

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Currie and Co. v. the Bombay Native Insurance Company, from the Court of the Recorder of Rangoon: delivered December 18, 1869.*

Present:

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THIS is an Appeal from the Judgment of the Recorder of Rangoon dismissing the suit of the Appellants brought to recover the amount of two Policies of Insurance effected by them with the Respondents upon the "cargo" and "disbursements" respectively of the ship "Northland" upon a voyage from Moulmein to Madras.

The policies, which were dated 1st June, 1867, were against total loss only.

The "Northland," with a cargo consisting partly of teak and partly of Padoak and other timber (of great specific gravity), set sail from Moulmein on the insured voyage to Madras on the 2nd June, 1867. She proceeded in charge of a pilot down the Moulmein River in tow of a tug steamer, and came to an anchor about half-past 5 in the evening of that day.

In consequence of the strength of the tide the "Northland" dragged her anchors and went aground about 9 o'clock. Endeavours were made during the night to get her off, but without success; and in the morning, the tide having left her, she was found (in the language of the pilot and the captain) "broken," or "almost broken in two." And the captain added, "if there had been any means by which she could then have been got into deep water she would most probably have gone down."

The captain procured a survey of the ship, and on the 6th June three surveyors reported that they found her lying ashore on the sands perfectly upright, but hogged to the extent of 4 feet; and after describing particularly other injuries which she had sustained they concluded their report in these terms: "In consequence of the vessel being loaded with a cargo of Padouk and teak timber we would recommend that she be stripped and dismantled with all despatch, and steps taken to save as much of the cargo and stores as possible for the benefit of all concerned." The Underwriters had a survey made on their behalf by a Mr. Pech, upon whose evidence in other respects their Lordships are not disposed to lay any stress, but upon this occasion he substantially agreed with the other surveyors, and reported as follows: "Her hull is so seriously injured that I recommend prompt and decisive steps be taken to dismantle and discharge for the benefit of all interested."

The captain, in accordance with the recommendation of the surveyors, proceeded to dismantle the vessel, and "sent down spars and sails, and everything above water which they could move." This work of dismantling continued until the 10th June, the day on which a notice of abandonment was given, but nothing was done or attempted towards discharging the cargo, which, according to the evidence of Mr. Dodd, one of the surveyors, by employing extra hands, might have gone on simultaneously with the work of dismantling the vessel. The grounds upon which the captain thought it would be useless to attempt to get out the cargo were stated by him to be that, "at the time the vessel was aground the weather was nasty and squally up to the 10th or 11th of June; that at that time of the year bad and heavy weather is to be expected, that he didn't think he could have got out a single log of the cargo without destroying the ship by cutting her open. That if the ports (meaning the openings through which the timber was shipped, and under ordinary circumstances would have been taken out of the vessel) had been opened she would have filled with sand; and that if he had attempted to get at the cargo by cutting the ship, with the weather such as it was at the time, he didn't think he should have

saved any of the ship or cargo." There is some contradictory evidence as to the state of the weather between the 6th and the 10th or 11th of June. The pilot, without specifying the exact time to which he was speaking, said, "The weather was very dirty, blowing hard with rain. There was a heavy sea on at high water. At low water it was smooth enough." The notarial protest made by the captain, however, does not state that there was any stormy weather between the time of the vessel grounding and the 10th or 11th June. His description of the weather on each day is, "Thursday, 6th June, commenced with light cloudy weather and variable winds." He gives no account of the state of the weather on the 7th June. On the 8th June he describes as "squally weather and rain." But on Sunday, the 9th June, this is his description—"Throughout these twenty-four hours fine clear weather and moderate breeze from S.W." On Monday, the 10th June, he states it to have been "fine all day, clear weather, and very hot." And on Tuesday, the 11th of June, that the "first and middle part was fine clear weather and very hot, with fine S.W. breeze." This protest of the captain tends strongly to confirm the evidence of the witness Bodeker, who is the agent of the Respondent, and who swore that "there had been unusually fine weather for some time before the second survey.

