1910

*Oct. 24, 25.
*Nov. 21.

ALBERT E. LEWIS, GEORGE F. CAMPBELL, GEORGE C. HASCALL AND ROY B. ROBINETTE, TRADING TOGETHER AS CO-PARTNERS UNDER THE NAME AND STYLE OF PRAIRIE CITY OIL COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE STANDARD MUTUAL FIRE INSURANCE COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Fire insurance—Policy—Statutory conditions—Gasoline on premises—Illuminating oils insured—Notice of loss—Remedial clause in Act — Discretion of court — Construction of statute — R.S.M. (1902) *c.* 87.

By the Manitoba "Fire Insurance Policy Act" (R.S.M. (1902) ch. 87, sch.), an insurance company insuring against loss by fire is not liable "for loss or damage occurring while * * * gasoline * * * is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was effected "on stock consisting chiefly of illuminating and lubricating oils, etc., and all other goods kept by them for sale." A quantity of gasoline was in the building containing the stock when destroyed by fire.

Held, that gasoline, being an illuminating oil, was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.

Held, per Anglin J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale."

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

By section 2 of the Act "where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with * * * or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.

By statutory condition 13(*a*) in the schedule to the Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."

Held, Fitzpatrick C.J. dissenting, that the above clause applies to said condition and under it, in the circumstances of this case, the insurance should be held not to be forfeited by reason of the failure to give such notice.

Judgment appealed from (19 Man. R. 720) reversed, Fitzpatrick C.J. dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Metcalfe J., at the trial, by which the plaintiffs' action was dismissed with costs.

The circumstances of the case are stated in the judgments now reported.

J. B. Coyne and *S. Hart Green* for the appellants.

Affleck for the respondents.

THE CHIEF JUSTICE (dissenting).—Referring to the objection that the policy was void by reason of a breach of the statutory condition which exempts the insurer from liability for loss occurring where gasoline is kept upon the premises insured without permission in writing from the insurer, I agree absolutely in the conclusion reached by the majority of the court on

(1) 19 Man. R. 720.

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

The Chief Justice.

this point. Insurance contracts are to be construed like ordinary contracts. The duty of the court is to seek the intention of the parties, which, in this case, is manifest; that is, it was, in my opinion, clearly intended to insure the stock in trade of the appellants, an oil company, which, to the knowledge of the respondents, dealt in gasoline and other petroleum products. The general agents of the company inspected the premises; saw gasoline there; and their knowledge was, in the circumstances of this case, the knowledge of the company. *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.*(1). To hold that because of some statutory condition the policy was rendered void if the insured kept and stored goods covered by the description in the body of the policy without the permission in writing of the insurer would be to assume that one of the parties may insert some condition in a contract which will avail on a possible construction of the whole instrument to defeat the right of the other. Let me test it in this way. When the contract was made, did the risk attach to any gasoline that might then be on the premises? This question must be answered affirmatively. The object of the insurance was

the stock, consisting chiefly of illuminating and lubricating oils,

viz., those articles of commerce, including gasoline, which to the respondents' knowledge the appellant kept on the premises for sale. Further, can it be doubted that gasoline, which is well known to be one of the products obtained from the distillation of petroleum, and generally used for illuminating purposes, comes within the generic name and description of

(1) 23 Times L.R. 521.

illuminating oil ? Is it conceivable that the main object of the contract is defeated by a condition such as the one relied upon ?

I cannot add anything further to what has been said by my brothers Davies and Anglin, in all of which I concur.

I regret, however, that it is impossible for me to accept their conclusion with respect to the breach of the statutory condition (sch. 13(*a*)), which imposes upon the insured the obligation forthwith after the loss to give notice in writing to the company. By the contract declared upon the appellants were insured by the respondent company to the amount stipulated against loss resulting from or occasioned by the happening of the event insured against—fire. It is clearly a contract of indemnity and the payment of the amount for which the company is liable under the policy is made subject to certain conditions with respect

1. To notice of loss;

2. To proofs of loss.

And the questions to be determined by us on this branch of the case are:

1. Is the condition in this policy as to notice of loss so framed as to make a strict compliance with its requirements a condition precedent to the right to recover the amount of the policy ?

