1888

*Oct. 15.

*Dec. 15.

JOHN HENRY ALLEN .... APPELLANT;

AND

THE MERCHANTS MARINE INSURANCE CO. OF CANADA ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Insurance, marine—Condition of policy—Validity of—Claim not made within delay stipulated by the policy—Art. 2184 C. C.—Waiver.

A condition in a marine policy that all claims under the policy shall be void unless prosecuted within one year from date of loss is a valid condition not contrary to art. 2184 C. C., and all claims under such a policy will be barred if not sued on within one year from the date of the loss.

The plaintiff cannot rely in appeal on a waiver of the condition, unless such waiver has been properly pleaded.

Per Taschereau J.—The debtor cannot stipulate to enlarge the delay to prescribe, but the creditor may stipulate to shorten that delay.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) rendered on the 22nd day of November, 1887, which confirmed, unanimously, a judgment of the Superior Court rendered on the 31st day of October, 1885, dismissing the action of the appellant, plaintiff in the Superior Court.

The action was instituted on the 8th April, 1880, upon a policy of insurance to recover from the said respondents the sum of $5,000.

The declaration alleged that on the 29th October, 1877, the plaintiff effected an insurance with the defendants for the sum of $5,000 on the barque "Waterloo," her tackle, etc., to take effect from the 25th day of said month of October said vessel having sailed from Quebec on the 26th day of the same month, for a premium of $500. That in the said policy the said vessel, tackle, etc., were valued at $35,000; that the said vessel sailed

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*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

(1) M. L. R. 3 Q. B. 293.

from Quebec to Liverpool on the 26th October, 1877, and was lost on or about 28th February, 1878; that the plaintiff was interested in the said vessel to the extent of $5,000; that on the 6th June, 1878, the plaintiff abandoned the said vessel and all his rights therein to the defendants and complied with all the conditions of the policy.

The declaration concluded for a condemnation against the defendants for $5,000 with interest from 28th February, 1878, and costs.

The defendants pleaded two special pleas and a general denial to the action.

The first plea upon which this appeal was determined set up one of the conditions of the policy which is in words following:—

"It is also agreed that all claims under this policy "shall be void unless prosecuted within one year from "the date of loss; and in case the note or obligation "given for the premium herefor be not paid at matu- "rity the full amount of the premium shall be con- "sidered as earned and this policy become void while "the said note or obligation remains over due and "unpaid."

The plaintiff filed general answers to the pleas of the defendants.

Upon these pleadings and the evidence being taken the case was argued and judgment was rendered by the Honorable Mr. Justice Jetté in the Superior Court dismissing the plaintiff's action with costs.

Ritchie for appellant contended:

1. That the clause of the policy stating that "all claims should be void unless prosecuted within one year from the date of loss" was not binding on the appellant.

2. Supposing the clause to be binding, the respondents had waived the rights thereunder by their actions herein.

1888

ALLEN v. THE MERCHANTS MARINE INS. CO.

3. That the condition, binding him to institute proceedings within a year is not valid, not being mentioned in the binding application for insurance, which was the contract between the parties and being contrary to the terms of art. 2184 of the Civil Code.

The learned council cited and relied on *Grant* v. *Lexington Ins. Co.* (1); *Jones* v. *Sun Mutual Ins. Co.* (2); *Eagle Ins. Co.* v. *The Lafayette Ins. Co.* (3); *Dolbier* v. *The Agricultural Ins. Co.* (4); *French* v. *The Lafayette Ins. Co.* (5); *The Anchor Marine Ins. Co.* v. *Allen* (6); *Chandler & Co.* v. *St. Paul F. & M. Inst. Co.* (7); also Parsons, Maritime Law (8); *Little* v. *Phœnix Ins. Co.* (9); Sansum's Digest of Insurance *vo.* Limitation (10).

Hatton Q.C. for respondent contended the clause was valid and not contrary to the code and that no waiver had been pleaded, citing and relying on the following in addition to the cases cited in the judgment given :—

Browning v. *The Provincial Ins. Co.* (11); *Rousseau* v. *Royal Ins. Co.* (12); Porter's Laws of Insurance (13); Bunyon Fire Insurance (14), and cases there cited.

As to the French law the learned counsel referred to Laurent (15); Pouget, dict. des assurances; Pothier, Droit civil (16); Merlin, Rep. Eén. Vo. Prescrip. (17); Dalloz Rep. Ass. Terrestres (18); Marcadé (19); Aubry & Rau (20); Troplong, Pres. (21); Pothier Vente (22).

(1) 5 Ind. Rep.
(2) 7 Rev. Leg. 387.
(3) 9 Indiana 443.
(4) 67 Maine 180.
(5) 5 McLean 461.
(6) 13 Q. L. R. p. 4, Queen's Bench, Quebec, May, 1886.
(7) 21 Minn. 85.
(8) 2 Page 483.
(9) 123 Mass. 381, 389.
(10) Pp. 767, 8, 9.
(11) L. R. 5 P. C. pp. 274-5.
(12) M. L. R. 1 S. C. p. 395.
(13) P. 177.
(14) 3 Ed. p. 135.
(15) 32 vol. sec. 184 p. 191.
(16) Vol. 1 ch 7 p. 340.
(17) Sec. 1 & 7, art. 2, quest 1, No. 3.
(18) No. 307.
(19) T. 12 p. 23 No. 1.
(20) T. 8 pp. 426 & 771-40, ibid. 4 pp. 408, 357.
(21) T. 1 p. 50 ss. 43, 44.
(22) No. 434, et sqq.

