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*Oct. 23, 24.
*Nov. 19.

FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... } APPELLANT;

AND

D. McPHERSON AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Fire insurance—Warranty clause—Variations of statutory conditions—Want of proper form—The Alberta Insurance Act, R.S.A. (1922) c. 171, s. 70.

A fire insurance policy on railway ties issued by the appellant company contained, immediately after the words descriptive of the subject of insurance and its location, a clause reading "warranted by the assured that the property insured is not within 1,000 feet of any scrub or brush nor within 50 feet of any railway track or siding."

Held that this clause was a variation of the statutory condition and, not being indicated as such in the manner required by s. 70 of the Alberta Insurance Act, R.S.A. (1922) c. 171, was ineffective against the insured. The differences between the wording of this clause and the one in *The W. M. Mackay Co.* v. *The British America Assur. Co.* ([1923] S.C.R. 335) are of form merely and not of substance.

Judgment of the Appellate Division ([1924] 2 W.W.R. 1019) affirmed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge (2) and maintaining the respondents' action to recover under a fire insurance policy.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

J. A. Mann K.C. for the appellant.

R. B. Bennett K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The defendants appeal from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of Ives J. holding them liable on a fire insurance policy issued to the plaintiffs.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] 2 W.W.R. 1019. (2) [1924] 2 W.W.R. 737.

The sole defence relied upon is the admitted fact that, contrary to a provision of the policy, the property insured was situated within 1,000 feet of some scrub or bush and within fifty feet of a railway track or siding.

Attached to and forming part of the policy was the following wording:

> On ties, the property of the assured, or sold but not delivered or for which they may be responsible in case of loss or damage by fire, only while piled in their cleared yard on the west bank of the McLeod river, on timber berth No. 1330 being 8½ miles south of Hargwen station, Canadian National Railway (connected by assured's own railway) in the province of Alberta.
>
> Warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

The appellants assert that the clause

> warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding

formed part of the description of the property insured, or, if not, that it was a warranty of the existence of a certain state of affairs surrounding the insured property at the date of issue of the policy and that in either case its untruth prevented the risk attaching.

The respondents maintain that this clause is inoperative:

(*a*) because it was surreptitiously introduced into the policy by one Slessor, who, they allege, was an agent of the insurers, after the policy had been delivered to them and without their assent or knowledge; the issue on this branch of the case was the agency of Slessor for the insurers;

(*b*) because it is a variation of or an addition to the statutory conditions imposed by the *Alberta Insurance Act* (R.S.A. c. 17, s. 69, s.s. 5) and was not printed as prescribed by s. 70 which reads as follows:

> 70. If the insurer desires to vary the statutory conditions or to omit any of them, or to add any new condition, there shall be added immediately after such conditions words to the following effect, which with any such variation, addition or reference to omissions, shall be printed in conspicuous type and in red ink:
>
> "Variations in conditions"
>
> "This policy is issued on the above statutory conditions, with the following variations, omissions and additions, which are, by virtue of *The Alberta Insurance Act*, in force so far only as they shall be held to be just and reasonable to be exacted by the company;"

the warranty clause was not printed in red ink nor was it preceded by the words "Variations in conditions," or any equivalent.

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The Appellate Division upheld the latter contention following the decision of this court in *Mackay* v. *British America Assurance Co.* (1).

Mr. Mann for the appellants very ably and ingeniously, but we think unsuccessfully, endeavoured to distinguish between the wording of the so-called warranty clause in *Mackay's Case* (1) and that now before us. In *Mackay's Case* (1) the clause in question read as follows:

> Warranted by the assured that a continuous clear space of 300 feet shall hereafter be maintained between the lumber hereby insured and any standing wood, brush or forest, or any saw mill or other special hazard.

This clause was separated in the policy from the description of the property and of its location by some intervening provisions. The clause now under consideration immediately follows what the respondents admit to be descriptive words of identification—the only description of the risk which the policy contains. The language of the clause in Mackay's policy was that a

> continuous clear space of 300 feet shall be maintained;

whereas in the policy now before us the term reads

> the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

Upon these differences Mr. Mann rests his submission that the clause with which we have now to deal should be treated either as descriptive or as a warranty not in the nature of a condition, notwithstanding the Mackay decision.

