THE COLLINS BAY RAFTING AND FORWARDING CO. (DEFENDANT).. } APPELLANT;

AND

JOHN C. KAINE (PLAINTIFF)... .....RESPONDENT.

1898

*Oct. 12.

*Dec. 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

Lease—Negligence—Hire of tug—Conditions—Repairs—Compensation—Presumption of fault—Evidence—Measure of damages.

The company chartered the tug "Beaver" from K., by written contract dated at Quebec, 22nd May, 1895, by which it was agreed that K. should charter the tug "Beaver" for not less than one month from date, at forty-five dollars per day of twenty-four hours. If kept longer than one month the rate to be forty dollars per day. K. to furnish tug, crew, provisions, oil, etc., and everything necessary except coal and pilots above Montreal. The tug to leave next morning's tide, and to be discharged in Quebec.

The company took possession of the tug, put her in charge of their pilot (who assumed the control, employment and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the day time, into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders were to make the necessary repairs, to put the vessel in the same condition as she was immediately before the accident, and on 30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect who reported that, in addition to the repairs already made, it would cost $2,494.90 to restore the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

vessel to the same condition as when leased to the company. On 1st August, K. took possession of the tug under protest and brought the action for the amount of this estimate in addition to the rent accrued with fees for survey and protest. The company admitted the rent due and tendered that portion of the claim into court. The Superior Court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Courts of Review and the Queen's Bench increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyor's estimate and the fees. On appeal to the Supreme Court of Canada:

Held, Sedgewick and Girouard JJ. dissenting, that the contract between the parties was a contract of lease; that the taking of the vessel, in the day-time, into the waters where she struck was *primâ facie* evidence of negligence on the part of the company, and that as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them they were responsible under the Civil Code of Lower Canada for the damages caused to the vessel during the time she was controlled and used by them.

Held, further, that the proper estimate of damages under the circumstances is the cost of the repairs which should be assumed to be the measure of depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.

Girouard J. was of opinion that the Superior Court judgment should be restored.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the decision of the Superior Court, sitting in Review, at Quebec, by which the judgment of the Superior Court, District of Quebec, at the trial, had been reversed with costs.

The appellant being engaged in the business of rafting timber and conveying it to Quebec, hired the steam tug "Beaver" from the respondent, the agree-

ment between the parties being embodied in the following memorandum :

QUEBEC, CAN., MAY 22nd, 1895.

"It is agreed between the undersigned, that Mr. "John C. Kaine charters the tug 'Beaver' to the "Collins Bay Rafting and Forwarding Company for "not less than one month from date at the rate of forty-"five dollars ($45) per day of twenty-four hours."

"Should the tug be kept longer than one month, "the rate per day for the balance of the period to be "forty dollars ($40)."

"John C. Kaine to furnish the tug, crew, provisions, "oil, &c., and everything necessary to run the boat, "except the coal and the pilots required above Mont-"real. The tug to leave here to-morrow morning's "tide and to be discharged here on expiration of "agreement.

"Signed on the day written above."

"JOHN C. KAINE,"

"N. FLOOD,

"Agent for Collins Bay Rafting Co."

The company took possession of the tug, put her in charge of their pilot, who assumed the control, employment and navigation of the vessel, and used her for its purposes until 8th July, 1895, when, while still in its possession, the pilot took her in the day-time into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders given by the company were to make the necessary repairs to put the vessel in the same condition as she was before the accident, and on

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased and requested the company to join in a survey, which however was declined. The survey was made by a naval architect who reported that, in addition to the repairs already made, it would cost $2,494.90 to restore the vessel to the same condition as when leased to the company. On 1st August, K. took possession of the tug under protest and brought the action for the amount of this estimate in addition to the rent accrued with fees for survey and protest. The company admitted the rent due and tendered that portion of the claim into court.

The Superior Court at the trial rendered judgment for the amount of the tender, dismissing the action as to the remainer of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Court of Review increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyor's estimate and the fees. On appeal, this latter judgment was confirmed by the Court of Queen's Bench.

The appellant asked to have the judgment appealed from reversed, and that the judgment by the Superior Court at the trial should be restored.

Fitzpatrick Q.C. (Solicitor General for Canada), and *Walkem Q.C.* for the appellant. This was not a demise but an agreement to give the vessel's services for one month in the first place and thereafter from day to day at a certain rate per day, the possession and management of the vessel remaining with the respondent. The pilot to be part of the crew and the

servant of the respondent, the appellants paying for his services as well as for the coal. *Thompson* v. *Fowler* (1); *The Manchester Trust* v. *Furness* (2); *The "Beeswing"* (3); Abbott on Shipping, pp. 61-69. Respondent had a right to choose his own pilot if he wished to do so. The captain had supreme command and the pilot was under his jurisdiction. Abbott on Shipping, pp. 191-192.

Kaine agreed to furnish the tug, crew, provisions, &c., as the consideration of the payment to be made to him, and when the vessel sank he ceased to fulfil this agreement and cannot claim compensation after that time. The clause providing that the vessel should be discharged in Quebec, on the expiration of the agreement, does not mean an undertaking or warranty to deliver the vessel but rather to pay for her services until she was sent back to Quebec. Thus, the charterer would have to pay for the time the vessel would reasonably take to reach Quebec, after cessation of employment. When the vessel sank the charterers were under no obligation to raise her, and for doing so and bringing her to the dock in Montreal after notice of their intention to do so, they would be entitled to salvage under the admiralty law.

