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*Feb. 19, 20.
*May 6.

ROBERT SHEPARD AND THE MERCHANTS BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

AND

THE BRITISH DOMINIONS GENERAL INSURANCE CO. OF LONDON, ENGLAND (DEFENDANT) ..... RESPONDENT.

ROBERT SHEPARD AND THE MERCHANTS BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

AND

GLENS FALLS INSURANCE CO., OF GLENS FALLS, NEW YORK (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Insurance—Fire—Policy—Conditions—Notice of loss—Proofs of loss—Irregularity—Relief—Specified delay to begin action—Action premature—"The Fire Insurance Policy Act," R.S. Sask., 1909, c. 80, s. 2—"The Saskatchewan Insurance Act," Sask. S., 1915, c. 15 s. 86.

Insurance policies against fire were issued by the companies respondent on buildings owned by the appellant Shepard with loss, if any, payable to the appellant bank, assignee of a mortgage on the property. The buildings were subsequently destroyed by a fire occurring on the 1st or 2nd April, 1915, of which the agent of the bank informed the companies respondent. In the course of their investigation they suspected some incendiary origin and declined payment for a considerable period. The proofs of loss were furnished on the 29th February, 1916. The statutory condition No. 13 required that the assured should "forthwith" give notice in writing to the companies, and, "as soon afterwards as practicable," deliver a detailed account of the loss accompanied by a

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

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statutory declaration as to the truth of his statements. According to another condition, no action could be brought after the expiration of one year from the date of the loss. The statutory condition No. 17 also provided that "the loss shall not be payable until thirty days" in the case of one policy and sixty days in the case of the other policy "after completion of the proofs of loss." The present actions were commenced on the 22nd March, 1916, before the lapse of the required period, in order that they might be instituted within one year from the date of the fire.

Held, that this court should not interfere with the discretion exercised by the trial judge in deciding that the non-performance of condition No. 13 had been due to mistake and that relief should be granted to the assured under sec. 2 of "The Fire Insurance Policy Act."

Per Idington J.—As the notice was not given "forthwith after loss" and the proofs were not delivered as soon afterwards "as practicable," they cannot be regarded as made in compliance with the terms of the policy and, therefore, cannot be used to fix the time when the actions should be brought.

Per Anglin and Cassels JJ.—The proofs of loss became of value and were "completed" only when the trial court exercised its statutory power to give relief; and the effect of granting it was to put the assured in the same position for all purposes as if the proofs had been furnished as required by the statutory condition No. 13. Accordingly, the respective periods, prescribed by statutory condition No. 17, should be deemed to have elapsed and the loss under each of the policies to have been payable before the action upon it was begun.

Per Mignault J. (dissenting).—Sec. 2 of "The Fire Insurance Policy Act" did not give power to the courts to relieve against the requirements of statutory condition No. 17.

Judgment of the Court of Appeal (11 Sask. L.R. 259; 42 D.L.R. 746), reversed, Davies C.J. and Mignault J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial court, Newlands J. (2), and dismissing the plaintiff's actions with costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported

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

Travers Sweatman for the respondent.

(1) 11 Sask. L.R. 259; 42 D.L.R. 746; (1918) 2 W.W.R. 985.

(2) 10 Sask. L.R. 421; (1918) 1 W.W.R. 85.

THE CHIEF JUSTICE (dissenting).—Concurring as I do with the judgment of the Court of Appeal of Saskatchewan and with the reasons for that judgment stated by Mr. Justice Elwood J.A., concurred in by Chief Justice Haultain, I would dismiss these appeals with costs.

IDINGTON J.—These cases were argued together. The actions were brought to recover insurance moneys respectively due on policies assuring against fire and issued by the respondents respectively in September and October, 1912, to the appellant Shepard, providing in each case for the loss, if any, being payable to the appellant bank.

