1891
*Nov. 9.
1892
*April 4.

THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA (DEFENDANTS)..... } APPELLANTS;

AND

DAME ELIZABETH YOUNG (PLAINTIFF)..... } RESPONDENT.

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

Accident insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.

An accident policy issued by the appellants, was payable in case *inter alia*, "the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, &c., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under the policy.

On the 21st of March, 1886, the insured was accidently wounded in the leg by falling from a verandah and within four or five days the wound which appeared at first to be a slight one was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to

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

the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound but the court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court:

Held, reversing the judgment of the Court below, Fournier and Patterson JJ. dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.

Per Strong, Fournier and Patterson JJ., that the external injury was the proximate or sole cause of death within the meaning of the policy.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) rendered on the 21st March, 1891, confirming a judgment of the Superior Court (Mr. Justice Tellier) (1) of the 13th September, 1889, condemning the defendants to pay to the plaintiff the sum of $5,000 with interest and costs of suit.

The action was brought to recover from the defendants the sum of $5,000, under and by virtue of a certain policy of insurance issued by the said defendants insuring one William Wilson, against death by accident.

The material clauses of the policy and the facts and pleadings are sufficiently stated in the head note and in the judgments hereinafter given (2).

Geoffrion Q.C. and *Cross* for appellant, cited and relied on Porter's Laws of Insurance (3); *Cawley* v. *The National Employers' Accident, Etc., Association* (4);

(1) M.L.R. 6 S.C. 4.
(2) See also report of the case M.L.R. 6 S.C. 4.
(3) Pp. 443-444.
(4) 1 Cab. & El. 597.

1891

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Smith v. *The Accident Ins. Co.* (1); *Lawrence* v. *Accidental Ins. Co.* (2); *Insurance Co.* v. *Tweed* (3); *Insurance Co.* v. *Transportation Co.* (4); *Scheffer* v. *Railroad Company* (5); *Southard* v. *The Railway Passenger Ins. Co.* (6); *Accident Ins. Co.* v. *Crandal* (7); Dalloz Rep. (8); Journal des Assurances (9); *Gamble* v. *Accident Ins. Co.* (10); *Whyte* v. *Western Assurance Co.* (11).

Lafleur for respondent cited and relied on art. 2478 C.C.; May on Insurance (12); Bliss on Life Insurance (13); Angell on Life Insurance (14); *Herald Co.* v. *Northern Assurance Co.* (15); *Kelly* v. *Hochelaga Mut. Fire Insurance Co.* (16); *Garceau* v. *Niagara Mut. Insurance Co.* (17); *Ducharme* v. *Mut. Fire Insurance Co.* (18); *Agricultural Insurance Co. of Watertown* v. *Ansley* (19); *Ouimet* v. *Glasgow & London Insurance Co.* (20).

The case of *White* v. *Western Assurance Co.* (11), cited by the appellants, does not conflict with this doctrine.

Marble v. *City of Worcester* (21); Dumoulin (22); Sourdat, Responsabilité (23); Pothier, Obligations (24); Demolombe (25); Marcadé & Pont, Code Civil (26); *North American Life & Accident Ins. Co.* v. *Burroughs* (27); *McCarthy* v. *Travellers' Ins. Co.* (28); *Barry* v. *U. S. Mut. Accident Association* (29); *Peck* v. *Equitable Accident Association* (30); *Fitton* v. *Accidental Death Ins. Co.* (31).

(1) L.R. 5 Ex. 302.
(2) 7 Q.B.D. 216.
(3) 7 Wall. U.S. 44.
(4) 12 Wall. U.S. 194.
(5) 105 U.S. S.C. 249.
(6) 1 Big. L. & A. Ins. R. 70.
(7) 120 U.S. S.C. 527.
(8) Vo. Assurance Terrestre No. 197.
(9) 1886—p. 130, and 1887—p. 35.
(10) 4 Ir. R. C. L. 204.
(11) 22 L. C. Jur. 215.
(12) § 468.
(13) § 263.
(14) § 244.
(15) M.L.R., 4 S.C. 254.
(16) 3 Legal News, 63.
(17) 3 Q.L.R., 337.
(18) 2 Legal News, 115.
(19) 15 Q.L.R. 256.
(20) 19 Rev. Leg. 27.
(21) 4 Gray 412.
(22) No. 179.
(23) 1 Vol. § 693.
(24) No. 167.
(25) 24 vol., No. 599.
(26) Art. 1151 C. N.
(27) 8 Am. R. 212.
(28) 8 Bissell 362.
(29) 23 Fed. Reporter 712.
(30) 59 N.Y. 255.
(31) 34 L.J. (N.S.) C.P. 28.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C. J.