The provisions of the Code, art. 1627, are not applicable. If there was no negligence on the part of the appellants, there would be no responsibility on their part in this action except for the charter money. In the lease of a vessel the risks are incidental to ownership and user, the modes of user being by leasing or chartering. The accident was one of the ordinary incidents of the navigation in which the vessel was employed, one of peculiar risk and danger to the know-

(1) 23 O. R. 644. (2) 73 L. T. 110.
(3) 5 Asp. M. C. N. S. 484.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

ledge of the respondent. There was no evidence of negligence on the part of the pilot who was a competent, careful man, knew the river well and had been engaged in the business for many years. At the place of the accident there were thirty or forty feet of water.

The unfortunate result of the accident was due to the unseaworthy condition of the boat; the stern post was rotten, the heads of the spikes corroded, the planks at the stern loose. A vessel in our waters, particularly in the lakes and rivers, is expected to be able to stand concussion with the bottom. It is an every day experience that vessels touch in the rapids or in the river and any vessel in a seaworthy condition should have stood the shock without injury. See Abbott on Shipping, (13 ed.), pp. 384-385. The plaintiff should not recover damages sustained in consequence of unseaworthiness. The claim was covered by the amount paid into court, and the Superior Court found that the appellant had done all repairs necessary to put the tug in the same condition as she was before the accident.

The result of the judgments of the Court of Review and Appeal is to compel the restoration of the vessel to the condition in which she was when she left dock in Quebec in May, 1895, and the accident happened in July, up to which time the boat was constantly in use. No allowance is made for wear and tear during that period. Yet the judgment appealed from compels the appellant to renew the boat.

The respondent offered no evidence on which a correct estimate of the damages could be based, and the conduct of the respondent shows that he was satisfied with the repairs being done. The instructions were "to examine the boat carefully and make

her as good as before the accident," and these directions were fulfilled. These instructions must have been known to the respondent and his captain who were both about when the repairs were being made. After the repairs were made the respondent used the vessel in his business both above and below Quebec, and up to the time of the trial of the action no further repairs had been made upon her.

The appellant's conduct in dealing with the vessel should not prejudice the defence nor operate as an admission of liability. The company acted reasonably and prudently and for the benefit of all parties. If not at fault it would be entitled to salvage for raising the vessel, and, as wrecking is part of the company's business, raising the vessel and bringing her to Montreal was a safe adventure. It certainly would not have been wise to leave the boat at the bottom of the river at the foot of the rapids while the parties were fighting out a dispute as to liability for the accident. The repairs were necessary to float the vessel. Everything was done after a repudiation of liability and a termination by the defendant of the contract and was so done without prejudice.

We also refer to *Kopitoff* v. *Wilson* (1); *Steele* v. *State Line Steamship Co.* (2); and *Murphy* v. *Labbé* (3).

Languedoc Q.C. and *Stuart Q.C.* for the respondent. The evidence shows a complete demise, and that the appellant's pilot was actually in full charge as master of the tug at the time of the accident, also that he took her into shallow waters and had no chart aboard; Maclaughlan on Shipping (4 ed.) p. 283; *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (4); arts

(1) 1 Q. B. D. 377.
(2) 3 App. Cas. 72.
(3) Q. R. 5 Q. B. 88; 27 Can. S. C. R. 126.
(4) [1893] A. C. 8.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

1601, 1627 and 2413 C. C,; *Christie* v. *Lewis* (1); *The Neptune the Second* (2); *The Eden* (3); consequently the appellant is responsible for the damages claimed, and responsible for injuries which happened during the lease, unless it is proved that the lessee is without fault; *Nugent* v. *Smith* (4), per James L.J. at page 444; Pothier, Louage, nos. 192, 183, 197, 199 and 200. There is no pretence here of a *vis major* or fortuitous event or of perils of the sea; Story on Bailments, no. 515*a*.

The offers of settlement by respondent are admissions of liability; *The V. Hudon Cotton Co.* v. *Canada Shipping Co.* (5); *The Picton* (6); *Nordheimer* v. *Alexander* (7).

The question of negligence decided by the trial judge, two judges of the Court of Review and unanimously by the Court of Queen's Bench, should not be disturbed by this court.

