THE NEW YORK LIFE INSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

HENRY PETER SCHLITT, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE E. ROSS, DECEASED (PLAINTIFF) ..... RESPONDENT.

1944
*Oct. 19
1945
*Feb. 27

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Life insurance—Provision in policy for "double indemnity" if insured's death resulted from "external, violent and accidental" cause, but not applicable in case of suicide—Insured burned to death in fire in his barn—Whether death "accidental"—Onus of proof—Presumption against suicide—Inferences from facts in evidence.

Plaintiff, administrator of the estate of R., deceased, sued to recover under a "double indemnity" clause in a policy issued by defendant insuring R.'s life (the amount payable simply on death had been paid). The

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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"double indemnity" was payable "upon receipt of due proof" that R.'s death "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause". It was not payable if R.'s death resulted from (*inter alia*) self destruction or any violation of law by him. He was a successful farmer. He had an asthmatic condition but otherwise was well. On the day before the day on which he died, his wife, during a quarrel, threatened to leave him (as she had threatened in quarrels on previous occasions), and the next morning, on his asking if she still "figured on leaving him", she replied "yes" (though she had made no preparations to leave), and, according to her evidence, he said it would spoil his life, he "couldn't face it". Shortly afterwards his barn was found to be on fire; it was completely destroyed, and his remains were found in its ruins.

The trial Judge dismissed the action ([1944] 1 W.W.R. 129), finding, in view of R.'s said statements, that he had committed suicide. That judgment was reversed by the Appellate Division, Alta, ([1944] 2 W.W.R. 68). Defendant appealed.

Held (affirming the judgment of the Appellate Division), that plaintiff should recover under the double indemnity clause. Rand J. dissented.

Per the Chief Justice and Kerwin J.: It is evident from the trial Judge's reasons that, but for R.'s said words on the morning of the fire, he would have concluded that R.'s death was due to an accident within the meaning of the policy. An appellate court is in as good a position as the trial Judge, in such a case, to draw the proper inference; and, under all the circumstances, the evidence did not lead to a finding of suicide. There is a presumption against the imputation of crime. That presumption is not overcome merely by proof of motive (also, there was no reasonable motive suggested in this case).

The burden upon plaintiff to show that R.'s death came within the terms of the double indemnity clause did not require plaintiff to show that the fire itself was started accidentally. Plaintiff was required only to produce such evidence as would warrant a court in finding that R.'s death, which undoubtedly occurred by reason of the fire, resulted from a bodily injury that was effected solely through an accidental cause (no question arises as to the cause being external and violent). The fire may have been started innocently by R. or innocently or intentionally by some one else; so long as R. did not start the fire with intention of committing suicide or place himself in the barn with that intention after a fire had been otherwise started, plaintiff must succeed.

Per Taschereau J.: Plaintiff had satisfied the burden upon him to show that R.'s death resulted from an "external, violent and accidental cause" within the meaning of the double indemnity clause. All the circumstances as revealed by the evidence (and bearing in mind that courts act upon the "balance of probabilities") lead to that conclusion. The case is one where an appellate court may draw its own inferences from the proven facts. Suicide is a crime and there is a legal presumption against the imputation of crime. Motives are very unreliable and cannot be classified as an accurate determining cause

of human deeds, which they often influence in different ways; taken alone, they have very little probative value; and those alleged in this case do not rebut the presumption against suicide.

Per Estey J.: The case is one in which an appellate court is in the same position as the trial Judge as to drawing inferences of fact. R.'s words to his wife on the morning of the fire, when read in relation to all the other facts, do not justify an inference of suicide. On the issue of "accidental" death, plaintiff was entitled to invoke the inference against suicide, which inference was not "destroyed or attenuated" by R.'s said words. On the evidence it must be found that the cause of death was the fire and that that was an "external, violent and accidental cause" within the meaning of the double indemnity clause.

Per Rand J., dissenting: To recover under the double indemnity clause, plaintiff must show death by accident. That onus remained on him; and if, with the presumption against suicide and its underlying probative force properly applied, the evidence compels the Court to say that on the whole case the probabilities of accident or suicide are in equal balance, plaintiff must fail. The presumption against suicide arises from mankind's experience that a human being normally and instinctively shrinks from it. That general reaction the Court, in considering all facts before it, will keep in mind; but it, treated as a fact, is to be looked upon as any other circumstance in the particular situation. In the present case there was in the whole of the circumstances, including the weight of the factors in experience, sufficient to leave the Court in doubt whether R.'s death was brought about by his intentional act or by accident; and in that state of things plaintiff's burden had not been discharged. The Appellate Division had acted upon inferences which the undisputed facts did not warrant and at the same time had applied them to a burden of proof on defendant which the issue between the parties did not raise. The action should be dismissed.

APPEAL by the defendant from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of O'Connor J. (2) dismissing the action, which was brought to recover, under a double indemnity provision in an insurance policy issued by the defendant, a further sum than that which the defendant had paid under the policy.

The plaintiff sued in his capacity as administrator of the estate of George E. Ross, deceased, who died on April 27, 1942, in a fire which burned his barn. The defendant had issued a policy dated December 28, 1925; which insured the life of the said Ross.

(1) [1944] 2 W.W.R. 68; [1944] 2 D.L.R. 660.

(2) [1944] 1 W.W.R. 129.

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By the policy the defendant had agreed to pay $6,850 (the face of the policy) upon receipt of due proof of the death of said Ross, or $13,700 (double the face of the policy) upon receipt of due proof that his death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within 90 days after sustaining such injury, subject to all the terms and conditions contained in sec. 2 of the policy. Said sec. 2 provided that the said provision for double indemnity benefit would not apply if the insured's death resulted from (*inter alia*) self-destruction, whether sane or insane, or any violation of law by the insured.

The defendant paid the sum of $6,850. The plaintiff brought action to recover the further sum of $6,850 under the said double indemnity provision, alleging that the death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and occurred within 90 days from the injury and that due proof of such death, etc., had been supplied to or acquired by the defendant. The defendant denied the allegations of fact upon which the plaintiff based his claim (except the covenant in the policy) and further pleaded in the alternative the provision in the policy that the double indemnity benefit would not apply if the death of Ross resulted from self destruction, whether sane or insane, and alleged that his death resulted from self-destruction.