2. Are the provisions of the policy concerning notice of loss and proofs of loss severable and distinct ?

Whether the condition as to notice of loss is a condition precedent may not be free from doubt; but, on the whole, I agree with the conclusion reached by the trial judge, based as it is upon what may be called

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

The Chief Justice.

the well-settled jurisprudence of this court. *Accident Ins. Co. of North America* v. *Young*(1); *Employers' Liability Assurance Corporation* v. *Taylor* (2); *Home Life Association of Canada* v. *Randall*(3), and *Hyde* v. *Lefaivre*(4). See also *Scott* v. *Phœnix Assurance Co.*(5), decided in the Privy Council.

Whether the condition as to the notice is a condition precedent or not is, I admit, a question of construction in each case; but the obligation to give notice is clearly distinguishable from the obligation to produce proofs of loss. The imperfect compliance with the condition to provide full and complete proofs of loss may be remedied without injury to the company and is merely a directory provision. The purpose which proofs of loss are intended to serve, that is, to enable the company to determine the amount of its liability may be effected otherwise. But the failure to give notice of the loss cannot be remedied. The opportunity to inquire into the circumstances of the fire while the matter is still fresh is lost and this may be of great importance to the company. See *In re, Coleman's Depositories and Life and Health Assurance Association* (6), *per* Fletcher Moulton L.J., at page 807. Moreover, the policy is made and accepted subject to the conditions imposed by the legislature upon the insurance companies for the benefit presumably of the public and one of those conditions, accepted by the insured, is that the amount of the claim is made payable sixty days after due notice of the loss has been given in writing and the condition cannot be waived

(1) 20 Can. S.C.R. 280.
(2) 29 Can. S.C.R. 104.
(3) 30 Can. S.C.R. 97.
(4) 32 Can. S.C.R. 474.
(5) 1 Mathieu, Rev. Rep. 188; Stu. K.B. 354.
(6) (1907) 2 K.B. 798.

unless the waiver is clearly expressed in writing, signed by an agent of the company.

If notice is not given, when does the amount become due and exigible ?

The remaining question now is: Can section two of the Manitoba "Fire Policy Act" be held to vest this court with authority or jurisdiction to relieve the appellants against their failure to comply with the condition as to notice of loss ?

That section is in these words:

> Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith or on behalf of the insured, in pursuance of any proviso or condition of such contract, the company, through its agent, or otherwise, objects to the loss upon such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the insured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective, and so from time to time, or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be), shall, in any such case, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into. R.S.M. ch. 59, sec. 2, part.

The purpose of the statute was undoubtedly to protect persons insured who, by reason of necessity, accident or mistake, failed to comply strictly with the conditions of the policy as to the proof to be given to the company after the occurrence of the fire. This extraordinary power to relieve one of the parties to a contract from the consequences of a breach of its conditions, which is vested in the court, is limited to the proofs of loss and, in order to make it applicable to

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

The Chief Justice.

the present case, it is necessary to extend the scope of the statute so as to include the condition as to notice of loss. I cannot agree that the statute gives us power to make, practically, a new contract for the parties. If this condition is, as I hold, a condition precedent; and, as to this, I think we are bound by the cases decided in this court and mentioned above; failure to comply with that condition defeats the claim and we cannot, in this court, revive it. Moreover, as I said before, the section of the Act is intended to relieve against necessity, accident or mistake. Under which head can we give relief? There can be no suggestion of necessity. It is obvious that it is not a case of mistake or accident. To say that a man forgot to do something is not the same thing as saying that he was mistaken. It is not accident, in the sense in which that word is used in the Act, to say that a man omitted to do something which his contract required him to do. *Johnston* v. *Dominion Guarantee and Accident Ins. Co.*(1). I may add that if I saw my way to find for the appellant, I would gladly do so, but the giving of the notice is a fundamental condition of recovery, a condition that goes to the root of the contract; and against the consequence of his failure to comply with the condition we cannot give relief.

I would dismiss this appeal.

GIROUARD J. agreed with Anglin J.

DAVIES J.—This was an action brought on a policy of insurance to recover a loss sustained by fire which

(1) 44 Can. L.J. 783.

destroyed the plaintiffs' goods alleged to have been insured under the policy.

The two main grounds set up by way of defence at the trial and afterwards in the Court of Appeal for Manitoba were that under the conditions of the policy the presence of gasoline kept or stored on the premises discharged the insurance company from all liability, and secondly, that under rule 13 it was a condition precedent to the plaintiffs' right to recover that he should forthwith after loss give notice in writing to the company, and that he had not done so.

