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*May 31.

*June 21.

THE MUTUAL FIRE INSURANCE COMPANY OF THE COUNTY OF WELLINGTON..... } APPELLANTS;

AND

JACOB FREY.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Mutual Insurance Co.—Uniform Conditions Act, R. S. O., ch. 162, not applicable to Mutual Insurance Companies —Action premature.

Appellants, a mutual insurance company, issued in favor of *J. F.*, a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 *Vic.*, c. 44, sec. 52, O., now R. S. O., c. 161, sec. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning *J. F.* advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to *J. F's.* attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, *J. F.* furnished the company with the claim papers, or proofs of loss, and on the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, *J. F.* brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd of July, 1877, and that less than three months elapsed before the commencement of this suit.

Held,—On appeal, 1st. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O., c. 162.

2nd. That the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought.

Ballagh v. *The Royal Mutual Fire Insurance Company* (1) approved

APPEAL from a judgment of the Court of Appeal for *Ontario* (2) affirming a judgment of the Court of Queen's Bench (3).

The action was commenced on the 23rd August, 1877,

(1) 5 Ont. App. R. 87. (2) 4 Ont. App. R. 293.
(3) 43 U. C. Q. B. 102.

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and was brought upon a fire insurance policy issued by appellants. The policy is dated the eleventh day of October one thousand eight hundred and seventy-six. By it the company promise "according to the provisions of said Act, to settle and pay unto the said assured, his heirs, executors, administrators or assigns, all losses or damage, not exceeding in the whole the said sum of two thousand dollars, which shall or may happen to the aforesaid property by reason or by means of fire during the time this policy shall remain in force; the said losses or damage to be estimated according to the true actual value of the property at the time the same shall happen, and to be paid within three months after due notice is given by the insured, according to the provisions of the said Act." The fire occurred the 21st of May, 1877. The respondent stated his loss at thirteen hundred dollars. The subject of insurance was a general stock of goods in a country store.

The declaration alleged a loss by fire on 21st May, 1877, and set up, that the policy having been issued after 1st July, 1876, and not having thereon endorsed the statutory conditions provided by *Ont.* Stat. 39 *Vic.*, c. 24 (R. S. O., c. 162), was a policy without conditions as against the respondent. The appellants pleaded nine pleas, the purport of them being as follows:

1st. Denial of policy; 2nd. Denial of loss; 3rd. Denial of proof of loss; 4th. Denial of particular account of loss; 5th. That policy was made and issued subject to a condition that loss not payable till three months after proof of loss; that proofs of loss were furnished 3rd July, 1877, and that 3 months did not elapse before action brought; 6th. Alleged that the appellants were a mutual insurance company, incorporated under the laws of the province relating to such companies, and set out conditions endorsed on policy, and among others the condition as

to three months for payment after proof of loss; and concludes by averring that the three months had not elapsed; 7th. Non-payment of assessment due on premium note; 8th. Arson; 9th. That more than five gallons of coal oil were kept on premises, contrary to a condition printed on policy, pursuant to the statute in that behalf.

The case was tried before Mr. Justice *Morrison* and a jury on 26th September, 1877, when a verdict was rendered for the respondent on the first six and the eighth issues, and for the appellants on the seventh and ninth issues. Damages were assessed at $700.

At the trial it was proved that on the next morning after the fire, the respondent advised the appellants by telegraph of the fire, and their secretary visited the scene of the fire the same afternoon, when he was informed of the particulars. On the 29th June the secretary wrote to the respondent's attorney, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, the respondent sent in his claim papers or proofs of loss, and on the 13th July, 1877, the secretary wrote, stating, that after an examination of the papers at the board meeting, it was resolved that the claim should not be paid.

In Michaelmas Term, 1877, cross rules were obtained, and on the 15th March, 1878, the Court of Queen's Bench gave judgment affirming the respondent's verdict on the seven issues found for him, and entering a verdict for respondent on the two issues found against him.

From this judgment the appellants appealed to the Court of Appeal of *Ontario*, and on the 27th May, 1879, judgment was given dismissing the appeal, and affirming the judgment of the Queen's Bench.

From this latter judgment the present appeal was brought.

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Mr. *Robinson*, Q. C., for appellants:

In the case of *Ballagh* v. *The Royal Mutual Fire Insurance Company* (1), it was held that the statutory conditions set forth in the schedule to the Fire Insurance Policy Act, 1876, Rev. Stats. *Ont.*, c. 162, are not applicable to policies issued by mutual insurance companies. If this decision is not overruled, under the terms of the policy, and by statute, c. 161 Rev. St. *Ont.*, the appellants are entitled to succeed under the fifth and sixth pleas.

The plaintiff furnished proofs on 3rd July, 1877, as being proofs called for by his policy. The loss was not payable until three months thereafter. The policy on its face promises payment only according to provisions of the Act.

The policy also provides that the loss or damage should be "estimated according to the true actual value of the property at the time the same shall happen, and to be paid within three months after due notice is given by the insured according to the provisions of the said act."

The action having been brought in August, and the proof papers having been furnished in July, I contend that the action is prematurely brought under the agreement contained in the body of the policy.

Mr. *McCarthy*, Q. C., and Mr. *Clement* for respondent:

The case is narrowed down to the question whether the action has been prematurely brought, and also as to the question of coal oil. Although the conditions are endorsed on the contract, there is no reference made to them in the body of the policy.

