1913

THE ANGLO-AMERICAN FIRE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS; *Dec. 4, 5. *Dec. 23.

AND

CHARLES A. HENDRY AND THE GAULT BROTHERS COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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

AND

CHARLES A. HENDRY AND THE GAULT BROTHERS COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Fire insurance — Application—Misrepresentation—Materiality—Statutory conditions—Variation.

In an action on a policy insuring a stock of merchandise the company pleaded — That the stock on hand at the time of the fire was fraudulently over-valued. That the insured in his application concealed a material fact, namely, that he had previously suffered loss by fire in his business. That the action was barred by a condition in the policy requiring it to be brought within six months from the date of the fire. This was a variation from the statutory condition that it must be brought within twelve months.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 356) that the evidence established the value of the stock at the

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

time of the fire to be as represented by the insured; that the materiality to the risk of the non-disclosure of a former loss by fire was a question of fact for the judge at the trial who properly held it to be immaterial; and that the question whether or not the variation from the statutory conditions was just and reasonable depended on the circumstances of the case, and the courts below rightly held that it was not.

Held, per Davies, Anglin and Brodeur JJ.—That the insured having supplied on demand, duplicate copies of the invoices of goods purchased between the last stock-taking and the time of the fire as well as copies of the stock-taking itself, was not obliged to comply with a further demand for invoices of purchases prior to said stock-taking.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial in favour of the plaintiffs.

The facts of the cases were not in dispute. The questions at issue to be decided are stated in the above head-note.

DuVernet K.C. and *Heighington* for the appellants. The trial judge should not have held that the non-disclosure of the previous fire was not material to the risk. An insurance company is entitled to knowledge of such a fact in order to refuse the risk if so inclined. See *Western Assur. Co.* v. *Harrison* (2). And evidence of other insurers should not have been admitted. *Thames and Mersey Marine Ins. Co.* v. *"Gunford" Ship Co.* (3), at page 538. As to materiality see also *Ionides* v. *Pender* (4); *Gillis* v. *Canada Fire Assurance Co.* (5).

In many cases a six months' limitation of action has been held just and reasonable. See *Home Ins. Co.* v. *Victoria-Montreal Fire Ins. Co.* (6), and cases re-

(1) 29 Ont. L.R. 33, *sub nom. Strong* v. *Insurance Companies.*
(2) 33 Can. S.C.R. 473.
(3) [1911] A.C. 529.
(4) L.R. 9 Q.B. 531.
(5) Q.R. 26 S.C. 166.
(6) [1907] A.C. 59.

ferred to in May on Fire Insurance, ed. of 1900, vol. 2, page 1146.

Rowell K.C. and *George Kerr* for the respondents, referred to *Hartney* v. *North British Fire Ins. Co.* (1); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (2).

THE CHIEF JUSTICE.—For the purposes of this appeal the two cases were consolidated.

The questions involved relate chiefly to: 1o. the materiality of the misrepresentation of the insured in his application for insurance with respect to a former fire; 2o. the amount and value of the goods insured; 3o. the variation in the policies proscribing legal proceedings after a period of six months.

The question of the materiality in a contract of insurance is declared by the Ontario Act (sec. 156, sub-sec. 6) to be a question of fact for the jury, or for the court if there is no jury as in this case, and the learned trial judge found that the representation was not material. On appeal that question was disposed of by the learned Chief Justice of Ontario in two paragraphs of his judgment which I adopt and incorporate here as the exact expression of my own views.

> The circumstances relied on by the learned trial judge for coming to that conclusion are fully stated in his reasons for judgment, and it is unnecessary to repeat them or to say more than that I am unable to say that he erred in so deciding.
>
> It may be observed, in view of the importance that counsel for the appellants contended was attached by insurance companies to the information which was sought to be obtained by the question as to the applicant for insurance having had property destroyed by fire, that no such question was asked by the Crown Life Insurance Company.

(1) 13 O.R. 581. (2) 44 Can. S.C.R. 40.

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

The Chief Justice.

The rule seems to be now well settled that the evidence of underwriters and insurance brokers as to materiality is admissible (17 Halsbury, page 412, No. 805) and the evidence of Messrs. McLean, Curry and Nichols amply justifies the conclusion reached by the trial judge that the misrepresentation was not material.

I would also refer on this branch of the case to the "Marine Insurance Act" (Imp.), 1906, 6 Edw. VII., ch. 41, sec. 18 (4) and (7).

