H. B. SEDGWICK AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE MONTREAL LIGHT, HEAT AND POWER COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*March 9, 10.
*May 4.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC SITTING IN REVIEW AT MONTREAL.

Appeal—Court of Review—Appeal to Privy Council—Appealable amount—Amendment to statute—Application—Notice of appeal—New trial—Marine insurance—Constructive total loss—Trial by jury—Misdirection.

An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. ch. 75 (Que.) the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore.

Held, that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.

By sec. 70 of the Supreme Court Act notice must be given of an appeal from the judgment, *inter alia* "upon a motion for a new trial."

Held, that such provision only applies when the motion is made for a new trial and nothing else and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment *non obstante* or, in the alternative, for a new trial.

In order to determine whether or not a ship is a constructive total loss under a policy of marine insurance the value of the hull when broken up should be added to the cost of repairs. *Macbeth* v. *Maritime Insurance Co.* ((1908) A.C. 144) followed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Every vessel submerged in a river is not *ipso facto* to be deemed a constructive total loss. The total loss of its cargo rendering the further prosecution of the particular voyage or adventure "not worth pursuing" does not, in itself, warrant a finding that a vessel is a constructive total loss; and the trial judge having instructed the jury that, if they found such a loss on cargo they might, thereupon, find, under article 2522 of the Civil Code, that the vessel itself was a constructive total loss, their finding that the vessel was a constructive total loss was set aside for misdirection and a partial new trial was ordered.

Judgment appealed from (Q.R. 34 S.C. 127) reversed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal,(1) affirming the judgment entered in the Superior Court, District of Montreal, by Mr. Justice Hutchison, upon the verdict of the jury at the trial, in favour of the plaintiffs for $2,700 with interest and costs.

The circumstances of the case are stated in the judgment now reported.

Lafleur K.C. and *Pope* for the appellants.

R. C. Smith K.C. and *G. H. Montgomery* for the respondents.

The judgment of the court was delivered by

ANGLIN J.—The defendants, marine insurance underwriters, appeal from the judgment of the Superior Court of the Province of Quebec, sitting in review, affirming the judgment of Hutchison J. in favour of the plaintiffs (the insured) upon a policy of marine insurance on the cargo of the barge "Maria." The risk, was upon "total loss" of the cargo caused "by total loss of vessel." The jury found that there was

(1) Q.R. 34 S.C. 127.

an actual total loss of the cargo and a constructive total loss of the barge. The appeal is against the latter finding and generally upon grounds of misdirection.

The respondents raise two objections to the jurisdiction of this court: 1st, that the amount involved, $2,700, does not give the right of appeal; 2ndly, that no notice of appeal was given by the appellant pursuant to section 70 of the Supreme Court Act.

The provincial legislation raising the limit of cases appealable from the Court of Review to the Privy Council from £500 to $5,000 (8 Edw. VII. c. 75) became law on the 25th April, 1908. The judgment in appeal was rendered by the Court of Review on the 22nd April, 1908. The right of appeal had already vested in the appellants when the statute upon which the respondents rely was passed. The statute, which contains no provision making it retroactive and does not deal with procedure only but affects rights, does not in my opinion take away the right of appeal in this case conferred by section 40 of the "Supreme Court Act."

The other objection, based upon section 70 of the Supreme Court Act, is, I think, also ill-founded. That section is as follows:

> 70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial or from the judgment upon a motion for a new trial, shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the court appealed from, or a judge thereof, allows.

This is not an appeal upon a special case, nor from a judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial. No point was

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reserved at the trial. Neither do I think it is an appeal "from the judgment upon a motion for a new trial" within the meaning of that phrase in section 70. The motion in the court below was for judgment in favour of the defendants *non obstante veredicto,* and, only in the event of the defendants not being entitled to this relief and as an incidental alternative, for a new trial. In my view the words "motion for a new trial," in section 70, should be read as meaning "motion for a new trial only" and not as including cases in which the motion is substantially for other relief and only as an alternative for a new trial. See *Leishman* v. *Garland*(1), at page 243. Upon any other construction this section would apply to almost every appealable case, which was manifestly not intended.

