

1888 GEORGE W. GEROW (PLAINTIFF).....APPELLANT;

*Nov. 17, 19.

AND

1889 THE BRITISH AMERICAN AS- }
 *April 30. SURANCE COMPANY (DEFEND- } RESPONDENTS.
 ANTS).....

GEORGE W. GEROW (PLAINTIFF).....APPELLANT;

AND

THE ROYAL CANADIAN IN- }
 SURANCE COMPANY (DEFEND- } RESPONDENTS.
 ANTS).....

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

Marine Insurance—Constructive total loss—Liability of company—Cost of repairs—One-third new for old—Construction of condition when vessel not repaired.

A policy of insurance on a ship contained the following clause:—

“In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy.”

The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made.

Held, affirming the judgment of the court below, Patterson J. dissenting, that the “cost of repairs” in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in adjusting a partial

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value.

APPEAL from a decision of the Supreme Court of New Brunswick in favor of the defendants on a special case.

The policies sued on in these cases were precisely similar, and they came before the court below on the same special case, which was as follows :—

1. On the 7th day of September, A. D. 1883, the plaintiff effected a policy of insurance with the defendants on the ship “Minnie H. Gerow” (of which he is part owner), of which policy the facts material to this case are as follows :—

2. The ship, laden with guano, was disabled at sea on her voyage from Labos to Falmouth, England, for orders, and put into Valparaiso for repairs.

3. The cost of repairs and expenses connected therewith at Valparaiso would exceed more than one-half of the value declared in the policy, if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made.

4. If such deduction is made, then the cost of repairs after such deduction would not exceed one-half of the value as declared in the policy.

5. The said ship, after notice of abandonment, was sold at Valparaiso under circumstances such that a prudent owner, uninsured, would not have repaired her ; but the defendants claim that, under the policy, that fact is immaterial.

6. The defendants contend that under the terms of the policy there is not such a constructive total loss of the vessel as would render them liable to pay for a total loss.

7. It is admitted that more than six months had

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elapsed from the date of her first registration when the damage occurred.

8. The policy in question contained the following clause :

“ In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy.”

9. Either party to be at liberty to refer to the policy of insurance on the argument.

10. Should the court be of opinion that the contention of the defendant is correct, then a non-suit is to be entered ; but if the court is of opinion that under the terms and conditions of the policy and the admitted facts the defendants are liable to pay for a total loss, then the judgment to be entered for the plaintiff for the sum of \$2,500, with interest from the first day of January, A. D., 1885, less the amount of premium note and interest, and any other amount due by the plaintiff to the defendants.

The decision of the Supreme Court of New Brunswick on this special case was in favor of the insurance companies. The plaintiff then appealed in each case to the Supreme Court of Canada.

Weldon Q. C. for the appellants. The former law in the United States was in favor of the plaintiffs' contention here *Peele v. The Merchants' Ins. Co.* (1).

This was a decision of Judge Strong, and in consequence of it a form of policy was adopted, making the amount in such case only what the insurers would

have to pay. Parson on Insurance (1), *Potter v. The Ocean Ins. Co.* (2), *Bradlie v. The Maryland Ins. Co.* (3).

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The adjustment is only to ascertain the cost of repairs and distribute it, and the deduction is not made until after the adjustment.

The matter is fully discussed in the case of *Aitchison v. Lohre* (4).

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Barker Q.C. for the respondents, referred to *Smith v. Bell* (5), *Pezant v. The National Ins. Co.* (6), *Orrok v. The Commonwealth Ins. Co.* (7), *Allen v. The Commercial Ins. Co.* (8).

Sir W. J. RITCHIE C.J.—The only point involved in this case is the construction to be put upon a clause in the policy set out in section 8 of the special case, and which is as follows: "In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration; but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel, in case of abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

It is obvious the cost of repairing must be as under an adjustment as of partial loss according to the terms of the policy.

And in case of loss, such loss shall be adjusted in accordance with English practice and the usage of Lloyds (except where otherwise provided for by the conditions of this policy), and authenticated by the agents of the company, if there be one at the place

(1) Vol. 2, p. 130.

(2) 3 Sum. 27.

(3) 12 Peters 378.

