time policy of insurance for 1,000*l.*, granted by the Defendants (the now Respondents) from the 9th January 1890 to the 8th January 1891, upon the ship "Sir William Wallace," valued at 4,000*l.* This policy contained a clause that the policy should be subject to the same warranties of seaworthiness as if the said ship were insured separately for each voyage. The Defendants pleaded that the said ship was not, at the commencement of the voyage in the declaration mentioned, seaworthy for the said voyage.

Other defences were raised, but that of the unseaworthiness of the vessel is the only one which it is now necessary to consider.

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The case was tried before the Chief Justice, Sir Frederick Darley, when the specific issue whether the ship was seaworthy at the commencement of the voyage was left to the jury, who found in the affirmative. This verdict was set aside by the Supreme Court, and a new trial ordered, on the ground that the verdict was, as stated by the Chief Justice, one which no reasonable men could or ought to have found, and that it was demonstrably wrong.

The "Sir William Wallace" was a vessel of 968 gross tonnage; she was built in 1866, and in 1883 was bought by the Plaintiff for 1,650*l*. After various repairs were done to her she was classed as A. 1. She then made several voyages, each lasting eight or nine months. In 1888 she carried a cargo of coal to San Diego. During this voyage she made so much water that she put into San Francisco, where she was re-coppered. It was found that she still leaked, and she was ultimately put into dock at Sydney, to discover where the leak was; it was discovered and rectified. After this she went on a voyage to Shanghai and back. On this voyage she was sound, and so returned to Sydney. This was the last voyage before the insurance. During all this time the Plaintiff had been his own insurer. The Plaintiff then, wanting some insurance for banking purposes, applied to the Defendant Company. She was then examined by Captain John Hall, the surveyor to the Sydney underwriters, who suggested certain repairs, which were carried through. He then considered her a good second class risk, and seaworthy. The insurance was then effected.

On the 27th January 1890 the vessel sailed with a cargo of 1,350 tons of coal, being less than she had carried on any previous voyage. "She "was then," to adopt the language of the Chief Justice, "according to the evidence of her

" captain, well found, and to all appearance " tight and sound, and perfectly seaworthy. " Several other witnesses, including the Plaintiff, " gave evidence that she was then seaworthy," and he adds that it may "be assumed that this " was their honest opinion."

The entries in the log show that at 12 p.m. on the 27th January she encountered a south-west swell, also described as a heavy swell from the S.W. On the afternoon of the 28th, at 6 p.m., the weather is described as " moderate increasing " breeze, with cross swell;" and at midnight, " breeze freshening, furled fore top-gallant sail." At 8 p.m. of the 29th, "light airs and cloudy, " with heavy south-west swell;" midnight, " heavy rain, and squally looking towards the " S.W." On the morning of the 30th the record is "Heavy rain, squalls during the watch;" at 4 a.m., "Ditto, ditto. Calm. Crew employed " swifting in the main lower rigging and " setting up the topmast, top-gall., and royal " backstays."

The " swifting in " is a mode of tightening the rigging, and was rendered necessary by the rigging having become slack. The Captain stated in his evidence that the ship was "rolling a lot. The " rigging slacked up a little. Glass going down, " and not having time to set up lanyards, we " put a swifter in the rigging."

The log of the afternoon of the 30th shows that the wind was "unsteady, shifting from S.W. " to S.E. Cloudy with rain-showers, and a " heavy S.W. swell;" at midnight, "main " rigging became very slack, and ship rolling " and labouring very heavy, was unable to take " a set on the lanyards so swifted it in;" at 8 a.m. (31st), "Moderate gale and cloudy, with a high " sea, ship labouring heavily, wore ship round to " S.E. . . . ship making a great deal of " water." After this the weather increased in

severity, until on the morning of the 2nd February, at 9 a.m., it is entered in the log as "Heavy gale accompanied with violent squalls "of hurricane force, and a mountainous cross "sea running, main lower rigging and backstays "became very slack, causing the masts to swing "from side to side, which carried away the lower "cap. . . . We had to cut the weather back-"stays lanyards and let the masts go over the "side for the safety of all concerned;" at 7 p.m., "Kept the ship away under bare poles for "Sydney; wind at hurricane force, sea running "in all directions."

On the morning of the 5th February she returned to Sydney, having sustained damage, according to the finding of the jury, to the extent of 3,000*l*.

The question for the jury to consider was, whether the Defendants had established that this damage arose from the unseaworthiness of the ship at the commencement of the voyage. The case for the Defendants was that the necessity for swifting in on the 30th January indicated a slackening of the rigging; that there was nothing in the weather up to that time to account for this slackening; that as the main-mast, on the return of the vessel, was, as described by some witnesses, sunk three or four inches, by others, two or three inches, the only reasonable inference was that the mast had begun to sink on the 30th, and that this could only have arisen from the vessel being overladen and so unseaworthy.

