ORIGINAL CIVIL.

Before Sir C. Sargent, Justice.

1878
August 22.

RICHARD LATHAM AND OTHERS (PLAINTIFFS) *v.* HURRUCKCHAND SOORATRAM (DEFENDANT).*

Marine insurance—Notice of claim by insured—Action brought before expiration of six months from date of notice—Constructive total loss—Meaning of the words "sunk", 'stranded".

Where insurers on receiving notice of a claim made against them under a policy of insurance distinctly repudiate their liability and deny that any claim exists against them, or that the party serving such notice has any right to recover against them, there arises an immediate right to sue, and the insured is not bound to wait for the expiration of six months before taking proceedings to enforce his claim.

Where it appeared upon evidence, that goods on board a ship that was wrecked on a voyage from Kurrachee to Bombay, although much damaged by sea water, were nevertheless of such merchantable value as to make it worth while to send them on to their port of destination,

Held, in an action against the insurers of the goods, that no claim for constructive total loss was maintainable.

In an action upon a policy of marine insurance the evidence given with respect to the loss of the ship was as follows :—"The vessel grounded near Dwárka. After the vessel struck, the water constantly broke right over all. * * * The cargo was all under water. The labourers were only able to work at ebb tide, and at high tide they could only see the top of the vessel's masts. * * The vessel lay where she stranded seven days, and was then raised with casks." Some of the goods on board were insured by a policy which contained the clause "warranted free of particular average, unless sunk or burnt." It was contended for the plaintiffs that the ship had "sunk", and that the damage to the goods was, therefore, covered by the policy.

Held that where a vessel runs aground and lists over, and is in consequence covered by the high tide, which causes damage to goods on board, it cannot be said that she has 'sunk' within the meaning of the word as used in a policy of insurance, and, therefore, that a claim for particular average cannot be sustained under the clause —"warranted free of particular average, unless sunk or burnt."

THIS was a suit to recover from the defendant the sum of Rs. 1,382 upon a policy of insurance, effected by the plaintiffs, and underwritten by the defendant upon certain hides shipped at Kurrachee in the "Luckmiprasád" for conveyance to Bombay.

* Suit No. 268 of 1878.

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The vessel sailed from Kurrachee on the 3rd January 1878, and on the 5th January grounded near Dwárka. Two days after the wreck the ship was cleared of cargo. The greater portion of the plaintiffs' hides was taken on shore, and sold. The plaintiffs alleged that the hides were so much damaged that they could not be taken to Bombay, and accordingly claimed in respect of a constructive total loss. They also claimed for a particular average loss. The policy contained the following clause :—"warranted free of particular average, unless sunk or burnt."

Macpherson and *Lang* for the plaintiffs.

The Advocate General (Hon'ble *J. Marriott*) and *Farran* for the defendant.

The following authorities were cited and commented upon :— *Doyle* v. *Dallas*(1) ; *Roux* v. *Salvador*(2) ; *Rosetto* v. *Gurney*(3) ; *Moss* v. *Smith*(4) ; *Farnworth* v. *Hyde* ; *Ralli* v. *Johnson*6 ; *Hills* v. *London Assurance Co.*(7); *De Mattos* v. *Saunders*(8) ; Arnould on Insurance (5th ed.), p. 950 ; Philips on Insurance, p. 252, 312 ; *Carr* v. *Royal Insurance Co.*(9) ; *Frost* v. *Knight*(10) ; *Hochster* v. *De la Tour*(11).

SARGENT, J.— In this suit the plaintiffs claim to recover Rs. 1,382 from the defendant upon a policy of insurance.

There was a preliminary point taken, as to whether this action was not premature, inasmuch as it was brought before the expiration of six months from the date at which notice of the plaintiffs' claim in respect of the policy of insurance, was given to the underwriters. Where, however, as was the case here, the persons to whom such a notice is given, distinctly repudiate and deny that any claim exists against them, or that the party serving such notice has any right to recover against them, there arises an immediate right to sue, and the insured is not bound to wait for the expiration of six months before taking proceedings to enforce his claim.

(1) 1 Moody & R. 48
(2) 1 Bing. N. C. 526 ; S. C. 3 Bing. N. C. 266.
(3) 11 C. B. 176.
(4) 9 C. B. 94.
(5) L. R. 2 C. P. 204.
(6) 6 El. & Bl. 422.
(7) 5 M. & W. 569.
(8) L. R. 7 C. P. 570.
(9) 33 L. J. Q. B. 63.
(10) L. R. 5 Ex. 322 ; S. C. L. R. 7 Ex. 11.
(11) 2 E. & B. 678.

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The important question, however, is whether the plaintiffs are entitled to recover for constructive total loss. The vessel in question was wrecked by running aground near Dwárka, and 457 out of the 500 hides were recovered from the vessel and were sold. We have, therefore, to see whether the sale took place under such circumstances as to justify a claim for constructive total loss on the principles laid down in *Farnworth* v. *Hyde*[1].