(4) 4 App. Cas. 755.

(5) 2 Caine (N.Y.) 155.

(6) 15 Wend. 453.

(7) 21 Pick. 467.

(8) 1 Gray² 157.

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where such proofs are taken, and paid in sixty days after the company shall receive proof and adjustment thereof and proof of interest.

I think effect must be given to the words "in case of repairs the usual deduction of one-third after six months," from which date the deduction will be made. It is clear the cost of repairing under an adjustment in case of abandonment or otherwise as a partial loss is to be according to the terms of the policy which recognizes the deduction of one-third. If so, how can an adjustment be made up unless one-third new for old be calculated in ascertaining the partial loss?

I think the construction put on the clause in the court below was the correct one, and the appeal should be dismissed.

STRONG J.—These causes, which were argued together both here and in the Supreme Court of New Brunswick, involve a question as to the proper legal construction of a particular clause contained in two separate policies of marine insurance. The question was submitted for the opinion of the court below upon a special case stated in each cause by agreement between the parties.

This special case was in the following words:

1. On the seventh day of September, A.D. 1883, the plaintiff effected a policy of insurance with the defendants on the ship "Minnie H. Gerow" (of which he is part owner) of which policy the facts material to this case are as follows:

2. The ship, laden with guano, was disabled at sea on her voyage from Lobos to Falmouth, England, for orders, and put into Valparaiso for repairs.

3. The costs of repairs and expenses connected therewith at Valparaiso would exceed more than one-half of the value declared in the policy, if the usual deduc-

tion of one-third allowed in adjusting a partial loss under the terms of the policy was not made.

4. If such deduction is made, then the cost of repairs after such deduction would not exceed one-half of the value as declared in the policy.

5. The said ship, after notice of abandonment, was sold at Valparaiso under circumstances such that a prudent owner, uninsured, would not have repaired her: but the defendants claim that, under the policy, that fact is immaterial.

6. The defendants contend that under the terms of the policy there is not such a constructive total loss of the vessel as would render them liable to pay for a total loss.

7. It is admitted that more than six months had elapsed from the date of her first registration when the damage occurred.

8. The policy in question contained the following clause: "In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

9 Either party to be at liberty to refer to the policy of insurance on the argument.

10. Should the court be of opinion that the contention of the defendant is correct, then a non-suit to be entered: but if the court is of opinion that under the terms and conditions of the policy and the admitted facts the defendants are liable to pay for a total loss, then the judgment to be entered for the plaintiff for the sum of \$2,500, with interest from the 1st day of

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January, A.D. 1885, less the amount of premium note and interest, and any other amount due by the plaintiff to the defendants.

After argument, the Supreme Court of New Brunswick gave judgment in favor of the defendants, directing non-suits to be entered. From this judgment Mr.

Justice Palmer dissented, holding that the plaintiff was entitled to judgment for the amount agreed upon.

The judgment of the majority of the court was delivered by Mr. Justice King, and Mr. Justice Palmer

has also expressed the reasons for his dissent in a written judgment. In these well-considered judgments

the reasons and arguments relied on in support of the opposite views entertained on the question in dispute

are set forth in a very full and exhaustive manner. The statement of the case already given shows that no

question of law is involved in the appeal, the matter in contest being purely one as to the proper legal construction of the clause relating to the estimation of the

cost of repairs in case of loss, as set forth in the case already stated. In other words, the question is, whether

under the terms of this provision one-third of the gross amount required to be expended for repairs, in the case

(which happened) of a loss, is, upon the principle of "one-third new for old," to be deducted in determining

whether there has been a loss amounting to more than one-half of the value of the vessel, as declared by the

policy, so as to entitle the assured to claim for a constructive total loss. The point really in controversy

may be still further narrowed, for, in fact, it is confined entirely to the meaning to be placed on the words

"cost of repairing" contained in this stipulation limiting the right of the assured to claim for a constructive total loss. This expression, "cost of repairing

the vessel" is construed by Mr. Justice Palmer as meaning the estimated amount of the gross cost of the

repairs which would form the basis upon which an

average adjuster would, if a claim were made for a partial loss, arrive at a final estimate or adjustment of the loss by the deduction of one-third of the amount in respect of the substitution of new for old, and not as meaning the net amount of the loss after that deduction should have been made.

