

1894
 *May 9.
 *May 31.

WILLIAM H. ROURKE AND RACHEL
 E. ROURKE, HIS WIFE (PLAINTIFFS) } APPELLANTS;

AND

THE UNION INSURANCE COM-
 PANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Trover—Conversion of vessel—Joint owners—Marine insurance—Abandonment—Salvage.

A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest.

A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of her interest by any action of the underwriters but by the decree of the court under which she was sold for salvage.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside the verdict for the plaintiffs at the trial and ordering a non-suit.

The facts of the case are set out in the judgment of the court delivered by Mr. Justice Sedgewick, as follows:—

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

This is an action on trover brought against the defendants for the alleged conversion of the plaintiff's interest in the schooner "James Rourke" a British vessel owned as follows:—

The plaintiff Rachel E. Rourke, twenty-four shares; one E. V. Rourke, eight shares; Charlotte Rourke, wife of James Rourke, twenty-four shares; Phœbe Rourke, eight shares. James Rourke, Charlotte's husband, was ship's husband as well as the particular agent of his wife and Phœbe Rourke in the insurance of their respective interests. The plaintiff's share and that of E. V. Rourke were uninsured. Charlotte and Phœbe's interests were insured in the defendant company.

On the 11th February, 1891, the schooner while on a voyage from Boston to St. John, New Brunswick, laden with phosphate, became stranded on a reef at North Haven, on the coast of Maine, about ten miles distant from the port of Rockland. The vessel was badly damaged and a telegraph message was sent to James Rourke the ship's husband. He lived at St. Martins near the city of St. John where the owners lived William and Edward being his brothers and Phœbe his sister; the plaintiff was at the time his clerk as well. James Rourke upon receiving the message left for St. John, saw the agent of the defendant company, informed him of the telegram received and that he believed the schooner was a wreck. On his arrival at Rockland, February 14th, he saw one Butler who was acting as the company's representative who had sent down a Mr. Bunker to look after the wreck. James Rourke on his arrival boarded the vessel and examined her condition. She had then been stripped of her rigging which had been brought on shore and placed in a building owned by one Ledbetter for safe keeping. Rourke remained near the scene until the 17th, three days, and then returned to New Bruns-