The trial Judge dismissed the action, finding that Ross had committed suicide. That judgment was reversed by the Appellate Division, which directed that judgment be entered for the plaintiff for the said sum of $6,850. The defendant appealed to this Court.

The facts and circumstances of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was dismissed with costs, Rand J. dissenting.

N. D. Maclean K.C. and *H. G. Johnson* for the appellant.

J. N. McDonald K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant Company is the defendant in an action brought by the administrator of the estate of George E. Ross upon a policy of insurance issued by the Company to Ross as the insured. The Company agreed to pay $6,850 upon receipt of due proof of Ross' death

or thirteen thousand seven hundred Dollars upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause.

Ross died on April 27th, 1942. The Company paid $6,850 but declined to pay the additional sum that was claimed by virtue of the clause referred to.

Mr. Justice O'Connor, the trial judge, dismissed the action, as he came to the conclusion that Ross had committed suicide. The Appellate Division of the Supreme Court of Alberta reversed this judgment, as the five members of that Court came to the conclusion that the insured had not committed suicide. Both Courts treated that as being the only substantial one in question, but counsel for the appellant argued that they had not dealt with another issue raised by the Company. This matter will be adverted to later, but the evidence relating to Ross' death and to the relevant circumstances prior thereto must first be stated.

Ross was born on February 11th, 1893, and at the time of the issue of the policy, December 9th, 1925, was a bachelor. The beneficiary mentioned in the policy was his mother but this was changed on November 12th, 1937, to the executors, administrators or assigns of the insured. In 1938, as a result of correspondence through what is called a friendship column in a newspaper, Ross became acquainted with Susie Klassen. She became his housekeeper on his farm and in about three months they were married. Some time after the marriage quarrels arose over her claim that her husband and the hired man, Robert Thomas, tracked mud into the house and while on several occasions she threatened to leave, at no time did she make any preparations to carry out these threats.

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On Sunday, April 26th, 1942, another quarrel occurred over the same matter and she told her husband that she was going to leave. In cross-examination she stated that she meant it at the time and that he must have known that she meant it but "she did not know." Thomas, who had worked for Ross for some years and for Ross' father before that, was present during this quarrel and, according to his evidence, he told Ross that it was time he was quitting. The two of them went out of the house together; Thomas intimated to Ross that either he or Ross' wife would have to leave; Ross asked Thomas not to quit but to wait a few days, to which Thomas agreed. (At some stage but whether in Thomas' presence or not is not quite clear, Mrs. Ross complained that she was working too hard while her husband intimated that she had not been working as hard as his mother.) Thomas went to visit a neighbour, not because of the quarrel but because he very often went there or to the houses of other neighbours, and did not return until Monday morning.

On that Monday morning, Ross rose about six o'clock and went to do the chores. His wife prepared his breakfast and then went back to bed. Ross returned to the house, ate his breakfast and then went to the bedroom to inquire if Mrs. Ross were ill. She replied that she was not, but that she was trying to get some sleep since she had not slept during the night. He again left the house. After an interval she arose and had started washing the dishes when he returned and on asking if she still "figured on leaving him", she replied "Yes". According to her evidence, he said that "It would spoil his life if I left him; he couldn't face it; and things like that he was telling me; and talking about other things, too" and he then went out of the house. She had not commenced to pack any of her effects nor had she asked him to drive her to town. About ten minutes after Ross left, his wife went to the porch of the house and saw smoke coming out of all parts of the barn. She went out into the yard, towards the barn, and shouted for him but, not getting any answer, returned to the house and telephoned for assistance. So far as she could see, all the doors in the barn were closed. She opened one door, the one on the

south side, and left it open. The barn and the contents burned, Ross' body was found in the debris and there is no doubt that he died as a result of the fire.

The barn was a frame building about eighty feet wide, running east and west, by about forty feet. There was a double door in the west part of the barn with a strip of cement about fifteen feet wide leading from this double door northerly across the barn, on either side of which strip of cement were the stalls, which had been planked. Otherwise the earth formed the ground floor of the barn. There was one stairway in the building, leading to the loft which extended over the whole area, and in the loft there were about eight tons of hay. The barn was wired for electricity, the power for which was generated outside. There were three or four gasoline cans on the premises, one of which was kept in a shed where the gasoline pump was. After the fire, one can was found by Thomas on the floor of the barn about fifteen feet from Ross' body. There was no gasoline in the can and the top was screwed on tightly. Thomas drove a tractor over this, flattened it and threw it on a junk pile, and it was only later that it was discovered by a policeman who then ascertained from Thomas what the latter had done. The fuse in the shed was intact.

Ross did not smoke and, therefore, did not always have matches with him but, on some occasions, Thomas had secured matches from him. It appears to be common ground that Ross had been in the loft and had fallen where he had been overcome. While the evidence is not clear, it seems to have been taken for granted, at the trial, that because of what was found in the stalls, Ross had harnessed a team of horses and had probably used them to bring some feed, which, however, was not brought in the barn but was left outside. There is also evidence that gasoline was used occasionally to shine the harness.

There was no contradictory evidence and while the trial judge described the widow as giving her evidence with a fatuous grin, he believed her testimony. Part of that testimony, however, was an opinion expressed by her that her husband had committed suicide and a statement that she did not want the double indemnity and would refuse to accept it. As to the first part, the evi-

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dence was inadmissible as that was the very point the Court was asked to determine. As to the second part, counsel for the administrator stated before the Appellate Division that the widow had concurred in the instructions by the administrator to prosecute the appeal. There might also be mentioned the evidence of Thomas that he acted as he did in connection with the gasoline can because he feared that it might be considered Ross had committed suicide. His opinion on that point was also inadmissible.

It is evident from the reasons of the trial judge that if it had not been for the evidence of the widow that her husband had said he could not face it, etc., Mr. Justice O'Connor would have come to the conclusion that Ross' death was due to an accident within the meaning of the policy. An Appellate Court is in as good a position as the trial judge, in such a case, to draw the proper inference: *Dominion Trust Co.* v. *New York Life Insurance Co.* (1). I agree with the Appellate Division that under all the circumstances and bearing in mind that no question as to financial difficulties could arise as Ross' estate was valued at about $40,000 with current debts of $400, the evidence does not lead to a finding that Ross committed suicide. There is a presumption against the imputation of crime: *London Life Insurance Company* v. *Trustee of the Property of Lang Shirt Co.* (2); and motive can never be of itself sufficient: *Dominion Trust Co.* v. *New York Life Insurance Co., supra.* The only motive suggested in this case—that Ross, being timid as far as public opinion was concerned and not liking to be teased or made to feel ridiculous, would commit suicide rather than have it said that his wife had left him—cannot be taken seriously.