On the other hand, Mr. Justice King and the majority of the court hold that, having regard to the context, these words are intended to denote the net amount which would be the result of an adjustment according to the usual rule followed in adjusting a partial loss, that is, by allowing one-third off the actual cost of the repairs in respect of new for old, and that consequently the words "cost of repairing the vessel" are to be read and construed as synonymous with "the amount of the loss."

I am of opinion the latter is the correct construction.

Mr. Justice Palmer asserts and Mr. Justice King concedes that in construing these policies we must give the assured the benefit of the rule that a provision of this kind is to be interpreted most strongly in favor of the assured and against the underwriters; and entirely admitting the soundness of this principle, I have, in arriving at the conclusion stated, endeavored to give the appellant the full benefit of it.

Although, as I have before said, no question of law is involved in this appeal, yet a reference to some general and elementary principles of the law of marine insurance will aid us to solve the question we are called upon to decide.

The test resorted to in English law to determine if the assured has a right to abandon and claim for a constructive total loss is well established to be that described in the case of *Irving v. Manning* (1), cited by Mr. Justice King, namely: "To consider the policy as altogether out of the question, and to enquire what a

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(1) 1 H. L. Cas. 287.

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prudent, uninsured owner would have done in the state in which the vessel was placed by the perils insured against."

This rule does not prevail in the United States. There, by a long-established usage, an insured owner claiming to recover in respect of a constructive total loss has to show that the costs of repairing the vessel would exceed half its value, before the loss, as the same may be ascertained either by the policy, if it is a valued policy, or by actual estimation, if the policy should be an open one. This usage is said by Chancellor Kent in his commentaries to have been derived from the law of Continental Europe. Whatever may have been its origin it suffices to say that it has long formed the rule according to which, in the United States, it is determined whether or not an assured has a right to abandon to the underwriters and to claim for a constructive total loss, and that irrespective altogether of any express provision to that effect in the policy. It is thus seen that the English and American law of marine insurance are in this particular of the conditions of a constructive total loss entirely different.

The policies now under consideration were executed in New Brunswick by underwriters who are Canadian corporations ; they are therefore, of course, to be construed according to English law as prevailing in New Brunswick. It follows that the right of the assured to abandon as for a total loss would, but for the clause now under consideration, have had to be determined according to the established English rule before stated. These special provisions have, however, introduced into these particular contracts of insurance a rule identical with the general rule of American law as applicable for that purpose.

As regards the ascertainment of a partial or particular average loss, the rule, so far as it is material for the present purpose, is identical in England and the United

States, the adjustment in both countries involving a deduction from the cost of repairs of one-third new for old (at least, in the case of wooden ships of a prescribed age) as a mode of approximating to an amount which should form a sufficient indemnity to the assured without placing him, at the expense of the underwriters, in a better position than he would have been in if no loss had happened.

These elementary and familiar principles of insurance law are stated here, not because they have any direct application to the question for decision, but for the reason that both the rules themselves and the language in which they are habitually stated by courts and text-writers have, as it seems to me, a strong, and indeed a conclusive, influence on the interpretation of the clause we are called upon to expound.

In applying the same American rule which by these policies the parties have adopted as forming the "law of their contracts," requiring a loss of over fifty per cent. to authorize a claim for a total loss, a judicial controversy early arose regarding the principle on which the costs of repairs should be calculated, for the purpose of ascertaining whether the loss amounted to fifty per cent. or not. On the one hand it was held by the Court of Errors of the State of New York, in *American Insurance Co. v. Ogden* (1) and by the Supreme Court of Massachusetts, in *Hall v. Ocean Insurance Co.* (2) that in estimating the cost of repairs for the purpose the rule applied in adjusting a partial loss of deducting one-third new for old should be adopted; whilst, on the other hand, Mr. Justice Story presiding, in the Circuit Court of the United States, in *Peele v. Merchants Insurance Co.* (3), and the Supreme Court of the United States also, in the case of *Bradlie v. Maryland Ins. Co.* (4), decided in 1838,

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(1) 20 Wend. 297; Kent's Com- (2) 21 Pick. 472.
 mentaries, vol. 3, p. 443, ed. 12. (3) 3 Mason 27.

