

THE ANCHOR MARINE INSUR- } APPELLANTS;  
ANCE COMPANY..... }

1883  
\*Oct. 26.

AND

JOHN KEITH..... RESPONDENT.

1884  
\*Jan'y 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Marine policy—Voyage policy—Mortgagee who assigns as collateral security has an insurable interest—Total loss—Right to recover—Notice of abandonment by mortgagee—Constructive total loss.*

While the barque “*Charley*” was at *Cochin* on or about the 12th April, 1879, the master entered into a charter party for a voyage to *Colombo*, and thence to *New York* by way of *Alippee*. The vessel sailed on the 22nd April, 1879, and arrived at *Colombo*, which place she left on 13th May, and while on her way to *Alippee* she struck hard on a reef and was damaged and put back to *Colombo*. The vessel was so damaged, that the master cabled to the ship’s husband at *New York* on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and *Bombay*, 1,000 miles

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

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distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction.

On the 21st May, the respondent, a mortgagee of  $\frac{2}{3}$  in the vessel, which he had assigned to the Bank of *Nova Scotia* by endorsement on the mortgage, as a collateral security for a pre-existing debt to the Bank of *Nova Scotia*, being aware of the charter from *Cochin* to *New York*, insured his interest with the appellant company. The nature of the risk being thus described in the policy: "Upon the body, &c., of the good ship or vessel called the barque *Charley* beginning the adventure (the said vessel being warranted by the insured to be then in safety,) at and from *Cochin viâ Colombo* and *Alippee* to *New York*." To an action on the policy for a total loss—the defendants pleaded *inter alia* 1st—that the plaintiff was not interested; 2nd, that the ship was not lost by the perils insured against; 3rd, concealment. A consent verdict for \$3,206 for plaintiff was taken subject to the opinion of the court upon points reserved to be stated in a rule *nisi*, and upon the understanding and agreement that everything which could be settled by a jury, should upon the evidence given be presumed to be found for the plaintiff.

*Held*,—1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance.

2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor, did not divest him of all interest so as to dis-entitle him to recover.

3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.

Per *Strong, J.*, that a mortgagee upon giving due notice of abandonment is not precluded from recovering for a constructive total loss.

**APPEAL** from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* for a new trial.

The facts of the case sufficiently appear in the head note and judgments hereafter given.

To a declaration as for a total loss upon a marine voyage policy upon the barque "*Charley*," alleged to have been executed by the defendants, they pleaded among other pleas,—

1st. That the plaintiff was not interested in the said ship, as alleged.

2nd. That the said ship was not lost by the perils insured against or any of them, as alleged.

3rd. That they were induced to make the policy by the fraud of the plaintiff.

4th. That at the time of making the policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and his agents, and unknown to the defendants, and material to the risk—that is to say, that the said ship was then lost or had sustained serious damage.

5th. That at the time of the making of the said policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and material to the risk—that is to say, that notice of the loss of the said ship or the damage she had sustained on said voyage had been published in one or more public newspapers in *England* two or three days previously, and,

6th. That at the time of the making the said policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and his agents and unknown to the defendants, and material to the risk—that is to say, that the said ship had been previously reported as lost or seriously injured on said voyage

Issue having been joined on these pleas the case went down for trial before Mr. Justice *Weatherbe* and a jury in November, 1881, and, upon the close of the evidence, a verdict at the suggestion of the counsel of the defendants was taken for the plaintiff for \$3,206.80, subject to the opinion of the court upon points reserved, to be stated in a rule *nisi* to be taken out, and upon the understanding and agreement that everything which

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could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff.

In pursuance of this agreement a rule *nisi* was obtained by the defendants in the following terms, namely, on hearing read the minutes of trial it is ordered that the verdict or judgment given herein for the plaintiff be set aside with costs and a new trial granted on the following grounds :

Because no sufficient interest is proved to entitle the plaintiff to recover the amount of the verdict.

Because the notice of abandonment was too late and insufficient.

Because no total loss was proved.

Because the vessel being only partially damaged could not under the terms of the policy be condemned at *Colombo*, a safe port, without notice to the underwriters, which was not given.

Because the declaration is not sufficient to enable the plaintiff to recover for a loss which happened before the application was made and insurance effected.

Because of the improper reception of evidence as to abandonment and of secondary evidence as to notice of abandonment and its contents.

Because the judge should not have allowed the declaration to be amended on the trial alleging interest in the Bank of *Nova Scotia*, unless cause to the contrary be shewn, &c., &c. Upon the argument of this rule *nisi* the court discharged the rule, thus maintaining the verdict, and it is from the rule and judgment discharging the rule *nisi* that this appeal was taken.

