BELL BROTHERS AND A. W. CHAPMAN (PLAINTIFFS) ..... APPELLANTS;

AND

THE HUDSON BAY INSURANCE COMPANY AND THE HUDSON BAY INSURANCE COMPANY, LIMITED (DEFENDANTS) ..... RESPONDENTS.

1911
*March 7, 8.
*April 3.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Fire insurance—Policy—Conditions—Notice of loss—Imperfect proofs—Non-payment of premium—Waiver—Application of statute—Remedial clause—N.W. Ter. Ord., 1903 (1*st sess.*), *c.* 16, *s.* 2.

The premium on a policy of fire insurance was not paid at the time the policy was delivered but, on request, credit was given for the amount and a draft for the same by the insurance company, accepted by the insured, remained due and unpaid at the time the property insured was destroyed by fire.

Held, that, in an action to recover the amount of the insurance, the non-payment of the premium was not available as a defence.

The policy was subject to the statutory condition requiring prompt notice of loss by the insured to the company; by another condition the insured was required, in making proofs of loss, to declare how the fire originated so far as he knew or believed. Upon the occurrence of the loss, the company's local agent gave notice thereof to the company, and informed the insured that he had done so and that the company had acknowledged receipt of his notice. The insured gave no further notice to the company. Forms were then supplied by the company for making proofs of loss and they were completed by an agent of the company and signed and sworn to by the insured, the origin of the fire being therein stated to be unknown. On examination for discovery the insured stated that, at the time he signed the declaration, he entertained an opinion as to the origin of the fire, and the

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

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company's adjuster reported a similar opinion as to its origin. An adjustment of the amount of the loss was then proceeded with by the several companies carrying insurances on the property in which the defendant company took part, but, after payment by the other companies of their proportionate shares according to the adjustment, the defendants repudiated liability on the grounds of want of notice as required by the statutory condition and non-disclosure of the opinion entertained by the insured as to the origin of the fire.

Held, reversing the judgment appealed from (3 Sask. L.R. 219), that, in respect of both conditions, the default was the result of mistake on the part of the insured and, in the circumstances of the case, the provisions of section 2 of "The Fire Insurance Policy Ordinance," N.W. Ter. Ord., 1903, (1st sess.), chapter 16, should be applied and the insurance held not to be forfeited by reason of default of notice or imperfect compliance with the condition as to proofs of loss. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (44 Can. S.C.R. 40) followed.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of Wetmore C.J., at the trial, by which the plaintiffs' action was dismissed with costs.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Chrysler K.C. and *Travers Sweatman* for the appellants.

A. H. Clarke K.C. and *W. E. Knowles* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed, but I will not dissent from the conclusion reached by the majority of the court.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

(1) 3 Sask. L.R. 219.

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IDINGTON J.—The appellants were insured for one year by the respondent against fire injuring or destroying a stock of goods in the Province of Saskatchewan. When the year was about to expire respondent's agent induced them to apply for insurance for another year and he delivered to them a policy of insurance for such second year. The premium was $66. They were unable to pay it. The agent on the 30th of September, 1907, in reporting to the head office this fact and the delivery to the appellants of the policy, asked if settlement could be postponed till the 7th of October. On the 1st of October, 1907, the head office replied:

> Your favour of the 30th ult. is to hand. We shall be pleased to grant Messrs. Bell Bros. extension of time to Monday, Oct. 7th, which we trust will be satisfactory.

And on the 15th of October the agent wrote as follows to head office:

> *Re* Bell Bros. No. 1024.
>
> Messrs. Bell have not yet paid their premium on the above. Collections are bad at present. Will you give them any further time or not ? At any rate please write them and oblige.

And on the 16th of October came the following reply thereto:

> *Re* Policy No. 1024, Bell Bros.
>
> We are in receipt of your letter of the 15th inst., and note same. We enclose herewith draft which we have dated November 1st. Kindly take this to Messrs. Bell Bros. and have their acceptance of same and return draft to us by first mail. When the draft is paid we will send you cheque for your commission, which we trust will be satisfactory.

And on the 17th October the agent returned the draft which was dated 16th October, payable November 1st, for $66, duly accepted in letter saying:

> *Re* Bell Bros. No. 1024.
>
> Herewith is draft accepted by Bell Bros. *re* the above policy.

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The draft was payable at the Bank of Hamilton, Moose Jaw, and was indorsed to the Union Bank at Sintaluta, where it had been made payable.

On the 16th of November, 1907, the company wrote the following letter to appellants:

Re Premium Policy No. 1024, self.