The other point mentioned earlier and on which counsel for the appellant relied was that the plaintiff had to bring himself within the terms of the policy. No doubt that is so and there must be evidence that Ross' death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause. It was suggested that this required the plaintiff to show that the fire itself was

(1) [1919] A.C. 254. (2) [1929] S.C.R. 117.

started accidentally. This is a fallacy. The plaintiff was required only to produce such evidence that would warrant a court in finding that Ross' death, which undoubtedly occurred by reason of the fire, resulted from a bodily injury that was effected solely through an accidental cause; no question arises as to the cause being external and violent. The fire may have been started innocently by Ross, or innocently or intentionally by some one else. So long as Ross did not start the fire with the intention of committing suicide or place himself in the barn with that intention after a fire had been otherwise started, the plaintiff must succeed.

The appeal should be dismissed with costs.

TASCHEREAU J.—The plaintiff, Henry Peter Schlitt, is the administrator of the estate of George E. Ross who died in tragic circumstances, and, in such capacity, he brought action against The New York Life Insurance Company, and based his claim on the following relevant paragraphs of the insurance policy, issued by the appellant on the life of the deceased:—

NEW YORK LIFE INSURANCE COMPANY
A MUTUAL COMPANY
AGREES TO PAY

to Lottie Ross, mother of the insured (with the right on the part of the Insured to change the Beneficiary in the manner provided in Section 7) Beneficiary Sixty-Eight Hundred Fifty Dollars (the face of this Policy) upon receipt of due proof of the death of George E. Ross the Insured before December 9th, 1957 (hereinafter called the maturity date); or Thirteen Thousand Seven Hundred Dollars (Double the face of this Policy) upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within ninety days after sustaining such injury, subject to all the terms and conditions contained in Section 2 hereof.

* * *

SECTION 2—DOUBLE INDEMNITY

The provision for Double Indemnity Benefit on the first page hereof will not apply if the Insured's death resulted from self-destruction, whether sane or insane; from any violation of law by the Insured; from military or naval service in time of war; from engaging in riot or insurrection; from war or any act incident thereto; from engaging, as a passenger or otherwise, in submarine or aeronautic operations; or directly or indi-

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rectly from physical or mental infirmity, illness or disease of any kind. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

* * *

SECTION 7

* * *

Self-Destruction.—In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

* * *

The appellant paid the sum of $6,850, but refused to pay the double indemnity on the ground that George E. Ross had committed suicide, and that under the terms of the policy, his death had not "resulted directly from bodily injury effected solely through external, violent and accidental cause." The trial Judge found that Ross had committed suicide and dismissed the action, but the Court of Appeal reversed this judgment and the Insurance Company now appeals to this Court.

Ross was a farmer domiciled in Wainwright, Alberta, where for many years he carried successfully his farming operations with the help of one man named Robert Thomas. The evidence reveals that he was a good worker, leading a retired life, that he was active and robust, except for an asthmatic condition of the lungs that occasionally required the care of Dr. Wallace, who was the family physician.

Ross's farm was highly mechanized, and he was the owner of a fine herd of cattle and of one team of horses, and he was very particular about his property which he kept in very good condition. The barn was equipped with an electric system.

In 1938, when he reached the age of approximately forty-five, as the result of an advertisement called "Friendship Group", which he had seen in the local newspaper, he met one Susie Klassen, who for three months acted as his housekeeper, and then became his wife. Until the date of his death, he had on several occasions quarrelled with her and although the differences seemed to be of a minor character, she threatened to leave him; but Ross's

matrimonial troubles, if serious at all, did not appear to affect him, for his friends testify that he looked quite happy and pleased about his marriage.

The day previous to his death, an insignificant happening arose about the hired man who came into the house with muddy boots, to which Mrs. Ross objected strenuously, so that Thomas left the house momentarily, and was not present when the next morning the tragedy happened.

That morning Ross got up at about six o'clock, and went out doing the chores, after which he came home and had his breakfast. He then went in his wife's room and, seeing that she was in bed, asked if she was sick. He went back to the barn and returned later, asking his wife if she still had the intention of leaving him, and, receiving an affirmative reply, he said it would spoil his life and that he could not face it. His wife testifies that he talked also of different other things, that he did not look cross at all, but she could see that he felt bad. Ten minutes after he had left, the wife, who was washing her dishes, walked into the porch and saw smoke coming out of the barn, which she says was all on fire. She went to the barn, which was located at a distance of approximately seventy-five yards from the house, and shouted for her husband, but did not get any answer. She opened one of the doors, but she could not go in because the smoke was too thick. She then telephoned for help, and the first to arrive was Mr. Mudles, with some other neighbours. Corporal Miller of the Royal Canadian Mounted Police was also called, as well as Corporal Francis.

When they arrived all the upper part of the barn was burned, and, towards the south end near the centre, they found the dead body of Ross. It was lying on prairie wool and underneath it were pieces of what appeared to be parts of the ceiling, leaving the impression that the body had fallen from the loft. Although it was in a charred condition, it was identified as being the body of Ross. The two horses and the other animals were also burned, but calcinated strips of leather were on the remains of the horses, evidence that they had recently been harnessed. A gasoline can was found in the barn

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after the fire. It was empty, but the top was screwed on, and when Addison Thomas, the help, discovered it, he thought he would destroy it, so he ran the tractor over it and threw it in the junk pile.

With this evidence, the trial Judge found that the plaintiff as administrator of the estate was not entitled to the double indemnity, because he thought that Ross had committed suicide, but the Court of Appeal reached a different conclusion.

It was undoubtedly upon the respondent to show that Ross's death was the result of "an external, violent and accidental cause". This, I think, he has established, although the trial Judge found otherwise. This is a case where a Court of Appeal is at liberty to draw its own inferences from the proven facts, and is not bound to accept the findings of the Judge in the original Court. (*Dominion Trust Co.* v. *New York Life Ins. Co.*). (1).

