Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Quebec Marine Insurance Company v. *the Commercial Bank of Canada, from the Court of Queen's Bench, Province of Quebec, Canada; delivered 20th April,* 1870.

LORD PENZANCE.
SIR WILLIAM ERLE.
LORD JUSTICE GIFFARD.

THIS is an Appeal from the Court of Queen's Bench in Canada, and the question to be determined is, whether or not the Appellants, who are the underwriters upon a policy of insurance, are, in the events that have happened, liable for the loss of the vessel insured by that policy?

The policy was a policy effected upon a printed form which was intended, as appears by many of its details, to have formed a policy for river, and what may be called inland navigation; but the risk and duration of the policy, as expressed upon the face of it, were "at and from Montreal to Halifax," in Nova Scotia, and it therefore appears to their Lordships to be practically a sea policy as well as a river policy.

The vessel was warranted to sail on or before the 21st of November, 1864; and within the period mentioned in the policy that vessel, "The West," left Montreal and proceeded down the river towards the sea. In due time she arrived at Quebec, from Quebec she pursued her voyage, and very shortly after she found herself in salt water. The boiler of the vessel, which had at the time of her starting on her voyage a defect in it, became unmanageable. The defect, which originally existed, was aggravated by the increased pressure arising from the vessel being in salt water; but, from whatever cause

the fact is undoubted, that the boiler, owing to the original defect, became then unmanageable. It ceased to do its work, and the vessel was obliged to put into a neighbouring place to have the defect remedied before she could proceed on her voyage. The defect was remedied, but a considerable delay occurred before the voyage was resumed. This delay was caused partly by the state of the tides, and partly by the time necessarily consumed in repairing the existing defect; but eventually she sailed again. She met with bad weather, and was lost. The question is, whether the underwriters, in these circumstances, are responsible for the loss that has occurred?

The underwriters defend themselves upon the ground that the vessel was not seaworthy for her voyage when she sailed, and they point to this defect existing in the boiler at that time, which undoubtedly asserted and established itself as a cause of unseaworthiness as soon as the vessel was in salt water. This defence the underwriters undoubtedly did put forward in very plain language, as it seems to their Lordships, upon their plea or *défense au fonds en droit;* and it may be remarked in passing, that although it has been argued that the present Appellants did not intend to rely upon that defence, yet that does not seem to have been questioned in either of the Courts in Canada. That the defence was raised, and that it was properly raised, seems to have been taken for granted by everybody, including the two learned Judges who have delivered their judgments in favour of the Respondents in the Court below.

Now it is undoubted that the vessel, from the fact of the boiler being in the state in which it was found to be as soon as the vessel entered salt water, was not fit to encounter the seas, and for that reason, and that reason alone, she put in to repair. Well, then, can it be said that the vessel sailed in a seaworthy state? The general proposition is not denied that in voyage policies there is an implication by law of a warranty of seaworthiness, and it was not contended that the vessel was seaworthy when she found herself in salt water; but it has been suggested that there is a different degree of seaworthiness required by law, according to the different stage or portion of the voyage which the vessel successively has to

pass through, and the difficulties she has to encounter; and no doubt that proposition is quite true.

The cases of Dixon *v.* Saddler, and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognized, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has been equally well decided that the vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.

It was argued that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it.

Now, in this case, supposing there were any such subsequent stage as has been argued, and that there were any such necessity for a different equipment at one period of the voyage than that which existed at another, which is by no means plain, can it be said, that at the commencement of that portion of her voyage which was to be made in salt water, the vessel was fit to encounter the perils of it, or in other words, was sea-worthy?

It is plain that this could not be asserted with truth, because from the moment that she entered the salt water, the defect became apparent, and she was actually disabled by the action of the salt water upon the defective boiler.

It seems, therefore, to their Lordships, that the warranty of seaworthiness has not been complied with.