The trial judge held the objection as to want of notice to be fatal and entered judgment for the defendant accordingly.

On appeal the four judges were divided as to the want of notice; Chief Justice Howell, with whom Perdue J. concurred, holding that the defendants had not in their defence distinctly set up the condition and its non-performance as required by rule 15A of the statute regulating the practice and pleading of the court, while Richards and Cameron JJ. held that there was a substantial compliance with the rule, and that the want of notice had been sufficiently pleaded and was fatal to plaintiffs' right to recover.

The Chief Justice and Perdue J. also held that under the circumstances of this case, and having regard to the special kind and character of the stock insured and the actual knowledge of the agent who issued the policy, that the insured did actually keep for limited times small quantities of gasoline on hand and that as such quantities were in the stock of the insured and seen by him at the time the policy issued, it might fairly be held that on a true construction of the policy the statutory condition F, prohibiting petro-

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Davies J.

leum, coal oil, gasoline, etc., from being kept or stored on the premises insured was inapplicable to this particular insurance. On this point the other two judges, Richards and Cameron JJ., expressed no opinion.

As the appeal court was equally divided the judgment of the trial judge remained.

As the point was taken and argued before us that gasoline was stored or kept on the premises in violation of statutory condition F, it is necessary to consider the written part of the policy relating to the stock insured and determine whether statutory condition F is applicable to such an insurance policy.

That part reads as follows:

> On stock consisting chiefly of illuminating and lubricating oils, greases, paints, varnishes, and all other goods kept by them for sale, manufactured and in process, including advertising matter and all materials used in the manufacture, packing and shipping of same, their own or held in trust, or on commission, or sold but not removed, while contained in the above described building or on platforms on ground within 100 feet of building.

The Prairie City Oil Company, which entered into the above insurance contract was, as its name indicates, a dealer in oils of all kinds. They formed, indeed, a large part of its stock in trade. The insurance agent who visited their place of business and filled up the insurance policy now sued on knew this. The fact was a patent and visible one. He embodied it in the above written description of the property insured by the policy. The insurance company in accepting such a policy from their agent and insuring a merchant's stock of the character described never could have intended that the statutory condition F now invoked to relieve them from liability should apply. The risk they expressly undertook in the written part of their policy to accept was in large part on the very

class of articles prohibited at the risk of forfeiture from being kept or stored on the premises by such condition F. The stock insured, as described, and this statutory condition, were repugnant to and inconsistent with each other, and could not be harmonized or reconciled. One or other must be ignored, and it needs no argument to shew that in such cases the statutory printed form of condition being repugnant to the substantive part of the contract entered into in writing cannot be held to govern the contract. This contract can fairly be read and construed ignoring such statutory condition, so far as least as it is repugnant to the real contract of insurance entered into; otherwise the courts would be lending themselves to the carrying out of a fraud.

As to whether gasoline comes within the terms used in the written part of the policy "illuminating oils" there was little argument at bar and the evidence seems clear that it may be so classed. Smith, the insurance agent who issued the policy, said in answer to a question from the trial judge asking whether gasoline was considered an illuminating oil, that from his point of view, the insurance point, it would be, but he did not know how the trade would consider it. He said they got

permits for it as an illuminating oil—as a gasoline lighting system.

Mr. Lewis, the head of the plaintiff's firm, in answer to questions on this point, speaking from the trade point of view, said that gasoline was used largely for illuminating, that it was used in the city by half a dozen different companies who sold a system for lighting with gasoline, that of his own knowledge a large quantity of it was used for illuminating purposes and

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Davies J.

that he would, if asked to name the different illuminating oils, include gasoline. The fact seems to be that it cannot be used in the ordinary household or other burning lamps, but that it can be and is used in lamps and ways specially designed as an illuminant and as fuel.

In Webster's new unabridged dictionary it is described as being a product of petroleum and its uses are stated as "solvent; fuel; illuminant."

Other oils such as petroleum, rock oil, kerosene, coal oil, burning fluid, are classed together with gasoline in the condition F as being dangerous and are prohibited from being kept or stored on the insured premises without written permission. All of these are admitted as coming within the general words of the policy "illuminating oils" and under the evidence given I think gasoline should also in this contract be so included.

That being so, the words of condition F "unless permission is given in writing by the company" clearly apply. If the company have insured expressly the very articles prohibited by clause F, unless permission is granted to keep or store them, surely it is not open to argument that in such a case written permission has been given.

