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COURT of CHANCERY, by JAMES R. O'FLANAGAN, Esq. Barrister-at-Law.

The Written Judgments are reported *verbatim* in Short-hand by Mr. H. GREGORY, Short-hand Writer.

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the gravel-pits in question had, before the incumbency of Mr. Grant, been opened for getting gravel for sale generally, we should have been of opinion, according to the case of *Kright* v. *Moseley*, Ambl. 176, that Mr. Grant had not committed waste by continuing to use them, but when it is found by the jury that the pits were opened by the surveyor for public purposes, and when the evidence shews that Mr. Grant, lessee, dug gravel from them and sold it generally for the first time, we think this digging was equivalent to an opening, and was an act of waste. The public necessarily requiring the opening of the pits in the place in question, the proper use of them was limited by that necessity. It ought to have been sloped down after the exercise of the public right, and the incumbent or lessee was not entitled to take advantage of the opening made, or continue the opening, which arose from a public duty, and to say that the pits thereby became permanently open. To the extent, therefore, of entering a verdict for the plaintiff for 5*l.* upon the second count, we think the present rule should be make absolute, and discharged as to the rest.

Rule accordingly.

Thursday, July 5.

SMALL *v.* NAIRNE.

Marine insurance—Constructive total loss.

In an action on a policy of insurance on a ship, the plaintiff claimed as for a total loss. The ship was abandoned to the underwriters and sold at Masulipatam, and the jury found that she could not have been repaired there so as to enable her to proceed to her port of destination; but in answer to a question whether she might have been partially repaired so as to enable her to proceed to some other port where she might have been more completely repaired, they found that there was no satisfactory evidence on that subject.

Held, that in the absence of such evidence the opinion of the jury as to the course which a prudent uninsured owner would have taken could not be satisfactory, and a verdict for the plaintiff was therefore set aside, and a new trial granted.

This was an action on a policy of insurance on a ship on a voyage to the Mauritius, tried before Wightman, J. during the sittings in London after Trinity Term 1848, when a verdict was found for the plaintiff. The plaintiff claimed for a total loss; and it appeared that the vessel on her outward voyage was driven into Masulipatam, and there abandoned to the underwriters and sold. The plaintiff's case was, that the vessel could not be repaired at Masulipatam so as to enable her to proceed to the Mauritius, and that the course which the plaintiff adopted was that which a prudent uninsured owner would have taken. On the part of the defendant it was contended that at all events the vessel might have been so far repaired at Masulipatam as to enable her to proceed to some port where she might be effectually repaired. The jury were asked several questions: one, whether the vessel might have been sufficiently repaired at Masulipatam to enable her to proceed to the Mauritius? another, whether she might have been so far repaired there as to enable her to proceed to some other port, at which more complete repairs might have been done? and a third, whether the conduct of the plaintiff had been such as a prudent uninsured owner would have pursued. The jury replied to the first question in the negative, and to the third in the affirmative; but to the second, they answered that there was no satisfactory evidence to enable them to decide it.

A rule *nisi* having been obtained to set aside the verdict and for a new trial, on the ground of misdirection and improper reception of evidence, cause was shewn on the 14th and 15th of June by

Sir *F. Kelly*, *Shee*, Serjt. and *Unthank*.—They contended that the true question was, what would be the cost of repair at the port where the vessel was obliged to put in? otherwise, in all cases of constructive total loss it would be necessary for the plaintiff to prove what would have been the cost of repair in every port which the ship could possibly reach; and that, at all events, if the plaintiff proved the impossibility of repairing the vessel in the port into which she was driven, the burden was cast upon the defendant of proving that there were other ports where she might have been repaired. The second question ought not to have been put to the jury at all; and their omission to answer it therefore cannot affect their finding upon the material questions. (*Somes* v. *Sugrue*, 4 Car. & P. 276; *Flemyng* v. *Smith*, 1 H. L. Rep. 513, 519; *Horrocks* v. *The Commonwealth Insurance Company*, 2 Phill. Ins. 223.)

