THE W. MALCOLM MACKAY COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE BRITISH AMERICA ASSURANCE COMPANY (DEFENDANT).... RESPONDENT.

1923
*Mar. 6, 7.
*Apr. 3.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Insurance, fire—Lumber—Statutory conditions—Variation—condition or description—Inspection of lumber—Knowledge of insurer—Estoppel.

A policy insuring lumber against loss or damage by fire contained the following clause: "Warranted by the insured that a clear space of 300 feet shall be maintained between the property hereby insured and any standing wood, brush or forest and any sawmill or other special hazard."

Held, that this clause was not merely descriptive of the property but was a condition of the contract of insurance and void as not being in the form required for an addition to, or variation of, the statutory conditions contained in the Fire Insurance Policies Act of New Brunswick (3 Geo. V, ch. 26.) *Curtis's & Harvey* v. *North British and Mercantile Ins. Co.* ([1921] 1 A.C. 303), and *Guimond* v. *Fidelity-Phenix* (47 Can. S.C.R. 216) dist.

Prior to the issue of the policy an expert in that class of insurance in the insurer's employ examined the lumber and the locality in which it was piled and reported to the insurer that none of it was within 300 feet of standing wood, brush or forest. On the trial of the action on the policy the jury found that some of it was within that distance at the time of the inspection but none was so placed afterwards.

Held, that the policy was issued and accepted in the belief that the inspection truly represented the fact and the insurer was estopped from maintaining the contrary.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the judgment on the trial in favour of the defendants.

Two questions for decision were presented on the appeal. The first was whether the clause in the policy set out in the head-note was a condition or merely descriptive of the property. The other depended on the following facts.

No written application for the policy was presented. The insured applied to the head agents in St. John, who sent one Heine, considered an expert, to view the property. Heine reported to his employer that he had paced the dis-

*PRESENT:—Idington, Duff, Anglin, Bordeur and Mignault JJ.

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tance between the lumber to be insured and the nearest woods and found it to be more than 300 feet; that some brush between the lumber and the woods had been burnt over and was not dangerous; and recommended the risk to the company. On the trial of the action the jury found that when Heine saw it the lumber was less than 300 feet from the brush and none had been placed within that distance after the inspection.

The Appeal Division held that the clause respecting the position of the lumber was not a condition and that the insurer could rely on the jury's findings as to such position. The second question was, therefore: Was the defendant estopped from claiming that there was a breach of the warranty?

Baxter K.C. and *F. R. Taylor K.C.* for the appellant. The clause warranting the continuance of the position of the lumber is a condition and void for want of proper form. See *Wanless* v. *Lancashire Ins. Co.* (1). The *Curtis's & Harvey Co.* v. *North British and Mercantile Ins. Co.* (2) is clearly distinguishable.

The defendant company is affected with the knowledge and bound by the acts of its agent Heine. *City of London Fire Ins. Co.* v. *Smith* (3). We rely on the rule laid down in *Carr* v. *London and North Western Ry. Co.* (4).

Teed K.C. for the respondent. The warranty clause is not a condition but a description of the nature of the risk. See *Great Northern Co.* v. *Alliance Ins. Co.* (5).

As to estoppel see *Guimond* v. *Fidelity Phœnix Ins. Co.* (6), *Lockharts* v. *Bernard Rosen & Co.* (7).

IDINGTON J.—The appellant brought this action against the respondent upon two policies of insurance dated 11th April, 1921, and on lumber piled at Burton, Sunbury County, New Brunswick.

The E. C. Atkinson Lumber Company having cut said lumber off lands owned by its said co-appellant which

(1) [1896] 23 Ont. App. R. 224.
(2) [1921] 1 A.C. 303.
(3) 15 Can. S.C.R. 69.
(4) [1875] L.R. 10 C.P. 307 at p. 317.
(5) 25 Ont. App. R. 393.
(6) 41 N.B. Rep. 145; 47 Can. S.C.R. 216, at p. 229.
(7) [1922] 1 Ch. 433.

had also made advances to said operator the loss, if any, was made payable to said company so advancing.

The Atkinson Company carried on its business at Fredericton, N.B., and applied to an insurance agent there for the needed insurance but he was not able to fix the rate or rates of premium at the place where the lumber was piled; he, therefore, turned the business over to the general agents of the respondent at St. John, N.B. They in turn sent R. W. Heine, a regular salaried man engaged to see after their outside work, to inspect the risk and fix the premium to be paid. He did so and upon his report the respondent through its said general agents determined the whole business, issued the policies and were paid the rates so fixed.