With respect to the reason given by the captain for not making any effort to save the cargo, that none of it could be got out without cutting the ship open, this was not the opinion of the surveyors at the time of the first survey, but on the contrary, they recommend "steps to be taken to save as much of the cargo as possible." And at the trial, Mr. Dodd, the Government Surveyor, said, "On the second occasion on which I visited the ship I did not think it was possible to save the cargo without cutting the ship." And, "When I saw the 'Northland' first I think she could have partly discharged her cargo and come up to Moulmein." Another of the surveyors, Mr. Carruthers, said, "It was on the second survey that I came to the conclusion that the cargo could not be got out except by cutting the ship's decks."

Before this second survey was made, and while it was the opinion of the surveyors that steps ought to

be taken to save the cargo, the assured, the Appellants, on the 10th June, 1867, wrote to the Underwriters in these terms: "With regard to the 'Northland,' we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements."

On the following day, the 11th June, another survey took place by the same three surveyors who had made the former one, and they reported as follows: "The ship is hogged to a fearful extent, and broken amidship, the water flowing and ebbing in and out and through her as the tide rises and falls, and the bow ports under water at high tide. We are of opinion it would be impossible to save the cargo, which consists of Padouk and teak, without cutting the ship's decks and beams, on account of the logs of timber being so severely jammed, which is caused by the vessel being so fearfully hogged and out of shape."

After this second survey the captain, on the 14th June, advertized for sale by public auction the wreck of the British ship "Northland," together with her cargo of timber, in one lot, and on the following day the ship and cargo were sold for the sum of 13,000 rupees. The purchasers immediately after the sale proceeded to discharge the timber, and succeeded in obtaining all of it except sixty logs. There were two timber ports at the side and one on the deck. These were opened, and the timber was got up through the hatchway and out of the ports, but the greater part was lifted through the hatchway. The person employed by the purchasers to discharge the cargo stated in his evidence that the vessel remained in the same position all the time they were discharging, and that they found no difficulty whatever in getting it out. They worked for thirty-five days uninterruptedly, but on the thirty-sixth day there was a strong wind, and the vessel became a wreck, and thereupon they ceased working and left her. Under ordinary circumstances the cargo could have been discharged in twenty-one days. Upon this evidence the Recorder was of opinion that there was no total loss, actual or constructive, within the terms of either of the two Policies, and that even if the assured had a right to abandon, there was no sufficient notice of abandonment.

Upon the argument before their Lordships, the Solicitor-General for the Respondents very properly admitted that the notice of abandonment was in its terms sufficient. The case upon which the Recorder founded his Judgment of the insufficiency of the notice was a *nisi prius* case of *Parmeter v. Todhunter*, 1 Camp. 541, in which there having been a verbal notice that the ship insured had been captured, recaptured, and carried into Grenada, and that the underwriters were required to settle as for a total loss, and to give directions as to the disposition of the ship and cargo, Lord Ellenborough said "the abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." But whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word "abandon;" any equivalent expressions which informed the underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient.

There can be no doubt that the letter of the 10th June from the assured to the Underwriters was a sufficient intimation of the intention of the assured to divest themselves of the property in the "Northland," and to vest it in the Underwriters, subject, of course, to the question of their right to abandon, upon the ground of either an actual or a constructive total loss.

The Respondents confined their answer to the Appellants' case to the denial of there having been a total loss of the cargo, and to the objection that if there were a total loss the notice of abandonment was not given within a reasonable time.

What is a reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the assured is not to delay his notice when a total loss occurs, in order to take his chance of doing better for himself by keeping the subject insured, and then when he finds it will be more to his advantage to do so, throwing the burthen upon the Underwriters, while, on the other, the Underwriters cannot complain of a suspense of judgment fairly exercised on the part of the assured, to enable him to determine

whether the circumstances are such as entitle him to abandon.

