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*Oct. 5.
*Oct. 31.

THE VICTORIA-MONTREAL FIRE INSURANCE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THE HOME INSURANCE COMPANY OF NEW YORK PLAINTIFFS)..... } RESPONDENTS,

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Fire insurance — Contract of re-insurance — Trade custom — Conditions — "Rider" to policy—Limitation of actions—Commencement of prescription—Art. 2236 C. C.

A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" attached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured.

Held, reversing the judgment appealed from, Girouard and Nesbitt JJ. dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider agreement as to claims for re-insurance and, consequently, that the action for recovery of the amount of the re insurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment by Trenholme J. at the trial, in the Superior Court, District of Montreal, which maintained the action with costs.

*PRESENT :—Sir Elzéar Taschereau, C. J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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The circumstances of the case and questions at issue on this appeal are stated in the judgments now reported.

J. E. Martin K.C. and *Howard* for the appellants, referred to *Prevost* v. *The Scottish Union and National Ins. Co.* (1) and cases there cited; *Cornell* v. *The Liverpool and London Fire and Life Ins. Co.* (2); *Allen* v. *The Merchants Marine Ins. Co.* (3); *Liverpool and London and Globe Ins. Co.* v. *The Agricultural Savings and Loan Co.* (4); *Provincial Ins. Co.* v. *Ætna Ins. Co.* (5); *Schroeder* v. *The Merchants' and Mechanics' Ins. Co.* (6); *Atlas Mutual Ins. Co.* v. *Downing* (7): *New York Bowery Fire Ins. Co.* v. *New York Fire Ins. Co.* (8); Wood on Fire Insurance, page 623; Poujet, pp. 607, 611; and Porter on Insurance (4 ed.) p. 299.

Lafleur K.C. and *Macdougall* for the respondents. The "rider" contains the whole contract and expresses the intention of the parties and the nature and scope of their agreement. This is not an insurance of property but merely re-insurance of a liability incurred under the terms set out in the form of the main policy. The conditions of that policy clearly apply only to the insurances on property and are incompatible with a contract such as the "rider" discloses. We must eliminate all incongruous and inappropriate clauses and, as no liability can arise until the re-insured company suffers loss by being forced to make payments upon adjustment of losses on their risks. The debt due by the re-insuring company does not become exigible until ten days after proof of such payments and, consequently, prescription cannot commence to run until the latter date, Art.

(1) Q. R. 14 S. C. 203.
(2) 14 L. C. Jur. 256.
(3) M. L. R. 3 Q. B. 293; 15 Can. S. C. R. 488.
(4) 33 Can. S. C. R. 94.
(5) 16 U. C. Q. B. 135.
(6) 12 Ins. L. J. 9.
(7) 12 Pa. S. C. 305.
(8) 17 Wend. 359.

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2236 C. C. None but the statutory limitation provided by Art. 2260 C. C. can apply in this case. We refer to *The Fire Insurance Association* v. *The Canada Fire and Marine Ins. Co.* (1) *per* Haggarty C.J. at pages 489-490; *Jackson* v. *St. Paul Fire and Marine Ins. Co.* (2); *The Manufacturers Fire and Marine Ins. Co.* v. *Western Assurance Co.* (3); *Faneuil Hall Ins. Co.* v. *Liverpool and London and Globe Ins. Co.* (4); *Imperial Fire Ins. Co. of London* v. *Home Ins. Co. of New Orleans* (5); *Insurance Company of the State of New York* v. *Associated Manufacturers' Mut. Fire Ins. Corporation* (6); *Alker* v *Rhoads* (7).

THE CHIEF JUSTICE:—"In consideration of the stipulations herein contained," the policy upon which the respondents' action is based was issued.

One of these stipulations reads as follows:—

> No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity *unless commenced within twelve months next after the fire.*

That is plain enough. However, the respondents contend that there is no contractual limitation of time whatever against any action under this policy. It is not true, they say, that it was issued in consideration of the stipulations therein contained, and that stipulation as to limitation of action must be read out of it because, they argue, it is provided therein that liability for re-insurance is to be as specifically agreed upon in the rider attached to it, and the provision as to limitation of action not being repeated in specific terms in that rider, it does not form part of the contract of re-insurance.