The lumber having been consumed by fire in the following July the respondent on notice and inspection by someone else, set up as a pretext for non-payment, that in and by a term of each of the said policies the assured had warranted a clear space of 300 feet between the property so insured and any standing wood, brush or forest, etc.

The appellant, therefore, brought this action which was tried with a jury to whom were submitted several questions answered by them.

The learned trial judge thereupon directed a judgment to be entered dismissing said action. From that judgment an appeal was taken to the Appeal Division for New Brunswick and that court dismissed the said appeal.

Of the several questions raised herein, the most important, in a general sense, is that which must turn upon the determination of whether or not the warranty above referred to was in law a condition which is required by the New Brunswick Fire Insurance Policies Act, 3 Geo. V, c. 26, to conform therewith. By section 3 thereof conditions set forth in the first schedule to the Act are made part of every contract of fire insurance, and required to be printed on every such policy with the heading "Statutory Conditions" and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured, unless evidenced in the manner prescribed in this Act in that behalf.

That is followed by section 4, reading as follows:—

4. If the insurer desires to vary the said conditions or to omit any of them, or to add new conditions, there shall be added on the instrument

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of contract containing the printed statutory conditions, words to the effect set out in the second schedule, printed in conspicuous type, and in ink of a different colour, and with the heading, "Variations in Conditions"; and section 5, reading as follows:—

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured; and no questions shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid; provided, it shall be optional with the insurers to pay or allow claims which are void under the third, the fifth, or ninth statutory conditions, in case the said insurers think fit to waive the objections mentioned in the said conditions.

The warranty in question seems to have varied in one of the policies by reason of something which transpired between their date of 11th April, 1921, and the 1st June, 1921.

There was no stress laid in argument by either side on that circumstance.

I therefore assume that the form of the condition now in question reads as it seems from the beginning to have read in policy no. 33704, and is as follows:—

Warranted by the assured that a continuous clear space of 300 feet shall hereafter be maintained between the property hereby insured and any standing wood, brush or forest and any saw-mill or other special hazard.

which raises the next question argued as to its being a condition within the meaning of the said above quoted sections of the Act, and applies to both policies though the word "hereafter" does not appear in the amended form of the other policy.

The Appeal Division below held that the said warranty was merely descriptive of the risk or, as it is put by the judgment of Mr. Justice Barry, speaking for that court, "to speak more accurately descriptive of the location of the risk" and hence not a condition within the meaning of the above quoted sections of the Act requiring such condition to be set forth in accordance therewith.

There is no pretence that if it is to be treated as such a condition that said requirements were complied with.

In the argument before us the case of *The London Assurance Co.* v. *The Great Northern Transit Co.* (1), was relied

(1) [1899] 29 Can. S.C.R. 577.

upon by respondent's counsel as maintaining the ground taken below as to the warranty being merely descriptive of the risk.

I cannot see much resemblance between what was involved in that case and is in this.

That decision, of course, in a case exactly like what was presented therein, must bind us, but, I submit, is not to be extended to, or cover, what in fact seems to be a condition within the meaning of the sections now in question; nor are we bound by the mere dicta assigned as reasons, or beyond the exact point decided.

In that case judicial opinion seems to have been much divided in the Ontario courts. The learned trial judge (the late Mr. Justice Armour) seems to have held in favour of the plaintiff, and the Court of Appeal seems to have been equally divided.

Of those in said Court of Appeal holding with the insurance company's contention, the late Chief Justice Burton spoke as follows:—

> But it is said that the clause "whilst running on the inland lakes rivers and canals during the season of navigation," if of any force in limiting or restricting the general nature of the insurance, is of force only as a condition in respect of the user of the vessel, and is not binding, not having been indorsed upon the policy in compliance with the provisions of the Ontario Insurance Act, as being a variation of, or an addition to, the statutory conditions. I am unable to agree in that contention. I could well understand that if this had been an insurance on this vessel or on a house generally, and the insurers had afterwards relied on a condition to the effect that if the house should be unoccupied or vacant for a certain number of days the risk should cease, that being a variation of the statutory conditions could not be resorted to unless the requirements of the statute had been complied with. But that is not this case; the policy describes and defines accurately and distinctly the precise risk they are willing to undertake, and the locality and user or occupation of the vessel form part of the definition of this risk; it is not the insurance of the vessel generally for a certain time, but it is for the insurance of her so long as she remains in a certain locality, and so long as during the summer she was in actual service and during the winter was tied up in a place of safety. The existence of these things formed part of the risk and was a condition precedent to the risk attaching or any liability on the part of the insurers.