As the damages arise from tort the respondent is entitled to the full amount resulting from the accident. Marsden on Collisions, p. 110. The Beaver must have been very seriously damaged by straining and "hogging" for according to the pilot's evidence, he ran her ashore twice; the first time there were 5 feet of water forward and 13 feet aft, and the second time she had 6 feet forward and 9½ feet aft, which must of course have strained the vessel very much. The straining is established by the evidence; see *The Clarence* (8). The sufferer is entitled to *restitutio in integrum*. There is no difference between the admiralty and common law rules as to what damages are

(1) 2 Brod. & B. 410; 5 Moore C. P. 211.
(2) 1 Dod. 467.
(3) 2 Wm. Rob. 442.
(4) 1 C. P. D. 423.
(5) 13 Can. S. C. R. 401.
(6) 4 Can. S. C. R. 648.
(7) 19 Can. S. C. R. 248.
(8) 3 Wm. Rob. 283.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

recoverable. See foot note Parsons Maritime Law, vol. 2, p. 215, and *Giles* v. *Eagle Ins. Co.* (1). It is a principle of Maritime Law that the wrong doer cannot claim salvage for services rendered to the ship, etc. Marsden, Collisions, p. 46. In any case the contract was to deliver the vessel at Quebec and respondent should have tendered a sufficient sum to cover the expenses of bringing her to Quebec, as well as the charter money for the time occupied in doing so, which was never offered.

The judgment of the majority of the court was delivered by:

KING J.—As to whether or not there was a demise of the vessel, the question in such cases is not one of title but of control. Has the owner parted during the period of the charter party with the entire possession and control? *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.* (2); *Steel* v. *Lester* (3).

The evidence of the master shows that the charterer controlled the employment and navigation of the vessel. "Macdonald, (the charterer's pilot) said 'Go here, go there,' and I took his orders * * I did nothing without he gave me his orders."

In this state of things the charterer is under the Code responsible for injuries and loss which happen to the demised vessel during his enjoyment of it unless he proves that he is without fault.

Apart from the provision of the Code, the fact that Macdonald personally directed the movements of the vessel, and took her in the day time into waters where she struck against a hard substance, is *primâ facie* evidence of negligence. The theory that she may

(1) 2 Met. 140.

(2) [1892] 1 Q. B. 253; [1893.] A. C. 8.

(3) 3 C. P. D. 121.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

King J.

have struck upon a floating log sunken at one end is wholly conjectural and has not been accepted by any of the courts below.

Then as to the amount of damages. The Superior Court held that this had been fully satisfied by the repairs made by the charterers, but the Courts of Review and Queen's Bench deemed that a further sum of $2,494 was needed to indemnify the plaintiff.

The charterers having undertaken to restore the vessel to the condition she was in just prior to the accident, the cost of repairs of damage occasioned by the accident is assumed by both parties to be the measure of depreciation in value.

The rule in the admiralty courts is that the owner of a vessel wrongfully injured by collision is entitled to have the damage occasioned by the wrongful act fully and completely repaired without deduction on account of the substitution of new for old material.

It is unfortunate that the appellants wholly ignored the request of the owner for a joint examination on the completion of the charterer's repairs in Cantin's dock. The report and conclusions of Auger, the person nominated by the owner, show clearly that the repairs made by the charterer in Cantin's dock were but partial. This is confirmed by Cantin's evidence who says that his orders did not require him to make full repairs.

But there is further a striking confirmation of Auger's report as to the condition of the vessel contained in the testimony of Mr. Leslie, the charterer's manager under whom the repairs at Cantin's were made.

Q. Will you look at it (Auger's report) now and go over it and make any remarks you think necessary, and say if you agree with that or not. (Witness takes communication of the paper.) Do you agree with the statements in the report?

A. I deny that the state of things described in Mr. Auger's report was occasioned by the accident. He refers to the butts being opened and filled with pine. That certainly could not have been occasioned by the accident.

Q. Do you deny the statements in the report itself?

A. No. What I deny is that this state of things described in the report was occasioned by the accident.

It is therefore to be taken as proved that the physical appearance and condition of the vessel after the repairs put on her by the charterer were as described by Auger in his report.

Then the question is: Was the damaged condition of the vessel occasioned by the accident? If it was not, or to the extent to which it was not, the wrongdoer is not under obligation to pay for or make good such damage. This is very clear.

Mr. Leslie in denying that the vessel's condition was the result of the accident specifies but one particular, viz., the butts filled with pieces of pine. Now it is obvious that the accident could not have the effect of filling butts with pieces of pine, and it is not to be supposed that Auger intended to say otherwise.

Following the usual form of such reports, the first part of it gives the physical appearance of the vessel, and then follow the proposed repairs and estimates of cost.

That the paragraph of the report dealing with the vessel's appearance is not a catalogue of things to be remedied is manifest from the fact that it notes, among other things, the new work done by the charterer on the vessel at Cantin's. In the same way reference is made to the butts filled with white pine, as a fact of appearance in connection with the straiks of planking sprung in on both sides of the keel.

In the recommendations for repairs there is nothing to show that the planks filled with pine at the butts are to be dealt with in any way in consequence of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

King J.

their being so filled, certainly nothing in terms, and nothing impliedly except so far as repairs of the damage indicated by the springing of the planking would incidentally remedy the other at the same time.

There is therefore nothing in what is adduced by Mr. Leslie to show that Auger's estimate of cost covered damage not occasioned by the accident.

Auger's testimony stands as that of a man of proved experience and capacity who has been credited by the Courts of Review and Queen's Bench as a trustworthy witness. In these circumstances the appeal should be dismissed. The amount of ordinary wear and tear in the few weeks elapsing between the beginning of the charter and the date of the accident would be so trifling that no substantial error arose from regarding the condition and value of the vessel at the earlier instead of the later period.

