

1888

• Oct. 9.

• Dec. 15.

JOHN ROBERTSON AND OTHERS } APPELLANTS;  
(PLAINTIFFS) .....

AND

JOHN PUGH (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Mar. Ins.—Warranty in policy—Time of sailing—Action on policy—  
Limitation of time—Defective proof—Whether time runs from  
filing of.*

A vessel insured for a voyage from Charlottetown to St. Johns, Nfld., left the wharf at Charlottetown on December 3, with the *bona fide* intention of commencing her voyage. After proceeding a short distance she was obliged, by stress of weather, to anchor within the limits of the harbor of Charlottetown and remained there until December 4 when she proceeded on her voyage.

*Held*, that this was a compliance with a warranty in the policy of insurance to sail not later than December 3, but a breach of a warranty to sail from the Port of Charlottetown not later than December 3.

A clause in a marine policy required action to be brought out on it within twelve months from the date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective and some months later an amended claim was deposited.

*Held*, affirming the judgment of the court below, that an action begun more than twelve months after the original, but less than twelve months after the amended, claim was deposited was too late.

**APPEAL** from a decision of the Supreme Court of Nova Scotia (1) sustaining, by a divided court, the judgment for the defendant on the trial.

This is an action on two marine policies of insurance issued by the Chebucto Marine Association, whereof defendant was a member, to the plaintiffs, bearing date

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• PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

the 29th November, 1882, one for \$1,500 upon the hull of the schooner "Marion Robertson," the other for \$500 upon the freight laden on board thereof, on a voyage from Charlottetown, P.E.I., to St. John's, Nfld. Each policy contained the following clauses:—

1888  
ROBERTSON  
v.  
PUGH.  
—

"All losses and damages which shall happen to the aforesaid vessel shall be paid within sixty days after proof made and exhibited of such at the office of the association.

"No suit or action of any kind for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers; and in case any such suit or action shall be commenced against the assurers after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

The policy on hull contains this clause: "Warranted to sail not later than 3rd December, 1882."

That on freight the following clause: "Warranted to sail from Charlottetown not later than 3rd December, 1882."

The vessel sailed from Peake's Wharf, Charlottetown, on the 3rd December, 1882. After proceeding two and a half or three miles she came to anchor at Three Tides, "half way down the harbor, inside of the headlands" of the harbor of Charlottetown, and inside the lighthouse at the mouth of the harbor. She remained there until December 4 when she proceeded on her voyage. The vessel on the 9th inst., went on shore at Langlade, Miquelon.

A paper signed by the master at the place of the loss represented the date of sailing from Charlottetown as

1888  
ROBERTSON  
v.  
PUGH.  
—

December 4, and on January 22, 1883, the master made an extended protest in which he also gave December 4 as the day of sailing. This protest was, on January 14, 1883, received by defendants as part of the proofs of loss.

The defendants refused to pay the insurance on the ground that the proofs of loss showed a breach of the condition as to time of sailing. In October, 1883, a declaration made by the master of the vessel, stating that the true date of sailing was December 3 and explaining how it was wrongly stated in the protest, was delivered to the defendants, and in February, 1884, a statement by the supercargo of the vessel confirming that of the master was also delivered.

The case was tried before a judge without a jury and the following facts were found among others :—

That the vessel sailed on the 3rd December, 1882, being then ready for sea, and that the master left the wharf with the *bonâ fide* intention of commencing the voyage and proceeding to sea that day.

That the vessel was so much injured by the perils insured against that she could not be floated without repairs, and that she could not be repaired at Langlade or any where in its vicinity at that season of the year, or taken to a place of repair.

That this action was commenced on the 5th April, 1884, as proved by the copy of pleadings filed by the plaintiffs to be used on the trial.

On this last finding judgment was given for the defendants, the judge holding that the twelve months limited for the bringing of the action ran from the date of delivery of the protest to the defendants, January 22, 1883, and not, as claimed by the plaintiffs, from the filing of the amended proofs. This judgment was sustained by the Supreme Court of Nova Scotia the judges of the court being equally divided in their opinions. The plaintiffs then appealed to the Supreme Court of Canada.

*Henry Q.C.* for the appellants cited *Kimball v. Hamilton Fire Ins. Co.* (1); *Chandler v. St. Paul Ins. Co.* (2); *Mayor v. Hamilton Fire Ins. Co.* (3); *Campbell v. Charter Oak Ins. Co.* (4).

1888

ROBERTSON

v.  
PUGH.

Ritchie C.J.

*Graham Q.C.* for the respondent referred to *Parsons on Marine Insurance* (5); *Cossmann v. West* (6); *Arnould on Marine Insurance* (7).