(4) 12 Peters 378.

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held that the deduction ought not to be made. The arguments upon which these conflicting decisions were based have no relevancy here, for what we have to determine is not any question concerning the scope and effect of the rule itself, but the proper legal effect of a clause introduced, as it appears to me, and as I shall endeavor to demonstrate, for the purpose of solving by an express provision the disputed point which, when left to implication, had given rise to the conflict of decision already mentioned. In order to meet the difficulty which the decision of Mr. Justice Story in *Peele v. The Merchants Ins. Co.* (1) and the other cases agreeing with it had given rise to, it is said by Mr. Parsons' Treatise on Marine Insurance (2) that it became the practice in Massachusetts to insert in the policy a clause worded as follows :

It is agreed that the insured shall not have the right to abandon for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured.

The same clause is also stated by Mr. Phillips in his Treatise on Insurance (3) as being in general use for the purpose of obviating the effect of the decision in *Peele v. Merchants Ins. Co.* (1)

Then, considering that the history and derivation of this clause in its general terms, and apart from any reference to a partial loss, is such as before stated, and also that the law in the United States, from whence it is derived, remains still unsettled, the latest decisions of courts of high authority being in direct conflict as to its effect, is it not a reasonable presumption that these words referring to an adjustment as of a partial loss, the meaning of which form the only subject for decision here, were introduced into these policies for the same purpose for which a clause in words almost identical had been inserted in American policies, viz.,

(1) 3 Mason 27.

(2) Vol. 2, p. 130 (n).

(3) 5 Ed. vol. 1, p. 264

to meet the difficulty which had arisen as to the mode of calculating the fifty per cent., and in order to control and explain the provision in such a way as to obviate the ambiguity which would be caused by the conflicting American decisions on the general law as applied in the United States? In other words, is it not fair and reasonable that, finding the parties to have contracted themselves out of the rule of English law, which affords a test for ascertaining whether there has been a constructive total loss, and to have subjected themselves by express agreement to the general rule of the American law, that we should in construing this conventional rule, adopted by the parties, infer that the reference to the adjustment of a partial loss as a guide in the calculation of fifty per cent. was intended to serve the same purpose as that for which a clause, almost identical in its terms, had been introduced into American policies, viz., to anticipate and determine the doubts and disputes which had arisen in applying the rule in the country of its origin? Surely there can be no difficulty in holding that these words:

Unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half its value—

are in all respects the equivalent of, and have no larger nor lesser meaning than the corresponding clause in the American policies:

Unless the amount which the insurer would be liable to pay under an adjustment of a partial loss shall exceed one-half the amount insured.

I can find no substantial or sensible distinction between the words "cost of repairs," in our Canadian policies now under consideration, and "the amount which the insurer would be liable to pay" in the American clause. Both expressions are subject to the condition immediately following "under an adjustment of a partial loss."

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It is not admissible to say that the words "cost of repairs" mean the estimate of the gross expenditure for repairs, upon which the adjustment is based; for it is expressly said that what it is intended to refer to is the expense of repairing "under the adjustment," which can only mean as determined, ascertained or settled by the adjustment, and so necessarily after all deductions usual in the case of a partial loss have been made, which deductions of course include that of "one-third new for old." Thus, the cost of repairs so ascertained by adjustment is the exact equivalent of the amount of a partial loss which the underwriter has to pay. So that whether we consider this clause, derogating from the general law, which the parties have thought fit to import into their contract, in the abstract, and subject it to close verbal criticism and analysis, or whether we investigate its history and construe it in the light thrown upon it by the decisions of courts and the writings of lawyers in the country from which it has been borrowed, we arrive either way at an identical conclusion—that adopted in the judgment under appeal. This alone ought to be conclusive.