For these reasons the appeal should be dismissed and with costs.

SEDGEWICK J. dissented.

GIROUARD J. (dissenting.) The respondent chartered the tug "Beaver" to the appellants by a written contract in the following words:

QUEBEC, May 22, 1895.

It is agreed between the undersigned that Mr. Kaine charters the tug *Beaver* for not less than one month from date, at forty-five dollars ($45) per day of twenty-four hours. If kept longer than a month the rate to be forty dollars per day.

Mr. Kaine to furnish tug, crew, provisions, oil, etc., and everything necessary except coal and pilots above Montreal. The tug to leave here tomorrow morning's tide, the tug to be discharged in Quebec.

J. C. KAINE,
N. FLOOD,
Agent for Collins Bay Rafting Co.

The appellants took possession of the tug in due time, and at the place indicated, and put her under

the charge of their pilot, Capt. Macdonald, and used the same until the 8th of July, 1895, when, in their possession, she was sunk in the St. Lawrence River, at the foot of the Cornwall Rapids.

On or about the 13th of July, 1895, the appellants, having raised the said tug, towed her down to the port of Montreal and placed her in Cantin's dock for repairs. These were made and completed on the 1st August, and paid for by the company to the amount of $664.89, exclusive of the expenses of raising the boat and transportation to Cantin's dock, amounting to the further sum of $1,201.69.

On the 30th July, 1895, the respondent was notified that the repairs were completed, and that the tug would be put out of dock the following day, and was requested to receive the same in Montreal.

The respondent answered that the boat was to be discharged in Quebec, and moreover that she was not in as good condition as when leased, and requested the appellants to be present at a survey to be held in Cantin's dock, at 11 o'clock of the 1st August, in which survey the appellants declined to take part.

The survey was made by one Auger, ship carpenter and naval architect of Quebec, who reported that the cost of repairing the tug, in addition to the repairs already made by Cantin, would amount to the sum of $2494.90. The survey was made on the 1st of August, but was written out and signed a day or two later on, and reads as follows:

MONTREAL, Cantin's Dry Dock, 11 a.m.

On examination I found the lower piece of stem made new. Stern post, after end keel, two after garboards and the plank above made new. The keel bruised at several places, sixty-five feet from stern post and six feet from keel five straiks of planking sprung in on both sides. The open butts of planking filled with white pine. The knee on the starboard forward wheel beam started. The stringer between wheel beam on that side broken, has been strengthened by a piece of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

oak. The butts of the main deck open at covering board, windlass, butts, mooring butts and hatch coaming. The main deck joiner work started and moved forward. The pilot house, the cover of steam drum, casing of engine frame, two posts and mast started. The main keelson broken at cylinder. The butts of clamps and ceiling open. Beams and knees at wake of boiler started. The rods of two posts made to fit by seven-eighth washers. The after end of hull twisted to starboard. The boat was sighted and found to have sagged when afloat about eight inches from half-past three to five o'clock.

I recommend the boat to be placed on dry dock. The main broken piece of keelson replaced, the balance of the centre line to be fastened with seven-eighth iron, one bolt in each frame clinched on rings. The boiler to be lifted and replaced, all her connections made good. Two keelsons of elm about 110 feet, 11 x 12, to be fitted on both sides secured with one bolt of seven-eighth in each frame clinched on rings. The scarfs to be six feet bolted with seven bolts of three-fourth iron. Two elm straiks of arches to be bent on both sides about 110 feet, 5 x 10, secured with three-fourth iron bolts in each timber. Seven straiks of planking with two sheer straiks to be fastened with five-eighth screw bolts one in each frame. The started beams and hanging knees to be secured. Deck to be respiked and caulked, joiner work to be secured and renailed.

I recommend the above repairs to be done to put her in the same condition as when the boat came out from floating dock in the month of April, 1895.

I estimate the materials and labour for those repairs to cost two thousand four hundred and ninety-four dollars and ninety cents ($2,494.90).

ELZÉAR AUGER,
Naval Architect.

On the 1st of August the respondent took possession of the boat in Montreal under protest, and by an action taken on the 31st August, 1895, claims this amount in addition to the rents accrued to the day of delivery of the boat, and $30 for the surveyor and notary's fees, altogether $4,909.90.

The appellants pleaded that the contract was not one of lease and that, even if it was, the accident was not the result of any fault on their part, but was purely accidental and caused by the dangers of navigation and the unseaworthy condition of the boat.

They, however, tendered and deposited in court all the rents due to the 4th August, namely, $2,385, covering the whole time required to reach Quebec, reserving their recourse for the recovery of the salvage and the repairs at Cantin's dock, a reservation which was not made when the first offer was made through Flood.

The Superior Court (Caron J.) maintained this tender with costs of contestation, and the appellants were condemned to pay $2,385, with interest from the date of service of process and costs of suit incurred down to the filing of the plea.

Considérant qu'il parait par la preuve de la Défenderesse a fait toutes les réparations nécesaires pour remettre le dit remarqueur tel qu'il était avant l'accident, ce qui lui a coûté six cent soixante-quatre piastres et quatre-vingt-neuf cents et qu'elle l'a râmené à Montréal à ses frais, etc.

