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*Nov. 20.
*Dec. 11.

LAURA E. SHARKEY (PLAINTIFF) ....APPELLANT;

AND

THE YORKSHIRE INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Insurance—Stallion—Accident or disease—Conditions—Attachment of risk.

S. applied for insurance on a stallion "for the season" the application in a marginal note stating "term 3 mos." and, in the body of the document, that the insurers would not be liable until the premium was paid and the policy delivered. The policy as issued stated that the insurance would expire at noon on Sept. 7th, and insured against the death of the stallion, after premium paid and policy delivered, from accident or disease "occurring or contracted after the commencement of the company's liability." The policy was delivered and premium paid before four o'clock p.m. of 8th June; the horse had become sick early that morning and died before six o'clock p.m.

Held, affirming the judgment of the Appellate Division (37 Ont. L.R. 344), that the statement in the application "term 3 mos." coupled with that in the policy "date of expiry 7th Sept." did not override the express provision as to commencement of liability and make the risk attach from noon of June 7th; that the liability did not commence until the policy was delivered on June 8th; and as the horse died of an illness contracted before such delivery S. could not recover.

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

This action is on a policy of insurance dated the 7th day of June, 1915, insuring the appellant against

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

(1) 37 Ont. L.R. 344.

death from accident or disease, during the currency of the policy, of a bay stallion named "Luron."

The application for the insurance is dated 29th May, 1915, and was for a "Class or Section No. One, Stallions all breeds for season of 3 months." The application also states "Term 3 mos., Expiry 7-9-16" being the 7th of September, 1916. In response to this application the policy was issued by the respondents, dated the 7th of June, 1915, which, as stated on its face, expired on the 7th of September, 1915, at noon. The premium charged, $32.50, was at the high rate of $3.25 upon each $100 for three months. This policy was sent by the respondents from its head office at Montreal to its agent in Petrolia on the 7th of June, 1915, the date it bears and was delivered on that date to the appellant and the premium collected.

The stallion was in perfect health at noon of the 7th of June when the appellant says that the policy went into force, but was taken ill on the 8th of June and died after the delivery of the policy and payment of the premium.

The respondents' contention and the judgment of the Appellate Division was based upon the following provision in the policy:—

> Now this policy witnesseth, that if after receipt hereof and payment by the Insured to the Company of the under noted premium for an insurance up to noon on the date of expiry of this policy any animal described in the Schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay to the insured, after receipt of proof satisfactory to the Directors, two-thirds of the loss which the said insured shall so suffer, but *pro rata* only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured.

Sir George C. Gibbons K.C. for the appellant re-

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ferred to May on Insurance (4 ed.), sec. 400, p. 918; *Hallock* v. *Commercial Ins. Co.*(1), at page 275.

G. F. Macdonnell and *Oscar H. King* for the respondents cited *Canning* v. *Farquhar*(2), at pages 731-2, contending that appellant should have disclosed the horse's condition when paying the premium. There was an alteration in the risk which avoided the policy.

THE CHIEF JUSTICE.—I find myself obliged though with great reluctance to concur in dismissing this appeal.

The proposal was for an insurance for the season against the death of a stallion from accident or disease and I cannot see what right the respondent company had to insert without notice the provision in the policy limiting the liability to death from accident or disease occurring or contracted after the commencement of the company's liability. The provision was of great importance involving, of course, in this case the whole liability under the insurance.

In the proposal the appellant declared, as was no doubt the fact, that the horse was then in perfect health, and it was examined and reported on by the inspecting veterinarian on behalf of the company. The policy was issued within ten days after. Counsel for the respondent said that this provision was the only way in which live stock insurance companies could protect themselves. I cannot in the least understand what he meant. There is no reason why they should not insure in accordance with their own form of proposal against death from disease whenever contracted, whilst the risk of disease being contracted during the few days elapsing between the dates of the

(1) 26 N.J. Law 268. (2) 16 Q.B.D. 727.

proposal and the policy would hardly, one may suppose, have been sufficient to deter them from accepting the insurance. Of course they were at liberty to make this or any other stipulation they pleased provided they did so in a proper manner and with due notice to the insured. What they were not at liberty to do was to accept the proposal, declare it to be the basis of the policy and then surreptitiously introduce a limitation of their liability and deliver the policy leaving the insured to suppose she had such an insurance as she applied for. It is precisely to guard against such practices that the "Insurance Act" (R.S.O. ch. 183) by the 8th Statutory Condition in section 194 provides:—

> 8. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, *unless the company points out in writing the particulars* wherein the policy differs from the application.

