Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Provincial Insurance Company of Canada v. *Leduc, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered 26th June*, 1874.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THE Respondent, Joel Leduc, is the Plaintiff, and the Appellants, the Provincial Insurance Company of Canada, are the Defendants in a suit brought in the Superior Court for Lower Canada, district of Montreal, upon a policy of insurance upon the body, tackle, apparel, and other furniture of the schooner "Babineau Gaudry."

The policy was effected by the Plaintiff as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all, for 5,000 dollars upon the said ship, &c., beginning the adventures at and from Montreal to trade between the Island of Newfoundland, Nova Scotia, West India Islands, Cuba, safe ports in the United States, and Quebec and Montreal, to and from ports in the Lower Provinces, the risk commencing at noon of the 15th of December, 1866, and ending at noon of the 15th of December, 1867. The vessel, &c., were valued at 7,000 dollars, and it was agreed that, in case a total loss should be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value should be her valuation in the said policy. The vessel was warranted free of war risk. The

policy contained a stipulation in the following words:—

"Not allowed under this policy to enter the Gulf of St. Lawrence before the twenty-fifth day of April, nor to be in the said Gulf after the fifteenth day of November. Nor to proceed to Newfoundland after the first day of December or before the fifteenth day of March, without payment of additional premium and leave first obtained, war risk and sealing voyages excepted."

It may be taken as against the Plaintiff that the vessel left the port of Montreal on the 16th of November, 1867, for the port of St. John, Newfoundland, and that she was wrecked between the 1st and 5th days of December, 1867, about 20 miles below the West Point of the Island of Anticosti, in the Gulf of St. Lawrence. (See the Plaintiff's declaration, Record, p. 14; and his protest, Record, pp. 19 and 20, pars. 5, 7, 8, and 9.)

It was contended on the part of the Plaintiff that notwithstanding the vessel was lost in the Gulf of St. Lawrence after the 15th of November, 1867, the case did not fall within that part of the warranty or condition by which it was declared that she was not to be in the said Gulf after the 15th of November. The argument in support of that contention was that the words, "to proceed to Newfoundland," must, according to the decision of Colledge *v.* Harty, 6 Exchequer Reports, 205, be read in the sense of "to proceed towards," or "to set sail for" Newfoundland, and that if read in that sense, it would be inconsistent to allow a vessel to set sail from Montreal to Newfoundland on or before the 1st of December, and not to allow her to enter the Gulf of St. Lawrence after the 15th of November. It was, therefore, urged that the first part of the condition by which it was declared that the vessel was not allowed to enter the Gulf of St. Lawrence after the 15th November, applied only to the case of entering the Gulf for the purpose of proceeding upwards; and in support of that argument the evidence of Bazil de Roy was referred to, in which he stated that it was the custom of navigators to leave the port of Montreal at any time in the month of November, for the purpose of going down the Gulf, but that for the purpose of going up the river, they did not generally enter the Gulf later than the 15th of November, and that the reason was that

the ice then began to descend, and the navigation became dangerous (Record, p. 77).

Mr. Routh, a commission merchant, who was the agent of the Defendants at Montreal, through whom the policy was effected, stated that he understood by the clause that the vessel was not to be in the Gulf after the 15th of November, that is to say, coming west; and going east, not to proceed to Newfoundland after the 1st of December, &c. On cross-examination he stated he did not undertake to do anything beyond giving his opinion of the reading of the clause.

Their Lordships are of opinion that the clause is very clear, that the opinion of Mr. Routh is not admissible, and that to put upon the clause such a construction as that contended for, would be to make a new agreement for the parties, instead of construing that which they made for themselves.

The only way in which a doubt is created as to the construction of the clause, is by reading the latter part of it, as declaring that the vessel might proceed from any of the ports mentioned in the policy to Newfoundland, on or before the 1st of December, notwithstanding they might have to pass through the Gulf after the 15th of November. That, however, is not the true construction of the clause. As their Lordships read it, the vessel was neither to be in the Gulf of St. Lawrence after the 15th day of November, nor to proceed to Newfoundland from any port after the 1st day of December. There is nothing inconsistent or unreasonable in giving effect to the words used, and in holding that the vessel, whether proceeding from Montreal, or from any other port, was not to be in the Gulf of St. Lawrence after the 15th of November.