Sir *F. Thesiger*, and *James Wilde*, contrà.—This verdict cannot stand. The plaintiff is bound to prove that a prudent uninsured owner would, under the same circumstances, have sold the vessel; and how can it be immaterial to that question to ascertain whether the vessel might have been partially repaired at the port where she was, and then taken to another where she could be sufficiently repaired to enable her to complete her voyage? If that could have been done a prudent uninsured owner would have done it; and yet upon that subject the jury said that they had no satisfactory evidence.

They cited *Milles* v. *Fletcher*, 1 Doug. 232; *Plantamour* v. *Staples*, 1 T. R. 611; *Gardiner* v. *Salvador*, 1 Moo. & R. 116; *Doyle* v. *Dallas*, ib. 48; *Faulkner* v. *Ritchie*, 2 M. & S. 293; *Boyd* v. *Royal Exchange Insurance Company*, 10 Law T. 129; *Manning* v. *Irvine*, 1 H. L. 287; *Wheeler* v. *Atkins*, 5 Esp. 246; *Thornely* v. *Hebson*, 2 B. & Ald. 513; *Hutchinson* v. *Bernard*, 2 Moo. & Rob. 1. *Cur. adv. vult.*

JUDGMENT.

Lord DENMAN, C. J.—This case was tried before my brother Wightman. It is, no doubt, incumbent on the owner, who seeks to recover the value of a vessel upon a constructive total loss, in a case where the vessel has been sold by reason of the inability to repair her at the place where sold, to give satisfactory evidence that no other course, consistent with ordinary prudence, could have been pursued, and that the sale was, in effect, rendered necessary by the circumstances in which the ship was placed. The plaintiff's evidence was that the ship could not be repaired at Masulipatam, so as to enable her to proceed to the Mauritius, and the jury, in answer to the third question put, found that she could not have been so repaired there; but in answer to the question whether she might have been partially repaired at Masulipatam, so as to enable her to proceed to some other port, where a more perfect repair might have been made, the jury found there was no satisfactory evidence to enable them to answer the question. This absence of satisfactory evidence so materially affected the fifth question proposed, that relating to the conduct of a prudent and uninsured owner, that the verdict for the plaintiff, in answer to the latter question, can hardly be deemed satisfactory. For all that has appeared to the jury, the vessel might have received such a repair in Masulipatam as would have enabled her to proceed to some other place at no great distance, where she might have been properly repaired; and if such had appeared to have been the case, the opinion of the jury as to the conduct of a prudent uninsured owner might have been altered, and a different answer might have been given to the question. Without at present entering further into the general merits of the case, as they appeared at the trial, we think it is sufficient to say that, taking the two answers together, we do not think the verdict satisfactory, and therefore the rule for a new trial must be made absolute. *Rule absolute.*

REG. *v.* HEMMING.

Railway company—Call on shares—Transfer.

By the 8 and 9 Vict. c. 16, s. 16, the transfer of shares is prohibited after a call has been made until the call is paid:

Held, that a call is made within the meaning of that section, as soon as the directors of the company have come to a formal resolution that a call be made.

This was a rule calling upon the secretary of the Londonderry and Coleraine Railway Company to shew cause why a *mandamus* should not issue, commanding him to register a memorial of a deed of bargain and sale of shares in the company. It appeared by the affidavits upon which the rule was obtained, that on the 28th January, a resolution of the directors was come to that a call be made. On the following day the resolution was advertised; and afterwards personal notice of the call was given to the shareholders. On the 4th of Feb. that notice was given to Mr. Cooke, who was one of the registered shareholders of the company; but on the 29th Jan. Mr. Cooke had executed a transfer of his shares to Mr. Hurrell, and application had been made to the secretary to enter a memorial of that transfer in the books of the company. That application had been refused on the ground that at the date of the transfer a call had been made on the shares, which remained unpaid.

The 8 Vict. c. 16, s. 16, enacts that "No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share by him."

