
(1871) 03 CAL CK 0010

Calcutta High Court

Case No: None

The East Indian
Railway Company

APPELLANT

Vs

The Australasian
Insurance Company

RESPONDENT

Date of Decision: March 23, 1871

Judgement

Paul, J.

This was an action instituted by the plaintiffs to recover from the defendants a sum of about Rs. 25,000 for a total loss in respect of a cargo of sleepers shipped on board the Heimdahl, bound from Geography Bay to Calcutta, under a policy of insurance granted by the defendants at Melbourne. The facts of this case lie in a small compass, and are tolerably free from doubt; they are to a great extent admitted, or at all events hardly controverted, by the defendants. The arguments, however, have been lengthy, and demand the fullest consideration. The policy on which this action is brought is dated the 24th January 1870, and was issued from the principal office of the defendants at Melbourne. The policy on its face states that losses are payable in Calcutta at Messrs. Mackillop, Stewart, and Co."s. It appears from the evidence of Mr. Noble, a partner in the firm of Messrs. Mackillop, Stewart, and Co., examined on behalf of the defendants, that since the date of the policy three mails had arrived in Calcutta, on the 27th February, 27th March, and 27th April respectively; but that this particular policy was not advised down to the 12th May, when the sale of the ship and cargo took place. On the 16th May, Messrs. Mackillop, Stewart, and Co. got inspection of the policy from Mr. Conroy, the Chief Store-keeper of the East Indian Railway, and on that day it was for the first time they became aware of the existence of the policy. It does not clearly appear whether the firm of Mackillop, Stewart, and Co. are agents for all purposes. However, Mr. Noble states in his evidence that the defendants have an agency in Calcutta, which is represented by his firm of Mackillop, Stewart, and Co., and it may be assumed that that firm has some powers, and they are entitled to look after the interests of the defendants. The ship Heimdahl, with the sleepers on board, sailed from Geography Bay, Western Australia, in

the month of March, and prosecuted her voyage without encountering any mishap until the 30th April, on which day, whilst proceeding up the River Hooghly towards Calcutta, she struck heavily on the Rungafulla (sic)s, which lie some distance from Diamond Harbour; and shortly afterwards heeled over, and came on her beam ends so nearly that her chains were almost on a level with the water. Whilst in this state her anchor was let go, but the ship dragged her anchor, and drifted further upon the sands. As the tide fell, the vessel heeled over very much, and by the advice of the pilot, who feared she might at any moment capsize, the crew were sent ashore. After the first night the ship remained fixed on the sands, and formed a bed for herself. She was at first surrounded by two feet of water, which subsequently disappeared, being displaced by sand. The pilot says that at ebb tide the ship lay over very much, as far as she could without capsizing, and that at flood tide she stood upright. In answer to a telegram sent by the captain to Messrs. Mackinnon, Mackenzie, and Co., who were the agents of the ship at Calcutta, the Cyclone, a very powerful steam tug, was sent to her assistance. The steam tug arrived on the 1st May at the Rungafulla Sands, and remained in attendance three days. During this interval of time, when the spring tides were at their height, the Cyclone endeavoured unsuccessfully to move the ship, and in several attempts to accomplish the moving and towing of the vessel, hawsers of considerable strength were broken. There was no bad weather, but the south-west monsoons had set in, and heavy winds and bad weather might at any time during that season of the year be reasonably expected. Failing in his best endeavours to get the vessel off the sands, the captain sought the advice of the most experienced, able, and intelligent surveyor in the port of Calcutta--namely, Captain Handley. On the 5th May, Captain Handley (who is Lloyd's surveyor, and the surveyor of various insurance offices) visited the vessel as she lay on the Rungafulla Sands. He was accompanied by Captain Reed, who is a commander in Government employment, and by Captain Bowden, who commands the steam tug Cyclone, which had conveyed Captain Handley to the place where the vessel lay. Captain Handley remained three hours on board, and made a most careful examination of the vessel. The result of that examination is contained in a report which is set out in pages 219-221 of the 6th volume of the Bengal Law Reports, in which the decision now under appeal is reported. I desire to refer to the report as printed, and do not transcribe the same here. It is sufficient to state at present for the purposes of my judgment that the report concludes thus : I therefore recommend that the sails, ropes, boats, or other stores of any value there may be on board be saved, and the vessel and cargo of sleepers abandoned and sold by public auction, after due advertisement, to the highest bidders on account of the concerned." The substance of the report made by Captains Reed and Bowden is given in page 221 of the case last mentioned. Captain Handley in his evidence substantially confirmed his report, and made further statements, to which I shall presently refer.

2. On Monday morning at 6-30, being the 2nd May, the captain observed that a sandbank had surrounded the vessel, and found that the sand had grown up five or six feet on both sides, and three or four feet by the stern. On Tuesday morning, i.e., the 3rd May, at 6-30, the captain came back to the vessel, and he makes the following statement with

reference to the vessel:--

I found her almost dry. The sand had risen about eight feet on both sides of her. She was more hogged then, the sand at the stern and bow was about five or six feet.

The captain further says:--

At 5-30 P.M. on Wednesday I found her lying over very much; then the sand was in the same way as before. On the same night (Wednesday) it blew; it was very rough, and there was a considerable sea; she jumped up and down in the bed, but did not move.

3. On the 5th May, as stated in their report, Captains Reed and Bowden observed that the sand worked round the vessel seven or eight feet in height; but whether the sand increased in height afterwards is not very clear. The evidence rather tends to show that the ship did not sink deeper, but as the only witness to this, Captain Reed, speaks from what he observed without making any measurement, or testing his observation in any way which would ensure accuracy, I cannot feel certain that the ship did not sink deeper. If I may form an opinion from the natural consequences which would result from the jumping up and down of the vessel, and from the fact that the high tides must have washed over the sands and made them susceptible at low water to the pressure caused by the superincumbent weight of the ship, I should say it was not likely that the ship remained for the remaining seven or eight days embedded in sand of the same height, and that it was probable the vessel sank deeper every day.

4. On the 7th May an advertisement was issued in accordance with Captain Handley's report, and the vessel and cargo were advertised for sale for the 12th May. On the 12th May the vessel and cargo were sold and purchased by Captain Mitchell, Captain Millard, and Mr. Gomes. The cargo realized the sum of Rs. 450. Captain Mitchell went on board on the 13th at 3 P.M., and he says, by means of country boats (not mentioning how many) he removed certain articles from the ship as she lay on the Rungafulla Sands. The articles he removed form the subject of controversy between the parties, and I will refer to them afterwards. Early in the morning of the 14th May, owing to an extraordinary high and strong tide, the vessel floated herself whilst Captain Mitchell was on board. She proceeded some distance, and then struck on some sands at Diamond Harbour. The vessel remained a short time on these sands; afterwards she floated again, and arrived at Armenian Ghaut, Calcutta, on the 18th May. It was clear she was able to keep the water after she floated, but what was her precise condition when she anchored off Armenian Ghaut is not at all exhibited by the evidence adduced by the defence. All that I can discover about her state when anchored in the port of Calcutta is to be gleaned from a letter written by Captain Mitchell, dated 18th May, which thus described her:--

I hope, however, her bad fortune has left her; she is a good little vessel, but will require extensive repairs, if she can be made seaworthy at all.

5. The opinion expressed in this letter singularly accords with the opinion expressed by Captain Handley in his report. The words used by Captain Handley are as follows:--

Were it even possible, which I do not believe, when the next springs are on again, to tow her off, she is in that state that she would probably sink when afloat, or if it was possible to float her to a dock at great risk and expense, the cost of repairs would amount, in my opinion, to much more than the value of the ship after the necessary repairs.

6. We have thus the description given of the vessel by Captain Handley before she floated, and as she lay an apparent wreck, substantially agreeing with the description given by her purchaser, who is also a seafaring man. Both opinions point to her unseaworthiness, and state the heavy expenses which must be incurred. In fact, Captain Mitchell's opinion as to the chance of her ever being seaworthy is stronger than Captain Handley's, I may therefore take it upon this evidence that the vessel had suffered considerably; she required extensive repairs, and it was doubtful whether she would ever afterwards become seaworthy. I believe the vessel has gone out to sea, and Captain Handley refused to certify she was seaworthy.

7. There can be no doubt that a portion of the opinion expressed by Captain Handley and the other commanders, to the effect that the vessel, if got off, would sink in deep water, turned out erroneous. But there is nothing to indicate, much less satisfy me, that the opinion expressed to the effect that the vessel was hogged, and had broken her back, was incorrect. If the evidence of Captain Handley and the other nautical gentlemen, namely, Captain Bird and Captains Bowden and Reed, is to be trusted (and I see no reason to distrust their evidence), it is certain that the vessel was considerably hogged, and that being so, unless the vessel had unusual and unheard-of elasticity, it must be presumed she had broken her back to some extent. If, however, it is a matter of nautical knowledge and naval science that a vessel to some extent broken-backed cannot keep the water, I can only say that I have no evidence on this point on which I can affirm the principle; but, on the contrary, there is some evidence on which I should be disposed to ignore it, for Captain Dando says,--"I have known vessels with their backs broken go on the sand, and come off again, and come safe to Calcutta." It is, however, certain the vessel had received other injuries, irrespective of breaking her back to some extent. In fact, I would observe on this part of the case, that if the condition of the ship after she got off was calculated either to throw light on her previous state, or to rebut or destroy the opinion of the nautical gentlemen examined on behalf of the plaintiffs, as insisted on during this appeal by the counsel for the defendants, it was the duty of the defendants to have placed before the Court the precise condition of the vessel, and to have proved what her repairs actually cost by the further and fuller examination of Captain Mitchell. This has not been done, and this apparent omission leads me to believe that the main and substantial contention in the Court below, as is also evident from the decision of that Court, consisted of only two points,--namely, the want of notice of abandonment, and that the loss of the cargo was not total, as the whole, or a very substantial part of it, could have been readily removed in country boats.

8. Having stated the principal facts, regarding which there is little or no controversy, I proceed to deal with the evidence of the witnesses in detail, and to read extracts therefrom.

[His Lordship here read portions of Captain Handley's evidence, from "I went on board the "Heimdahl" with Reed and Bird at about 11," to "she was then in dock on blocks" Ante, pp. 353--356; Captain Reed's evidence, from I did not think so at the time she was surveyed" to The captain could not have stacked that cargo on shore without great expense Ante, pp. 357, 358; Captain Bowden's evidence, to This (B) is a copy of the report signed in Calcutta Ante, pp. 359, 360; Captain Williams' evidence to We had three or four small jolly boats alongside of the vessel" &c. Ante, pp. 363, 364; Captain Mitchell's evidence, to "Anchored off Armenian Ghaut. I saw her condition Ante, pp. 865, 366; Mr. Gomes" evidence, to The boats went every day and brought some Ante, pp. 366, 367.]

9. Of these witnesses, Captains Handley, Reed, and Bowden were examined by the plaintiffs, and Captains Williams and Mitchell and Mr. Gomes by the defendants. All these witnesses agree in saying that the vessel was in great danger; and the nautical gentlemen give it as their opinion that the vessel would not get off. Captain Mitchell's opinion is the strongest, as he says that he telegraphed to say there was no hope of getting her off.

10. Upon these facts the first question which arises is, whether the master was justified in selling the ship. In order to have a clear idea of the master's powers, it is necessary to refer to one or two leading authorities on the subject. In *Hunter v. Parker* 7 M. & W., 342, Baron Parke remarked as follows:--

The master has, by virtue of his employment, not merely those powers which are necessary for the navigation of the ship and the conduct of the adventure to a safe termination, but also a power when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit.

11. The principal limitation, then, on the master's power to sell the ship is, that it can only be exercised when she is reduced by the perils of the seas to such a condition as to make the further prosecution of the adventure to be entirely hopeless. It is not, however, necessary that the ship should be absolutely destroyed in order to justify a sale.

In *Arnould on Insurance*, edition of 1848, page 191, the necessity under which the master should sell is thus stated:--

If by the perils of the sea a ship is reduced to such a condition that, although her timbers still hold together, yet the master, after making the utmost endeavours within his power, and leaving no resource untried, is compelled to renounce all hope of repairing her so as to be enabled to bring her home, either from the physical impossibility of extricating her

from the peril at all with the utmost exertion of force he can command, or from his inability by any means in his power to find the necessary funds for the purpose, in such cases, if the danger is imminent and delay likely to prove destructive, the master will be justified in selling the ship as she lies, although at the time of sale she may still retain the character of a ship Ed. of 1866, 341.