Their Lordships are therefore of opinion that the Appellants are not liable for the loss unless they have rendered themselves liable by accepting the notice of abandonment.

As regards that question it may be taken as proved that within a reasonable time after the Plaintiff first heard of the loss of the vessel, he gave notice of abandonment to the Company's agent at Montreal. (See Appellant's case, in the appeal to the Court of Queen's Bench, Record, p. 60.) It is there said, "The Respondent heard of the loss of the vessel on the 19th May, 1868, and

thereupon left the notification and protest with the Company's agent at Montreal. This document does not appear to have reached the Company's head office at Toronto until the 19th of June following."

Mr. McCuaig, the agent, however, gave evidence to the effect that the notice of abandonment was, to the best of his knowledge, served upon him on the 19th May, 1868, and that the said paper was sent by him to the head office of the Company at Toronto on the same day or the next day (Record, p. 82).

Their Lordships see no reason to doubt the truth of that statement. Mr. Crocker, who was a director and the manager and agent of the Company up to the month of August 1870, when examined as a witness for the Defendants, declared that the copy of the notice of abandonment was received at the office of the Defendants in Toronto on the 18th June, 1868 (Record, page 64, line 20). On cross-examination, however, he stated that he did not receive a copy of the notice through Mr. McCuaig, that he received it from Mr. McGregor, who sent it to him from Quebec. That copy, if sent by Mr. McGregor from Quebec must have been a different copy from that sent by Mr. McCuaig. Indeed, one of the learned Counsel for the Respondents was forced to admit upon the argument that the copy notice sent by Mr. McGregor and the notice of which Mr. McCuaig spoke, must have been different copies. The protest and notice of abandonment is set out at page 19 of the Record. It gave notice of the time and place of the wreck, demanded payment of the 5,000 dollars for which the vessel was insured, and relinquished and abandoned to the Defendants all the rights, claims, title, and interest of the Plaintiff in the said vessel.

Both the Superior Court and the Court of Queen's Bench on appeal, found that the abandonment was accepted by the Defendants. Two of the learned Judges of the Court of Queen's Bench dissented from the Judgment of that Court; Mr. Justice Monk, however, dissented only on the question of damages; Mr. Justice Badgley alone dissented as to the acceptance by the Defendants of the abandonment. It was proved by McGregor that on the 24th May he was instructed by the manager of the Insurance Company to proceed to Gaspé, in the Gulf of

St. Lawrence, to look after any interest the Company might have in the cargo or in the vessel: he also stated that the Defendants had constantly acted as salvors and saved vessels, and been allowed salvage for such service. But, whether the Defendants had acted as salvors on other occasions or not, the instructions which Mr. McGregor received, and upon which he acted, were to look after any interest the Company might have in the cargo or in the vessel. He stated that he went to Anticosti, and was there on the 15th of June; that he went to the vessel, which he found about 20 miles from the lighthouse, near the centre of the Island, on the south-west side; that she was lying bottom up with her bow out in the gulf, and her rigging, anchor, and chains lying just at her bow; that a hole had been cut in her side for the purpose of taking out her cargo. He further stated, that after disposing of her cargo, he got material and men, and went back to the island and took the vessel off, and brought her to Gaspé, where he left her and went home. He said, "After I got to Toronto I endeavoured to get the salvage," but he was wholly silent as to the person from whom, and the manner in which, he endeavoured to get it. He proceeded, "When I found I could not get it, I went down in September and brought the vessel up to Montreal, where she has since been sold." It was proved that the sale was made after a decree of the Vice-Admiralty Court in a proceeding *in rem.* for salvage (p. 54), and it is stated by Mr. J. Badgley that she was sold under Admiralty process (Supplementary Record, p. 6).