The distinction that the learned judge so made applies here, I submit, and in effect presents us with a view of the case in hand as being almost identical in principle with what we have to deal with.

I adopt that as distinguishing that case from this.

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Moreover there are a number of the statutory conditions such as appear in the 10th and 11th numbers thereof, which, to my mind, are very illuminative of the principles governing the action of the legislature in imposing these conditions as part of every fire insurance contract.

From these I submit we must be guided as to the nature of the conditions which are to fall within the variations or additions or omissions which an insurance company is imperatively required to set forth as prescribed and in default are to be held null and void.

Clearly it is the measure of the hazard which is involved that must determine whether or not anything touching that can be by the insurer imposed unless by adopting the prescribed mode of doing so.

Curiously enough the respondent by the adoption of its third variation in conditions, which reads as follows

> 3. If any building herein described be or become vacant or unoccupied, and so remain for the space of thirty consecutive days, or being a manufactory, shall cease to be operated for that length of time, this policy shall be void, unless notice of such vacancy or non-occupation has been given to the insurer, and such vacancy or non-occupation has been consented to in writing by the insurer,

seems to have observed that principle.

I cannot, in principle, distinguish between the increase of hazard involved in these changes in mode of use or condition and thus provided for, and that provided for by the warranty in question herein. Nor can I do so as between either and any of the tenth and eleventh of the statutory conditions.

If respondent succeed in imposing such a warranty as in question herein without observing the statutory requirements for validating it, I submit it will have gone a long way towards repealing what has proved to be a most excellent piece of Ontario legislation which was the work of a highly qualified commission intended and destined to put the insurance business on a higher level of honest dealing than it had been some years previously to its adoption by the Ontario legislature where it originated.

Indeed, I am forcibly reminded, by the respondent's contention herein of the undesirable conditions of the fire insurance business and its prolific source of litigation in that province for many years prior to said enactment.

Turning to the continuation of the story of how this insurance here in question was brought about, the Mr. Heine, who inspected and reported as above related, in his evidence tells us that on that occasion he had not trusted to memory of what respondent required in such cases, but read from a book he had with him and measured accordingly by pacing from where part of the lumber to be insured was piled to the nearest trees or bushes, and found they were three hundred feet from the lumber then piled by appellant, the E. C. Atkinson Lumber Company.

The jury, however, on the evidence of other witnesses, found that of the lumber so piled some was within three hundred feet of standing wood, brush or forest.

The jury also found that none of it was so placed within three hundred feet of any standing wood, brush or forest after the said inspection by Heine, upon which, and his report thereof, the rate of insurance was fixed and the policies were issued accordingly to appellants.

No application in writing was made by the appellants or either of them.

They acted in paying the rates demanded upon such basis as was solely fixed by respondent or its general agents, and accepted the policies proffered in accordance therewith and pursuant thereto.

The explanation of the difference between Heine's finding and that of other witnesses would seem to be that the alleged wood or forest had in a previous year been overrun by fire and so burnt over that for at least the distance he paced, what remained after said fire could no longer be properly considered as a fire hazard within said warranty.

No one seems to impute dishonesty to Heine. At best he would, from respondent's point of view, seem to have made an error of judgment. It is, I submit, easy to conceive how different minds under such circumstances might arrive at a different judgment as to where the line ought to be drawn in such a case.

These facts supply additional strength to the argument in favour of the appellant's contention that the warranty in question should be held to be a condition within the meaning of the said section above cited of the statute

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requiring it to be set forth as a variation, addition or omission, in the manner prescribed and, default that having been done, treated as null.

Neither the case above cited nor the case of *Curtis's & Harvey, Limited,* v. *North British & Mercantile Ins. Co.* (1), when closely examined, seems to me to help any one in this case. The facts there in question are entirely different from those here in question.

I am so decidedly of the opinion, upon all the foregoing considerations, that this appeal should be allowed that I do not feel disposed to enter elaborately into the other grounds referred to in the course of the argument.

The case of *Guimond* v. *Fidelity-Phenix Ins. Co.* (2), so much relied upon below and cited here, does not seem to me worthy of much consideration herein. It was decided before the New Brunswick Legislature had passed the Act above referred to and as I thought, in course of taking part in deciding it, raised only one point necessary for consideration and that did not suggest any possibility of making its decision turn upon any such considerations as are arguable herein.