This may have been done; the company should have had an opportunity to prove it.

Unfortunately the appellant has not raised this point and since it is not pleaded this court cannot give any effect to it.

The appeal must therefore be dismissed.

DAVIES J.—The real substantive question in dispute here is the exact time when "the liability of the company commenced" under the policy. Sir George Gibbons contended strongly that it began at noon on the date of the execution of the policy by the company, 7th June, and that as the sickness and death of the stallion insured happened after that date the company was liable to pay. The Court of Appeal, on the contrary, held that, on the true construction of the policy itself, the company's liability did not commence until after delivery and acceptance of the policy and

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that as at that time, on the 8th June, the horse was "sick unto death" and actually died within a few hours afterwards, no liability on the part of the company attached.

The language of the policy reads as follows:—

> If after receipt hereof and payment by the insured to the Company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay * * *.

The date of the expiry of the policy was stated in the policy as the 7th September, 1915. Sir George contended that although no specified term was mentioned in the policy itself, the proposal or application made by the plaintiff had written on its margin by the plaintiff's agent in pencil the words "term 3 months" and that as the expiry of the policy was definitely fixed as the 7th September in the policy, it must be construed once it came into operation as covering the whole period of three months and definitely fixing the commencement of defendants' liability as arising on the 7th June. But while the insurance statute, ch. 183, R.S.O., in its 156th section, enacts—

> that the proposal or application of the assured shall not *as against him* be deemed a part of or be considered the contract of insurance

(except in a case not arising here) it is manifest that if the plaintiff himself invokes the terms of that proposal or application as definitely fixing the time from which the policy was to run, the court must look at the whole of that document and not at a part only. So looking, we find the application, which was dated 29th May, expressly providing:—

> The Company's liability commences after payment of the premium and receipt of policy or protection note by the insured.

In this case there was no protection note and the plaintiff did not receive her policy or pay her premium until the afternoon of the 8th June. The horse died a few hours after such delivery, of a disease which it had contracted before such delivery, and if the application can under the circumstances I mention be referred to, it would conclusively settle when the company's liability commenced.

Apart from that, however, I concur with the reasons given by the judges of the Appellate Division that the language of the policy itself apart from the application settles the question. I have already quoted it.

As I construe that language, it covers insurance not for a period of three months but for such period from a time after delivery to and receipt by the insured of the policy up to the date of its expiry. No question arises as to this time of delivery. The insurance covers the period between those dates and the date the policy expires. The death of the animal must occur during that period, from a disease occurring or contracted after the commencement of the company's liability, and that liability, I hold under the words of the policy, did not commence until the delivery of the policy.

I would therefore dismiss the appeal.

IDINGTON J.—The appellant sues upon a policy of insurance issued by respondent, insuring her against loss by death of a stallion from accident or disease.

The operative covenant sued upon is as follows:—

NOW THIS POLICY WITNESSETH, that if after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of the expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay to the insured, after receipt of proof

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satisfactory to the directors, two-thirds of the loss which the said insured shall so suffer, but *pro ratâ* only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured.

The stallion died from a disease clearly contracted before the payment of the premium and before the delivery of the policy.

I am unable to expand the tolerably clear and explicit terms of this covenant whereby its operation is directed to something happening after its receipt and the payment of the premium, to cover a death which did not result from a disease contracted after the commencement of the company's liability thereunder, but from a disease contracted before the commencement of such liability.

The argument that the premium was obviously to cover three months and that as the policy was to expire on a day named which would make the policy operate retroactively a day or more before the time when its very clear terms indicate that it was the intention of the contracting parties that it should only begin to run after both the delivery of the policy and payment of the premium, seems clearly untenable.

The same line of argument, if maintained, might render the company liable to pay in case of the death of an animal weeks before the delivery of the policy or payment of the premium, which might well happen if the animal were at a long distance from the insured and insurer.

Such policies might exist and be effective as in analogous cases in marine insurance.

It all depends on the frame of the contract.

It is idle to rely upon dicta from authors or judges in relation to contracts in a form that lent another possible meaning than that which can fairly be put upon this one.

As I read this contract it does not offend in its operative part against the clauses in the "Insurance Act" relied on by counsel for the appellant.

The recital, however, in this policy, I may be permitted to suggest, is not what I could rely upon as a compliance with section 156 of the "Insurance Act."