In Review this judgment was modified, and the appellants were condemned to pay also the amount of the survey, $2,494.90, and the fees of the surveyor and costs of notarial protest, $30, altogether $4,909.90, Mr. Justice Routhier dissenting:

Considering that in this respect the said judgment errs inasmuch as it is satisfactorily proved by the survey and the testimony of the surveyor (Auger) that it will require a further expenditure of two thousand four hundred and ninety-four dollars and ninety cents to restore the said tug;

Considering the defendants were duly notified to be present at the said survey, but absented themselves, and have adduced no evidence whatever to contradict its conclusions or put in question its accuracy.

In appeal this judgment was unanimously confirmed.

None of the courts pronounced upon the plea of unseaworthiness; but the three courts held that the contract was one of lease and that the appellants were liable for the damage to the tug under art. 1627 of the Civil Code, unless they proved they were not in fault, and we agree in this proposition of law.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

The point at issue is as to the liability of the appellants for the amount of the survey made by Auger, namely, $2,494.90. Is it proved that it was necessary to place the vessel in the condition she was before the accident? Was she seaworthy?

The case was heard before the Superior Court at enquête and merits. We have no notes of Mr. Justice Caron, but in his text judgment he has entirely ignored the survey and testimony of the surveyor in its support.

The trial judge was sitting as a jury, and unless manifestly wrong it seems to me that a Court of Appeal, whether sitting in review or elsewhere, which did not see the witnesses, should not disturb his findings of facts. *Sénésac* v. *Central Vermont Railway Co.* (1); *Cossette* v. *Dun* (2); *Gingras* v. *Désilets* (3); *Levi* v. *Reed* (4). I find in the evidence ample proof that they were right.

I have given this case a good deal of time. I knew that upon a question of fact, the findings of two courts go very far before this court. I therefore did my best to reconcile myself to the judgment appealed from, and must confess that I cannot do so.

I believe that too much importance has been attached to the survey of Auger. The courts below took the view that his evidence is not contradicted. But is it conclusive? That is the least we should expect in a csse like this, where he proceeded by default, accompanied only by the respondent and his employees. True he certifies, in his unsworn report, that the repairs he recommended to be made were necessary to put the boat in the same condition as when she came out in April, 1895, from Russell floating dock, which was under his superintendence. But when in the

(1) 26 Can. S. C. R. 641.
(2) 18 Can. S. C. R. 222.
(3) Cass. Dig. 2 ed. 213.
(4) 6 Can. S. C. R. 482.

witness box, he is forced to admit that he made no examination of the boat in the Russell dock, or elsewhere, before he made the survey:

Q. Avez-vous vu les morceaux qui ont été enlevés? R.—Non, monsieur, parce que je n'ai pas fait un examen dans le dock, quand il était dans notre dock. On a rien que chevillé. Je n'avais pas ordre de faire ça non plus.

Finally, he swears that the boat, as repaired by Cantin, was not fit for towing below Quebec:

Q. A moins d'y faire des réparations que vous avez recommandées dans votre rapport? R.—Non.

The truth is that during the fall of 1895 the tug made several trips in the Gulf, as far as Father Point, and was used, without any repairs whatever, in the towing business the whole of the following navigation season, till the 7th November, 1896, when the trial took place. We do not know what has happened since.

It seems to me that what Auger meant was to report not what was necessary to repair the damage caused by the accident, but what was necessary to put her in good condition, and he says so in express terms:

Q. Vous avez recommandé dans ce survey là ce qu'il fallait pour mettre ce vaisseau là en bon était? R.—Oui.

Q. Entièrement en bon état de réparation? R.—Oui.

It is true that in answer to a leading question immediately following:

Voulez-vous dire, pour le mettre dans le même état qu'il était avant qu'il montè à Montréal et lorsqu'il est sorti de votre *dock* à la fin de mai?

He immediately answers "Oui, à peu près."

What is the value of this answer, in face of his statement that he did not examine the boat when in Russell's dock?

The same intelligence results from the testimony of Leslie, who although not in a position to deny that the

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

repairs recommended by Auger were not necessary, swears that they were not occasioned by the accident. He says:

I deny that the state of things described in Mr. Auger's report—plaintiff's exhibit "C"—was occasioned by the accident. He refers to the butts being opened and filled with pine. That certainly could not have been occasioned by the accident.

Q. Do you deny the statements in the report itself?

A. No; what I deny is that this state of things described in the report was occasioned by the accident.

It must be borne in mind that the appellants were not bound to build a new boat. In collision cases, it has been held that the wrongdoer is not expected to replace decayed timbers which had to be renewed to make the injured vessel seaworthy, this damage being caused not by the accident, but by the old age of the vessel, and this rule was enforced even when it is proved that the decayed parts, if undisturbed, would have lasted for some years. *The Princess* (1).