Sir W. J. RITCHIE C.J.—The appeal is from a judgment of the Court of Queen's Bench (appeal side) rendered on the 21st of March, 1891, unanimously confirming a judgment rendered by the Superior Court, in the district of Montreal, on the 13th September, 1889, which condemned the defendants (now appellants) to pay the plaintiff (now respondent) the sum of $5,000 claimed by her upon the death of her husband under the provisions of an accident policy issued by the defendants.

I am not by any means satisfied on the evidence that the deceased died solely in consequence of the external bodily injuries which he had sustained (*Smith* v. *Accident Ins. Co.* (1), but assuming that he did, as alleged in plaintiff's declaration, I think no immediate or due and sufficient notice was ever given as provided for by the policy.

The accident happened upon the 21st of March, 1886, the insured died on the 13th of April following; the notice of the accident and death was only sent to the company on the 29th of April one month and eight days after the accident, and sixteen days after the death, and notice was only received in Montreal on the 1st of May. I cannot think that this was any compliance with the express provision of the policy, which is as follows:

CONDITIONS.—1. In the event of any accident or injury for which claim may be made under this policy, or in case of death resulting therefrom, IMMEDIATE NOTICE must be given in writing, addressed to the manager of this company, at Montreal, stating the full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under this policy; and unless direct or affirmative proof of the same, and of the death or duration of total disability shall be furnished to the manager of the company within THREE MONTHS from the happening of such accident in the event of

(1) L. R. 5 Ex. 302.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C.J.

death, or SIX MONTHS in the case of non-fatal injury, then all claims accruing under this policy shall be absolutely invalid and of no effect.

It appears that the policy had been lost; this perhaps may account for the neglect to give the notice, but it does not dispense with the necessity of a compliance with the terms of the policy. Mr. May lays it down that inability by reason of the loss of the policy, is no excuse, and Mr. Crawley in his work on Life Insurance says (1):

> Where it is a condition precedent to the right to recover on an accident policy that notice giving particulars of the accident should be delivered to the head office of the company within nine days, the principle of *Taylor* v. *Caldwell* (2) does not apply, and the condition is not discharged by the fact that the accident resulting in instaneous death, and no other person knowing of the existence of the policy, notice could not be given. It is not a case of impossibility owing to the act of God; the insured might have provided for the contingency by informing others of the policy, *Gamble v. Accident Insurance Co., Limited* (3).

I do not think mere silence is enough to constitute a waiver; there was no admission or act done with the intention of influencing the conduct of the holder of the policy or by which he could be prejudiced.

Mr. May shows very clearly the distinction between a failure to give notice within the time required, and to give the notice in form. He says (4):

> A failure to give notice within the time required stands upon a different ground from the failure to give the notice in due form. The latter defect may be remedied by a new and more accurate form, but the former, if insisted upon by the insurers, is irremediable. It may, indeed, be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of a mere defect in form. The silence of the insurers upon a mere defect of form might be very injurious to the assured, since, if the defect were pointed out to him, he might at once supply the deficiency, and save himself from loss. A failure to give the notice in due time, on the contrary, leaves the insured entirely at the mercy of the insurers,

(1) Ch. 6, p. 145.
(2) 3 B. & S. 826.
(3) 4 Ir. R. C. L. 204.
(4) P. 702.

and to point out to him the fact will not in the least aid him to remedy the defect. The omission to point it out to him is therefore no wrong, or prejudice or want of good faith towards him, nor is the insurer under any legal obligation so to do. *Patrick* v. *Farmers' Ins. Co.* (1) ; *St. Louis Ins. Co.* v. *Kyle* (2) ; *Edwards* v. *Balt. Fire Ins. Co.* (3) ; Post par. 471. In *American Express Co.* v. *Triumph Ins. Co.* (4), it is said that the acceptance of proofs without objection had never been held a waiver of neglect in point of time, when the policy provided that the proofs should be presented as soon as possible. But see *contra Palmer* v. *St. Paul, &c., Ins. Co.* (5).

There are no facts in dispute. I am unable to understand how it can be said that a delay of one month and eight days after the accident, and sixteen days after the death was a compliance with the provision requiring immediate notice.

