

THE ATLAS ASSURANCE COM- }  
 PANY (DEFENDANT)..... } APPELLANT;

1899  
 \*Feb. 23, 24.  
 \*June 5.

AND

FERGUSON BROWNELL AND }  
 O. JAMES W. BROWNELL (PLAIN- }  
 TIFFS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Fire insurance—Condition in policy—Time limit for submitting particulars of loss—Condition precedent—Waiver—Authority of agent.*

A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits."

*Held*, following *Employers' Liability Assurance Corporation v. Taylor* (29 Can. S. C. R. 104), that compliance with this provision was a condition precedent to an action on the policy.

*Held*, also, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after the fifteen days had expired, extend the time without express authority from his principal.

*Held*, further, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition in the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiff.

The questions to be decided on the appeal are indicated in the above head-note, and the material facts

\*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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will be found in the judgment of the court delivered by Mr. Justice Sedgewick.

*Drysdale Q.C.* and *Currie Q.C.* for the appellant.

The scope of an agent's authority is always a question of fact for the jury, and in the face of the evidence the court cannot supply the necessary finding that Jarvis had authority to waive any condition. Even if the jury had found that he had authority, that finding would of necessity be set aside, as the evidence is all the other way. *Mason v. Hartford Fire Ins. Co.* (1); *Acey v. Fernie* (2). The plaintiff or his agent held the policy, and must be presumed to have known the time within which proofs of loss should have been delivered. *Accident Ins. Co. v. Young* (3). The furnishing of a blank to assured, or the filling of it up by adjuster or agent for the company, is not to be considered as a waiver of the rights of the company; *Caldwell v. Stadacona Fire and Life Ins. Co.* (4). The evidence does not support the second finding of the jury that Jarvis "by his acts, words and conduct," caused or induced the plaintiff to delay sending proofs of loss. Estoppel is not pleaded nor relied upon, and no evidence was given in support of it. This case is governed by *Logan v. Commercial Union Ins. Co.* (5). See also *Hiddle v. National Fire and Marine Ins. Co. of New Zealand* (6), and *Employers' Liability Assurance Corporation v. Taylor* (7).

It is clear that better particulars could have been given. The plaintiffs could have obtained invoices within a week after the loss; and the business was a new one carried on for only one year before the fire. The burden is upon the respondents to show that they

(1) 37 U. C. Q. B. 437.

(2) 7 M. & W. 151.

(3) 20 Can. S. C. R. 280.

(4) 11 Can. S. C. R. 212.

(5) 13 Can. S. C. R. 270.

(6) [1896] A. C. 372.

(7) 29 Can. S. C. R. 104.

could not furnish complete proofs within the fifteen days as the contract makes this a condition precedent to recovery, and they offer no excuse for delay. *Nixon v. Queen Ins. Co.* (1); *Hiddle v. National Fire and Marine Ins. Co. of New Zealand* (2).

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*Dickie Q.C.* and *Congdon* for the respondents. The defence did not allege that the statutory declaration had not been furnished within fifteen days, but only that the plaintiff delivered to the company as proofs of loss an account and statutory declaration which was fraudulent and contained false statements to the knowledge of the plaintiff, etc. At the close of the case, after both addresses to the jury, counsel for the defendant applied for leave to amend the defence by setting up that the declaration was not furnished within fifteen days at all. Such an amendment should not have been allowed at so late a stage of the proceedings, and there was nothing before the court justifying the allowance thereof; the defendant abandoned the amendment and never put any plea upon the record in pursuance thereof. Even if the request of the counsel can be deemed the plea upon the record, it is demurrable and shews no defence to the action. The condition has not been proved and does not appear upon the record. The policy shews the requirement as to statutory proof to be a mere direction and not a condition.

As particular an account of the loss as the nature of the case permitted was delivered by the plaintiff within the meaning of the policy. The term "full particulars" must mean the best particulars the assured can reasonably give; and the condition is not to be construed with strictness; *Mason v. Harvey* (3); Porter on Insurance, 3 ed. p. 206; May on Insurance, 3 ed. par. 475. The

(1) 23 Can. S. C. R. 26.