The appellants' counsel in argument stoutly contended that the policies sued upon were not only as usual liable to the application of the doctrine of *contra proferentem* but also under the peculiar circumstances above related so directly the product of its own efforts to induce through its agents the appellants to accept same, that the respondent is estopped from setting up the final determination of fact which in truth had nothing to do with the fire or the cause thereof and at best was a mere technical defence of which it in the last analysis was the sole creator.

The case of *Carr* v. *London & South Western Ry. Co.* (3) is relied upon by appellants' counsel as presenting, by Brett J., a correct statement of the doctrine of estoppel in the following quotation:—

> And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

(1) [1921] 1 A.C. 303. (2) 47 Can. S.C.R. 216.
(3) L.R. 10 C.P. 307, at p. 317.

And as to the misdescription they rely upon *In re Universal Non-Tariff Fire Ins. Co.* (1), which I am inclined to think is with numerous other cases cited in line therewith as to the relation of the party in question acting and causing the error being so far an agent of the company as to bind it under the peculiar circumstances and at all events estop it from setting up such error.

I incline to think the appellants are entitled to succeed on one or other of those aspects of the case as well as the chief ground above dealt with as against the pretensions of respondent.

I would allow the appeal with costs throughout and direct judgment to be entered for the amount of damages assessed at $5,361.71 as of the date of the trial with costs.

DUFF J.—Ss. 4 and 5 of the Fire Insurance Policies Act, New Brunswick (3 Geo. V, ch. 26), are in the following words:—

4. If the insurer desires to vary the said conditions or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions, words to the effect set out in the second schedule, printed in conspicuous type, and in ink of a different colour, and with the heading, "Variations in Conditions."

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured.

The policies sued upon contain a clause requiring the maintenance of a space of 300 feet between the lumber insured and any standing wood, brush or forest. In policy no. 33704 the clause is as follows:—

Warranted by the assured that a clear space of 300 feet shall be maintained between the property hereby insured and any standing wood, brush or forest and any saw-mill or other special hazard.

In policy no. 33705 the word "hereafter" is found between "shall" and "be". In other respects the two clauses do not materially differ.

It does not seem to admit of a doubt that if this clause is a "condition" within the meaning of ss. 4 and 5, then the insertion of it is an attempt to add a "new" condition or to vary a statutory condition within the meaning of that section and consequently not "binding upon the assured" and not "valid", because it is not set out in the manner prescribed by the statute.

(1) [1875] L.R. 19 Eq. 485.

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It is convenient first to discuss the effect of the clause. The property insured is described as "lumber, piled and lying along the line of the Canadian National Railway at Burton, Sunbury County, New Brunswick." The description embraces, I think, any lumber of the insured company so situated, and the clause in question cannot, I think, be read as importing merely a qualification of this description. I think it is a warranty against the presence of any of the lumber of the insured company within the prohibited space.

The warranty literally read seems to come into operation concurrently with the conclusion of the contract. There is an obvious difference between a warranty as to the existence of a state of facts, upon the faith of which a contract is concluded, and a warranty that such a state of facts shall exist from and after the conclusion of the contract. Here the meaning is that from the moment the contract is concluded the "clear space of 300 feet" shall be maintained. Such a clause introduced by the word "warranted," is in the nature of a condition precedent of the company's liability, as has been decided in numerous cases. (*Newcastle Fire Ins. Co.* v. *Macmorran* (1); *Barnard* v. *Faber* (2); *Ellinger* v. *Mutual Life Ins. Co.* (3); *Camors* v. *Union Marine Ins. Co.* (4)).

The warranty is therefore strictly a condition falling, *prima facie,* within the provisions of ss. 4 and 5 of the statute as being either an attempt to vary one of the statutory conditions or an attempt to add a "new" condition.