1894
 ROURKE
 v.
 THE UNION
 INSURANCE
 COMPANY.

1894
 ~~~~~  
 ROURKE  
 v.  
 THE UNION  
 INSURANCE  
 COMPANY.

wick and although ship's husband he left no directions as to the vessel, cargo or outfit nor did he take any means to save them. Upon his arrival at St. John on the 18th of February he saw the agent of the Insurance Company, told him about the position of the vessel and that in his opinion it was for the interest of all concerned better to leave her there, and afterwards, on behalf of his wife and sister, gave notice of abandonment and eventually was paid a large portion of his claim the question as to whether he was paid for a total loss being disputed by the appellants. After Mr. Rourke's departure the agent of the company appears to have advertised the sale of the vessel as she lay on the reef and her outfit, the outfit which was in Ledbetter's building being purchased by one Smith and the vessel by one Keene; the wreck and sails, however, seem to have come into Keene's possession, and subsequently the schooner was floated and brought to Rockland, a place of safety, where she could have been repaired, the sale in the mean time having apparently been abandoned although the evidence on this point is exceedingly obscure. Mr. Butler, the respondent's agent, on March 12th notified James Rourke, amongst other things, that she was not a total loss and requested him to come to Rockland, pay charges and take possession of the property. Neither the appellants nor James Rourke took any notice of this telegram nor did they do anything afterwards in the direction of taking the property or repairing the vessel. The vessel could not be kept afloat; she was put on the Marine Railway at Rockland and nothing being done Keene, who had succeeded in taking her off the rocks, commenced proceedings by way of libel in the United States District Court of Maine, setting out the facts above stated, and that he had incurred expense to the extent of \$1,000 in salving the property,

and asked that this amount might be paid him and that the vessel should be condemned and sold to pay the same. No defence was ever made by any person interested in the vessel to these proceedings, and eventually a decree of condemnation was made and the vessel was sold thereunder, the proceeds being paid into court and subsequently disposed of as by the decree ordered.

1894  
 ROURKE  
 v.  
 THE UNION  
 INSURANCE  
 COMPANY.

Subsequently the plaintiffs brought this action against the defendant company to recover damages by reason of the company's action in selling the vessel and outfit while wrecked upon the reef at North Haven. The jury found a verdict in favour of the plaintiff which verdict was set aside by the Supreme Court of New Brunswick upon appeal, and a non-suit ordered to be entered pursuant to leave reserved at the trial.

*McLeod* Q.C. for the appellants referred to *Shepherd v. Henderson* (1); *Jacobs v. Seward* (2).

*Weldon* Q.C. and *Palmer* Q.C. for the respondents.

The judgment of the court was delivered by—

SEDGEWICK J.—(His Lordship stated the facts appearing above and proceeded as follows.)

I am of opinion that the judgment of the Supreme Court is right. The action of the defendant company, in so far as its dealing with the interests of the assured was concerned, was perfectly proper under the "sue and labour" clause of the policy; it was within their authority to do all that they did do in respect to that interest; it was equally within their power to act as they did by reason of the abandonment to them of the assured's interest. At all events it is absolutely out of the question for the plaintiffs to deny the authority of

(1) 7 App. Cas. 49.

(2) L. R. 5 H. L. 464.

1894  
 ~~~~~  
 ROURKE
 v.
 THE UNION
 INSURANCE
 COMPANY.

 Sedgewick
 J.

the respondents to act as they did, whether as the agents of the assured or by virtue of their having a right to take possession of the wreck upon her abandonment by James Rourke on behalf of the assured. The position of the company then was that of a joint owner with the plaintiffs' of the vessel in question, and the only question upon this appeal is, whether the acts of the respondents' agents amounted to a conversion of the plaintiffs' interests. I am strongly convinced that the conduct of James Rourke, who, as ship's husband, was the agent of the plaintiffs in respect of this vessel, precludes the plaintiffs from bringing this action. If, as they contend, the vessel was not a total wreck, and could with advantage to the owners have been repaired and brought safely to port, his relationship to the plaintiffs as ship's husband most certainly had not ceased. It was his duty in their interest to have done everything possible to protect them. The evidence convinces me that he was perfectly satisfied that there was a total loss, and that it would be for the benefit of all concerned to let the insurance company deal exclusively with the wreck. I do not, however, wish to place my judgment upon this ground. The defendant company were in the position of co-owners with the plaintiffs of the wreck, and the question as to whether the alleged sale amounted to a conversion depends altogether upon what the result of that sale was. If the effect of it was to deprive the plaintiffs of their interest in the property, or to amount to a destruction of the property, so that under no circumstances could they in the future have any benefit from it, then, according to the authorities, a conversion would have been complete; but no such result followed from the sale in question; the effect of the sale was the very reverse; the assured owners had abandoned the property; James Rourke, as agent of the plaintiffs, acted as if he had abandoned

the property, but the purchasers at the sale saved it and brought the wreck to a place of perfect safety, where the plaintiffs might have come in less than a day and taken possession of it. The plaintiffs were in fact subsequently deprived of their right of possession, but not by reason of any sale of the property, but by reason of the decree of the United States District Court, the court having unquestionable jurisdiction, as respects this vessel, to decree her forfeiture and sale. If the plaintiffs now find themselves deprived of their interest in the vessel it is not through any action of the respondents, it is solely in consequence of the action of Keene claiming for salvage services in respect to the vessel, and their own inaction in not making their defence in the United States court; if he were not entitled to the decree he had obtained by reason of his not having rendered the salvage services upon which that decree was based. The authorities are numerous and the law is clear as to what constitutes a conversion by one joint owner against his co-owner. In *Mayhew v. Herrick* (1) it was decided that a mere sale of a property was not enough, though for such a disposition of a property as amounted to a destruction of it one tenant in common would be liable in trover to his co-tenant. In *Jacobs v. Seward* (2) the Lord Chancellor said:

