1883
*Oct. 27.
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*Jan. 12.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY..... } APPELLANTS;

AND

FREDERICK D. CORBETT, Assignee, &c..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine Insurance—Total or constructive total loss, what constitutes—Notice of abandonment not accepted by underwriters—Right to abandon—Sale by master.

C., as assignee of *W.*, was insured upon the schooner *Janie R.*, to the amount of $2,000 by a voyage policy.

On the 14th February, 1879, the *Janie R.*, which had been in the harbor of *Shelburne* since the 7th of February, left with a cargo

*PRESENT.—Sir W. J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to *Shelburne*, and on the morning of the 15th she went ashore, when the tide was about at its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbor, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for $1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favor of plaintiff for $1,913, which verdict was sustained by the Supreme Court of *Nova Scotia*. On appeal to the Supreme Court of *Canada*—

Held (reversing the judgment of the courts below), 1. That the sale by the master was not justified in the absence of all evidence to show any "stringent necessity" for the sale after the failure of all available means to rescue the vessel.

2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss.

Per *Strong*, J., That the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* to set aside a verdict in favor of the respondent.

This was an action brought on a policy of insurance issued by defendants for $2,000 upon the hull and materials of the schooner *Janie R.*, to the plaintiff, a mortgagee of the vessel.

The action was tried before *McDonald*, J., without a jury, and a verdict was given by him in favor of the plaintiff for eighteen hundred and forty dollars, together

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with seventy-three dollars and sixty cents damages in the nature of interest.

A rule *nisi* obtained by the defendants to set aside this verdict, was, after argument before the Supreme Court, by the judgment of the court delivered by *Weatherbe*, J., discharged with costs.

The declaration contained two counts upon a policy of insurance for $2,000 issued by defendants under seal to the plaintiff, upon the schooner *Janie R.* on a voyage at and from *Liverpool* to *Boston* returning either to *Liverpool* or *Halifax*, and claimed for a total loss.

The defences pleaded were:

1st. That defendants did not subscribe said policy, or undertake and promise as alleged.

2nd. A denial of the allegation averring interest in plaintiff's assignors, *Rhynard* and *Lohnes*, or some or one of them.

3rd. That the vessel was not lost by the perils insured against or any of them.

4th. That after the commencement of the risk and before said loss, said vessel, without sufficient cause or excuse, did not proceed on said voyage, and deviated therefrom.

It appeared in evidence at the trial that the *Janie R.* sailed from *Liverpool*, on the voyage described in the policy on the 5th of February, 1879, with a cargo of potatoes, and owing to bad weather put into *Shelburne* harbour on the night of the 7th, where she was compelled by adverse winds and bad weather to remain until the 14th, when she left to pursue her voyage. During the night of the 14th she was forced by stress of weather to put back to *Shelburne*. When approaching that harbour on the morning of Saturday the 15th, part of her steering gear was carried away, she was so iced her anchor would not drop, and she drove ashore with considerable force, the wind being high, at about

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high water, and was driven up some distance and lay between two rocks. The place where she struck was open and exposed to the ocean, and the shore under and around her was rocky and dangerous. Part of her cargo was taken out, and some unsuccessful attempts were made to get her off.

Some portion of the cargo was carried ashore in bags by men employed by the master. No attempt was made to float the vessel, either with casks, which were eventually used for that purpose by the purchaser with success, nor were other appliances, spoken of by the witnesses, and which could have been procured at *Shelburne* where there are ship yards, used or even procured. Nothing having been done towards saving the vessel, except hauling on the anchor with the windlass at high tide, the master on Tuesday the 18th sold the vessel as she lay, for something over $100, and she was got off by the purchaser the next day without much difficulty with the assistance of an American vessel and by the use of casks for floating her. It appears from the evidence of *McAlpin*, a witness for plaintiff, that a vessel was in the harbour, in open water, on Saturday, the day the *Janie R.* went ashore; whether this was the American vessel which afterwards hauled her off does not appear, but no attempt by the master to obtain the assistance of this vessel spoken of by *McAlpin* is proved. The vessel was valued in the policy at $5,000.