(1) 2 O. R. 481.
(2) 99 N. Y. 124.
(3) 145 Mass. 419.
(4) 153 Mass. 63.
(5) 68 Fed. Rep. 698.
(6) 70 N. Y. App. 69.
(7) 73 N. Y. App. 158.

In my opinion that contention is untenable. It is merely the extent and terms of the re-insurer's liability that must be specifically agreed upon by the rider. All the other conditions of the policy not incompatible with the contract of re-insurance must be given effect to. It is not because there are other stipulations in the policy that are incompatible with those of the rider that every stipulation thereof must be read out of it. The policy and the rider together, one as much as the other, contain the contract between the parties. There is not necessarily incompatibility between the stipulation as to limitation of action and any of the specific agreements as to the re-insurance. It may often happen that the loss is adjusted and paid within a short time after the fire, yet the respondents would contend that the right of action against the re-insurers would, notwithstanding the stipulation, exist in that case as long as not barred by statutory limitation. That cannot be, in my opinion. That such a limitation of action might occasionally, under certain circumstances, operate injuriously against the re-insured was a good reason not to stipulate it, not at all a reason for asking the court to read it out of the contract. They cannot have intended to stipulate it, or it is by inadvertence that it is in the policy, they would argue. That may be But they must be told that stipulations in a contract cannot be ignored simply because they lead to consequences that the parties did not contemplate. That is the law of Canada, whatever it may be in the foreign country whereto the respondents have had to look for decisions in support of their case.

And insurance companies are not at liberty to invoke their loose and careless ways of drafting their re-insurance policies that we have been told of at the hearing as a reason to be admitted in contending that

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they do not mean what they stipulate in clear and unambiguous terms.

The judgment appealed from holds that there was no limitation of action whatever stipulated by the policy If that were so, this would be the first insurance policy that has ever been before us in which there is no such stipulation.

I would allow the appeal, and dismiss the action with costs in all the courts.

SEDGWICK J. concurred in the judgment allowing the appeal with costs.

GIROUARD J. (dissenting):—I do not intend to go over the facts of the case; they are fully set out in the opinions of my colleagues, and moreover they are not disputed. No doubt the parties agreed by the printed form of policy that no suit or action on the policy should be sustainable

unless commenced within twelve months after the fire

but by the rider or latest agreement annexed, the claim is made subject to many new conditions usually stipulated in a contract of re-insurance which had to be accomplished before a claim could be made against the re-insuring company, and finally it is declared in the rider that

the loss, if any, is payable ten days after presentation of proofs of payment

The conditions in the printed form are applicable in so far as they are not inconsistent with those in the so-called rider, and when so inconsistent the rider should govern. I look therefore upon this addition as a modification to the contractual prescription stipulated in the printed form. Till ten days after the presentation of the proofs of payment, the respondents were in the absolute impossibility of moving against the appellants.

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Contra non valentem agere nulla currit praescriptio. This is the principle laid down in art. 2232 C. C. applicable to conventional as well as legal prescriptions. Fuzier-Herman Code Annoté, art. 2245, n, 106; art. 2248, n. 58. Prescription commenced to run only "ten days after" presentation of proofs of payment." *Denison* v. *The Masons' Fraternal Accident Association* (1), in 1891, at page 297.

The payment of the loss by respondents was made by them in April, 1901, and on the 31st of May following the proofs of payment were duly presented to the appellants. The loss due by them became, therefore, payable ten days after, namely, on the 10th June, 1901. The action was taken on the 17th of June 1901, within the time provided by both the printed policy and the rider.

To conclude, by interpreting the clauses of the contract so as to give effect to all, I have come to the conclusion that the plea of prescription is unfounded and that the appeal should be dismissed with costs

DAVIES J.:—The sole question for our decision is whether or not a clause in the policy prescribing any suit or action upon it for the recovery of any claim "unless commenced within twelve months next after the fire" can be eliminated as not being part of the contract between the parties. The respondent successfully contended in the courts below that this could be done on the ground that the contract was one of re-insurance only and the prescriptive clause in question was altogether inapplicable to it. I have not been able to reach that conclusion or to decide that this or any court can eliminate from a contract any of its provisions except those plainly and palpably inapplicable to the contract made or inconsistent with other provisions of the same contract.

Now there is nothing in a prescriptive clause plainly or palpably inapplicable to a re-insurance contract.