Then, what is our contract with regard to time? It is to settle and pay, not after proof but after due

(1) 5 Ont. App. R. 87.

notice is given, unless the words "according to the provisions of the Act" qualify the promise. Now, notice was given three months prior to the bringing of the action, then come the words in the 56th sec.: "And the proofs shall, &c., and such amount shall be payable in three months after receipt by the company of such proofs." This refers to the proofs required by the policy; now, if the conditions are not on the policy, then there are none. This section cannot help the appellants, because that section directs the directors to ascertain and determine the amount of loss, and then goes on to say that the amount shall be payable in three months, &c. The directors having refused to ascertain and determine an amount, that section does not apply. Supposing the insured were dissatisfied with the determination of the directors, there is nothing in that section to say that such insured shall delay action for three months.

Surely this section does not mean that in all cases they shall have three months. The next section shows clearly that the object is to give time to determine what the loss shall be, and not the time to make an assessment. Then, also, by this Act a condition unjust can be declared null.

I further contend that the appellants have waived their claim (if any) to the three months delay, by expressly refusing to pay the claims on the 13th July, 1871.

Then I go further, and say the Uniform Conditions Act c. 162 does apply. This court is not bound by the decision in *Ballagh* v. *The Royal Ins. Co.*

"The Fire Insurance Policy Act, 1876," was passed after the 36 *Vic.*, c. 44, s. 52, and being inconsistent therewith, the latter section is superseded. See remarks of *Harrison*, C. J., at p. 120, of 43 U. C. Q. B.

The conditions in the body of the policy and those

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pleaded in the 5th and 6th pleas, as to three months delay, differ from and are variations of the statutory conditions, and being so, are not binding on respondent, not being indicated and set forth in the manner prescribed by "The Fire Insurance Policy Act, 1876."

There is no difficulty in reading sections 53 and 55 together, leaving out section 52. Was not the object of the whole act to give three months to pay after notice and to collect three months after judgment? The amount which is postponed for payment is the amount to be determined, but not the amount of the loss.

Having refused to arbitrate or to ascertain the amount, we submit we had a right of action for refusal to ascertain.

The only object of sec. 56 is to fix some way of ascertaining the amount. The learned counsel relied upon the judgment of the Court appealed from delivered by *Moss*, C. J. (1), and the judgment of *Harrison*, C. J., in this case (2); and on the judgments of *Harrison*, C. J., and *Wilson*, J., in *Ulrich* v. *National Ins. Co.* (3). See also *Parsons* v. *Citizens' Ins. Co.* (4); *Parsons* v. *Queen Ins. Co.* (5).

RITCHIE, C. J.:

The only point we have now to determine is whether the Act to secure uniform policies applies to mutual insurance companies. I have carefully read the decision of the Court of Appeal in the case of *Ballagh* v. *The Royal Mutual Fire Ins. Co.* (6) decided in March last, and which has been just reported, in which case that court held that policies issued by mutual insurance companies were not governed by the Act to secure uniform policies, and

(1) 4 Ont. App. R. 293.
(2) 43 U. C. Q. B. 111.
(3) 42 U. C. Q. B. 141.
(4) 4 Ont. App. R. 96.
(5) 4 Ont. App. R. 103.
(6) 5 Ont. App. R. 87.

after consideration of the reason there given, I am not prepared to dissent. I agree that the appeal should be allowed, and the rule made absolute.

FOURNIER, J. concurred.

HENRY, J.:

I concur in that judgment. I am certainly convinced that the Legislature did not intend to include mutual insurance companies.

TASCHEREAU, J. concurred.

GWYNNE, J:

For the reasons given at large in my judgment in *The Citizens Insurance Company* v. *Parsons*, I am of opinion that this appeal should be allowed. I am of opinion, for the reasons already given in the case above referred to, that the *Fire Insurance Act of* 1876, *Ontario*, was *ultra vires* of the Provincial Legislature. I entirely agree, however, with the judgment of the Court of Appeal of *Ontario* in *Ballagh* v. *The Royal Mutual Insurance Company* to the effect that (assuming the Local Legislature to have had jurisdiction to pass that Act) it is difficult to conceive it possible that the Legislature intended by the language used in the Act to repeal or annul the plain provisions respecting mutual insurance companies, so precisely enacted in the *Mutual Fire Insurance Companies Acts*, and that therefore the Courts should not construe the Act of 1876 as repealing or annulling any of such provisions. But I confess that, to my mind, it is easier to construe the Act of 1876 as intended to apply to mutual insurance companies conducting the business of fire insurance purely upon the mutual principle of indemnifying each other by contributions among themselves, over which companies the Local Legislatures might assert jurisdic-

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tion equally as to proprietory or stock insurance companies insuring for cash premiums paid to them, as a matter of business and for profit, over which species of insurance being a branch of trade, they had, in my opinion, no jurisdiction whatever, than it is to give to the language of the Act of 1876 the effect of wholly perverting the operation of a contract to the terms of which the respective parties thereto had mutually agreed, so as to enable one of the parties thereto, who had violated all the terms of the contract, to recover against the other who had violated none of them, and although it was the express agreement of the party violating the terms that in such case he should have no claim whatever against the other, but that such other should in that case be released from all liability. But *quot homines tot sententiæ.*

Upon the settlement of the minutes of the order in appeal the question arose as to whether the court had held the action prematurely brought, and the court intimated that they were of opinion that the appellants under the policy were entitled to three months from the date of the furnishing of the claim papers before being subject to an action, and that therefore the action had been prematurely brought.

Appeal allowed with costs.

Solicitors for appellants: *Guthrie, Watt & Cutten.*

Solicitors for respondent: *Bowlby, Colquhoun & Clement.*