

JOHN TAYLOR (DEFENDANT).....APPELLANT ;

1885

AND

May. 8.

Nov. 16.

ROBERT G. MORAN, BENJAMIN }
 WISHART, ROBERT GALLAWAY } RESPONDENTS.
 AND DAVID SMITH (PLAINTIFFS) }

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

*Marine Insurance—Voyage policy—Sailing restrictions—Time of
 entering Gulf of St. Lawrence—Attempt to enter.*

In an action on a voyage policy containing this clause “warranted not to enter or attempt to enter or to use the Gulf of St. Lawrence prior to the 10th day of May, nor after the 30th day of October (a line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof shall be considered the bounds of the Gulf of St. Lawrence,)” the evidence was as follows:—

The Captain says: “The voyage was from Liverpool to Quebec and ship sailed on 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. Shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main top-sail, and about mid-night she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-four hours we started to work up towards Quebec.”

The log-book showed that the ship got into this ice on the seventh of May, and an expert examined at the trial swore that from the entries in the log-book of the 6th, 7th, 8th and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence.

A verdict was taken for the plaintiffs by consent, with leave for the defendants to move to enter a non-suit, or for a new trial; the court to have power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court of

* PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

1885
 TAYLOR
 v.
 MORAN.

New Brunswick sustained the verdict. On appeal to the Supreme Court of Canada,
Held, reversing the judgment of the court below, Henry J. dissenting, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause.

APPEAL from a decision of the Supreme Court of New Brunswick (1) refusing to enter a non-suit or order a new trial.

The facts of the case sufficiently appear in the head note and in the report of the case in the New Brunswick reports.

C. W. Weldon Q.C. for respondent.

My first point is that the evidence shows that prior to the tenth of May the said vessel was attempting to enter the Gulf of St. Lawrence, and there was therefore a breach of warranty.

The whole of a policy of insurance, as well as any contract, must be construed together and every part thereof given its full legal construction and meaning. Mr. Justice King seems to think this clause not applicable to this insurance, and in effect, in his judgment, strikes it out and considers it inconsistent. But the learned judge is wrong in this particular. This is a portion of the contract that cannot be rejected; whatever may be conjectured cannot alter its effect. It is reasonable on a voyage policy to warrant a vessel shall not use a certain sea before a certain time. For instance, a vessel might be insured on a voyage from Liverpool to San Francisco, with a warranty that she should not round or attempt to round Cape Horn during certain months, and clearly if she did so it would be a breach of warranty. In this case the vessel was in Liverpool, the underwriter in Canada; he had no knowledge of her sailing, and the underwriter might say: "Yes, I will take the risk at 2½ per cent., provided you warrant

(1) 24 N.B. Rep. 39.

your vessel will not enter or attempt to enter the Gulf of St. Lawrence before the tenth May." We can fairly infer what is referred to by the House of Lords in the case of *Birrell v. Dyer* (1), and it would seem the very damage the underwriter wished to be avoided was encountered in this case. The words "enter or attempt to enter," apply to two different acts—the one, the actual entering the gulf, the other, the attempt to enter—and it is immaterial whether it is successful or not; in either case it is a breach of warranty. Had the words been merely "enter the gulf" it is not disputed that a vessel sailing with the intention to enter would not commit a breach of warranty until the intention was carried out. Here the words are "attempt to enter," pointing to something more than actual entry, *i.e.* the intention to enter and an effort to carry that intention into effect. Here the master evidently intended to enter the gulf, and prior to the 10th of May was endeavoring to carry out that intention. *Birrell v. Dyer* (1); *Colledge v. Hart* (2).

Dr. Stockton for respondents.

There was no breach of warranty in this case. A line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof, shall be considered the bound of the Gulf of St. Lawrence seaward. The "Prince Eugene" did not enter or attempt to enter the gulf before the 10th of May. If the vessel were attempting to enter the gulf because sailing towards that line, then there was a breach of warranty under the policy from the moment the vessel set sail from Liverpool to Quebec. The policy covered a voyage from Liverpool to Quebec; it would be singular, if not absurd, to hold the prosecution of that voyage a breach of warranty of the very policy issued to cover that voyage. It is submitted the fair meaning

(1) 9 app. cas. 345.