All the circumstances of the case, as revealed by the evidence, lead me to the conclusion that the respondent has brought himself within the provisions of the double indemnity clause of the policy. In *Jerome* v. *Prudential Insurance Company of America* (2), Rose C.J. said: "Nothing, practically, can be proved to a demonstration, and courts act daily, and must act, upon a balancing of probabilities".

And some time before, in *Richard Evans & Co. Ltd.* v. *Astley* (3), Lord Loreburn had also said: "Courts like individuals, habitually act upon a balance of probabilities".

Here in this case, the balance of probabilities is in favour, I think, of George E. Ross having met a violent, external and accidental death, by burning in the fire which destroyed his barn.

The appellant company has alleged in its plea that Ross perished as a result of self-destruction. Suicide, although not punishable, is nevertheless a crime, and the law of evidence is that there is a legal presumption against the imputation of crime. In *London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (4), Mr. Justice Migneault said:

(1) [1919] A.C. 254.
(2) (1939) 6 Ins. L.R. 59.
(3) [1911] A.C. 674, at 678.
(4) [1929] S.C.R. 117, at 125-126.

That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.

In the same case, *Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (1), Latchford C.J., in his judgment at page 95 stated and quoted the law as follows:—

It is, I think, settled law that, when the death is explicable in two ways and the circumstances are equally consistent with accident or suicide, as, for instance when the assured is found drowned, without any explanation of how he happened to get into the water, the presumption against crime applies, and the insurers are therefore liable as for death by accident: Welford, Accident Insurance (1923), p. 211.

The same principle has also been applied in *Harvey* v. *Ocean Accident and Guarantee Corporation* (2), where it was held:—

If a man is found drowned, and certainly drowned either by accident or by suicide, and there is no preponderance of evidence as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption. (3).

The appellant submitted that it has established a motive which would show that death was self-inflicted by the deliberate intention of the deceased. It is said that Ross, being of a timid and retired nature, would be unable to bear the loss of his wife and the ridicule that would fall upon him, if she left him. The threats which never materalized, made by Mrs. Ross that she would leave her husband, must not be given too much weight. Motives are indeed very unreliable, and they cannot be classified as an accurate determining cause of human deeds, which they too often influence in different ways. Taken alone, and not coupled with other extraneous evidence, they have very little probative value, and surely those that are alleged in the case at bar do not rebut the presumption against suicide. As Lord Dunedin said in *Re Arnold Estate* (4):—

Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction being contrary to human instincts is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

(1) 62 Ont. L.R. 83.
(2) [1905] 2 Ir. R.
(3) The quotation is from p. 29.
(4) (1918) 44 D.L.R. 12, at 16.

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Ross was a prosperous farmer who left an estate of over $40,000, and who had no financial troubles. His affection for his wife had, since a certain time, cooled down to a stage of indifference, and the grief due to the possible loss of her companionship and the alleged ridicule that her departure would cast upon him, appear to be mere conjectures that cannot allow me to say that he sought an end to his sorrows and fears in self-destruction.

I would dismiss this appeal with costs.

RAND J. (dissenting)—This action was brought for $6,850 on a policy of life insurance providing what is known as a double indemnity on death arising from accident. Liability for death alone was admitted and payment made but as for accidental death it was denied and these proceedings resulted. The trial judge found the deceased had brought about his own death and dismissed the claim. On appeal this was reversed and judgment given for the amount claimed.

The facts are somewhat meagre. At the time of his death on April 27th, 1942, the deceased was forty-nine years of age. He was a farmer in the Wainwright district of Alberta and left property consisting of more than six quarter sections of land, buildings, farm implements, cattle, etc., of the net value of approximately $42,000. The farm had been his father's and apparently he had always lived on it. He had remained unmarried until 1938. In that year he replied to an advertisement for a place as housekeeper by the woman he later married; and, after the exchange of two or three letters, she came to his home in March or the early part of April of that year. The letters on the part of the deceased had been written by Robert Thomas, a hired man, who had evidently worked on the farm continuously from some years before the death of the father. On July 31st, 1938, the deceased married the housekeeper and from then until his death they lived together, with Thomas a member of the household.

Those best acquainted with the deceased, his doctor, Thomas and others, agree in describing him generally as a capable farmer but somewhat reserved and retiring:

a quiet man, who did not do much talking. He had enjoyed good health until three or four years before his death when "he seemed to get kind of asthma effects of some kind: got short of wind." The doctor described him as a "timid soul". He was peculiarly sensitive to ridicule and to neighbourhood talk, and in relation to women was shy and hesitant. He could not stand "guying" and was "touchy". We have not much to indicate the attitude or feeling between him and his wife but, from her account, their life together had been disappointing. She thought his affections had cooled towards her and at times he looked "despondent and down-hearted and fed up with life."

On several occasions she had threatened to leave but nothing of that sort actually took place. It is probably a fair inference that the wife on the one side and the deceased and the hired man on the other had gradually grown on each other's nerves. Their untidiness was evidently a source of irritation to her, which she did not hesitate to express to the hired man. On the Sunday preceding the death there was a flare-up between them on his coming into the house, as she complained, with too much dirt on his boots. He denied that and resented it. The wife declared she would leave and the hired man likewise. After a long talk with the deceased, however, he finally agreed to stay on for a few days at least. On that morning, with his work finished, he went over to friends about six miles distant, intending to return at night, but on account of rain he put off returning until the next morning. That was not unusual, however, and carried no significance.

Evidently the deceased and his wife did not speak again that day or night, although they occupied the same bed. About six o'clock the next morning, as was his practice, he got up and went outdoors, doubtless to do the chores. His wife, who had not slept during the night, prepared his breakfast and then went back to bed. The deceased returned to the house and, after eating breakfact, came to the door of the bedroom and enquired if his wife was ill. She replied no, that she was trying to get some sleep, upon which he again went out of the house.

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About nine o'clock his wife rose, dressed and started to wash up the breakfast dishes. While at this, the deceased came in and they had a serious discussion. He asked her if she intended to leave and she answered that she did. He spoke of the work about the house and contrasted what she did with what his mother used to do. He did not appear angry "but I could see he felt bad." Finally, "he said he couldn't—it would spoil his life and he couldn't face it" (her leaving). From these few details we must surmise his state of mind as he left her. The talk lasted but a few minutes and as he closed the door of the house again, it was the last seen of him alive.