On October 17th you gave us your accepted draft for the premium on the above policy amounting to $66. The draft was due on November 1st, but when presented for payment was not honoured. Kindly let us know why our draft was not honoured and state what disposition you wish to make of same.

And got reply dated November 18th, 1907, as follows:

Yours of the 16th to hand. We regret being unable to meet the premium on the insurance before now, but money has been very scarce, but we will do our best to remit you a cheque on the 25th of this month. We are sorry we have not had it before, but your agent said it would be all right if we paid it as soon as possible, which we will do, but we think the 25th would be as soon as we can promise it.

And to this the company replied as follows on the 20th of November:

Re Policy No. 1024, self.

We are in receipt of your letter of the 18th inst. and note what you say *re* payment of your draft in connection with premium on the above policy. If you cannot pay the full amount at this time we would be glad to receive a payment on account and trust the same will have your attention.

The policy has been outstanding for two months and we trust that you will let us have a remittance on account and the balance on the 25th of the month, as stated in your letter.

On the 26th of November, as result of the fire the agent wired:

Hudson Bay Ins. Co.,
Moose Jaw.

Bell Bros. store and contents totally destroyed by fire last night.
Albert Stauffer.

The company on the 26th of November replied as follows to the agent:

Re Loss Policy No. 1024, Bell Bros.

We are just in receipt of your telegram advising of loss under the above policy. Kindly let us have full particulars in this connection by return mail.

And on the 27th of November, 1907, the agent wrote as follows:

Re Loss Bell Bros. No. 1024.

This fire occurred on Monday night and the store and contents were completely destroyed. Three other buildings in the same row were also burnt.

The other insurance on store and contents are as follows:—

On stock—Occidental, $2,000.
Central Canada, $1,000.
On building—Central Canada, $1,700.
London Mutual, $1,500.

To this the company replied on 29th November, 1907, as follows:

Your letter of the 27th inst. with reference to Messrs. Bell Bros.' loss is to hand. We are enclosing herewith Messrs. Bell Bros.' application together with blank proof of loss form and would ask that you have the adjuster for the other companies look after our interests also.

The forms for proof of loss duly reached the appellants and were sworn to by one of them on the 3rd of December, 1907, and delivered then to the agent who took the oath of proof.

And about the same date the acting-adjuster inquired and apportioned the shares of the insurers relative to the loss as follows:

Apportionment.	Insures.	Pays.
A—8511, Central Canada	$1,000	$ 863.77
8652 and 8653, Occidental	2,000	1,727.54
1024, Hudson Bay	$2,000	$1,727.54
	$5,000	$4,318.85

and added thereto the following:

Fire started in the basement and although it is not definitely known, it is supposed to have been caused by the furnace.

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Assured seems to have been very well thought of in Sintaluta, and judging from the remarks of the other merchants in the town and my own impression of the character of the Bell Bros., I have no hesitation in saying that the fire was purely accidental.

The report from which I extract these particulars was dated 24th December, 1907, and was received at the head office on the 26th December, 1907.

On this state of facts respondents now contend there never was any insurance effected.

I cannot assent to such contention.

I cannot understand why a company accepting as a settlement the accepted draft for the amount of a premium for a year can now be heard to say there was no contract. Nor do I understand how anything I might add to the force of the foregoing can convince, if the correspondence does not, and the assenting to this adjustment does not convince.

Contracts such as the delivery of the policy and the acceptance by respondent of an accepted draft either as settlement for the cash premium or an independent consideration for the insurance were clearly within the competence of the insuring company to agree to and be bound by.

The company's managers do not seem to have imagined then or for a long time afterwards that they had not formed such a contract as these documents clearly evidence.

They held on to the accepted draft and could have sued and recovered thereon beyond a doubt.

This is not such a case as the reports of insurance cases are full of, where the local agent had attempted to accommodate a neighbour or client by taking his note for cash.

It is a solemn contract made by the head office armed with plenary authority.

It ought not to be frittered away by sophistries founded on the ambiguous language of the policy.

Holding these views I need not inquire as to the legal consequence alleged to be an estoppel founded upon the conduct of the insurers in assenting to the adjudication and apportionment of loss and thereby inducing the appellants to accept from each of the others who had become co-insurers a less sum than they each, but for such adjustment, presumably must have paid.

As full attention to this aspect of the case does not seem to have been paid in the courts below, I will not dwell needlessly upon it or pass an opinion thereon.