The only questions raised must turn upon the power of the court before which the actions were tried when applied to the relevant facts in evidence, under and pursuant to sec. 2 of "The Fire Insurance Policy Act" of Saskatchewan (R.S. Sask. ch. 80), which reads as follows:—

> Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or were, after a statement or proof of loss has been given in good faith by, or on behalf of, the assured in pursuance of any proviso or condition of such contract the company, through its agents or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended supplemental statement or proof as the case may be shall in any such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

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The fire in question destroyed, on the first or second of April, 1915, the entire properties insured. The agent of said bank, on or about the fifth of said April, informed the local firm of insurance agents of the said insurance companies, of the said loss, and asked them if there was anything further to be done by him in regard thereto, and was told not.

The insurance agents at once communicated by wire and letter with their respective principals (now respondents herein) informing them of the loss.

That resulted in the said companies intrusting jointly the investigation and adjustment of the loss to Patterson & Waugh, a firm of professional adjusters in Winnipeg, with local agents in Saskatchewan and Alberta.

That firm and the companies turned the matter of investigation and adjustment over to one O'Fallen, a local agent of said firm at Saskatoon, who went on or about the 8th of April to Margo, where the fire occurred and Shepard lived, and spent a day there engaged in the necessary work of investigation.

On that occasion Shepard met him and answered all his inquiries and gave him all the information he could.

In the course of doing so there were some things said by Shepard which led to a suspicion of some incendiary origin being the cause of the fire. This led in turn to the matter of the origin of the fire being reported to the Superintendent of Insurance for the Province of Saskatchewan, who took some part in making inquiries. Another officer, called a fire commissioner, also took part.

O'Fallen, on his visit to Shepard and the scene of the fire at Margo, took from him, in order that such investigation as his firm might desire might "be as

full and complete as possible" a document agreeing that everything done or demand made theretofore or thereafter should not be claimed as a waiver on the part of the insurance companies of any of the terms or conditions of their policies.

This only, to my mind, concerns us now as an indication of the thorough nature of the investigation to be made and which, if so made, would reduce the need for the usual formal notice of loss and proof thereof to something utterly superfluous.

Yet it is alleged by respondents that because of the assured's non-compliance with the literal terms of the condition requiring same, his right and those of his co-appellant have been destroyed.

Hence the questions raised as to the power of the court to give the relief provided by the section above quoted. To estimate properly the weight to be attached to this condition under the foregoing circumstances and many others which appear in evidence, let us consider it as gravely as we can.

Condition No. 12 says:—

Proof of loss must be made by the assured, although the loss be payable to a third party.

Condition No. 13, so far as involved herein, is as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith, after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration, declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused by his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

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6. The place where the property insured, if movable, was deposited at the time of the fire.

Unless for approximately fixing a date and fact, or as a trap, the importance of the notice being in writing is not of any great value, when assuredly there was not only from the bank but from Shepard also oral notice. And the document O'Fallen got him to sign contained all the notice required by the said requirement in subsection (a) of the condition need contain.

Indeed I submit that in face of such document the plea of want of notice (a) seems unfounded if not improper.

As to the requirement in (b), there is not the slightest pretence that the oral statement given by Shepard was incorrect or wanting in particularity and doubtless was noted in writing by O'Fallen.

Such pleas under such circumstances formerly were so common that legislation was found necessary to deal with them.

The requirement by sub-section (c) of a statutory declaration is a more reasonable requirement and its absence under some circumstances might become a very important omission.

Its absence in this particular case is reduced in importance almost to nothing; for the respondents were by means of legal assistance placed by law at their disposal enabled to make their investigation thorough, indeed, much more thorough than any declarations such as required by above conditions.

Not a word is adduced in evidence to indicate that the oral account given as stated failed to supply what items Nos. 1, 2 and 3 require, or were untrue.

The evidence does not shew that there was no other insurance and the information was given by the appellant bank as to that and other liens and encum-

brances on the subject of the insurance in answer to inquiries of respondents' agents.

More than that, the respondents on the trial produced through their cross-examination of appellants' witnesses, very much illuminating correspondence which, taken with that adduced by the appellants, leaves a rather unpleasant impression as to the conduct of respondents or their representatives in relation to the very probable reason for appellant's non-compliance with the condition I am dealing with.

I do not intend to elaborate or write at length upon all that which a perusal of the entire evidence suggests.

