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*Feb. 18.
June 12.

EDGAR K. SPINNEY AND SYLVESTER L. OLIVER (PLAINTIFFS) } APPELLANTS.

AND

THE OCEAN MUTUAL MARINE INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine Insurance—Delay in prosecuting voyage—Deviation—Enhancement of risk.

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment of the trial judge in favor of the defendants.

This was an action upon a policy of marine insurance on the cargo of a coasting vessel, tried before Mr. Justice Townshend without a jury. The voyage was from Pubnico, N.S. to Lunenberg and or Halifax and the policy contained the usual clause allowing the vessel, in case of extremity, to put into and stay at, any port or ports without prejudice to the insurance

The vessel sailed on Dec. 15th, 1886, and on Dec. 21st arrived off Shelburne harbor; the weather indicating

PRESENT: Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 21 N. S. Rep. 244.

a storm, she put in and remained in that harbor until next day when she attempted to proceed but returned to Shelburne; she did not go to sea again until Dec. 27th, when she started and again returned and remained in harbor until Jan. 3rd, when she started at midnight and a snow storm and head wind drove her back; on Jan. 4th she got as far as a place called Gull Rock when a heavy sea came on and she tried to put back, but at the entrance to the harbor in trying to tack she misstayed, and before an anchor would hold she struck on McNutt's Island and eventually went to pieces, the crew managing to get ashore.

The insurance company produced evidence by shipmasters familiar with the coast, and also from the log of a Dominion cutter then cruising in the same waters, to the effect that the vessel could have continued on her voyage at different times during the period of her stay in Shelburne, and it was also shown that other vessels bound on the same course did proceed during that period after seeking shelter in Shelburne.

The defendants had pleaded a number of pleas to the action, two of the defences raised being "barratry of the master and mariners," and "deviation by delay." The trial judge found that the vessel was designedly cast away, and gave judgment for defendants on the issue of barratry. In his judgment, which is published in full in the report of the case in the court below (1), he states that he attached little credit to the evidence of one of the witnesses, Nathan Snow, by whose testimony, mainly, barratry was established. The full court held that without the evidence of this witness the defence as to barratry must fail, but they confirmed the judgment for the defendants on the ground of deviation. From that decision the plaintiff appealed to the Supreme Court of Canada.

(1) 21 N. S. Rep. 244.

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Henry Q.C., and *Bingay* for the appellants. The only question we are called upon to argue is that of deviation, as there is no appeal against the decision of the Supreme Court of Nova Scotia that the defence as to barratry has failed.

The propriety of seeking a port, or sailing from it, at particular times must be left entirely to the discretion of the master, and more especially so in the case of small coasters navigating the dangerous waters of the Bay of Fundy. See *The Sarah* (1); *Turner* v. *Protection Ins. Co.* (2); *The Oregon* (3); Phillips on Insurance (4); *Lawrence* v. *Minturn* (5).

The only question in this case is: Did the master act in good faith? At the worst the facts only show error in judgment. *Turner* v. *Protection Ins. Co.* (2).

Borden for the respondents. The facts have been found in favor of the underwriters by the trial judge and the full court below, and this court has invariably refused to interfere with such findings. *The Picton* (6); *McCall* v *McDonald.* (7).

The judgment on the ground of deviation is fully warranted by authority. Carver on Carriage by Sea (8); Phillips on Insurance (9); Marshall on Insurance (10); *Maryland Ins. Co.* v. *LeRoy* (11).

SIR W. J. RITCHIE C.J. (After stating the substance of the proceedings in the action and the nature of the appeal, His Lordship proceeded as follows): There can be no doubt that the understanding implied in the contract is not only that the voyage shall be accomplished in the track or course of navigation in which it ought to

(1) 2 Spragg's Adm. Dec. (Mass.) 31.
(2) 25 Me. 515.
(3) Newbury's Adm. Rep. 504.
(4) 5 ed. sec.. 1583.
(5) 17 How. 110.
(6) 4 Can. S. C. R. 648.
(7) 13 Can. S. C. R. 247.
(8) Pp. 290-1.
(9) 5 Ed. ss. 931, 1018, 1021.
(10) 5 Ed. pp. 153, 158.
(11) 7 Cranch 26.

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be pursued, but also that the voyage shall be commenced and completed with all reasonable expedition, that is, with all reasonable and ordinary diligence, and that any unreasonable or unexcused delay, either in commencing or prosecuting the voyage insured, alters the risk and absolves the underwriter from his liability for any subsequent loss. No doubt it must be an unreasonable or inexcusable delay, that is, a wilful and unnecessary waste of time. In like manner as in the case of a departure from the usual course of navigation it is not necessary to prove that the peril has been enhanced, so it is equally clear that the same principle applies in case of deviation by delay.