(1) 59 N. Y. App. Div. 294.

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Nor in the contract before us is that clause inconsistent with any other provision or stipulation of the contract. In fact, *primâ facie* and as between two insurance companies, some such clause would seem to be just as applicable to the re-insurance contract as it would to an original insurance contract between an owner or mortgagee and an insurance company.

The special limitation of "twelve months next after the fire" inserted in the policy as the period within which an action must be brought upon the policy may be a harsh and unjust one and capable under certain contingencies of depriving the party insured of the indemnity he thought he had assured to him. But the same may be said with great, if not with equal force of the same clause in any ordinary policy of insurance. It may at times and under certain contingencies operate in ordinary cases most harshly and cruelly and yet no one would for a moment suggest that the courts could avoid giving effect to the clause.

In my opinion, therefore, before we attempt to read such a clause out of the contract we must be fully convinced that it is quite inapplicable to the real contract entered into and was never intended by the parties for that reason to form any part of it or that it is inconsistent with other express stipulations of the policy.

Now what are the facts here? The forms of the defendant company ordinarily used for insurance purposes are used between the two companies to express the re-insurance contract. That these forms are intended so to be used is apparent from their language. The words "liability for re-insurance shall be as specifically agreed hereon" form part of the printed form. The specific matters agreed to on the re-insurance were set out fully on what is called a "rider" pasted upon or attached to the policy above and before the usual and ordinary conditions and are headed "Re-Insurance Home Insurance

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Company of New York". As might be expected these special stipulations relate to the amount insured, the property the re-insurance covers, the losses which must be sustained by fire before any liability attached under the policy and other analogous clauses. They also fixed the notice required to cancel the policy and provided for the inspection of all papers touching any claim made under the contract. There was also inserted the usual clause in re-insurance contracts making the policy subject to the "same risks, conditions, valuations, privileges, mode of settlement and assessments as are or may be assumed or adopted by the Home Insurance Company, and covers such property as may be protected by the said company

and the *loss, if any, is payable ten days after presentation of proof of payment.*

As a good deal was attempted to be made of these words which I have italicized, I pause here to consider whether they in any way conflict or are at variance with the twelve months' prescription. For myself I read both clauses together and find nothing antagonistic in them. One defines with certainty the day when the loss, if any, becomes payable, namely, ten days after presentation of proof of payment by the company insured, the other clause fixes a date after which no action can be brought to recover the loss payable. But, it is argued, there may be such delays in proving and adjusting the original loss that the whole twelve months after the fire will have elapsed before the Home Company could pay, and in such a case, as the loss was not payable till ten days after presentation of proofs of payment, the prescriptive period being passed, no action could be brought at all, or to put it the other way the right to bring the action might not arise until the period which extinguished the right had elapsed. Just so. Such a contingency

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might possible arise. But if the company by its own contract created such a possible disability on itself it has only itself to blame. Such a result would not justify a court in cutting the gordian knot and granting relief by altering the contract.

Returning to our examination of the policy we find that after the special stipulations above referred to relating to re-insurance had been inserted the usual and ordinary clauses in customary use followed including the one in question reading as follows:

> No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

This again was followed by another clause declaring

> this policy is made and accepted subject to the foregoing stipulations and conditions.

The time limit for bringing the action is one of those stipulations and conditions. If it was irreconcilable with any special stipulation inserted respecting re-insurance the court would have to reconcile them, and if that could only be done by striking the clause out or declaring it plainly and palpably inapplicable, such a result might be defended. But as I cannot find any such conditions of irreconcilability exist I must only construe the contract with the clause in. Remaining there it can have but one meaning and that is fatal to the maintenance of the action.

The appeal should be allowed with costs in all the courts.

NESBITT J. (dissenting):—The plaintiffs' action is based on a policy of re-insurance issued by the company on the 29th of December, 1899, by which it re-insured for the term of one year and to the extent of $10,000 the liability of the Home Insurance Company,

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under policies issued through its railway department covering railway property situated in the United States of America, Canada and Mexico.

In order that any liability should attach under the terms of the policy it was agreed that any railway company insured by the Home Insurance Company, either directly or as re-insurance of another company, must suffer by one fire a loss exceeding $50,000, and that by such fire the Home Insurance Company must also have sustained an insurance loss in excess of $5,000, after proper allowance for all other re-insurance applicable to the same.

