THE HOME LIFE ASSOCIATION OF CANADA (DEFENDANT)..... } APPELLANT;

AND

ELEANOR MARION RANDALL (PLAINTIFF)..... } RESPONDENT.

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*Oct. 27.
*Nov. 29.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action—Condition precedent—Allegation of performance—Burden of proof—Waiver—Insurance policy.

Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Chief Justice Armour at the trial in favour of the plaintiff.

The facts of the case are fully set out in the judgment of the court.

Osler Q.C. and *Hoskin Q.C.* for the appellant.

Watson Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The respondent is the widow of Andrew Blackston Randall.

On the 20th of October, 1896, the appellants issued a policy duly executed under the corporate seal of the appellants and under the hand of their president and managing director assuring the life of the respondent's husband for the sum of $2,000 to be paid in case of death to the respondent if she should survive, and otherwise to the personal representatives of the assured.

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

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The contract of insurance entered into by the appellants is set forth in the body of the policy as follows:

In consideration of the written and printed application for this policy by Andrew Blackston Randall, of Grimsby, Province of Ontario, in the Dominion of Canada, and the answers and statements made by and on behalf of the applicant herein, which form a part of this contract, and the agreement on the part of the said applicant to accept the conditions and rules indorsed hereon and the conditions contained herein as a part of this contract between said association and himself, hereby constitutes the said applicant a benefit member of said association, *and agrees in ninety days after there shall have been furnished to said association satisfactory proof of a valid claim under this contract, consequent upon the death of said member from any cause within the meaning of this contract, to pay out of the death fund of the association*, and out of any money realised from premium calls to be made for that purpose, to Eleanor Marion Randall (wife) if living, otherwise to the executors or administrators of said member, the sum of two thousand dollars.

A number of conditions were indorsed on the policy two of which must be specially referred to The 13th condition was in these words.

An action to enforce the obligations of a policy may be validly taken in any court of competent jurisdiction in the province wherein the policy holder resides, or last resided before his decease, but no action, suit or claim shall be taken, brought or made upon any policy after the expiration of one year from the death of such member, without reference to the time of furnishing proofs of death, and such lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding.

The 19th condition was as follows:

Death of the person insured from consumption, bronchitis, or any chronic pulmonary affection or from cancer, within one year from the date of the policy issued to the assured, or from the date of any revival of such policy, is a risk not contemplated or covered by the contract in such policy, and in such event the association shall have the right to cancel such policy and to return to the legal representative, or payee designated in such policy, the sum of all payments made thereon on account of Mortuary and Reserve Funds, which sum shall be accepted in full and complete settlement of all liability of said association under the contract contained in such policy.

The sum of $28.85 was duly paid by the assured to the appellants by way of premiums, or as it is called

in the rules of the appellant association, on account of "Mortuary and Reserve Funds," being all that was due on that account according to the terms of the policy up to the date of the death of the assured.

The assured, Andrew Blackston Randall, died on the 16th of July, 1897.

The 14th condition indorsed on the policy embodies the requirements as to proofs of death and is thus expressed:

14. (26) Before the payment of this policy, after the death of the member, proofs of death must be furnished, properly verified by statutory declaration on blanks furnished by the association for the purpose, and shall include: (1) A statement by the claimant or claimants. (2) A statement from each physician who attended deceased within three years before death. (3) A statement from a responsible householder who knew deceased. (4) A statement from the undertaker. (5) A statement from the clergyman where one officiates. (6) A copy of the verdict and of the evidence upon which it is based, duly certified wherever an inquest has been held. Also a certified copy, under seal of the proper court, of the letters of administration of the estate of the deceased, if he should die intestate, or of letters probate should he die leaving a will, or of letters of guardianship, or other instruments by virtue of or under which the claimant claims to be entitled, and such other reasonable proof as may be required by the association, and tender to the association of this policy at its head office with a proper release hereon indorsed of all claims hereunder, executed by the party entitled to receive the benefit thereof, or satisfactory proof of the loss or destruction of this policy, accompanied by a release duly executed by the person or persons entitled as aforesaid.

On the 7th of August, 1897, less than a month after the death of the assured, the respondent furnished and delivered to the appellants as proof of loss, five papers.