The case of Hudson *v.* Harrison, 3 Brod. and Bingh., 97, was cited as an authority to show that the silence of an insurer has been construed to be an acceptance of an abandonment. It is not necessary to go to that length in this case. Their Lordships consider that Mr. J. Story was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing *and does nothing* the proper conclusion is that he does not mean to accept. In the case of Peele *v.* the Mercantile Insurance Company, 3 Mason's Reports, 27 (Phillips on Insurance, 3rd edition, 391), it was held by Mr. J. Story that the floating and repairing of a stranded ship by the underwriters,

though it was done with the intention of surrendering to the assured, was a constructive acceptance of an abandonment. In the case of Peele *v.* The Suffolk Insurance Company, 7 Pickering's Reports, 254 (Phillips, 390), the Supreme Court of Massachusetts held that, though the underwriters had a right to keep possession of a ship for a reasonable time to repair it, yet that their keeping of it for an unreasonable time for that purpose was a constructive acceptance of the abandonment. It has also been held that, if the underwriters take possession of a vessel after an abandonment and proceed to repair without giving notice of their object, it is an acceptance. (The Cincinnati Insurance Company *v.* Bakewell, 4 B. Monroe's Report, Kentucky, 541.)

In the present case the Defendants were not merely silent, but they were active, and by their agent, Mr. McGregor, took possession of the vessel after notice of abandonment had been sent to the head office at Toronto; and the vessel was kept in the possession of the Defendants from the time it was raised and taken into Gaspé until it was arrested at the instance of the Defendants by the Vice-Admiralty Court, and it must have been repaired before it was taken to Montreal.

Mr. McGregor stated, in his evidence, that he left the vessel at Gaspé, when he returned to Toronto; but there can be no doubt that it was left in the charge of some person on behalf of the Company from that time until the month of September following, when he returned to Gaspé, and took the vessel up to Montreal; and, at all events, the vessel having been raised and taken into Gaspé by the agent of the Defendants, must be assumed to have remained in their possession until proved to have been delivered over. There is no evidence that the Plaintiff, at any time during that period, had notice of the object with which the Defendants took and retained possession of the vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment. There was nothing to lead the Plaintiff to suppose that the Defendants repudiated altogether their liability under the policy and the notice of abandonment, and that they were acting, not as insurers, but as mere ordinary salvors, who had no interest whatever in the vessel, and their

Lordships cannot believe that they acted merely in that capacity. The remarks of the Court in the case above cited of the Cincinnati Insurance Company *v.* Bakewell, are very applicable to the present as regards that suggestion.

Mr. Justice Badgley considered that the Decree of the Vice-Admiralty Court in favour of the Defendants proved them to be mere salvors of the vessel (Supp. Record, p. 6, line 43). But their Lordships do not concur in that view. That decree is dated 23rd April, 1869. It does not appear, nor is it very material, at what time the suit in the Vice-Admiralty Court was commenced. It is, however, stated by Mr. Justice Badgley (page 5, Supplemental Record), and the fact is probably so, that the vessel was libelled, pending the present action, in the Superior Court. It was, however, a proceeding *in rem*, and not against the Plaintiff personally. It would have been no answer in that proceeding for the Plaintiff to have alleged that he had no interest in the vessel, that by virtue of the insurance, the loss, the abandonment, and the acceptance thereof, the vessel had become the property of the Defendants. If the Defendants thought fit to libel their own vessel for salvage, it was no concern of the Plaintiff's, nor was he bound to appear. He could not have defended that suit without alleging that he had an interest in the vessel, and thereby prejudicing his own action on the policy and his contention that the Defendants had accepted the abandonment.

Mr. Croker stated that McGregor was never instructed to accept an abandonment, and that abandonments could be accepted only at the head office and by writing; but McGregor was instructed to look after the interests of the Company, and if his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, amounted to an acceptance, or were evidence from which an acceptance might be inferred, the Defendants are bound by those acts. The question as to whether the abandonment has been constructively accepted is a mixed question of law and fact. Unfortunately, we have not the reasons of the majority of the Judges. Their Lordships are of opinion that the acts of the Defendants, by their agent, McGregor, in regard to the vessel after notice of

abandonment, and especially their repairing the vessel and retaining it in their possession from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing the Plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment. They would not reverse the concurrent decisions of two Courts upon a question of fact except upon the clearest conviction that they were wrong. In the present case they are of opinion that the Courts were correct in finding that the abandonment was accepted. Their Lordships' view upon this part of the case would be the same even if Mr. McCuaig had not forwarded the notice of abandonment to the head office before the 18th June.