About ten minutes later his wife, happening to go out to the back porch, saw smoke coming from all parts of the barn. She ran out, calling her husband, and went as far as the barn door which she opened but, in the thick smoke that met her, left it, turned back to the house and telephoned for help.

In the barn, which was 60′ by 30′, were a team of horses, two calves and three pups. The horses were in a double stall next to the double doors which opened towards the house. The loft had a good flooring throughout and was reached by a stairway running to the back, the northerly side, along the westerly wall. In it were seven or eight tons of hay, some of which was known as prairie wool. There were doors between the sections below through which the stairway could be reached from any part.

The fire consumed the barn and contents. The body of the deceased was found near the easterly side of the double doors and underneath it were some unburned prairie grass and a small portion of the floor of the loft. The head as well as the arms and legs had been entirely burned off and identity was in part established by a watch found near the remains.

The hired man had heard of the fire and reached the home between ten and eleven o'clock at a time when the barn was still burning. In looking through the ruins he came across a can which he recognized as one which had been used for gasoline and kept in a small building between the barn and the house and a bit to the east,

which housed a gasoline engine and water pump. This can lay twelve feet or so in a cross direction from the body of the deceased. Thomas had never seen it in the barn before. He picked it up and two or three days later ran a tractor over it and threw it on the junk pile. There is no doubt of his reason for so doing. When he had picked it up, however, he was not alone and some time later, in August, upon being questioned about it by the Mounted Police he produced it to them.

There was no doubt, either, in the mind of the widow as to the cause of the fire and up to and including the trial she disclaimed the insurance monies. The first coroner called was a friend of the deceased and certified the death as from accident. The matter was not allowed to rest there, however, and an enquiry later held by another coroner found death by suicide.

From the moment when the deceased left his house for the last time with the words "it would spoil his life and he couldn't face it" on his lips, until his charred remains were found in the ruins, we are left to conjecture. What actually took place was hidden behind the closed doors of the barn.

The trial judge took the issue to be whether or not the deceased committed suicide, with the onus of establishing it on the appellant. He found a motive in the fact that "he had met his wife in a rather unorthodox way which no doubt caused considerable gossip in the neighbourhood and many dire predictions of unhappy married life, now likely to be fulfilled," and he was strongly influenced by the last conversation in part quoted: that it would spoil his life if his wife left him and that he could not face it. "I take his last words to mean that he could not face the disgrace of his wife's desertion and would end his life. I find he did." In the Court of Appeal the reasons of Ford, J.A., were concurred in by Harvey, C.J.A., Howson J.A. and Shepherd J. In them the controlling view of the facts is, I think, indicated by the references to the incident of the gasoline can and the cause of the fire. Speaking of the former, Ford J.A., says:

> There are, I think, many other inferences to be drawn from what the hired man did with the gasoline can he says he found in the ruins than the one that he was endeavouring to protect the reputation of his

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employer from the odium attached to suicide. He says that he found an empty gasoline can, which had been usually kept elsewhere, in the ruins of the barn, and that he ran the tractor over it. This action on his part as well as the expressed opinion of the widow on whose farm he and she are still living, may have been done and expressed to protect some one other than Ross as the incendiary and killer.

And of the fire:

> The fact that it was not more than ten minutes after Ross is said to have left the house that the barn was on fire, with smoke coming out of every crack, the fact that it is clear that he had gone to the loft and, that if he is the one who set the fire, must have made other preparations for his alleged act, unless he had previously prepared the setting for his death, should lead to the conclusion that it was someone else who set the fire or that the fire was itself accidental. The possibility, if not probability, of the fire itself being accidental is stated in the reasons for judgment of the learned trial Judge.

There is also this observation on the possibility of suicide:

> Here the "method of death," which it is said is what should be found to have been adopted by Ross, is so fantastic that it is almost unbelievable that such a man as Ross is said to have been would have planned and adopted it as the means of escape from his troubles.

Lunney J.A. reached the same conclusion. It was assumed, as a result of the presumption against it, that the onus lay upon the appellant to prove suicide in order to defeat accident.

In dealing with these speculations I should first remark that we are not at liberty to question the testimony of the widow. The trial judge, in a case in which he would properly subject her and her testimony to a keen scrutiny, believed her and, although he mentions an unattractive mannerism, he had no doubt of her veracity. As to the hired man, Thomas, not the slightest justification appears for any question of his honesty or truthfulness. We cannot, therefore, disregard their testimony or assume facts contradictory of it.

The vital question of fact meets us at the threshold of the enquiry: what or who caused the fire? If the barn was on fire when the deceased reached it, a distance of about seventy-five yards from the house, would he, without a word or call of alarm, have entered it, closed the door behind him and gone to the loft? Not, surely, unless he was bent on his own destruction. With no such intent, would he not have made some attempt to save the horses? Opening the westerly half of the main doors

he was immediately at their side in the double stall; but we know that the doors were closed and that the horses died there with their harness on. Then, let us assume the fire to have started after he entered the barn. It was lighted by electricity and, if there had been a short circuit in the wiring, the fuse would have burned out, but the fuse was found intact; he did not smoke; there is not a word to support the possibility of spontaneous combustion in seven or eight tons of hay at that time of year; and that at that particular moment he, a careful farmer, would be moving, or looking or searching around hay in a loft with two windows and an electric light, with a burning match in his hand, and so set the fire and become his own victim, must, I think, be rejected out of hand. What could have been the purpose of the can in the barn? It was suggested that the gasoline might be used to clean harness; but the only use shown was by Thomas, to put a shine on the horses; the deceased was "not much for slicking up his horses." No other possible cause has been mentioned.

On the other hand, a fire in hay generally does and can easily be made to give off dense smoke and, when first seen by the wife, smoke was pouring from all openings in the barn; the deceased was asthmatic and peculiarly susceptible to suffocation; given a will to suicide, here was a means at hand, swift, and with an effect perhaps not unfamiliar to his imaginings. But that same susceptibility would have tended, from the first contact, to cause him to seek his own safety and that of the animals in the barn, had he been so disposed.

