1911

*Feb. 23.
*April 3.

THE CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ANDREW JOSEPH HAINES, ADMINISTRATOR OF THE ESTATE OF F. L. HAINES, DECEASED (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Accident insurance — Condition of policy — Notice — Tender before action—Waiver.

The condition of a policy insuring H. against death by accident required that notice of death should be given to the company within ten days thereafter, and it was provided that if the insured met his death while under the influence of intoxicating liquor the company should be liable only for one-tenth of the amount of the insurance. The insured disappeared on the 21st of November, 1908. When last seen on the evening of that day he was apparently under the influence of intoxicants, and, on 3rd April, 1909, his dead body was found in the river in an advanced state of decomposition, death having been, in all probability, caused by drowning. After the finding of the body the plaintiff gave notice of death to the company and furnished proofs as required. The company refused payment and, before action, tendered to the plaintiff one-tenth of the amount of the insurance payable under the policy as full settlement therefor. The company pleaded this tender in their defence to the action and made proof thereof at the trial.

Held, that the tender made by the company was a waiver of the condition requiring notice within ten days of death and also an admission of liability by the company; and, Anglin J. dissenting, that, as the company had failed to shew that the deceased came to his death while under the influence of intoxicating liquor, the plaintiff was entitled to recover the full amount of the insurance. Judgment appealed from (20 Man. R. 69) affirmed.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers C.J., at the trial, and maintaining the plaintiff's action with costs.

The circumstances of the case appear in the headnote and the questions at issue on the appeal are stated in the judgments now reported.

Wallace Nesbitt K.C. for the appellants.
W. H. Trueman for the respondent.

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. See S.V., 1904, 1, note at page 388.

DAVIES J.—During and at the close of the argument I entertained doubts whether the finding of the trial judge, confirmed by the Court of Appeal, that the defendants, appellants, had failed to prove the defence that the deceased came to his death while under the influence of intoxicating liquor, could be sustained.

I am not able, however, to satisfy myself that this finding of the two courts is so clearly wrong as to justify me in reversing it and in allowing the appeal on that ground.

On the other ground, of want of notice, I concur in holding that the proof of the tender of $100 before action and the payment of the amount into court amounts to an admission of the cause of action and to a waiver of the notices required by the policy before action.

IDINGTON J.—In my opinion the finding of the learned trial judge that the appellants had not success-

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fully met the onus of proof resting upon them to shew that deceased came to his death through intoxication, ought not to be disturbed.

The evidence was far from conclusive. I might suspect much — might assume suicide — I might even suspect the deceased was thrown into the river and thus drowned. None of these are proven.

In my view it is unnecessary to pass any opinion upon the effect of the conditions or any of them.

The defendants did not merely plead as the rule relied upon provides, payment into court, but pleaded a tender before action and payment into court of the amount so tendered.

It could not prove such a plea by proving a conditional tender as it now says in argument was what was intended.

A tender without prejudice is no tender. It could not be brought in evidence and ought not to have been attempted to be brought in evidence unless clearly abandoning then and there the without prejudice part.

The defendants clearly intended to get the benefit of an unconditional tender, and proved it for that purpose.

In doing so they waived the conditions relied upon.

They cannot now be heard to say they waived it only in part.

It was quite competent for the court below to have amended the pleading to conform with the evidence and if the court has not done so I think it ought now to be taken to have so intended and directed.

The appeal should be dismissed with costs.

DUFF J.—It is not disputed that the deceased, Frederick Lorne Haines came to his death by "ex-

ternal violent and accidental means" within the meaning of the policy on which the action was brought. The defences of the company were two: First, that notice of the death of Haines was not given within ten days after it occurred as required by the strict tenor of the sixth proviso; and, secondly, that the injuries from which he died happened while he was under the influence of intoxicating liquors. This last mentioned fact if established would bring into operation "Part G." by which is provided that, in such circumstances, the sum recoverable shall be one-tenth of the maximum amount payable under the policy; and this sum ($100) was paid into court with a plea of tender accompanied by a denial of liability.

Haines was last seen in Winnipeg (where he resided with his mother) on the 21st of November, 1908. At about 7 o'clock in the evening of that day he was in a state of deep intoxication and, at 9 o'clock, he was observed on the street by a number of people, and although manifestly under the influence of liquor he was then, as the learned trial judge expresses it, "capable of taking care of himself." On 3rd April, 1909, his dead body was taken out of the Red River at Winnipeg in an advanced state of decomposition. An autopsy disclosed no marks or indications of violence, death having been caused seemingly by suffocation from drowning. These facts do not appear to me to lead to the inference that the deceased came to his death while "under the influence of intoxicating liquors." It has been said often enough that the question whether a plaintiff has acquitted himself of the burden of proof in respect of an allegation of fact is not a question to be tried by a rigorous application of the canons of scientific inference. It is not necessary that the evidence should be such as to de-

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monstrate the conclusion. But the conclusion must have some more legitimate warrant than conjecture, surmise, guess. I agree with the learned trial judge and the majority of the Court of Appeal that, in this case, the inference the company asks us to draw can not properly be held to arise from the facts in evidence.

As to the first defence I am unable, with respect, to agree to the construction of the proviso proposed by the respondent. I think the terms are unmistakable, and I do not think we can justly assume that the parties left out of contemplation a contingency so obviously possible as that of death from accident remaining undiscovered until after the lapse of the prescribed period for giving notice of it. We must, I think, take it that the parties did deliberately intend the manifest result of the language used, viz., that in certain readily conceivable events (of which the contingency which has happened was one) the policy should become an honour policy.