I therefore think the objections to the jurisdiction cannot prevail.

Upon the merits there can be no doubt that there has been a partial mistrial of this action. The questions for the jury were framed and the trial itself was conducted upon the principles laid down by the English Court of Appeal in *Angel* v. *Merchants Marine Insurance Co.*(2). The mixed question of law and fact, whether or not there had been a constructive total loss of the vessel, was left to the jury, but upon a direction by the learned judge which gave to them an entirely mistaken standard as to what constitutes a constructive total loss. The test of constructive total loss according to the *Angel Case*(2) should be whether the cost of permanent repair would or would not exceed the value of the ship so repaired, and the

(1) 3 Ont. L.R. 241.

(2) [1903] 1 K.B. 811.

shipowner is not entitled to add the value of the wreck to the cost of repair in determining whether there was a constructive total loss of the ship. This decision was distinctly overruled by the House of Lords in *Macbeth* v. *Maritime Insurance Co.*(1), and it was there decided that

> in determining the question whether a ship seriously damaged by perils insured against can be treated as a constructive total loss the test is whether a prudent, uninsured owner would have repaired her having regard to all the circumstances. In this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs.

The jury were not asked to find and have not found the break-up value of the wreck as she lay on the bottom of the river. The evidence upon this point, to which little attention seems to have been directed, is unsatisfactory and conflicting.

But the defendants' interests were not prejudiced by the application of the test propounded in the *Angel Case*(2), which is more favourable to them than that established by the *Macbeth Case*(1). This misdirection might not therefore, without more, warrant the setting aside of the finding that the vessel was a constructive total loss.

That every vessel which sinks in one of our rivers is *ipso facto* to be deemed a constructive total loss—as contended by the learned counsel for the respondents—is a view, in my opinion, not warranted by anything said in the *Macbeth Case*(1), and not consonant with the test of constructive total loss there formulated.

In his charge the learned trial judge applied to the question of constructive total loss of the vessel a

(1) [1908] A.C. 144. (2) (1903) 1 K.B. 811.

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test prescribed by article 2522 of the Civil Code for determining when a loss is constructively total, which appears to be intended for application only to the case of loss of cargo. The article reads:

> Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when, by reason of any event insured against, the thing though not wholly destroyed or lost becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing.

The learned judge told the jury in effect that a total loss of the cargo would result in the voyage and adventure of the barge being lost or rendered not worth pursuing and, therefore, that if they found that the cargo was a total loss they might find for that reason that the vessel itself was a constructive total loss. He put it in this way:

> Here is the other alternative. It is constructive total loss when the voyage and adventure are lost or not worth pursuing. There is no doubt this voyage was not pursued. It was not continued. Was it worth continuing under the circumstances, with the cargo gone? Now it is a matter for you to decide.

It is impossible to support the finding of constructive total loss of the vessel based upon this direction.

There remains the question whether the motion of the appellants for judgment in their favour *non obstante veredicto* should prevail, or whether their relief must be limited to the granting of a new trial. Upon this question being raised in the course of argument counsel referred to articles 496 and 508 of the Code of Civil Procedure. These provisions are both found in chapter XXI, which is intituled "Trial by jury" and in section X, which is headed "Remedies against Judgments and Proceedings in Reserved Cases." Article 496 reads:

496. The court may, in all cases where the judgment of the trial judge, or the verdict in a reserved case, is attacked, apply any remedy by which it considers that the ends of justice will be attained, even if such remedy has not been specifically demanded by any of the parties.