The cases cited in support of this proposition are *Robertson v. Clarke* 1 Bing., 443, *Mount v. Harrison* 4 Bing., 388, and *Hunter v. Parker* 7 M. & W., 342. Having stated at length the master's powers to sell a ship, and the circumstances of urgent necessity under which it should be exercised, I now turn to the broad facts of this case to see whether or not every member of the propositions thus enunciated is made out in this case; and if I find that all the elements required by the law to justify a Bale by the master of a ship exist in the present case, it follows that this present sale was justifiable and passed the property in the ship to the purchaser. The broad and unmistakable facts of this case are as follows:--

A vessel heavily laden with timber which either sinks in the water or does not readily float, struck, during the south-western "monsoon, on one of the most dangerous sands in the River Hooghly, which is known to be one of the most capricious and treacherous of rivers; she heeled over at low tide so as almost to capsize, and she might at any moment capsize; and by the advice of the pilot the crew were put on shore, as it was unsafe for them to remain on board. During the height of the spring tides, very shortly after she struck, and before the sand round her grew 8 feet, one of the most powerful tugs on the river, the Cyclone, failed to move her, having made several attempts whilst the spring tides lasted, and on three consecutive days. It was believed by persons of great experience that the vessel could not live many days; that at any moment during the ebb tide she might tilt over or capsize, or she might sink at any time. It was a well-known fact that, three years before, the *Aga Baker* had struck on this very Band and disappeared in one tide. It appears to me that these facts, if not controverted, make out a case of urgent necessity within the terms of the propositions above stated. The facts to which I have adverted prove that no prospect remained of bringing the vessel to her destination; that having tried the best resources and the most powerful agency to extricate the vessel from her position, and it being found physically impossible to do so, the master was obliged to renounce all hope of getting the vessel off, and consequently of repairing her; that the danger was imminent, and delay likely to prove destructive. I consider these conclusions legitimately and properly flow from the facts of this case. The reverse of these conclusions would, as it appears to me, be extravagant in the extreme;--for instance, to assert that, whilst the vessel was lying on the Rungafulla Sands during the south-western monsoon, she was not in imminent peril of perishing, would be to advance a conclusion which the most ordinary experience of the ravages of the Hooghly and of the frequent disasters that occur in that river would neither support nor justify. These facts, which lead to the conclusion that the sale was justifiable, are challenged on the ground that the vessel, notwithstanding the assertions and opinions of the nautical savants, actually got off easily and readily, and not very much injured, as it is alleged. If the ship got off easily

and readily, either through the medium of human agency or by means of ordinary natural causes, these circumstances would have to be considered in forming an opinion on the question whether the sale was justified; but, generally speaking, it may be laid down as the result of the cases, that in considering whether the sale was justified, we must mainly, if not exclusively, look to the state of the circumstances at the time of the sale. It has been laid down by Lord Tenterden in *Robertson v. Caruthers* 2 Starkie, 572, that "the question is not whether, by possibility, if a different conduct had been pursued by the master, the ship might not eventually have been saved; but whether, exercising the best discretion he could on the subject-matter, he was not justified, without entering into a nice and minute calculation." The same doctrine is stated with admirable clearness by Mr. Justice Story thus:--

In the case of the sale of the ship and cargo by the master, which can only be justified by urgent necessity, if such necessity does apparently exist at the time and on the spot, I conceive that the master would be justified, although subsequent events show that a different course might have been attended with success.

See Arnould on Marine Insurance, 3rd ed., 948; and *The Fortitude*, cited 2 Phillips on Insurance, 315. Looking at the state of the circumstances at the time and spot, there can hardly be a doubt that there existed an apparent urgent necessity which justified the sale by the master. The subsequent event which occurred (that is, that the ship floated herself readily and easily), was due to an extraordinary natural cause,--namely, an extraordinary high and strong tide. The vessel was thus extricated from her desperate and forlorn situation in a manner which may be correctly characterised as marvellous, and which was really contrary to all experience. The fact of the vessel having got off under these circumstances may be left out of consideration in forming a correct opinion as to whether the master was justified in making a sale under an urgent necessity existing at the time and spot, because that fact cannot be fairly regarded as a circumstance throwing light on the master's conduct. In testing the soundness of the judgment which pronounces upon a sale as the best course of conduct for all concerned, we must be careful not to allow our minds to be prejudiced by subsequent events which were unforeseen, unexpected, and extraordinary in their nature; and we must resist the temptation "to be wise after the event," which too often impels the human mind to an unsound decision. I have next to consider whether there was anything in the condition of the vessel after she got off which proves that she was not very much injured. On this head I have already observed at some length, and it would be useless to repeat what I have said. The actual condition of the vessel when she was anchored is not proved by any evidence. The conclusions which I have formed on such evidence as exists, and which I have already stated, are that the vessel was injured considerably, that extensive repairs were required, and that when she sailed out of the port of Calcutta she was in all probability unseaworthy. These conclusions, therefore, instead of detracting from or casting doubt on the facts on which the plaintiffs rely in justification of the sale, tend to demonstrate the soundness of the opinion expressed by Captain Handley, that even if it were possible to float the ship to a

dock, the cost of repairs would amount to much more than the value of the ship after the necessary repairs. Captain Handley's estimated costs of Rs. 20,000 to 25,000 for necessary repairs, and his opinion that after these repairs the vessel would not be worth more than 9,000 or 10,000 rupees, are uncontradicted on the evidence in this case. Further, Captain Handley in cross-examination says--"I believe an action is pending against me for refusing a certificate on this ship. Captain Millard is the plaintiff." This implies that Captain Handley saw the ship after she had anchored at Armenian Ghaut and before she left the port of Calcutta. After this he is further cross-examined, and says, I would not take her as a gift to sell her. After repairs such as I would give her she would then fetch Rs. 9,000 or 10,000, to break up. It would cost Rs. 20,000 or 25,000 to repair her. If Rs. 20,000 or 25,000 had been expended, she would be worth Rs. 9,000 or 10,000." Captain Handley is apparently speaking of the ship either as she then lay in the river in Calcutta or as she was before she left Calcutta. The date of her departure is not to be found in the evidence. In answer to the second question put to him in cross-examination by Mr. Anstey as to whether his predictions were falsified, Captain Handley says that he does not know that his predictions were falsified. His predictions as to the necessary repairs to the vessel were not falsified; for the opinion expressed in his report that the repairs would amount to much more than the value of the vessel, is not only not falsified but insisted on at the trial, at which he is able to enter into figures, and he actually gives these figures, and in doing so Captain Handley proves to demonstration that his original opinion was correct. In his cross-examination he further says," I do not know if she was brought up by Captain Millard. He came into my office and asked me what I wanted done to the ship, and when I enumerated what I wanted done, he said he would rather strip off the copper. He has not done so." This part of his evidence is not attempted to be controverted by calling Captain Millard. On the whole then, I consider Captain Handley's opinion that the ship was not worth repairing may be accepted as true; and therefore on that ground, in addition to the ground that the ship was expected to sink at any time, I consider the master was justified in selling the vessel as she lay in the sands: see *Robertson v. Clarke* 1 Bing., 445, *Cambridge v. Anderton* 2 B. & Cr., 691, *Somes v. Sugrue* 4 C. & P., 276.

12. The only consideration which remains to be noticed as that in conflict with Captain Handley's opinion that the ship should be sold as she lay, is that of the pilot, who says that he thought the vessel should not have been abandoned and sold. I have not been favorably impressed with the evidence of the gentleman, and the account which Captain Handley gives of him in his cross-examination, namely,--"The pilot of the ship struck me as the most worthless fellow I ever saw on board a ship," does not contribute to enhance my estimate of the value of the pilot's evidence. I would further observe on this part of the case, that the learned counsel have not attempted to assail Captain Handley's evidence as being untrue, nor have they impugned his general integrity or disputed his intelligence and his profound knowledge in nautical matters; they have endeavoured to show that Captain Handley was mistaken in the conclusions stated in his report, and they contended that, owing to Captain Handley's residence for the last 20 years on shore, and

to his advancing years, his nerves have become more sensitive, and his original hardy frame has lost something of its daring and boldness, so that his evidence as to the actual state of danger must be received with some considerable reservation. On this latter subject I have already made my remarks. I consider the position of the vessel as she lay in the Rungafulla Sands was indubitably most perilous and hazardous; I have already shown that Captain Handley was only mistaken on one point,--namely, his belief that the ship would not float. His belief in all other matters contained in the report was not only not mistaken, but correct, unless we are to except his belief that the vessel would sink as she lay on the sands. This can hardly be excepted: this belief appears to have been correct at that time, and would have proved correct in all probability under ordinary circumstances. An extraordinary circumstance emancipated the vessel from her helpless and dangerous position; and it can hardly be expected that Captain Handley should in forming his opinion have taken into consideration an event which up to that time had not occurred within the range of his experience. Having regard to the proved occurrences of the three previous days, namely, the unsuccessful attempts on the part of the steamer Cyclone to tow the vessel off at the very height of the spring tides, it appears to me that Captain Handley's belief that the vessel could not be got off, and would subside in the river, was reasonably well-founded. The circumstances just adverted to also show that Captain Handley had no reason to expect that endeavours which had failed at the height of one set of spring tides would succeed at the next, and consequently I consider he was justified in his recommendation to sell without delay. If the sale were not recommended under the circumstances, the vessel would have been simply left to perish, according to the views then entertained of her helpless and dangerous situation. In estimating the value of Captain Handley's evidence, the fact that he is surveyor of several insurance offices should not be forgotten, for, if the evidence he has given, and the opinion he has pronounced, be accepted and acted on, it may be said that (unless Captain Handley really considers the present sale justifiable) he would be creating a bad precedent against himself and his employers. On this ground, to some extent, Captain Handley's evidence is against his interest. Regarding, therefore, Captain Handley's evidence from this point of view, and also considering that he is a gentleman of long experience and ability, and that there exists no reason whatever to impeach his credit or integrity, I unhesitatingly accept his evidence as true, and throughout my judgment, I shall proceed on this assumption. One more remark, and I have fully considered every thing relating to this part of the case, and that is, that Captain Reed saw the condition of the vessel as she lay for a whole week down to the 9th May, during which time she appeared to him in the same desperate situation. Having regard to these views, I hold the sale by the master of the ship was justifiable, and that it passed the property in the ship to the purchasers thereof.

13. The next question is, whether the sale of the cargo was justifiable. Now the power to sell the cargo depends on the same principle as the power to sell the ship, and, like it, can be exercised only in cases of urgent necessity. In *The Gratitude* 3 Rob. Adm. Rep., 240; see 257, 259, Lord Stowell describes the power of the master to sell the cargo thus:--

Though the master in the ordinary state of things is a stranger to the cargo, except for the purposes of custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, his character of supercargo or agent is forced on him by the general policy of the law, unless the law can be supposed to mean that valuable property in his hands is to be left without protection or care. Suppose the case of a ship driven into port with a perishable cargo, or suppose the vessel unable to proceed, or to stand in need of repairs; what must be done? The master in such a case must exercise his judgment whether it would be better to tranship the cargo if he has the means, or sell it; he is not bound to tranship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell. If he has not the means of transshipment, he is under an obligation to sell the cargo, unless it can be said that he is under an obligation to let it perish.

14. In the case of *Farnworth v. Hyde* 34 L.J., C.P., 207; S.C. on appeal, 36 L.J., C.P., 33, an estimate having been made of the expenses which would be incurred in forwarding cargo, &c, from a disabled ship, showing that the amount of these expenses fell short of the actual value of the cargo by ■ 209, which, it was submitted, should be allowed for depreciation in value, the learned Judge at nisi prius left the case to the jury thus: first, whether anything was to be deducted for loss of quantity; and secondly, that the question whether it was right to sell the cargo depended upon whether the cargo could have been practically carried in a mercantile sense to its destination,--that is, whether the cost of bringing the cargo, added to the amount of depreciation, would have left any appreciable profit. He left them to say whether it was right to sell the ship, and also whether it was right to sell the cargo. The jury found both questions in the affirmative. A new trial was moved for, and the rule discharged. This case went up before the Exchequer Chamber, and the directions of law given to the jury were left untouched. The Exchequer Chamber detected a mistake in the calculation of expenses to the extent of ■ 1,556 (being the value of the original freight), which should not have been added to the expenses, and considered that the amount of expenses thus reduced fell short of the value of the cargo by about 40 percent and hence they held there was no case of total loss which could be properly left to the jury.