To what the Chief Justice said I would merely add that Mr. DuVernet's very lucid and frank analysis of the evidence has convinced me that in the answer given to the question as to the other fires there was no lack of *bona fides* on the part of the assured, but rather a *bonâ fide* mistake as to the nature of the information which the question was intended to elicit. If the incident is open to two constructions the court ought to adopt that construction which is most favourable to the assured (*Anstey* v. *British Natural Premium Life Association*) (1), and certainly the concurrent findings of the two courts below conclude that question on this appeal. (D. 80, 1, 410; S.V. 81, 1, 223.)

I am also satisfied on the evidence that the stock-in-trade on hand at the time of the fire exceeded in value the amount of the insurance carried by Jeffrey. He took stock in August, 1910, and I agree with the courts below that the evidence establishes it was well and accurately taken. I attach great importance to the corroborative evidence of the commercial travellers whose business it is to estimate the amount of stock carried by their customers. If the stock list then made is accepted as a safe point of departure, there is

(1) 24 Times L.R. 872.

very little in dispute as to the amounts of the purchases and sales made from that time up to the date of the fire. Mr. Grant, the appellants' adjuster, admits, on the assumption that the stock was honestly taken in August, 1910, that there would be on hand in the store at the time of the fire goods of a value substantially in excess of the total amount of insurance. Mr. Gordon, another of the appellants' adjusters, is of the same opinion. In the presence of such evidence the appeal must fail on that point also.

The reasonableness of the variation in the prescription clause is so fully and learnedly discussed in the light of the decided cases by the Chief Justice of Ontario, that it would be mere presumption to attempt to add anything to what he has said. I would merely refer to *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Ins. Co.*(1), and Planiol, vol. 2, No. 2158, 3rd ed.

I would dismiss these appeals with costs.

DAVIES J.—These appeals from the judgments of the Appellate Division of the Supreme Court for Ontario were heard together, there being one appeal book only and the defence of both companies appellants to the actions against them being the same.

The judgments appealed from affirmed that of the trial judge who heard the case twice and who gave judgment for the plaintiff against each of the defendant companies after the second hearing for the amounts insured by them under their respective policies of insurance with interest and costs of all proceedings subsequent to the time of the delivery of his first judgment on the 2nd January, 1912.

(1) [1907] A.C. 59; 35 Can. S.C.R. 208.

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

Davies J.

Three principal grounds of objection to the judgment appealed from were stated and argued at not unreasonable length.

The first ground was the alleged fraudulent valuation of the goods destroyed by the fire; the second, the reasonableness of the variation of statutory condition 22 as to the time allowed for bringing suit against the company for the recovery of claims under the policies; and the third the avoidance of the policy in each company by an alleged misrepresentation in the applications for insurance.

As to the first ground, the fraudulent over-valuation of the goods destroyed by the fire, I agree fully with the findings of the learned trial judge, who had the advantage of hearing the case tried before him twice, confirmed by the Appellate Division, that the charge of over-valuation is unfounded.

There had been a stock-taking by Jeffrey, the insured and owner of the goods, in the month of August preceding the December fire. The evidence shewed clearly that this stock-taking was participated in by all of the employees of the insured, as well as by Jeffrey himself, that the quantities and values of the goods were taken down at first upon sheets of paper which were handed in by each of the employees to Jeffrey and then by him and one of his assistants copied into three stock books. Before, however, it was so transcribed into these books these stock sheets were seen by the companies' own agent, Gillespie, who took the applications for the policies sued upon; and he states that the amount of stock as shewn by these original stock sheets was $24,000, or thereabouts.

There were, it is true, some conflicting estimates made from general observation of the stock by com-

mercial travellers of the value of the goods upon the shelves and in the store as they "sized them up," to use the expression of one of them, after the August stock-taking and before the fire in December. Some of these estimates agreed substantially with the result of the stock-taking while others were much below it.

I have, as requested by Mr. DuVernet in his argument, gone carefully through all the evidence called to our attention by him on this material question and read much not specially referred to; and the result is that I agree with the findings of the trial judge concurred in by the Appellate Division that "the stock-taking in August, 1910, was well and accurately done and its results carried honestly and carefully into the three books constituting Exhibit 6," and further, that "at the time of the fire there was in the store approximately $25,000 worth of goods, estimated at cost prices."

These two findings concurred in by the Appellate Division, and upon the correctness of which I cannot find evidence sufficient to cast reasonable doubt, dispose at once of the whole charge of fraudulent over-valuation.

If the stock-taking in August was an honest one, as I hold it was, there cannot be any reasonable doubt under the evidence as to the daily sales between then and the date of the fire and the purchases of goods between these dates that the value of the stock at the time of the fire was substantially in excess of $21,000, the total amount of insurance.