The circumstances of the case are clearly distinguishable from those of the case of Curtis & Harvey, which Their Lordships of the Judicial Committee had before them in 1921. (*Curtis's & Harvey, Limited* v. *North British & Mercantile Ins. Co.* (5)). That was a case which arose out of a claim made under a policy of insurance which, on the face of it, was an insurance against fire, but which contained two clauses dealing with the subject of the perils insured against. One was clause 11, a statutory condition, providing that the company should not be liable for explosions of any kind unless fire should ensue, and then for loss or dam-

(1) 3 Dow 255, at page 262.
(2) [1893] 1 Q.B. 340.
(3) [1905] 1 K.B. 31.
(4) 81 Am. St. R. 128.
(5) [1921] 1 A.C. 303.

age by fire only; and the other a clause in these words: "Warranted free of claim for loss or damage caused by explosion of any of the materials used on the premises." The Supreme Court of Canada had in *Hobbs* v. *Guardian Fire and Life Ins. Co.* (1) held that clause 11 did apply to explosions resulting from fire; in other words that, notwithstanding clause 11, the policy was a policy of insurance against loss caused by fire, including loss resulting from explosions due to fire. Their Lordships held that the warranty clause had, according to its terms, the effect of excluding explosions from the perils insured against, and Lord Dunedin, in delivering the judgment of Their Lordships at page 312, said that

> any other stipulation or covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions, which are paramount.

It must be remembered that Their Lordships were dealing with a clause defining and limiting the risk in the sense of limiting the perils insured against. One of the so-called conditions of the policy dealt with this same subject, and in so far as the clause was a variation of the condition (that is in so far as it dealt with explosions resulting from fire) the statute applied. In so far as it was not a variation of the condition but an independent stipulation defining and limiting the risk in that sense (that is in so far as it related to explosions not arising from fire) it was treated by Their Lordships as valid, obviously because it was not a "condition" to which the statute applied.

The clause now before us does not define or limit the risk in the view I take of it either as being merely a description of the property insured or in the sense of defining or limiting the perils insured against, as in the case of Curtis & Harvey. Strictly limiting its legal effect to the scope of its terms, it is not, in my judgment, other than a "condition" within the meaning of the statute.

The respondent company argues, however, that the warranty, and especially by force of the word "maintained" implies the affirmation of an existing state of facts corresponding to the state of facts warranted. It is clear enough, of course, that strict and literal compliance with the warranty would in a practical sense be impossible unless the

(1) 12 Can. S.C.R. 631.

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state of facts which the policy warrants shall be maintained was in existence at the moment the policy came into force. But it does not follow at all, I think, that an affirmation of the existence of this state of facts as the basis of the contract is included within the scope of the warranty as defined by the terms in which it is expressed. To the argument that it is implied, there are, I think, two answers: First, if I am right in my conclusion that the condition imported by the warranty as expressed is inoperative by force of the provisions of the statute, then I do not think that you can consistently with the statute imply from it a condition or a term not expressed even though such an implication might be found there if the clause were truly a part of the contract.

In the next place, as I have already intimated, assuming the warranty by its express terms involved an affirmation as to the existing state of facts, it would still be something more than a description of the property and would import a condition precedent of the company's liability—a "condition" to which the statute would apply.

There is another point. The policy on the contention raised by the respondent company, which succeeded in the courts below (as to the effect of the words "standing wood, brush or forest") was sterile from the commencement. The respondent company, through Heine, their agent, had full knowledge of the actual facts, and the acceptance of the construction of the words mentioned now advanced by them necessarily involves the proposition that they received a premium for and delivered a policy to the insured which, constructively at all events, they knew to be inoperative. It is impossible, I think, to ascribe to the parties an intention to deliver and to accept an inoperative policy, and I think it is a very arguable proposition that the case can be brought within the principle laid down in "*The Moorcock*" (1); *Hamlyn* v. *Wood* (2); and by Lord Watson in *Dahl* v. *Nelson* (3). Certainly if the matter had been mentioned it is impossible to suppose the parties subscribing to a contract which in the existing

(1) [1889] 14 P.D. 64, at page 68. (2) [1891] 2 Q.B. 488 at page 491.
(3) 6 App. Cas. 38, at page 59.

state of facts which the parties contemplated as continuing to exist could impose no liability on the company, and I think, as I say, it could be argued with a great deal of force that a term should be implied by which the words mentioned should be read as excluding anything found within 300 feet of the lumber as situated at the time of Heine's inspection. Moreover, the respondent company —being as to this matter *spondentes peritiam artis*—were fully aware, through Heine, that the Atkinson company believed, as a consequence of Heine's conduct, the facts as they existed to constitute a sufficient compliance with the warranty as understood by the respondent company. It is open to question, I think, whether the respondent company is at liberty now to put forward another construction of the warranty with the effect of obliterating the only consideration which the insured company was receiving for the premium it paid.

The appeal should be allowed.

ANGLIN J.—The plaintiffs sue upon two policies to recover insurance for a quantity of lumber destroyed by fire. The sole defence to the claim is non-fulfilment of the following term of the policies:—

> Warranted by the assured that a continuous clear space of 300 feet shall (hereafter) be maintained between the lumber hereby insured and any standing wood, brush or forest or any saw-mill or other special hazard.