Notice of abandonment was given by the plaintiff, with whom the master had communicated by telegraph to the agent of the underwriters in *Halifax*, on the afternoon or evening of the 17th.

Upon the trial the policy was admitted without objection, and the interest was proven as averred.

The only question raised upon the argument here and in the court below was whether or not the respondent, under the facts in proof, could recover for a total loss.

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Mr. *Graham*, Q.C., for appellants, and Mr. *Lash*, Q.C., and Mr. *Gormully* for respondent.

The arguments and cases cited appear in the judgments.

RITCHIE, C. J.:—

This is an action on a marine policy on the *Janie R.*, which sailed from *Liverpool* on February 5, 1879, with a cargo of potatoes bound for *Boston*. On the morning of the 15th she got ashore at the entrance of *Shelburne* harbour, having been in the harbour since 7th February. Monday, the 17th, notice of abandonment was given to the defendants and not accepted, and on the 18th the master sold her, her owner being present in *Shelburne*.

This question is as much as possible like that involved in the case of *Taylor* v. *Gallagher* (1), which we decided in this court, and in which case we held that the evidence did not establish that urgent necessity for the sale which alone can justify a sale by the master, so as to subject the insurers to liability as for a total loss. In this case I think there is nothing whatever to justify a sale by the master under the circumstances detailed in evidence.

The captain says that on the morning of the 15th they went ashore. Then, without apparently making the slightest effort to get the vessel off, or any investigation as to her exact position or condition on the shore, or any enquiries, or seeking any assistance in the neighbourhood, he leaves the vessel at daylight, and says he got to *Shelburne* town, about eight miles, in the morning. When there, he does not appear to have made any enquiries as to the possibility of getting assistance to get the vessel off, but his sole enquiries appear to have been as to getting a survey, and in this view, and this alone, he seems to

(1) 5 Can. S. C. R. 368.

have visited *Shelburne* town. This is all the account he gives of this mission, "Left at daylight and returned with two surveyors about noon. Captain *Purvey* and Mr. *McAlpin* were the two." The other surveyor, he says, was Captain *Dall*, who resided near the vessel, and they surveyed her. Having accomplished this he appears for the first time to have turned his attention to getting the vessel off, and this is his account:

After we got back, we put out an anchor astern and tried to heave the vessel off. We carried the anchor out about fifty fathoms. The tide was about half high when we put it out, and we hove on by the windlass when the tide was high. Eight or ten hands hove-on but they did not affect her.

He says he communicated with the owners in *Liverpool* and the plaintiff by telegram before he sold. But he thought the first thing to be done was to get surveyors. Another witness—Mr. *McAlpin*, one of the surveyors—says:

The weather was then comparatively smooth. The wind W.N.W., and we had hopes of getting her off. On the next day we returned about 3 p.m. The tide well up. I think it was rising. I remained there a short time. Saw no efforts made.

Now, it appears that this vessel was condemned on Monday and sold on Tuesday, and a day or two after, she was got off and repaired, and became a seaworthy vessel sailing as she had done before. She was got off by means of a vessel attached to her, and hauled her off. This witness says he saw a vessel there but did not know her. There was a vessel there which could have taken her off on Saturday, but the captain does not appear to have made the least effort to obtain its assistance. He has to admit that on Saturday it might have been prudent to get the potatoes out first before going to *Shelburne*. Then he shows what would have been the most natural thing to do—the vessel being on shore, to lighten her. "If, he says, she had been my vessel, and not insured, I think

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that would have been my course." We have the evidence of this man, who acted as a surveyor, testifying that the course the captain adopted was not the course he should have adopted. "I am not prepared to say she could not be repaired, at low water, enough to pump out the water," and yet he was prepared to condemn her. Common sense points out that unless there was a determination to condemn the vessel, that was the proper course to be adopted, viz:—to examine the vessel, to see whether there were any leaks, and to what extent, to lighten her to repair her, and to use every exertion to get her off. Then he adds:

> I think she could have been repaired for $500, perhaps for $300. I am not prepared to say what I would have done on Sunday, but on Monday we made our report.

This is, to my mind, conclusive that the surveyors came to a conclusion before any proper examination was made.