It is clear, however, that in fact the bank was the party most deeply interested in the loss and the party most urgent and insistent upon the inquiry coming to a decision or close and evidently was lulled into acquiescence of delay by such representation as reported in the letter from its manager at Saskatoon, to him managing at the agency in Edmonton as follows:—

> They ask for a full settlement of the bank's claim, but it will not be necessary to make the customary affidavit.

The appellant Shepard had enlisted, in July following the fire, to go to the front. Supposing he had reached there shortly after so enlisting, then been killed or taken prisoner, and the respondents' construction of the law being upheld that the bank could not make proof, could any court be got to hold that it could not give relief under said section? I hope not.

Yet wherein does this contention set up differ? It is idle to answer this as counsel did that his agent could make it. No agent in all likelihood ever would have been left to look after what in fact had got to be looked on as the bank's own business.

It is clear to my mind that under the circumstances in evidence in this case the failure to put in the

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necessary proof in conformity with the condition was one of those mistakes from the consequences whereof, whatever they may be, the statute enabled relief to be given.

And as to the pretension that the giving such proofs in February changes the issue to one of not bringing either action within given delays, I agree with Mr. Justice Newlands' view that as the giving such proofs at that time availed nothing, it must be treated as if non-existent.

I am of the opinion that the power given by the statute covers a defective proof of any kind even if oral or written, and that there is no room for the contention of the respondents' counsel herein and I need not perhaps examine the statute microscopically.

I may observe that, in looking at the authorities cited in respondents' factum, I find *Anderson* v. *Saugeen Mutual Fire Ins. Co. of Mount Forest* (1), contains, to my mind, a decision by the late Chancellor followed by an able judgment of the late Mr. Justice Ferguson, which, in principle, maintains when analyzed the conclusion I have reached so far as the bank is concerned, only by another road.

There the condition No. 12 was held as it reads that the assured, being the mortgagor, must make the proof; and hence the usual clause giving the mortgagee entitled to the insurance the right to recover, though the mortgagor had lost his remedy, by reason of sixty days not elapsing from the time when prescribed before expiration of the year.

There the learned judges acted upon the said clause. Here, though the clause does not exist, the learned trial judge was right in acting by virtue of the statute in an analogous situation.

(1) 18 O. R. 355.

If the Glens Falls Company respondent instead of denying everything and pleading as it did, had admitted fully the validity of the declaration in February, 1916, as a fulfilment of the conditions 12 and 13, it might have presented an arguable objection based on the condition respecting limit of time to bring an action. That limit means from a valid delivery of proof, which in the case in question never took place and had to be substituted by the relief which the learned trial judge gave.

In view of the failure to present a tittle of evidence relative to the charge of arson set up in the pleading, it is to be hoped the law, as claimed to be expressed in the *Juridini* v. *National British and Irish Millers Ins. Co.* (1), is, as argued, applicable to such a case, but I have not had time to form an opinion founded thereon which, in my view herein, is unnecessary.

I think the appeal should be allowed with costs throughout and the judgment of the learned trial judge be restored. But there should be no costs allowed for printing an appeal case that so grossly offends the rules of this court as it does.

ANGLIN J.—The facts of these cases sufficiently appear in the judgments of the Court of Appeal for Saskatchewan (2).

By sec. 2 of "The Fire Insurance Policy Act" (R.S. Sask. ch. 80), the court is under certain circumstances enabled to decline to give effect to a defence based on an "objection to the sufficiency of (the) statement of proof" of loss required by statutory condition No. 13. In the present case proofs of loss were furnished on the 29th of February, 1916, the loss

(1) [1915] A.C. 499.

(2) 11 Sask. L.R. 259; 42 D.L.R. 746.

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having occurred on the night of the 1st-2nd of April, 1915. The only defence which, in my opinion, need be seriously considered on this appeal is based on the 17th statutory condition providing that "the loss shall not be payable until 60 (in the case of the Glens Falls policy, 30) days after completion of the proofs of loss * * *"

These actions were begun on the 22nd of March, 1916. Under statutory condition No. 22, the last day for commencing them would have been the first or the second of April, 1916.

