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*Feb. 15.

Nov. 21.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION (DEFENDANT) ..... APPELLANT;

AND

MARGARET G. TAYLOR (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Accident insurance—Condition in policy—Notice—Condition precedent.

A condition in a policy of insurance against accidents required that in the event of an accident thereunder, written notice, containing the full name and address of the insured, with full particulars of the accident, should be given within thirty days of its occurrence to the manager for the United States or the local agent.

Held, reversing the judgment of the Supreme Court of New Brunswick, Gwynne J. dissenting, that the giving of such notice was a condition precedent to the right to bring an action on the policy.

APPEAL from a decision of the Supreme Court of New Brunswick in favour of the plaintiff on demurrer.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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The plaintiff sued on a policy of insurance against accidents in favour of her deceased husband Byron G. Taylor. One of the conditions in the insurance policy provided that:

"In the event of any accident within the meaning of this policy happening to the insured, written notice, containing full name and address of the insured, with full particulars of the accident, shall be given within thirty days of its occurrence to the manager for the United States, at Boston, Mass., or the agent of the corporation whose name is indorsed hereon."

The defendant pleaded, among other defences, that no notice was given as required by this condition. To this plea the plaintiff demurred, and her demurrer was sustained by the Supreme Court of New Brunswick which held that the giving of the notice was not a condition precedent to a right of action on the policy. From that judgment the appeal to this court was taken.

Owen Ritchie for the appellant. The effect of the judgment of the court below is to expunge the clause which was made part of the contract by the policy, requiring notice as a condition precedent to any right of action. In fire policies made on "terms and conditions" providing for notice of loss, compliance with such terms are conditions precedent; *Nixon* v. *The Queen Insurance Co.* (1); *Bowes* v. *National Insurance Co.* (2); *Gibson* v. *The North British and Mercantile Insurance Co.* (3); and the same principle applies to insurances against accidents; *The Accident Insurance Co. of North America* v. *Young* (4); *Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.* (5); *Patton* v. *Employers' Liability Assurance Corporation* (6). See also

(1) 23 Can. S. C. R. 26.
(2) 4 P. & B. 437.
(3) 3 Pugs. 83.
(4) 20 Can. S. C. R. 280.
(5) 1 Times L. R. 495.
(6) 20 L. R. Ir. 93.

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Porter on Insurance (2 ed.), p. 186; *Trippe* v. *The Provident Fund Society* (1); *Whyte* v. *The Western Assurance Co.* (2). The rule "*Verba chartarum fortius accipiuntur contra proferentem*" is a doubtful one and was held to be unreasonable by Jessel, M. R. in *Taylor* v. *The Corporation of St. Helens* (3).

Pugsley Q.C. and *Blair* for the respondent. This is a case falling within the application of the maxim "*Verba chartarum fortius accipiuntur contra proferentem*" and the principles decided in *Stoneham* v. *The Ocean Ry. and Gen. Accident Insurance Co.* (4); see also *Bowes* v. *The National Insurance Co.* (5). The company has failed to use language sufficiently express to make the giving of the notice a condition precedent and the policy must be construed most strongly against the party making it; *Notman* v. *The Anchor Insurance Co.* (6); consequently reasonable notice, as actually given, was sufficient. We rely also upon the decisions in *Anderson* v. *Fitzgerald* (7); *Cassel* v. *The Lancashire and Yorkshire Accident Insurance Co.* (8), and we refer to Bunyon on Life Assurance, p. 82. There is in this case a distinction to be drawn between "conditions" and "collateral agreements."

TASCHEREAU J.—By a policy for $5,000 on which the action was brought the defendants (now appellants) insured one Taylor, the respondent's husband, against bodily injuries "subject and according to the agreements and conditions herein contained including those printed on the back of this policy." On the back of the policy, among the "agreements and condi-

(1) 140 N. Y. 23.
(2) 7 R. L. 106; 22 L. C. Jur. 215.
(3) 6 Ch. D. 264.
(4) 19 Q. B. D. 237.
(5) 4 P. & B. 437.
(6) 4 Jur. N. S. 712.
(7) 4 H. L. Cas. 484.
(8) 1 Times L. R. 495.

tions under which this policy is issued and accepted," it is provided among other things that:

In the event of any accident within the meaning of this policy happening to the insured written notice containing full name and address of the insured, with full particulars of the accident, shall be given within thirty days of its occurrence to the manager for the United States at Boston, Mass., or the agent of the corporation whose name is indorsed hereon, and on demand such certificate by medical practitioners qualified by law, and other papers of proof of claim shall be furnished by the insured or his representatives, at his or their own cost, as this corporation may reasonably require.

The declaration sets out the policy including the indorsed conditions and avers generally the performance of conditions precedent. The plea demurred to traverses the performance of the above condition, and on the demurrer judgment was given for the plaintiff (the respondent.) The defendants now appeal from that judgment.

The point of law upon this appeal is therefore, whether the above provision is a condition precedent to any right of action upon this policy, or an independent and collateral covenant. I think that it is a condition precedent.

That provision cannot be read out of the contract. It forms part of it, and is a stipulation that must be given effect to. Now, to say that it is not a condition precedent is to leave it without any effect whatsoever. The intention of the parties, which is the guide in interpretation of contracts, must necessarily have been that this notice should be a condition precedent to any right of action upon the policy. Otherwise, the stipulation is vain, frivolous, means nothing. It was not necessary to say that it was to be a condition precedent. It is so by its nature. It is not a condition at all if it is not a condition precedent. And we cannot so obliterate it from the contract. I would allow the appeal with costs.