On the 26th of April, during the currency of this policy, the "Hull fire" occurred and by it the Canadian Pacific Railway Company suffered a large loss. The railway company were directly insured by the Western Assurance Company of Canada, under a policy issued on the 20th. April, 1899. Twenty per cent of the liability of the Western Assurance Company under this policy was re-insured by the Home Insurance Company under a policy dated the 10th. April, 1899, and the Home Insurance Company, in its turn, re-insured a portion of its liability under the policy referred to. The liability of the Western Assurance Company was finally settled and paid on the 16th. March, 1901, and the Home Insurance Company immediately paid their proportion of the loss, and on the 21st. May, 1901, made a claim upon the Victoria Fire Insurance Company for a sum which was subsequently fixed as the sum of $3,727 60, and the question to be decided in this case is as to the application of a limitation clause which appears in a printed portion of the defendants' policy in the following terms:—

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all foregoing requirements, nor unless commenced within twelve months next after the fire.

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The trial judge and the Court of Review have both held this condition inapplicable to the contract of re-insurance. The contract was entered into apparently by the defendant company using one of their ordinary printed blank forms changing the words "does insure" in the second line of the policy, to the words "does re-insure" and by adding a number of conditions applicable to a contract of re-insurance in a type-written "rider" attached to the printed form.

This course was probably taken because an examination of the American authorities indicates that such a course of action is customary, and apparently this blank printed form has, by reason of its use for such purposes, had inserted in it the printed words "liability for re-insurance to be as specifically agreed hereon"; language, so far as I can see, entirely inapplicable to the ordinary contract of insurance which contemplates an insurance upon specific property in which the assured has an interest and in which, in case of a loss, he is required to make proofs of loss by fire and submit his claim to arbitrators if required and fulfil many other conditions in no respect applicable to a case such as this where the insurance is not upon any specific property in any specific place, but is an insurance *of the liability* of the Home Insurance Company under their railway policies, provided the originally insured railway company suffered by one fire a loss exceeding $50,000, and that the Home Insurance Company itself sustained a loss in excess of $5,000 in respect of such fire, after proper allowance made for all other re-insurance applicable to the loss and with the specific "rider-agreement" as between the Home Insurance Company and the Victoria Fire Insurance Company:—

This policy is subject to and liable for the same risks, conditions, valuations, privileges, *mode of settlement*, indorsements and assignments as are or may be assumed or adopted by the Home Insurance Com-

pany, and covers such property as may be protected by the said company, and the loss, if any, is payable ten days after presentation of proofs of payment.

The manifest purpose and spirit of this contract is that, except for the purpose of receiving certain notice from the Home Insurance Company, the Victoria Fire Insurance Company are in no way interested in the adjustment of the loss nor can they be called upon to make a payment until after all disputes have been settled by litigation or otherwise ended and the claim has been paid by the Home Insurance Company for the space of ten days.

I have pointed out that the Home Insurance Company must have paid a considerable sum before any liability at all attaches on the re-insurance contract. I think the limitation clause which provides that no action shall be maintained after one year from the date of the fire is wholly inapplicable to such a contract and covenant for payment, and would provide for prescription running when no claim was running. I think the period of ordinary commercial prescription would apply ten days after the payment by the Home Insurance Company as under similar conditions six years have been held the prescriptive time applicable in the United States. Article 2236 of the Civil Code provides:—

> Prescription of personal actions does not run with respect to debts depending on a condition, until such condition happens.

The condition in this case was the payment by the plaintiffs, and, until ten days thereafter, no debt arose. The American authorities, both state and federal, are uniform in dealing with precisely similar questions, and it is scarcely credible to me that the parties to this contract were not well aware of what seems to be the uniform practice. Although the American cases are not authorities in our courts the opinion and reasoning

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of the learned judges of courts in the United States, especially in insurance cases, have always been regarded with respectful consideration in this court and in England as affording valuable assistance, and I think we cannot do better than adopt them in this case. I would refer to the following cases upon the point under consideration:—*Consolidated Real Estate and Fire Insurance Company of Baltimore* v. *Cashow* (1874), (1); *Jackson* v. *St. Paul F. & M. Insurance Company* (1885), (2); *Manufacturers' Fire & Marine Ins. Co.* v. *Western Assurance Company* (1888), (3); *Faneuil Hall Insurance Company* v. *Liverpool & London & Globe Insurance Company* (1891), (4); *Imperial Fire Insurance Company of London* v. *Home Insurance Company of New Orleans* (1895), (5); *Alker* v. *Rhoads* (1902), (6); *Insurance Company of the State of New York* v. *Associated Manufacturers' Mutual Insurance Corporation* (1902), (7).