The "Beaver" was first built in 1858 for service in the construction of the Victoria Bridge. She was rebuilt in 1873, and re-registered that year under the same name but, as stated in the certificate of registry, with the old engine. She was again rebuilt in 1884, and this time new boilers were put in. Respondent swears that he spent $5,000 or $6,000 in this reconstruction, but if his memory is as reliable as when he speaks of the repairs at Russell's dock as amounting to $400 or $500, whereas in fact they came to only $298, we must accept the figures of the respondent as exaggerated, and suppose that $3,000 or $4,000 were likely the correct ones. Whether they were or not, the respondent admits that the hull built in 1873 was of no value in 1884, and had to be renewed. The accident at the foot of the Cornwall Rapids happened just eleven years after the hull was rebuilt in 1884.

(1) 5 Asp. M. C. N. S. 451.

No repairs had been made to the boat from that year to the spring of 1895, except small repairs, "not very large," remarks the respondent in his evidence, "just enough to keep her up." And the repairs in the spring of 1895 came only to $298, including $80 for docking charges. And in face of this indisputable fact, the respondent wishes us to believe that, after this third period of her existence, the hull of the boat was in good condition. The evidence shows that the vessel was a rotten one, unseaworthy, that is, unfit for the service for which she was chartered. The evidence adduced is conclusive that the tug was rotten in her stern, which struck the rock or log, and it may reasonably be inferred that the rest of her hull, considering her age, was in the same decayed condition; but whether it was so or not, we have the clearest proof that in her stern at least she was unseaworthy, and to my mind, it matters very little whether in this respect the appellants repaired the damage or not; the fact remains undisputed that she was unseaworthy, that is, not staunch, to use the expression of art. 2423 of our Code. The fact that they did not insist upon their right in so far as the repairs to the stern of the boat were concerned, does not take it away with regard to the remaining portions of the vessel. Consequently the appellants are not responsible for the damage, unless they exposed the vessel to extraordinary perils.

The learned Chief Justice of the Superior Court (Sir L. N. Casault), says that Capt. Macdonald directed the vessel to a dangerous spot of the river, but this is stated by only one witness, one Bergeron, the engineer of the "Beaver," who is not only contradicted by Macdonald, but is only reporting what the wheelman, Méthot, told him, although not examined.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

Under article 1612 of the Civil Code, the lessor is obliged to maintain the thing leased in a fit condition for the use for which it has been leased; the thing must be delivered in good state of repair in all respects, art. 1613; the lessor is even obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not. Art. 1614. If the thing leased be a vessel, art. 2423 provides that the lessor is obliged to provide a vessel *tight and staunch*, and to keep her in that condition till the end of the service. Art. 2413 provides that a lease or contract of affreightment of a vessel and the obligation of the parties under the same, is subject to the rules relating to carriers contained in the title of *lease and hire*, when these are not inconsistent; and art. 1675, respecting carriers, says they are liable for the loss or damage of things entrusted to them unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

Seaworthiness implies that the hull is not only tight but sound, staunch and strong, that is sufficiently strong to stand the ordinary risks of her undertaking. *Eden* v. *Parkinson* (1); *Mills* v. *Roebuck* and *Lee* v. *Beach*, reported in Park on Insurance, (7 ed.), p. 335. *Parker* v. *Potts* (2); *Watt* v. *Morris* (3); *Foster* v. *Steele* (4); *Knill* v. *Hooper* (5); *Douglas* v. *Scougall* (6); see also decisions collected in 7 Am. & Eng. Ency. of Law (2 ed.) pages 211 and following; Valin Ord. de la Marine, 1681, liv. 3, tit. 3, art. 12. Pothier "Charte-Partie," n. 30, 68. In *Douglas* v. *Scougall* (6), a certificate of seaworthiness had been issued by a ship

(1) 2 Dougl. 732.
(2) 3 Dow 23.
(3) 1 Dow 32.
(4) 5 Scott 25; 3 Bing. N.C. 892.
(5) 2 H. & N. 277.
(6) 4 Dow 269.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

carpenter who had repaired the ship immediately before the voyage began, but without making any thorough inspection. The ship sailed, and at the outset appeared to have been for two or three days in a violent storm. In the protest, the master stated that the sea sprung the boltsprit and wrought the stem entirely loose, at the same time washed the boats out of the chocks, the ship making three feet of water per hour, and in consequence the master had to look for a place of refuge. In an action by the owners to recover from the insurers £1,420, cost of repairing the ship, it was proved she was an old boat and materially decayed. The action was maintained by the trial judge, but on appeal to the House of Lords this judgment was reversed. Lord Eldon said:

> The ship sails, and appears to have been for two or three days in a violent storm. If so damaged as that the damage might be fairly considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as in common probability she would not be, if she had been sea-worthy when she sailed on the voyage, the implied warranty is not observed.
>
> On the ship coming into port she was surveyed by Scott and Steele and, whatever Scott might say in 1812, it is clear that he and Steele, applying particular assertions to particular facts, upon this survey, stated that part of the timbers were *decayed*, and that the iron work, in general, was very *much decayed* and wrought loose * *
>
> Having considered the whole of this evidence I never was more clear about anything than that it is proved to be perfectly manifest, and proved to my entire satisfaction, that this vessel was not sea-worthy for the voyage when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her.