The other question raised as to the assured's noncompliance with the condition requiring him forthwith after loss to give notice in writing to the company gives rise to greater difficulties than the one I have already disposed of.

I am not able to accept the reasoning of the learned judges below who held the telegram sent to the company by their local agent stating the facts of the fire and loss could under the circumstances be held as a

compliance with the condition requiring written notice from the assured. The agent of the company was in no sense the agent of the assured when sending his telegram to his principals. I have, however, after a good deal of consideration reached the conclusion that this notice comes within section 2 of chapter 87 of the Revised Statutes of Manitoba, and that this section enables and justifies us in refusing to allow the objection as to the neglect of the insured to give the notice in question to be set up as a discharge of the liability of the company under the policy sued on.

That it was under the circumstances proved a most inequitable defence was found by the trial judge and hardly admits even of argument.

The only question remaining was whether that notice so required came within the terms of the enabling section above referred to.

Strangely enough it does not appear to have been called to the attention either of the trial judge or of the Court of Appeal.

The statutory condition requiring the notice is No. 13. It reads:

> Any person entitled to make a claim under this policy is to observe the following conditions:
>
> (*a*) He is forthwith after loss to give notice in writing to the company.

This is followed by a number of other conditions, (*b*), (*c*), (*d*), and (*e*), relating to the proofs or particulars of loss which are subsequently to be delivered.

The question is whether the section of the statute I have above referred to is to be construed as limited to the requirements of statutory condition 13 relating to the particulars of loss as required by sub-sections (*b*), (*c*), (*d*), and (*e*), or whether it embraces and

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Davies J.

includes the requirement of sub-section (*a*) relating to the notice in writing to be given forthwith after the fire.

The question is one not free from doubt. The first part of the section reads:

> Where by reason of necessity, accident, or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where after a statement or proof of loss has been given in good faith or on behalf of the insured, etc.

Do the words "as to the proof to be given to the insurance company after the fire" embrace or exclude the notice in writing required by sub-section (*a*) of statutory condition 13.

The word "proof" as used here is inapt. In the latter part of the section it is used alternatively, but evidently synonymously with "statement," and in this way "no objection to the sufficiency of such statement or proof," etc.

The statutory condition 13 does not in itself use the word proof with reference either to this written notice of loss or with reference to what is called in it

> as particular account of the loss as the nature of the case admits of.

These are to embrace: 1. Statutory declarations; 2. Books of account, invoices and other vouchers, etc.; 3. A certificate under the hand of a magistrate or other specified official.

The condition 14 which follows refers to the "above proofs of loss," but, of course, that may embrace as well the notice as the "particular account of the loss" the assured is required to deliver. These statements the assured is required to deliver are not, properly speaking, proofs, they are supposed to be and embrace the best evidence of the loss he can supply.

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Davies J.

In reason and equity there is no ground for putting the narrow construction upon the above section 2 of chapter 87 giving to the court or judge the power to prevent on the ground of it being inequitable any objection as to the sufficiency of "such statement or proof" required after the fire. Non-compliance with the condition required as to notice of the fire arising from mistake, accident or necessity from which the company was not prejudiced is just as inequitable a plea as non-compliance arising from the same causes and with the same innocuous results in respect to the fuller particulars which the assured is subsequently required to give.

The notice of the fire is required by the same statutory condition as the subsequent more particular statements or accounts. That they are called "proof" in one part of section and "statements or proof" in another part, satisfies me that the legislature intended the equitable jurisdiction it vested in the court or judge to extend to and cover as well the written notice required by sub-section (*a*) as to the fire having occurred as the more particular subsequent of the loss required by sub-sections (*b*), (*c*), (*d*), and (*e*).

The appeal should be allowed with costs here and in the court below and judgment entered for the amount of the claim with costs.

IDINGTON J.—The learned trial judge held the appellants' action must fail by reason of the first paragraph in the list of conditions embraced in No. 13 of the statutory conditions indorsed on the policy sued upon.

The Court of Appeal for Manitoba dividing equally on an appeal against that decision, the appeal failed.

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Idington J.

In answer to the appeal here the respondent besides maintaining the contention upheld as above, urged as had been urged throughout, and I rather think had been its chief objection at the outset, that the condition on the policy forbidding the keeping of coal oil, gasoline and a number of other products of petroleum, had been violated.