The double indemnity is an insurance against death by accident. There are other qualifying characteristics but they are not material to this controversy. The onus of proof of accidental death is on the plaintiff: the question of suicide does not, as a plea, arise. If the action had been brought as a claim upon death only, the defendant must have raised that question as a defence and would, conversely, have carried the burden of that issue.

A presumption requires the court or jury to assume a fact material to an issue before it until evidence has been presented which, to a degree fixed in each case by law, destroys or sufficiently qualifies it. The presump-

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tion may depend upon the proof of a special fact or it may accompany certain evidentiary matters whenever they appear. A primary question in each case is whether the presumption raises an onus of proof or, as it is sometimes called, persuasion, on the party against whom it operates, or requires merely the neutralizing of the fact presumed in the framework of the existing onus. That the same presumption in its application to different circumstances may give rise to either of these, is illustrated in the consideration of the question in *United Motors Service Inc.* v. *Hutson* (1).

Does, then, the presumption against suicide as it arises in this case throw upon the appellant the burden of establishing it by the preponderance of probability, or does the onus remain that of establishing death by accident? I have no doubt it is the latter; and if, with the presumption and its underlying probative force properly applied, the proof in rebuttal brings the court to the point where on the whole case it must say that the probabilities are in equal balance, the respondent must fail.

In the conception of a function of requiring a quantum of proof, the presumption plays no part in the drawing of conclusions from the facts presented in rebuttal, and this circumstance has made a generous contribution to the confusion and difficulty which surround the practical application of this very necessary device.

Presumptions may be raised primarily from considerations of convenience bearing little or no relation to the logic of proof, but they may also be the legal crystallizations of inferences from experience. There can be little doubt that the rule with which we are dealing is of the latter class. It is the experience of mankind that a human being normally and instinctively shrinks from the act of his own destruction. But we know that suicide does take place, and unpredictably: and when in a given controversy circumstances appear pointing to such a conclusion, what, in fact, is the rôle of the presumption?

The clue to that lies in the distinction between the presumption in its legal requirement and the matter in experience out of which it has arisen. In the consideration of all facts before it, a court or jury will inevitably

(1) [1937] S.C.R. 294.

keep before itself that basic datum, in this case the general repugnance to self-slaughter. That instinctive reaction, treated as a fact, is to be looked upon as any other circumstance in the particular situation. The distinction is indicated by Lord Dunedin in *Dominion Trust Company* v. *New York Life Insurance Company* (1):

> Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

And these circumstances, in turn, run the gauntlet of the factors underlying that inference in the process of interpreting them.

When a point has been reached at which suicide becomes a reasonable conclusion or counter-balances accident, the legal effect of the presumption is exhausted. The cardinal question in any case is whether the evidence offered in rebuttal warrants a finding of that degree of probability. The crux lies in defining practical formulas for determining that question. Middleton J.A., dealing with the presumption as against crime, where the onus of proof must be met, lays down this test:

> While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed.

(*Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (2)).

But that passage is dealing with a "right" or a "defence". The only right here is asserted by the respondent; the suggestion of suicide arises in the proof of "accident", the basis of the right, and not by way of "defence" in the sense there intended.

In this case, therefore, the facts and the inferences which may fairly be drawn, including not merely the motive but the intention implied in fact from the language accompanying the first step towards the final act, brought into juxtaposition with the elements in experience giving rise to the presumption, must, to defeat the claim, bring about in the mind of the court or jury an impasse of

(1) [1919] A.C. 254. (2) (1928) 62 Ont. L.R. 83, at 93.

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balanced probabilities. Obviously, if they are inconsistent with accident, the claim fails; but having regard to the factors to be taken into account, I see no reason why, under such an onus, inconsistency must be shown. An equal consistency reached after giving full effect to the presumption as fact is the same as a balance of probability; and unless there is some rule of policy that will otherwise control it, the party carrying the onus must necessarily fail. I know of no such rule.

It is no doubt settled that where death is explicable in two ways and the circumstances are equally consistent with suicide or accident, as in the case where a person is found drowned and there is no explanation of how he got into the water, the presumption prevails. This assumes a simplicity of facts and an evaluation of them uninfluenced by the instinctive bias against suicide, which are not present or possible here: we have not an "equal consistency": and the presumption in some form must descend into the facts. The same probative requirement is observed in either form of the statement but, in my opinion, it comports more nearly with the actual processes of judging such an issue that the underlying factors and the surrounding circumstances be conceived in reciprocal effect upon each other; and not that the presumption as a neutral arbiter should be called in to tip the scales of balanced fact.

The ruling of this Court in *The London Life Insurance Company* v. *Trustee of the Property of Lang Shirt Company Limited* (1) was pressed upon us and is taken as governing in the Courts below. In the main action of that appeal, suicide was raised as an affirmative plea; in the other two actions, in which claims were for death by accident, it was apparently conceded—as it was in the Court below—on the argument, and certainly assumed, that as to the alternative of suicide, the onus likewise was on the defence. But, as I have already indicated, the issue before the trial judge in the present case was not suicide: it was accident, with the onus on the respondent: and that onus has not been displaced by any effect of the presumption. I find nothing in the rule of law laid down by Mignault J. in conflict with what I have said here.

(1) [1929] S.C.R. 117

I think it clear that there is in the whole of the circumstances before us, including the weight of the factors in experience, sufficient to leave the court in doubt whether the death was brought about by the act of the deceased or by accident. That, against years of external routine, this climax of depression, emotional disturbance, motive, intention, fire and death, crowded into the space of ten minutes, should be accepted as pure coincidence, is too great a strain on credulity. In that state of things the burden on the respondent has not been discharged.

With the greatest respect, I am forced to the opinion that the Court of Appeal has acted upon inferences which the undisputed facts do not warrant and at the same time has applied them to a burden of proof on the defendant which the issue between the parties did not raise.

I would allow the appeal and dismiss the action with costs throughout.