Mr. *MacLennan*, Q.C., for appellants.

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

The points of argument are fully noticed in the judgments.

RITCHIE, C. J. :

I had some doubts whether the evidence made it clear that there was a total loss, but all the facts have been submitted to a jury, and found in favour of the plaintiff, establishing that there was a total loss, and I am therefore not prepared to differ from the rest of the Court in the conclusion that there was an actual total loss, and this gets rid of any discussion as to the abandonment and notice.

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The nature of the risk is thus described in the policy :

Upon the body, tackle, apparel and other furniture of the good ship or vessel called the barque "*Charley*," beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin* via *Colombo* and *Allippee* to *New York*.

It is first said that the words "lost or not lost" are not inserted in the policy, and that the warranty of safety has reference, not to the commencement of the voyage, but to the date of the policy, the 22nd May, 1879, when the loss had actually occurred. I think it very clear, as clear, indeed, as words can make it, that this was a voyage policy, and that the warranty of safety refers only to the commencement of the voyage, and not to the time of the insurance.

Concealment is not proved, and any objection to the verdict on that ground is distinctly precluded by the very terms of the agreement between counsel, on which the consent verdict was taken. This stipulation was noted by the learned judge as follows :

A verdict is taken by plaintiff for the amount of \$3206.80, interest from the first April, 1880, subject to the opinion of the court on questions reserved in the rule *nisi*. The verdict, by consent, is taken at the suggestion of the defendant's counsel, and I state before it is taken, that everything that a jury could settle on the evidence, must be presumed to be for the plaintiff.

The fact of concealment would be a question for the

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jury, and we must, therefore consider the case as though there had been an express finding in the plaintiff's favor on that ground, in which case it could not be pretended that the verdict was against the weight of evidence. Further, the verdict was to be subject only to the points reserved in the rule *nisi* which, according to the *Nova Scotia* practice, was, of course, moved for immediately after the trial, and this is not mentioned.

The question of the action not having been brought in due time is not raised by the pleadings, was not taken at the trial, and is also excluded by the terms of the agreement pursuant to which the consent verdict was given, as it is not comprised in the rule *nisi*.

Then, it appears, that the plaintiff had an interest as mortgagee of shares to secure \$8,000. The mortgage was made by *Barteaux*, and it must be presumed that the registrar would not have registered the mortgage unless *Barteaux*, the mortgagor, appeared on the registry to be the owner of all the shares comprised in the mortgage. And this would probably appear if the registry was fully set out. Again, it cannot be denied, that *Barteaux* was owner of 30 shares, which, in any event, the mortgage includes, so that the objection becomes one only to the amount of the verdict, and is excluded by the terms of the consent, no objection to the amount of the verdict being taken in the rule.

There is nothing in the objection, that secondary evidence of the notice of abandonment was not admissible because there was no notice to produce; secondary proof of a notice is a well known exception to the rule requiring secondary evidence (1), and there is no reason why it should not apply to notices of abandonment as well as to notices to quit and a variety of other similar documents.

(1) Steven's Dig. of Law of Evidence, 84.

Then, I am of opinion, that notice of abandonment was given with sufficient promptitude. The plaintiff first heard of the disaster from seeing it in a newspaper, and within a week he gave the notice. Allowing for the lapse of a reasonable time for making enquiries, this was in sufficient time. Moreover, it would, under proper directions, have been a question for the jury if the point had been raised at the trial; and under the agreement that every thing which a jury could settle on the evidence must be presumed to be for the plaintiff, the defendants are again concluded from raising this question. The point that the notice of abandonment was insufficient, because there was no transfer, must also share the fate of those which have already been disposed of. As shown in the case of *Kaultenback v. McKenzie* (1), by the present Master of the Rolls, the abandonment is a totally different thing from the notice of abandonment. The cession of the property in consequence of the abandonment operates, it is said, without a word being spoken as necessary incident of the abandonment. This is so laid down in the text writers where numerous authorities are cited in support of it. It will be enough to refer to *Arnold on Insurance* (2), where I find the following statement of the law:

If notice of abandonment has been duly given, a deed of cession or formal cession or formal transfer is unnecessary to enable the assured to perfect his abandonment and recover as for a total loss.

The assignment to the bank, if absolute in form, was either absolutely void under the statute, in which case it could have no effect at all, or it was merely by way of mortgage as a collateral security for a pre-existing debt. It, however, very clearly appears upon its face to have been of the latter character, and this being so, I am at a loss to conceive what possible effect it could have on

(1) 3 C. P. D. 467; see also per Blackburn, J., in *Rankin v. Potter*, 6 H. L. C. 118.