This clause is found in a typewritten slip attached to each of the two policies. so placed that it is separated from the description of the property insured and of its location by intervening provisions. The word "hereafter" is omitted from one of the clauses. There is no suggestion of proximity to a saw-mill or special hazard other than standing wood, brush or forest.

The action was tried with a jury, which found that at the time of the fire and at the date of an inspection by one Heine, a salaried representative of the general agents of the defendant company, made immediately before the risk was taken, the lumber or some of it was within 300 feet of standing wood, brush or forest and that none of it had been so placed after the agent's inspection. These findings of fact are accepted.

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The material circumstances of the application for the insurance and of the inspection of the risk by Heine are stated by Mr. Justice Barry, who delivered the decision of the Appeal Division of the Supreme Court of New Brunswick confirming the judgment of the trial judge (Chandler J.), dismissing the action. The appellants have expressly accepted that statement of fact as accurate, and the respondent does not seriously challenge it. Its correctness should, I think, be assumed.

It is quite clear that when Heine visited Burton Station to inspect the risk he had abundant opportunity of ascertaining the precise surroundings of the lumber then piled and that he was fully satisfied that every part of it was more than 300 feet from the nearest standing wood, brush or forest. He so reported to the respondent company by letter, and highly recommended the risk. There is no suggestion of collusion between Heine and the assured or of any lack of good faith on the part of either. If the finding of the jury is right, as must now be assumed, Heine simply made a mistake, probably in his appreciation of a bush hazard. The insurer in issuing and the insured in accepting the policies both proceeded on the assumption that the surroundings of the lumber at that time were in fact as they appeared to, and were reported by, Heine, whose business it was to inspect proposed risks for the purpose of passing upon their desirability for, and fixing the rates to be charged for them by, the companies represented by his employers as general agents.

For the appellants it is contended that the clauses invoked against them are indirect attempts to add a condition to the terms of the policies and, as such, ineffectual for non-compliance with the requirement as to form prescribed for variations of, or additions to, the statutory conditions by the New Brunswick Insurance Act (3 Geo. V, c. 26); for the respondent it is urged that the clauses in question are descriptive or limitative of the risk assumed and not within the purview of the statutory provisions dealing with variations of, or additions to, statutory conditions. If so, urge the appellants, the respondent is estopped by what took place in regard to, and consequent upon, the inspec-

tion by Heine from relying upon the facts found by the jury as a defence.

I find difficulty in regarding a provision warranting that a certain state of affairs, impliedly existing, "shall be maintained" as merely descriptive. The word "warranty" followed by the verb in the future tense seems inapt to express description of a risk presently assumed. While the present existence of the conditions to be maintained is no doubt implied, in the sense that unless they exist the warranty is incapable of literal fulfilment, there is no contractual guarantee of their present existence. It therefore seems more in accord with the language used to treat the warranty as affecting only the state of affairs to be maintained during the future continuance of the risk. So viewed it seems to me to be not descriptive, but in reality to import a condition that the assured shall so keep the insured lumber that no part of it will in the future and during the continuance of the risk, be within 300 feet of any standing wood, brush or forest.

On the other hand if, notwithstanding the use of the future tense, the clause is *in se* susceptible of a construction importing a guarantee of the present existence of the state of affairs warranted, as well as its continuance during the term of the policies, I should regard it as so equivocal that resort can properly be had to evidence of the circumstances under which the policies were issued to aid in determining the sense in which it should be taken to have been intended. To these circumstances I have already sufficiently adverted. Of the existing situs of the lumber and its surroundings the insurance company must be deemed, as between it and the insured, to have had, through Heine, full notice. *Bawden* v. *London, Edinburgh and Glasgow Ins Co.* (1); *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.* (2). Heine, representing the general agents, was satisfied from his inspection that, if the conditions existing when the policies issued should be maintained, the warranty would be fulfilled. The application for the insurance proceeded on that footing. No guarantee as to the present existence of such condition was therefore required, and the insured had no reason to expect that it would be asked.

(1) [1892] 2 Q.B. 534. (2) [1907] 23 Times L.R. 521.