Sir W. J. RITCHIE C.J.—I think there was a strict compliance with the warranty in the policy on the hull not to sail later than the third of December, 1882, because I am of opinion that the ship broke ground for her sea voyage, and got fairly under sail for her place of destination on the day limited in the warranty and that there was a *bonâ fide* commencement of the voyage insured on the given day, and that she was undoubtedly detained and delayed in pursuing her voyage by stress of weather and as there was a beginning to sail on the voyage insured on the day named in the warranty the warranty was complied with.

I am equally clear the warranty that she should sail from Charlottetown not later than the 3rd of December, 1882, was not complied with because it is clear that she did not leave, but was in, the port of Charlottetown until the 4th of December; therefore, the warranty was not complied with and the learned judge should have found on the 17th plea to the third count on the policy on freight, that the said vessel did sail from the port of Charlottetown later than the 3rd of December, to wit, on the 4th of December, 1882.

In *Arnould on Marine Insurance* the law is thus stated (8).

We now proceed to notice those cases which have been decided

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| (1) 21 N. Y. (S. C.) 495.                 | (5) Vol. 2 p. 473.            |
| (2) 5 Bennett's Fire Insurance Cases 606. | (6) 13 App. Cas. 160.         |
| (3) 39 N. Y. 45.                          | (7) 6 Ed. vol. pp. 610-18.    |
| (4) 10 Allen (Mass.) 213,                 | (8) 6 Ed. vol. 2 ch. 3 p. 619 |

1888 on warranties "to depart" and "to sail from." *Moir v. Royal Exch. Ass. Co.* (1).

ROBERTSON  
v.  
PUGH.  
Ritchie C.J.

Under a policy "lost or not lost, at and from Memel from her port of discharge in England, warranted to depart on or before the 15th of September." The "Neptunus" having completed her loading, and clearing at the Custom House of Memel on the 9th September, in a state of perfect readiness for her voyage hove up her anchor, and dropped down the river, with the intention of at once proceeding to sea; a change of wind, however, obliged her to lie to at a place in the river, still within the limits of the port of Memel, till the 21st, when she finally got to sea. Lord Ellenborough, at the trial, held that a warranty, "to depart on or before the 15th of September, must mean that she should be out of the port of Memel and at sea by the given day, but she was still in that port on that day, and, therefore, the warranty was not complied with." The Court of King's Bench supported this ruling (2); and in another action on the same policy in the Court of Common Pleas, the unanimous judgment of the court was given in the same way (3).

A warranty "to sail from" receives precisely the same meaning as the warranty "to depart"; this was admitted in the following case, (citing *Lang v. Anderdon* (4)) the only question being as to what in mercantile usage were the limits of the port of departure, with references to ships of the burden of the ship insured.

But it is not necessary to pursue this discussion further because the next objection, which applies alike to both policies, must, in my opinion, prevail, viz., was the action brought within the time limited under the clause in the policy which provides that:—

No suit or action of any kind for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers; and in case any such suit or action shall be commenced against the assurers after the expiration of 12 months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The claim of loss and a protest in proof thereof made

(1) 4 Camp. 84.

(2) 3 M. & S. 461.

(3) 6 Taunt. 240; 1 Marsh. R. 570.

(4) 3 B. & C. 495.

on the 22nd of January, 1883, at Buctouche was furnished to and deposited at the office of the assurers on the 24th of January, 1883. The claim is as follows:—

1888  
ROBERTSON  
v.  
PUGH.

Buctouche, December 19, 1882.

Mr. G. A. MACKENZIE:—

Ritchie C.J.

We beg to inform your company of the loss of our vessel or schooner called the "Marion Robertson," at Miquelon, which happened on the 9th inst. We hold policy upon the said vessel and freight to the extent of two thousand dollars—fifteen hundred dollars upon the vessel, and five hundred dollars upon the freight, &c., which policies were effected through the agency of your company at Charlottetown, P. E. Island. You will please give the matter your earliest attention, and oblige yours,

G. & J. ROBERTSON.

In this protest there is the statement that the said vessel "did, on the 4th day of December last past, sail from her last mentioned place of loading (viz., Charlottetown,) bound directly for the port of St. John's. This plaintiffs insist was an accidental error, which they subsequently corrected by papers furnished to defendants in October, 1883, and confirmed by McMillan's statement sworn on the 1st of February, 1884, and they seek to make the date of the alleged correction the time from which the twelve months is to commence to run. But the fact appears to have been entirely overlooked that the vessel actually sailed from Charlottetown on the fourth, for though she did leave the wharf and did sail on her voyage on the third, she was after such sailing, by reason of stress of weather, detained in the said port of Charlottetown and did not sail therefrom until the fourth.

Unless this provision of the contract is to be entirely ignored, which it cannot be on any principle of the law of contracts of insurance, I cannot escape the conclusion (I wish I could) that the learned judge was quite right in finding that the claim for loss or damage under the policies sued on was deposited by the plaintiffs at the office of the insurers before February, 1883,

1888  
ROBERTSON v. PUGH.  
Ritchie C.J.

from which time the limitation commenced to run ; and as the action was not commenced until the 5th of April, 1884, and so not brought within the time limited therefor by the policies, the judgment must be for the defendants.