As to this contention it was shewn that gasoline itself as well as other things kept, were in fact illuminating oils and thus within the very terms of the specific things that were described as what was insured. Moreover, the oral evidence was clear that the contention ought never to have been set up.

Therefore, I need not argue that this contention is quite untenable.

The other contention I have referred to though one not to be favoured has not so much inherent absurdity in it.

I think each one of a number of answers that appear hereunder may be held good.

It so happens that neither one of these helps the other. Each must stand or fall of its own strength or weakness.

The fire took place in Winnipeg where the oil business of appellants is carried on and where a firm engaged as the general agents of the respondents, live and represent it, by virtue of a power of attorney that seems comprehensive enough to sanction almost, yet not altogether, everything an insurance company may have to transact in the course of its business.

It was such as to attract both the junior member of the firm of general agents and one or more members of the appellant firm to the spot whilst the insured property was being burned on the 13th November, 1908.

The senior member of the firm of general agents also knew of it and immediately reported by wire to his company at its head office in Toronto, on the same day as the fire took place, the fact of the total loss.

The next day the company's manager, on the 14th November, wrote the general agents acknowledging this message and making remarks clearly indicative of liability to pay and expectation the company would pay.

The general agents acting within their powers engaged one Paterson, a professional or official adjuster of insurance losses.

Mr. Smith says

> we instructed the adjuster to adjust the claim of the plaintiffs. * * We supplied him with the forms that the company supplied us with.

The papers contain statements of loss, declaration of one of the plaintiffs as to the fire and other insurances and valuation by the adjuster of the property burned and of the salvage.

But to my mind, in the view of the case that the question of estoppel gives rise to, the most important part is an apportionment of the loss between this company and five other insurance companies.

The amount of what would on such bases be payable to the appellants by the respondent company was thereby fixed at $3,532.70 and agreed to.

The whole mass of work and consideration to be given thereto lasted until the 27th November, when the papers having been completed were duly handed over by Paterson to the said general agents and by them forwarded to the company's head office on the 1st December.

The general agents write at same time requesting cheque within thirty days. In short they treat the

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Idington J.

whole business as closed except the payment within usual delays.

No answer or objection appears until January when Smith, at the head office, brought the matter under the notice of the president and the manager of the respondent, who replied they had the impression other companies concerned were resisting payment, and upon being told other companies were paying, the manager said he would recommend payment by his company also.

No such objection as now relied upon was ever made until the statement of defence shewed it amongst a great many other random shots.

It is in argument replied to this objection that the pleading does not, as the rules require, distinctly set up such a condition as now relied upon, (namely, the omission to give written notice), but one of a distinctly different nature, namely, of "the alleged loss and damage." The want of its being in writing is not pleaded.

I incline to think the objection is well taken. If the issue joined is looked to, then it may well be said that issue is to be found in the appellants' favour proven by oral notice to the general agents. It may be inferred from what transpired between them and the appellants.

It is the notice to the company at their office that is pleaded and their office, I think, for the purposes of the business in hand must be held to be that in Winnipeg conducted with such ample powers as the constitution thereof by the power of attorney to the general agents both expresses and implies.

Again the reason for the notice is that at the earliest practicable time after its receipt the company

may have an opportunity to investigate and, if possible, adjust the damages. All the purposes which the notice could serve were served by the oral notice to the general agents. Suppose the case, not an unusual one, but a thing likely to arise daily, of an English company with an agency well-known and through which a policy was issued in this country, and a man, insured thereby, instead of directing his notice upon loss occurring to the office with which the business was transacted took it in his head for improper purposes desiring to defeat investigation to direct his notice to the head office in England.

What would such a company say and the law hold relative to such conduct ?

I think notice was intended in such a case and in this case to be directed to the general agency in the province where the fire occurred. Such, undoubtedly, was what the company intended by this so-called condition.

Even if, looking at the condition, oral evidence is not sufficient it is a complete answer to the plea as framed.

Let us pass such technicality and get to the substance. Suppose a fire occurred next door to the head office of a company liable for the loss under a policy such as this.

Suppose, further, the insured in half an hour called at the head office, saw the manager, explained the loss which had occurred and the manager wrote down in his books a record of the oral notice. Could the company plead in such a case want of written notice ? Could not the insured point to the manager's own written record as a full answer ? Suppose, following all that the happening of such dealings in relation to the loss

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Idington J.

as appear herein and the company had no other defence. I can hardly imagine such a defence successful.