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Only a warranty against altering existing conditions so as to impinge upon the 300 feet clear space would be looked for. The bringing into the Burton Station piling ground of other lumber then piled elsewhere was immediately contemplated. Hence the importance of stipulating that the existing satisfactory state of affairs should not be prejudicially affected by the placing of such additional lumber when brought in—that the "clear space of 300 feet shall be maintained." That, and that alone, would, under the circumstances, appear to have been what might reasonably be expected to be made the subject of warranty by the insured against the proximity of such hazard. Giving due weight to the rule, *contra proferentem,* I am not at all certain that its scope should not be so restricted.

But the language used covers not only undue proximity owing to changes to be made in, or additions to, the piles of lumber, which the jury has clearly negatived, but also the maintaining of such undue proximity if it should already exist. In whichever way it is read, however, the clause in question involves a stipulation that the risk shall not attach if the warranty is not fulfilled, and it is in my opinion either a variation of statutory condition No. 3 or a new condition added to the statutory conditions, and in either view falls within the provision prescribing that it must be placed under a stated heading and in ink of a colour different from that in which the body of the policy is printed—conditions admittedly not complied with.

The case is distinguishable from *Curtis's & Harvey (Canada) Limited* v. *North British & Mercantile Ins. Co.* (1), in that we have here a clause by which it is intended to impose a condition upon the risk attaching or continuing, whereas the clause under consideration in the *Curtis's & Harvey Case* (1) qualified and restricted, not the circumstances in which the risk should attach or continue, but the peril insured against. The latter clause, in so far as it was not in conflict therewith, was held not to be in the nature of a variation or addition to the statuory conditions, but "another stipulation or covenant which defined or limited the risk" (the word "risk" being obviously used here in the sense of "peril"), insured against.

(1) [1921] 1 A.C. 303.

On the other hand if I should be wrong in regarding the clauses under consideration as attempts to vary or add to the statutory conditions—if, as the respondent contends, they should be deemed merely descriptive of the risk assumed—I am satisfied that, in view of the inspection made by Heine, of his report, on the faith of which both parties acted, and of the fact that the clauses relied upon were prepared by the company itself, for it, after loss, to dispute the existence, at the time the policies were issued, of the facts necessary to meet the requirements of those clauses, is inequitable and should not be tolerated by the court. The insured in accepting the policies with the warranty against proximity of bush hazard relied, as they were entitled to do (*Joel* v. *Law Union and Crown Ins. Co.*) (1), upon the skill and judgment of Heine as to what constituted "standing wood, brush or forest" within the meaning of the warranty clause, which he says he explained and interpreted to Atkinson (representing the insured) at the time of the inspection. He had been sent by the respondents' general agents to make the inspection for the very purpose of ascertaining to what hazard from the insurer's point of view the lumber was exposed. As put by Ritchie C.J., in *Hastings Mutual Fire Ins. Co.* v. *Shannon* (2),

> who but the company is to be responsible for his (Heine's) not making a more accurate examination?—

I would add—or for any lack of skill on his part in failing to recognize a bush hazard which he must have seen, if it in fact existed, as the jury has found. Ritchie C.J. further said in the *Shannon Case* (2), at page 408:—

> So long ago as 1815 Lord Eldon, in the House of Lords, recognized that while it is a first principle of the law of insurance that, in the case of warranty, the thing must be exactly as it is represented to be, it would be an effectual answer, even in the case of a warranty, that the insured were misled by the insurers or their agents. *Newcastle Fire Ins. Co.* v. *Macmoran* (3).

See also *Quinlan* v. *Union Fire Ins. Co.* (4); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (5); *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (6); *In re Universal*

(1) [1908] 2 K.B. 863, 891.
(2) 2 Can. S.C.R. 394, at p. 407.
(3) 3 Dow 255.
(4) [1883] 8 Ont. App. R. 376.
(5) [1910] 44 Can. S.C.R. 40.
(6) [1913] 48 Can. S.C.R. 546.

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Non-Tariff Fire Ins. Co. (1); *Benson* v. *Ottawa Agricultural Ins. Co.* (2)

In *Guimond* v. *Fidelity-Phœnix Ins. Co.* (3), there was no inspection of the risk by any one on behalf of the insurers. The existence or non-existence of the thing warranted not to exist—a railway passing within 200 feet of the insured lumber—was in no wise a matter of opinion or a subject as to which reliance would be placed on inspection by an expert. There was no room for the suggestion that the insured had been misled by any person acting for the insurers.

I would for these reasons, with respect, allow this appeal and direct that judgment be entered for the plaintiffs (appellants) for the amount of their claim with costs throughout.

BRODEUR J.—I would allow this appeal on the ground that the insurance company knew through its agent Heine the exact location of the lumber insured.