John Purvey, in his evidence, says: "She was not not making water then." As it appears that, after this party went there, she was not making water, how important was it that the cargo should have been got out at the earliest possible period, and this witness will not say she could not have been got off. The witness goes on to say: "There was an American schooner inside of the point." This is another important point, because the vessel was got off by this American vessel. So that at the very time the vessel was sold, there were means at hands to get her off, had the captain chosen to avail himself of them.

Was it ever heard that under such circumstances, a captain was justified in selling a vessel on shore without making any effort whatever to get her off? I think this is as strong a case as *Taylor* v. *Gallagher*, decided in this court (1). I think the sale

(1) 5 Can. S. C. R. 368.

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was not justified. Under the circumstances, a prudent owner uninsured would have done exactly what the owner under the sale did, viz, would have resorted to the ship yards and got his appliances there, would have put them to the vessel and accomplished what was accomplished, and in one hour she would have been taken off and saved. Under these circumstances, I think there was nothing to justify the sale. After the sale she was repaired, and she became a vessel that went on her way, pursuing her course as an insurable vessel, made several voyages and was finally sold. The utmost extent of the cost of repairing her was $500, the extreme extent of the loss was $300, which deducted from the $1,600 for which she was sold, left $800 of value in the vessel. Besides that, she was much older when she was sold. There must be a most stringent necessity to justify a captain in selling a vessel, and I think that it should not be tolerated that a sale should be made hastily without examination or without the captain having previously made every exertion in his power to get off his vessel.

Under these circumstances I think the appeal must be allowed.

STRONG, J.:

The first question which arises is, was there a constructive total loss—such a loss as justified an abandonment to the underwriters? For two reasons it appears that this must be answered in the negative. First, it is clear that there is no right in a case of stranding to abandon to the underwriters until all reasonable means within his power have been used by the master for the recovery of the vessel. In *Parsons* on Insurance (1), the rule in this respect is thus stated:

It is quite certain, however, that neither stranding nor submerging,

(1) Vol. 2, p. 181.

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nor any loss that leaves the probability of recovery, gives of itself at once and necessarily the right to abandon, for it is the duty of the master to examine sedulously and use to the best of his skill and power all means for recovery; and there is no right to abandon until these means are used, or until it is obvious, from the nature of the loss or the circumstances attending it, that there is but little, if any, hope of success.

Can it be said that the master, in the present case complied with these essential requirements before the notice of abandonment was given? I am of opinion that it cannot. The evidence of *Harlon*, one of the plaintiff's witnesses, and of Captain *McLean*, a witness for the defendant, and the undisputed facts, show very conclusively that the course which ought obviously to have been adopted was not followed. In the first place, the master seems to have been more intent on saving the cargo than the vessel. Instead of landing the cargo by the slow process of carrying it ashore in bags, he ought, having regard to the comparative value of the vessel and the cargo, to have lightened the vessel by throwing overboard such portion of the cargo as he could not expeditiously save. Then he ought to have had recourse to the use of the devices mentioned in the evidence, and which were afterwards successfully used, of floating the vessel with casks, and if this, too, failed, he might have used the "Sampson Posts" spoken of by the witnesses. All these appliances could have been got either on the spot or at *Shelburne*, and were therefore within his reach. Had all this been done, as with reasonable and proper energy it might have been, on the Saturday, there could have been at least four opportunities of endeavouring to float the vessel, by hauling her off with the anchor and cable at high tide, between Saturday and the sale on Tuesday. Then, too, it does not appear that the assistance of the American vessel, which afterwards hauled the schooner off, was asked and that if it had been