Sect. 22. "It shall be lawful for the company from time to time to make such calls of money upon the shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any; and that successive calls be not made at less than the prescribed interval, if any; and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons and at the time and places from time to time appointed by the company."

Sect. 27. "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was, in fact, made, and such notice thereof given as is directed by this or the special Act; and it shall not be necessary to prove the appointment o the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

Tuesday, June 12.—The *Attorney-General* and *J. Brown* shewed cause.—The question is, when was the call made? for if it was made before the transfer this rule must be discharged. Stat. 8 & 9 Vict. c. 16, s. 16, prohibits the transfer after a call has been made until it is paid; and the call is made as soon as the resolution of the directors has been passed. If the company were to register the purchaser they would lose the call; for under s. 27 the company would be bound to prove that he was a shareholder when it was made, in which they would fail. (*Aylesbury Railway Company* v. *Mount*, 5 Sc. N. R. 127.) It is true that the time and place of payment are not appointed by the resolution, but the call is previously complete; and it is only necessary that the time and place of paying the call which has been made should be appointed before the company can sue for it. The word "call" cannot receive the strict construction of an application for the money to each shareholder, but must be construed with reference to the context. (*Sheffield and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574; *Great North of England Railway Company* v. *Biddulph*, ib. 242; *Shaw* v. *Rowley*, 16 M. & W. 810.)

Crowder and *Phipson*, contrà.—The gross injustice which would be inflicted upon a shareholder by holding that a transfer made without notice of a call is void unless the call be paid, will weigh against that construction. A call means an application for the money; and it is not clear that Hurrell, if the transfer was registered, might not be sued for the call. Sec. 22 shews that the call is not complete until the time of payment is specified, because it gives the power of making calls upon condition that twenty-one days' notice of the call be given. [COLERIDGE, J.—Notice of a thing assumes its previous existence. PATTESON, J.—The notice is that the call has been made.] In *The Sheffield and Manchester Railway* v. *Woodcock*, 7 M. & W. 574, Parke, B. said, that the notice in the newspaper was the call; but, under the general Act, he has held that notice to the person is the call. *The Newry and Inniskillen Railway Company* v. *Edmonds*, 2 Exch. Rep. 118, explained in *Shaw* v. *Rowley*, 16 M. & W. 813. [ERLE, J.—The call is the act of the whole company; has not, then, every member of the company necessarily notice of it? To say that notice of the call is the call seems a contradiction.] By express provision the call may be made by two directors; and notice to the shareholders is required. Sec. 27 is to be read together with ss. 21 and 22, and then all ambiguity vanishes. The object of that section was to remove the doubt raised in *The Aylesbury Railway Company* v. *Mount*. How can that be a call which is not final and binding on all parties, which the resolution certainly is not; for it might be altered by the directors at any time previous to its communication to the shareholders?

Cur. adv. vult.

JUDGMENT.

PATTESON, J. now delivered the judgment of the Court.—The facts raised one question, when a call is made within the 8 & 9 Vict. c. 16, s. 16? It appears the directors passed a resolution, by which the money was called for; then a transfer was executed and offered to be delivered to the secretary before either party had notice of the resolution. The secretary refused to receive the transfer unless the assignee had paid the money so called, alleging that a call had been made and applied for; which application the assignor denied. On a consideration of the statute, and the clauses bearing upon the subject, it appears that a call may mean only a resolution formally come to by those who have to determine the contribution of those who are bound to contribute and to pay certain instalments; or it may mean that resolution, together with notice to pay to the person called on, after such resolution shall have been come to; or the combination of facts making the party called on liable in an action for nonpayment when called upon: the last meaning not being probable, the question lies between the other two constructions. We have come to the conclusion that the first is correct, and that a call is made within the meaning of this section when the resolution above described has been come to. The section which restrains the power to transfer (the 16th), using the words "after any call shall have been made," must be construed in reference to the 22nd section, which empowers the company to make calls. On referring