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the plaintiff's right to recover. No direct authority is produced showing that such a sub-mortgage is to be considered as so divesting the mortgagee of all interest as to dis-entitle him to recover. Practically he still retains the same interest which he had before the transfer, as the security held by his creditor is still for his benefit, since, if it is realized, he must receive credit for the proceeds and in that way pay his debt. He, therefore, retains his original interest unimpaired. No English authority can be cited for such a position. In the case of fire insurance a mortgage by the insured after the policy will not, in the absence, of course, of a special condition, be considered such a transfer of interest as to prevent a recovery, and I see no reason why it should have that effect in marine insurance which would also apply to fire insurance.

Lastly, it is said that in no case can a mortgagee recover for a constructive total loss. The first answer to this is, that the loss here was not a constructive loss at all, but an actual total loss. The ship was taken to the harbour of *Colombo* where it was found that there was no dry dock, and where she could not, for very sufficient reasons given by the captain, be beached, for the purposes of repair, and she was in such a condition that she could not be taken to another port for repair. This is the substance of the evidence of the master, and the appellants are debarred by the terms of the consent verdict from disputing the facts. In *Barker v. Janson* (1), *Willes, J.*, says :

If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship ; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is notice of abandonment there is not even a constructive total loss.



The case first put exactly describes the condition of this ship as she lay in the harbour of *Colombo*, no appliances for repair were within reach, and there it was impossible, even temporarily, to stop the leak so as to enable her to reach a port where repairs could be effected. It was, therefore, a case of actual total loss, and if there are authorities to show, which however I deny, that a mortgagee cannot recover for a constructive total loss, they do not apply to the facts of this case. I can find, however, no authority for holding that a mortgagee is precluded from recovering as for a constructive total loss upon giving due notice of abandonment; and upon principle I can see no reasonable reason for such rule. It is true that a bottomry bond holder cannot recover for a constructive total loss; but for this a reason is given which does not apply to the case of a mortgage (1). If, however the case of *Kaultenback v. MacKenzie* (2), is to be considered as overruling the opinion of *Willes, J* in *Barker v. Janson*, and restoring Lord *Campbell's* doctrine in *Knight v. Faith* (3) (which I must be presumptuous enough to doubt, considering what has been said in some of the cases in the House of Lords) which was that whenever the subject-matter remained in specie, notice of abandonment was necessary, not for the purpose of declaring the election of the assured, for in such a case there can be no room for a choice, but to enable the underwriters to look after their interests in the property, the plaintiff is, I consider, still entitled to recover as having given a sufficient notice of abandonment. The appeal should be dismissed with costs.

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FOURNIER, J., concurred.

(1) See Arnould on Insurance,  
 p. 1015.

(2) 3 C. P. D. 467.

(3) 15 Q. B. 649.

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There are five leading points to be considered in dealing with the issues in this case:—1st, as to the insurable interest in the respondent when the policy was issued; 2nd, the state of the ship when sold; 3rd, as to the notice of abandonment; 4th, as to the allegation of concealment; 5th, as to the warranty contained in the policy.

As to the first point, the respondent on the 31st of (October, 1877, became a mortgagee of  $\frac{4}{11}$  shares in the vessel insured, and the mortgage to him was duly registered on the 10th of the following month. On the 28th of October, 1878, the respondent assigned the mortgage to the bank of *Nova Scotia* by endorsement on the mortgage as follows:

I, the within named *John Keith*, of *Windsor*, in consideration of the bank of *Nova Scotia* giving me time on a debt of \$3,016.90 now owing to them by me on a draft drawn by me on *C. W. Barteaux*, *New York*, and due to-day, do hereby transfer to them the benefit of the within written security.

What then was the effect of that assignment? Did it transfer absolutely the whole interest in the mortgage? I am of the opinion it did not, and that the latter retained a valid insurable interest in the vessel to the amount greater than the amount insured. In the first place the only transfer recognized and provided for by the Merchants' Shipping Act is where the whole interest is sold and transferred. Here it is patent on the face of the assignment that it was made only as collateral security for the payment by the respondent of the amount of the dishonoured draft. The consideration is not alleged to have been in the shape of a sum paid, or to be paid, by the bank, but solely on account of the bank giving time for the payment of the draft. The bank took, no doubt, an equitable interest in the mortgage capable of enforcement, but not such as to divest wholly the interest of the assignor, who, in my

opinion, retained the legal title to the mortgaged shares. By law the bank was prohibited from taking or holding any mortgage of a ship, otherwise than as additional security for debts due them. Besides when we find the respondents' mortgage was \$10,000, it would, indeed, be impossible, without evidence of the fact, to conclude, that for the time given him to pay the amount of the draft he agreed and intended to give a bonus to the bank of nearly \$7,000. I have therefore no hesitation in deciding that the respondent had a valid insurable interest to an amount beyond that covered by the policy when it was issued.