That the differences relied upon were of form merely and not of substance has, we think, been clearly shown by Mr. Justice Hyndman in his carefully prepared opinion. Identification of the goods insured was adequately made in the first paragraph of the policy. That paragraph contained a complete description. The purpose of the insertion of the warranty clause which followed it was to stipulate a term or condition of the risk attaching—and, as the appellants, we think properly, admitted, also of its continuing during the period of the policy. That such a "warranty" is an addition to the statutory conditions within the meaning of s. 71 is in our opinion concluded by *Mackay's Case* (1)—a decision which we would unhesitatingly re-affirm. The distinction between a condition imposed on the risk attach-

(1) [1923] S.C.R. 335.

ing or continuing and a proviso limiting the peril insured against (such as was dealt with in *Curtis's and Harvey (Canada) Ltd.* v. *North British and Mercantile Ins. Co.*) (1), was sufficiently indicated in the *Mackay Case* (2).

We are, therefore, of the opinion that the clause invoked is not binding on the assured under s.s. 5 of s. 69 of *The Alberta Insurance Act.*

It is unnecessary, in view of this conclusion, to pass upon the question of Slessor's agency.

IDINGTON J.—This appeal arises out of an action brought by the respondents against the appellant upon a policy of insurance in favour of the respondents as owners of certain railway ties.

There were attached to the said policy the following clauses amongst others:—

Assured: Messrs. McPherson and Quigley.

Seven thousand five hundred dollars on ties, the property of assured or sold but not delivered or for which they may be responsible in case of loss or damage by fire, only while piled in their cleared yard on the west bank of the McLeod river, on timber berth No. 1330 being 8½ miles miles south of Hargwen station, Canadian National Railway (connected by assured's own railway) in the province of Alberta.

Warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

The appellant set this up as a defence.

The learned trial judge and the Appellate Division for Alberta unanimously held that this warranty clause was a variation of or addition to the statutory conditions provided by the Alberta Insurance Act, R.S.A., c. 171, and by reason of its not being printed in red ink and otherwise in conformity with the relevant requirements of said statute as set forth in section 70 of said Act, it was, by section 71, null and void and hence no defence.

Said sections 70 and 71 are as follows:—

70. If the insurer desires to vary the statutory conditions or to omit any of them, or to add any new condition, there shall be added immediately after such conditions words to the following effect, which with any such variation, addition or reference to omissions, shall be printed in conspicuous type and in red ink:

"Variations in conditions"

"This policy is issued on the above statutory conditions, with the following variations, omissions and additions, which are, by virtue of *The*

(1) [1921] 1 A.C. 303. (2) [1923] S.C.R. 335.

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Alberta Insurance Act, in force so far only as they shall be held to be just and reasonable to be exacted by the company."

71. No such variation, omission or addition, unless the same is distinctly indicated and set forth in the manner above prescribed, shall be binding on the assured; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only.

In so holding the said courts adopted our ruling in the case of *Mackay* v. *The British America Assurance Company* (1), and I am of the decided opinion that they were right in so doing.

There is no reasonable ground for distinguishing the two cases.

There can be distinctions attempted, and often are, between any two decisions or cases, which look clever to those adopting them, but I submit the facts in this case render it a stronger case for the application of said statute than did those in the *Mackay Case* (1). There as here there was no written application by the assured. There was not in that case any such excuse for confusion of thought on the part of the assured such as likely to arise on the facts, as they existed in this case.

The insurer herein got the benefit of that, by the court holding that the broker was the agent of the insured and not the insurer.

I pass no legal opinion upon that aspect of this case for it is not necessary herein to do so, taking the view I do as to the applicability of the said section.

But the circumstances shew how necessary it is to bring home to the mind of the insured exactly what he is getting.

The distinction sought in argument to be made between this case and said *Mackay Case* (1) arising out of the fact that in this case there had been no examination by the insurer, whilst in that of the latter there had been, does not appeal to me.

If it were rendered an imperative duty by law for insurers to inspect before insuring whenever possible and practicable, there would be vastly fewer losses by fire. I need not elaborate that, for inspection or no inspection does not, to my mind, make any difference in law. All I mean to say is that the insurer inspecting is better entitled to due consideration if open to him in law, than is he who indulges

(1) [1923] S.C.R. 335.

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in the reckless gambling kind of insurance that so often prevails with some insurers.

The strictly legal aspect of the case is, however, all we have to deal with, and, having dealt with it so recently in the *Mackay Case* (1) I see no need for enlarging or repeating elaborate argument herein.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wallbridge, Henwood & Cairns.*

Solicitors for the respondents: *Milner, Matheson, Carr & Dafoe.*