The learned trial judge (1) took the view that upon the facts in evidence the insured was entitled to be excused from strict compliance with condition 13 under the powers conferred by sec. 2 of the statute, and granted relief accordingly. The sufficiency of the case made to justify this course was not questioned by the Court of Appeal. The existence of the power itself is undoubted (*Bell* v. *Hudson Bay Ins. Co.* (2); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (3)), and after carefully considering all the facts in evidence I am satisfied that the discretion exercised by the trial judge should not be interfered with.

But the majority of the appellate judges (Haultain C.J. and Elwood J.), in this reversing the learned trial judge, held that the power conferred by section 2 does not extend to relieving the insured from a disability created by the 17th statutory condition; and when the case is one of disability arising solely out of that condition I entirely concur in their view.

With great respect, however, I am of the opinion that there has been a misconception of the true nature of the defences in these actions based on condition No. 17.

(1) 10 Sask. L.R. 421. (2) 44 Can. S.C.R. 419.
(3) 44 Can. S.C.R. 40.

They are that the actions were prematurely brought because the period after the completion of proofs of loss which, under that condition, must elapse before action, had not in either case expired. Otherwise stated, the pleas are that the proofs of loss had been completed too late to permit of the actions being begun when they were. They, therefore, rest upon an "objection to the sufficiency of the statement of proof." The assumption of these pleas is that the proofs were completed when delivered to the companies on or about the 29th February. In the case of the British Dominions' policy, if the view taken by the Appellate Court is correct, the necessary result would be a forfeiture of the policy by reason of imperfect compliance with condition 13, since action could not have been brought more than 60 days after the 29th of February and yet within one year from the date of the loss as required by condition No. 22. In the case of the Glens Falls policy, however, if the delivery of the proofs on the 29th of February was a good delivery in compliance with that condition, action might have been brought on it after the lapse of the 30 days prescribed by condition 17 and yet before the expiry of the limitation of one year imposed by condition 22.

But the delivery of proofs on the 29th of February was not a compliance with the requirement of the 13th statutory condition prescribing that proofs of loss shall be made "as soon as practicable," and the companies declined to accept these proofs as sufficient for that reason. That is one of the defences in each of the records in these actions. The proofs of loss became of value and were "completed" only when the court exercised its statutory power to relieve against the failure to comply strictly with the 13th condition. That necessarily took place after the actions were

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brought. The effect of granting relief under sec. 2 of the "Insurance Act" was, in my opinion, to put the insured in the same position for all purposes as if proofs of loss had been furnished, as was required by the 13th statutory condition, "as soon as practicable afterwards," *i.e.*, after the giving of the notice in writing directed to be given "forthwith after loss," with the result that, treating the proofs as having been completed, *nunc pro tunc*, "as soon as practicable" after the loss, the respective periods prescribed by the 17th condition should be deemed to have elapsed and the loss under each of the policies to have been payable before the action upon it was begun. To hold otherwise would be to enable defendants to take advantage of their own wrong-doing since it was their misleading conduct that produced the situation which rendered it inequitable that they should be allowed to insist on anything resulting from the plaintiffs' non-compliance with the 13th statutory condition as a defence.

MIGNAULT J. (dissenting):—The same questions arise in both these cases, the point mainly argued being whether the actions of the appellants could be maintained in view of conditions 13 and 17 of the insurance policies, being statutory conditions of the Province of Saskatchewan.

These conditions read as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

6. The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claim, if required and if practicable, to procure books of account, and furnish invoices and other vouchers, to furnish copies of the written portion of all policies, and to exhibit for examination all the remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a justice of the peace, notary public, or commissioner for oaths, residing in the vicinity in which the fire happened, and not concerned in the loss, or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified.

17. The loss shall not be payable until sixty days (in the case of Glens Falls Co., this delay is 30 days, in that of the British Dominions Co. it is, as above indicated, sixty days) after the completion of the proof of loss, unless otherwise provided for by the contract of insurance.