Apart, however, from any rigid literal interpretation of the language, I agree with Mr. Justice King that any mercantile man or average adjuster reading these policies with a view to adjusting a claim for a constructive total loss would, as a matter of course, consider the proper mode of proceeding to be to treat the loss in the first instance as a partial loss, and calculate it upon the principle universally applicable to such losses; and this is a consideration which would be of weight, even if the arguments for and against the suggested construction were much more evenly balanced than they are. The argument for the appellant is that we are to ascribe the adoption of these stipulations to an intention to exclude such particular subjects of loss as either under the general law of insurance or under the par-

ticular terms of these policies would be excluded altogether, and not brought into account in calculating the amount of a partial loss. The plain answer to this, besides what has been already stated, is that if we were to confine the meaning in this way we should not be giving due and proper effect to the term "adjustment of partial loss," an expression which, taken in its primary signification, clearly imports a completed calculation of the amount due for a partial loss, made according to the general principles of insurance law, which require the deduction of one-third "new for old."

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The appeals should be dismissed with costs.

TASCHEREAU J.—I am of opinion that these appeals should be dismissed. I concur in Mr. Justice King's opinion.

GWYNNE J.—I am of opinion that these appeals should be dismissed for the reasons stated in the judgment of the majority of the court below, and in that of my brother Strong in this court. The construction thus put upon the clause in question seems to me to be that which the language used naturally requires.

PATTERSON J.—This controversy turns on the interpretation to be given to certain words in the policies issued by the defendant companies.

In searching for their meaning and effect as terms of the contracts, we have no direct assistance from decisions of our own or other courts. The plaintiffs claim the right to abandon the vessel to the underwriters as a total loss, and the defendants, who are underwriters, deny that right.

The vessel was in fact abandoned and sold, as stated in the special case, under circumstances such that a prudent owner, uninsured, would not have repaired her. The ordinary law of marine insurance, apart from

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these particular contracts, warranted the abandonment as a constructive total loss. But the contracts provided that "the insurers will not be liable for a constructive total loss of the vessel in case of, abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half its value as declared by this policy."

The value stated in the policies was \$28,000. To repair the vessel would have cost more than half of the amount; but if a deduction was made of one-third new for old, the amount would be reduced to less than half of the valued amount.

The defendants insist that the "cost of repairing the vessel" must be with the deduction of the one-third, and the court below has sustained that contention, Mr. Justice Palmer dissenting.

The words "cost of repairing," &c., are those for which we have to find the appropriate meaning and force.

The policy, after specifying in the ordinary way the perils insured against, provides that the insurers shall not be liable for any loss or claim arising from a number of causes which are specified in detail—

Nor for any partial loss or particular average, unless it amounts to five per cent., exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss.

Then follows this passage :

Warranted by the assured free from any claim for charge, damage or loss which may arise from jettison, or loss of deck cargo. In case of repairs the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date deduction will be made. Each passage subject to separate average. And the insurers will not be liable for a constructive total loss of the vessel, in case of abandonment or otherwise, unless the cost of repairing the vessel under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy. The assurers are not liable for copper, metal or other sheathing after it has been on forty months; and not liable

for wages and provisions, except in general average, when customary at the port of destination.

Whenever the cost of repairing a vessel under an adjustment of partial loss, according to the terms of the policy, had to be ascertained, one essential inquiry would be whether the repairs were of damage for which the insurers were liable. Damage from the excepted perils, which might be damage to the hull, tackle or apparel of the ship, must be excluded. So also must repairs to copper, metal or other sheathing, if it had been on for forty months. Those particulars give operation to the words "under an adjustment as of partial loss according to the terms of this policy," and limit the estimate of the cost of repairs as between the underwriters and the insured. On a total loss, actual or constructive, the full value of \$28,000 would be the basis of the computation of what each underwriter was to pay. A partial loss would of course be adjusted with regard to the damage only which, under the terms of the policy, was to be made good. Such an adjustment might fall short of half the stated value, while the repairs of all the damage, including that class of damage for which the underwriters were not bound, might exceed the half. In such a case, the estimate on which the right to abandon depended being made "under an adjustment as of a partial loss," there would be no right to abandon. The adjustment or estimate in the present case, which exceeds \$14,000, we must, on this special case, understand not to include any subjects of the insurance for which the underwriters are not liable, under the policies, on a partial loss.