15. Keeping these authorities in mind, I have to consider whether the sale of the cargo by the master was justifiable. The vessel being in imminent danger, the cargo was also in imminent danger. It is, however, contended that there was a difference between the situation of the vessel and the cargo; and it consisted in this, that, assuming that the vessel, as she lay before the sale, could not be extricated, the cargo might have been saved. The saving of the cargo in the present case substantially depended on the employment of one of two agencies: first, by hiring a tug steamer by the day, and transferring to it the cargo daily by means of the long boat This operation, according to the evidence, could only be performed during half-flood,--i.e., for three hours a day. In thus removing the sleepers an additional amount of extra labor would be needed. Secondly, by engaging a number of cargo boats, and employing men on board to remove

the cargo from the vessel on board the cargo boats during the same three hours per diem.

16. The first of these means of saving the cargo may be readily dismissed. The captain of the ship states: With the long boat, and with all these men employed, and according to the state of the vessel and the sand, I think I could have discharged into the steamer 100 sleepers per diem" "We have it in evidence that the daily hire of tug steamers averages from Rs. 400 to 900 per diem; and considering there would be some amount of risk attending a steamer lying at anchor for many hours of the day close to the Rungafulla Sands, I should say if a steamer were procurable, as to which there may be some doubt, an estimated hire of Rs. 500 per diem would be very moderate. Consequently I may take it as sufficiently proved by the evidence that the hire of a steamer would cost Rs. 500 per diem. One hundred sleepers per diem being delivered into the steamer would thus have been saved, but the whole value of 100 sleepers is, at the rate of Rs. 5 a sleeper which is admitted on both sides, Rs. 500. I therefore hold that the cargo, consisting of about 4,000 sleepers, could not have been practically carried in a mercantile sense ashore, much less to its destination, and that the sale of the cargo on this ground was justifiable.

17. As to the removal of the cargo by cargo boats, this I hold on the evidence was not practicable, and in fact impossible, during the south-west monsoon. On this point Captain Handley"s evidence is clear. He says a cargo boat would not live there (i.e., near the Rungafulla Sands) in the south-west monsoon. I would not have attempted to remove the cargo at that time. I have had the greatest difficulty in sending cargo boats half that distance in that monsoon. They are very shy of going in that monsoon. It is more dangerous below Hooghly Point. I consider it would have been dangerous in that monsoon for a cargo boat to go down. There was a very heavy sea, in which no ordinary cargo boat would have lived. The south-west monsoon is very strong, even half way down to Hooghly Point. In twenty years I have never known cargo boats so far in the south-west monsoon." Captain Handley also says: "In the Rungafulla, in the south-west monsoon, a cargo boat would not live. Loaded cargo boats are of all sizes. One to carry 500 logs would be worth Rs. 2,500." This part of Captain Handler"s evidence is generally confirmed by Captain Dando, who has been in the habit of building cargo boats. Captain Dando says: I have built cargo boats for Mackinnon, Mackenzie, & Co., &c. At the beginning of the south-west monsoon, if it was blowing hard from the south-west, I would not send cargo boats down there. They are not constructed for the purpose. I think very few insurance offices would have taken the risk." He further says: In the first place, boats could not be procured. Two respectable companies were applied to to my knowledge, and refused to let their boats go down. Each cargo boat would in fair weather carry 100 sleepers." With regard to the weather he says: "All I know is May is a most treacherous month," Captain Bowden also generally confirms Captain Handley"s statements. Mr. Duncan Mackinnon proves that applications were made to two of the principal owners of cargo boats, but without success; and, in fact, Mr. Mackinnon says as follows:--

I re-consulted before we had the cargo and ship put up for sale. I went to Fraser and Co., and the Calcutta Landing and Shipping Co., Ltd.; for, as I am aware, they are the principal landing agents. That was before I gave directions for sale of the vessel and cargo.

The evidence thus detailed, if believed (and I fully believe it), proves that cargo boats were not procurable for the purpose of saving the cargo; and that their employment, if procurable, would have been attended with risk and danger to life and property. The conclusion which this evidence produces is resisted by the defendants on Mr. Sutherland's evidence. This gentleman says he is the owner of cargo boats, that he was applied to by a Mr. Compton (who and what he is the witness does not know) for cargo boats to send down to the Heimdahl, and he consented to do so for something between Rs. 15 and Rs. 25 a day. This witness, however, admits that when asked by Captain Lowen, the manager of a cargo boat company, whether he was going to send boats to the Heimdahl, he gave Captain Lowen no information. This reticence Mr. Sutherland now attributes to a desire on his part to keep his own counsel, and not to divulge to Captain Lowen what he intended to do. This may be so, but I should have thought that if Mr. Sutherland realized in his own mind the danger to which he was about to subject valuable property, he would readily have entered into conversation with Captain Lowen, and obtained his views on the subject. Mr. Sutherland values his cargo boats at Rs. 5,000 or Rs. 6,000 each; I am therefore to believe that to earn something like Rs. 300 or Rs. 400 on a cargo boat (assuming on the most liberal computation that each boat would be engaged for fifteen or twenty days) Mr. Sutherland was disposed to risk his property of the value of twelve times the amount to be earned. I can only say that if I believe this, I should regard Mr. Sutherland's consenting to send his boats down in the southwest monsoon during the month of May as an exceedingly imprudent measure. Even if it be that Mr. Sutherland was willing to send down his cargo boats, this circumstance does not appear to have been communicated to the captain of the ship, and I think it would be too much to expect Messrs. Mackinnon, Mackenzie, & Co., to send to Messrs. Simpson & Co., when Captain Fraser's boat company, one of long standing, had positively refused to send down their boats. On the whole then, I do not consider Mr. Sutherland's evidence of much value, and, if of any value, it does not displace the conclusion at which I have arrived, that it was impracticable to send down cargo boats at that time of the year to save the cargo at the great risk of life and property.

18. These two agencies not being available for the purpose of saving the cargo, I should hold, and do hold, that the sale of the cargo was also justifiable, and under it the property in the cargo was transferred to the purchaser. Mr. Kennedy, for the respondent, contends that there were other means which might have been used to save the cargo, and suggests two other sets of means: first, the employment of country boats; secondly, by means of rafting the sleepers, the rafts to be made out of the timber of the ship to be broken up for the purpose. I can find no suggestion on the cross-examination of the plaintiff's witnesses as to the possibility or otherwise of saving the cargo by country boats, except towards the close of the plaintiff's case, when two or three questions were

put to Captain Bowden on that subject. Captain Handley was examined so far back as the 31st August 1870, and if the idea of saving by country boats was a feasible and proper one, I cannot understand why no question on that subject was put to him. I am disposed to believe that the notion of saving the cargo by country boats has been ingeniously started by the pilot. He probably knew the fact that two or three country boats had assisted Captain Mitchell, and he consequently thought that with this known fact, the theory of saving the cargo by country boats would have a sort of safe anchorage to support it. But however this be, I proceed to consider the evidence on the subject of saving the cargo by means of country boats. In the first place, it readily occurs to my mind (that if I believed, as I do, that ordinary cargo boats would not be safe at the Rungafulla Sands at that season of the year) that country boats would incur the greatest possible risk in being sent down there. Therefore, *prima facie*, the agency of country boats to save the cargo seems most improbable and impracticable; the use of these boats, if the captain succeeded in loading them, would be extremely dubious; the risk to which the cargo would have been subject on board the wreck would not, as it appears to me, be lessened by the employment of this sort of agency for the purpose of saving the cargo. Now the evidence as to the chance of obtaining the assistance of country boats is the following. The pilot, Captain Williams, says: There is a creek by the Semaphore; there were several large bhurs there; a bhur is a large up-country boat of 20 to 25 tons; they have high bows and sterns. There were two or three of them up a creek. There was one came off on two occasions with coolies to assist us. The first time they came to assist us and hoist the horses, and the second day they assisted us in throwing sleepers over-board. They were alongside; there was no difficulty in putting sleepers into them. There were not many country boats about there, about the small creek between Rungafulla Obelisk and Semaphore at Diamond Harbour. Sometimes there are, and sometimes not, I cannot say of my own knowledge." (This statement is by a man constantly engaged in going up and down the river.) There was at least one to take twenty or twenty-live tons. I did advise the captain to apply for a large up-country flat. On the flood a cargo boat could have come alongside, but not on the ebb. The sleepers were rather heavy. We tried to discharge a few, but it was rather slow work." Now this evidence of the pilot is not satisfactory. All that can be deduced from it is that there were two or three up-country bhurs lying in a creek; as is usual, they had probably retired to rest, if I may so say, until the north-east monsoon again set in, and as to the other country boats the pilot says there were not many. It is clear that the ordinary country boat would be wholly useless for the purpose of loading sleepers thereon, and saving them. On this evidence I cannot say I am at all satisfied that country boats, scanty in number, were available for the purpose of saving the cargo, and though it may well be that the manjees on board these boats might be willing, when the weather was perfectly fair, to venture out on the river, it is by no means clear that they would have accepted any engagement other than one of a very temporary character. Captain Eastwood says there are always many country boats about the river, but he does not specify in which part of the river, nor does he assert that they would have been available for the purpose of saving the sleepers. This evidence, therefore, does not make out the contention of the defendants that the cargo could have been saved by country

boats. It is further contended by Mr. Kennedy, that all speculation as to whether country boats could have saved the cargo is set at rest by the fact that country boats assisted Captain Mitchell at the scene of the apparent wreck at the Rungafulla Sands, and that in point of fact some seventy-eight sleepers were removed from the vessel, as she lay on those sands, to Diamond Harbour by country boats. This contention requires some examination. Mr. Gomes, who hired some country boats for Captain Mitchell, says that he got country boats at Diamond Harbour, two, three, or four a day; each boat could take twelve, thirteen, or fourteen sleepers; the utmost they could make would be two trips a day. Mr. Gomes does not say he despatched the boats to the Rungafulla Sands, nor does he say how many sleepers were sent from there to Diamond Harbour. Mr. Gomes only says that seventy or eighty sleepers were delivered at Diamond Harbour. He cannot say in how many boats. He says boats went every day and brought some." Now, if this version is true, it appears clear that all seventy or eighty sleepers could not have been sent from the Rungafulla Sands; and it further appears most probable that no sleepers were sent from that place. As the vessel remained two or three days at Diamond Harbour, and two or three boats went every day, and brought away some, it would follow that, if three boats made one trip during two days, or two boats made one trip during three days, and each boat carried thirteen sleepers, the precise number of seventy-eight sleepers, which number is alleged to have been saved, could have been sent from this vessel at Diamond Harbour. Captain Mitchell says that, after purchasing the ship and cargo, he went down the Rungafulla Sands, and arrived there at 3 P.M. on the 13th. He further says:--

I rigged a whip. There were no boats alongside then, but before dark there were.