Section 2 of "The Fire Insurance Policy Act," ch. 80, Revised Statutes of Saskatchewan, 1909, which has since been re-enacted as sec. 86 of "The Saskatchewan Insurance Act, 1915," is in the following terms:—

2. Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or where after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract the company through its agents or otherwise objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall in any of such cases be allowed as a discharge of the

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liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

The fire in question occurred on the 1st of April, 1915, and the proofs of loss, although dated the 29th February, 1916, were furnished, Mr. Allan stated, on the 1st of March, 1916. The actions were taken on the 22nd of March. Among other contentions made at the argument, the respondents claimed that condition 13 was not complied with; that even granting that the trial court could, under sec. 86 of "The Saskatchewan Insurance Act," treat the filing of the proofs of loss on the 1st March as a sufficient compliance with condition 13, the appellants were required by condition 17 to allow a delay of 30 days, in the case of the Glens Falls Company, and of 60 days, in the case of the British Dominions Company, to elapse before taking their action, and further that inasmuch as any action would be absolutely barred, under condition 22, on the 1st April, 1916, no action was possible on the 22nd March against the British Dominions Co., although the appellants, by waiting until the 31st March—and thus giving a full delay of 30 days for the the completion of the proofs of loss—might have taken an action against the Glens Falls Company, assuming that they could be relieved from non-compliance with condition 13.

The learned trial judge, Mr. Justice Newlands, relieved the appellants from the consequences of non-compliance with condition 13 in the following terms:—

I also find that the notice of loss and proofs of loss were not given according to the terms of the policy.

As plaintiffs have asked to be relieved under sec. 2 of the "Fire Insurance Policy Act," and as I am of the opinion that it was through mistake that the plaintiffs did not perform these conditions, I will relieve them from the consequences thereof.

Then as to the defence of the respondents that the actions were premature under condition 17, he said:—

This action was brought on the 22nd of March, less than thirty days after such formal notice and proofs were given. These were not given forthwith nor as soon afterwards as practicable, and were, therefore, not a compliance with the terms of the policy and as I cannot accept them as such, they cannot be used to fix the time when the action should be brought.

This judgment was set aside by the Court of Appeal, Mr. Justice Lamont dissenting.

I have carefully read all the correspondence filed by the parties, and I cannot help thinking that the appellants have only themselves to blame if they filed the proofs of loss at as late a date as the 1st March, 1916. Shepard was in the premises at the time of the fire, as he stated in his statutory declaration of the 29th of February, 1916, yet he took no steps whatever to claim the insurance, probably because no moneys thereunder would go to him. He subsequently enlisted in the Canadian Expeditionary Forces, but the other appellant, the Merchants Bank, located him with apparent ease at Regina when it became concerned about the furnishing of the proofs of loss. It is a matter of surprise that this concern only came to the bank about February 12th when its solicitors addressed a letter to Shepard at Margo, where he no longer was, inquiring whether he had sent in proofs of loss. The whole matter was in the hands of the bank's solicitors as early as October, 1915, and it must have been perfectly obvious to them that it would be necessary to take legal proceedings to recover the amount of insurance.

However, the learned trial judge, under the authority conferred by sec. 86 of "The Saskatchewan Insurance Act," relieved the appellants from the consequence of their failure to furnish notice and proofs of loss according to the terms of the policy. I am not inclined to interfere with the discretion of the learned judge. But I cannot see how this can deprive the respondents

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of the benefit of the delay for payment which must, under condition 17, run from the completion of the proofs of loss. The learned trial judge has not ordered —if indeed he could do so—that the proofs of loss furnished on March 1st be taken as having been given *nunc pro tunc*, but he says that these proofs were not given forthwith "nor as soon afterwards as practicable," and were not, therefore, a compliance with the terms of the policy, and as he could not accept them as such, they could be used to fix the time when the action should be brought. With all deference, I cannot concur in this reasoning, which would mean that when the assured has given notice and furnished proofs of loss several months after a fire, he could take his action the very next day, provided the judge was satisfied that, by reason of necessity, accident or mistake, the condition of the contract as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with. Indeed, the reasoning of the learned trial judge would lead to the consequence that the assured would be in a better, and the insurer in a worse, position when the proofs of loss have, as in the present case, been furnished several months after the fire, provided the assured can obtain the indulgence of the court as to the strict compliance with condition 13. I can find no authority in section 86 to dispense with the requirements of any condition of the contract, save that obliging the assured to give notice and proofs of loss to the insurer. It certainly does not allow me to disregard a condition granting a delay to the insurer to pay the loss insured against after proofs and particulars of loss have been furnished him by the assured. Even in this case the appellants could have given the Glens Falls Co. a delay of thirty days to pay the insurance without allowing a full year

to elapse before taking their action, while, with regard to the British Dominions Company, they furnished proofs of loss at a date when it was impossible to allow the company a delay of sixty days and take their action within the year. I cannot, upon due consideration, think that I can come to their assistance under section 86, and it is, therefore, my duty to give effect to condition 17 which has not been complied with.