The plaintiff's declaration does not directly set forth the clause of the policy we are now considering. It is as follows :—

That both before and after the said accident, the said William Wilson had used all due diligence for his personal safety, protection and preservation, and had in every way complied with the clauses and conditions of the said policy of insurance, and his said accident and subsequent death were covered by the said policy ;

That within due time after the death of the said William Wilson, the plaintiff furnished the defendants with sufficient proof of said accident and death according to the conditions of said policy, and then and ever since conformed herself to and fulfilled all the requirements of said policy, and duly demanded payment of the sum of five thousand dollars which became due and payable to her in virtue of said policy upon the happening of the aforesaid events ;

That the defendants illegally and without just cause or reason, refused and still refuse to pay plaintiff the said sum or any part thereof, though they have frequently acknowledged their liability thereof.

Now, it is abundantly clear that no notice as required was given after the accident and before the death and none was furnished to defendants within due time

(1) 43 N. H. 621.
(2) 11 Mo. 278.
(3) 3 Gill (Md.) 176.
(4) 5 Ins. L.J. Dist. Ct. Hamilton Co., Ohio.
(5) 44 Wis. 201.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Ritchie C. J.

after the death of Mr. Wilson according to the conditions of the said policy, nor did plaintiff conform herself to, nor fulfil all the requirements of the said conditions, nor is there any evidence that the defendants frequently as alleged, or at any time, acknowledged their liability; on the contrary, the proof is directly the opposite. Now it is clear, that having made these allegations the burden was on the assured or plaintiff, to show that she has complied with the requirements of the policy, which she has failed to do.

But it is alleged that defendants waived the fulfilment of the conditions of the policy; but this is not the case set up by the plaintiff in her declaration, or that which the defendants were by the pleadings called on to answer. It is true that the plaintiff, in answer to the defendant's pleas which are as follows:—

That in and by one of the conditions contained in the said policy of insurance declared on by the said plaintiff and forming part of the contract thereby entered into, it was specially stipulated and agreed as follows, and in the words following: "In the event of any accident or injury for which claim may be made under this policy, or in case of death resulting therefrom, immediate notice must be given in writing, addressed to the manager of this company, at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under this policy; and unless direct or affirmative proof of the same, and of the death or duration of total disability shall be furnished to the manager of the company within three months from the happening of such accident, in the event of death, or six months in the case of non-fatal injury, then all claims accruing under this policy shall be absolutely invalid and of on effect.

That the death of the said William Wilson occurred on the thirteenth day of April, one thousand eight hundred and eighty-six, as alleged in the plaintiff's declaration, but the said plaintiff wholly failed and neglected to notify the said defendants as required by the said above recited condition until long after the death and burial of the said William Wilson, to wit, on the twenty-ninth day of April, one thousand eight hundred and eighty-six, a period of sixteen days thereafter, and which notification was only received by the said defendants

at their head office in Montreal on the first day of May, one thousand eight hundred and eighty-six.

That the said plaintiff has wholly failed and neglected to comply with the terms and conditions of the said policy of insurance.

That by reason of the said above recited condition and of the premises, all claims under and by virtue of the said policy became invalidated and the same are invalid and of no effect and cannot be enforced against the said defendant.

Reaffirmed the performance of this condition, and at the same time set up a waiver. Assuming that there was no necessity for plaintiff to allege waiver in her declaration, and that it was sufficient for her to do it in the replication, I can discover nothing to justify me in saying that the company waived the performance of this condition of the policy. It appears to me to have been a case of all others requiring immediate notice, and the company appears to have had an agent at Wilmington, to whom no notice appears to have been given, even if that would have been sufficient, which I do not think it would under the terms of the policy. I am therefore of opinion that this appeal should be allowed with costs.

STRONG J.—I am clear to allow this appeal. No doubt that erysipelas immediately resulting from the accident was the proximate cause of death, and the plaintiff would have been entitled to recover if he had brought himself within the conditions. But he did not give the notice required by the condition unless as argued the word "immediate" has reference only to death, an interpretation which is, however, totally inadmissible. There is no ground whatever for saying there was any waiver. The loss of the policy could not prejudice the company or dispense with the conditions against them. I am of opinion that the appeal should be allowed and the action dismissed with costs.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

FOURNIER J.—was of opinion that the appeal should be dismissed for the reasons given by the court below, and also for the reasons stated in the judgment of Patterson J.