The first of these papers was a statutory declaration by the respondent herself made on the 4th of August, 1897, in which after describing herself as the widow of the assured and stating the death of her husband, she in the third paragaph thus states the cause of death:

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I was in constant attendance upon my said deceased husband, for several days before his death, and the said deceased did not die by his own hand but death was caused by phlebitis and tubercolosis caused by an attack of pneumonia as I am informed by his medical attendant and verily believe.

The second of these proofs was the statutory declaration of Dr. Milward, a physician and surgeon practising in the Village of Grimsby (where the assured lived and died) and who had been the medical attendant of the deceased in his last illness — who declares as follows:

(1) I was personally acquainted with the said Andrew Blackston Randall of the said Village of Grimsby, who was seen and attended in his last illness by me for the period of three and a half months preceding the sixteenth day of July, 1897, when he died at the said Village of Grimsby.

(2) I saw the said deceased Andrew Blackston Randall after his death and he did not die by his own hands but that death was caused I have no doubt by tuberculosis caused by an attack of pneumonia, in January last, 1897, and death hastened by phlebitis the large veins of both lower limbs being badly affected.

There was also included in the proofs the declaration of Rev. John Muir, a minister of the Presbyterian Church of Canada, who assisted at the funeral of the deceased and who identified him as the person assured in the policy.

James C. Martell, the undertaker, who conducted the funeral of the deceased also makes a declaration in which he states the death and funeral, and that he had read the declarations of Mrs. Randall and Dr. Millward and believes them to "contain a true statement of the facts."

Samuel E. Mabey, a householder in the Village of Grimsby, states in his declaration that he had known deceased for thirty years, and that he had read the declaration of Dr. Millward and believed the said declaration to contain a true statement of the facts and of the cause of the death of the assured, and that

he had also read the declaration of the respondent which he believed also to contain a true statement of facts.

No proofs of loss other than those stated were ever presented to the appellants by the respondent or by any one on her behalf.

The appellants refusing to pay the amount of the insurance money and disputing their liability to do so, the respondent on the 11th of December, 1897, brought her action on the policy to recover the amount insured. In the statement of claim the respondent states the terms of the policy to have been to pay "in ninety days after there should have been furnished to the defendants proof of a claim under the contract contained in such policy consequent upon the death of the said Andrew Blackston Randall." The statement of claim then proceeds to allege the death of the assured, at the date already mentioned, and then the fourth paragraph alleges compliance with all conditions as well that relating to proofs of loss as others in the following terms:

The plaintiff duly furnished the defendants proof of the death of her said husband and of a claim under the said contract and policy on the 7th day of August, 1897, and all conditions were performed, all things happened and all times elapsed necessary to entitle the plaintiff to a performance by the defendants of their said agreement and to be paid the said sum of $2,000, yet the defendants have not paid the same or any part thereof.

By the statement of defence the appellants in the second paragraph put the respondent to proof of the allegations of the statement of claim. This second paragraph is as follows:

The defendants admit the allegations contained in paragraph 1 of the plaintiff's statement of claim, but deny the allegations contained in the other paragraphs thereof and put the plaintiff to the strict proof thereof.

The defence further set up amongst other defences that the assured had died of consumption, and that

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therefore under the 19th condition no cause of action arose.

Issue was joined by the respondent on this defence.

A few days after the respondent's action was commenced the appellants instituted a cross action to have the policy delivered up to be cancelled, and had delivered their statement of claim when an order was made by the Master in Chambers consolidating the two actions.

The trial took place before the Chief Justice of the Queen's Bench Division at St. Catharines, on the 30th of May, 1898, without a jury, when judgment was pronounced for the respondent for the amount sued for, without costs.

From this judgment there was an appeal to the Court of Appeal, by which court the judgment was affirmed, the learned judges all concurring in the decision.

The learned Chief Justice of the Queen's Bench Division, who presided at the trial, seems to have considered that the burden of proof in respect of all the issues raised by the pleadings was on the appellants. This view appears also to have been taken by some of the learned judges in the Court of Appeal. The Chief Justice of Ontario, however, expressed a clear opinion that there was an issue raising the question as to the sufficiency of the proofs of loss but that the appellants have waived their defence under it. The learned Chief Justice in his judgment thus expresses himself:

> It was not in my opinion a matter of defence that satisfactory proofs of a valid claim were not presented, but it was something to be proved by the plaintiff before any liability attached ; but if the company were willing to waive that requirement, it was open, and I think creditable to them to do so, for it is a very harsh condition to insert in a policy of insurance intended as a provision for the family of the party assuring.