asked it could not have been procured. In the face of these undisputed facts it is impossible to say that all the conditions which are essential to a right to abandon the vessel to the underwriters were complied with. It is out of the question to say, in the face of the evidence of *Harlon*, the purchaser, and one of the plaintiff's own witnesses, that the vessel as she lay on the rocks was such a wreck as not to be worth repairing if she was got off. At all events, it was for the plaintiff to prove this, if he could establish it, but there is no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after being repaired, more than the money expended for that purpose. It would be sufficient to say that it was for the plaintiff to prove this, and that he has not done so, but, from the evidence of *Harlon*, the contrary is a fair inference, though he does not give the total cost of repair, for, he says, the purchasers sold her, after repairing and coppering her, for $1,560—the coppering having cost $250 ; the cost of the repairs, he does not give, but he says this price was obtained after the purchasers had made use of her in several voyages, one a fishing trip, and then a voyage to the *West Indies*. Then *McAlpine*, one of the persons who held a survey of the vessel, and a witness for the plaintiff, who is a ship-builder, says he will not swear she could not be repaired for $300. It is therefore, in my opinion, fully established that the underwriters are not liable as for a constructive total loss.

Next, another and independent ground for coming to the same conclusion, is invoked in the appellant's factum, and was also urged in the argument at the bar. It is said that the rule of English law, differing in this respect from that which prevails in the American courts, and is established by the Codes of

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Continental Europe, is that the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given. This contention seems to be well founded.

Lord *Blackburn*, in his opinion in the case of *Shepherd* v. *Henderson* (1), states this rule very decisively. He says:

> There is considerable difference between the law of *England* and the law of some foreign countries, *France* in particular. In the law of *England*, where notice of abandonment is given and the circumstances are such that the man may reasonably give it, but the underwriter refuses to take it and afterwards an action commences, if in the interim that which the man who gave the notice of abandonment reasonably and properly believed to be a total loss turns out to be not a total loss, it cannot be held that it is. For instance, if a ship has actually been captured and is apparently going off into the enemy's hands, and thereupon notice of abandonment is given; it is perfectly good as matters then stand. But an English frigate meets the ship and re-captures her and brings her back before action is brought, then you must take it that it is not a case of constructive total loss in law at the time when the action is brought; and, as Lord *Mansfield* said long before, in *Hamilton* v. *Mendes* (2), it is a rule of the law of insurance in *England* that where a thing is safe in fact, no artificial reasoning should be permitted to say that it is not.

The same judge in *Rankin* v. *Potter* (3), lays down the same rule in even clearer terms, thus:

> Even in the case when the loss is at the time of the notice of abandonment total, though capable of being reduced by a change of circumstances to a partial loss, the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss, if that change of circumstances does occur before the trial.

In *Arnold* on Insurance (4) the law is stated to the same effect, as follows:

> In this country an abandonment is not indefeasible until action brought. Till that event, therefore, the loss though at one time

(1) 7 App. Cases 70.
(2) 2 Burr. 1198.
(3) L. R. 6 H. L. 127.
(4) Vol. 2, p. 930, 5 Ed.

total is liable to be reduced to a partial loss, by the restitution of the property under such circumstances, in this country, that the assured may, if he pleases, have possession and may reasonably be expected to take it.

Mr. *Parsons* in his work (1) recognises the existence of this rule in English law, but points out that the American courts hold that the abandonment, if good at the time notice is given, is indefeasible.

The same principle of insurance law was also recognized by the Supreme Court of *Nova Scotia* in the case of *Kenny* v. *Halifax Marine Insurance Co.* (2), but I confess I cannot understand its applicability to the facts in that case, since the notice of abandonment was there accepted by the underwriters, which, of course, operated as an immediate cession of the property to them, and as Lord *Blackburn* says, in the quotation already given, made the abandonment at once indefeasible.

If it be said that this rule only applies when the assured can get the vessel back, and that here he could not, as his right to do so was intercepted by the sale, the answer is plainly that there was no valid sale, and the plaintiff's rights as mortgagee have never been divested unless he has lost them by his acquiescence in the sale. That the sale was an unauthorized one is plain when we apply the law to the state of facts disclosed by the evidence already remarked upon in connection with the point regarding the right to abandon. The master has no authority to sell so as to bind the absent owner, (and of course an absent mortgagee must stand in precisely the same position as a *quasi* owner,) unless compelled to do so by "stringent necessity." That this is the law, the recent cases of *Cobequid Marine Ins. Co.* v. *Barteaux* (3); *Hall* v. *Jupe* (4); and *Taylor* v. *Gallagher* (5), establish beyond doubt or

(1) Vol. 2, p. 181.
(2) 1 Thomson, 141.
(3) L. R. 6 P. C. 319.
(4) 43 L. T. N. S. 411.
(5) 5 Can. S. C. R. 385.

