JONES v. INSURANCE CO.

Case No. 7,470.

[2 Wall. Jr. 278.][1]

Circuit Court, E. D. Pennsylvania. Nov. 5, 1852.

INSURANCE—IMPLIED WARRANTY OF SEAWORTHINESS IN TIME POLICIES.

1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all.

[Cited in House v. Insurance Co., Case No. 12,089; Pope v. Swiss Lloyd Ins. Co., 4 Fed. 155.]

[Cited in Merchants' Ins. Co. v. Morrison, 62 Ill. 247; Hoxie v. Pacific Ins. Co., 7 Allen, 215.]

2. The court, supposing on a case not before it says: It may indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; or, that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence.

The plaintiff in this case declared on policies of insurance on the ship Sarah and Eliza, dated the 12th day of May, 1851, "lost or not lost from the first day of May, 1851, at noon, to May the first, 1852, at noon;" averring that during the continuance of the risk, to wit, about the first day of August, 1851, and proceeding on her voyage the said ship was, by the perils and dangers of the sea, &c., destroyed and totally lost. A second count averred that during the continuance "of the risk in said policy mentioned, to wit, on or about the first day of July, 1851, the said ship Sarah and Eliza set sail and departed from a certain port, to wit, the port of Callao in South America, bound to the port of New York, and that the said ship so sailing and proceeding on her Voyage afterwards, to wit, on or about the 23d day of the same month, and, while on the high seas, was, by the perils and dangers of the seas, &c, destroyed and wholly lost." To this declaration the defendants pleaded inter alia: (1) That at the commencement of said voyage, the said vessel was unseaworthy, defective and insufficient, &c, and so continued to be and still was, at the time of the occurrence of the supposed perils and loss, &c. (2) That the said vessel was not sound and seaworthy at the time the risk in said policy mentioned attached, to wit, on the first day of May, 1851. (3) The said vessel was not sound and seaworthy at the time she was warranted so to be by the said plaintiff, according to the true tenor and effect of the said policy and contract of insurance. To these pleas the plaintiff demurred, assigning as causes of demurrer, that the said pleas tender an immaterial issue, to wit, upon the seaworthiness and sufficiency of the vessel for the said voyage at the commencement of said voyage, and subsequently thereto, &c. The question, therefore, raised by these demurrers

and argued, was, whether there is an implied warranty of seaworthiness in time policies, as well as in policies on a voyage?

T. I. Wharton and Henry Wharton, in support of demurrer.

W. Rawle and J. Fallon, contra.

GRIER, Circuit Justice. Although some of the treatises on marine insurance do not, in treating this subject, make any distinction between voyage and time policies, and many dicta of judges may be found, to the same effect, while others (see Paddock v. Franklin Ins. Co., 11 Pick. 231, and cases there cited) express doubt, the precise point does not appear to have been decided on full argument in a court of error till very lately. The case of Small v. Gibson, 3 Eng. Law & Eq. 290–299, 14 Jur. 368, and 15 Jur. 325, was first argued and decided in the queen's bench, in November, 1850, and it was there decided, "that there is an implied warranty of seaworthiness in time policies, if nothing appear in them to the contrary, as well as in policies on a voyage." This case was removed by writ of error to the exchequer chamber, where the judgment of the queen's bench was reversed. The opinion of Baron Parke, which had the concurrence of the whole court, contains a full review of all the cases and arguments bearing on the subject. This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question, and shall therefore content myself by referring to that case, where the arguments on both sides of the question have been exhausted by the counsel and court. It is true this ease does not decide, that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea that she was not seaworthy when the voyage commenced. It may be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her lossor

that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to hare been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause, which may be attributed to the insufficiency of the ship. As neither of these pleas comes within the conditions stated, we overrule them, and give judgment for plaintiff on the demurrers.

NOTE. Since this opinion was given, we have (18 Jur. 1131, December, 1853) the report of Small v. Gibson (the case cited as a precedent by the court), in the house of lords, to which it was taken after the judgment mentioned by Mr. Justice Grier in the exchequer chamber. Nine judges gave able opinions to the house: seven being against implying a condition of sea-worthiness, and two in favour of it. After the opinions were given, Lord St. Leonards and Lord Campbell delivered the judgment of the house, which affirmed the judgment of the exchequer chamber. Both these judges agreed very clearly, on the point decided, with the seven judges. On the point raised by Mr. Justice Grier in the conclusion of his opinion, which was one of the questions put by the house of lords to the judges, though not a point necessary to be decided in the actual case, there appears to have been a difference of opinion between Lord St. Leonards and Lord Campbell. The former says: "If a ship were to sail on a particular voyage, and a time policy were to be effected instead or a policy on the intended voyage, as at present advised, I think that a condition would be implied that the ship was seaworthy at the commencement of the voyage." Lord Campbell, on the contrary, acting on a principle of simplicity and broad distinction, says as follows: "I have hesitated more upon the questions, whether, when a time policy is effected upon an outward bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness; and it is free from some strong objection to the condition of seaworthiness, being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no implied condition of seaworthiness in any time policy, and that the general rule being against the condition, as it seems to me—having the most sincere and perfect deference for the opinion of my noble and learned friend on this point, in which I do not agree—this would be a gratuitous and judge-made exception to the rule, and I think it more expedient that the rule should remain without any exception; and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into cases where the ship is in a British port, and where she is abroad, and still more, if the residence of the ship owner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable, therefore, that, in commercial transactions, there should be plain rules to go by, without qualification or exceptions.

Marine insurance has been found most beneficial as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, if it were understood, according to my present impression of the law, that in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce; and where any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I must offer with the greatest deference, after what has fallen from my noble and learned friend, for whose opinion on all subjects within the whole range of the laws of England, I entertain the most sincere respect."

[1] {Reported by John William Wallace, Esq.}

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