1888

ALLEN v. THE MERCHANTS MARINE INS. CO.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—The appeal in this case should be dismissed upon the ground that the action was instituted too late under a valid provision of the policy. It is claimed that there was a waiver. It was not pleaded and, therefore, there is no issue upon which we could give judgment.

STRONG J.—I am of opinion that there is no foundation for this appeal. The action is on a policy of marine insurance whereby the respondents insured the barque "Waterloo" for the sum of $5,000 for one year from the 25th of October, 1877, sailing from Quebec "on present voyage" on 26th October, 1877. The policy was effected by E. H. Duval on account of himself, loss (if any) payable to the appellant, (who was described in the policy as of the firm of Moses & Mitchell, 4 Grace Church street, London). The "Waterloo" sailed on the voyage from Quebec on the 26th October, 1877, did not arrive at her port of destination and was never afterwards heard of.

It is not disputed that the vessel was lost sometime before the 28th February, 1878, on which day she was posted at Lloyd's list.

The policy contained a provision in the words following:—

It is also agreed that all claims under the policy shall be void unless prosecuted within one year from the date of loss.

This action was instituted on the 8th April, 1880.

By their first peremptory exception the respondents set up the bar of the prescriptive clause already referred to. The plaintiff fyled general answers only to all the defendant's exceptions. The cause being at issue, the parties went to *enquête*, and the action was afterwards heard before Mr. Justice Jetté in the Superior Court.

The Superior Court dismissed the action with costs and an appeal from that judgment having been taken to the Court of Queen's Bench by the present appel-

1888

ALLEN v. THE MERCHANTS MARINE INS. CO.

Strong J.

lant, that court affirmed the judgment of the Superior Court. A further appeal has now been taken to this court.

Only two points requiring notice were argued here. First, it was said that the conventional prescription provided by the clause already quoted had been waived. It is sufficient to refer to one conclusive answer to this contention. The appellant cannot be admitted to insist on waiver in the state of the record before us. If it had been intended to rely on this reply it should have been set up by a special answer to the exception pleading the prescription, but this was not done. It is, therefore, out of the question now, in this second stage of appeal to consider this answer to the defence, even if it were sustained by the clearest and strongest evidence. It is sufficient then to say that it is not now competent to the appellant to raise this objection, and to this it may be added that there is not a tittle of evidence in support of the pretended waiver.

The only other point seriously urged in argument was the legal one that this prescriptive clause was void as against public policy. It has over and over again been adjudged that a provision of this kind is valid and unimpeachable in English law—and no authority has been quoted to show that the French law differs in this respect from the English law; on the contrary numerous French authorities show that the law of France as settled by a general consensus of legal authors as well as by the jurisprudence of the Court of Cassation, agrees with the law of England.

The appeal is one of the most frivolous and ill founded which has ever come before this court and should be dismissed with costs.

FOURNIER J.—Concurred with Taschereau J.

TASCHEREAU J.—This was an action on a policy of

Marine Insurance. One of the conditions of the policy was that "all claims under this policy shall be void unless presented within one year from the date of loss." The action was instituted more than two years after the loss. The company pleaded this condition and the Superior Court, thereupon, dismissed the action. The Court of Appeal unanimously confirmed that judgment, and the plaintiff now appeals to this court. His appeal must be dismissed. I would call it a frivolous appeal. His first contention was that "prosecuted" in the said policy does not mean "prosecution by a suit or action." The appellant has not been able to cite a single authority in support of this contention. In the case of *Carraway* v. *The Merchant's Mutual Ins. Co.* (1) this very same point was raised and determined against the plaintiff.

The appellant, secondly, argued that this condition is void under article 2184 of the Civil Code, which enacts that prescription cannot be renounced by anticipation, the only prescription against him recognized by law, as he contends, being the prescription of five years, under art. 2260 C.C. The question is now well settled, and the validity of such a condition perfectly well established. I need only refer to *Cornell* v. *The Liverpool Ins. Co.* (2); *Armstrong* v. *Northern Ins. Co.* (3); *Bell* v. *Hartford* (4); *Rousseau* v. *The Royal* (5); *Whyte* v. *Western* in the Privy Council (6); and to Laurent (7) and Pouget, Dictionnaire des Assurances (8) where all the French authorities are collected. The enactment that prescription cannot be renounced by anticipation is an enactment in favor of the debtor and means simply, that (to apply it to the present case, for instance) if the company had stipulated that an action on this

(1) 26 Ann Rep. La. 298.
(2) 14 L. C. J. 256.
(3) 4 L. N. 77.
(4) 1 L. N. 100.
(5) M. L. R. 1 S. C. 395.
(6) 22 L. C. J. 218.
(7) 32 S. 185.
(8) Vo. prescription de l'indemnité.

1888

ALLEN v. THE MERCHANTS MARINE INS. CO.

Taschereau J.

policy should lie in case of loss at any time even after five years, the company upon being sued after five years could plead this prescription, notwithstanding the stipulation to the contrary. But that the plaintiff should himself invoke the article to support the contention that he could not legally stipulate that the delay to prosecute should be shorter than five years seems to be a misconception of the article. The debtor cannot stipulate to enlarge the delay to prescribe, but the creditor may stipulate to shorten that delay.

As to the waiver which the appellant attempted to rely upon, it is sufficient to say that there is no such issue raised on the record. The appellant's only answer to the company's plea was a general replication.

GWYNNE J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Davidson & Ritchie.*

Solicitor for respondents: *J. C. Hatton.*