I have carefully considered two previous decisions of this court in which a provision similar to section 86 was construed and applied.

In *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1), the question was whether sec. 2 of "The Manitoba Fire Insurance Act" applied to a condition of the insurance policy obliging every person entitled to make a claim "forthwith after loss to give notice in writing to the company," and it was decided that under this section the court could relieve the assured from non-compliance with this condition.

In *Bell Bros.* v. *The Hudson Bay Ins. Co.* (2), it was held that the N.W. Terr. Ord., 1903 (1st sess.), ch. 16, sec. 2, applied to non-compliance by the assured with conditions requiring prompt notice of loss to the company and obliging the assured, in making proofs of loss, to declare how the fire originated so far as he knew or believed.

While I am undoubtedly bound by these decisions so far as they go, I think, with all possible deference, that they should not be extended to a condition such as the one here in question giving to the insurer a certain delay to pay the loss after he has been furnished with notice and proofs of loss. If section 86 can be extended to such a condition, there would really

(1) 44 Can. S.C.R. 40. (2) 44 Can. S.C.R. 419.

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be no condition of the insurance contract that could not be brought under its provisions. This would virtually permit the court, in any case where strict compliance with the statutory conditions might appear inequitable, to remake the contract for the parties. I cannot agree that such a power is given to the court, and in declining to apply section 86 to condition 17 of these policies, so as to deprive the insurers of the delay therein stipulated, I do not believe that I am in any way in variance with these decisions so far as they go, for they are clearly distinguishable from the case under consideration.

It is, of course, conceivable that a case may arise where the insurer has himself fully investigated the cause of the fire and the damage thereby caused—and I think that was what had happened in the cases referred to—so that it would be unnecessary for the assured to furnish any proofs of loss under condition 13. In such an event, it might be difficult to determine the starting point of the delay mentioned in condition 17, so that it might not be reasonable to apply this condition as regards an insurer who has voluntarily undertaken such an investigation, thus implicitly relieving the insured from the duty incumbent on him under condition 13. But here the assured has himself furnished proofs of loss and the insurer has done nothing to free him from this obligation, so assuming that section 86 would permit the court to declare that there has been a sufficient compliance with condition 13, I cannot find any satisfactory reason for disallowing an objection based on condition 17 which clearly provides that the loss shall not be payable until the delay of thirty or sixty days has elapsed.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

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SHEPARD AND THE MERCHANTS BANK OF CANADA v. THE BRITISH DOMINIONS GENERAL INSURANCE CO. OF LONDON ENGLAND.

SHEPARD AND THE MERCHANTS BANK OF CANADA v. GLENS FALLS INSURANCE CO. OF GLENS FALLS NEW YORK.

Cassels J.

CASSELS J.—I have had the privilege of perusing the reasons of judgment of Mr. Justice Anglin. I concur entirely both in his reasons and his conclusions. If it were necessary for the decision of this case I would go further.

In my opinion, under the circumstances of this case, the proofs of loss were entirely dispensed with.

The companies took upon themselves, through the assistance of adjusters, to ascertain the amounts of the loss and dispensed with the proofs.

One cannot read the correspondence as I read it without coming to this conclusion.

Furthermore, it seems to me that as the defendants repudiate the whole contract on the ground of arson, they cannot avail themselves of the defences. I am not basing my opinion solely upon the allegation in the defence.

Before action the correspondence shews that the companies had pointed out as a reason why the settlement was not likely, viz., on account of arson. *Jureidini* v. *National British and Irish Millers Ins. Co.* (1) may be referred to.

Appeal allowed with costs.

Solicitors for the appellants: *Allan, Gordon & Gordon.*
Solicitors for the respondents: *McCraney, MacKenzie & Hutchinson.*

(1) (1915) A.C. 499.