If, contrary to my view, the accepted draft is not to be looked at as in itself good consideration, then I fully agree with Chief Justice Wetmore there was a settlement of the premium. In other words there was a final contract that covered the period of the fire and bound respondents and still binds them unless they have some other means of escape such as I am about to consider.

The defence is set up that the notice required by paragraph (*a*), section 13, of the statutory conditions, had not been complied with.

This might have been arguable but for the decision of this court in the case we disposed of last session (*Prairie City Oil Co.* v. *The Standard Insurance Company*(1)), wherein we held that this requirement fell under the description of proofs of loss. We held such a defective compliance therewith as this was one the court was enabled by statute to relieve against.

(1) 44 Can. S.C.R. 40.

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This decision was come to after the learned judge had disposed of this case, but it must be governed thereby in this appeal.

The only questions relative to it now are, whether or not the insurer's agent, who took the risk and as matter of common knowledge (partly recognized in the form of application for insurance used herein) is commonly looked upon as agent of both parties in such cases, whatever may be the legal relationship, having given notice of the loss in writing evidenced by a telegram and a letter to the company and received by it, such notice can be adopted by the insured by way of ratification or the courts can under the facts and circumstances relieve under the provisions of section 2 of the ordinance, which is as follows:

> 2. Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in the territories, 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, by or on behalf of the assured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured 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 for 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 of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the coming into force of this ordinance.

I am inclined to the opinion that the acts of the insured (who were informed next morning after the fire by the agent what he had done relative to notice)

in adopting the methods of proof required by the insurers, and in complying with everything the agent and adjuster required on behalf of the company, might be held to have acted upon the presumption that such preliminary notice given by the agent was understood by the company to have been adopted by the assured and thereby in effect to have ratified its giving as if their act. Certainly most men informed, as these insured were, of notice having been sent and responded to as this was, would have supposed that the insurer had accepted it as sufficient.

But, however that may be, the circumstances are such as in the language of the enactment constitute a sufficient

> other reason the court or judge before whom a question relating to such insurance is tried or inquired into for which he or they may consider it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions.

I am of opinion this court is engaged in such an inquiry as contemplated and is authorized by said section to consider and declare or hold that if such part of the conditions has not been observed there exists or may exist "an imperfect compliance with such conditions" and to hold it to be considered inequitable that the insurance should be deemed void by reason thereof.

For my part I do hold that in the circumstances it would be inequitable to deem this insurance void by reason of said imperfect compliance with such conditions.

I may observe that it is not as suggested during argument an imperfect compliance with any single condition that is aimed at, but an "imperfect compliance with the conditions" of proof as a whole that the clear comprehensive language covers.

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It may be said the want of notice of a fire does not fall within these conditions of proof, but that is just what we have held in the *Prairie City Oil Company's Case*(1), as within the purview of the statute. And if omission to give that notice does so fall, clearly the omission of notice was the result of mistake arising from the insured being told when they called on the agent next morning, he had sent the notice and being confirmed in the belief of its sufficiency by the response it brought from the head office of the insurers. Either ratification already suggested or mistake seems to be the correct inference.

Another ground of defence taken is that, by statutory condition 13, the insured is required to make a declaration of loss and that, by sub-section 2 of said condition, he is to state

> when and how the fire originated so far as the declarant knows or believes,

and that, in making this declaration, the appellants did not disclose their belief anent the origin of the fire.

I am not disposed to treat this requirement lightly. Each case must stand on its own bottom.

There may be cases where it is of vital importance both to the insurers and the interests of justice to have the insured pinned down to a statement of his belief. I have considered everything adduced in this case upon the point, yet I fail to find how, in it, much importance can be attached to the omission, if such can be claimed.

The facts bearing upon the question are as follows. The company having, as already stated, sent the forms of proof, the declaration verifying the same was executed and sworn before the company's own agent.

(1) 44 Can. S.C.R. 40.

The form was printed with blanks to be filled in.

The part stating that the fire occurred, represents it as taking place at a time named, destroying the property as thereinbefore stated, and ends by these words, "said fire originated as follows:—Origin unknown."

The first part being printed, the words "origin unknown" are inserted, it is said and not denied, in the handwriting of the acting-adjuster who prepared the report above referred to, and from which I have already quoted the statement relative to the origin of the fire.

Seeing that the report from which I have already quoted, as to origin of the fire, was prepared about the same time as this proof of loss by the same man who filled in these words "origin unknown," I am at a loss to know why there can be much importance attached to the matter.

From whom did he get the information embodied in his report? Could he, if he found the insured reluctant to state exactly what the report shews, and been driven to get it elsewhere, have reported, as he does, as to the honesty of the insured?