(2) 6 Ex. 205.

1885
TAYLOR
v.
MORAN.

of the clause is, that the vessel would not cross the line, or attempt actually to do so, until after the 10th of May. The attempt to enter the gulf would only be when the vessel reached the line and attempted to cross. It is not pretended the vessel crossed the line before the 10th of May, but was sailing towards it. The vessel sailed on the 2nd April; the policy was effected on the 3rd April. She was sailing towards the line at the time policy issued.

What purported to be a chart was produced by appellant on the trial, and attempted to be used to show the position of the vessel at certain dates. There was no proof what kind of a chart it was, or by whom compiled; no evidence that it was accurate, or published by authority of the Admiralty, or any other competent authority (1). The judge offered to admit chart, subject to objection, but it was not pressed. The rejection of questions put by appellant, and also the offer to admit chart, are fully alluded to in the judgment of King J. in the court below.

C. W. Weldon Q.C. was heard in reply.

Sir W. J. RITCHIE C.J.—The warranty is in the policy, the parties have not chosen to strike it out or reject it, and we have no right to do so, but are bound to give it due effect if it is capable of being acted on, which I think it is quite as much in a voyage as in a time policy. I cannot see that the warranty is at all inconsistent with a voyage policy; the same reasons which would induce an insurer to prohibit the entering, attempting to enter or usage of the gulf within the times limited, would apply with equal force to, and was as necessary in, a voyage, as a time policy when the insurer is unwilling to take on himself the risk of the insured entering, or attempting to enter or use the Gulf of St. Lawrence prior to the 10th of

(1) See Roscoe N. P. Ev. Vol 1 (Ed. 1884) p. 47.

May, or after the 30th of October; for, if the entering or attempting to enter or use, would be dangerous in the case of a time policy, it would be equally so in that of a voyage policy. Why should the assured not as well thus limit himself as to entering, attempting to enter, or using the gulf before or after the days named, in a voyage policy as in a time policy? In either case, the limit he puts on himself is precisely the same, and if he can make a warranty good in the one case, I can see no reason why he may not do so in the other; and if he chooses so to pursue his voyage as to amount to a breach of his warranty, clearly the underwriter may avail himself of it; and therefore, in my opinion, the real and only point in the question here is: Was there a breach of the warranty? That is to say: Did the vessel enter, or attempt to enter, or use the Gulf of St. Lawrence prior to the 10th day of May? The vessel did not actually enter the gulf until after the 10th of May, so that the only breach, if any, was: Did she, before the 10th of May, attempt to enter the gulf? And this, in my opinion, is a pure question of fact, which should have been submitted to the jury.

The respondent contends that the fair meaning of the clause is that the vessel should not cross the line, or attempt actually to cross, until the 10th of May; that the attempt to enter the gulf would only be when the vessel reached the line and attempted to cross.

But surely, if she had not reached the line, but there was ice between her and the line, and while, in attempting to force her way through the ice to reach and cross the line and enter the gulf, in so doing she received damage, could it be said she was not attempting to enter? Or could it be said that if and while so attempting she received damage, it was not the very damage from which the warranty was intended to protect the underwriters?

1885
 TAYLOR
 v.
 MORAN.
 Ritchie C.J.

1885

TAYLOR
v.
MORAN.

Ritchie C.J.

The contention that "attempting to enter" means attempting to cross the line, and that there can be no "attempt to enter" until the vessel is at the line, appears to me to render the words "attempting to enter" meaningless; it is tantamount to saying that the vessel must come up to the line and actually cross (for it is difficult to see how, practically, she could just reach the line and not cross) which would not be an attempt to enter, but an actual entry. It is clear the warranty contemplates two distinct contingencies, one attempting to enter, the other actually entering.

Judge Palmer says :

It must be borne in mind that this was a voyage policy, and under such a policy the vessel would have a right to sail on the voyage according to the representation made, or, if nothing said, then at any time; and when she arrived at the place where she would have to enter the gulf he would have to delay, and not attempt to enter until the time named.

