Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Montreal Light, Heat, and Power Company v. H. B. Sedgwick and others, from the Supreme Court of Canada; delivered the 25th July 1910.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.
SIR HENRI ELZÉAR TASCHEREAU.

DELIVERED BY LORD ATKINSON.

This is an appeal from an Order of the Supreme Court of Canada, dated the 4th of May 1909, reversing an Order of the Court of Review of the Province of Quebec, dated the 22nd of April 1908, and directing a new trial of an action brought by the Appellants (Plaintiffs) against the Respondents (Defendants) on a certain policy of insurance, dated the 15th of May 1903, to recover the sum of $2,700 damages in respect of the total loss of a cargo of cement claimed to be covered by the policy.

The action was tried before Mr. Justice Hutchinson and a special jury, and resulted in a verdict for the Appellants for the above-mentioned sum, upon which judgment was, on the 7th of December 1906, duly entered.

J. 4. 100.—7/1910. E. & S. [38.]

The facts are simple. The Appellants, on or before the 18th of May 1903, shipped on board a certain barge, of the class specified in the policy, named "Maria," belonging to one Page, 1,500 barrels of cement to be carried to a place called Chambly Canton, situated on the River Richelieu, one of the tributaries of the St. Lawrence.

The barge, which was about 90 feet in length, was to be towed on this trip or voyage. On the following day while *en route* she struck against a snag in this river, knocking a hole in her bow of about three feet by two in size. She settled down on the shelving bank of the river, and about 70 feet of her deck were completely submerged. Her bow was held up, presumably, by the snag, which had pierced her hull, or by the upper part of the bank of the river; her stern was sunk in the deeper part of the stream, and all but a very small portion of the cement was by the wetting turned, as it were, into stone, and completely destroyed as cement. It was scarcely contended, and could not be contended successfully, that the cargo had not been totally lost. It was abandoned. No fault was found with the amount of the damages awarded, if the Defendants were liable for damages at all. The policy of insurance was very peculiar in form. It purported to insure against the total loss of the cement "by total loss "of the vessel." The Defendants based their defence substantially on these six words "by "total loss of the vessel," and contended that they were not liable because, though the cargo of cement, the thing insured, was totally lost and abandoned, the barge which carried it was not totally lost.

The result was that the case was tried very much as if the action had been brought by Page,

the owner of the barge, against a company which had insured his barge, for total loss of the thing insured, the barge.

The construction of Article 2522 of the Civil Code of Lower Canada; its history and genesis; the question whether its framers intended it to be an embodiment of the principles of the English law on the subject of constructive total loss, or of the principles of the French law on that subject were each much discussed. But Article 2522 only purports to define what is a constructive total loss of "the thing "insured." "The thing insured" in this case was the cement. Of this the loss was absolute, not constructive at all. Whether the barge, as she lay submerged, was so valuable or was so slightly damaged that a prudent owner would, with a reasonable regard to his own interest, most probably cause her to be raised and repaired; or was of such small value, or so seriously damaged that he would most probably not think she was worth being raised and repaired, but would abandon her—vital issues—if the action was one for the loss of the barge, were matters which in no way affected the loss the Plaintiffs, in fact, sustained. And it is difficult to suppose that the parties to this policy of assurance ever entered into it with the intention that these considerations, not in any way affecting the loss the Plaintiffs sustained, should be made of the very essence of the contract, and decisive on the question of their right to recover.

Cement being easily damaged by water, it is obvious that the Defendants would naturally desire to protect themselves from liability for a partial or total loss of the cargo, caused by a slight injury to the barge, or by some casual incident of the voyage; but where a total loss of the cargo is brought about by such a

wreckage of the barge as resulted in her sinking to the bottom of the river, becoming entirely flooded, and almost entirely submerged, the peril which the parties to the contract meant to guard against must, their Lordships think, be held to have supervened, and the total loss of the barge which they contemplated be held to have resulted. This would appear to be the view taken by the Court of Review upon this point. In their Lordships' opinion it is the true view.

Having regard to this view, then, unless the jury were misdirected to the Defendants' prejudice, their answers to Questions 3, 4, 5, 11, and 12 in substance dispose of the case. The questions and answers were as follows :—

"3. Was the said barge 'Maria' in the course of her "voyage to Chambly Canton wrecked in the Richelieu River "and did she sink to the bottom ?—Yes.

"4. Were the said barge and the said cargo completely "submerged any time on that occasion and trip ?—Practically "submerged if not completely.

"5. Were the said barge and the said cargo abandoned "by the owners as a total loss ?—Yes.

* * * * *

"11. Was the said cargo an actual or constructive total "loss ?—Actual total loss.

"12. Could a portion of said cement have been salved at "small cost and delivered sound at Chambly Canton ?—No."

Taken together, these findings amount to a finding that the loss covered by the policy had in fact occurred, though they have not found in so many words that the barge was a total loss, and it is not contended that there was not ample evidence in the case to sustain each of these findings. Indeed, if the jury had answered those questions otherwise than they did, so preponderating was the evidence, that their findings, if challenged, could scarcely be allowed to stand.

No substantial wrong or miscarriage of justice therefore has been brought about by the alleged misdirection, since, if the Judge mis-

directed at all, he misdirected in reference to questions 7 and 10, which, in their Lordships' view, are irrelevant questions. The fact found by question 10 would be evidence, no doubt, on the question of what a prudent owner would do with the wreck, and had the issue for decision been whether or not the barge was a constructive total loss within the meaning of Article 2522, it could not be contended that this question was rightly framed, but their Lordships are of opinion, for reasons already given, that this latter was not properly a matter for decision at all. It lay outside the proper issue, namely, whether the loss of the thing insured, the cement, had, in fact, occurred or been occasioned within the meaning of the policy. At the same time their Lordships think it right to say that the Trial Judge's remark in reference to question 10, that the voyage was not pursued, was not in any sense an instruction to the jury, but was, as he himself said, a mere statement by him of an undisputed fact in the case.

For these reasons their Lordships are of opinion that there was no miscarriage of justice at the trial; that the interests of the Defendants were not unfairly prejudiced; that the substantial issue of fact upon which the liability of the Defendants turned in law was in substance tried; that the findings of the jury upon the several issues which together constitute this substantial issue were amply sustained by the evidence; that consequently there should not be a new trial of this action; and that the decision appealed from granting it should therefore be reversed and the decision of the Court of Review on these points restored. Their Lordships are further of opinion that judgment could not on the evidence in the case and findings of the jury be entered for the Defendants *non*

obstante veredicto. It is unnecessary to consider whether it is open to the Defendants to apply for this latter relief the decision appealed from having been in their favour. Their Lordships therefore think the Appeal should be allowed, and will humbly advise His Majesty accordingly.

The Respondents must pay the costs of the hearing here and in the Supreme Court.

In the Privy Council.

THE MONTREAL LIGHT, HEAT, AND POWER COMPANY

v.

H. B. SEDGWICK AND OTHERS.

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