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question. It is not sufficient to show that the sale was made in good faith, and that the master acted as a prudent owner would have done. The law is now conclusively settled, that nothing but the most urgent necessity, after the failure of all available means to rescue the vessel, will justify him in so acting; if he sells under any other condition, the sale is unauthorized, and nothing passes by it. In the present case, it is true, the owner, the mortgagor, seems to have been on the spot, but, even if he concurred in the sale, which is not proved, but which may, perhaps, be inferred, that can make no difference, for he certainly had no authority to bind either the plaintiff, as mortgagee, or the underwriters. Again, it would seem that the master had no authority to sell so as to bind either the plaintiff or the underwriters without first communicating with them. He must have known that the plaintiff was interested in the vessel, as he communicated with him by telegraph, and the owner was at hand to inform both as to the interest of the plaintiff, and also of the fact of the insurance, and who the underwriters were, and how they could be communicated with. In such cases it seems that the master has no more power to sell, so as to affect the rights of absent parties, than he has to sell in the absence of the owner without first communicating with him, if the means of communication are at hand, as they were here by the telegraph (1).

It is apparent, therefore, that there was no valid sale, and consequently the rights of the plaintiff as mortgagee were entirely unaffected by the unauthorised disposition of the vessel which the master assumed to make, and he was as free to enforce his rights as mortgagee against the vessel after she was taken off the rocks as he was before the stranding occurred. There was nothing, therefore, to prevent the operation of the rule,

(1) Parsons on Insurance, Vol. 2, p. 146.

that the restoration of the vessel before action brought does away with the effect of the notice of abandonment and makes a recovery for a total loss impossible. There are doubtless numerous cases, from among which *Cambridge* v. *Anderton* (1) may be selected as an example in which the insured has recovered for a total loss, although the vessel has been sold and afterwards got off and repaired. But such are all cases in which the sale was a valid one within the rule which requires a case of "stringent necessity" to authorise the master to take such a step.

A sale by itself is not a loss covered by a policy of marine insurance, it is not a peril insured against; what constitutes the loss in such a case is the state of things which can alone authorise the master to sell. In *Gardner* v. *Salvador* (2), Mr. Justice *Bayley* says:

> There is no such head in insurance as loss by sale.

In *Rankin* v. *Potter* (3) the law is there laid down by Mr. Justice *Blackburn:*

> As has been often observed, a sale by the master is not one of the underwriter's perils, and is only material as shewing that there is no longer anything to be done to save the thing sold for whom it may concern.

To these authorities may be added Lord *Campbell* to the same effect in the following passage from his judgment in *Knight* v. *Faith* (4):

> There is no such loss in insurance law as a sale by the master, unless it be barratrous, and a *bonâ fide* sale by the master can only affect the insurers when it becomes necessary by prior damage arising from a peril for which they were answerable.

The question of the validity of a sale by the master will be found to have arisen in actions against underwriters in connection with the important question, upon which the opinions of courts and judges have so

(1) 2 B. & C. 691.
(2) 3 Bing. N. C. 766.
(3) L. R. 6 H. L. 127.
(4) 15 Q. B. 649.

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much differed, whether a sale relieves the insured from the obligation of giving notice of abandonment and entitles him to claim for an actual total loss—a question which seemed to have been set at rest by the decision in *Rankin* v. *Potter* (1), which, following *Roux* v. *Salvador* (2), and *Farnworth* v. *Hyde* (3), determined against the opinion of Lord *Campbell*, that the assured was not bound to give notice when there had been a "right sale," and consequently nothing left to be abandoned to the underwriters.

Both counts in the declaration are in form for a total loss, but under a declaration so framed there may be a recovery for a partial loss (4), and this it appears the plaintiff is entitled to proceed for in the present case.

The judgment of the court below discharging the rule for a new trial must be reversed, and the rule for a new trial made absolute with costs to the appellant in both courts.

FOURNIER, J., concurred.