Seaworthiness is not a fixed inflexible quantity; it is a question of fact which must be decided according to the circumstances of each case; the degree required has a relation to the length and hazardousness of the employment. *Dixon* v. *Sadler* (1). The appellants had reason to suppose that the boat was at least sound

(1) 5 M. & W. 405.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

and capable of touching bottom without going to pieces, a very common occurrence in river and canal navigation, especially in the navigation of a tug engaged in the towing of rafts between the rapids of the St. Lawrence river.

The repairs done at Cantin's and the examination which preceded the same, disclose the fact that the boat was in a rotten condition. The very assertion made by Auger that a further expenditure of $2494.90 was required to put the hull in as good condition as before (for the boilers and machinery were not injured), shows that a rebuilding was needed as was done in 1873 and 1884.

While collecting some dispersed portions of a raft at the foot of the Cornwall rapids, her stern struck a submerged log or a rock, it matters very little which under the pleadings, and she was shortly after beached on an even bottom of the river, without apparently receiving any further injury. Immediately Captain Fournier wrote to the respondent:

> When we struck that rock we were going to try to haul off drams on a shoal called the Crabs. In starting from a little bay on the south side of the river we struck a big rock near the stern post, they say that there never was any rocks there before; the stern post is split and a little piece of the rudder broke, and all the butts from her seven feet mark down to the keel are open from her stern post four inches, and three seams open about fifteen feet long and an inch wide and forehead the stem is about two inches open from the planking, and nearly all the butts from the wheel to the stern are open from the wheels to the stem. She bends five feet.

The boat was raised and towed down to Cantin's dock in Montreal, where she was examined by many experts, but by no one on behalf of respondent. Then was, however, the proper time for a survey. Instructions were given to put her afloat, and in a good condition to go about her usual work. This was done without any complaint on the part of the respondent,

or his captain, who watched the repairs and suggested some of them.

Cantin says:

Q. Did you examine the vessel pretty thoroughly?—A. No. I did not. I examined the stern where the work was done.

Q. What was the condition of the wood work at the stern? I mean independently of the accident?—A. It was pretty ripe.

Q. Well, I suppose ripe means rotten?—A. Yes.

Q. What did you find to be in that ripe condition you speak of?—A. The upper part of the stern post and the apron particularly were defective. We took them out and replaced them with new. They were rotten.

Q. Not in such a condition as they should have been had the vessel been sea-worthy?—A. The vessel if she had not touched anything would have got along all right.

Q. If she did touch something?—A. She would not resist it quite as well.

Q. How did you find the planking in the stern of the vessel?—A. They came off pretty easily.

Q. What did that indicate?—A. It would indicate, of course, that they had been started by this accident.

Q. How did you find the bolting or spiking at the stern of the vessel?—A. Some of them were somewhat corroded by, evidently, the salt water.

Q. What had corroded upon them?—A. Underneath the part between the plank and the frame—the inside.

Q. What was the result of the corrosion so far as holding the vessel together was concerned?—A. The vessel could have got along if she had not touched the bottom.

Q. That then was the condition of the vessel at the point where the accident occurred?—A. The principal part.

Trudeau, Cantin's foreman:

Q. Avez-vous vu dans quel état était le bois du bâtiment, le corps du bâtiment, dans quel état était-il? était-il pourri?—R. Bien, pour le sûr qu'il était pourri, vous savez bien ce qui était défoncé, était pourri. Le bordé qui était pourri, il fallait calfeutrer, et lorsque ça ne calfeutrait pas.....

Q. C'était tellement pourri qu'on ne pouvait pas calfeutrer?—R. Des places. Pas tout.

Q. Est-ce qu'il y en avait pas mal comme ca?—R. Pas bien bien, mais jusqu'en haut des échoirs.

Q. Jusqu'en haut de la ligne d'eau?—R. Oui, Monsieur.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

Q. C'etait tout pourri, n'est-ce pas ?—R. Pardonnez, pas tout, il ne faut pas mettre tout, un morceau d'un bord, un morceau de l'autre.

Captain Macdonald :

Q. Did you see her put in Cantin's dock ?—A. Yes.

Q. Did you examine her after she was put in ?—Yes.

Q. First, as to the stern what did you find its condition to be ?—A. I found her stern post knocked to one side.

Q. Which side ?—A. Knocked over to the port side.

Q. And anything more ?—A. There was a plank loose on the bottom ; the carpenters went to pry the plank off and it came off quite easily ; it almost fell alone.

Q. What was the condition of the other planks at the stern ?—A. The timber was rotten, nothing to hold them.

Q. Which timbers do you refer to ?—A. The frame where the planks were spiked.

Q. What was the condition of the stern post ?—A. All the dead wood was rotten, that is there was nothing to hold the stern post.

Q. What did you find the condition to be of the bolts or spikes that fastened the timbers ?—A. All the spikes were eaten off with rust. * *

The place where I beached her is a flat bottom and very level.

Leslie, manager of the company, appellants :

I went to the scene of the accident as soon as I heard of it. I went to the steamboat. I made no examination of the place.

Q. How did you find the vessel herself ?—A. On the bank outside the Cornwall Canal, on the north bank of the river lying in a slanting direction. Her bow was in about six and a-half feet of water, and her stern nine and a half. She was lying on the bottom with a little list to port.

Q. Was she resting at both ends ?—A. Yes. Resting straight through all the way ; I had her examined by a diver there. He went all round her.