Such a circumstance should have aroused suspicion at once.

As stated in argument, and not denied, the performance of all I have referred to as done by the adjuster, or acting-adjuster, for the company, was all actually done by the assistant and then put in the shape it now appears and was adopted, dated and signed by his principal.

What the respondents contend is that this declarant, one of the appellants, had refrained from telling his belief, till he was examined for discovery in this action.

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A comparison with what he says in such examination and what the report contains does not disclose to my mind any startling discrepancy. I infer the whole was told the acting-adjuster who, for brevity sake, wrote the fact in filling up the declaration and set forth the belief of fact in this report.

The adjuster says, as above quoted, it started in the basement, and although not definitely known it is supposed to have been caused by the furnace.

The other man says, in a multiplicity of words, such as the examination for discovery may have rendered necessary, the same thing with some speculative detail as to the clerk who fed the coal into the furnace having failed in care to feed the slacked coal in such a way as to avoid explosion.

Both are mere theories, and possibly both idle speculation.

But we find no such importance attached to the discovery when got as now urged; neither were the versions of belief found material or aught implied therein so. It needed no amended pleadings or change of base. Why ? The fair inference is the insurers had the information from the insured. Neither said clerk to prove neglect or fact nor the acting-adjuster to say he was misled, were called.

The defence on this head is reduced to the narrowest sort of technicality.

It is alleged to be a violation of the condition working forfeiture of the policy that the belief was not inserted in the proof.

The respondent company receiving defective proof was in duty bound by the terms of section 2, above quoted, if the omission to state belief was thought to be of the slightest consequence, or such could be seri-

ously attached thereto, within a reasonable time to have notified the insured in writing that such statement of proof was objected to, and in what particular it was alleged to be defective, or abide by the consequences of such neglect on their behalf as opening the way for the judicial relief the section permits against forfeiture ensuing as result of the omission.

The company chose to refrain from objecting and cannot now be heard to complain if the alternative is applied to the case.

It is suggested in the court below that it cannot now be inequitable to hold the parties to the terms of the contract.

With respect I submit that is a misconception of the whole enactment.

It was to prevent the inequities that arose from insisting upon the observance of insurance contracts and conditions contained therein, that the Ontario Legislature, by 38 Vict. ch. 65, enacted, as section 2, above quoted provided and authorized the Lieutenant-Governor of Ontario to appoint a judicial commission to frame just and reasonable conditions to which insurers should be restricted, saving the right to add thereto others liable to be held void if found by court or judge to be not reasonable or just.

The commission appointed pursuant to that statute reported the statutory conditions which have remained substantially the same in Ontario ever since.

This enactment of the Ontario Legislature and those statutory conditions have been found most beneficial and have been copied in the western provinces as appears by the ordinance referred to and dealt with at the time of the trial herein and in appeal.

They met a then existent condition of things of

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which the present case and the contentions set up herein remind those who can recall that far off time; just as if old familiar faces had come up for judgment.

The Court of Appeal for Ontario in the case of *Robins* v. *The Victoria Mutual Ins. Co.*(1), in 1881, fully considered this enactment relative to proofs of loss, and applied same in a way that has been followed ever since where such or the like enactment has prevailed. I do not think, even if we have the power to overrule such a jurisprudence of such long standing, we should depart therefrom for any light reason.

It rendered the insurance business in Ontario more respectable. It should be acted upon just as it has hitherto been acted upon, and applied to prevent wrong and injustice from being perpetrated in the name of contract.

It is not by any means the only piece of modern legislation that has had to be enacted and resorted to in order to avoid the unjust forfeiture of men's equitable rights by the condition named in the bond.

Instances of such like legislation relative to contracts both in England and in this country, were referred to in said case, and other cases in which the subject was discussed.

The relief we are entitled, and I think, bound, to give is to hold that it would be inequitable to permit the respondents to set up this condition as a defence after accepting, without objection, an imperfect compliance with the conditions, and adjusting the loss upon a basis that relieved other co-insurers from a part of their obligation, on the supposition that this company was bound by and agreeing to the adjust-

(1) 6 Ont. App. R. 427.

ment made, and after receiving, as I infer, from appellants in another form the very information respecting which they are assuming to be aggrieved herein by appellants omitting to give.

I think if need be the relief must be applied and hence it is unnecessary to pursue the question of whether or not there has in fact been an omission.

The ground for relief being, to my mind, clear, I prefer not to discuss and pass an opinion upon the other questions raised anent belief.