As to compliance by the assured with the conditions of the policies relating to furnishing proofs of loss, I need only say that I fully agree with the findings of the trial judge concurred in by the Appellate

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

Davies J.

Division that these conditions were fully complied with when on the 17th March, 1911, Jeffrey delivered to the companies, in accordance with their request, copies of the stock-taking in August with duplicate copies of the invoices of all goods purchased between such stock-taking and the date of the fire. I do not think the further demands of the companies for other invoices of purchases before the stock-taking were reasonable and I agree that complete proofs of loss were delivered on that date, 17th March, 1911.

In 60 days afterwards the claims became payable. The actions brought before that date were premature, but those brought on December 20th, 1911, were in time, on my conclusion with respect to the variation clause as to time.

Then comes the question of the reasonableness of the variation of the statutory condition absolutely barring every action, suit or proceeding, for the recovery of any claim under the policy "unless commenced within six months after the loss or damage shall have occurred."

I concur in the conclusions of law reached by the Appellate Division on this point which is in accordance with the judgment of this court in *Eckhardt & Co.* v. *The Lancashire Ins. Co.* (1), that the justice and reasonableness of a variation or addition must be determined upon the circumstances of the case in which it is sought to be applied. Applying that test to the case before us, I have no difficulty in concurring with the trial judge and the Appellate Division that the variation reducing to *six months from the happening of the loss* the twelve months allowed by the statutory

(1) 31 Can. S.C.R. 72.

conditions for bringing the action is not reasonable or just.

The fire happened on the 25th December, 1910. The original proofs of loss were delivered shortly afterwards. In my opinion, the companies were entitled to demand further proofs of the loss and I think those supplied to them on the 17th March, 1911, complied with the demand to the full extent of the insured's duty and that the still further proofs demanded of all invoices of goods purchased by him before his stock-taking in August, 1910, from the time he began business, or of duplicates thereof, were not such proofs as he was bound to furnish. If it was held that he was bound to comply with all the companies' demands in this regard, it is at least doubtful whether he could have satisfactorily furnished them in time to have brought his action within the six months of the variation clause and goes to shew how unreasonable the limitation is.

The first action was commenced on the 26th April, 1911, and in my view was, therefore, prematurely brought. The second action was begun on the 20th December, 1911, and was in time if the statutory condition 22 is applicable, but too late if the variation was held reasonable. As I hold the variation clause unreasonable the second action was in time.

There remains the question whether the policies were avoided by the negative answer given to the question in the applications for insurance, "Have you ever had any property destroyed by fire?" The fact that the applicant signed the application in blank requesting the agent to fill it up and that the agent did so in accordance with a similar answer in another application to another company given to him by Jeffrey does

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

Davies J.

not enable the applicant to escape the effect of his answer. The answer must be taken to be his own. Nor do I give much weight to Mr. Rowell's argument rather faintly pressed that although, as a fact, the applicant Jeffrey had suffered a previous fire the loss had been occasioned by smoke from the fire and not by actual contact with the flames or heat. I prefer to base my judgment on the ground that the question of the materiality of the answer made by Jeffrey to the question, though technically and literally inaccurate, was one of fact for the jury, or for the court, if there is no jury, to determine. Would the literal facts, if given truly in the answer, have increased in the judgment of the companies the moral risk and influenced them to refuse the risk? The trial judge decided that under the circumstances the answer was not material. The previous fire, if it could be dignified with that name, was a very small affair and took place years previously not on the premises where the fire in question in this action took place, but amongst some rubbish in the cellar of a building occupied by Jeffrey in another town in which he then carried on his business. There was a good deal of smoke which damaged some goods. The company which had insurance on the goods damaged investigated the facts, paid some $350 for damages and continued on their insurance. The learned trial judge goes fully into the facts and reasons for the conclusion reached by him and the Appellate Division concurs with him. I am not able to say that both courts were wrong.

There was a cross appeal by the respondent as to the disposition made of the costs; but in view of the conclusion I have reached as to the first action having been prematurely brought I see no reason to interfere with the disposition made of the costs.

1913

ANGLO-AMERICAN FIRE INS. CO. v. HENDRY.

MONTREAL-CANADA FIRE INS. CO. v. HENDRY.

Duff J.

The appeal and cross-appeal should both be dismissed, each with costs in this court.

DUFF J.—I agree that the impeached variation from the statutory conditions was not just and reasonable within the meaning of the Act. That is the only point to which it is necessary to refer specifically.

I think the appeal should be dismissed with costs.

ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Heighington, Macklem & Shaver.*

Solicitors for the respondents: *Kerr, Bull, Shaw & Montgomery.*