In the report in 145 Mass. the court said:

> The contract entered into by the defendant with the plaintiff differed materially from an ordinary contract to insure a general owner against damage to his property by fire. While in a sense it was an insurance upon property, it was strictly a contract of indemnity against risk under another contract which has been entered into by the assured. The assured was not the owner of the property at risk, and had no relation to it except as insurer under the original policy. In that relation it had an insurable interest in it, and could enter into any proper contract for the protection of that interest. *Eastern Railroad Co.* v. *Relief Fire Ins. Co.* (8). But, manifestly, many provisions appropriate to an ordinary agreement with the owner of property for the insurance of it could have no proper application to the agreement made by these parties.
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> It appears upon inspection of the defendant's policy, and is agreed by the parties, that it was prepared upon a printed blank,

(1) 41 Md. 59.
(2) 99 N. Y. 124.
(3) 145 Mass. 419.
(4) 153 Mass. 63.
(5) 68 Fed. 698.
(6) 73 App. Div. N.Y. 158.
(7) 70 App. Div. 69.
(8) 98 Mass. 420.

commonly used in writing policies to insure against loss upon property by the owners of it,

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It is often doubtful how far provisions which relate to the conduct of an assured person as general owner of that which is the subject of the contract should be given effect, in a policy to indemnify against a risk which the assured has taken upon the property of another. That can only be determined in a given case by a careful scrutiny of the different parts of the writing to ascertain its meaning. Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded; and, not infrequently, the careless use of printed blanks compels recognition of this rule. The policy in this case contained many provisions which were originally intended to regulate the conduct of an owner in relation to his property before and after a possible fire.

As I have pointed out, the provision making the policy subject to and liable to the same risks, etc., and making the loss payable only ten days after proof of payment by the Home Insurance Company, coupled with the provision that liability for re-insurance shall be as specifically agreed hereon, rendered nugatory many printed portions of the policy. In the language of the case cited

these are special and peculiar partaining directly to the subject matter of the contract and control those parts of the policy which are inconsistent with it.

In Ontario it has been held in *Citizens Ins Co.* v. *Parsons* (1881), (1), that the statutory conditions are applicable to every contract of insurance the subject matter of which is situated in Ontario. And it was argued in the *Fire Insurance Association* v. *Canada Fire & Marine Insurance Co.* (1883), (2), that, therefore, the statutory conditions must be read into a contract of re-insurance. But it was held that the statutory conditions would be meaningless as applied to the contract of re-insurance, a holding which

(1) 7 App. Cas. 96.

(2) 2 O. R. 481 at p. 491.

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is applicable to this case, and although it was urged upon the argument that the parties had seen fit to make these conditions part of their contract of insurance, so in the case referred to it was argued that the statute had made practically similar additions applicable without the consent of the parties to the contract of insurance in that case. The cases are all reviewed and it is pointed out that owing to the decisions a clause such as I have indicated is now always inserted in re-insurance contracts by which the re-insuring company bind themselves to allow the insuring company to make a settlement, and the re-insuring company to be bound by such settlement and adjustment, and so the usual conditions cannot form part of the contract. It is plain that the plaintiffs were not to send in proofs, furnish certificates, etc., and it is to my mind equally clear that the parties agreed that the time for prescription should not begin until ten days after payment by the insuring company.

It is admitted that many of the conditions are wholly inapplicable to and cannot form part of the contract made by the parties. Why? Because they are senseless and repugnant to the bargain. Is it not then the duty of the court to go over the language and see if the same can be harmonized and read into the admitted bargain? In the case of this particular condition, the early part is wholly senseless applied to the bargain here but clearly applicable to an ordinary risk. Why then emasculate the condition and divorce part of it from its context and read in a different bargain and one with which the condition as a whole can have no relation?

I would affirm the judgment of the court below and dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McLennan & Howard.*

Solicitors for the respondents: *Lafleur, Macdougall & Macfarlane.*