It is undesirable that expressions, however carefully framed, should be quoted to justify any possibly intentional omission on other cases that may arise.

I do not infer such was at all the character of the omission in this case.

And I should be loath to take away indirectly the right of insurers to insist in a straightforward manner on a full compliance with the conditions where deemed necessary.

The appeal should be allowed with costs here and in the courts below, and judgment be entered for the amount of the claim as settled by the adjuster, and interest.

DUFF J.—The respondent company resists the appellants' claim on three distinct grounds.

The first ground is that the policy never went into operation. This objection rests upon a term of the application expressed in these words:

> If the premium is not paid as herein agreed this insurance shall be held void until such settlement is made.

This term, it is contended, must be treated as incorporated in the policy as a condition of the insurance contract; the contention being based upon the

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second of the "statutory conditions" which reads as follows:

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

I do not think it is important to determine whether (if the rights of the parties were to be ascertained from a construction of the words of the application and the policy) this clause would have the effect of constituting the stipulation in question a part of the company's deed just as if it had appeared in the policy in so many words. Whether, on the construction of those documents, it ought or ought not to be regarded in that light I think the company is disabled from relying upon it. The stipulation appears, no doubt, to the lawyer's mind obscurely expressed and it cannot be denied that it lacks precision. I think, however, there is not much difficulty in penetrating to the intention beneath. The application contains an offer by Bell Bros. to enter into a contract with the company by which in consideration of a specified premium the company is to insure certain buildings against fire for the period of one year. No time is named for the payment of the premium; but in the absence of any provision upon the point I can entertain no doubt that the application must be taken to propose that the payment of the premium and the delivery of the policy shall be contemporaneous. The provision we have to consider is doubtless inserted to make it clear, and does, I think, make it clear, that should the premium not be paid at or before the delivery of the policy, the contract expressed in the application and the policy, notwithstanding the delivery of the latter, is not to go into operation until there has been payment or the

equivalent of payment. In layman's phrase the "insurance is to be void until," etc., means, I think, that the contract of insurance is not to arise until the event contemplated happens; and so, although it is not material, I should think in laymen's phrase, "until such settlement is made" when used with reference to the contingency of the payment of a sum certain means until payment or the equivalent of payment.

In my view, the company cannot take advantage of this stipulation whether it be regarded as a term of the policy or not. If it is not a term of the policy then it is a condition, wholly ineffective at law, but in the absence of other circumstances enforceable in equity, to which the delivery of the policy is subject. If it became a term of the policy then any defence which might be based upon it would have been as effective in the one jurisdiction as in the other. In either view it does not afford a defence for the company; because, in my opinion, there is ample evidence of an enforceable agreement by the company that it should not be relied upon. The stipulation, as I have observed, makes the payment of the premium a condition of any contract arising between the parties. Therefore, under the application and policy standing alone no obligation arose in the absence of payment or its equivalent either on the one hand to indemnify against loss or on the other to pay for such indemnity. But the correspondence demonstrates the existence of an understanding between the parties that Bell Bros. were to be under an obligation to pay — involving, of course, a correlative obligation upon the company to insure. I do not think it necessary to go through the letters in detail. They seem to me to be only compatible with the hypothesis that for a perfectly good con-

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sideration (an undertaking on the part of Bell Bros. to pay the premium), the company had waived benefit of this stipulation.

This view accords with what the circumstances indicate to have been the intention of the parties. The policy was a renewal of an existing contract of insurance and it is quite improbable that it was in the contemplation of the parties that the property should be uninsured during the period for which credit was given to the insured.

The second objection is that the statutory condition requiring notice of the loss was not observed. The recent decision of this court in *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*(1), exempts us from the necessity of considering whether such a non-compliance with the conditions of the policy can be cured under the provisions of the statute. The enactment according to that decision applies to "notice of loss" wherever it applies to "proofs of loss." Such being the effect of the statute; — Is the failure to give notice attributable, in the circumstances of this case, to "accident or mistake" ? The evidence shews, I think, that it may properly be ascribed to a mistake on the part of the insured. The facts are that the agent through whom the insurance had been effected informed one of the appellants the morning after the fire occurred that he had forwarded notice of it to the head office of the company. I think the proper inference is that the appellants assumed this to be a sufficient compliance with the conditions of the policy either as having been done on their behalf or as being within the terms of the conditions. It is true the appellants were not asked to say whether they had

(1) 44 Can. S.C.R. 40.

acted under such a mistake, but I think the point was not really in dispute at the trial; and, since it is quite clear that the appellants never entertained the idea of allowing their claim to lapse, formal notice would unquestionably have been given had they thought it necessary.