The claim and verdict being for a total loss, the state of the ship when sold is most important to be considered. If she was at the time capable of being repaired, and there were the means at hand where she was of having the necessary repairs made, or if she could have been removed to another available port or place for that purpose, an actual total loss had not taken place, but, under the circumstances, if she could have been repaired the owner was bound to have that done, unless the repairs would cost as much, or more, than she would be worth when repaired. In the latter case, however, it would be but a constructive total loss and a notice of abandonment duly given would be necessary to entitle the insured to recover as for a total loss. It has been satisfactorily made to appear, by the evidence in this case, that when the ship returned to *Colombo* after having sustained the injuries spoken of on her voyage to *Allippee*, she was unseaworthy. At *Colombo* she could not be repaired so as to go to sea. At that place there were neither ship carpenters or shipyards, nor any other of the necessary means for repairing. It appears that *Bombay* was the nearest available port for getting her repaired, but it is distant

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about 1,000 miles from *Colombo*, and in the state she was in it was impossible to take her there.

The master, after having the damages inspected by two boards of surveyors, and acting by their advice, sold the vessel and materials, the latter in lots, and the hull, after having been stripped, separately. The purchaser of it immediately broke her up and got what was available out of her. I have no doubt that the master (who owned two shares of the vessel uninsured) did the best he could, under the circumstances, for all concerned, and the fact that the purchaser of the hull made no attempt to repair it, is corroborative evidence of the contention that the repair of the vessel was impracticable. If, then, the ship could not be repaired where she was, and could not be removed for repairs to another port, the loss becomes, in my opinion, an actual total loss. The law, as I view it, is well expressed by *Willes, J.*, in *Barker v. Janson* (1). He says :

If a ship is so injured that it cannot sail without repairs and cannot be taken to a port at which the necessary repairs can be executed there is an actual total loss, for that has ceased to be a ship, which never can be used for the purposes of a ship.

The ship at *Colombo* had therefore ceased to be a ship at the time the respondent first heard of her having been injured.

I consider that no notice of abandonment was therefore necessary and I need not discuss the question raised as to that given by the respondent.

There is not the slightest evidence of any concealment by the respondent personally of anything within his knowledge when he effected the insurance in question. But it is contended that the knowledge of the master affected him, and, as the master knew of the damage done to the vessel before that time, that know-

(1) L. R. 3 C, P. 305.

ledge must be imputed to the respondent as mortgagee of the shares in her.

I know of no case wherein such has been decided, nor would I expect to find one. The master is no doubt the agent for many purposes of the owner, and in certain cases is expected and required in the ordinary course of business to communicate immediately with him, and, if he do not, and the owner is in ignorance of circumstances that he had a right to expect to be communicated to him by the master effects insurance, the policy becomes liable to forfeiture on the ground of concealment. The mere mortgagee of shares in a ship has nothing to do in ordinary cases with the employment or conduct of the master. He is in no wise his servant. Although the owner of a ship executes a mortgage of her he is no less the owner, and, subject to the rights of the mortgagee, can act the part of a full owner in every other respect. There exists a privity between him and the master, but none between the latter and a mortgagee of whom in many cases he never heard. If the law held one mortgagee affected by the knowledge of the master, the doctrine would apply to twenty mortgagees, if there were so many, and of whom the master knows nothing. After a vessel leaves her home port on a lengthened voyage, it may be for two or three years, how is the master to know of the mortgages and assignments that may be subsequently made? To require every mortgagee or assignee to find out and notify a master of his interest would, if not wholly impracticable, at least create difficulties that would hamper trade, by throwing embarrassing responsibilities on such mortgagees or assignees, and making them answerable for parties they may not know, and without the slightest privity of contract or knowledge otherwise having existed. It is the duty of the master to communicate with his owner, but he is under no obligation to communicate with a mortgagee. The

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latter pays him nothing for his services, and he has no claim upon him to furnish information as to the ship, her movements or condition. It would be unreasonable and inequitable to hold the mortgagee answerable for the knowledge of the master thousands of miles distant.