HENRY, J.:

The plaintiff must recover either for an actual total, or a constructive total, loss. There is no evidence whatever of an actual total loss, so we must look at the law and the facts, and see if he has made out a case for a constructive total loss. Mere notice of abandonment amounts to very little, unless the circumstances existing at the time and afterwards, affirm the right of the party to make the abandonment. A mere sale does not convey the property unless the party had a right to make it. The captain is the agent of all parties where the owner is absent, but in this case he was present, and we may dismiss from our minds the law or facts of the

(1) L. R. 6 H. L. 127.
(2) 3 Bing. N. C. 266.
(3) 18 C. B. N. S. 835.
(4) Arnold Ins. 1127, *Gardner* v. *Croasdale*, 3 Burr. 904; *King* v. *Walker*, 2 H. & C. 384, 3 H. & C. 209.

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sale by the captain as agent, and speak of the sale as having been made by the owner. Can the owner of an insured ship, by giving notice of abandonment, part with the property to another, and then afterwards say: I cannot abandon to you, because I have sold. That would be no excuse in law. He could not first do the act and then plead that act as an impediment in his way to do something else. If there is any difficulty in the position of the owner, he created it himself by the sale. The law is very clear on the question of a constructive total loss. The English authorities lay down the rule that a party cannot recover for a constructive total loss after an abandonment, unless he shows the repairs would cost as much or more than the ship was worth. That is a necessity at the beginning of his right to recover. In this case, then, the plaintiff was bound to show that this was the fact. The evidence, on the contrary, shows that it was not the fact. In order to prove that case, he should have given evidence what the value of the repairs would have been, and, to do so, he should have had a proper survey. As the vessel was got off and repaired, it was competent for him to prove, if the circumstances would justify his doing so, that the vessel would not be worth the amount of the cost of the repairs. This vessel was repaired on the spot, in the harbour. She was in the harbor when she was sold. There is no evidence of sufficient justification to the captain to sell on the ground that the vessel was likely to go to pieces. She was in the harbor, and, although it was possible she might have been more injured by a storm, there is nothing to show she would have been totally destroyed if she had remained there all the winter. But the plaintiff ought to have given evidence of what the cost of the repairs would be, and of the value of the vessel after she was repaired, and, if the one amounted to as much as the other, he would have

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been entitled to demand for a constructive total loss. That he has not done. At the time this action was brought, that vessel was floating as seaworthy, and it could not be said there was a constructive total loss unless the amount expended was as much as she was afterwards worth. Under these circumstances, without going into other matters, I think the parties have totally failed to establish a constructive total loss, and have therefore not made out the case which the law requires them to make out. I think, therefore, the judgment below should be reversed, and a new trial ordered.

GWYNNE, J.:

The question presented by this case does not appear to me to differ in substance from that which came before us in *Gallagher* v. *Taylor*; namely, had the master done everything that it was his duty to do before selling, and was there that urgent necessity to sell which alone could make a sale justifiable; for although notice of abandonment was given in this case the evening before the sale, whereas no such notice was given in *Gallagher* v. *Taylor*, still notice of abandonment will not of itself justify a sale or entitle the insured to recover as for a total loss, unless those events have occurred which justify the notice being given; that is to say, which entitle the assured in point of law to abandon to the insurer the thing insured, and to subrogate the insurer in the place of the assured as to all the latter's rights of property in the thing insured. The question here then is, did those events occur? The plaintiff, who was insured upon a schooner to the amount of $2,000 by a voyage policy, claims to recover as for a total loss. The vessel ran ashore upon the morning of Saturday, the 15th February, 1879, when the tide was about at its height

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within the harbour of *Shelburne*, on the coast of *Nova Scotia*, within eight miles of a town of the same name, which is a shipbuilding place. Notice of abandonment was given to the insurers on the evening of Monday, the 17th February, and the vessel was sold by the master at noon of the following day, the insurers having in the interim declined to accept abandonment.