The third objection is that the proofs of loss are defective as not containing a statement of the appellants' belief respecting the origin of the fire. The declaration contained a statement that the origin of the fire was unknown. The member of the appellant firm who made the declaration (on his examination for discovery) stated his belief to be that the fire had originated in an explosion of gas in the cellar furnace. It is said that this belief ought also to have been set forth in the declaration. I agree that a strict reading of the condition relied upon would require this, and I am not disposed to give any support to the suggestion that strict compliance with this condition might not be most material or that failure to state a belief actually held might not be a most substantial non-compliance with the terms of the contract. In this case, however, the non-compliance was, I think, not the fault of the appellants and the respondents have suffered no disadvantage by reason of it. The adjuster acting for this company prepared the declaration and it appears from his report that at that time or not far from that time he had become possessed of the conjecture that the fire originated as Bell thought it did. I have no doubt that Bell's failure to mention his belief in the declaration was due to the circumstance that the agent who filled in the form and presented it to him for signature treated the question as a question not of belief, but of fact. The form itself would convey the same impression. I think most

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people having this document presented to them would not unreasonably assume that what was required was a statement of facts bearing upon the origin of the fire. The "belief" of the declarant was probably nothing more than a conviction based upon the circumstance that he could find no other explanation of the occurrence. The facts bearing upon this point — the construction of the furnace, the course of the fire and so on — being known, to his knowledge, to the person who prepared the declaration, it would not occur to him to mention them. It is too much to expect from the appellants an appreciation of the point of view from which a belief presents itself as included within the category of matter of fact. I repeat I do not in the least doubt that the vast majority of people signing, as the appellant Bell did, at the behest of the company's agent, this declaration prepared by him, would have done so in the full assurance that they were omitting to deal with no point which the company desired to be dealt with. I am equally without doubt that the majority of people would have assumed and reasonably assumed that this form prepared by the company was not intended as a trap; but was prepared with a view to compliance with the conditions of the insurance contract and that in making the declaration required of them they would be sufficiently complying with those conditions. In the circumstances it does not seem fair as between these signatories and the company (who appear to have been apprised of everything of which the most precise observance of the condition would have informed them) that the latter should be permitted to take advantage of this default. If unfair to the appellants it would, I think, be inequitable within the meaning of the statute.

Mr. Clark quite properly pressed upon us the circumstance that the premium was not paid. That fact might, I agree, conceivably affect, and affect very materially, the question whether the company was acting unfairly in setting up technical defences such as these. In this case, however, it is not suggested that the default was due to wilfulness or gross negligence and that being the case I think such delay as occurred here is not a sufficient ground for withholding the absolution which the statute sanctions.

ANGLIN J.—The plaintiffs appeal from the judgment of the Supreme Court of Saskatchewan *en banc,* affirming the judgment of Wetmore C.J., dismissing their action to recover upon a fire insurance policy, dated the 17th of September, 1907, and issued for a term of one year.

Three defences are made to the plaintiffs' claim:—

(1) That they omitted to give notice of loss as required by statutory condition 13(*a*) of the policy;

(2) That the policy was void because the premium had not been paid when the loss occurred;

(3) That the proofs of loss were defective because the person who made them failed to disclose a belief which he entertained as to the origin of the fire.

(1) The circumstances of this case — the demand by the company for proofs of loss, their failure to object to the proofs, (furnished in good faith) on the ground that the requisite notice of loss had not been given, coupled with the fact that the company's manager objected to the loss on other grounds than for imperfect compliance with the conditions as to proofs, the adjustment with which they subsequently proceeded, the fact that they had prompt notice from

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their own agent of the loss and could have suffered no prejudice from the omission of the insured also to notify them, and the fact that the agent of the company informed George Bell, one of the insured, that he had so notified the company, from which Bell's evidence warrants the inference that he concluded that personal notice from himself was not required — bring it on this point within the decision of this court in *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*(1). Section 2 of the ordinance of the North-West Territories, 1903 (1st Sess.), chapter 16, corresponds with section 2 of chapter 87 of the Revised Statutes of Manitoba, 1902, dealt with in that case. The insured certainly gave notice of the loss when they sent in their proofs. The statute enables the court to relieve them in respect of default in delivery within the prescribed time as well as against forfeiture for insufficiency in the proofs. *Robins* v. *Victoria Mutual Ins. Co.* (2), at pages 440-1, 453-4.