I certainly do not think the writing must of necessity be that of the insured or signed by him if framed so as to identify the parties concerned.

There is the purpose of the thing and reason for it to be considered.

Let us consider further that the writing in this case was sent by wire. Is that sufficient ? Can any one say if done by the appellants it was not in writing, but by wire, and the writing was not transmitted to the company ? Where is the end to be of all such wretched subterfuges if we pass by the reason for the thing and the substantial purpose of the parties ? I by no means wish to imply that there may not be cases of a writing being imperatively required by the hand of a named person as part of the contract.

The appellants claim the respondent estopped by reason of its inducing them to enter upon extensive and expensive inquiries and to an assent to the finding and apportionment of the loss implying thus a discharge *pro tanto* of each of the other companies. I think there is a great deal in the contention, but I doubt if the pleadings give the ground for either that or the claim of a binding adjustment or adjudication.

Again, can the appellants not be taken to have adopted the act of the agents and that adoption to relate back to the time the agents gave the written notice ? I merely suggest that as a possibly fair inference from the facts knowing as matter of common knowledge how much the agents for insurance companies daily constitute themselves the agents of both parties for many things relative to the transaction of the business in hand.

This point was not taken in argument and the appellants' case being well argued probably not enough in the evidence to maintain it. I, therefore, have not fully examined it.

I think there is a complete answer to the whole contention furnished by section 2 of chapter 87 of the Revised Statutes of Manitoba, enabling the court to disallow such objection.

The section is identical with one in force in Ontario in whose legislature it originated as the result of a commission designed thirty-five years ago to put an end to the unjust advantages taken by virtue of such conditions as insurance companies saw fit to put upon their policies.

The fact that not a single case has arisen and been reported of such an attempt as this is pretty strong evidence that the profession and judges of that province and other provinces adopting the legislation have interpreted the section as a cure for such wrong as involved in permitting such a defence to prevail.

No such case has been cited and a diligent search by myself has not resulted in finding one.

The cases cited as decided in this court do not touch the point.

The statute in this second section is wide enough to cover any mistake of which this is one.

My only doubt has been as to its language relative to statement or proof of loss and that is wide enough when we have regard to the purview of the statute and especially the clauses of the condition relative to proofs of loss.

I think No. 13 is intended to form a group of subject-matters designated by No. 14 as proofs of loss and so introduced by No. 12 on the same subject.

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Idington J.

It seems to me the remedial nature of the Act must also be borne in mind. Though this is a contract, it is one of which the Act in this regard has imposed the form and tried to limit its meaning.

Its use is rendered imperative upon the companies and was designed to protect insurers, and hence requires we should interpret it as I have no doubt it has in practice and judicially been for a long time.

The appeal should be allowed with costs here and in the courts below.

ANGLIN J.—To the appellants' claim to recover on an insurance policy for $4,000 on their stock, buildings and machinery the respondent company answers (*a*) that the policy was rendered void by the appellants' breach of statutory condition 10(*f*), exempting the insurers from liability for loss or damage occurring while gasoline is stored or kept on the premises without permission in writing from the insurers; and (*b*) that the appellants failed to give to the company the notice in writing required by statutory condition 13 (*a*).

The statutory conditions are found in the schedule to chapter 87 of the Revised Statutes of Manitoba, 1902. They were printed on the policy issued to the appellants.

(*a*) The appellants were an oil company and were notoriously dealers in gasoline and other petroleum products. This feature of their business was specially brought to the notice of the insurers through their agents at the time the risk was taken. If statutory condition 10(*f*) was applicable, and if the permission in writing of the company which it requires had not been obtained, it deprived the appellants of any insur-

ance by the respondents, because the very keeping or storing of staple articles in which they dealt would exempt the insurers from all liability.

The description of the risk on the face of the policy contains the follow paragraph:

> $3,000. On stock, consisting chiefly of illuminating and lubricating oils, greases, paints, varnishes, and all other goods kept by them for sale, manufactured and in process, including advertising matter and all materials used in the manufacture, packing and shipping of same, their own or held in trust, or on commisssion, or sold but not removed, while contained in the above described building or on platforms on ground within 100 feet, or in cars within 100 feet of building.