Taschereau J.

TASCHEREAU J.—In my opinion this appeal should be allowed, and the respondent's action dismissed upon the company's plea of want of due notice.

It was specially stipulated and agreed in the contract between the parties that

> In the event of any accident or injury for which claim may be had under this policy, or in case of death resulting therefrom immediate notice must be given in writing, addressed to the manager of this company, at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury.

It is in the evidence that the accident from which the late William Wilson died, happened on the 21st of March, 1886, and that he died on the 13th day of April following; but that notice thereof was only sent to the company on the 29th of April, sixteen days after the death, which notice was only received by them in Montreal on the 1st day of May.

Now by the law which rules this case, there can be no doubt that the aforesaid condition of the said policy must be given its full force and effect.

Dalloz, Répertoire Vo. Assurance Terrestre (1):

> Il est bien entendu que, si le contrat porte que le sinistre sera dénoncé dans un délai fatal emportant déchéance l'assuré qui a laissé passer ce délai sans faire la dénonciation perd tout droit à l'indemnité, à moins qu'il ne prouve avoir été empêché par cas fortuit ou force majeure.

Revue de Droit Commercial 1883 (2):

> Tribunal de Nantes (Commerce) 13 mai 1882.
>
> En matière d'assurance contre les accidents, l'assuré est tenu, alors même que la police ne stipule aucune déchéance à ce sujet, d'avertir l'assurance des accidents survenus à la chose assurée et l'assureur est

(1) No. 197. (2) P. 271.

fondé à refuser toute indemnité s'il n'a été prévenu que très longtemps après l'accident dont on veut le rendre responsable et s'il se trouve par suite, dans l'impossibilité de faire les vérifications nécessaires à la défence de ses intérêts.

NOTE—La clause d'une police, par laquelle l'assuré est tenu de faire la déclaration de chaque accident dans le délai de deux jours, doit être rigoureusement appliquée.....Cp. Tribunal de la Seine, 10 mars 1869. *Lecomte* v. *La Prévoyance, etc.*

Journal des Assurances, 1886 (1) :

Cour d'Appel de Paris, 4 Chambre, 29 janvier 1886.

L'assuré qui n'observe pas les délais et les formalités prescrites pour la déclaration du sinistre, doit être déchu de toute indemnité.

Journal des Assurances, 1883 (2) :

Tribunal Civil de la Seine, 19 août 1882.

Lorsqu'il a été stipulé qu'en cas de maladie ou d'accident sur les bestiaux soumis à l'assurance, l'assuré est tenu d'en prévenir l'administration dans les vingt-quatre heures, à peine de déchéance, cette clause est valable et la déchéance doit être prononcée.

The respondent could hardly contend that the notice she gave in this case was given within the proper time, but relied chiefly, as Mr. Justice Cross did in the Court of Queen's Bench, on the ground that the said condition of the policy had been waived by the conduct of the company, who, in their correspondence with her or her solicitors had given as their reason for acknowledging liability the only ground that Wilson's death did not result from the accident which happened to him. The respondent certainly brought to our notice some cases which would appear to support her contention on this point. But however this may be, the law on the question is in my opinion entirely against her. Certainly such conditions can be waived. Article 2478 C. C. expressly recognizes it, but of such a waiver, there is in my opinion not a tittle of evidence in this case. The respondent cannot deny it, but she wants us to presume or infer waiver from the conduct of the com-

(1) P. 130. (2) P. 35.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Taschereau J.

pany. But the company did nothing here to mislead her. When on the 29th day of April, she, for the first time, notified the company at their head-office in Montreal, her right of action was then gone and nothing that the company did afterwards can have revived it. It is a well-established proposition of law that a renunciation to a right is never to be presumed.

Comme personne n'est facilement présumé renoncer à son droit, les renonciations expresses ou tacites doivent être strictement resserrées dans leurs termes, jamais on ne doit les étendre d'un cas à un autre. Cela résulte de la nature même des choses ; tous les auteurs sont d'accord sur ce principe. Fav. de Langlade (1).

Mais puisque des faits emportent renonciation, il faut qu'il en résulte une volonté manifeste de renoncer, c'est-à-dire, que ces faits soient directement et à tous égards contraires au droit dont il s'agit ; Merlin (2), ou exclusifs de l'exercice de ce droit. Merlin (3).