Indeed I think it unjustifiable but I cannot in this case see how I can, save by discarding it, give any effect to the section.

If we tried to go further, as invited by the argument of counsel, in the way of applying sub-section 1 of section 156, we could only destroy the contract but would be unable to construct another unless by unduly straining that clearly intended by the language used.

If, for example, the policy had been delivered, then even without payment, we might have an arguable case presented by virtue of sub-section 1 of section 159, whereby to set up or make operative the contract so amended by that sub-section. I pass no opinion thereon—indeed have none—and am merely trying to illustrate what may, by virtue of the statute, be possible, but here is impossible.

The appeal must be dismissed with costs.

DUFF J.—The language of the policy does not appear to admit of more than one construction; and one of the conditions of responsibility laid down is that the "accident or disease" shall occur or be contracted after the commencement of the "company's liability" under the policy and the "company's liability" does not commence before the payment of the premium. "Otherwise defined in the aforesaid proposal" upon which counsel for the appellant to some extent relies, is an adjective clause qualifying

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"accident or disease." In the contract now before us there is apparently no subject-matter to which these words can apply; but the form is a general form and the words might find their application where risks insured against fall within table four, and they are no doubt also intended to provide for special cases to which the form does not itself in terms refer.

ANGLIN J.—In view of the explicit directions of sub-section 1 of sec. 156 and of sub-section 1 of section 193 of the "Insurance Act" (R.S.O. 1914, ch. 164) and of the express prohibition of the sub-section 3 of the former section I am, with the appellant, unable to understand the reference of the learned Chief Justice of the Common Pleas to the proposal or application made by the assured for the purpose of defining the term of the contract of insurance sued upon, or for that of interpreting the phrase, "commencement of the company's liability" used in the policy. With respect, I am of the opinion that, under the statutory provisions above cited, the term of the insurance must, as against the insured at all events, be found in the language of the policy itself unaided by anything in the application or proposal for insurance. That, I think, is the clear effect of the legislation to which I have referred. Although the insured is not debarred from invoking the application in so far as he can derive aid therefrom in other respects, inasmuch as the statute by sub-section 1 of section 193 (made applicable by section 235) requires that "the term of the insurance" shall appear on the face of the policy, I doubt whether even he can invoke the application to extend the term as stated in the policy.

With the other learned judges of the Appellate Division I find it unnecessary to resort at all to the

application in order to ascertain the beginning of the term of the insurance. With them I find the beginning of that term fixed in the policy as to the occurrence of death to be the time of the receipt of the policy and payment of premium, and as to the accident or disease occasioning the death to be—

> the commencement of the company's liability hereunder,

i.e., under the policy. Sir George Gibbons argued that the use of these two distinct phrases indicates that "the commencement of liability" was meant to describe a moment of time different from and necessarily earlier than that at which the contract was made by delivery of the policy. Inasmuch as by sec. 159 of the statute the contract of insurance when delivered is

> as binding on the insurer as if the premium had been paid

and this

> notwithstanding any agreement, condition or stipulation to the contrary,

the risk attached from the moment of the delivery of the policy although the premium was not paid until afterwards. The contention that the use of two distinct descriptive phrases necessarily excludes an intention thereby to refer to the same event proceeds on the assumption that the policy was framed by a skilled draughtsman. A very cursory perusal of the document suffices to dispel any such illusion. Brief as the operative clause is, tautology is perhaps its most striking feature. It is, therefore, not surprising to find in it the same idea expressed—the same thing described—in different language.

Delivery of the policy took place on the 8th of June, before the death of the animal insured, but after it had contracted the disease which proved fatal. That disease, however, had only manifested itself on

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the morning of the 8th and the case proceeds on the footing that it was then first contracted. The policy bears date the 7th of June and was certainly executed on or before that day. The date of expiry of the risk is stated on the face of the policy to be the 7th September and in a table of "risks," likewise printed on the face of the policy, we find the item:—

> Stallions as against death from accident or disease during the currency of the policy.

It is at least questionable whether the adjectival phrase,

> during the currency of the policy,

in this item qualifies the words "accident or disease." I think it does not, but applies only to the word "death." At all events it should not in the case of disease be read as meaning disease first contracted during the currency of the policy. But I cannot think that this somewhat vague clause can affect the clear and explicit limitation of the risk in the operative provision of the policy to death from a

> disease contracted after the commencement of the company's liability hereunder.