ESTEY J.—The respondent (plaintiff), Henry Peter Schlitt, in his capacity as Administrator of the Estate of George E. Ross, claims under a policy of insurance with the appellant (defendant), The New York Life Insurance Company. The policy contains the usual coverage upon the life of the late Mr. Ross, in the sum of $6,850, and this amount the company has paid. In addition thereto this policy has a double indemnity clause, under which the company refused to make payment, and this action is for the recovery thereof. The parts of the policy material to this action are as follows:

* * * Thirteen Thousand Seven Hundred Dollars upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause * * *

Section 2—Double Indemnity

The provision for Double Indemnity Benefit on the first page hereof will not apply if the Insured's death resulted from self-destruction * * *

It is incumbent upon the plaintiff to establish that the death of George E. Ross "resulted * * * from bodily injury effected solely through external, violent and accidental cause." *Ocean Accident and Guarantee Corporation* v. *Fowlie* (1). *Wadsworth* v. *Canadian Railway Accident Insurance Co.* (2).

(1) (1902) 33 Can. S.C.R. 253. (2) (1914) 49 Can. S.C.R. 115.

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There is no question of credibility nor controversy with respect to the facts and this is therefore a case in which the appellate is in the same position as the original Court with respect to drawing inferences of fact. *Per* Lord Halsbury in *Montgomerie & Co. Ltd.* v. *Wallace-James* (1).

It is established that on Monday, April 27, 1942, the death of George E. Ross resulted from bodily injuries caused by a fire which was an "external and violent cause" within the meaning of the policy. In order for the plaintiff to recover, it must also be found that this fire was an accidental cause. The cause of this fire constitutes the important issue in this appeal.

Mr. Ross lived on a farm near Wainwright, and after doing his chores came into the house about nine o'clock Monday morning, where he had a conversation with his wife, and went out again. Ten minutes later Mrs. Ross, from the porch of the house, saw smoke coming out of the barn "from every crack I could see". She ran outdoors, called to Mr. Ross, who did not answer. She opened the barn door, and finding the barn full of smoke, she hastened to telephone neighbours. The barn was completely destroyed and Mr. Ross' remains were found in the ruins of the barn.

The learned trial judge states: "If it were not for the wife's evidence as to Ross' last words to her, I would agree with Dr. Wallace"; and further stated: "I take his last words to mean that he could not face the disgrace of his wife's desertion and would end his life. I find he did". Dr. Wallace had deposed, as coroner: "I closed the case as accidental death due to burning."

On Sunday morning Mrs. Ross objected to Mr. Ross and the hired man, Thomas, walking into the house with muddy boots. Words followed, and Mrs. Ross threatened to leave, as did the hired man. The quarrel apparently ended with Mr. Ross and the hired man going out of the house. Outside they had a conversation of some length, and the hired man reiterated his statement that he thought he should leave. Mr. Ross counselled him to remain a few days and he promised to do so. Immediately after this conversation, the hired man left, not

(1) [1904] A.C. 73, at 75.

because of the quarrel, but to visit a friend about three miles away. Because of rain, he did not, as he had intended, return that evening and was not on the farm again until he came in response to a telephone call about the fire.

After the quarrel on Sunday, Mr. and Mrs. Ross did not speak to each other; they did, however, have their meals together and slept together that night. He got up Monday morning early as usual and completed his chores. He harnessed his team of horses, and whether he had already used them to haul feed, or intended to use them, we do not know, but he left them in the barn with the harness on.

Mrs. Ross had not slept well, and after Mr. Ross had gone out the first time, she got up, prepared his breakfast and went back to bed. Mr. Ross came in, ate his breakfast, went to the bedroom and inquired if she was ill, to which Mrs. Ross replied she was not but was merely catching up on her sleep. Mr. Ross went out of the house again. When he came back about nine o'clock, he found Mrs. Ross washing the dishes. As to what then took place, Mrs. Ross deposes as follows:

> After a little, I got up and started doing my dishes, and then after a little while he came in again, and he asked me if I still figured on leaving him. I said: "Yes". He said it would spoil his life if I left him; he couldn't face it; and things like that he was telling me; and talking about other things, too. A little while after that, he went out and I never seen him again.

She also deposes, with regard to Mr. Ross at that time:

> He didn't look to be cross at all, but I could see he felt bad, you know.

Again, she says:

> He came in and we were talking together.

This was Mr. Ross' last conversation which so influenced the learned trial judge. He went out and ten minutes later the barn was seen to be on fire.

The evidence would indicate that ever since their honeymoon in 1938 Mr. and Mrs. Ross from time to time would have differences and Mrs. Ross would threaten to leave, but she had never left. No particulars of these previous difficulties are given, but Mr. Schlitt, the administrator, who was "fairly intimately" acquainted with Mr. Ross, deposes:

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In fact right up until a few weeks before his death he quite often mentioned his marriage to me, and he always seemed to be—you know —rather happy about it.

A gasoline can was found near the northwest corner of the ruins. It was empty and the top screwed on tight. Thomas, the hired man, when he found this gasoline can was so wrought up that he later ran a tractor over it and threw it on the junk pile. He could not positively identify it, and there were two others upon the premises. It is suggested that it came from the pump-house where it was used as a gasoline container, but it should be noted that they "used gasoline to clean up the horses."

Mr. Ross' body was found in the south half "towards the centre" and on the east side of a cement walk running north and south through the barn, resting upon some "prairie wool" and "pieces of what appeared to be ceiling or loft flooring, which gave the appearance that the body fell from the loft." Mr. Ross was working around the barn that morning and Thomas, the hired man, when asked if Mr. Ross was in the habit of going into that hayloft replied: "Oh, yes; oh, yes, he went in there quite often."

This barn was about 30′ x 60′, well built, with cement floor and equipped with electric lights. The evidence is to the effect that the electric wiring was not responsible for the fire and the current was generated by a wind-charger apart from the barn. At the time of the fire his horses, with the harness on, and some calves were in the barn and all were burned to death.

Mr. Ross was 49 years of age, had resided there for many years, and at the time of his death was farming more than six quarter-sections of land, to all of which he had clear title. He died intestate and his estate was valued at $42,000.

He was a quiet, level-headed and successful man; not given to worry and throughout there is no suggestion of any unusual or abnormal conduct on his part. On Sunday he apparently remained the coolest of the three, as evidenced by his conversation with Thomas when the latter suggested that he should leave and Mr. Ross coun-

selled him to wait a few days, to which Thomas agreed. On Monday morning, during the conversation in question, it is evident that there was no heated discussion.