Then, as to the effect of that acceptance, it was contended that, as there was no loss for which the Defendants were liable, the notice of abandonment was inoperative, and that the acceptance of it could not convert a partial loss for which the Defendants were not liable into a total loss for which they were liable. Articles 2,521 and 2,522 of the Civil Code were referred to, and it was urged that there could be no loss within the meaning of the Code unless it was caused by an event insured against. Mr. J. Badgley was of that opinion, and he considered that at most there was only a partial loss, which could not, under Articles 2,544 and 2,545, be converted into a total loss by notice of abandonment. That learned Judge said, "implications of acceptance are not favoured, and can have no effect or validity in contravention of the positive fact upheld by Article 2,545 of the actual recovery of the stranded vessel." (Supplemental Record, page 10, line 6.) He was also of opinion that the fact of the restoration and recovery of the stranded vessel prevented abandonment at all.

It appears to their Lordships that the learned Judge, did not sufficiently advert to the distinction between a mere notice of abandonment and a valid abandonment, or a notice of abandonment which has been accepted.

Their Lordships are of opinion that the present case did not fall within Article 2545, upon which Mr. J. Badgley so much relied. It was not a case of mere stranding. The vessel could not have been

raised and put into a condition to continue her voyage to the place of destination. Further, it appears to their Lordships that Article 2545 must be read in conjunction with Articles 2538, 2543, and 2544, and that it does not apply to the case of an abandonment which has been accepted. It puts the case of stranding very much upon the same footing as that upon which it stands under the law of this country. Abandonments made, and accepted, are treated of in Article 2547. It is there said, "Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied."

Article 2549 of the Code was intended to prevent a notice of abandonment when accepted from being defeated by any subsequent event.

The Superior Court held that the Plaintiff was estopped, by the acceptance, from urging against the Plaintiff objections founded upon the breaches of condition, and awarded the Plaintiff half the amount, viz., 3,500 dollars, of the declared value of the vessel. The Court of Queen's Bench, Mr. Justice Badgley dissenting, held that the allegations set forth by the Plaintiff in his declaration, which included an allegation of acceptance, were fully proved, and that by reason thereof, and of the abandonment *accepted* by the Company, the Plaintiff was entitled to recover the full amount insured, viz., 5,000 dollars. Mr. Justice Monk dissented on the question of amount only. He considered that the Plaintiff was entitled to recover but only one-half of the amount insured.

Their Lordships are of opinion that by the acceptance of the abandonment, the Defendants became liable as for a total loss. In Smith *v.* Robertson, 2 Dow's Parl. Cases, 474, it was held that the insurers could not be allowed to say that the loss was not total after they had acquiesced in the abandonment as for a total loss, and had thereby admitted that the loss was a loss of that description. In that case the insurer had no right to abandon, but merely a right to give notice of abandonment. But the moment the notice was accepted, the abandonment took effect; the loss immediately became tantamount to a total loss; and the insurers

were precluded from relying upon the subsequent recovery of the property because they were not allowed to say that the loss was not total. This case, as it appears to their Lordships, gets rid of the objection of Mr. Justice Badgley to the form of the Plaintiff's declaration at page 7, line 25, Supplemental Record. He there says:—

"Now the only loss alleged in the declaration is that '*le dit navire aurait péri corps et biens dans le Golfe Saint Laurent, faisant un naufrage entier et complet,*' which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words submerged in the Gulf of St. Lawrence. As matter of fact the alleged total loss is not true, and has been disapproved, but it is the only one alleged, and the insurers cannot be made to suffer from any other description of loss or cause of action than that charged; and in strict justice the Appellant's action should be dismissed, unless, under the rule of practice, he should elect to amend his declaration to meet the proof of the case, which as it is admits of no effective abandonment with its alleged acceptance as set out in the declaration."

