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*Nov. 5.
*Nov. 13.

H. P. ECKARDT & CO., (PLAINTIFFS)....APPELLANTS;

AND

THE LANCASHIRE INSURANCE CO., (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Statutory conditions—Variations—Co-insurance.

The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent of its value, will not be pronounced unjust and unreasonable within the meaning of sec. 115 of the Ontario Insurance Act (R. S. O. [1887] ch. 167.)

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendant company.

The question for decision of the appeal is stated in the above head-note and in the judgment of the court.

Lash Q.C. for the appellants. The court must decide, from all the circumstances whether or not the condition is just and reasonable. See *Smith* v. *City of London Ins. Co.* (3); *May* v. *Standard Ins. Co.* (4).

The condition is eminently unreasonable. *McKay* v. *Norwich Union Ins. Co.* (5); *Graham* v. *Ontario Mutual Ins. Co.* (6).

Creelman Q.C. and *MacInnes* for the respondent.

The judgment of the court was delivered by:

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

(1) 27 Ont. App. R. 373.
(2) 29 O. R. 695.
(3) 14 Ont. App. R. 328; 15 Can. S. C. R. 69.
(4) 5 Ont. App. R. 605.
(5) 27 O. R. 251.
(6) 14 O. R. 358.

GWYNNE J.—The respondent, being a fire insurance company, doing business in the Province of Ontario, has two forms of printed policies in use, both framed in the form prescribed by the Ontario Insurance Act, (ch 167, R. S. O. 1887) the one being for insurance with the clause known as the "co-insurance" clause and the other not having such clause. The premium charged in the case of insurance effected on a policy having the clause is twenty per cent less than that charged on insurance in the other form. Parties insuring may select in which form a policy shall be entered into with them. Now in section 114 of the above Act, it is enacted that :

> The conditions set forth in this section shall as against the insurers be deemed to be part of every contract whether sealed, written or oral of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein or in transit therefrom or thereto and shall be printed on every such policy with the heading *statutory conditions;* and no stipulation to the contrary or providing for any variation, addition or omission shall be binding on the assured unless evidenced in the manner prescribed by sections 115 and 116.

Upon the second of January, 1896, the respondent entered into a policy with the plaintiffs which contained the *co-insurance* clause under the heading of "variations in *conditions*" as prescribed by the Act and in every particular in the precise manner prescribed by the sections 115 and 116.

Upon this clause being so introduced into the policy it became part of the contract of insurance contained in the policy to the same extent precisely as the statutory conditions indorsed on the policy would have been if no alteration had been made therein.

It is quite unimportant whether the alteration so introduced into the contract was of the character of a variation in any particular statutory condition or an addition to the statutory conditions, and the clause,

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having been introduced into the contract of insurance in the precise manner prescribed by the Act, became part of the contract, unless it should be pronounced to be unjust and unreasonable by the court or judge before whom a question should be tried relating thereto.

The clause then being so introduced into the policy, if it should be pronounced to be unjust and unreasonable, the effect would be that either the policy contained no contract or, as the appellants contend, one subject to the statutory conditions only, and so the plaintiffs, the now appellants, could recover a sum largely in excess of the amount upon which they had paid a premium upon a policy which they had held for sixteen months without objection.

The clause objected to has been in use in fire insurance companies in several countries on the continent of Europe, in England and in the United States for upwards of fifty years and is daily coming more into use and we can see no substantial reason or suggestion why it should be pronounced to be unjust or unreasonable.

There is no foundation for the contention that every variation from a statutory condition or addition thereto should be, *primâ facie*, held to be unjust and unreasonable.

In fine, with the reasoning of the learned Chief Justice Meredith, who tried the case, we entirely concur.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Blake, Lash & Cassells.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*