Although they did not plead it, the plaintiffs invoked the aid of the statute at the trial. The foregoing facts were all before the learned Chief Justice and upon them he was urged to apply the statute in their favour. He refused to excuse their failure to give notice of loss, not because in his opinion the statute was inapplicable to a case of defective compliance with the statutory condition as to notice, but because he regarded the present case as one, not of imperfect compliance with the condition, but of "no compliance at all." The court or judge before whom the "questions relating to the insurance" were "tried or inquired into," therefore, had this issue before

(1) 44 Can. S.C.R. 40. (2) 6 Ont. App. R. 427.

him. He dealt with it, refusing to give the plaintiffs the benefit of the statute because, in his opinion, the circumstances which warrant the granting of relief under it had not been made out. In that view I am, with great respect, unable to agree. The question of the plaintiffs' right to relief under the statute having been raised and dealt with at the trial, I see no reason why this court should not give the judgment upon it which, in its opinion, the court below should have given — no necessity for, or advantage to be gained by, sending the case back in order that this question may be again canvassed in a trial court.

(2) The court *en banc,* differing on this point from the trial judge, held the policy void because the insured had failed to pay the premium before the loss. When delivering the policy the company did not exact payment of the premium. Subsequently it entered into correspondence with the insured pressing for payment of it, and at their instance from time to time gave them extensions of time. On the 17th of October the insured at the company's request accepted a draft in its favour for the amount of the premium. This draft was payable on the 1st of November. It was not paid at maturity. The company, nevertheless, continued to press for payment of the full premium without extending the term of the insurance beyond the 17th September, 1908. The two last letters in the correspondence prior to the loss were as follows:

Sintaluta, Nov. 18th, 1907.

The Hudson Bay Insurance Co.,
Moose Jaw.

Dear Sirs,—Yours of the 16th to hand. We regret being unable to meet the premium on the insurance before now, but money has been very scarce, but we will do our best to remit you a cheque on the 25th of this month. We are sorry we have not had it before, but your agent said it would be all right if we paid it as soon as

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possible, which we will do, but we think the 25th would be as soon as we can promise it.

Yours truly,

BELL BROS.

C.E.B. Nov. 20th, 1907.
K.M.

Messrs. Bell Bros.,
Sintaluta, Sask.

Re Policy No. 1024, self.

Gentlemen,—We are in receipt of your letter of the 18th inst., and note what you say *re* payment of your draft in connection with premium on the above policy. If you cannot pay the full amount at this time we would be glad to receive a payment on account and trust that same will have your attention.

The policy has been outstanding for two months and we trust that you will let us have a remittance on account and the balance on the 25th of the month, as stated in your letter.

Yours truly,
HUDSON BAY INSURANCE CO., LTD.,
Manager.

The loss occurred about seven o'clock in the evening of the 25th of November.

The defendants rely upon a clause of the plaintiff's application which reads:

> If the premium is not paid as herein agreed this insurance shall be held void until such settlement is made.

The application contains no agreement as to the time at which the premium is to be paid. The quoted condition can apply only to a policy upon which the premium is payable in advance. Where the policy issues on a credit basis of whatever duration, and whether definite or indefinite, the risk must attach from the date of issue. In that event the company is protected against having to carry the risk longer than it desires without having received the premium by the provision in the policy enabling it at any time to cancel the insurance. Having regard to the implication from the provisions of the policy for termination of

the risk, "if on the cash plan," or "if for cash," that the company did some business on other than a cash basis, and to the intention of the parties as evidenced by the delivery of the policy without exacting payment of the premium and the subsequent negotiations in regard to payment of it at a later date, I entertain little doubt that this policy issued, not on a cash basis, but on a credit basis. The fact that the company throughout asked for payment of the full year's premium, to which it would be entitled only on the assumption that the risk attached from the date of the policy, affords strong confirmation of this view. If the policy issued on a credit basis the condition cited from the application did not apply; the risk attached; and non-payment of the premium is not a defence to the plaintiffs' claim.

But if the policy should be held to have issued in the first instance on a cash basis, and if the condition in the application on which the respondents rely applied to the risk, the correspondence as a whole, in my opinion, sufficiently establishes a waiver of it by the company. It was not "a condition of the policy" and, therefore, might be waived by implication notwithstanding the provisions of condition No. 20. The taking of the draft of the insured for the full year's premium had the effect of causing the risk to attach (if it had not already attached) at all events during the currency of the draft. The condition in the application was a single condition. Once the risk attached under the policy it ceased to be effective and would not revive without an express agreement by the parties that it should revive. There is no evidence of any such agreement and it should not be inferred.