Two grounds have been taken by the Respondents as reasons why the underwriters should, nevertheless, be held responsible. The first and main ground is one which it may be said, in passing, received no attention whatever either from the Counsel or from the Courts in Canada, namely, that in this particular policy there is no warranty of seaworthiness to be implied. It is said that the language of this policy is such, that the Court ought not to imply therefrom, the ordinary warranty of seaworthiness. No doubt it is competent to parties by language in a contract to which, as an ordinary rule, the law attaches some implied condition, by express, pertinent, and apposite language to exclude that condition, and the question in this case is, whether the parties have done so? This, like all questions of contract, is a question of the intention of the parties. The law by which the warranty of seaworthiness is attached to the contract, is a law known to the parties who make contracts of this description; and, therefore, they are prepared to understand that the implied warranty will be attached to the contract they are about to make. If, therefore, there is an intention to exclude that implied warranty, it ought to be expressed in plain language; but, upon looking at the language which it is argued has that effect in this case, there seems to their Lordships to be no reason whatever for saying that it was intended to have any such result. The enumeration of losses for which the underwriter here declares that he will not be responsible, is one that may properly have been introduced for either one of two reasons: first of all, the underwriter may have thought it right to say that, should a loss occur which he attributes to the condition of the ship, he will not be placed in the position of being obliged to satisfy a Court or a Jury, that that loss was brought about by the vessel being deficient in seaworthiness at the time when she sailed. He may wish to protect himself by stipulating, that when any loss is attempted to be brought home to him, he shall be at liberty to investigate at once the immediate cause of that loss (quite irrespective of the time when the rottenness or inherent defect, or unseaworthiness

arose), and be entitled to put his finger upon it, and say, "This is a loss that has not arisen by the pressure of the elements, but one which has in fact arisen from rottenness or inherent defect."

There is another reason why he may wish to have this enumeration included in the policy without intending to disturb the well known warranty that attaches to all policies of this character; it is this—the warranty of seaworthiness would only protect him in case the defect exists at the time the vessel sails on her voyage, but the language of the enumeration is quite wide enough to protect the underwriters from losses of a similar character, although it is proved to demonstration that they did not arise till after the vessel sailed. This enumeration of excepted losses, therefore, very largely enhances the protection of the underwriters; and it is impossible to read this enumeration without seeing that the underwriters were bent on being specially protected by the terms of this policy. And if it be said that the enumeration of excepted losses superseded the need of the warranty, as all losses arising from unseaworthiness, whether existing before or after the commencement of the voyage, are thereby excepted, the answer is obvious—that the warranty, if broken, exempts the underwriters from loss by fire or pirates, or any other danger, though in no way referable to the unseaworthiness itself. It would seem, therefore, an odd conclusion to come to, to say that, where the underwriters were bent upon special protection and exemption they should have intended to surrender the warranty of seaworthiness, which after all is the main protection to their interests.

It seems to their Lordships, therefore, that there is no pretence for saying that the language here used is such that the Court ought to conclude from it that the underwriters intended to part with the protection which the law otherwise would have accorded.

The second ground taken by the Respondents is founded upon the language attributed to a great authority (Lord Tenterden) in the case of Weir *v.* Aberdeen, to the effect that if a defect, though it exists at the time the vessel sailed, and exists to such an extent and is of such a character as to render the vessel unseaworthy, be remedied before any loss

arises, the underwriters still remain responsible. This is a proposition of perilous latitude. It is impossible not to see that such a doctrine would tend, if carried to its legitimate consequences, to fritter away the value of this warranty altogether. It is all very well to talk of trivial and small things, but it is very difficult to define what should fall within the category of small or trivial things, and what should exceed it. It may, however, be safely observed, without going more narrowly into that subject, that the case of Weir *v.* Aberdeen did not proceed upon the language that is attributed to Lord Tenterden—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness, and had assented to the vessel putting back to the port to cure herself of the defect, and, therefore, they were held responsible. They had assented in writing on the policy to maintain their liability notwithstanding the violation of the warranty. If the statements attributed to the Chief Justice were to be held to be the ground of decision in that case, the case itself would come in direct conflict with many other cases, and especially the case of Fordshaw *v.* Chabert, in which a defect existed at the time the vessel sailed, was completely remedied at Jamaica, the port into which the vessel put for that purpose, and after the defect was completely remedied the vessel was lost on the voyage from Jamaica to Liverpool; and yet the underwriters were held not responsible.

For these reasons their Lordships think that they ought humbly to advise Her Majesty to reverse this decision of the Court of Queen's Bench in Canada, and their Lordships think that the reversal ought to be with costs. The Judgment of the Court of Appeal in Canada appears to have given the costs in both Courts to the present respondents. Their Lordships think that this portion also of the Judgment ought to be reversed, and that the costs of both Courts in Canada, as well as the costs of this Appeal, ought to be paid by the present Respondents.

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