I think there was ample evidence to justify the conclusion arrived at by the full court, including Mr. Justice Townshend, the trial judge, who concurred with the other judges on the question of deviation. The court below thus puts the case :

The vessel in question the "Village Belle," was a fishing schooner 40 tons burthen laden with a cargo of dry fish, which cargo was on the 30th November insured on a voyage from Pubnico to Lunenburg and or Halifax. The schooner, which was proved to be seaworthy and had new sails, left Pubnico on the 15th December. That night, although the wind was fair for going through Barrington Passage, she put into Doctor's Cove ; she left there finally on the 20th and that evening put into Shelburne Harbor where she remained until the 4th day of January. The voyage from Shelburne to Lunenberg, to which port she was bound, could according to the evidence be made with a fair wind in seven or eight hours, and in my opinion the delay of 14 days in Shelburne Harbor was altogether unreasonable unless satisfactorily accounted for by the plaintiffs the *onus* being on them to do so. Capt. Lorway proved that a fair wind from Shelburne to Lunenburg would be any wind from south round westerly to north, and this is admitted by Larkin, the Master of the "Village Belle." It was established by the mate of the Government cruiser "L. Houlett" who regularly kept the log of that vessel, that at Shelburne on the 21st, 22nd, 23rd, 26th, 27th and 28th days of December and the 2nd and 3rd days of January the wind and weather were such that the "Village Belle" could have continued her voyage, and it appears that one or

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more schooners bound to the eastward which had put into Shelburne Harbor did proceed during that period.

In answer to this the master of the Village Belle enters into no particulars—admits he cannot remember how the wind and weather on each day of his stay in Shelburne were—he kept no log and contented himself with stating generally that he could not proceed on his voyage, without, as the court below says, attempting to justify the delay between the 27th December and the 3rd of January.

Michael Belliveau, one of the crew of the Village Belle, says on cross-examination "I cannot undertake to say anything as to the wind on different days nor the weather nor as to reasons for not sailing." And John Wiman another of the crew, says "I left vessel 2nd January 1887"; on cross examination he says "I cannot swear wind was unfavorable for our voyage the night we went to Cape Negro. I do not speak of character of wind or weather after I went into Shelburne; and then on his re-examination he says:—

The weather from the time we left Pubnico Harbor till we got to Shelburne was so unfavorable we could not proceed on our voyage.

But he also says:—

Cannot say what weather was on 22nd, or 23rd of Dec. nor on 24th, 25th, or 26th. I know the day before I left, Saturday, there was a heavy south east gale and continued in afternoon more southerly. I left vessel Sunday 26th January. Cannot speak of weather 28th, 29th, 30th or 31st. I remember on January 1st there was bad weather, and on Sunday there was rain all day.

The captain of the Dominion cutter, who was in Shelburne harbor, says that on the 28th December he rendered assistance to the schooner Ospray bound from Boston to La Have which had struck a rock off Baccarot and within a day she proceeded on her voyage, La Have being about sixty miles to eastward of Shelburne in direction of Halifax; and he says—"a fair wind from Shelburne to Lunenburg would be anything

from south round westerly to north." He describes the wind and weather while in Shelburne from day to day and says, "If vessel was sea-worthy nothing to prevent her proceeding on her voyage."

If such was the case it is evident that the captain's remaining in a harbor when he could have proceeded on his voyage was in this case wholly unjustifiable and amounted to a clear deviation. It is therefore impossible, in my opinion, for this court to say the court below was wrong in so holding.

FOURNIER J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Ritchie in the court below.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—To an action on a policy of marine insurance the defendants pleaded no less than sixteen pleas, two of which only were rested upon at the trial, and these two are as follows:

"10th. The defendants further say that after the commencement of the said voyage and before the alleged loss, the said vessel deviated from the voyage;" and

"13th. The said loss occurred and was caused by the barratry of the master and mariners on board of the said vessel which was not insured against by the said policy."

The learned judge who tried the case rendered a verdict for the defendants upon this latter plea, although the only direct evidence in support of it was the evidence of one Snow, a hand on board, as to whom the learned judge said that he made an unfavorable impression upon him as to his honesty and truthfulness; but he thought that this man's evidence, not-

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withstanding, taken with other circumstances, such no doubt being the facts relied upon as evidence of voluntary deviation, was worth something; and he added that without any reference to Snow's evidence he came to the conclusion that the vessel was deliberately cast away by the captain, and he therefore found a verdict for the defendants upon the plea of barratry.

The Supreme Court of Nova Scotia on the appeal was of opinion that without the testimony of Snow there was not sufficient evidence to sustain the contention that the loss was occasioned by the barratry of the master; in this opinion I concur. The Supreme Court was further of opinion that the fourteen days delay in Shelburne harbor was altogether unreasonable unless satisfactorily accounted for, and that it was not at all accounted for, and the defendants were therefore entitled to judgment upon the plea of deviation. Upon a careful perusal of the log of the Government schooner L. Houlett, the accuracy of which is testified to, and the evidence in relation to the weather during the period of that delay, the captain of the insured vessel having himself kept no log, I cannot say that the judgment of the Supreme Court upon the plea of deviation is not well founded, and the judgment of that court should, in my opinion, be maintained, and the appeal dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellants: *George Bingay.*

Solicitor for respondents: *R. L. Borden.*