That was on the 13th May. They went away when one or two boats were loaded to Diamond Harbour, No doubt they discharged cargo." Now what cargo would two boats have discharged even if laden with sleepers? Each fourteen or twenty-eight sleepers at the utmost. Now, referring to a former part of his evidence, it does not appear that he loaded the boats with sleepers on the first day,--namely, the 13th May. On the next day at 6 A.M. the vessel floated off; so if sleepers were sent ashore then, they must have been sent from the sands near Diamond Harbour, when the vessel struck the second time. Captain Mitchell says that, when I got down (i.e., at 3 P.M. of the 13th May), there were country boats there ready to help me." (This is in contradiction with what he had stated that there were no boats alongside then, but before dark there were"). I employed them. I mean I delivered sleepers into them. They took them ashore." This would show that the sleepers were carried ashore, but the next few sentences in his evidence contradicts that. Three at first worked the first day. I relieved the ship of all the dead weight, and put the spars over the side. I made a raft of them. I can't say what weight it would have carried. It was as broad as this table, a little longer. That was the first operation; the next was to get the sleepers from between decks to the upper deck." Then the evidence apparently breaks off. It is hardly possible he would have got up all the sleepers to the upper deck to despatch any on the first day. This evidence therefore does not satisfy me that even a

few sleepers were sent from the Rungafulla Sands to Diamond Harbour. Mr. Gomes' evidence, however, tends to show that the sleepers must have come from the ship when lying on the sands at Diamond Harbour, for he makes no distinction as to the places whence the sleepers were taken from, and landed at, Diamond Harbour; he makes the landing of the sleepers at Diamond Harbour one affair without any break, and leads me to believe that all the sleepers, the seventy or eighty, were landed under his supervision at Diamond Harbour. If sleepers were carried ashore from Rungafulla, they would, in all probability, be landed on shore much closer to the Rungafulla Sands than Diamond Harbour is. Assuming, however, that, with the assistance of Gomes, a Government official at Diamond Harbour, who may be supposed to exercise some influence on boatmen there, a few country boats were obtained, which in fine weather succeeded in getting off a few sleepers, it by no means follows, either that others could have procured country boats for the purpose, or that with the employment of country boats there could exist such a chance of saving the bulk of the cargo from a vessel lying in imminent danger as to have rendered that course the best in the judgment of the captain. Under the circumstances assumed, the question which the captain, representing all parties, would have to determine would be, whether it was more prudent to sell the cargo as it lay, and thus entitle the insurer to the benefit of salvage, which would represent the value of the cargo as sold, than to run the very great risk of either saving nothing at all, or at all events something very trifling. The determination to sell may well be the better course under such circumstances. Moreover, the zest with which a person in the position of Captain Mitchell, who purchased a wreck, pursued the object of his salvage, and the risk to which he exposed his own life, do not, in my opinion, furnish a rule of conduct which a prudent owner uninsured would be at all likely, or is required, to adopt.

19. As to the remaining contention of Mr. Kennedy, that the vessel should have been broken up, and made into rafts to float the sleepers, I must observe his theory as propounded to the Court was not very intelligible, and certainly not well conceived, or put forward in a digested form. Mr. Kennedy refers to the case of *Currie v. The Bombay Native Assurance Company* 8 Moore's P.C., 62, and argues from some observations in that case that it was the duty of the master to have broken up the ship, and to have made rafts with the limber, and floated the sleepers to a place of safety. It appears to me that that case does not support Mr. Kennedy's contention. In that case the Privy Council in substance remarked that the master had been very partial in his duties; he had sacrificed the interests of the cargo to the interests of the ship, which was a wreck, in not cutting open the decks, and thereby getting out the cargo. It appears to me that, if the ship were broken up (independently of the impossibility of doing so, having regard to the protection of the cargo), the master would have been sacrificing the interests of the ship to those of the cargo, and thus acting in the teeth of the proposition laid down by the Privy Council. Supposing, however, the ship was to be broken up, the question remains, which part of the ship? The sides of the ship could clearly not be broken up; all that could be broken up would be only part of the deck of the vessel. Of what precise utility this would have been in saving the bulk of the cargo is not shown, and what number of rafts, and of what

dimensions they would have been made, is not attempted even to be suggested. Captain Dando was cross-examined by the counsel of the defendants as to saving the cargo by rafts, and he says as follows:--

I did think of the possibility of rafting. I have seen some of the iron wood. The specific gravity is considerable. I have seen some of it 9-10ths of the specific gravity of water. They are lighter than water when dry. At first they would float very deep. I have my doubts whether they would have floated as a raft. "When they get wet it makes a considerable difference. I did consider the possibility of rafting and using casks and spars. The only way you could use the ship's timbers is by plucking her to pieces. It is questionable whether she would sell well under these circumstances. She sold for a very low price. It would require a number of persons to break up the ship into rafts. Coolies would have taken long about it. It is a most extraordinary idea. I have been long at sea, and never heard such an idea broached before." The matter of the rafting is not further pursued, and no substantive case is made in respect of it by the evidence adduced on behalf of the defendants. I think, therefore, with Captain Dando's evidence, I may dismiss the possibility of rafting the timbers of the vessel as a means of saving the cargo. Moreover, it must not be forgotten that the defence of the defendants, which is put forward in a letter of Messrs. Mackillop, Stewart, and Co., is as follows:--

We consider the sale of the vessel and cargo unjustifiable. No efforts appear to have been made to save either or any portion of either.

What was then deemed to amount to no efforts is now converted into the argument that, although some efforts were made, the ingenious device of floating the sleepers on rafts to be made from the timbers of the vessel had not been resorted to. The defence, as appearing in the written statement, was to the effect that no notice of abandonment was given, and no effort had been made to save ship or cargo. That defence, which insisted on the plaintiffs proving their case, expanded itself some time after the examination of the principal witness, Captain Handley, to whom no question either as to the employment of country boats or as to rafting was put. In fact, the case of the defendant acquired fresh vigour and dimensions as it proceeded, and it realises the idea of

Mobilitate viget, viresque acquirit eundo,

Parva metu primo, mox sese attollit in auras, & c.

20. On the whole, then, I consider the sale of the cargo was justifiable, and this conclusion is fully borne out by Captain " Mitchell's letter of the 7th May, written before the sale of the ship and cargo, which contained the following passage:--

I do not think the sleepers would realise the expense of recovering and delivering in town.

Captain Mitchell is put forward by the defendants as a witness of truth, and I may therefore fairly act upon his estimate and views expressed at a time when, as it appears

to me, he had no interest to pervert the truth.

21. Having held that the sale of the vessel and cargo was justifiable, and that by such sale the vessel and cargo was transferred to the purchasers, it follows that both the vessel and cargo were totally lost to their respective owners, and that the plaintiffs, the owners of the cargo, ought to be entitled to recover the full value of the insurance effected on the cargo from the underwriters. It is, however, insisted by the defendants that the plaintiff has lost all claim in respect of his total loss by not giving notice of abandonment, previous to the sale of the cargo, to the underwriters, or rather to their agents in Calcutta. It thus becomes necessary to examine a few cases, and to see whether the present loss should be considered a constructive total loss, to be converted into an absolute total loss by notice of abandonment.

22. The utility of a notice of abandonment is well described by Mr. Arnould in his work on Insurance (edition of 1848), 2nd volume, page 997 : To all indeed who are engaged in commercial speculation it is of the last importance to have a ready and quick command over their capital, so as to be enabled at once to withdraw it from an adventure likely to be losing, and invest it in another which promises to be lucrative." Suppose, then, a merchant or shipowner to have received information of some marine casualty, such as capture or stranding, which renders the total loss of his property highly probable, but not absolutely certain. What is he to do under these circumstances? To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute loss of his property; in fact, more so, for in the latter case he would have an immediate claim on the underwriter for the amount of his subscription. The claim, therefore, which he would have a right to make in case of an absolute loss the law allows him to make in these cases of probable and highly imminent total loss. It allows him to release himself from his embarrassment, and deal with the underwriters on the same footing as though a total loss had occurred, on condition of his abandoning to them all his interest in the subject insured, and all the rights of recovering it. In *Mellish v. Andrews* 15 East, 13, Lord Ellenborough says : It is an established familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again, in *Mullett v. Shedden* 13 East, 304, his Lordship says:--

If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship and been restored at last to the owner, I should have thought that there was much in the argument that, in order to make it a total loss, there should have been notice of abandonment. But here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away with.

These considerations show that if the assured is desirous of realising the value of his policy as soon as possible after intelligence of a disaster which renders a total loss highly probable, and he does not wish to abide the eventual result of the accident, he should give notice of abandonment, and cede all his rights of property in the thing abandoned; and having done so, if the circumstances were such as entitled the insured to treat the property insured as a constructive total loss, he is entitled to recover at once from the underwriters in the same way as if the property were totally lost. But if the property insured happens to be totally lost to the owner by a justifiable and proper sale by the master, no notice of abandonment is necessary. To take a case which might occur in the river Hooghly. Suppose a river steamer laden with cargo in the course of her voyage up-country during the cold weather strikes on a bank, and remains firmly embedded there without receiving any material damage, and suppose that the steamer and cargo are both insured against the perils of the river. Until the rains set in (six months afterwards), there would be no chance or hope to extricate the vessel from her situation, and then it is not improbable she may either float off by herself, or be towed into deep water. In this case, would the insured owner be bound to wait for the eventual result, which may or may not be favorable? The law seems to say not; he may treat the loss to him as a constructive total loss, and give notice of abandonment to the insurers to enable them to do their best to get the vessel off. The vessel not being in imminent peril (but high and dry) and not having suffered any material injury, it is apprehended the master could not sell her of his own authority, and consequently until the following rains it would not be known whether she would be totally lost or not. If after having given notice of abandonment, but before the vessel is extricated, the assured sues the underwriters as for a total loss, I apprehend the insurer, having had the opportunity of getting the vessel off, and having failed, will have no defence to such a suit. Similarly in the case supposed, there may be a constructive loss of the cargo if the owner thereof is satisfied that the cost of saving the cargo and the extra expense of the transit would come to more than the cargo is worth, and he would then be entitled to treat the loss as a constructive total loss, and to give notice of abandonment. On this notice reaching the insurers, they would be in a position to see whether they should accept the abandonment or not. If they accepted the abandonment, they might adopt measures for realising the value of the cargo to some extent, or if they did not accept the abandonment, they might save the cargo and restore the same to the owner at its port of destination. From the very nature of cases similar to the one supposed, a notice of abandonment becomes essential and necessary, it acquires a utility and significance. But where there is imminent danger impending, and the master is unable to save the ship or carry the cargo practically in a mercantile sense to its port of destination, so that the sale of ship and cargo becomes absolutely necessary as the best course to be pursued for the benefit of all concerned, and is actually resorted to, then by the operation of such sale the property in the ship and cargo are divested from the original owners, and the ship and cargo are totally and absolutely lost to their respective owners. This being so under the assurance, which is a contract of indemnity, the assured are entitled to recover for a total loss, without any previous notice of abandonment, as in such a case a notice of abandonment would be superfluous and

useless, and would serve no practical purpose, or contribute to any benefit as regards the insurers. However, to pursue the inquiry as to the necessity of giving notice of abandonment, I shall refer to a few more cases. In *Cambridge v. Anderton* 2 B. & C., 691, a ship having got on rocks, and experienced persons having given it as their opinion that the expenses of getting her off and repairing her would exceed her value when repaired, the captain sold her; and it was held that the assured might recover for a total loss without notice of abandonment, notwithstanding the purchaser afterwards got her off, and despatched her on a voyage to England. In *Roux v. Salvador* 3 Bing. N.C., 266; see 279, 286, which is admitted to be the leading case on the subject of insurance, the following observations are made by Lord Abinger with reference to cargo which is imperishable:--

If, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstances over which he has no control they can never or within no assignable period of time be brought to their original destination; in any of these cases the circumstances of their existing in specie at that forced termination of the risk is of no importance. The loss is in its nature total to him who has no hopes of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle.

Further on in the judgment, in reference to the subject of notice of abandonment, the following observations occur:--

But there are intermediate cases; there may be a capture which, though *prima facie* a total loss, may be followed by a recapture, which would re-vest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriters, treat the case as one of total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may be still of any value, and that he may, if he pleases, take measures at his own cost for realising or increasing that value. In all these cases, not only the thing assured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If in the event the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a

total loss has become certain which was uncertain before.

Still further in the judgment there are the following remarks 3 Bing, N.C., 288:--

In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, on payment by him of the total loss.