The next point is as to the warranty contained in the policy. The policy was issued on the 21st of May, 1879, and was "for \$4,000 on the ship, tackle, apparel, and other furniture, beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin via Colombo* and *Allippee to New York*." The policy insured against all perils, losses or misfortunes that have or shall come to the hurt of the vessel. What then is the substance of the warranty. In answer to the printed questions submitted for answers to the respondent, before the policy was issued, he said the vessel was then on the *Malabar* coast and to sail on the 10th of April the previous month. The evidence shows that the vessel sailed from *Rangoon* for *Cochin* in February, 1879; although not specially shown, she was no doubt at *Cochin* on the 10th of April, for about the 12th of that month the master chartered her for the voyage mentioned in the policy. She was then safe, and sailed from there under the charter for *Colombo* on the 22nd of April. She arrived at the latter, took in some cargo and sailed on her voyage to *Allippee* on the 13th May, and on the 17th ran on a reef and received the damage which made it necessary for her to return to *Colombo*. When the policy was issued the risk reverted back to the date of sailing from *Cochin*, and if she was then safe the words in the policy "all perils, losses or misfortunes that have or shall come to the hurt, &c., of the vessel cover a loss before the issue of the policy as well as a subsequent one. The appellants charged and got paid for the whole risk from *Cochin via Colombo* and *Allippee to New York*, and their insurance was co-

extensive. The policy expressly provides for insurance against any loss that had previously been sustained after the commencement of the voyage, and therefore must necessarily cover that sustained on the 17th of May and subsequently. The warranty of the safety of the vessel, as I read it and the application and answers to the printed questions, does not apply to the 21st of May, when the policy was issued, but to the safety of the vessel at *Cochin*, from whence to commence the voyage as expected on the tenth of April.

A contention was raised at the argument that the respondent was not entitled to recover, because the suit was not commenced within twelve months from the time of the depositing of his claim.

That is a defence that must be pleaded, and there is no plea of that kind on the record. No such issue was raised, and none can be considered. Besides, no such objection is included in the rule *nisi* to set aside the verdict, and we cannot consider grounds of objection not contained in it.

For the reasons given, I am of opinion the appeal should be dismissed, and the judgment of the court below confirmed with costs.

GWYNNE, J.:—

The question before us upon this appeal is whether the verdict, which was taken by consent at the trial, subject to the opinion of the court as above stated, should be set aside and a verdict entered for the plaintiff, or a non-suit upon any of the objections stated in the rule, and first as to the interest of the plaintiff in the subject of the insurance and his right to recover under the policy, the injury which caused the subsequent loss of the vessel having been received before the policy was executed.

The plaintiff's interest is as mortgagee of  $\frac{46}{64}$  parts or

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shares of the vessel insured, under a mortgage executed by one *Barleaux*, the then owner of those shares, dated the 31st October, 1877, and entered on the ship's registry on the 10th November, 1877. One *Robinson*, who was himself the owner of  $\frac{2}{64}$  shares in the vessel, took charge of her in October, 1874, at *Kingsport, Nova Scotia*, where she was built, and continued in charge of her as master from thence continually until her loss in 1878, during all which time, so far as appears in the evidence, she may have been at sea and abroad. *Barleaux*, who mortgaged his  $\frac{46}{64}$  shares to the plaintiff in 1877, always acted as managing owner and ship's husband. In December, 1878, she was at *Rangoon*, from whence she sailed for *Cochin* in February, 1879. While at *Cochin*, and on or about the 12th of April, 1879, the master entered into a charter party with her for a voyage to *Colombo*, in the island of *Ceylon*, and thence to *New York* via *Allippee*. She sailed from *Cochin* under this charter on the 22nd April, 1879, and arrived at *Colombo*, which place she left on the 13th May, and while on her way to *Allippee* she struck hard upon a reef on the 17th May. While thumping on the reef she unshipped her rudder and part of her keel came up. Having sounded the pumps and found four and a half feet of water in the well, the master, after consultation with his officers, decided, as the best course, to put back to *Colombo*, which was the nearest and safest port to get to. They arrived there (constantly pumping all the way) on the 19th May; the water was then gaining two feet per hour. Evidence, which was not contradicted, establishes that the vessel's bottom could not be examined until the cargo should be discharged, and this could not be done in consequence of the south west monsoon having burst on the 19th May, and the heavy sea which was running.

The cargo was got out as fast as possible, but no part



could be taken out until the 24th or 25th May, and in the mean time, on the 23rd May, the master cabled to the ship's husband at *New York* as to what was to be done, and in reply received orders from him that when the master should have exhausted all available means to take care of the vessel, he should do then the best he could for all concerned. As soon as the cargo was got out the master had the bottom surveyed, and found the end of the stern post exposed and other injuries of such a nature that it was physically impossible to put to sea again, unless the vessel should undergo very extensive repairs, which repairs it was impossible to get made at *Colombo*, there being neither ship yards nor ship carpenters there, nor any wharf to heave her down to, nor any blocks to put her on. *Bombay* was the nearest port at which the vessel could have been repaired, and it was 1,000 miles off; after the cargo had been completely discharged, and on or about the 10th June, the master had a second survey made by two ship masters and a carpenter of one of the ships there, and a third survey by two ship masters, and, after consultation with them, he, in concurrence with them under their advice, came to the conclusion that, as he could not take the vessel to a port where she could have been repaired, the best thing he could do was to strip her and make the best he could of her materials. This he accordingly did. He stripped the vessel and sold the materials in lots at auction, and the hull in like manner, separately, the purchaser of which proceeded to break it up as the only thing which could have been done with it. On the 20th May in *Lloyd's List* and *Commercial Daily Chronicle*, published in *London, England*, there appeared the following information as transmitted from *Colombo* on the 19th May :—

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northwardly of *Cormorin* and has put back leaky, cargo damaged, but to what extent not yet ascertained.