But I think the respondent is entitled to succeed upon the ground that the appellants are precluded from taking advantage of this proviso. It was proved by them at the trial that, before the action was brought, they tendered the sum of one hundred dollars as payable under the policy. This tender as mentioned was pleaded and the sum tendered was paid into court. The plea did not admit, but on the contrary was accompanied by a denial of liability. The tender, however, appears not to have been qualified by any such denial. The effect of it, in the circumstances, was, I think, an unqualified admission that the defendants were liable upon the footing that the plaintiff was entitled to recover the amount payable under "Part G.," that is to say, the amount payable on the assumption that when his death occurred

Haines was under the influence of intoxicating liquor. What then is the effect of this tender upon the rights of the parties? The sixth proviso unquestionably expresses a condition — whether a condition precedent requiring notice and proof of loss as essential elements of a cause of action based upon the policy, or a condition subsequent causing a right of action complete at the moment of death to be defeated in default of notice and proofs. It is immaterial for the purpose of this case which of these is the more accurate view of the legal effect of the clause. In either case one cannot doubt that the stipulation that the rights under the policy shall be "void" or "invalidated" is intended, in accordance with the interpretation which, by inveterate practice, has been put upon such stipulations, to declare that these rights shall be "void" at the election of the company. There are numerous authorities in which similar clauses in various classes of contracts, leases, charter parties, sales of lands and of goods have been held to confer on the party for whose benefit they were framed the option of treating or not treating the rights of the other party as at an end. The decision of the Court of Sessions in *Donnison* v. *Employers' Accident and Live Stock Ins. Co.*(1), is an illustration of the application of the principle to a clause declaring the giving of notice to be a condition precedent to a right of action upon an accident insurance policy.

Now, the rule is perfectly settled that if you have a clause of that type and the event has happened upon which under the terms of the clause the one party is entitled at his option to insist that the other party's rights have lapsed — and if, after that event has hap-

(1) 24 Ct. Sess. Cas. (4th Ser.) 681.

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pened, the party in whom the right of election is vested do any act involving a recognition of the other party's rights as still subsisting and do it with a knowledge of the facts that entitle him to say that these rights have been terminated — then the doing of such an act is a conclusive election not to take advantage of the clause.

The offer mentioned appears to me to be such an act because it must be taken to involve a recognition of the company's liability under the policy — a liability which the company might have successfully repudiated by insisting upon the *strictissimum jus* under the clause in question. I should not wish to be misunderstood as holding that the company could not have made a tender which would not have involved such a recognition. I think it could. I think it is quite clear that the company could have said when making the offer — we are willing to pay this sum if you wish to take it, but we do not admit we are under any liability to pay you anything; we say that through failure to give notice you have lost any rights you might otherwise have had, but we treat the policy as an honour policy for $100. That would have been a tender and an unconditional tender because it would not have required from the claimant any admission — that is to say, the acceptance of that sum would not have involved any admission on his part — that he was not entitled to more. *Greenwood* v. *Sutcliffe*(1); *Scott* v. *Uxbridge and Rickmansworth Railway Co.*(2). But I think it is clear that the tender was not qualified in this way and that as made it involved a waiver of or an election not to insist upon the objection that no notice had been

(1) [1892] 1 Ch. 1. (2) 35 L.J.C.P. 293.

given; once made the election became, of course, irrevocable.

ANGLIN J. (dissenting).—While denying all liability under the insurance policy upon the life of the deceased Frederick Lorne Haines on the ground that proper notices of his death and proofs of claim were not given within the periods prescribed by the conditions of the policy, the defendants have also pleaded that the insured came to his death while under the influence of intoxicating liquors and that, by virtue of another condition of the policy, their liability, if any, is, therefore, limited to the sum of $100, one-tenth of the amount of the insurance. They have pleaded tender of this amount to the plaintiff and have given evidence in support of that plea. They have also brought the sum of $100 into court as sufficient to satisfy the plaintiff's claim, if any.

Upon the issue as to the condition of the insured at the time of his death there are no facts in dispute. Whether he was or was not then intoxicated is purely a matter of inference from the facts as deposed to and found. The learned trial judge was of opinion that the defendants had not discharged the burden of establishing that the accident causing the death of the insured occurred while he was under the influence of liquor. The learned judge dismissed the plaintiff's action on the ground of non-compliance with the conditions as to notice of death and proof of claim. The Court of Appeal reversed this judgment, holding that the tender made by the defendants was a waiver of the conditions as to notice of proof and, inferentially, agreeing with the trial judge on the question of the condition of the insured at the time of his death.

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From this judgment Richards J.A. dissented, holding that the only proper inference from the evidence is that the insured was drowned while under the influence of intoxicating liquor.

While very loath to disturb a finding of a trial judge upon a matter of fact such as this, though resting solely upon inference, especially when that finding has been confirmed by a majority of the judges of a provincial appellate court, a careful consideration of the actual facts found by the learned trial judge and of the evidence upon which his findings were based has satisfied me that Mr. Justice Richards drew from them the correct inference when he said that:

> Every indication seems to me to point to the death having happened while the insured was under the influence of intoxicating liquor. Unless some person could be produced who saw the happening of the death and also noticed that the insured was then intoxicated to some extent I can imagine no stronger proof than that given.

I agree with the learned judge that the defendants have discharged the onus which lay upon them to prove their plea.

The appeal should, in my opinion, be allowed, and the judgment for the plaintiff should be reduced to the sum of $100. The defendants should have their costs in all the courts, against which the sum of $100 awarded to the plaintiffs may be set off. The money in court should be paid out to the defendants.

Appeal dismissed with costs.

Solicitors for the appellants: *Aikins, Fullerton, Coyne & Foley.*

Solicitors for the respondent: *Bonnar, Trueman & Thornburn.*