In *Farnworth v. Hyde* 34 L.J. C., 207; see 210, in which the circumstances were singularly parallel to the facts of the present case, the subject of the notice of abandonment is thus treated: "But no such notice was given, and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer, that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him as much as if it were destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale where the ship or cargo might have been saved wholly or partially if notice of abandonment had been given; but we are also aware that if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment; it must rest with the tribunal that has to deal with the questions of fact to guard against fraud and wrong; and the sale by the master ought not to be found right or valid, unless it was the best that could be done for the interest of those concerned, with reference to all the circumstances, including the time and manner of sale, and so in a mercantile sense necessary." This decision then proceeds to show that the case then under consideration was expressly included in the doctrine laid down in *Roux v. Salvador* 1 Bing. N.C., 266. In *Knight v. Faith* 15 A. & E., 649; see 656, 657, 658, 663, it was held that, under the circumstances of that case, the sale by the master did not, nor did the other facts, constitute an actual total loss; and that if there was a constructive total loss, which would have entitled the assured to abandon, they could not recover for such loss, not having given notice of abandonment. Lord Campbell in his judgment says: The plaintiff's counsel then relied upon the sale of the ship by the master. Whether notice of abandonment may be dispensed with where there has lawfully been a sale by the master, we are not now called upon to decide. Where she is reduced to a mere wreck, the solution of this question may be clear enough. Where she still retains her character of a ship, it may be attended with difficulty; but here we are of opinion that, as against the insurers, the sale is not shown to be lawful. It must be borne in mind that she remained in the character of a ship capable of being repaired, if there had been the means of repairing her at Santa Cruz; and that she might have been sent to other places where she might have been repaired, although not prudently, &c. We have here, then, the case of a

ship rendered unnavigable by the perils insured against, and capable of being repaired in the harbour into which she was carried, but still retaining her character as a ship without the title of the assured, the original owners being properly transferred to a purchaser. This, we think, is not an actual total loss, and if a constructive total loss, the insurers can only be rendered liable for the sum insured by a notice of abandonment. If there had been a notice of abandonment, the defendants would have been entitled to any freight due in respect of the goods which were landed at Santa Cruz; whereas, without a notice of abandonment, they have only the illusory claim to the ■ 72-10 after defraying the expenses of Bale. There is reason to apprehend that great frauds are committed in distant parts under pretence that ships have received an injury which renders it imprudent to repair them; and such frauds would be facilitated if the owners were not required to make any communication to the insurer till they come upon him peremptorily to demand payment of the full sum subscribed in the policy. For these reasons we think that the verdict in this case cannot stand as for a total loss." Now the principles enunciated in this case are entirely consistent with those which were laid down in *Farnworth v. Hyde* 34 L.J., C.P., 203, and it appears they are in accordance with the principles in the latter case. In *Fleming v. Smith* 1 H.L.C., 513; see 534, it was held that notice of abandonment is necessary to convert a constructive into a total loss, and that where a prudent owner uninsured would have sold, the case amounts to one of actual total loss. The circumstances of that case were very peculiar. The ship encountered bad weather in the Indian seas, and put into the Mauritius in May 1842. Some communication took place as to the necessity of making extensive repairs and borrowing money on bottomry for that purpose between 18th May and December 1842. Ultimately the vessel returned to England on the 27th March 1843. She was at first taken possession of by the agents of the owners. On the 30th March the owners abandoned to the underwriters. Lord Campbell in his judgment says: A constructive total loss is a good ground for abandonment, but in deciding on the circumstances which constitute a constructive total loss, which is as good a term as a contingent total loss, the reasons which govern the conduct of prudent uninsured owners must be considered. If a prudent person uninsured would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." Then his Lordship proceeds to show that, in this case, notice of abandonment should have been given in the month of November 1842, and that in point of fact the assured had elected to treat the loss as a partial loss. In *Stringer v. The English and Scottish Marine Insurance Company* 5 L.R., Q.B., 599; see 605, 606, Baron Martin makes the following remarks: The object of the insurance being that the goods should arrive under the control and in the possession of the assured at the port of discharge, when they were once captured or taken by any means mentioned in the policy by a person hostile to the owner, he would have a right to abandon them; and upon that capture he would have a clear right to declare his intention, or rather his wish, that the goods should be considered as lost to him, and that the underwriters should be responsible to him for the agreed value on the policy. But it was quite competent to him not to take that course, because assuming the goods were insured under their value, he might expect that in a short time the goods would be returned to him, and that it was more

for his interest to retain his ownership in the goods with the expectation of being able to take them to the port of discharge, and to sell them there at a large profit; and he had a right to follow that course, and he did follow it, and for the purpose of my judgment assume that he stated to an underwriter applying to him to abandon the goods that he would not abandon them, for he thought he had a better chance by remaining the holder of the goods; and therefore at this time there was no right to recover as for what is called a total loss. It is unfortunate that that terra is used; a total loss in one sense means where goods go to the bottom of the sea, or where the goods are burnt or utterly destroyed; in another sense a total loss means that the man who owns the goods is deprived of them in some way or other, and a great part of the argument turns upon the distinction between these two species of losses. The goods in that case having been sold by an order of Court pending an appeal, the question was whether they were totally lost to the plaintiff. On this head Baron Martin observes as follows: That order being made, the proper officer proceeded with the sale; and in my opinion when that sale took place, the property in those goods was taken out of the owner, so that it became impossible for him to take those goods under his original ownership to the port of discharge; and upon that taking place, the goods, I will not say, were totally lost, because I have complained of that as being an ambiguous expression, but were taken entirely from the owner's dominion and control, and were absolutely taken away from him; and in my judgment, after that event took place, the word abandonment, in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all."

23. I do not think it necessary to examine the cases further on this subject. The cases from which I have quoted at length clearly establish the following propositions:--

1st.--That the insured, in cases in which he would, on receiving intelligence of a disaster, be entitled to give notice of abandonment, and to treat his property as a constructive total loss before the eventual result is known, is not bound to do so; he may prefer to take his chance of the recovery of his property, especially when it is not fully insured. 2ndly.--If he takes his chance, and does not abandon, he is not the less entitled to recover on the happening of the result, which makes the subject insured a total loss. 3rdly.--Total loss occurs as much when the property insured goes to the bottom of the sea, as when it is in such a condition and plight that the assured has no means of recovering it, his inability arising from some insuperable obstacle. 4thly.--That a justifiable sale by the master, on the ground of urgent necessity, of the thing insured, which divests the original insured owner of his property, causes a total loss to him. 5thly.--That in case of constructive total loss only, a notice of abandonment is required, and that where the assured, on receiving full information of a disaster to property insured, caused by the perils of the sea, does not give due notice of abandonment, he is not entitled to recover as and for a total loss, if by reason of that disaster and the subsequent events connected with it, his property became so deteriorated in value as not to have been worth saving or bringing to the port of destination, or if by reason of an unjustifiable sale by the master he is not entitled to claim a total loss from the insurers.

24. Under these circumstances, and specially having regard to the principles laid down in *Farnworth v. Hyde* 34 L.J., C.P., 207; S.C. on appeal, 36 L.J., C.P., 33, I consider notice of abandonment of the cargo was not necessary. Assuming, however, that notice of abandonment should have been given, if the assured,--namely, the plaintiffs, the owners of the cargo,--had known the condition of the ship and cargo at or before the time of the sale thereof, I find there is no evidence in the case to show that the plaintiffs had such knowledge. Mr. Conroy, the chief storekeeper, was called as a witness by the defendants, but he was not examined as to whether he or the Railway Company had any knowledge of the state of the ship and cargo at or before the sale of the master. It was held in *Abel v. Potts* 3 Esp., 242 that, if the assured is not proved to have had intelligence of the loss until there is nothing left to abandon, no defence founded on his not having given notice of abandonment at all, or in due time, can be a bar to his claim for a total loss. In this case all that is known is that the plaintiffs made a claim for total loss after the sale, after there was nothing left to abandon, and it is not proved that they had notice of the disaster or of the loss at any time before the Bale so that, according to the case last cited, the want of notice of abandonment cannot be insisted on as a defence to this action. Assuming, however, that notice of abandonment had been given to Messrs, Mackillop, Stewart, and Co., it is not probable they would have interfered with the sale, as they had not been advised of this particular policy. I believe the notice of abandonment would have been of no practical utility owing to the laches of the defendants in not having advised this policy, and I therefore consider it unjust that such a defence as the want of the notice of abandonment under the circumstances of this case should be allowed to prevail. Further, I do not consider that in this case a mere formal protection should be thrown round a body of underwriters who did not deem it worth their while to protect themselves by duly apprising their agents in Calcutta of this policy and of the subject-matter of insurance.

25. It is further argued on behalf of the defendants, and held by the Court below, that if the master sold without consulting the plaintiffs as owners of the cargo, the sale was wrongful, and passed no property. In one case in the United States it was held that the power of the master to sell was limited to stranding on a foreign coast, but it has been decided by Mr. Justice Story that in case of urgent necessity the master has a right to sell the vessel as well on a home as on a foreign shore, and whether the owner's residence be near or at a distance. In *Arnould on Insurance*, 3rd edition, page 344. The same rule must apply to cargo. In *Fleming v. Smith* 1 H.L.C., 573; see 536, Lord Campbell says: It is not necessary to give any opinion as to the general power of the master under such circumstances as exist in this case, but I must hear a great deal of argument before I determine that, where he acts bona fide for the advantage of the owners, he has not authority by so doing to bind them." In the present case the bona fides of the captain is not disputed. The master is clearly the agent for the owner in a case of necessity, and I apprehend his power to sell arises from urgent necessity, and not from any consent, express or implied, on part of the owner. The greatest possible inconvenience would arise if the master could not sell cargo under urgent necessity without consulting the owner of the cargo. Bills of lading are in fact negotiable instruments, and it would be difficult for the

master at a moment of urgency to find out in whose hands the bills of lading are, or who are the owners of the cargo, or any portion thereof; and further, even if the master were to know who are the respective owners of a mixed cargo, and it became necessary to sell the cargo as a whole, I apprehend the veto of any particular owner would be of no consequence. Further, in this case it does not appear that the master knew, in fact I think he did not know, that the plaintiffs were consignees of the cargo, the bills of lading having been blank endorsed, and consequently the sale of the cargo, if made without the knowledge or consent of the owners, and before the termination of the voyage, if otherwise justifiable, would clearly be a lawful sale. I do not therefore think there is any force in this objection. It is further argued that, from the circumstances of the case, it must be presumed that the cargo was sold with the full knowledge of the plaintiffs, and that if that were so, the sale stands on the same footing as if it had been a sale by the owners themselves, and that it is a mere fallacy to say that the plaintiffs have been deprived of their property by a sale which must be treated as their own act. This position is not correct according to the authorities. The question raised is thus disposed of by Mr. Arnould in Volume 2, 3rd edition, page 948. It further appears from the authorities that, as between the assured and the underwriter, if the sale were otherwise justifiable, it makes no difference whether it were conducted by the master alone, where the assured has no agent, or by the master with the sanction and attendance of one of the partners, who is agent for the rest (see *Idle v. Royal Exchange Assurance Co.* 3 Moore, 115 : 8 Taunt., 755) or even by the assured himself, who is both master and owner, and also plaintiff in the action." (See *Green v. Royal Exchange Assurance Co.* 1 Marsh., 447 : 6 Taunt., 68) "On the broad ground," says Chief Justice Dallas, of a power to act on a sudden emergency, to save as much as could be saved from impending ruin, whether it be the owner or captain, will make no difference if the circumstances justified the selling, and the sale was honestly and fairly conducted."

26. It has also been contended in the course of the argument by the respondent's counsel, that if any portion of the cargo had been saved, the plaintiffs could have claimed nothing under the present policy. I think the risk is one of total loss in respect of the perils of the sea enumerated in the policy, but under the condition or memorandum of the policy an average loss is payable in case of stranding.

27. In forming my opinion in this case I have kept in mind the very valuable observations of Lord Mansfield in *Hamilton v. Mendes* 2 Burrows, 1198; see 1214, and I have endeavoured to subject my views to them. These observations are as follows:--

The daily negotiations and property of merchants ought not to depend upon subtleties and niceties, but upon rules easily learned and easily retained, because they are the dictates of common sense drawn from the truth of the case.

28. I cannot close this judgment without expressing my sense of obligation to Mr. Graham for his lucid and able argument, which has materially assisted me in forming my opinion. On the whole, I am of opinion that the judgment of the Court below should be reversed,

and that the plaintiffs' suit should be decreed.

Phear, J.