On the 21st of May the plaintiff who resides at *Windsor, Nova Scotia*, being aware of the charter from *Cochin* to *New York* but having no reason whatever to think the vessel was in trouble, unless the knowledge of the master constituted notice to the plaintiff (a point hereafter to be referred to) made application to the agent of the defendant at *Halifax* for the policy now sued upon, wherein he informed the defendants that the voyage he wanted the insurance for was from *Cochin via Colombo* and *Allippee* to *New York*, and, in reply to questions therein as to where the vessel then was, and when ready to sail, replied to the former that she was on the *Malabar* coast, and to the latter, the 10th April; thereupon the policy now sued upon was issued—being for \$4,000 :

Upon the body, tackle, apparel and other furniture of the good ship or vessel called the barque *Charley*, beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin via Colombo* and *Allippee* to *New York*.

The said vessel, tackle, &c., valued at \$20,000, and the perils to which the defendants are made liable are stated in the policy to be among others :

All perils, losses or misfortunes that have or shall come to the hurt of the vessel subject to the conditions and provisions contained in or referred to by clauses in this policy.

Now, it is contended that this policy is for a voyage thereafter to be commenced from *Cochin*, where, as is contended, the plaintiff warranted the vessel to be then, on the 21st May, in safety, and that the words "lost or not lost" not being inserted the defendants are not liable, but upon reference to the application, which may be looked to as explanatory of the intention of the parties, it sufficiently appears that the defendants were

informed that the voyage for which the plaintiff wanted to effect insurance was expected to have commenced on the 10th April, and the warranty must be read as applying to the beginning of the adventure upon her sailing from *Cochin* on such contemplated voyage. The statement in the policy that it is intended to cover "all perils, &c., &c., that have, or *shall* come, to the hurt of the vessel, &c., supports this view. The plaintiff, therefore, in the absence of any knowledge then possessed by him of the injury which the vessel had sustained, is entitled to recover, notwithstanding the absence from the policy of the words "lost or not lost."

It was contended further, that as it appeared that the plaintiff had assigned his mortgage to the *Bank of Nova Scotia* on the 21st of October, 1878, the absolute legal interest in the  $\frac{46}{64}$  shares mortgaged to the plaintiff became, by force of sec. 73 of the Merchants' Shipping Act of 1854, vested in the bank, and that the plaintiff therefore had no interest on the 22nd May, 1879, when the policy was executed. This contention was well answered, as it appears to me, by the judgment appealed from. The transfer of the mortgage to the bank is in these words :

I, the within named *John Keith*, of *Windsor*, in consideration of *The Bank of Nova Scotia* giving me time on a debt of \$3,016.90, now owing to them by me on a draft drawn by me on *C. W. Barteaux*, *New York*, and due to-day, do hereby transfer to them the benefit of the within written security. In witness, &c."

By the Dominion statute 34 *Vic.*, ch. 5, the bank could not take, or hold, any mortgage of any ship, or other vessel, otherwise than by way of additional security for debts contracted to the bank in the course of its business. When, then, the plaintiff, in consideration of the bank giving to him time for the payment of a draft for \$3,016.90 then due, transferred to the bank "the benefit" of the mortgage held by the plaintiff on *Barteaux's*  $\frac{46}{64}$ th.