Q. If there had been any rocks in the middle between the stem and stern what would have been the result ?—A. She would have her bottom pinned up. There was no indication of that kind. That is why we made the examination to see if we had to pump her at once.

Q. What did you do then ?—A. We found out where the leaks were at the stern and we put some canvas and boards over it in the usual way and pumped her out and she floated. We put two pumps on her. In ordering the pumps, I thought it was as well to get two as one, as we had to bring the steamboat down with the pumps from Kingston. I sent for two. We pumped her out, patched her, and sent her to Montreal.

Referring to an examination he made of the boat in Cantin's dock, he continues:

Q. What did you find?—A. I found how the accident had occurred. She struck her stern and the post was broken—twisted off to port, probably a foot at the bottom and the garboard started and we found the stern post and all the apron inside perfectly rotten.

Q. Could you judge from the appearance of the stern post what had caused the accident?—A. Yes, distinctly how it occurred. My supposition was strengthened that she had struck a stick of timber because there was no abrasion on the bottom of the keel; just as though something caught her at the stern post and she cleared it evidently at once. I found another thing that probably went off. Her butts had been opened and wedged evidently when she had been in the docks before. The butts are where the planks come together.

Q. What had been done to these?—A. They had been open and pieces of pine put in from an inch to an inch and a half.

Q. What did you find to be the state of the bolts?—A. We had to pull the planks off aft. The oakum was taken out and they put in a bar to start the plank and the whole plank nearly fell off. They did not require to wedge it.

Q. As a matter of fact what does that indicate?—A. That the fastenings had all been rotted out; the iron fastenings.

Finally, he says:

Q. Was the vessel an old boat?—A. Yes.

Q. Had she been kept in good repair?—A. She was not in good repair when I examined her.

Q. In what way do you mean?—A. The stern posts were rotten, and the apron.

Q. And you alluded to the bow?—A. The stem had started and the opening had been filled up by driving in a piece of rope.

Auger also swears:

Q. Les butts qui étaient ouverts et qui avaient été arranges par vous autres, ce n'est pas l'accident qui avait causé ça?—R. Non. Comme je viens de dire, c'est l'âge du bâtiment.

It seems to me that the appellants have proved their plea of unseaworthiness, and upon that ground and also for the reason that there is no satisfactory evidence that the repairs recommended by Auger were occasioned by the accident, I feel disposed to allow the appeal with costs. Were it not for the admission of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

the appellants in their pleas, and the tender made by Flood on their behalf, and renewed under reservation by their pleadings, I would dismiss respondent's action for everything beyond the rent due on the day of the accident, the appellants having rebutted, in my opinion, the presumption of article 1627, by proving that the loss happened without any fault on their part, and that the unseaworthy condition of the boat was the immediate cause of the damage.

In France and on the continent of Europe generally, when it is proved that the vessel was unseaworthy at the beginning of the service, she does not earn any freight, and the owner is further responsible for any damage which the lessee might suffer. Art. 297 of the *Code de Commerce* and the *Ordonnance de la Marine* of 1681, liv. 3, tit 3, art. 12, say so in express terms. Valin, in his comments, seems to think that such is the universal maritime law. The English law, which is followed also in the United States and the British Colonies, is not so severe. The charterer is always liable in damages, but he may, in certain cases, recover a certain proportion of the freight, and even the whole of it; and that seems to be the rule which was adopted by the Quebec Civil Code, arts. 1065, 2423, 2426, 2448. It is not necessary to dwell any longer upon this point, in face of the admission contained in the pleas, which is in these words:

> The defendants while denying any liability to the plaintiff except for the sum of two thousand three hundred and eighty-five dollars ($2,385) being the balance of the charter money, nevertheless tendered to the plaintiff, before this action was brought, the sum of two thousand three hundred and eighty-five dollars, without prejudice or admission of liability on the part of the defendants, in full satisfaction of the plaintiff's claim which sum the defendants allege was amply sufficient to pay such claim, but the plaintiff refused to accept the sum so tendered. And the said defendants deposit herewith the said sum of two thousand three hundred and eighty-five dollars and of the said tender pray *acte*.

It is undoubtedly a very unfortunate admission and tender, as it includes the rent accrued after the accident till the delivery of the boat supposed to have taken place in Quebec, on the 4th of August. It is in contradiction of the previous allegations in the plea. Evidently the appellants were anxious to avoid litigation, and on the 23rd August, 1895, they authorized their agent in Quebec, Flood, to offer, and through him did offer, the respondent,—but not *à deniers découverts*—the sum of $3,015, less $630, already paid, that is all the rent to the 4th of August "in full settlement of your claim against said company for services rendered by tug "Beaver." It is this offer which the company has repeated by their pleadings under reservation.

I am not willing to extend the scope of that admission or tender beyond its terms; and therefore, upon the two grounds that the tug was unseaworthy and that it is not proved that the repairs recommended by surveyor Auger were occasioned by the accident in question, I am of the opinion that the appeal should be allowed, and the judgment of the Superior Court restored, with costs before this court, the Court of Queen's Bench and the Court of Review.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitors for the respondent: *Caron, Pentland & Stuart.*