Il faut que les circonstances soient telles que tout concoure à faire supposer la renonciation, sans qu'il y ait aucune conjecture vraisemblable qui tente à faire augurer le contraire. Solon, nullités (4).

See also *Lancashire Ins. Co.* v. *Chapman* (5), where the Privy Council, in a case, it is true, from Quebec, held that a notice had been waived but upon acts by the company which necessarily implied an acknowledgment of their liability.

For these reasons I am of opinion that this appeal should be allowed.

PATTERSON J.—I remain of the opinion which I was inclined to at the hearing of this appeal, that there is no sufficient reason for disturbing the judgment in which the courts below have concurred.

The more formidable of the two main grounds of appeal is that which relates to the somewhat tardy notice

(1) Répertoire, vo. Renonciation.
(2) Répertoire, vo. Renonciation.
(3) Questions de droit, vo. Hypothèque, par. 19.
(4) 2 vol. No. 452 ; See also *The Western Assurance Co.* v. *Atwell*, 2 L.C. Jur. 181 ; Reversing *Atwell* v. *The Western*, 1 L. C. Jur. 278.
(5) 7 Rev. Leg. 47.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

of the accident. The condition calls for immediate notice, but the word "immediate" cannot be taken in its strict etymological meaning. The absurdity of that is easily shown. It would require a man who gets hurt, say *e. g.* in a railway accident, to give notice before doing any intermediate act. He must get home first or to some place where a notice can be written, and when there he would to a certainty do some other intermediate thing, if it were only to get his hurts attended to. How, then, is the word to be understood in a contract like this, or in a statute which requires an immediate notice or something to be done immediately after something else? We shall find a sensible and practical answer to the question given by Lord Chief Justice Cockburn in *The Queen* v. *Justices of Berkshire* (1):

"The question" he said "is substantially one of fact. It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

If the appellants had said, when they received the notice in this case, that it was not the notice they bargained for, because it did not enable them to make prompt inquiry into the facts while they were fresh or to take such steps as they might have taken to prevent serious consequences, it is not likely that any court would have said they put too strict a construction on the condition as applied to the circumstances. The sufficiency of the notice as a compliance with the condition was a question of fact, and the company's view of the fact may not improperly be gathered from its conduct. What was done was precisely what would

(1) 4 Q.B.D. 469.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

have been done if an unobjectionable notice had been given—receiving proofs of the claim, investigating the particulars, and intimating the decision to resist on the ground that the accident or injury was not covered by the policy.

Now whether we regard the company as having conceded the sufficiency of the notice as a question of fact, and acting on that concession, hold the condition satisfied, which is the formal finding of the court below; or hold that the company waived the giving of the notice in the precise terms of the condition, which is the view intimated by Mr. Justice Cross; or that the company is estopped from insisting upon the condition, which might not be a strained conclusion; the result is the same. I see no good reason to find fault with the conclusion, nor do I think it important to examine the grounds of it more closely.

As to the other ground of appeal which has afforded room for some ingenious discussion, I cannot see my way to question, much less to reverse, the decision of the courts below.

There is ample evidence to sustain the finding of fact that the bruise or abrasion or wound on the leg of the deceased, caused by the accident of his falling off the verandah, led to his death.

The medical evidence cannot be taken to establish any facts inconsistent with the findings of the court below. Much stress has properly been laid upon the *post-mortem* examination. The facts ascertained upon that examination by the pathologist who made it and the local physician who assisted him are, of course, beyond the reach of dispute. But the deductions from those facts stand on a different footing and as to them the doctors differ. The autopsy revealed some pneumonic consolidation of one lung and traces of a disease of the kidneys. Three opinions, more or less divergent,

are given respecting these discoveries. One is that they may indicate some debilitating disease that may have predisposed the patient to erysipelas; another makes them account for the attack of erysipelas; and the third treats them as either of no significance in connection with the erysipelas, or as secondary to or resulting from it. It is plain that those differences are not for us to reconcile, and that for the purpose of this appeal the broader facts alone can be looked at. These are that in consequence of the injury to the leg of the deceased erysipelas set in, involving the whole of the limb from the foot upwards. The examination did not disclose any indications of pyæmic poisoning, but the presence of considerable quantities of pus in the leg, in conjunction with the evidence furnished by the absence of surgical incisions which would have promoted the discharge of the pus, led to the inference that the treatment of the patient had not been skilful.