The view of the dissentient judge in the court below was, as I gather from his judgment, that the clause in question was satisfied by an adjustment on the principle to which I have adverted, and that the full sum arrived at was, within the true meaning of the clause—"the cost of repairing the vessel under an adjustment

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as of a partial loss according to the terms of this policy." wherefore, he held the condition to be fulfilled upon which the plaintiff was entitled to treat the loss as a constructive total loss. In the judgment of the majority of the court, which was delivered by Mr. Justice King, those provisions of the policies which exclude certain subjects from the liability of the underwriters for particular average are not noticed, and the deduction of one-third, as new for old, is treated as if it were the only matter to which the phrase—

Under an adjustment as for partial loss under the terms of this policy could refer. If that had been so, the conclusion arrived at would follow almost of necessity.

The deduction of one-third was to be made only after six months from the registration of the vessel, and the special case happens to omit the essential statement that that time had elapsed. We must, however, assume, as no doubt the fact is, that the time had elapsed.

The question whether the words—

The cost of repairing the vessel, under, &c.—
are to be read as meaning

The amount which would be payable to the insured if the loss were treated as a partial loss"

is the question to be decided.

Why should the language be read as anything but what the companies have themselves employed?

"Cost of repairing" might, it is true, without much violence, be read as signifying the cost to the underwriters as what they would be liable to pay for repairing, which would be only two-thirds of the cost of repairing. If necessary, in order to give effect to the provision, and *ut res magis valeat quam pereat*, it might be the duty of the court so to assist the expressed idea by intendment. But when the words in their natural and literal force have full operation, it does not appear consonant with sound principles to extend their meaning in favor of the parties whose language they are.

My view may, I think, be supported by a legitimate argument from what we learn of the practice of Insurance in the United States from works of authority, such as those of Parsons and Phillips.

A clause, cognate with the one before us, has for many years been common in American policies, having been introduced for the purpose of settling or avoiding questions on which there was a conflict of opinion, namely, whether or not the one-third for new in place of old ought to be deducted in computing the amount of damage which would justify an abandonment as for total loss; and whether, if one-third was deducted, the fifty per cent. ought not to be computed on the actual value of the vessel at the time of the loss, irrespective of the value named in the policy (1).

The weight of authority seems to have been for either computing the full cost of the requisite repairs without deduction of the one-third, or if the one-third were deducted, then for taking the actual and not the stated value of the vessel as the basis for computation of the fifty per cent.

The clause adopted and in use in American policies reads thus:

It is agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed one-half the amount insured.

We may safely assume that our insurance companies adopted the clause we have now to construe for the same reasons, and in order to avoid the same questions as the American authorities. But what do they say? Where in the United States *the amount which the insurer would be liable to pay*, or in other words, two thirds of the cost of repairing, is to determine the right to abandon, our policies expressly say *the cost of repairing*. With the American precedent before them, they have deliberately used different language. Why should we construe the language as if it were the same, and not different?

(1) 2 Parsons 129; 2 Phillips 265.

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The more reasonable understanding, as it strikes me, is that while the American insurers, choosing between the opposing opinions which existed, adopted the rule that the one-third should be deducted, these companies of ours adhered to the other view, and said that the cost should govern, in both cases the stated value of the vessel, being that on which the fifty per cent. was to be computed.

There is another view of the subject which, with me, bears in the same direction upon this question of construction.

The right to abandon ordinarily arises when the damage is such that the vessel, if repaired, would not be worth the cost of the repairs, and does not, in principle, depend on the cost of repairing bearing any defined proportion to the value stated in the policy, or even to the actual value.

The statement in this special case respecting the sale of the vessel sets forth facts that would seem to justify the abandonment, unless the policy requires something more. The clause in question is a restriction in favor of the insurer. It is not material to consider closely whether its effect might be to entitle the insured to abandon a vessel as a constructive total loss whenever the cost of repairing her would exceed the specified proportion of her stated value. In its form, it is not an entitling provision in favor of the insured, but a restriction which may be to his prejudice, and which would be notably so under the facts before us, if interpreted as contended for by the companies.

For this reason, as well as on the principle of the maxim *verba chartarum fortius accipiuntur contra proferentem*, it should be construed strictly.

On these grounds, I agree in opinion with Mr. Justice Palmer, and think the appeal ought to be allowed.

Appeal dismissed with costs.

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