(2) [1896] A. C. 372.

(3) 8 Ex. 819.

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letter and telegram sent at the instance of assured were notice to the company, and contained as particular an account of the loss as the nature of the case permitted: (a) time of fire; (b) that the loss was total; (c) that there was \$500 other insurance on store; (d) that the fire was probably of incendiary origin; (e) that stock was worth \$3,000 and over; (f) particulars as to state of premises before fire. Books, invoices and drafts were furnished to Jarvis within the fifteen days, and all information the nature of the case then permitted was submitted to him, and he expressed himself as satisfied. Jarvis waived compliance with the direction as to time for putting in the proofs of loss, and the company is estopped by matter *in pais* from setting up non-compliance; (a) by stating that the proofs of loss should be sent in within thirty days, and by his acts leading plaintiffs to rely on such statement; (b) by appointing a time to meet plaintiffs and prepare proofs of loss which was later than fifteen days after the fire; (c) by post card and by letter. The finding of the jury on this phase of the case cannot be disturbed. *Caldwell v. Stadacona Fire and Life Ins. Co.* (1), per Ritchie C.J. at pages 224-5.

The court below erred in treating this as a waiver, but should have held the defendants estopped by matter *in pais* from setting up non-compliance with the condition; *Western Assurance Co. v. Doull* (2); *Searle v. Dwelling House Ins. Co.* (3); Beach on Insurance, sec. 1,240; *Jennings v. Metropolitan Life Ins. Co.* (4), per Allen J. at p. 65; *Union Mutual Ins. Co. v. Wilkinson* (5). Jarvis was acting within his authority as agent and could by his language and acts waive the condition in question and estop the company from setting it up,

(1) 11 Can. S. C. R. 212.

(3) 152 Mass. 263.

(2) 12 Can. S. C. R. 446.

(4) 148 Mass. 61.

(5) 13 Wall. (U. S.) 222.

and the company was so satisfied to adopt his acts that until the trial was about concluded the issue as to delivery of proofs of loss was not raised, and no other attack made on them except that they were fraudulent and false. See also *Stoneham v. Ocean, Railway & General Accident Ins. Co.* (1); *Manufacturers Accident Ins. Co. v. Pudsey* (2); *Carroll v. Charter Oak Ins. Co.* (3); *Travellers Ins. Co. v. Edwards* (4).

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SEDGEWICK J.—The plaintiff Ferguson Brownell, a general merchant, carrying on business at Northport, Nova Scotia, had insured his stock in trade to the extent of \$2,000, in the appellant company. Fire having occurred the claim was disputed upon several grounds, and the case having been tried before Mr. Justice Townshend and a jury there was judgment for the plaintiffs, which was sustained by the court *en banc*, Mr. Justice Henry dissenting. The policy was in the usual form with conditions indorsed and made part of the policy. The thirteenth condition was in part as follows :

(b) He is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits.

(d) He is, in support of his claim, if required, and if practicable, to produce books of account and furnish invoices, plans, specifications and other vouchers ; to furnish copies of the written portions of all policies ; and to exhibit for examination all that remains of the property which was covered by the policy, which property, if moveable, the insured shall, by separating the damaged from the undamaged and otherwise, assort and arrange in as good order as the circumstances of the case will allow, so as to facilitate the taking of an account and estimating the value of the same.

Another condition was :

6. No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by the company's manager in Montreal.

(1) 19 Q. B. D. 237.

(2) 27 Can. S. C. R. 374.

(3) 40 Bab. N. Y. 292.

(4) 122 U. S. 457.

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It is admitted that the plaintiff did not deliver to the company or its agent within fifteen days after the fire as particular an account of the loss as the nature of the case permitted, as required by the condition above set out; and the main question upon this appeal is as to whether this condition was waived by the company so as to enable the plaintiff to recover.