29. This appeal was, in the first instance, argued before Mr. Justice Paul and myself, and afterwards, at our request, with the consent of the parties, it was re-argued before Mr. Justice Macpherson, Mr. Justice Paul, and myself. It is unfortunate that, in a case of so much importance as this undoubtedly is, we have been unable, even after this double argument, to arrive at unanimity of opinion. The judgment which I am about to read is concurred in by Mr. Justice Macpherson; and it will consequently be the judgment of the Court. I regret that it must go forth wanting that additional weight which would have attached to it if it had also met with the concurrence of so experienced a practical lawyer as Mr. Justice Paul.

30. The plaintiffs sue the defendants on a valued policy of marine insurance as for a total loss of the goods insured, caused by the perils insured against. The goods in question were sleepers shipped on board the Heimdahl at Geographe Bay, Australia, and consigned to the plaintiffs at Calcutta. The governing term of the policy is expressed in these words:--

The said ship, &c., goods and merchandize, &c, for so much as concerns the assured, by agreement between the assured and the said company in this policy, are and shall be rated as follows,--that is to say, upon sleepers valued at ■ 2,230-10. Amount covered by this policy not to exceed four thousand pounds sterling, warranted free from all risks, except total loss only.

31. The goods were not in fact totally lost by the perils insured against, inasmuch as the greater portion of them were in the end safely brought in the ship itself to their destination, and actually came into the hands of the plaintiffs. But in her way up the Hooghly the ship grounded on a shoal, and remained stranded for some days in such a condition of apparent peril, that the master thought it expedient, having regard to the interest of all concerned, to sell her and her cargo. Accordingly ship and cargo were sold, as they stood, by public auction; and it was after this sale that the ship got off the sand, and with the bulk of her cargo on board came up the river to Calcutta. The plaintiffs contend that the sale, bona fide made under the circumstances which occurred, and which I shall presently be obliged to inquire into a little in detail, constituted such a constructive total loss to the insured as to be covered by the policy according to its proper legal construction.

32. I do not myself feel that there is any doubt as to the state of the law, so far as it bears upon the material issues in this suit. It has long enough been settled that total loss, within the meaning of a policy of this kind, comprehends not only actual loss of the whole subject insured, or destruction of its specific character or utility, but also any other forced termination of the assured's venture by compulsion of the perils insured against, even

though at the time of such termination the subject insured, or some portion of it, exists in specie, and has a merchantable value. In most cases, when termination of the risk by an event which does not effect a destruction of the subject insured is allowed to count as total loss, it becomes the duty of the matter, on the occurrence of that termination, in the interest of all concerned, to realise as much as possible by sale or otherwise. But it is important always (in the present case specially so) to bear in mind that the duty of the master so to realise does not spring up until his functions as agent of the carrier have been put an end to by the forced termination of the venture.

33. By keeping this principle in view, we are led at once to the one issue of fact upon which the fate of this case, as it presents itself to me, turns, namely,--

Was it, reasonably speaking, possible, at the time when the sleepers were sold, for the master to continue the venture, and in some mode to convey the goods to their destination, viz., Calcutta?

34. It lies upon the plaintiffs to prove the negative of this issue, not for the defendants to prove the affirmative.

35. The learned counsel for the plaintiffs, as I have already mentioned, have put their case in a somewhat different form. They Say that the master was justified by the urgency of the perils insured against in making the sale, and that consequently the sale was effective to deprive the insured of his property, and so to cause him loss of goods in specie. It is probable that in the present matter the plaintiffs' case under either form would necessitate the discussion of the same facts, and depend upon the same ultimate considerations, so that it would perhaps at first sight seem a thing of small consequence which was taken as the starting point in this inquiry. But I think nevertheless that we ought to avoid the latter, because I consider it inaccurate, and believe it to suggest an analogy which does not really subsist, or at least is not complete in all its aspects, namely, an analogy between a sale of goods made by the master to meet an urgent necessity of the ship pending the venture, and a sale such as that now in question, made by him on the termination of the venture by the perils of the sea. The one works a true loss to the owner of the goods, for which he may or may not be entitled to claim reimbursement; the other is, pro tanto, an act of salvage, which will enure to the benefit of the owner of the goods or the insurers, as the case may be.

36. It was urged in argument before us that a valid sale of the goods by the master put them as completely out of the control of the owner as if they were destroyed or captured, and therefore must (as those causes would) effect a total loss within the meaning of the policy. But the sequence of this reasoning appears to me open to objections. If the circumstances which occurred were such as to enable the master to effect a valid sale of the goods, this must have been because they were such as to confer upon him a power of sale,--i.e., authority as agent of the owner for this purpose; but who would be the owner at this time? Why, of course, the insured, because there had been no abandonment

followed by acceptance, and nothing happened to divest the insured of his property; and this power of sale is not a right bestowed by the exigency of the case upon a person other than the owner for the benefit of third persons; it is simply a power of sale confided to the master for the purpose of realising as much as possible for the owner. It would arise, if at all, in precisely the same way, whether the owner were insured or not. Then, surely, a sale by or on behalf of the insured could not make that a loss which was not otherwise a loss. We must thus go back to the circumstances themselves, not so much for the purpose of seeing whether they justified a sale of the goods by the master as against the owner, as for the purpose of ascertaining whether they amounted to a termination of the venture insured. The two tests are, no doubt, as I have already admitted, generally equivalent; but nevertheless they may not be precisely the same in all cases, and ought not to be confounded with each other. Doubtless we frequently find the phrase "loss by sale" in the leading English authorities in speaking of a loss which is attributed to perils of the sea, but those authorities at the same time abundantly show that the criterion of total loss must be looked for in the occurrences which precede the sale. Optima fides on the part of the master in selling will not effect a loss, unless the venture has been practically terminated. Thus in *Roux v. Salvador* 3 Bing., N.C., 266; see 285, 286, Lord Abinger says:--

The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or, if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases. There may be a capture which, though prima facie a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss and demand the full sum insured.

37. Lord Abinger, in his very able and carefully considered judgment, then goes on to point out that the cases wherein the subject insured is not actually destroyed, or put beyond recovery, divide themselves into two sets,--the one, in which the thing assured, or part of it, is not only supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it;" the other, where the subject-matter insured has, by a peril of the sea, lost its form and species,

where a ship, for example, has become a wreck, or a mere congeries of planks." In the latter class of cases the sale is the final fact of the series which constitute the history of the loss; and it was with reference to them alone that the learned Judge spoke of loss by sale;" while in regard to the former he seems to indicate his opinion that the insured must either abandon to the underwriters, or rely upon making out that the thing insured could not by any reasonable exertions have been conveyed to its destination.

38. In *Kemp v. Halliday* 11 Jur., N.S., 852; see 856, which was argued before Blackburn and Shee, JJ., the circumstances which ought to be regarded in determining whether in any given case a constructive total loss has occurred were discussed at some length by Mr. Justice Blackburn; and Mr. Justice Shee, although he differed from his colleague as to the verdict proper to be entered as between the parties to the suit, declared his entire concurrence in the views which were expressed by Mr. Justice Blackburn in this particular matter. In the course of his judgment Mr. Justice Blackburn said:--

It is now finally settled in England by the decision of the House of Lords in *Irvine v. Manning* 1 H.L.C., 287, 306 "that the question of loss, whether total or not, is to be determined just as if there was no policy at all." If the subject-matter is by the underwriters' perils put in such a situation that, supposing there was no policy, it would be lost to its owner, then as between the assured and the underwriters there is a total loss, not otherwise. And the question whether the thing is lost to the owner is to be treated in a practical business-like spirit; and if the thing cannot, by any means which the owners or their representative, the captain, can reasonably use, be saved, then it is totally lost; but if by any means, which were reasonably within their reach, they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owners to take those reasonable means. If they do not take those means, they cannot make the loss total by their own neglect--*Thornley v. Hebson* 2 B. & A., 573 as explained by Lord Tenterden in *Parry v. Aberdeen* 9 B. & C., 411." The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so, at an expense not ruinous; and to bring home the cargo, and earn the freight, if possible"--*Benson v. Chapman* 2 H.L.C., 696. The underwriters do not by their contract engage to indemnify against the consequences of his neglect to perform that duty. The question, however, whether it is possible, must be understood in the sense in which it is explained by Maule, J., in *Moss v. Smith* 9 C.B., 103. "In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible by some very expensive contrivance to recover it." I may add, to complete the illustration, that a diamond of great value would not be totally lost if dropped into water, from whence it would cost 10 to recover it, though a shilling in the same position would be totally lost. When a ship or other subject-matter of insurance is in such a position that it can be

saved, but only by an excessive expenditure, the assured may undoubtedly (at least if they give notice of abandonment in due time) treat it as a total loss and recover for it as such.

39. And somewhat later in the same judgment, the learned Judge said:--

All the English authorities agree that, unless the circumstances are such as to make the loss total within the principle expounded by Mr. Justice Maule in *Moss v. Smith* 9 C.B., 103, no notice of abandonment can make it so; and also, that even if the circumstances were such that at the time the notice of abandonment was given it was justified, yet if by subsequent events before an action brought, the plaintiff might by reasonable means obtain the thing, he can only recover for a partial loss.

40. It appears to me that this principle applies just as strongly to a case of sale without abandonment as to a case of abandonment. I would say that unless the circumstances are such as to make the loss total within the principle expounded by Mr. Justice Maule in *Moss v. Smith* 9 C.B., 103, no sale can make it so. No doubt the majority of the Judges of the Court of Common Pleas in the case of *Farnworth v. Hyde* 34 L.J., C.P., 207 seemed to think that there is, or ought to be, some special efficiency in what they termed a right sale." They were afraid that unless some advantage were given to the insured as against the insurer as the consequence of a right sale," it would be for the interest of the insured in all cases to take the alternative of giving notice of abandonment, and to leave the ship and cargo to perish unsold, thereby causing a loss of the salvage, which would be the effect of a sale. It appears to me that this consideration, whatever may be its intrinsic worth, is raised upon a very hollow basis. But I apprehend that at the best it must lead to small results, for unless a new meaning was intended by the Judges of the Common Pleas to be attributed to the term right sale," a sale Cannot, I suppose, having regard to the authorities referred to by Mr. Justice Blackburn, be right, for the purpose of constituting a total loss, unless it is made under circumstances which, independently of the sale, would amount to constructive total loss. The Court of Common Pleas did not in terms give the word any enlargement of meaning, and Mr. Justice Byles expressly said that" in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so when he sells the cargo, the necessity of so doing ought to be Strictly proved." At any rate, I may certainly take it to be undoubted law that nothing should be construed as a termination of the venture as against the insurer which would not have afforded the master and the shipowner a good defence in an action of trover brought against them by the insured. The judgment of the Privy Council in *Tronson v. Dent* 8 Moore's P.C., 419 reviewed all the cases bearing upon this point. At page 449 of the report, Justice Patteson, who delivered the judgment of the Court, says:--

Now the first question is, was he justified in doing what he did? There is a very considerable difference between the sale of the ship and the sale of the cargo. The master is the agent of the shipowners; he has the charge of the ship for them; he has therefore a much more powerful control over the ship in cases of injury than he can have

over the cargo, because he is altogether entrusted by the shipowners with the charge of the ship, but with regard to the goods which are shipped on board it is not so; he is bound to convey them according to the tenor of his bill of lading, or whatever contract he has entered into, to their place of destination; and all the books of authority, English and foreign, say, it is only if an accident arises, if he is actually cast away, that he is to deal with the cargo; it being a necessity cast upon him, not by any act of others with whom he is connected, but by the events that have occurred, and because the cargo is not to be left to perish, or to be left unregarded and uncared for, and there is no one else on whom the duty of guarding the goods, or taking care, or doing the best with them can be cast except upon the master. But we find in Abbott on Shipping it is laid down that the master is to be very careful in this matter, and his duty is to carry the goods to their destination. "The disposal, however, of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear it in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method." Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible, and the law of England does not recognize the authority of any tribunal or officer acting upon his suggestion or at his instance." And still more recently in *Currie v. The Bombay Native Insurance Company* 3 L.R., P.C., 73; see 80, their Lordships have given their sanction to the same doctrines. 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 only be partial.