So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action can lie against him by his co-tenant. Now, it is perfectly lawful for a tenant in common to make hay, for somebody must make it, just as it is lawful for a tenant in common of a whale to make the blubber into oil. That is a perfectly legitimate purpose. It does not signify whether one or other of the tenants in common made use of it, it being made use of in an ordinary and legitimate way. No trover would, therefore, lie against the co-tenant in respect of his having done what he did.

The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, he seeking to exercise his

(1) 7 C. B. 229.

(2) L. R. 5 H. L. 464.

1894
 ROURKE
 v.
 THE UNION
 INSURANCE
 COMPANY.
 Sedgewick
 J.

1894
 ~~~~~  
 ROURKE  
 v.  
 THE UNION  
 INSURANCE  
 COMPANY.  
 \_\_\_\_\_  
 Sedgewick  
 J.  
 \_\_\_\_\_

rights therein, and being denied the exercise of such rights. There was the case of a ship being taken possession of by one tenant in common and sent to sea without the consent of his co-tenant. In that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share. But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed.

The case referred to by the Lord Chancellor was *Barnardiston v. Chapman* cited in *Heath v. Hubbard* (1). In that case the plaintiff was tenant in common of one moiety of a ship and the defendants tenants in common of another moiety. The defendants had forcibly taken the ship out of the plaintiffs' possession, secreted it from him, changed its name and afterwards handed it over to a third party who sent it on a voyage in the course of which it became a total loss. The jury having found that there had been a destruction of the vessel by the defendants' means the court refused to disturb the verdict. The law on the subject is well stated in Clerk & Lindsell on Torts (2).

If two or more people own a chattel either jointly or in common, one of them cannot bring an action against the others merely for an interference with his right of possession, since the possession of each is alike lawful, and the manner of its exercise is left by the law to be settled among the parties themselves. But if one co-owner has deprived the other of all possible use and enjoyment of the property, either in the present or the future, then he has been guilty of an act of conversion. It is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it. Short, therefore, of "destruction or something equivalent" one co-owner may exercise the full rights of property over a chattel in defiance of the wishes of the other co-owners, without being guilty of a tort. He may destroy its identity by the process of manufacture, he may create a lien on it, he may sell it, and this immunity extends to those who stand in his shoes. If a sheriff seizes partnership pro-

(1) 4 East 121.

(2) P. 179.

perty under an execution against one of the firm he becomes part owner, and this part ownership protects him, even though he purports to sell the entire interest in the goods. If co-owners jointly pledge property, and one of them without the authority of the other afterwards demands the property back tendering the amount due, the pledgee is not guilty of a conversion by refusing to deliver.

In the present case the company had unquestionably the right for the protection of their own interests to take the cargo from the wreck, as well as her rigging and other appurtenances; they had equally the right, in their own interests, to restore the rigging and appurtenances to the vessel, with a view of saving her if possible. They had a right to employ parties, on their own account, to use all possible means to make such repairs on the vessel as would enable her to be brought to a place of safety. Whether there was a sale or not, all this was done by the company, or by persons acting with the authority of the company, and there was nothing done, so far as they were concerned, which at any time prevented the plaintiffs from taking possession and treating the vessel as if no disaster had ever overtaken her.

For these reasons I am of opinion that the judgment of the Supreme Court of New Brunswick is right, and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for appellants: *E. & R. McLeod & Ewing.*

Solicitors for respondents: *Weldon & McLean.*

1894  
 ROURKE  
 v.  
 THE UNION  
 INSURANCE  
 COMPANY.  
 —  
 Sedgewick  
 J.  
 —