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If I could see that the defence referred to had been in fact waived I might agree to this, but as I shall more fully state hereafter I fail to see any waiver which would support the view of the Chief Justice.

Mr. Justice Maclennan's judgment proceeded upon the omission of the appellants to set up in their statement of defence any objection to the non-delivery of sufficient proofs of loss. In this I entirely differ from him. Mr. Justice Maclennan however did not think there was any waiver at the trial, for he distinctly says the contrary ;

> In this case the point was raised for the first time on the argument before the learned Chief Justice at the conclusion of the evidence, and I think he very properly gave no effect to it.

Mr. Justice Osler treats the case as though the only question raised at the trial was that upon the evidence as to the actual cause of death.

Upon the record before the learned trial judge it was clearly an issue whether ninety days before the commencement of the action the respondent had furnished to the appellants "satisfactory proof of a valid claim under the contract."

The course of pleading has now very much departed from the old forms of common law pleadings; substantially however the rules remain the same. *Probata secundum allegata* is just as much the rule as it ever was. There can be no doubt upon the plain words of the policy that delivery of proofs of a valid cause of death was an essential condition precedent which it was incumbent on the plaintiff in the action to establish both in pleading and in proof, and it was incumbent on her to shew that she had ninety days before action furnished the required proof. This requirement as to pleading was sufficiently complied with by the allegation contained in the 4th section of her pleading that she had duly furnished to the defendants proof of

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the death of her husband and of a claim under the contract and policy and by the further general allegation that all conditions were performed, all things happened and all times elapsed necessary to entitle the plaintiff to be paid the sum assured.

Indeed without any reference at all to the furnishing of proofs of loss, the general mode of pleading would have been sufficient, and if it had been adopted the respondent would nevertheless have had to make out her case by proof of the performance of the conditions. Under the old rule of pleading which prevailed before the Common Law Procedure Act, specific allegations of performance of conditions precedent were required. This was altered by that Act which permitted a general allegation of performance to be substituted for the former more precise mode of pleading. And this, as I understand, must still remain the law for under the Ontario Judicature Act there has been no alteration in the rules of pleading as there has been in England where it is not now required to allege even in general terms any performance of conditions precedent, such an allegation being implied. English Order 19 Rule 14; Odgers on Pleading (3 ed.) p. 81; Bullen & Leake (5 ed.) p. 188. The rule however remains as it always was, that performance of conditions precedent to the defendants' liability must be proved by the plaintiff.

There is not now nor was there ever any rule requiring the defendant to set up a non-performance of conditions precedent.

It is plain, therefore, that at the trial supposing there to have been no consent or waiver or "putting aside" of a most substantial defence on the part of the appellants they were entitled to insist (as they did in fact insist) that the respondent should prove that ninety days before action brought she had delivered proofs

of a valid claim under the policy. The appellants by their pleading in defence sufficiently put this question in issue by the second paragraph denying the allegations of the respondent and putting her to "strict proof thereof." Even if there had not been this denial but the appellant had allowed the averment to pass *sub silentio* the respondent would still have been obliged to establish that she duly furnished proofs of loss for the rules under the Ontario Judicature Act, in this respect again differing from the English Act (Order 19, Rule 13; Odgers on Pleading, (3 ed.) p. 131,) provide that all allegations not specifically admitted shall be taken as denied. (Con. Rule 272.)

Then, how did the respondent perform this obligation which was thus cast upon her? She proved that she had furnished proofs of loss showing the death of the assured but proofs which upon their face necessarily defeated her action inasmuch as they showed that the deceased had died within nine months from the date of the policy from consumption, a case in which the 19th condition expressly provides the appellants shall not be liable, the words of that condition being that "death from consumption within one year from the date of the policy * * is a risk not contemplated or covered by the contract in such policy."

The question of waiver is next to be considered. The improbability of any such concession to the respondent in an action so stoutly contested as this has been is very considerable when we recall a few dates which shew that this was not a mere dilatory defence which could have been avoided by dismissing the action, paying costs and delivering new proofs of loss. The assured died on the 16th of July, 1897, the trial took place on the 30th of May, 1898; had the

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action then been dismissed and new proof immediately furnished, no cause of action would have arisen until the 28th of August, 1898. Then an action brought at that date would have been too late for it would have been barred by the 13th condition which expressly provides

> that no action, suit or claim shall be taken, brought or made upon any policy after the expiration of one year from the death of such member without reference to the time of furnishing proofs of death, and such lapse of time shall be conclusive to bar any recovery hereon.