The question is purely one of interpretation of the latter phrase.

Now there can be no doubt that there was no liability of the company before the delivery of the policy. Up to that moment there was no contract of insurance. The company might have entirely declined the risk. The applicant might have refused to accept the policy or to pay the premium. By force of the statute liability began upon delivery of the policy, though it should not otherwise have arisen until payment of the premium. Granted that it was possible for the parties to have provided by express stipulation

on the face of the policy that the risk should be deemed to have attached before delivery, they have not done so. Sir George Gibbons contended that it sufficiently appears that the premium paid to and accepted by the company was based on a full three months' risk. I find nothing in the policy to indicate that to be the fact—nothing which justifies a conclusion that upon a basis either of contract or of estoppel the respondent should be held to have undertaken a risk or liability antedating the delivery of the policy. It is true that on the application—not in its body but in a marginal note on the upper left-hand corner—we find the words "Term 3 Mos." But, while that is so, we also find in the body of the same document this clause:—

> The company's liability commences after payment of the premium and receipt of policy or protection note by the insured.

It is this latter clause which is referred to by the learned Chief Justice of the Common Pleas as an aid in determining the limitation of the risk and defining "the commencement of the company's liability" as against the insured. While in my opinion it may not be so used on behalf of the insurer, on the other hand if, notwithstanding the explicit requirement of sub-section 1 of section 193 that the term of the insurance shall appear on the face of the policy, the insured may invoke the application in support of his contention that the risk was for a full period of three months (necessarily beginning on the 7th of June since the date of its expiry is fixed as the 7th of September) he must take that document as a whole and cannot escape the effect of its very clear and precise provision fixing the commencement of the risk as, in the absence of a protection note, the time of receipt of the policy. In the light of this provision the marginal note on the application form, "Term 3 Mos.", must, I think, be

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regarded as a classification of the risk rather than as intended to define its precise duration. In this view the 8th statutory condition, which might otherwise, though not invoked by the appellant, present a somewhat formidable difficulty to the respondents (see *Laforest* v. *Factories Ins. Co.*(1)), is inapplicable to this marginal note on the application.

On the whole case the conclusion reached in the Appellate Division seems to me to be right. The appeal should be dismissed with costs.

BRODEUR J.—The application for insurance in this case is dated the 29th day of May, 1915, and was a proposal applying to the respondent for insurance on a horse for a sum of one thousand dollars ($1,000).

In the body of the application there was a note that the company's liability would commence after the payment of the premium and the receipt of the policy by the insured.

No payment was made by the applicant when the application was signed. The policy was issued by the company in Montreal on the 7th day of June, 1915, and was mailed to their agent in Petrolia, the place of residence of the appellant. It appears that on the morning of the 8th the horse became sick. In the afternoon of the same day the policy was delivered and the premium paid and a few hours after the horse died.

The policy contained the following provision:—

> If after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay, etc.

(1) 53 Can. S.C.R. 296.

When the policy was issued on the 7th of June the horse was in good health; when it was delivered, however, it had become sick and the question is whether the company's liability began on the date of the policy or when the premium was paid and the policy delivered.

The stipulation above quoted shews that there was no liability on the part of the company until the policy was delivered. Then if the sickness existed at the time of the delivery of the policy the company would not be liable because it was formally stated that if the horse dies from a disease contracted before the delivery of the policy there will be no liability. That contract could not in my opinion be construed in any other way.

It was contended, however, by Sir George Gibbons in his argument that if the horse died before the delivery of the policy there would be no liability; but if the horse simply took sick before the delivery then, in such a case, the company would be responsible for the amount of insurance.

I am unable to find any such distinction in the clause above quoted. It seems to me clear that the liability begins at the time of the delivery of the policy and at the time of the payment of the premium and the condition of the policy was that if the horse died before the delivery of the policy or the payment of the premium, or if he died after but from a disease which had been contracted before the delivery of the policy, then in such case the loss would be not for the insurance company but for the owner of the horse.

It may be then, as a result of that construction, that the plaintiff was not fully insured for the three months which she contemplated; but we have a declaration in the application itself that the policy would not be in force before it was delivered and before

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the premium was paid. The appellant was aware of that condition, because it was on the document which she signed.

I am unable to come to any other conclusion than that the action of the plaintiff was properly dismissed by the Appellate Division and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Moncrieff & Wilson.*
Solicitors for the respondents: *King & King.*