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shares in the vessel, which was a security for payment to the plaintiff of \$10,000, together with an arrear of interest thereon at the rate of 7 per cent. from the 31st of October, 1877, all that can be held to have passed to the bank was in the nature of a mortgage, that is to say, an equitable interest in, or lien upon, the \$10,000 secured by the mortgage as security that the plaintiff's debt to them of \$3,016.90 should be paid, and the only way by which the bank could acquire the absolute legal title to the property mortgaged, namely, the  $\frac{4}{11}$ th shares in the vessel, would be under the provisions of the 41st and 43rd secs. of 34 *Vic.*, ch. 5, taken together, "by obtaining a release of the equity of redemption in the property mortgaged, or by foreclosure in a Court of Equity, or by any other means whereby an equity of redemption can by law be barred." Such transfer by the plaintiff, operating therefore merely in the nature of a derivative mortgage, was not such a transfer as is contemplated in the 73rd section of the Merchants' Shipping Act, which section contemplates such an absolute legal transfer of a mortgage of a vessel, or of shares therein, as would entitle the transferee to be entered upon the registry of the vessel as the mortgagee of the vessel, or of the shares therein, under the original mortgage, and as the legal owner of such vessel, or shares, to the limited extent defined in the 70th section, and the result is that, notwithstanding the execution by the plaintiff of the instrument endorsed upon the mortgage, he still retained, under the provisions of the 70th and 71st sections of the Merchant's Shipping Act, the legal interest in the shares mortgaged to him by *Bartheaux*, and he must be held to have still retained such interest when the policy was executed, and entitled to effect the insurance contained therein, notwithstanding, that the bank had an equitable interest in the plaintiff's

mortgage and a lien upon the monies to be realised thereunder.

As to the issues joined upon the pleas averring concealment by the plaintiff, at the time of his effecting the insurance, of facts alleged to have been known to him and unknown to the defendants and material to the risk—namely, that the vessel was then lost, or had sustained serious injury, and that notice of the damage which she had sustained had previously been published in one or more public newspapers in *England* two or three days previously, and that the vessel had been reported as lost or seriously injured on her said voyage, the evidence shows that the plaintiff had no actual knowledge of any of those matters, and that he had no reason to believe she had been in any trouble whatever.

All that appears to have been published in any newspapers relating to the vessel was the information published in *Lloyd's* list on the 20th May—namely, “that she had struck the ground and had put back leaky, and that the cargo was damaged, but to what extent had not yet been ascertained ;” but the plaintiff had no knowledge of such publication. It was contended, however, by the learned counsel for the defendants, that the knowledge of the master was the knowledge of the plaintiff, and it was upon such constructive knowledge solely that the contention for the defendants in support of their pleas was rested.

That the master is the agent of the owners of a vessel there can be no doubt, and *Gladstone v. King* (1), cited and followed in *Proudfoot v. Montefiore* (2), decides that the knowledge of the master as to any injury sustained by the vessel when under his charge is impliedly the knowledge of the owners ; the foundation of that doctrine, however, is that the master, being appointed by the owners, the relation of principal and agent has

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(1) 1 M. & S. 35.

(2) L. R. 2 Q. B. 520.

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been established between them. The principle as laid down in *Proudfoot v. Montefiore*, is that—

If an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship or cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance.

No case has been cited which establishes that the registered owner of shares in a vessel who, as such owner, had taken part in the appointment of the master, and between whom and the master the relation therefore of principal and agent exists, by executing (in the absence, it may be, of the master with the vessel on a voyage) a mortgage of the whole, or of some part, of his shares, to a person of whose existence even the master may be ignorant, constitutes the relation of principal and agent to exist between the mortgagee and the master, so as to make the neglect of the master to communicate to the mortgagee (of whose status as mortgagee, and of whose existence even, he may be ignorant) such matter within his knowledge as it would be his duty to communicate to his principals such a breach of his duty as to subject the mortgagee to the consequences of such neglect, and that it could in law and reason be said, on the principle upon which *Gladstone v. King* and *Proudfoot v. Montefiore* were decided, that the knowledge of the master was impliedly the knowledge of the (to him) unknown mortgagee. In the absence of any decision in support of such a contention, I must

say that so to hold, would be, as it appears to me, to do violence to, to the extent of ignoring, the principle which is the foundation of the decisions in *Gladstone v. King and Proudfoot v. Montefiore*, and is not warranted by any thing in the Merchants' Shipping Act, upon the provisions of which act the contention is rested, for, although true it is that that act makes the mortgagee of shares in a vessel the owner of such shares for the purpose of realizing his mortgage debt by sale of the shares, or so much thereof as might be necessary, and of giving a good and absolute title to the purchaser, yet, for all other purposes, the mortgagor continues to be the owner of the shares mortgaged. By the 70th section of the Act it is specially provided that

A mortgagee, shall not by reason of his mortgage, be deemed to be the owner of a ship or any share therein, nor shall the mortgagor have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

So that the act gives no countenance, as it appears to me, to the contention that the plaintiff, by taking a mortgage upon *Barteaux*' shares became the owner of such shares so as to create between himself and the master appointed by *Barteaux* and his co-owners the relation of principal and agent. The issues joined, therefore, upon the pleas averring concealment by the plaintiff of material facts known to him and unknown to the defendants could be found in favor of the defendants solely in the event of actual previous knowledge of the matters alleged to have been concealed being brought home to the plaintiff, in which the evidence wholly fails.