It thus appears that the defence alleged to have been waived was one going to the root of the action, one which must have been conclusive if any conditions stipulated for by assurance companies can be binding on those who contract with them.

Then if there was any effective waiver it must, in the face of the positive denials of the counsel for the appellants who at this bar most strenuously disclaimed ever having had any intention of abandoning the defence, be shewn from something appearing on the face of the printed record before us. It was manifestly not conceded by counsel for the appellants in the Court of Appeal that there had been any waiver or we should not find two of the learned judges there dealing with the point, whilst one of them (Mr. Justice Maclennan) expressly says the point was raised at the trial for the first time at the conclusion of the evidence. In order to ascertain the true state of facts as to the waiver we have most carefully scrutinised the report contained in the printed case of what took place at the trial, but we find nothing indicating that counsel for the appellants agreed to anything or said anything which could be considered as an abandonment of the defence in question.

At the conclusion of the evidence the learned Chief Justice addressing counsel said: " What do you say

as to the defence you have made out, Mr. Osler?" The learned counsel answers: "We say, my lord, that under the terms of the policy it is not a covenant to pay at death but a covenant upon proof of a valid claim under this contract consequent upon death within the meaning of this contract."

This I construe as counsel before us contended it should be construed as expressly insisting upon the defence.

Then again the counsel repeats: "I say our contract is not at large, death and then a condition, but our contract is a payment under the circumstances covered by the contract." Further Mr. Osler is reported as again urging the same defence in these words; "We submit that everything shews that the suggested kick —no such thing is proved—is a mere afterthought, a mere method by which they seek to avoid the condition of the policy upon which we rest, made out in fact by their own proofs. They are bound to give us the proofs and bound to give us the true proofs; they cannot be heard to say 'These are not the true proofs,' so we submit our case under the policy and under the contract is made out."

On the whole it does not appear that there was any waiver but so far from it that the defence was insisted upon by counsel but overruled by the learned Chief Justice though for what reason does not distinctly appear. This seems to have been the view of Mr. Justice Maclennan and we think it entirely right.

Had we been of a different opinion as regards the point already considered it is not probable that we could have affirmed the judgment under appeal. It is true that the question as to the cause of death is entirely one of fact and that there was contradictory expert evidence but having regard to the deliberate statement in the declaration of the medical attendant,

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the absence of any attempt to explain and correct this until the trial, and other surrounding circumstances, we are all of opinion that it would have been very difficult to come to any other conclusion than one at variance with the finding of the learned Chief Justice. And we should not have been precluded from entering upon an examination of the evidence upon this head by the rule that a second court of appeal will not interfere with the concurrent finding of two preceding courts on a question of fact, a rule well established and often acted upon here as well as in the Privy Council, and also in some late cases in the Supreme Court of the United States (1).

In order to apply the rule referred to it must appear however that the question of evidence has undergone consideration in both the court of first instance and the first court of appeal. That does not appear to have been the case since the learned judges of the Court of Appeal did not deal with the question of evidence but decided on other grounds. We are therefore in the position as regards this question of a first court of appeal and as the court was in the case of *Jones* v. *Hough* (2) which authority establishes generally the right of an appellant if the question is open to have the evidence taken on a trial without a jury reviewed on appeal.

If it all depended on the credit to be given to witnesses I should be of the same opinion as Mr. Justice Osler, but it is not a case altogether dependent on such consideration, but rather on the inferences to be drawn from surrounding facts not disputed and from documents, in other words a question of circum-

(1) See cases collected, Holmsted & Langton's Judicature Act, 2 ed. pp. 46, 47, 48; also *Stuart* v. *Hayden*, 169 U. S. R. 1; *Dravo* v. *Fabel*, 132 U. S. R. 487; *Baker* v. *Cummings*, 169 U. S. R. 189; *Towson* v. *Moore*, 173 U. S. R. 17.

(2) 5 Ex. Div. 115 in app.

stantial evidence complicated with the opinions of experts. Although all my learned brothers agree on this view, we decide the appeal upon the first point. The judgment must be reversed and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Hoskin, Ogden & Hoskin.*

Solicitor for the respondent: *E. A. Lancaster.*

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