The plaintiffs rely upon the acts and statements of one Charles E. L. Jarvis, who after the fire was sent by the company to report on the fire and the amount of the loss, as sufficient proof of waiver on the part of the company. And the question was put by the learned trial judge to the jury :

Did Charles E. Jarvis by his acts, words or conduct, cause or induce the plaintiff to delay in sending to the company or its agent the necessary proofs of loss within the fifteen days expressed in the condition ?

and the jury answered " Yes."

There was no finding of the jury that Jarvis had any authority from the company so to bind it, but inasmuch as the trial judge entered judgment for the plaintiff although at the same time expressing very grave doubts as to whether Jarvis occupied such a position towards the company as to make his conduct and statements binding upon it by estoppel, it must be assumed for the purpose of this appeal that the learned judge found that he had such authority. The authority of Mr. Jarvis and his relation to the defendant company will appear from the evidence. (It must be remembered that the plaintiff applied for insurance to Mr. Logan, a local agent for the company at Amherst, Nova Scotia; that he had no power to issue a policy but only to solicit therefor; that the policy issued from and was sent to the plaintiff by

the provincial head office of the company at Halifax.)  
Mr. Jarvis's evidence is as follows :

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Reside at St. John, N.B. I am a fire insurance agent and fire insurance adjuster. I have been thirty years in fire insurance, also in marine insurance. I am not an officer of the Atlas Insurance Company. I have done a good deal of adjusting of fire losses for that company. I get no regular salary for it, but I am paid the particular bill I put in in each case I adjust. In Nova Scotia Mr. Bell pays me. I have no authority of my own motion to go and adjust. I went at the request of Alfred J. Bell to adjust the loss in this case. Adjusting is to ascertain the amount of the loss from the evidence obtainable and to report on the circumstances of the loss. I am not appointed until the fire takes place. I have nothing to do with receiving the notice of loss or putting in the proofs, no authority or instruction in that respect at all. I did not represent myself to plaintiff as having any such authority.

This evidence is not disputed. The plaintiffs' case is that Jarvis told him that he had thirty days within which to deliver his proofs of loss, whereas the condition requires the proofs to be in within fifteen days.

I told him (he swears), the people I traded with where he would get the invoices. He said to send and get others as soon as I could as it should be made out within thirty days—the proofs of loss (objected.) He said the proofs of loss should be in on or within thirty days.

Jarvis swears,

I did not tell him he had thirty days to put proofs in. If he had asked I would have told him correctly as to the time. I did not purport to waive the time and had no authority to do it nor did I do so.

This is the only evidence of waiver relied on. Jarvis never had the policy in his possession and never saw it. It was at the very time spoken of either in the possession of the plaintiff or of his solicitor, and he, the plaintiff, had a much better opportunity of knowing what its contents were than Jarvis. The jury, however, upon this evidence, found, as is usual in such cases, that Jarvis induced the plaintiff to delay sending in his proofs within the stipulated time.

It is clear from the evidence that at the time this alleged conversation between Jarvis and the plaintiff

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took place the fifteen days had expired and that the policy had then become void by reason of failure to produce the proofs of loss within the stipulated time. These are, I think, all the facts bearing upon the case so far as necessary to determine this appeal.

I am of opinion that whatever Jarvis's authority may have been, and whether under given circumstances he might not have had power to extend the time within which the proofs of loss might be given notwithstanding the fifteen days condition in the policy, yet inasmuch as fifteen days after the fire the policy had become absolutely forfeited by reason of failure of delivery of the proofs nothing that Jarvis could thereafter do without the express authority of the company could reinstate it and revive the company's liability upon it.

I am further of opinion that the evidence does not disclose any facts from which it can be inferred that the company waived the condition. At the time of the conversation relied on twenty-seven days after the fire the policy as I have said had already become forfeited. Nothing within those twenty-seven days that Jarvis had said or done could have induced the plaintiff to alter his position in any way, nor so far as I can see was his position altered in consequence of what he says Jarvis told him, nor does he even allege that his position was in any way changed. In addition to that besides assuming the plaintiff's statement to be true he merely asked Jarvis for his opinion, which it must be presumed he honestly gave, and that he believed the contents of the policy was as he stated. Had the policy been in Jarvis's possession, and had he been the only one capable of giving the information asked for there might be something to be said in favour of the plaintiffs' view, but all the time it was in his own possession or in that of his solicitor



as he knew, and the proper method to ascertain what these stipulations were was to peruse the policy itself or to inquire from its custodian what they were. I cannot see that Jarvis's answer to his question, assuming it to have been as stated, was anything more than if his own solicitor had made it, or even any stranger.