41. Having so far endeavoured to explain my view of the law applicable to this case, and the ground upon which I take it, I will now address myself to the evidence on the record for the purpose of ascertaining, as well as I can, whether or not at the time of the sale, the master by reason and as a consequence of the stranding of the ship, was rendered unable to convey the sleepers, or any substantial portion of them, by any fairly practical mode, to Calcutta.

42. At the outset we find ourselves confronted, so to speak, with the very significant fact, that forty-eight hours after the sale the ship floated off the sand comparatively little injured, and ultimately brought her cargo of sleepers in safety to Calcutta. It is contended, however, that this fact ought not to be allowed any weight in the present matter, because it occurred after the sale was made. This objection might be good, if we were now concerned only with a question as to the captain's bona fides in making the sale, but clearly the plaintiffs have to prove much more than that the captain acted bona fide. It was said by the Privy Council in *Tronson v. Dent* 8 Moore's P.C., 419, that the necessity

and legality of the sale was not to be inferred from the bona fides of the master. No doubt if there was not bona fides it would take another aspect; but the existence of bona fides and the fact that the master acted to the best of his judgment, would not of itself be sufficient; it must be shown that there was an actual necessity." This language applies with considerable aptness to the present case, and assuredly the condition and behaviour of the ship when she got off the shoal affords valuable indication of her real state and strength while she was on it. I think, therefore, that we ought to receive and allow full weight to this evidence, When the vessel grounded she was, according to the master, drifting up the river with the tide against the wind. She heeled over almost immediately, and there seemed to be some reason for fearing that she might capsize. But nothing occurred to cause the ship serious injury. Soundings gave fifteen feet of water, and she drew fifteen and a half feet. It does not appear that there was any sea running. The tidal current of five or six knots an hour drifted her further and further upon the sand. The grounding took place early on the morning of the 30th April, and at that time the Heimdahl had eight inches of water in her. The master states this, and I suppose he speaks of a time just previous to the grounding, for he presently adds that in consequence of her having heeled over, he could not sound again till midnight, and that he then found she had eleven inches of water. The master's description of all that took place after the 13th April is somewhat lengthy, hut I think it best to quote it in full. He states as follows. (His Lordship here read the evidence of the master of the vessel taken on commission) Ante, pp. 348--352. This account does not appear to me to disclose any necessity for abandoning the ship, and still less of necessity for treating the cargo as lost. Although the ship seems to have been from the first much hogged, all inference of deadly injury prima facie deducible therefrom was rebutted by the fact that during the whole time, namely, twelve days, of her stay on the sands, notwithstanding the bumping and straining caused by the daily oscillations of tide which then occurred, she really made no water at all worth speaking of. It is clear enough now that if she had been sufficiently lightened, she would have floated off in perfect safety at an ordinary tide, and it cannot be doubted from the master's evidence that she might easily have been so lightened, I would here observe that the phenomenon of the hogging, marked as it was at first, was not regarded by the master as a symptom which should prevent him from endeavouring to get the ship into deep water. Indeed it was not until Mr. Handley and the Calcutta officials came upon the scene that this view appears to have been taken. But even if the master was right on this account in ultimately giving up all attempts to save the ship, his statement of what he fruitlessly did for the purpose of saving the cargo falls very far short of establishing to my satisfaction that no reasonable means were open to him for carrying the sleepers, or causing them to be carried, to their destination. As far as I can gather from his evidence he did not address himself to the separate task of saving the cargo, independently of the ship, until the day when Captain Handley came down and made Ms survey,--that is, the 5th,--and then he says:--

I came up to Calcutta at night. The next morning I reported myself to Messrs. Mackinnon, Mackenzie & Co. I asked the principal boating companies to land the sleepers; they could

not undertake it; they refused to do so.

He afterwards says that the ship's boats were inadequate to the purpose of landing any substantial quantity of the sleepers in a limited time. I will presently return to this part of the case again, but first I will refer to the testimony of Captain Handley as to the situation of the ship upon the sand when he surveyed her. The report made by him is as follows. (His Lordship here read the report made by Captain Handley, and the certificate given by Captains Reed and Bowden) See 6 B.L.R., 219--221.

43. The events which subsequently happened abundantly prove that the judgment of each of these experts was strangely at fault. The vessel had not broken her back, and she was not a wreck; for the master admits that when he saw her at her moorings a fortnight later she was afloat like any other ship. And in truth the dismal picture drawn by Captain Handley in his report was virtually modified by him very materially in his oral testimony. During his examination in Court, which extended to some length, he stated that at the time of his survey, that is, 5th May, the spring tides were just over; that he did not think it likely the ship would remain safely on the sand for the ten or eleven days which must elapse before the top of the next spring tides; and that even if she did last so long she would not then come off the sand; still if he had thought that she could live those ten days he would not have recommended abandoning her." And those words, which constitute the kernel of his evidence in my view, lead almost immediately to the conclusion that there was not an urgent necessity of any sort for the sale which took place on the 12th May. By that time the vessel had lived through seven out of the ten days; her condition had in no way deteriorated. She floated, i.e., stood upright in her bed, at every tide. It is beyond contest that she made no considerable amount of water. Captain Handley even states that the water in her was very little for such a vessel; also, as far as I can judge, the weather was not bad. Captain Handley's evidence, no doubt, is such as to convey an unfavourable impression of the weather which he experienced on the 5th. I can't help thinking, however, that his account somewhat exaggerates the actual facts of that day. He says: There was a very heavy sea when I went, in which no ordinary cargo boat could have lived." Yet it appears from Captain Reed, who accompanied him, that he and Captain Handley boarded the stranded Teasel on her windward side from an ordinary jolly boat. I imagine, therefore, that Captain Handley, when speaking this sentence, was probably keeping in his mind the case of a loaded cargo boat, about which he had been examined just before, and I suppose a loaded cargo boat might well be swamped in a swell which would have no material effect upon the stranded vessel. The other statement of Captain Handley, that it blew so fresh that I got wet on the steamer in going down," is certainly so worded as to magnify a very small symptom of bad weather; for Captain Bowden, who commanded this steamer, describes the matter thus: The day I took Captain Handley down there was a sea on; the spray passed over the steamer." Again, while Captain Reed so far supports Captain Handley's view as to state that "there was a nasty short jobble on" when they boarded the Heimdahl on the 5th, Captain Bowden, who was also there at the time, says: A jobble is not a particularly heavy sea,

just enough to prevent a boat remaining steady." But that which seems to my mind conclusive on the point is, that Captain Handley's report is entirely silent about the state of the weather. It is, I think, plain, that at the time of making his report he did not consider the weather was bad enough to constitute an element in the question whether or not the ship should be abandoned. And then we must remember that Captain Handley can speak of one particular day only; and that day a week before the sale took place. If we look to the evidence of those whose observation extended over any number of the days which the ship spent on the Bands, we find nowhere, except in the testimony of Gomes, any trace of general bad weather. The master of the vessel says there was a strong wind on Monday night. On Wednesday night it blew very rough, with considerable sea; she jumped up and down in her bed, but did not move. The mate says:--

On Saturday night there was a fresh breeze; on Tuesday night there was a strong breeze.

Captain Reed says:--

I remained a week; it was blowing hard.

Captain Bowden, who was there several days, says:--

The weather was very moderate, but in May bad weather may come on in a few hours.

The pilot says:--

It was not blowing at all hard while I was there up to the 5th.

Mitchell says: "It was not at all rough." Captain Eastwood, whose evidence I consider to be most valuable on this point, says that "it was fine weather." Gomes alone says of the whole period: The weather was rough monsoon weather, very rough." It appears to me that this testimony taken together, and considered fairly as a whole, leads to only one conclusion; namely, that the weather which prevailed during the time when the Heimdahl was on the sand, and specially about the time of the sale, was not bad weather. Further, the tide was then daily increasing. It is impossible, I think, in this state of things, even under the guidance of Captain Handley himself, to say that there was at the time of the sale no reasonable probability of the vessel coming safely off the sand. On the contrary, as it seems to my mind, there was then great probability that it would be possible to get her off with her cargo substantially uninjured. And as a matter of fact she did so come off, of her own accord, just forty-eight hours later. On the whole, therefore, I am of opinion that that which occurred to the vessel on the Rungafulla Sand was not such as the insured was entitled, as against the insurer, to treat as a constructive total loss of the vessel. And, inasmuch as the bulk of the cargo remained in the vessel till it was delivered at Calcutta, necessarily under the same circumstances there was not a constructive total loss of the cargo.

44. Even if we ought, however, on the evidence to hold that on the 12th May, or immediately previously, the vessel was constructively lost to its owners, still it appears to me that the plaintiffs have failed to make out that the master had no practical means of saving the cargo of sleepers, or a substantial portion of it. I have already remarked that the master made no effort to save the cargo, independently of the ship, up to the day when Captain Handley condemned the latter. And he does not appear to have even after that day taken any very active steps for that purpose. The utmost that he apparently did (his evidence being read along with that of Mr. Mackinnon, the charterer's agent) was to enquire for cargo boats at the offices of Eraser and Co., and of the Calcutta Landing Company, who tire respectively landing and shipping agents in Calcutta. And there is nothing to show, or to lead me to suppose, that he was very earnest in the quest. There is a conflict of evidence as to whether cargo boats could have been obtained at Calcutta for a job such as this on reasonable terms. And this is at least unfortunate for the plaintiffs, whose case is such as to oblige them to prove the negative. But I do not propose to balance the evidence on this point. For I am convinced that the captain was not reduced to Calcutta cargo boats alone for the means of landing the sleepers. It is true that the specific gravity of these goods was so high, that they could not be transported to the shore except by the aid of some contrivance for floating them. But would nothing other than valuable Calcutta cargo boats serve this purpose? Is it conceivable that an uninsured owner at Calcutta, with the knowledge that a ship containing upwards of 4,000 sleepers of his was stranded on the Rungafulla Sands, and that all this valuable property, worth at least Rs. 20,000, would be wholly lost to him unless he managed to get it ashore; is it conceivable that he would let twelve days of moderate weather pass away without finding out some method of landing the goods, which was at least worth trying, even though the principal boating companies at Calcutta refused to undertake the task? It appears to me almost incredible a priori that it should happen so, and when we look more closely at all the facts of the case, it is, I think, manifest that the master might without great difficulty have landed a considerable portion, at least, of the sleepers. It is remarkable that Captain Handley, in making his report, gave no attention whatever to this point. He seems for some cause or another to have altogether omitted to consider the interests of the owner of the cargo. That local boats could be procured of considerable size is, I think, certain; for the mate states that while the ship was on the sand a native boat with twenty men came off and offered assistance, seemingly of its own accord. And at any rate there is no reason whatever why the master should not have done what Gomes and Mitchell set themselves to do, and these persons certainly did enough, before the ship gave them the slip, and relieved them of their task, to demonstrate that it was perfectly feasible to save some at least of the sleepers without Calcutta cargo boats. During the time that the ship was lying stranded, Gomes and Mitchell (the latter having gone on board and seen the position of the ship) formed so high an opinion of the practicability of saving something material of ship and cargo as to think it worth their while to buy both at the auction, although each was sold separately; and it must be remarked that the sleepers could have had no value whatever on the Rungafulla Sands, unless there existed a reasonable prospect of getting them to Calcutta, that is, to the very

destination to which the master was bound to convey them. It is not perfectly clear on the evidence what exactly were the measures taken by these gentlemen in that matter, but it is certain that they bought the sleepers for Rs. 450, got country boats and men in readiness; and further, did actually by these means, in an exceedingly limited time, remove some sleepers to the shore at Diamond Harbour. In view of this portion of the facts of the case, I have no hesitation whatever in saying that the plaintiffs have entirely failed to prove to my satisfaction (sitting here as I do in the capacity of juror), that at the time of the sale, or shortly before, it was impracticable to convey the sleepers, or a substantial portion of them, to their destination. I thus, again, come to the conclusion that in this case there was no constructive loss of the cargo independently of the effect of the sale itself. And I have already stated that in my opinion a sale even made *optima fide* cannot make that a constructive loss which would not otherwise be so.