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SEDGEWICK, KING and GIROUARD JJ. concurred.

GWYNNE J.—It is impossible, in my opinion, to read the policy of insurance against accidents in this case, as providing that unless written notice containing full name and address of the insured with full particulars of the accident shall be given within thirty days of the occurrence to the company's manager for the United States at Boston, or to the agent of the company whose name is indorsed on the policy, and unless such certificate by duly qualified medical practitioners as should be reasonably required by the company should be furnished on demand, and unless such other affirmative proof of the claim as the company should reasonably require should be furnished within thirteen months from the happening of the accident, no payment shall be made under the policy. Not being susceptible of such a construction the policy must be read as containing separate independent stipulations, one of which relates to furnishing notice of the accident within thirty days from its occurrence, compliance with which stipulation is not in express terms declared to constitute a condition precedent; and another having relation to the furnishing proof of claim, compliance with which is in express terms made a condition precedent. This stipulation is wholly independent of that as to notice of the occurrence of the accident, and is in these words:

> Unless affirmative proof of claim is furnished within thirteen months from the happening of the accident no payment shall be made hereunder.

That clause in express terms makes the furnishing proof of claim within the prescribed period a condition precedent. So compliance with the provision of the next clause is in like manner expressly made as condition precedent. It provides that;—

No legal proceeding for recovery hereunder shall be brought within three months after receipt of proof at this office.

So that if proof should not be furnished until some time in the thirteenth month from the happening of the accident no action would lie until the expiration of the further period of three months. The case in short is undistinguishable from *Stoneham* v. *Ocean Railway and General Accident Assurance Co.* (1); and the sole question is whether, although we are not bound in law by the decision in that case, it so recommends itself to our judgment that we ought to adopt it as a correct exposition of the law, or on the contrary that we must pronounce our judgment to be adverse to it and therefore must reject it as not being a correct exposition of the law upon the subject. If we are of opinion that it is a sound exposition of the law although not bound in law we are, *in foro conscientiæ*, bound to follow it. We must concur in the judgment wherein it says that the question whether compliance with the stipulation as to notice of the happening of the accident is a condition precedent is purely a question of construction, and that it is for the court to say looking at all the terms of the policy what the true meaning of the contract is—or in other words what the true intention of the parties to the contract was to be gathered from the terms of the policy.

Now in the clause of the policy as to giving notice of the occurrence of the accident there are no words used expressing the intention of the parties to be that compliance in this particular is a condition precedent to the right of the assured to recover anything under the policy, whereas in the clause relative to the furnishing proof of claim there are used words plainly expressing the intention of the parties to be that com-

(1) 19 Q. B. D. 237.

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pliance with that clause is such a condition precedent. Now this difference in the mode of expression as to these two clauses reasonably points to a difference in intention as to their respective effect. But in addition to this it appears by clause E that the policy was intended to cover an accident occurring anywhere "within the limits of the civilized world." In such a case it was very reasonable that thirteen months should be allowed for furnishing proof of claim, and it is reasonable to infer that this was the reason for allowing such a length of time, but the period limited for furnishing proof of claim applies equally to every case irrespective of all question as to the place where the accident occurred. No distinction is made in the policy in any manner affecting the time within which either notice of the occurrence of the accident, or proof of claim must be given having regard to the place where the accident should occur, namely, whether in the remotest part of the civilized world or upon the very premises of the defendants. Now how can we with any reasonable regard to the intention of the parties to be gathered from the terms of the policy hold that if an accident should occur in some remote part of the civilized world notice of the occurrence of the accident must be given within thirty days of its occurrence, or in default, that all right of recovery is forfeited, while thirteen months are expressly given by the clause for furnishing proof of claim? This I confess appears to me to be so plainly inconsistent with a reasonable construction of the contract that for this reason coupled with those given in *Stoneham* v. *Ocean Insurance Co.* (1), I am of opinion that the appeal ahould be dismissed. It is said that the effect of this construction would be to eliminate the stipulation as to notice of the occurrence of the accident wholly from the contract, but this is by no means the

(1) 19 Q. B. D. 237.

case for if the company should sustain any damage by reason of a non-compliance with that stipulation they can recover compensation for such damage in an action instituted for the purpose. In the present action if in the courts of the Province of Ontario such compensation could be recovered upon a counter-claim, but if the defendants have received no damage by reason of such non-compliance it is not reasonable that they should recover anything, much less that the non-compliance should constitute a forfeiture of all claim under the contract when the defendants have not in express terms declared in the policy their intention to be that it should have such an effect; why should the defendants' vagueness in expressing their intention operate thus by implication and not by express terms as a forfeiture of the policy for their own benefit and to the prejudice of the assured.

In the present case it is quite possible that the notice may have been given on the 31st day from the occurrence of the accident, and that the defendants called for certain specific proof which was furnished by the plaintiff; the issues joined upon the pleas which the defendants pleaded but obtained leave to withdraw, may have shown this. We cannot tell, for the pleas withdrawn and the issues thereon are not before us, but however this may be I am of opinion that the parties have not by the terms of this policy plainly expressed their intention to be that non-compliance with the stipulation as to notice of the occurrence of the accident shall constitute a forfeiture of all right to recover anything under the policy, and that therefore the judgment of the court in New Brunswick upon the demurrer should be sustained and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. McLean.*

Solicitor for the respondent: *A. G. Blair.*