In the present case, assuming the loss to be a total one, there appears to have been no unreasonable delay in giving the notice of abandonment. At the time of the first survey on the 6th June, there was no reason for supposing that the timber would be totally lost. The surveyors at this time recommended steps to be taken which they must have supposed would have been effectual to save some, at least, of the cargo. But at the time when the notice was given (as sufficiently appears by the Surveyors' Report of the following day), things had assumed a much more serious appearance, so as to justify the apprehension that the cargo would be entirely lost. Whether the vessel was brought into the condition described in the second survey, suddenly, or gradually between the 6th and the 10th June is not in evidence, but in either case their Lordships think that there was no unreasonable delay in giving the notice of abandonment, and that supposing there was a total loss of the subject insured it would entitle the Appellant to recover the amount of the policies.

We arrive then at the question whether there was a total loss under the policies. And here we must distinguish between the policy on the timber, and that upon the disbursements, as different considerations are applicable to them. Taking first the policy on the timber, does the evidence show that the assured were entitled to treat the case as one of total loss? It cannot be contended that at the time of the first survey the timber, or at all events some part of it, could not have been saved; and if part might have been saved the loss, of course, could be only partial. The surveyors were all of opinion that endeavours should be made to get the timber out of the ship, and at the first survey they did not think it would have been necessary to cut the decks to effect this object. It was the duty of the assured, or of the captain of the "Northland" (to whom everything appears to have been left), to take some steps in accordance with the recommendation of the surveyors to try and save the cargo. But towards this object the captain literally did nothing. As far as dismantling the ship went he acted upon the Report of the Surveyors,

and continued this particular work down to the 10th June, but according to Mr. Dodd this need not have interfered with the discharge of the cargo, for although the crew could not have assisted in that service, "by employing extra hands both operations might have been conducted together."

The excuse offered by the Captain for not attempting to get out the timber is that not only at that time of the year "bad and heavy weather" might be expected, but that the weather was actually "nasty and squally," by which he must be understood to mean that it was of such a character as to render it impracticable to make even an attempt to get at the timber. But his evidence as to the state of the weather from the 6th to the 11th of June, both inclusive, is positively contradicted by his own Notarial Protest, to which reference has been already made.

It is impossible, therefore, to believe that the state of the weather prevented even the smallest attempt to save any portion of the timber, the weather having been, on the contrary, peculiarly favourable for that season of the year for at least making the experiment.

At the time of the second survey things had materially altered for the worse, and from what the surveyors call "the fearful extent" to which the vessel was hogged, the timber had become "so severely jammed," that, in their opinion, it was impossible to save it without cutting the decks. Now, assume for the moment that the cargo was in such a condition at this time that it might be regarded as totally lost, if previously a portion of it, at least, might have been saved by the exertions of the Captain acting for the assured, and he chose not to make the slightest attempt to save it, how can the assured recover from the Underwriters a loss which was made total by their own negligence?

This, in itself, would be an answer to the claim of a total loss upon the policy on the timber. But it is very doubtful whether, at the time of the second survey, there really was a total loss. It is true that it was the opinion of the surveyors that the cargo could not be saved without cutting the ship's decks and beams, and the Captain said, "If they had attempted to get at the cargo by cutting the ship, with the weather they had at the time, he

didn't think they would have saved any of the ship or cargo." The Captain here again makes the state of the weather an obstacle to doing what was necessary for saving the cargo, but it has been clearly shown that this excuse cannot avail him.

If there was nothing in the state of the weather to prevent the operation of cutting open the decks, what reason was there for not resorting to it? When a ship and cargo are in peril of being lost, the Captain is called upon to act for the benefit of all concerned, and he is not at liberty to prefer the interests of one of the parties to another. In this case, his tenderness to the ship might have arisen from his being a part-owner uninsured, but, at all events, there was no reason why she should have been spared if her sacrifice were necessary to the safety of her cargo. She was a hopeless wreck, and was sold at the Auction in that character and by that description.