This defence of unseaworthiness was developed at a late stage of the case, and in a very obscure manner. Captain John Vine Hall, a Marine Surveyor, called for the Defendants, says, that on surveying the vessel on the 13th and 14th February, he could not say, from what he saw, that the mast had sunk at all: "There was no

" indication of ship having buckled or sagged " in the hold. If there were, it would show it " in the bilge keelson at the scarfes. You would " see it in the butts of the ceiling. There was " no appearance of the ship altering her position," by which it is clear the witness meant " form." He says, however, in cross-examination, that if the rigging were slack, and the ship rolling, this would create a tendency to strain the ship and cause what he had described; but he says that " a heavy south-west swell ought not to " have given rise to a necessity to swift in " rigging. The most natural way to account for " this is that her bottom had sagged, and her " mast become depressed, caused by her having " too heavy a load for a ship in her condition." He had, however, before stated that there were none of the signs which he would have expected to find that the vessel had sagged, which he says would result from overloading.

It seems to be the result of the evidence that if the vessel had sagged (by which is meant the partial sinking or bulging of her bottom), signs of it would have remained visible after the unloading of the cargo; and this view has been strongly confirmed by the assessors, whose assistance their Lordships have obtained.

In support of the Defendants' contention that the slackening of the rigging on the 30th January was caused by the sinking of the mast, reliance was placed on the statement of Edwards the first officer, that " you could see " that the mast was settling down by the mast " coat." But it does not appear when this was observed, and the value of this evidence depends on whether it was seen on the 30th and to what extent.

For the Plaintiff the suggestion was that the slackening of the rigging on the 30th was caused by the heavy swell and cross swell to

which the vessel had been subjected on the 27th, 28th, and 29th, recorded in the log on those days. This was stated to be the cause by Captain Brown the master, who says, "The "slacking of the rigging was caused by the heavy "seas, and not by any defect in the ship," and by the first officer, who says, "the swell was on "the lee, which caused the vessel to roll about. "There was not enough wind to keep the ship "steady. This would cause the ship to strain, "and would have effect upon the rigging. The "cross swell caused the ship to roll and labour "very heavily, and caused the rigging to slack "up."

This was to some extent confirmed by the evidence of Captain John Vine Hall, the witness already referred to, who says in cross-examination,—

"If you could steady the ship, a swell less "trying than when nothing to steady the ship. "A ship is better with a breeze than without "one if there be a swell on. If sea coming up "different ways, as in a calm centre of a cyclone, "then this would cause the ship to labour much "and strain. If a ship is rolling heavily, a "captain might act wisely in swifting in his "rigging." The circumstances thus described by the witness are those which the captain says existed when he first swifted in.

Evidence to the same purpose was given by other witnesses. The effect of the heavy labouring of the vessel, and the consequent slackening of the rigging, would be to cause the mast to sway from side to side, and thus to strain the vessel in her topsides. Captain John Hall states "that it is frequently the case that a vessel is "strained in her topsides, and not below at "all. . . . That she is not leaking now is "an indication to me that the strain was from "her topsides."

The effect of the topsides being strained would be that the sides would be stretched, and so to alter the relative position of the mast, although the keelson, or bottom of the ship, had not sunk, and thus an effect on the rigging similar to that arising from the sinking of the mast might be produced.

It is not necessary to determine which of the conflicting views presented by the parties is the true one. The onus lay on the Defendants to establish their defence of unseaworthiness; the only question is whether the finding of the jury that this defence was not made out is such as "no "reasonable men could or ought to have found." The only case set up by the Defendants was that the necessity for swifting in on the 30th must have arisen from the sinking of the mast, and that this must have been caused by the unseaworthiness of the vessel from overloading. There was a direct conflict of evidence on this point. There was a considerable body of testimony to the effect that the loosening of the rigging and the swaying of the mast, and as a consequence the straining of the vessel, was caused by the continuous heavy swell; and whatever their Lordships view as to the weight to be attributed to this evidence as against the counter case made by the Defendants might be, they would find it difficult to say that there was not evidence before the jury which might be held to justify their verdict, or to say that the verdict was not such as reasonable men might find. But their Lordships are also advised by their assessors that, having regard to the condition of the vessel when surveyed after her return to Sydney, the slackening of the rigging on the 30th is not in their judgment attributable to the sinking of the mast.

Upon consideration of the whole case, their Lordships are unable to concur in the opinion of

the Supreme Court that the verdict of the jury was such as no reasonable men could or ought to have found, and they will humbly advise Her Majesty that the order appealed from should be set aside, and that the verdict be entered for the Plaintiff for 857*l.*, the sum agreed upon by the parties. The Respondents must pay the costs of the trial and of the motion for a new trial, and of this appeal.