The three hundred feet clause stipulated in the policy had been the subject of a special investigation on the part of the agent. An application had been made for insurance to the general New Brunswick agents of the respondent company. They sent up this man Heine to examine the locus and he was of opinion that there was no risk from small brush which had been burned about a year before, and he so advised the company before the policy was issued. All the facts and circumstances surrounding the risk were well known to the company, and it fixed the premium according to the view expressed by Heine. Whether or not there was a brush risk, the insurance company was willing to insure, as in fact was done with regard to some other lumber for the benefit of the appellant company which was in a brush risk. All the difference was in the percentage of premium asked for. After having had the ground thoroughly examined by the representative and after having had a report from the latter that in the case in question there was no brush risk and after having then charged a premium of 2½ per cent instead of 5 per

(1) L.R. 19 Eq. 485, 495. (2) 42 U.C.Q.B. 282.
(3) 47 Can. S.C.R. 216.

cent, can this insurance company be permitted now to claim that it is not liable if a loss subsequently occurs?

The courts below have relied on the case of *Guimond* v. *Fidelity-Phœnix Ins. Co.* (1). When this latter case was decided, there was no statute in New Brunswick providing for statutory conditions while now there is such a statute which might oblige us to construe differently certain provisions of the policy now under consideration. We came to the conclusion in the *Guimond Case* (1) that the persons to whom the insured applied for insurance were not the agents of the insurer. In this case, there is not the least doubt that Heine was the representative and agent of the insurer.

The following cases are authority for the proposition that in the present case the insurance company should be declared liable. *National Benefit Life Assur. Co.* v. *McCoy* (2); *Kline Brothers* v. *Dominion Fire Ins. Co.* (3); In re *Universal Non-Tariff Fire Ins. Co.* (4). I may also refer to Halsbury, vol. 17, age 534, where it is said:—

> If the agent of the insurance office takes upon himself the responsibility of surveying and describing the property, any misdescription by him of the property cannot be imputed to the assured and if the property is consequently misdescribed in the policy the instrument, if necessary, may be rectified.

In view of my conclusion on the above point, it is not necessary for me to consider whether the 300 feet clause was a condition to the terms of the policy in issue and whether the statutory conditions of the Fire Policies Act of New Brunswick should apply.

The appeal should be allowed with costs throughout and judgment should be rendered for the plaintiff for the amount of the loss which was fixed by agreement at the sum of $5,361.71.

MIGNAULT J.—I think that what has been termed the warranty clause is a condition of the policies and not a description of the risk insured against. Being a condition, it is governed by the New Brunswick Fire Insurance Policies Act (3 Geo. V, ch. 26). Section 4 of the statute

(1) 47 Can. S.C.R. 216.
(2) [1918] 57 Can. S.C.R. 29, at p. 34.
(3) [1912] 47 Can. S.C.R. 252.
(4) L.R. 19 Eq. 485.

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contains an imperative rule, which must be observed by the insurer who desires to vary the statutory conditions, or to omit any of them, or to add new conditions, and requires that such conditions be printed in conspicuous type, and in ink of a different colour and with the heading "Variations in Conditions." The sanction of this rule is that, unless the condition is distinctly indicated as above mentioned, or to the like effect, it is not valid and binding on the assured. The insurer here did not comply with this rule. My learned colleagues have to my mind successfully distinguished this case from the *Curtis's & Harvey Case* (1), and I need not repeat what they have said. On this point the judgment appealed from cannot be sustained.

The respondent's agent, Heine, having inspected this risk, measured the distance between the lumber and the nearest bush, and reported that there was a clear space of 300 feet between the lumber and any standing wood, brush or forest, and the so-called warranty clause having been inserted in the policies on Heine's representations, I would think that the respondent should not now be allowed to dispute liability on the ground that the facts so represented were not true. No change in the situation of the lumber was made by the appellant who throughout acted in good faith, relying on Heine's representations. There is, therefore, much more here than mere knowledge by the insured of the situation of the property, and this distinguishes this case from *Guimond* v. *Fidelity-Phœnix Ins. Co.* (2).

The first ground of appeal, however, suffices to dispose of the case in favour of the appellant.

I would allow the appeal with costs and give judgment to the appellant for the amount of the verdict with interest and costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Fred R. Taylor.*

Solicitors for the respondent: *Teed & Teed.*

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(1) [1921] 1 A.C. 303.

(2) 47 Can. S.C.R. 216.