45. If I am right in this conclusion, it is in strictness not necessary for the purpose of our decision to consider whether actual abandonment to the underwriters was essential in order to render complete the plaintiff's right to claim as for a total loss. For it is not in any case until the constructive loss is made out that it becomes material to enquire whether or not the plaintiff ought to be allowed to claim on the policy as for a total loss, without having by reasonable notice of abandonment given the insurer the opportunity of exercising his own judgment and discretion on the merits of the transaction, and on the course to be pursued with the object of effecting salvage. The learned Judge below, however, dismissed the plaintiff's suit, solely on the ground that the claim was such as could not be enforced in the absence of abandonment, and that admittedly no abandonment had been made. And this has been the occasion of considerable argument before us, in the course of which learned counsel have almost gone the length of contending that the judgment of the majority of the Judges in the Court of Common Pleas in *Farnworth v. Hyde* 34 L.J., C.P., 207, so far as it was undisturbed on appeal by the Court of Exchequer Chamber, has virtually done away with the necessity of giving notice of abandonment in all cases of constructive total loss. I will not dwell on this side of the present case at any great length, but I think I ought to go so far as to say that I do not understand the judgment referred to as operating to impeach in any way the equitable principles which have hitherto been held to govern the discretion of the Court, when in any given instance of constructive total loss it is called upon to decide whether or not a plaintiff who has not abandoned to the underwriter should be permitted to recover as for a total loss. It is perhaps less necessary to enquire into the particular merits of that decision, because the foundation of facts upon which it was based was swept away by the Exchequer Chamber, and so in the end the decision determined nothing between the parties to the suit, and for that reason was ostentatiously left untouched by the Appeal Court. If it does go the length which has been claimed for it before us, we do not perceive how it can be upheld consistently with those principles to which I allude, and which the three learned Judges who passed it certainly did not in express words impeach.

46. The relations between the insured and insurer, so far as it is necessary to consider them in reference to this point, may be shortly stated. The insurer engages that the subject of insurance shall, by the completion of a particular adventure, arrive in safety at its destination, notwithstanding specified perils. This has always been treated as a contract of indemnity, not merely a contract to pay money on the happening of a named contingency; and it is essential to the foundation of the cause of action in a suit brought by the insured against the insurer on the footing of such a contract, that this has happened,--namely, that the subject of insurance, by reason of the perils insured against, has not in completion of the adventure arrived at its destination. This result may have come about in two modes, viz., either the subject of insurance may have entirely succumbed to those perils, or having been wholly or partially saved from them, may still, as a consequence of those perils, have failed to have arrived at its destination in completion of the adventure by those concerned in it.

47. By judicial construction, come to in view of the practice of merchants and underwriters, the contract of indemnity which is involved in an ordinary policy of marine insurance has been, as I have already had occasion in the course of this judgment to remark, extended to cover losses of the latter class. It has, in short, been found expedient in the interests of commerce to hold that the insured should not always be obliged to wait for the ultimate issue of the accident which may have happened to the subject of insurance, before he can become entitled in law to claim his indemnity, as on a forced termination of the adventure by the perils insured against. I have shown, however, as I conceive, by reference to judicial decisions of the highest authority, that the urgency of peril, to be such as to justify the step of giving up the adventure for this purpose, must amount, practically speaking, to a necessity. I will not go back again to this question now; but, for the purposes of the argument, supposing events to have happened which are such as to entitle the insured to take this course, I think it clear that he is bound in common honesty to inform the insurer of it at the earliest moment, in order that the latter may when practicable take his own measures for saving the property, and also may have opportunity of ascertaining for himself the true state of the case. In all cases such as the present, where the insurance is against total loss only, it is impossible to avoid seeing that there is much to operate as inducement to the insured, and those acting on his behalf, to be lax in their efforts at any partial saving of the subject of insurance; and yet the insurer is entitled to insist that these parties should be active even against the interest of the insured in this matter; and I apprehend it is certain, notwithstanding anything to the contrary which may seem to be deducible from the reported opinion of three Judges of the Common Pleas in *Farnworth v. Hyde* 34 L.J., C.P.. 207, that a Court of Equity will never allow the insurer to be compelled to indemnify the insured as for a total loss, if the latter has not dealt fairly by him in the matter of the accident, and has not afforded him all reasonable opportunity for protecting himself, and making the most of the imperiled subject of insurance. The relative position of the parties is very analogous to that of a guaranteed creditor and surety of the debtor; and I need hardly say that the former is not permitted to recover on the guarantee, unless he does all in his power to make available

to the latter such means of reimbursement as he himself possesses against the debtor. So in these cases of marine insurance, I think the insured cannot generally, while the subject of insurance retains any merchantable value, be allowed to abandon the adventure and to recover against the insurer as for a total loss, unless he places the insurer, so far as is possible under the circumstances of the case, in his own position relative to effecting salvage, that is to say, gives him prompt notice of abandonment when such notice can be given. Of course no rigid rule can be laid down and observed on this point. It may well enough be in a particular instance that such merchantable value as the subject retained notwithstanding the accident, would be lost unless it were sold immediately after the moment when the impracticability of carrying on the adventure became convincingly apparent to those engaged in it, and thus it might be in a sense necessary to effect a sale before notice of abandonment could be given to the insurer. Manifestly, notice of abandonment after a sale would be useless as regards the particular object of which I am now speaking, because the sale, if rightly effected, would pass the subject of it beyond the reach of the insurer. But even in such a case, it becomes, to say the least of it, a badge of bona fides on the part of the insured to give notice to the insurer as soon as possible, and so to afford him the earliest opportunity of questioning the propriety of abandonment. It must not be forgotten at this point, that in the matter of carrying out or abandoning the adventure, the master of the ship and the insured (as I have indicated above) form one party, so to speak, on one side, as opposed to the insurer on the other. It is a mistake, as it seems to me in this respect, to represent the master as a third person, capable of exercising a vis major to control and overpower the will or discretion of the insured. As against the insurer, the insured can only succeed upon grounds which establish the rightness and validity of the master's conduct and acts.

48. Let us now look at the facts of the present case which are relevant to the issue as to the necessity of notice of abandonment, assuming the insured was legally justified in abandoning the adventure and in claiming thereon as for a total loss. It appears to me that there is no nice question here as to whether or not notice could, under the circumstances, have been given by or on behalf of the insured to the insurer in time to have been of any practicable use to him. There is evidence, no doubt, to the effect that neither the master of the ship nor the charterer's agents in Calcutta knew who was the consignee of the sleepers, or whether these goods were insured or not. I will not, however, inquire whether or not these persons might by reasonable diligence have informed themselves on these points, because the insured, i.e., the plaintiff's, were, so to speak, on the spot with the policy in their hands, and I have no sort of doubt, upon the evidence before us, that they were aware of the stranding and of the intended sale quite early enough to give notice of the abandonment, if they adopted it (as they did adopt it), to the insurer's agents in Calcutta before the sale took place. The case was determined in the Court below upon the single issue whether or not notice of abandonment was, on the facts of the case, a condition precedent to the plaintiffs' right to recover in the suit. On this issue it would have been most material to the case of the plaintiffs to show, if it could have been shown, that the plaintiffs did not, in fact, know of the stranding and intended

abandonment of the adventure until after the sale had taken place, yet the plaintiffs did not make the slightest effort at the trial to establish that this was so. They did not themselves call any officer of the company as a witness, and when Mr. Conroy was put into the witness box by the defendants, the plaintiffs forbore to ask him any question on the point. The sale was held by public auction in Calcutta twelve days after the stranding occurred in the river, and two days after that sale the plaintiffs applied to the agents of the defendants for payment under the policy as for a total loss. If the plaintiffs were ignorant of the whole matter during the twelve days which elapsed previous to the sale, by what means did they become acquainted with it during the two subsequent days? They have not chosen to offer the Court the smallest information on this point. Can it in reason be doubted for a moment that they knew quite well before the event of the sale all that had taken place, and if this were so, it is, I think, altogether immaterial whether or not the master of the ship, or the agents of her charterers, had the means of finding out who were the consignees, or who were the insurers of the sleepers. I have already said that, in my opinion, the plaintiffs themselves being the insured, are as against the insurers the principals in the transaction of abandonment of the adventure and sale of the cargo. If they had been uninsured, I am convinced we should have found that they had interposed, and either satisfied themselves that the sale was the only proper step to take, or had forbidden it, and warned the master that they should hold his owners responsible for the non-prosecution of the adventure. They cannot therefore stand by with full knowledge of what is going on, and at the same time take advantage as against the insurers of the ignorance of those who were acting on their behalf. They must accept the consequence of not having themselves given the notice to the insurers which they undoubtedly, as I think, were able to give.

49. But it is said, first, that there was no one in Calcutta, or elsewhere within reach, who was authorized on behalf of the insurers to receive and act upon notice of abandonment; and, secondly, that if Messrs. Mackillop, Stewart and Co. were so authorized, it would have been useless to give them notice, because they had not been informed of this particular policy by their principals. These objections seem to me exceedingly unsubstantial. As to the first, it is enough to remark that the plaintiffs have brought the present suit in this Court on the footing of Messrs. Mackillop, Stewart and Co. being the agents and representatives of the insurers in this port. Also on the margin of the policy held by the plaintiffs, Messrs. Mackillop, Stewart and Co. are named as the agents of the insurers to pay any loss falling under the policy. They were therefore necessarily the agents of the insurers to ascertain and satisfy themselves whether or not the contingency which constituted such a loss had happened. To my mind, they were obviously the persons to whom notice of abandonment should be given, and the plaintiffs could, I think, have had no real doubt upon this point. As to the second, it appears to me that we are not called upon to speculate as to what Messrs. Mackillop, Stewart and Co. would have done in the matter had notice of abandonment been given to them. I do not myself doubt that they would have done their duty to their principals; and surely, had the policy been shown or communicated to them by the plaintiffs, they would have been in just the same position

relative to the matter as if the information had come to them directly from their principals. Indeed, as a matter of fact, we find that as soon as the plaintiffs showed their policy to Messrs. Mackillop, Stewart and Co., the latter at once accepted their position as agents of the insurers. As a last objection it was urged before us that the defendants ought not to be heard to say that no notice of abandonment had been given, inasmuch as they themselves had been negligent in omitting or delaying to inform their agents of this policy. It was said that had it not been for this neglect, i.e., had their agents been duly informed, they might, notwithstanding the non-receipt of notice from the plaintiffs, have taken steps to protect the insurer's interest in the matter of the stranding. I really do not know whether or not I rightly appreciate the force of this objection. It seems to me at any rate to be double-edged, and to cut as much against the plaintiffs as against the defendants. The short answer to it, if it requires one, is that the purpose of the notice of abandonment is to give the insurer the opportunity of protecting himself with his own eyes and hands, and if the insured has it in his power to give this notice in time for it to be of use to the insurer, he is bound in equity to do so before he can make the insurer responsible for the whole loss. That the insurer has himself failed to keep his eyes so completely open as he might have done, appears to me in no wise to touch this duty on the part of the insured. If now we turn back to the actual facts which constitute this case, it is abundantly clear that a notice of abandonment to Messrs. Mackillop, Stewart and Co. which would have had the effect of bringing them on the scene as agents of the insurer a single hour before the sale took place, not only might, but probably would, have led to the whole cargo of sleepers remaining the property of the plaintiffs. For reasons which I have already explained at length, and need not now repeat, I conceive it to be in the highest degree improbable that persons so deeply interested in saving the cargo as Messrs. Mackillop, Stewart and Co. in their capacity of agents of the insurers were, would under the circumstances of the case have been satisfied with the efforts at effecting salvage which had been made before Mitchell and Gomes took action. I cannot imagine that the insurers, or any one acting for them, would have allowed the great, and as it seems to me manifest blunder to be committed of selling a ship which had been on the sand twelve days without making water, and which, as nearly as possible, floated with all her cargo on board every tide, of selling both her and her cargo in comparatively fine weather just as the tides were approaching their maximum, and had the sale been even delayed to the time of that maximum, the stranding would have disposed of itself before the sale was effected.

50. With regard, then, to this second part of the case, I am of opinion on the facts that the plaintiffs had it in their power to give notice of the abandonment to the defendants through their agents before the sale was effected; such notice of abandonment would have given the insurers an opportunity of protecting themselves, which the insured were bound to afford them.

51. I therefore think that the learned Judge below was right in holding that the giving of notice was essential to the plaintiffs' right to recover in this action. The appeal will be dismissed with costs.