This expression "he could not face it" is similar to many used by persons upon occasions of disappointment, sorrow or distress. As a rule they do not lead to any immediate course of conduct. In this case the words refer not to the moment of conversation, but to the time Mrs. Ross may leave. Mr. Ross knew that Mrs. Ross had made no preparation to go and to outward appearances she was proceeding with her housework. He had left her just catching up on her sleep and now she was doing the dishes. Under these circumstances he asked the question and she repeated her intention to leave; in effect the same statement she had made the day before when he apparently treated it as upon previous occasions.

Now twenty-four hours after the trouble, during which time Mrs. Ross had made no preparation to leave and was apparently resuming her normal routine about the house, we are asked to conclude, because in reply to the oft repeated threat to leave Mr. Ross said, in part: "If I left him, he couldn't face it", that he thereby indicated an intention to voluntarily end his life; that he forthwith carried out that intention by going to the barn and setting fire thereto. Up to that moment he followed the regular routine of the morning chores. There was nothing new about the threat, but we are asked to conclude that now this successful, quiet type of man at once acts in a manner entirely different to his conduct on any previous occasion. In my opinion, and with greatest respect to the learned trial judge, when those words are read in relation to all the other facts, they do not justify such an inference.

The issue of accident raises at once, apart from any affirmative defence, the question of intention in the sense that if an act is intended, it cannot be accidental. The only intent here suggested is that Mr. Ross intended voluntarily to end his life. In the determination of this issue the plaintiff is entitled to invoke the inference against voluntary death. This inference may be "destroyed or attenuated" by evidence of motive, as sug-

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gested by Lord Dunedin in *Dominion Trust Company* v. *New York Life Insurance Co.* (1), where he states as follows:

> Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

In my opinion, the words attributed to Mr. Ross, read in relation to the other facts, do not "destroy or attenuate" that inference.

If I have properly construed the last words attributed to Mr. Ross, then it seems to me the case may be regarded as similar to *Boyd* v. *Refuge Assurance Co. Ltd.* (2); *Harvey* v. *Ocean Accident & Guarantee Corp.* (3); and *Wright* v. *The Sun Mutual Life Insurance Co.* (4). If these last words have some evidential value the case is similar to *London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (5); *Fowlie* v. *The Ocean Accident & Guarantee Corp.* (6), and *New York Life Insurance Co.* v. *Gamer* (7). In either case, on the facts as I view them, the authorities indicate that judgment should be in favour of the respondent.

The appellant then contends: "He (Mr. Ross) might have attempted to put out the fire and in so doing was overcome by the smoke or flames. If this were the 'natural and direct consequences' of his actions, having regard to his asthmatic condition, it would not be accidental."

In support of this contention the appellant cites: *Scarr* v. *General Accident Assurance Corp.* (8); *Harmon* v. *Travelers Insurance Co.* (9); *Sloboda* v. *Continental Casualty Co.* (10).

The policy makes no reference to asthmatic or any kindred bodily condition. It does provide that the double indemnity shall not be recovered if the death results

(1) [1919] A.C. 254, at 259.
(2) (1890) 17 Sess. Cas. 955.
(3) [1905] 2 Ir. R. 1.
(4) (1878) 29 U.C.C.P. 221.
(5) [1929] S.C.R. 117.
(6) (1902) 4 O.L.R. 146, affirmed 33 S.C.R. 253.
(7) (1938) 303 U.S. 161.
(8) [1905] 1 K.B. 387; 74 L.J. K.B. 237.
(9) [1937] 1 W.W.R. 424.
(10) [1938] 2 W.W.R. 237.

"directly or indirectly from physical or mental infirmity." In my opinion, the cause of death was the fire; if it had not been for the fire he would have continued his normal duties. Periodically during the last three or four years he had consulted Dr. Wallace, his physician. Dr. Wallace stated that Mr. Ross had an asthmatic condition and was short of breath. As a consequence he was "troubled a great deal with dust during haying and threshing" operations, but he does not suggest that he ever advised Mr. Ross not to engage in these operations. Further, Dr. Wallace stated: "Smoke-fumes would have much the same effect on him as dust or any irritating substance, he would breathe in." Mr. Ross was otherwise healthy. This asthmatic condition may have caused him to succumb or become unconscious more quickly than some other person, but cannot, under the circumstances, be described as the cause of his death. Moreover, the policy does not indicate that either of the contracting parties intended that the protection purchased by the assured should turn upon any such inquiry or refinement of the assured's health.

Moreover, a man who finds himself in a position such as Mr. Ross, where, finding his barn afire, he must act instantly, is not required to stop, deliberate and consider whether such a condition as asthma would require him to adopt one or another course. It is enough if he follows one, which under the circumstances is a reasonable course.

All of the foregoing cases cited by the appellant upon this issue have this in common: the assured deliberately, and with ample time to arrive at a decision, selected a course that eventually led to the injury which caused death. In *Harmon* v. *Travelers Insurance Co.* (1), the plaintiff had been warned of his heart condition a few months before the injury. Notwithstanding the advice he then received, he did engage in a curling bonspiel and because of the sweeping suffered a heart attack. The cause was held not to be accidental. In *Sloboda* v. *Continental Casualty Co.* (2), the "light dressy pair" of shoes used for

(1) [1937] 1 W.W.R. 424. (2) [1938] 2 W.W.R. 237.

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walking in March over rough country roads for three and one-half miles to the post office and back developed a blister:

> In the present case not merely was the wearing of the shoes deliberate and intended but the consequence was natural and direct and moreover at some time at least before the walk was concluded must have appeared to the insured as the probable consequence.

In *Scarr* v. *General Accident Assurance Corp.* (1), the insured there sought to remove a drunken man who offered only passive resistance. His own effort brought on the condition which caused his death and it was held not to be accidental.

The appellant also pleaded the affirmative defence of suicide. The only evidence supporting this plea was also tendered to defeat the plaintiff's plea of accident. It failed to do so and *a fortiori* does not establish suicide.

In my opinion, Mr. Ross' death resulted from the fire, which, within the meaning of the policy, was an "external, violent and accidental cause." The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Duncan, Cross & Johnson.*

Solicitor for the respondent: *G. W. Archibald.*

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(1) [1905] 1 K.B. 387; 74 L.J. K.B. 237.