It was in that case held that there is a constructive total loss of goods if it is not practically possible to carry them to their destination; that is, if it would cost more to do so, than the goods are worth; and in determining this, "the jury are to take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing and re-shipping the goods, but they are not to take into account the fact, that if they are carried on in the original bottom, or by the original shipowner, in a substituted bottom, they will have to pay the freight contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not."

What was contended in the present case was, that the goods were in such a state, that, taking into account the cost of unloading, drying, warehousing and re-shipping, they would not, if conveyed to their destination and there sold, have realized as much as they cost.

But upon the evidence it appears to me that this contention failed. I think it is impossible to arrive at the conclusion that these hides had not such merchantable value as to make it worth while to have sent them on to Bombay (His Lordship read the evidence upon the point). I, therefore, hold that there was no constructive total loss in this case.

The next point for decision is whether the plaintiffs are entitled to recover for a partial loss.

The policy contains the following clause:—"warranted free of particular average, unless sunk or burnt," and it was contended by the plaintiffs that in the present case the ship sunk, and that they were, therefore, entitled to recover under the policy. The account

(1) L. R, 2 C. P. 204.

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of the wreck given by the captain in the protest, is this. He says that all control over the ship was lost, and that he in consequence let go two anchors; but in two hours the cables gave way, and the ship drove towards the land at the mercy of wind and sea. At 2 o'clock P.M. on the 5th January 1878 "the vessel grounded near Dwárka, from which they were distant about six miles at a place called Mujjum. After the vessel struck, the water constantly broke right over all. At day-light they got out their three boats, and landed the passengers and crew. A number of Government officers belonging to Dwárka and some merchants came on board, and these people ordered a number of labourers to save as much cargo as they could. The cargo was all under water, and they only succeeded in extracting it from the water that filled the vessel. At ebb tide they were only able to work, and at high tide they could only see the top of the vessel's masts. The vessel lay where she stranded seven days, and they then raised her with casks." The evidence given by the captain at the hearing is substantially to the same effect.

It is clear, I think, upon this evidence that the ship stranded or ran aground, and then listed over, and that in certain states of the tide, a portion of the hull could be seen, but that at high tide the vessel was completely submerged. The question raised at the hearing was whether, under these circumstances, the ship had "sunk" or had only stranded. In the former case, the plaintiffs are entitled to claim upon the policy; in the latter case they are not. It is to be remarked that listing over is a common incident of stranding. In Bayley on the "Perils of the Sea" (p. 177) stranding is defined to be "taking the ground under any extraordinary circumstances of time and place by reason of some unusual or accidental occurrence, and lying or resting on it for a time." The authorities cited are the cases of *Caruthers* v. *Sydebotham*(1), *Rayner* v. *Godmond*(2), and *Wells* v. *Hopwood*(3). In all these cases the listing over of the ship is an incident in consequence of which the water reached the goods, and caused the damage in respect of which the action was brought.

(1) 4 M. & S. 77. (2) 5 B. & Ald. 225

(3) 3 B. & Ad. 20.

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I can find no definition of the word "sunk" in any case or book of authority. That it is intended, however, to mean something different from stranding, appears from the fact, as stated by Bayley (p. 174), that this clause is usually written "unless sunk, burnt or stranded". Sinking in its ordinary acceptation means "subsidence" in deep water, and is different from mere submersion by the high tide when stranded. Had the vessel slipped off the rock or ground where it stranded, and fallen back into deep water, it would then have sunk. But I cannot hold where a vessel, as in this case, merely runs aground and lists over, and is in consequence covered by the high tide which causes damage to goods on board, that she has "sunk" within the meaning of the word as used in a policy of insurance. I am of opinion, therefore, that the damage, in respect of which the claim is made in this case, was not caused by the sinking of the ship, and is not covered by the policy of insurance effected by the plaintiff. The plaint must be dismissed with costs.

Suit dismissed.

Attorneys for plaintiffs.—Messrs. *Craigie, Lynch and Owen.*
Attorneys for defendant.—Messrs. *Smith and Frere.*

ORIGINAL CIVIL.

Before Sir C. Sargent, Justice.

1879
August 12.

GOVINDJI KHIMJI (PLAINTIFF) *v.* LAKMIDA'S NATHUBHOY, AN INSOLVENT, HIS WIFE GOMTIBA'I, AND C. A TURNER, ESQ., OFFICIAL ASSIGNEE (DEFENDANTS).

Husband and wife—Hindu married woman, effect of joint and separate contract by —Stridhan—Separate property.

A contract entered into by a Hindu married woman, jointly with her husband and separately for herself, must, in the absence of special circumstances, be considered as entered into with reference to her *stridhan*, which is analogous to a woman's separate property in England.

THIS was a suit by the plaintiff to recover the sum of Rs. 1,109 and interest from the first and second defendants.

On 3rd January 1877 the plaintiff advanced to the first defendant a sum of Rs. 5,000 on the security of a mortgage upon a house in Bhendy Bázár belonging to the second defendant. On the same day a mortgage deed was executed, made between the