Moreover, the policy contains nothing which incor-

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porates the provisions of the application. The incorporating clause contained in the application itself has no referenec to the proviso or condition, with which we have been dealing, against the risk attaching until payment of premium. In my opinion when the loss occurred the policy was not subject to this term whether it issued on a cash, or on a credit basis.

For these reasons I think that non-payment of the premium by the insured is not available as a defence to the company.

(3) The learned trial judge found that George R. Bell, who was a member of the plaintiff firm and as such executed their proofs of loss, believed at that time that the fire was caused by an explosion in the furnace. Bell himself said he was satisfied immediately after the fire that "it was owing to the dusty coal that the furnace exploded" — that "in my own mind I was quite positive." This finding I think cannot be impugned.

The policy, by clause (*c*) of the 13th condition, required the assured to furnish to the company

> a statutory declaration declaring * * * (2) when and how the fire originated so far as the declarant knows or believes.

The form of proof furnished by the company to the insured after the fire, which he was asked to fill up and sign, contained the following paragraph:

> A fire occurred on the day of , 19 , about the hour of o'clock M., by which the property described by said policy and situate as therein named was destroyed or damaged as hereinafter set forth in detail, *said fire originating as follows:* .....

The agent of the company filled this in with the date and hour and at the end of the paragraph inserted the words "origin unknown" and George R. Bell signed and declared to it. He was probably

misled by this form. But, although he gave evidence at the trial, he did not say that this was the case. An estoppel is, therefore, not established. A provision in the proofs of loss precludes the setting up of a waiver. I incline, however, to the view that there was in this respect "an imperfect compliance" with conditions as to proof. It does not appear that the company has been in any way prejudiced by Bell's failure to state his belief as to the origin of the fire. The omission was almost certainly due to accident or mistake. Having regard to the facts mentioned in connection with the defence as to failure to give notice of loss, the plaintiffs are, in my opinion, entitled to relief in respect of this omission also under section 2 of the ordinance, N.W.T., 1903 (1st sess.), ch. 16.

It further appears that, with full knowledge that notice of loss had not been given by the insured and that their premium had not been paid, the defendants proceeded to adjust with the insured the amount of the loss and with the other companies interested the proportion of it which each should bear. This adjustment was, of course, gone on with on the footing that the defendants' policy was in force. It does not appear that the insured took part in the apportionment between the companies. But on the strength of this adjustment and apportionment, as the defendants must have known and intended that they should, the plaintiffs accepted from the other companies interested cheques for smaller sums than they would have been obliged to pay if the defendants were not liable to share the loss. Up to this time the defendants had not raised any question as to their liability to pay under their policy. Their whole conduct was consistent only with such liability. It is not clear whether

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the plaintiffs have so dealt with the other companies interested as to have released them from further liability. But that their position in regard to these companies has been materially and seriously altered by what has taken place scarcely admits of doubt. These facts would probably suffice to establish an estoppel precluding the defendants from now setting up that they were not liable under their policy because of the plaintiffs' failure either to pay their premium or to give notice of loss. *Mutchmor* v. *Waterloo Mutual Fire Ins. Co.*(1), at page 612. But this point it is unnecessary to determine.

For the foregoing reasons I would, with respect, allow this appeal.

The plaintiffs claim to be entitled to be relieved from the provision of the defendants' policy that, in the event of loss, the company shall not be liable for an amount greater than two-thirds of the actual cash value of the property covered by the policy at the time of loss. This provision and that dealing with the apportionment of such two-thirds' value between the insurers and co-insurers is contained in the body of the policy. The policy itself restricts the liability

as hereinafter provided to an amount not exceeding $2,000.

The contention of the plaintiffs is that the co-insurance clause is a variation of the conditions and is, therefore, not binding because not printed in ink different in colour from that in which the rest of the policy is printed, as is required in the case of variation of any of the statutory conditions. This objection cannot prevail. The insurance is in effect an insurance to the extent of two-thirds of the cash value of

(1) 4 Ont. L.R. 606.

the property not exceeding $2,000. The clause making the owner a co-insurer to the extent of one-third of the value of his property is in no sense a variation of the statutory conditions and is not subject to the provisions of the statute as to variation of such conditions.

The plaintiffs are entitled to judgment for the sum of $1,727.54, the proportion of the loss to be borne by the defendants according to the adjustment, with interest from the date at which this amount was payable according to the terms of the policy. They are also entitled to their costs of this litigation throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Allan, Gordon, Bryant & Gordon.*

Solicitors for the respondents: *Knowles & Hare.*