Can it be said that the Captain was doing his duty, either to the owners of the cargo or to the Underwriters, by not opening this wreck in order to obtain access to the cargo, by the only mode in which it was supposed at this time that it could be saved? But even at the period of the second survey, if any effort had been made by the Captain to get at the cargo, some portion of it might have been saved without cutting open the decks. He states, indeed, in his evidence, that "he didn't think he could have got out a single log of the cargo without destroying the ship, and that if the timber ports had been opened she would have filled with sand." But, after the auction, the purchaser, according to the evidence of the person employed by him, discharged almost the whole of the cargo through the hatchways and out of the ports, without apparently experiencing any extraordinary difficulty, except that a longer time was occupied in unloading the timber than would have been required under ordinary circumstances. Whether the timber was taken out of the hatchways without cutting open the decks is not stated. It is said that during the thirty-six days employed on the work the weather was unusually fine, but this has been abundantly shown to have also been the case between the first and second surveys.

Their Lordships are of opinion that there was



no time between the grounding of the "Northland" and the sale by auction, at which the assured were entitled to treat the cargo as having been totally lost. They have already adverted to the absence of even the smallest attempt on the part of the Captain after the first survey to save the cargo, and to the extreme probability that with the favourable weather which occurred afterwards and before the ship was hogged to such an extent as that the timber became "severely jammed," a considerable portion of it would have been obtained. This omission of the Captain to take any steps towards saving the cargo, at a time when it was probable that his endeavours would be successful, in their Lordships' judgment, precludes the assured from claiming for a total loss of the cargo into whatever condition it might have been brought afterwards. But even at the time of the second survey, as the "Northland" had then become a perfect wreck, there was no reason for sparing her, and if the timber could not be got out without cutting up the decks, their Lordships think that the Captain, who is bound where there is danger of loss of ship and cargo to act for the benefit of all concerned, ought to have treated the ship as utterly lost, and to have regarded only the interests of the owners of the cargo and of the Underwriters. As far, therefore, as the Judgment of the Recorder applies to the policy upon the cargo, their Lordships are of opinion that he came to a right conclusion that the assured were not entitled to recover.

With respect to the Policy on disbursements their Lordships cannot agree with the Recorder's Judgment. The disbursements were advances made by the charterer to the captain of the "Northland," to be paid out of freight which would not be earned except by the arrival of the vessel at Madras. There can be no doubt, upon the authority of the case of *Droege v. Stuart & Simpson*, decided by the Judicial Committee on the 15th July last, that the sums borrowed by the captain from the charterer at the port of loading, to be repaid by deductions from the freight, must be considered as advances of freight, and that the charterer had therefore an insurable interest. The possibility of freight being earned by the "Northland" was of course at an end when she was reduced to a wreck, and the case

became one of total loss. It was argued on the part of the Respondents, that the captain might have hired another vessel and forwarded the timber to its destination, and so have earned freight out of which the disbursements might have been paid. But even supposing that the advances made upon the original freight would attach upon the freight thus acquired, the captain is not under an absolute obligation to tranship a cargo when a ship is disabled from pursuing the voyage insured, but may exercise his discretion upon the subject. And while the ship was unquestionably a wreck, and utterly incapable of conveying the goods to their destination, and so earning freight, the assured gave notice of abandonment to the Underwriters (which their Lordships have determined to be a good notice), and at this time there is no doubt there was a total loss of the disbursements which were to be paid out of freight.

Their Lordships therefore will recommend to Her Majesty that the Judgment appealed from be varied so far as relates to the Policy on disbursements, and that it be declared that the Appellants are entitled to recover on that Policy, with so much costs of Suit as according to the course of the Court below he would have been entitled to if the Judgment had been given for him on that Policy, and that in respect of the other Policy the Judgment be affirmed, and that the cause be remitted to the Court below in order that a final Decree be made in accordance with the above declarations. Their Lordships think there should be no costs of the Appeal on either side.