The learned judge before whom the case was tried, without a jury, rendered a verdict for the plaintiff for $1,840, being the full amount of the policy less $160, apparently allowed for salvage money arising from the sale of the vessel, to which he added $73.60 for interest from the commencement of the action, making in all $1,913.60. What was the opinion of the learned judge upon the law or the evidence, we have no means of knowing otherwise than by inference from the fact that he has rendered a verdict for the plaintiff for the full amount of the policy. Looking at the evidence as given on both sides there is a conflict upon some points; but looking only at that portion as to which there does not seem to be any conflict, I do not see how we can avoid sending the case back for a new trial with a declaration that the undisputed facts disclosed do not constitute what in law can be pronounced to be either an absolute or a constructive total loss.

An absolute total loss entitles the assured to claim the whole amount. A constructive total loss gives him the like right upon condition only of his giving such notice. Absolute total loss occurs only when in the progress of the voyage, the vessel becomes totally destroyed or annihilated, or placed, by reason of the perils against which the underwriter insures, in such a position, that it is wholly out of the power of the assured, or of the underwriter, to extricate her from her peril, or that she was in such imminent danger of destruction that a sale appeared to afford the only reasonable hope

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of saving any part of her value. *Roux* v. *Salvador* (1), *Farnworth* v. *Hyde* (2). Constructive total loss occurs when, by some of the perils insured against, the vessel has become of so little value, that a prudent owner uninsured, would decline any further expense in putting the vessel in a state of repair to pursue her voyage; and if the expense of repairing her, so as to pursue her voyage, be greater than the value of the vessel when repaired, he is justified in declining to incur that expense, and he is allowed to abandon her and to treat the loss as total (3).

Now, that the vessel in this case was not an absolute total loss, in the sense of having been annihilated, or placed in such a position that it was wholly out of the power of the assured, or of the underwriter, to extricate her from her peril, so as to undergo such necessary repairs as might enable her to pursue her voyage, appears from the fact that when means calculated to get her off were applied by the purchasers she was apparently easily extricated from her peril, and was repaired. It remains, therefore, to consider whether she was in such imminent danger of destruction that a sale appeared to afford the only reasonable hope of saving any part of her value; or, whether the expense of repairing her was such (compared with her value when repaired), as to have justified a prudent owner, uninsured, to decline to incur any further expense upon her. As to the former of these questions the same point arises as arose in *Galagher* v. *Taylor*, namely, was there that urgent necessity for a sale, after the fruitless application by the master of every possible means at his disposal for extricating her, which alone would justify him in selling her? Upon the undisputed evidence the facts may be stated to be, that the vessel having run ashore

(1) 3 Bing. N. C. 286.
(2) 18 C. B. N. S. 854.
(3) 2 *Wm. Saund*, 202—*Roux* v. *Salvador*. 3 Bing. N. C. 86.

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about full tide upon the morning of Saturday, the 15th February, 1879, the master did not then make any efforts whatever to get the vessel off with the tide; that although there was at the time an Italian bark close by in the harbor of *Shelburne*, where the vessel was ashore, he made no application to her for assistance, but, without giving any orders to lighten the vessel, or to attempt to get her off, in his absence, he went straightway to the town of *Shelburne*, a ship-building place only eight miles off, not for the purpose of getting any assistance or appliances to get the vessel off, but to get surveyors to come down with the apparent intention of having her condemned. During Saturday, Sunday and Monday, the only efforts made to get the vessel off consisted in hauling upon one anchor thrown out some distance astern, although the master must have known that as the vessel went ashore at high tide, she could not have been so hauled off without lightening her. Instead of lightening her at once by throwing overboard her cargo, which consisted of potatoes loose in the hold, Saturday, Sunday and Monday were employed in saving the cargo by putting the potatoes into bags, carrying them ashore and safely housing them, and on Tuesday, before the sale, the balance of the potatoes remaining in the hold was sold to one *Goodrich*, who was allowed twelve hours to remove them, and the purchasers of the vessel afterwards were obliged to pay *Goodrich* for the privilege of throwing the potatoes overboard in order to lighten the vessel so as to haul her off. Although there was an American vessel on Saturday in the harbour in open water as well as the Italian barque, neither the one or the other was applied to for any assistance to get the vessel off. The surveyors, who were brought down on Saturday, condemned the vessel upon Monday by a report which was not produced, but on Sunday, as one of them swore, they concluded to order a sale,

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although, as that same witness said, they made no examination of the vessel on the Sunday, and could not see the extent of the damage, and that he was not prepared to say that she could not have been repaired at low water enough to pump out the water. The master's efforts, therefore, appear to have been directed rather to saving the cargo, than by throwing it out—as might have been done, overboard at once—to lighten the vessel and save her.