The evidence, in my opinion (if indeed evidence of such a fact of common knowledge be necessary), establishes that gasoline is an illuminating oil within the meaning of that term in the above description. I think the words "illuminating and lubricating" should be read distributively, and that the insurance was not confined, as argued by counsel for the respondents, to such oils as were both illuminating and lubricating, but included all oils in the appellants' stock which were either illuminating or lubricating. But if gasoline was not within this part of the description it was undoubtedly within the other part, which reads,

> other goods kept by (the appellants) for sale, manufactured and in process.

It was part of the appellants' stock in trade when the general agents of the respondents, who prepared this description to insert in the policy, inspected the premises of the appellants for that purpose and, as already stated, their attention was then specially drawn to it. Unless we are to regard the policy as a nullity because of inconsistency between the description of the risk and condition 10(*f*), we must either discard that

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Anglin J.

condition as void for repugnancy—something left in the document *per incuriam*—or we must treat the policy containing this description as itself a permission in writing of the insurers for the insured to keep and store all goods covered by the description and a compliance with this requirement of condition 10(*f*). Because it does not involve the rejection of any part of the contract, I incline to think that the latter is the correct view.

Whether on that ground or by rejecting the condition 10(*f*) for repugnancy, *ut res magis valeat*, we should uphold the policy and regard the insurance given by the appellants as real and not illusory. I am, therefore, of the opinion that the keeping and storing of gasoline on the appellants' premises did not exempt the insurers from liability. That was one of the very risks against which they insured the plaintiffs, and for which the policy itself embodied their written permission.

(*b*) The appellants admittedly did not themselves give to the company notice of the loss in writing forthwith after the fire. The general agents of the company, however, immediately notified their principals of the loss by telegram. The company's adjuster on instructions from its agents at once prepared the particulars and other evidence of loss called for by articles (*b*) and (*c*) of the 13th condition and attended the insured and had them execute these documents and adjusted with them the amount of their claim. Until they delivered their statement of defence in this action no exception appears to have been taken by the company to these proofs or statements on the ground that the insured had failed to give the notice in writing called for by clause (*a*) of the 13th condition.

It is, perhaps, doubtful whether they have in their plea set up want of notice in writing with the precision required by the Manitoba Judicature Rule 315(*a*). But in the view I take it becomes unnecessary to deal with this question of practice.

Ordinarily I should not regard a notice such as is called for by clause (*a*) of the 13th condition as any part of the proofs of loss. But I find that other clauses of this 13th condition deal with what are unquestionably proofs of loss. Proofs of loss are first mentioned in clause 12 and the references to them are completed in clause 14. Clauses 12, 13 and 14 appear to be a fasciculus of provisions dealing with proofs of loss. Because of the collocation in which it is found, I have, though not without some hesitation, reached the conclusion that the requirement of a notice in writing under clause 13(*a*), is one of

> the conditions * * * as to the proof to be given to the insurance company after the occurrence of a fire,

referred to in section 2 of the statute(1). This is a case in which (in the language of section 2) after receiving a statement or proof of loss given in good faith by or on behalf of the insured in pursuance of a proviso or condition of the contract, the company has objected to the loss upon other grounds than for imperfect compliance with such conditions: it did not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof was objected to, giving the particulars of the alleged defects. Its officers had, through the telegram from its own agents, all the benefit which they could derive from a notice in writing given pe sonally by the

(1) R.S.M. 1902, ch. 87.

1910

PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO.

Anglin J.

insured. They so conducted themselves that the insured may well have been lulled into the belief that the company would accept its agents' notification as a compliance with clause (*a*) of the 13th condition. The omission of the insured to give the notice in writing was obviously due to accident or mistake. This is, therefore, in my opinion, eminently a case in which it would be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the condition as to immediate notice in writing. The use in section 2 of the terms "statement" and "proof" indifferently and as interchangeable equivalents helps the conclusion that the notice in writing under clause 13(*a*) is part of the proof mentioned in section 2. It follows that the company's plea that the insured had failed to give this notice, assuming it to be formulated in compliance with rule 315(*a*) and to be proven, should not be deemed an answer to the plaintiff's claim. Section 2 of the statute renders the plea of want of notice in such circumstances ineffectual.

On these grounds I would, with respect, allow the plaintiffs' appeal with costs here and in the provincial Court of Appeal, and would direct the entry of judgment for them for the amount of their claim and costs of the action.

Appeal allowed with costs.

Solicitors for the appellants: *Chapman & Green.*

Solicitors for the respondents: *Richards, Affleck & Co.*