I cannot assent to this as good law. The duty was cast on insured to pursue his voyage, once entered on, without unnecessary delay or deviation; if he wished to prevent a breach of his warranty, he should have taken care to have started on his voyage late enough to prevent the necessity of attempting to enter or entering before the 10th of May. It would not do, in my opinion, for the vessel to lay at, or beat about, the mouth of the gulf, waiting until the 10th, to enable her then to enter and save her warranty. I think the evidence shows that the vessel, while pursuing her voyage, was attempting to enter the gulf, and would have done so but for the ice. This, in my opinion, was the very risk the warranty was intended to protect the underwriters from, viz., beating about in the ice attempting to enter the gulf. If, as suggested by Judge King, it could have been shown that at the time of the accident the vessel was so far from the line of the gulf, as fixed by the policy, that she could not have reached it by the

10th of May, or that she was so far from it that she could not reasonably, in the opinion of the jury, be said to be attempting to enter the gulf at the time of the loss, under such circumstances, the jury would be fully justified in finding that she was not attempting to enter, and so there had been no breach of warranty.

1885
 TAYLOR
 v.
 MORAN.
 Ritchie C.J.
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Mr. Justice King says :

Capt. Thomas stated where the line was, but Capt. Smith might have a different opinion; or as, according to Capt. Thomas, the ship was about sixty miles from the line of the gulf at noon on the 7th May, and with an ordinary wind could run that distance in about eight hours, and with such winds as prevailed could have got to the line in twenty-four hours from where she was at noon of the 7th, but was hove to and was drifting, and was farther from the line on the 10th than on the 7th; the master might possibly have shown that if he had wished to enter the gulf, he could have done so, and that not doing so, and being prevented by no physical obstacle, as for instance by the ice, from doing so if he had so wished, he could not be said to be attempting to enter the gulf. In any point of view the plaintiffs were entitled to his evidence on the point, and the amendment should have been made only upon terms of postponement of the trial.

But it must be remembered that unnecessary delay in pursuing the voyage would vitiate the policy, such delay being tantamount to deviation, it being the clear duty of the master, having commenced the voyage, then to proceed to the place of destination by the shortest and most direct course usually taken by ships on the same voyage; this is a stipulation implied in all contracts of affreightment and all policies of marine insurance, liable, however, to be modified in respect of particular voyages by evidence of usage when common and established, or by express agreement when the language is clear and unambiguous (1).

The warranty certainly could not prevent him from completing the voyage, but if he entered, and so was guilty of a breach of his warranty, it would certainly be at owner's risk, for the simple reason that by the terms of his policy he assumed that risk.

1885

TAYLOR
v.
MORAN.

Per Tindal C.J. in *McAndrews v. Adams* (1); *Davis v. Garrett* (2); *Freeman v. Taylor* (3); *Mount v. Larkins* (4); *Palmer v. Marshall* (5).

Ritchie C.J.

This being the captain's duty, and he being within such a short distance of the mouth of the gulf and continuing on his voyage, he must, I think, be taken to be attempting to enter the gulf, and he only failed to do so by reason of the ice which he encountered in such attempt, and which caused the injury from which it was the object of the warranty to protect the insurers.

The appeal must be allowed, and the parties having made an agreement to that effect a non-suit will be entered, otherwise we could only have ordered a new trial.

FOURNIER J.—I am of opinion that the appeal should be allowed.

HENRY J.—The respondents' ship sailed from Liverpool to Quebec on 2nd April. She was under an obligation not to enter the Gulf of St. Lawrence before 10th May, or to attempt to enter. Some two or three days before that date the vessel got into the ice several miles south of the gulf, and was injured. A claim is made for particular average for damage sustained by the ice three or four days before the time. She met it on the sixth of May, and got into it that night or the night following, and sustained the damage for which the action is brought.

Now, where did she meet the ice? To the southward of the coast of Newfoundland, the distance not being stated. She sailed for four or five days after, when she got into a field of thin ice, and after going through that,

(1) 1 Bing. N. C. 39.

(2) 6 Bing. 716.

(3) 8 Bing. 124.

(4) 8 Bing. 108.

(5) 8 Bing. 317.

proceeded without meeting any more, and arrived at Quebec on the 30th or 31st of May. She did not enter the gulf before the tenth and the question is as to an attempt to do so.