Article 508 reads:

508. A judgment different, in whole or in part, from that rendered by the trial judge, or from the verdict in a reserved case, may be rendered in any of the following cases:

1. When the facts as found by the jury require a judgment in favour of the party moving or inscribing, or the judge has erred as to the real effect of the verdict;

2 When the allegations of the party in whose favour the verdict or the judgment has been rendered, are not sufficient in law to maintain his pretensions;

3. When it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the party moving or inscribing.

Dealing first with article 508, it is apparent that when the party moving attacks merely the judgment and does not seek to set aside the verdict the appellate tribunal is given jurisdiction to enter in favour of the party moving any judgment warranted by the findings of fact or the real effect of the verdict. But when the party moving attacks the verdict itself and must set it aside to obtain relief, two restrictions are placed upon the exercise of its power by the court: First, it must be a verdict "in a reserved case"; and secondly, it must be absolutely clear from all the evidence that no jury would be justified in finding any verdict not in his favour. We are not dealing with a reserved case and it cannot be contended that the other provisions apply. It follows that the appellant cannot have judgment *non obstante veredicto* under article 508.

Turning to article 496, it is apparent that a motion against a judgment merely, involving no attack upon the verdict, may be made in any case; but where the

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party moving would attack the verdict there must have been a reserved case to enable the court to exercise the powers conferred by this article. There was not, as already stated, a case reserved by the trial judge. This action came before the Court of Review by inscription of the defendants.

Neither under article 508 nor under article 496, therefore, are the appellants entitled to ask that the findings of the jury should be set aside, new findings made upon conflicting evidence and thereupon judgment entered in their favour.

An instance in which article 496 was successfully invoked by a party dissatisfied with the judgment in an action tried with a jury is found in *Roberts* v. *Hawkins*(1), in 1898.

Whether, where there is a reserved case under articles 496 and 508, the appellate courts in Quebec should exercise wider powers than are exercised by English appellate tribunals under the judicature rules is a question which I desire to leave open for future consideration should such a case arise. See authorities collected in Snow's Annual Practice, 1909, at page 574, in the Yearly Practice, 1909, at page 539, and in Holmested & Langton's Judicature Act, (Ont.) (3 ed.) pages 812-814, 1059; also *Ferguson* v. *Grand Trunk Railway Co.*(2), *per* Lemieux J., at p. 82.

Upon the important question as to the break-up value of the wreck there is no finding of the jury. Their finding of constructive total loss based upon misdirection as to the application and effect of article 2522 C.C. must be set aside. The making of a new finding upon

(1) Q.R. 7 Q.B. 428; 29 Can. S.C.R. 218.

(2) Q.R. 20 S.C. 54.

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that question would involve determining the break-up value, which, according to the evidence, may be any sum between $100 and $700, and it might be necessary to pass upon the credibility of the witnesses who give evidence upon it. That is eminently a function of the jury which should not in my view be usurped by an appellate court. *McLachlan* v. *The Accident Ins. Co. of North America,* in 1890, (1).

Some of the findings of the jury, such as the 8th and 9th, seem quite irrelevant; but, if disregarded, they will probably be innocuous. They may, therefore, be allowed to stand with the other findings properly made. The questions covered by these latter findings it seems unnecessary to submit to the consideration of a fresh jury.

It follows that the judgment below should be vacated and the finding of the jury upon the 10th question set aside. The action should be remitted to the Superior Court in order that another jury may determine the break-up value of the wrecked vessel, which they should be asked to find specifically. They should also be asked to find whether the vessel was or was not a constructive total loss according to the test propounded in *Macbeth & Co., Ltd.* v. *Maritime Ins. Co.*(2). Upon the findings already made and which are undisturbed, supplemented by such new findings, the Superior Court will then direct such judgment to be entered as it deems proper.

The appellants should have their costs of the appeal to this court and of the proceedings in the Court of Review. The costs of the abortive trial should abide the event of the new trial.

(1) 34 L.C. Jur. 43.

(2) [1908] A.C. 144.

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Motion to quash dismissed and appeal allowed with costs.

Solicitors for the appellants: *Lafleur, Macdougall, Macfarlane & Pope.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*