The conclusion of fact that the erysipelas from which the insured died was due directly to the injury and not to any diseased condition of the system was, as I have said, fully warranted by the evidence, and must be accepted by us.

The conclusion of law, against which the appellants contend, is that under the circumstances it was not a case of death caused (within the words of the policy) "wholly or in part by bodily infirmities or disease existing prior to or subsequent to the date of this contract," but that the injury was "the proximate or sole cause of the death."

There is frequently some difficulty in satisfactorily interpreting the language of provisoes like that from which I quote these words. I cannot say that that is so in the present instance. As soon as we abandon the notion that other diseases, such as the dis-

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

eases of the lungs or kidneys of which traces were found, produced or aided in producing the erysipelas, the reference to "bodily infirmities or disease existing prior or subsequent to the date of this contract" becomes inapplicable to the case. It would be straining the language and giving a delusive character to the contract to understand a disease produced by an accident against which the company insures to be included in the reference.

It would be straining the language if we had nothing but the words of the proviso to guide us. But the contract itself helps to define the extent of these words. The insurance applies in cases of death whenever the fatal result follows within ninety days of the accident. During that interval it is obvious that the insured is contemplated as suffering from the effects of the accident, and it must be also contemplated that his sufferings may take the form of a disease that has a name of its own, it may be pyæmia, or tetanus, or erysipelas, or congestion of the brain, or something else, but still the direct consequence of his injury and the path by which the fatal result is approached. It would make the contract a delusion to hold that in any such case the liability of the company was gone by reason of the exception of death from bodily infirmity or disease existing subsequent to the date of the contract.

A force is claimed for the word "proximate," which again would reduce the contract to a delusive pretense of insurance. Leave erysipelas out of view for the moment. A disease more readily recognized, at least in popular estimation, as the result of an injury is tetanus, one development of which is lock-jaw. Can it be contended that a person whose hand or foot is injured and who in consequence dies of tetanus, did not die from the injury as, within the meaning of this policy, the proximate cause of his death?

It might as well be argued that in the case of a gun-shot wound that severs an artery and the man bleeds to death because no one happens to be present with the means or the skill to stop the flow of blood, the proximate cause of death was not the wound, but the exhaustion from loss of blood.

The construction of the proviso for which the appellants contend seems to treat the word "proximate" as referring only to the order of time. That is not its meaning here. The contract is to pay if the death happens within ninety days. During that interval secondary or resulting "causes of death," as that expression might be used in the report of a *post-mortem* examination, must often intervene, nearer in point of time to the death, but still not the proximate cause.

The proviso in the policy distinguishes between death from an injury, as a direct consequence, and death from bodily infirmities and disease not caused by the injury. The latter cause of death gives no claim under the policy, the former, which is designated the proximate cause, gives a claim. The word "proximate" I understand to be used in the sense of "direct," which seems to be the word employed in English policies. It is so in the policies which were in question in *Fitton* v. *Accidental Death Ins. Co.* (1), *Smith* v. *Accident Insurance Co.* (2), in *Winspear* v. *The Accident Ins. Co.* (3), and in *Lawrence* v. *The Accidental Ins. Co.* (4).

In this sense the word has a useful and sufficient signification. For example, a man suffering from some disease brought on by an accidental and violent injury, involving perhaps congestion, or suppuration, or inflammation like the peritonitis discussed in one of the American cases, *N. American Life and Accident Co.* v.

(1) 17 C. B. N. S. 122.
(2) L. R. 5 Ex. 302.
(3) 6 Q. B. D. 42.
(4) 7 Q. B. D. 216.

1892

THE ACCIDENT INS. CO. OF NORTH AMERICA v. YOUNG.

Patterson J.

Burroughs (1), and threatening a fatal termination, happens to die from heart disease with which the injury had nothing to do, although the condition of the patient may have made him more liable to an acute attack. The proviso would protect the company, while if the death had been from the peritonitis or other effect of the injury, the injury would have been the proximate cause of it within the meaning of the policy.

I do not think it necessary to go into a detailed discussion of the cases cited to us, though I have not failed to examine them. I may say generally that the principle on which the policies and facts in the various cases have, as a rule, been discussed is that which I have applied to the construction of the policy before us. I have already incidentally mentioned the principal English cases. Several of the American decisions are direct authorities for the construction contended for by the respondent.

In my opinion the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellants: *Selkirk Cross.*

Solicitor for respondent: *E. Lafleur.*

(1) 8 Am. R. 212.