The vessel was sold on Tuesday, and one of the surveyors who had condemned her was himself either one of the purchasers, or was employed by the purchasers to get her off, and did succeed in so doing.

On Tuesday, as appears by the evidence of Mr. *Purvey*, one of the surveyors, the purchasers got an American schooner to go down, but she put back without doing anything that day. *Hart*, another witness called by the plaintiff, says that on Wednesday the purchasers had the American vessel there, and that it was no more stormy on Tuesday than it was on Wednesday, when the American schooner got into position.

Mr. *Harlon*, one of the purchasers, says that they got her off with the aid of the American vessel and water casks the next night after they bought her. They lost, he says, the first tide after they bought her; it was during the evening tide of the day after they bought her that they got her off. There was no evidence whatever offered to shew why the cargo was not thrown overboard and the vessel lightened on the Saturday, nor why the master did not apply to one or other of the vessels in the harbor for assistance; nor was there any reason to suppose that if the vessel had been lightened at once upon the Saturday she might not have been gotten off as readily on the Saturday, or the Sunday or the Monday before the surveyors signed their report, if the same means had been used as were subsequently

used by the purchasers, and by one of the surveyors who condemned the vessel, or that the master could not have made use of the like means. If, therefore, this case depended upon the validity of the sale in the absence of a notice of abandonment, it must needs be governed by *Gallagher* v. *Taylor*, and the sale must be held to have been invalid by reason of the absence of all evidence to shew any urgent necessity for the sale, or that the master had exhausted, as was his duty all the means within his power of extricating the vessel and so that there was no absolute total loss. Can then the giving notice of abandonment in this case make any difference? Clearly not for—1st. There was no evidence whatever offered as to what was the extent of the damage done, or what the cost of such repairs as would have enabled the vessel to pursue her voyage, or what the value of the vessel when so repaired as compared with the cost of such repairs, so that there cannot be said to have been offered any evidence to establish a constructive total loss; and 2nd. Upon the vessel running ashore it was the duty of the master to use all the means in his power to extricate her from her peril, whether an actual or constructive total loss was relied upon, and if he fails to do so, as the notice of abandoment is of no avail unless the events happen which entitle an assured to abandon, he must fail upon a claim for constructive, equally as upon one for absolute total loss. The case then is resolved into this:

1st. Here the evidence shews there was no absolute total loss.

2nd. It shews also that the master did not make use of all the means within his power to extricate the vessel from her peril, and so that he neglected a duty incumbent upon him to discharge before the assured could abandon and subrogate the insurers into his place.

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3rd. There was no evidence offered of any constructive total loss.

4th. The plaintiff therefore was not entitled to recover, except for a partial loss, as to which he made no claim, and if he had, he failed to offer the necessary evidence in support of it.

It is said, however, that the plaintiff's right to recover depends on questions of fact, and that the verdict of the learned judge who tried the case without a jury, being in favor of the plaintiff must be taken as having found all the necessary facts in his favor equally as if a jury had rendered the verdict. If the case had been tried by a jury, it must have been left to them with such a direction that it should appear whether they should intend, by their verdict, if in favor of the plaintiff, to find as upon an absolute or constructive total loss, or for partial loss only. If they had found as for an absolute total loss, their verdict must have been set aside as wholly contrary to law and evidence, for the undisputed evidence sufficiently shows that there was no such loss. If they had found as upon a constructive total loss, their verdict must equally have been set aside for the reasons I have already above given.

The verdict of the learned judge must be set aside for the like reasons, whether he proceeded as upon an absolute or a constructive total loss.

Appeal allowed with costs.

Solicitor for appellants: *Hugh McD. Henry.*

Solicitor for respondent: *John M. Chisholm.*