Their Lordships would deeply regret if an objection to the mere form of the declaration, which does not affect the merits of the case, should compel them to decide against the Plaintiff, but they are relieved from that difficulty by the above-mentioned case in the House of Lords, in which it was held that the insurers after acceptance could not be allowed to say that the loss was not total.

It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured: the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed. In the case of the Cincinnati Insurance Company *v.* Bakewell, the insurance was merely against a total loss. But it was held that the insurers could not, after acceptance of an abandonment, rely upon the fact that the loss was not total, and, consequently, that it was a loss within the terms of the policy.

There is no distinction in principle between an express and a constructive acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Suppose the Defendants, upon the receipt of the notice, had

written to the Plaintiff and said that, as the loss took place in the Gulf of St. Lawrence after the 15th of November, they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry that Mr. Routh, their agent at Montreal, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the Gulf of St. Lawrence after the 15th of November applied merely to the case of its going west, and that, under those circumstances, they did not consider it right to avail themselves of the breach of warranty; that they accepted the abandonment, and would make the best they could for themselves of the salvage, and would settle as for a total loss. Or suppose they had gone further and stated that they concurred with Mr. Routh in his construction of the policy, and that they accepted the abandonment. Suppose that, after they had raised the vessel they had sold her for 10,000 dollars in excess of the salvage expenses, it is clear that the Plaintiff could not have turned round and claimed the full amount of the proceeds of the vessel upon the ground that the loss was not caused by a risk insured against, and that he had, consequently, no right to give notice of the abandonment. If the Plaintiff could not have treated the abandonment as a nullity, surely the Defendants cannot be allowed, after acceptance, to rely upon a breach of the warranty or condition of which they had full notice at the time of their acceptance of the abandonment. Estoppels are mutual. If the mouth of one party is closed, so also is that of the other. By the abandonment and the acceptance of the abandonment, the matter was closed. The whole interest of the Plaintiff in the thing abandoned was transferred to the Defendants and became their property (Article 2547).

There are many cases in which it may be very doubtful whether, in point of law, the particular facts amount to a breach of warranty. But if, after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, resile and rely upon a breach of warranty.

The effect of acceptance is, as remarked by Mr. Arnould, well expressed by Boulay Paty—

Cours de Droit, Comm., tit. xi, sec. 7, vol. 4, p. 380 :—"Par leur acceptation voluntaire il s'est fait un pacte entre les parties qui a tout terminè." (Arnould, p. 1,173, note *x*.)

The only remaining question is as to the amount to which the Plaintiff is entitled. Jean Baptiste Vigneau proved that his brother, Benjamin Vigneau, who was the captain of the vessel and was lost in her, told him that he was in debt to the Plaintiff, that he had given him a guarantee for the debt, and had authorized him to insure the vessel "Babineau Gaudry," in his own name, to the end that if the vessel should be lost the Plaintiff might receive the whole of the insurance money, and pay himself the amount which Benjamin Vigneau owed him.

Their Lordships consider that this declaration of the deceased against his own interest was evidence sufficient to prove that the Plaintiff was authorized by Benjamin Vigneau to insure the half of the vessel which belonged to him, and to receive the amount insured. This, coupled with the interest which the Plaintiff had in the other half of the vessel, entitled him to insure the whole vessel, and to recover the full amount insured.

Mr. Justice Badgley appears to have overlooked the evidence of Jean Baptiste Vigneau, when he stated that his interest in the insurance money did not exceed one-half share thereof. It is clear that an agent who insures for another with his authority may sue in his own name (Phillips on Insurance, paragraph 1,598). The mortgage did not affect the Plaintiff's right to insure for the full amount of the value of the vessel. The vessel or the value of it may be the only means which he has of paying the mortgage debt.

Their Lordships are of opinion that the Judgment of the Court of Queen's Bench was correct, and they will humbly advise Her Majesty to affirm it, with the costs of this appeal.

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