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Nor do I think that Jarvis had any authority, whether within or beyond the fifteen days, by any act or representation of his, to extend the time limit in question. I am inclined to think that the name which he gives to his profession, namely that of an insurance adjuster, is somewhat inaccurate. To adjust an insurance loss in my view implies a dealing between two or more parties, a settlement or determination of something in dispute, a fixing of an amount in respect of which there has been a controversy, but that, it would appear from the evidence, was no part of Mr. Jarvis's duty or within the scope of his authority. He was simply appointed to make inquiries, investigate and report to his employers what in his view was the amount of loss sustained. Had he the larger power to which I have just referred, then, as already stated, I am not prepared to determine the extent of his implied authority to bind the company so far as the making up and delivery of proofs of loss are concerned. But in the present case the evidence is that no such authority was possessed by him, and we must take his duties and powers to be no greater, no less, than the evidence shows them to have been.

It seems to me further that this case is settled by the decision of this court in *Logan v. The Commercial Ins. Co.* (1). Condition twenty of the policy in that case was as follows :

(1) 13 Can. S. C. R. 270.

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the same condition as in the present case. There the waiver was of the condition in respect to the certificate of two magistrates most contiguous to the place of the fire. There the evidence of the authority of Salter, the Halifax agent of the company, was much stronger than in the present case, and the jury found against the company. Upon appeal to this court the learned Chief Justice of this court at page 276 says as follows :

I am of opinion that, irrespective altogether of the requirement of the 19th condition that any waiver should be in writing, there was no evidence showing that the stipulations as to the magistrate's certificate required by the 14th condition had been, in fact, waived in such a way as to bind the respondents, even if a verbal waiver had not been provided against. Salter, as agent, apart from the authority expressly conferred on him to waive in writing, had no power so to bind the respondents, and granting that the plaintiff's account of what passed at the interview at Halifax was, as the jury found, the true one, what was then said could not in any way have precluded the company from setting up the want of the certificate as a defence, simply for the reason given that Salter was exceeding his powers in assuming (even if the plaintiff's evidence is to be so construed) to dispense with it. Further, even if there could have been any doubt of this in the absence of the 19th condition, that condition clearly excludes any authority in the agent to waive otherwise than according to its terms. Lastly, there was not the slightest evidence of any waiver of the 19th condition itself, and moreover, it is manifest that nothing Salter, the agent, might have said, could have had the effect of enlarging the limited power to waive which the company had thought fit to impose upon him.

The judgment of the Supreme Court in *Western Assurance Co. v. Doull* (1), was to the same effect, Mr. Justice Henry in his judgment pointing out that any waiver would have to be evidenced by writing according to the terms of the condition.

The only point remaining is that the condition requiring proofs of loss within fifteen days is not a condition precedent. This question was fully considered by this court in the recent case of *The Employers Liability Co. v. Taylor* (1), where most of the authorities upon the question were referred to. In that case it was held that a condition indorsed upon the policy to the effect that the assured was within twenty days after the accident to give notice to the company was held to be a condition precedent. In the present case the argument is much stronger in that view. The condition is,

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Any person entitled to make a claim under this policy is to observe the following directions. \* \* \* He is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits.

That, it seems to me, is equivalent to a stipulation that before any one can make any demand against the company or sue the company under the policy he must deliver the proofs within the fifteen days. To hold otherwise would be in effect to overrule the decision in the case referred to as well as to disturb the jurisprudence of both England and Canada upon this point as it has existed for many years.

I am of opinion that the appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *Hector McInnes*.

Solicitor for the respondents: *William T. Pipes*.

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(1) 29 Can. S. C. R. 104.