The issue joined upon the plea denying the loss of the vessel by any of the perils insured against, raises the question whether the loss was an actual total loss, or only a constructive total loss, which latter could only be perfected by notice of abandonment in due

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time after the receipt, by the plaintiff, of information that the vessel had suffered the damage which caused the loss. If the loss was an actual total loss the plaintiff would, so far as the issue raising that point is concerned, be entitled to recover without any notice of abandonment, and we shall be relieved from the necessity of determining the objection taken that the notice given was too late and insufficient.

Now, upon the evidence we must take it to be established, that the first information which the plaintiff had of any injury having been sustained by the vessel was upon the 3rd or 5th of June, 1879, and that the extent of such information was that contained in *Lloyd's List*, as published in *London, England*, on the 25th May, 1879, as above extracted.

The proper conclusion to arrive at on the evidence, I think also, is, that, although it may not have been until upon or after the 10th June that the master became aware of the full extent of the injury which the vessel had sustained, and that it was of such a nature that it was utterly impossible to have repairs made at *Colombo*, so as to enable the vessel to proceed to a place where the repairs could have been made, and that it was a physical impossibility, under the circumstances, in her then condition to have taken her to a place where she could have been repaired, she had nevertheless, on the 3rd of June completely lost her character of a ship or vessel, and had become to all intents and purposes as complete a wreck as if she had been broken into pieces, and become, as it has been called, a congeries of planks, by the perils insured against. This, as it seems to me, is the dictate of sound sense, nor is authority wanting in support of it. *Willes, J.*, in *Barker v. Janson* (1), lays it down distinctly. He there says:

If a ship is so injured that it cannot sail without repairs and can-

(1) L. R. 3 C. P. 305.



not be taken to a port at which the necessary repairs can be executed there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship.

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The evidence would have justified a jury in finding that upon the 3rd of June, 1879, when first the plaintiff became aware of the vessel having met with any injury, it was a physical impossibility to take her again to sea without previously undergoing repairs, and that it was not possible that the necessary repairs to fit her to go to sea should be executed at *Colombo*, where there were no appliances whatever, or shipwrights, and that, therefore, she was not capable of being again used as a ship, and that she was not saleable as such, and that the master, in selling, as he did, the materials of which she was composed in parcels, did the best that under the circumstances could be done with her, and that he acted *bonâ fide* and honestly for the benefit of all concerned, and without any knowledge of the vessel being insured by the plaintiff. Under the agreement upon which the verdict for the plaintiff was taken, we must treat as found by the jury everything which upon the evidence could properly have been found by them. Under these circumstances and upon the authority of *Milles v. Fletcher* (1); *Idle v. Royal Exchange Assurance Co.* (2); *Cambridge v. Anderton* (3); approved in *Roux v. Salvador* (4); *Robertson v. Clark* (5); and of *Willes, J., in Barker v. Janson* (6), the plaintiff is, in my opinion, entitled to recover as for an actual total loss without any notice of abandonment.

A further point was taken before us—namely, that by a clause in the policy it is provided that—

No suit or action of any kind for the recovery of any claim upon, under, or by virtue of, this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within

(1) 1 Doug. 231.

(2) 8 Taunt. 755.

(3) 2 B. & C. 697.

(4) 3 Bing. N. C. 288.

(5) 1 Bing. 445.

(6) L. R. 3 C. P. 303,

1884 the term of twelve months next after claim for loss or damage shall be deposited at the office of the company, and in case any such suit or action shall be commenced against the company after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken to be conclusive evidence against the validity of the claim thereby so attempted to be enforced.

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In answer to this objection, it is sufficient to say that there is no plea upon the record under which the objection is open, nor was it suggested at the trial, nor in the rule *nisi* taken out in pursuance of the agreement upon which the verdict was taken, and therefore it is not open to the defendants to make the objection upon this appeal; but, independently of this, there does not appear in the case any real foundation for the objection. The claim for loss or damage referred to in the above clause must be taken to be the same as is comprehended in the terms of the 6th paragraph of the policy as printed in the appeal case, by which it is provided that—

All losses and damages which shall happen to the aforesaid ship or vessel, &c., shall be paid within sixty days after proof made and exhibited of such at the office of the company.

And the twelve months within which the action must be brought for non-payment of such loss, must begin to run only from the deposit of such proof of claim at the office of the company. Now, the office of the company appears to be at *Toronto*, and there is no evidence whatever to show when the plaintiff's "claim for loss or damage was deposited at the office of the company;" so that it is impossible to say when the twelve months began to run, if ever.

For the above reasons I am of opinion that the appeal should be dismissed with costs, and that the plaintiff is entitled to retain his verdict.

*Appeal dismissed with costs.*

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Ritchie.*