STRONG J.—This action is brought upon two separate policies of insurance, one on the hull of the schooner “Marion Robertson,” the other on the freight to be carried by the same vessel on a voyage from Charlottetown, P. E. Island, to St. John’s, Newfoundland. The policies were both dated the 24th of November, 1882, and each contained a limitation clause in the following words:—

No suit or action of any kind for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers ; and in case any such suit or action shall be commenced against the assurers after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The policy on the vessel contains also the following warranty: “Warranted to sail not later than 3rd of “December, 1882,” and that on freight contained the clause, “warranted to sail from Charlottetown not “later than 3rd of December, 1882.”

The vessel sailed from Peake’s wharf at Charlottetown on the 3rd of December, 1882, but owing to a snow storm and bad weather did not go to sea, but came to anchor at a place within the harbor called “Three Tides,” from which she again sailed on the 4th of December, 1882, and was subsequently lost on the 9th of December, 1882, at Langlade, Miquelon, where she was surveyed and sold by the master.

The master afterwards went before a notary public at Buctouche, N.B., who on the 22nd of January, 1883,

drew up a formal protest of the loss. This protest was lodged with the secretary of the underwriters on the 24th of January, 1883.

1888  
ROBERTSON  
v.  
PUGH.  
Strong J

The action was not brought until the 5th of April, 1884. As regards the policy on freight it is clear that the appellants are precluded from recovering by reason of the admitted fact that the vessel did not sail from the port of Charlottetown until after the 3rd of December, 1882, that is to say, not until the 4th of December. The passage quoted from Arnould on Insurance (1) by the respondents in their factum, and the authorities there referred to, are conclusive on this point. Sailing on the voyage is not a compliance with a warranty to sail from a particular port before a named date, if the vessel does not actually leave the port or harbor before the day indicated. The proposition that a sailing from one point within a port to another within the same port, though it may be a *bonâ fide* sailing on the voyage, is not equivalent to a sailing from the port has long been so well established that it cannot now be called in question.

As regards the warranty in the policy on the vessel which only required that she should sail on the voyage not later than the third December, there was a sufficient compliance with its terms, inasmuch as it is not disputed that the vessel, in good faith, left her moorings at Peak's wharf, Charlottetown harbour, and proceeded on her voyage on that day, but was detained by bad weather from leaving the bounds of the port until the next day (2).

Then the underwriters (the present respondents) rely on the limitation clause as an answer to the action as respects both policies, and if we are to consider the lodging of the protest with the underwriters, on the 24th January, 1883, as a depositing of the claim for loss within the meaning of those words as used in the

(1) 6th Ed. p. 619,

(2) Arnould, 6 ed., p. 619,



1888  
ROBERTSON  
v.  
PUGH.  
Strong J.

clause under consideration, it is clear that this action instituted on the 5th April, 1884, was too late. The appellants contend, however, first, that the protest was not a claim for loss within the meaning of the limitation clause, and second, that though it might have been so considered if it had been accurate, yet, inasmuch as it contained an inaccurate statement of the date of sailing it was not to be considered a complete claim. The answer to this is, however, very plain. The "claim for loss or damage" is manifestly the same thing as the "proof" referred to in the preceding clause, which provides that "all losses and damages" shall be paid within sixty days after "proof," made and exhibited at the office of the association.

Then the protest was intended and drawn up as a formal record of the loss and the facts attending it, and is to be considered as having been lodged with the secretary as a compliance with the limitation clause, and also as showing a title to be paid the indemnity. The case of *Cossman v. West* (1), in the Privy Council, shows that this is to be considered proof of the loss.

Further, there was no mistake or inaccuracy either in the protest or in the master's declaration before the French authorities at Langlade. Both these documents were strictly accurate in stating that the schooner sailed from Charlottetown on the 4th December, but even if it were otherwise, and she had in fact sailed from that port on the 3rd (the day on which she actually commenced her voyage, though she did not leave the harbor until the next day), that would not have disentitled the plaintiff to show the real fact at the trial. So that even if the protest had been inaccurate, it would nevertheless have been a "claim and proof of loss" within the terms of the policy. It follows that the 24th of January, 1883, the date on which it was deposited with the secretary of the association must be

considered as the date from which the period of one year prescribed by the limitation clause began to run. The action was not brought within a year from this date, and therefore the court below were right in holding the plaintiff debarred from recovering. The appeal should be dismissed with costs.

1888  
ROBERTSON.  
v.  
PUGH.  
Strong J.

FOURNIER J.—I concur in the judgment delivered by the Chief Justice.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by Ritchie J. in the court below that the action was too late.

GWYNNE J.—Concurred.

*Appeal dismissed with costs.*

Solicitors for appellants : *Henry, Ritchie & Weston.*

Solicitors for respondents : *Graham, Tupper, Borden & Parker.*

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