The pleas of the defendants did not originally contain any allegation of breach of covenant. The captain was examined under commission, and there appears to have been no question raised as to the breach of covenant before the trial. At the trial an application was made to add this plea. The presiding judge to whom this application was made not only granted it, but required the parties to proceed with the trial.

There was no necessity to ask the captain when examined any question as to his intention, or as to his action from which such could be ascertained. The amendment having been made, we look for the testimony, and find there is no evidence as to the question at all. The defendant sets up an attempt to enter the gulf before the time mentioned as a defence. He says: "You are entitled to recover in this case on all other points, but your right to recover in every other respect is of no avail because, on or before the 10th of May, you attempted to enter the gulf."

This is the defence, where is the evidence? If there is none, the defence should fail. If the captain intended and meant, and did attempt to break through this line before the 10th of May, the appellant is bound to give evidence of it. But does the fact of meeting the ice away to the southward of this line prove that he started from Liverpool too soon, and that he necessarily throughout the passage was making the illegal attempt? The captain is under legal liabilities, and is bound to sail when the ship is loaded and ready for sea. What evidence is there to show the court or jury, that if he had waited two days longer he would not have met the same ice. Then how can it be said that it was sailing

1885
 TAYLOR
 v.
 MORAN.

Henry J.

1885
 TAYLOR
 v.
 MORAN.
 Henry J.

too soon that caused the damage? The defendant is bound to prove his defence and to make out a reasonably strong case. He must remove every reasonable doubt as to the fact alleged in defence. I think that courts should interpret conditions of this kind strictly.

But we are told that if he had not been attempting to enter the gulf he would not have been where he was. What evidence is there of that? I must say in this case that we should have some proof that the party did make the attempt. When did he attempt it? On what part of the voyage? When he left Liverpool, on the 10th of May, or when? If we are to decide upon the rights of parties on evidence as slim as this, I think we are not performing our legitimate functions.

I think, therefore, that the appeal should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J.—I would have come to the same conclusion as my brother Gwynne. I think the appeal should be allowed, without costs.

GWYNNE J.—I think there can be no non-suit upon the point as to there being, as was contended, no proof of damage on the voyage to Quebec to the amount of five per cent. upon the declared value of the ship. There was evidence upon that point to go to the court below acting as a jury, therefore there can be no non-suit; and as against the finding of the court upon that evidence, the point to be established by the appellant before us sitting in appeal is, that on this matter of fact they were clearly wrong. The appellant has failed to establish that point to my satisfaction. As to the breach of warranty the respondents having waived all claim to a new trial upon this point, leave to have which was reserved to them if they desired it, as a condition subject to which the plea was allowed to be added at the trial

and consenting to have the question on the warranty determined by us upon the evidence as it stands, I am of opinion that a verdict and judgment thereon should be entered for the defendant in the court below upon the plea of warranty and breach thereof. I cannot entertain a doubt that according to the ordinary understanding of the language used in the warranty the evidence shows a clear attempt to enter the Gulf of St. Lawrence prior to the 10th of May, and that it was by reason of this very attempt, against the consequences resulting from which the appellant was by the warranty protecting himself, that the injury to the insured vessel, for which this action is brought, occurred. Unless the evidence shows a breach of the warranty that the vessel should not attempt to enter the Gulf of St. Lawrence prior to the 10th day of May, the warranty as to the attempt would be quite illusory, in fact a dead letter. No doubt that by using a printed form for time policies to frame a voyage policy thereon, there are matters appearing in the policy, as framed, which are inappropriate to a voyage policy and insensible, but this cannot justify us in expunging from the policy the warranty that the ship shall not attempt to enter the Gulf of St. Lawrence prior to the 10th of May; for by so doing we should be plainly depriving the insurer of the benefit of a clause which is apparently a most reasonable one, upon which he relied for his protection from the injury to the vessel which has occurred. Judgment must, therefore, be for the appellant on the plea of breach of warranty, with costs in the court below.

Appeal allowed with costs.

Solicitors for appellant: *Weldon, McLean & Devlin.*

Solicitors for respondents: *A. A. & R. O. Stockton.*

1885
 TAYLOR
 v.
 MORAN.
 Gwynne J.