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*May 19.
*June 9.

JOHN HYDE, LIQUIDATOR TO THE VICTORIA-MONTREAL FIRE INSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

GEORGE LEFAIVRE AND LÉONCE TASCHEREAU, JOINT CURATORS OF THE ESTATE OF GEO. BROWN, (PLAINTIFFS)..... RESPONDENTS;

ON APPEAL FROM THE COURT OF KING BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Fire insurance — Condition of policy—Proof of loss—Waiver—Acts of officials.

An insurance company cannot be presumed to have waived a condition precedent to action on a policy on account of unauthorised acts of its officers.

Judgment appealed from reversed, Girouard J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the action with costs.

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills J.J.

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The questions arising on this appeal are stated in the judgment of the majority of the court delivered by His Lordship Mr. Justice Taschereau.

T. Chase Casgrain, K.C., for the appellant, cited *Nixon* v. *Queen Insurance Co.* (1); *Hiddle* v. *National Fire & Marine Insurance Co. of New Zealand* (2); *Atlas Assurance Co.* v. *Brownell* (3); *Commercial Union Assurance Co.* v. *Margeson* (4); *Employers' Liability Assurance Corporation* v. *Taylor* (5); *Western Assurance Co.* v. *Doull* (6); *Logan* v. *Commercial Union Insurance Co.* (7).

Robitaille K.C. and *F. X. Drouin K.C.* for the respondents. The general manager, the director and the liquidator were all important officers and could issue policies and waive conditions. We refer to May on Insurance, Vol. I., No. 126, Vol. II., No. 143; *Ruggles* v. *American Central Insurance Co. of St. Louis* (8); *Stickley* v. *Mobile Insurance Co.* (9); Story on Agency, p. 502; *Quebec Bank* v. *Bryant, Powis & Bryant* (10); *Agricultural Insurance Co. of Watertown* v. *Ansley* (11).

The insurer had communications with the insured after the expiration of the time limited in the condition and carried on negotiations towards an amicable settlement of the claim and authorized him to dispose of the damaged goods and, consequently, cannot take advantage of the non-observance of formalities. A waiver results from the negotiations or transactions after knowledge of the forfeiture by which the insurer recognized the continued validity of the claim and acted thereon. The insurer and the insured proceeded amicably to an estimate of the loss, without observance

(1) 23 Can. S. C. R. 26.
(2) [1896] A. C. 372.
(3) 29 Can. S. C. R. 537.
(4) 29 Can. S. C. R. 601.
(5) 29 Can. S. C. R. 104.
(6) 12 Can. S. C. R. 446.
(7) 13 Can. S. C. R. 270.
(8) 114 N. Y. 415.
(9) 16 S. E. Repr. 280.
(10) 17 Q. L. R. 98.
(11) 15 Q. L. R. 256.

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of forms and consequently they have waived all formalities. See *DeMontigny* v. *Agricultural Insurance Co. of Watertown* (1); *Provincial Insurance Co. of Canada* v. *Leduc* (2) The company was bound by the admission of the existence of the claim in its printed circular issued upon liquidation. See *Fowler* v. *Metropolitan Life Insurance Co.* (3); *Southern Mutual Life Insurance Co.* v. *Montague.*

The judgment of the majority of the court was delivered by

TASCHEREAU J.—The action was brought by the respondents for four thousand dollars upon a policy of fire insurance. It was dismissed in the Superior Court, (Caron J.) but maintained by the Court of Appeal.

The appellant claims that the respondents failed to comply with the condition of the policy as to proof of loss antecedent to action. The respondents reply: first, that they conformed to the requirements of the policy; secondly, that if they failed to do so in any particular, the insurance company have waived all the objections they might otherwise have relied upon. The following are the material parts of the policy relating to the controversy:

19. If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within fourteen days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether

(1) 2 Dor. Q. B. 27.
(2) L. R. 6 P. C. 224.
(3) 41 Hun. 357.
(4) 84 Ky. 653.

valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies.

22. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required.

25. 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, and every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within twelve months next after the loss or damage occurs.

27. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or attached hereto, and no officer, agent or representative of this company shall be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be in writing, signed by the managers of the company.

Did the insured furnish to the company, within fourteen days after the fire, the proof of loss required by the policy, is the first point to be considered.

The insured has himself amply demonstrated that he did not do so by the very document which he has produced in the case purporting to fulfil the condition in question, and this point must clearly be determined against him. His claim, as sent to the company, does not contain any inventory or description of the goods destroyed; the value and cost of the goods is not given; no mention is made of the goods which, as it is in evidence, escaped from the fire, nor of their value before or after the fire, though the books and invoices of the insured had been saved; and the company did not, within the fourteen days, extend in writing, the time given by the policy for furnishing proof.

The insured's contention that though he did not furnish it to the appellant, yet he furnished it to two

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other companies which had also insured these goods, cannot be taken seriously. Did he or did he not furnish it to the appellant? He did not, and that concludes this part of the case. Whether or not he furnished it to the other companies cannot affect the rights that the appellant had to it.

The Court of Appeal, upon that point, seem to have been against the respondents, as the Superior Court had been, but determined the case in their favour upon the ground that the company had waived its right to insist upon these conditions of the policy. With deference, I cannot adopt that view of the case. The fact upon which the respondents first base this plea is that the adjusters sent by the two other companies interested reported verbally to the appellant what they had done in the matter for their own companies. I cannot see in this any evidence of waiver on the part of the company simply because they continued to remain inactive in the matter. Waiver cannot be implied from mere silence.

The second fact relied upon by the respondents on this part of the case is that one Audet, a director of the company, and one Lavery, a member of the liquidator's committee, had recognised the claim and promised to pay it. There is nothing in this contention, in the total absence of proof that these gentlemen were in any way regularly authorised to admit the claim so as to bind the company.

The third ground relied upon by the respondents as to waiver by the company is a circular to the creditors dated 7th January, 1901, sent by Grant, the manager, in which it may be contended that he admitted the respondent's claim. But Grant, heard as a witness, swears that he acted without authority from the Board of Directors in sending this circular. Moreover, when he says in it that the respondent's claim is admitted, he distinctly states that it is the liquidators who authorised him in the matter. Now those liquidators

had no power to bind the company and the insured must be assumed to have been aware of it. They were mere volunteers without any legal authority whatever. They themselves could not bind the company, and what they could not do, they could not authorise the manager to do. Then it is proved negatively that the Board of Directors never admitted the claim. The permission given by Grant to Brown, upon his request on the same or next day, to open his store and sell stock cannot be deemed a waiver by the company. A refusal to grant him that permission might, perhaps, rationally have been invoked as an admission that the relations between the company and the insured, upon the policy, had not come to an end. But at that time, the insured's right of action was gone and it would require stronger evidence than I am able to find in the record to satisfy me that a new right of action had been created by the manager's conduct in allowing the store to be opened, a thing which the company had no right to prevent, with which it then had nothing to do. The respondents would ask us to imply a waiver from this permission given to the insured. That cannot be done. The company cannot have been presumed to have renounced their rights upon such slight evidence.

I would allow the appeal and restore the judgment of the Superior Court.

GIROUARD J. (dissenting).—I am of opinion that the appeal should be dismissed with costs for the reasons given in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Casgrain, Lavery, Rivard & Chauveau.*

Solicitors for the respondents: *Robitaille & Roy.*