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WILLIAM LOGAN (PLAINTIFF)...APPELLANT;

Feb. 19.

AND

May 17.

THE COMMERCIAL UNION IN-
SURANCE COMPANY (DEFEND- } RESPONDENTS.
ANTS) }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insurance against fire—Condition—Production of magistrate's certificate—Waiver of condition.

A policy of insurance against fire contained the following conditions :—

“The assured must procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

“No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N.S.”

The insured premises having been destroyed by fire he applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion, told the assured that he objected to the claim, as he “did not think it was a square loss.”

Held, affirming the judgment of the court below, that the non-production of the certificate, required by the above condition, pre-

*PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry and Gwynne JJ.

vented the assured from recovering on the policy.

Held also, that even if such condition could be waived without indorsement on the policy, the acts of the agent did not amount to a waiver.

Semble, that the condition could not be so waived.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) setting aside a verdict at *nisi prius* for the plaintiff.

The above head-note contains a sufficient statement of the facts upon which this appeal was decided.

Sedgwick Q.C. for the appellants.

Condition 19, relating to waiver, does not refer to matters arising after the loss. *Franklin Fire Insurance Co. v. Chicago Ice Co.* (2).

If the agent had said that the proofs of loss were defective in respect to the magistrate's certificate, we could have procured it. He was aware of the defect when he told Logan that the proofs were satisfactory. *Pitney v. Glens Falls Insurance Co.* (3).

Henry Q.C. for the respondents

There can be no estoppel in the case of persons insured under this policy. See *Walsh v Hartford Insurance Co.* (4); *Merserau v. Phœnix Mutual Life Insurance Co.* (5).

Sir W. J. RITCHIE C. J.—The judgment of the Supreme Court of Nova Scotia was clearly right. There was, unquestionably, a non-compliance with the 14th condition of the policy, which provides that :

The assured must also procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or the assurance as creditor or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know or verily believe that the assured really, by misfortune, and without fraud or

(1) 6 Russ. & Geld. 209.

(2) 11 Am. Repts. 469.

(3) 61 Barb. (N. Y.) 335,

(4) 73 N. Y. 5.

(5) 66 N. Y. 279,

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evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

Instead of producing a certificate under the hands of two justices of the peace most contiguous to the place of the fire, &c., the evidence showed that application had been made to two such justices who had refused to give the required certificate. But it is alleged that the respondents had waived the production of such certificate. There is not, in my opinion, any sufficient evidence of waiver in this case, supposing the want of the certificate could be waived without writing indorsed on the policy. The only evidence bearing on this question of waiver is as follows: On the 19th of March Salter, defendant's agent at Halifax, wrote the plaintiff as follows:—

EXHIBIT D. T.

COMMERCIAL UNION ASSURANCE COMPANY
 Of London, England.

Capital.....£2,500,000 stg.
 Address—P. O. Box 64, Halifax.

HALIFAX, N.S., 19th March, 1884.

WM. N. LOGAN, Truro.

DEAR SIR,—Yours of the 17th inst. received and noted. I sent up the papers *re* your case to Truro, but Mr. Corey won't be there for some time, so I have sent to get them returned, when I will adjust the case myself and see what I can do.

Yours faithfully,

WM. S. SALTER.

And on the 22nd of March he wrote again :

COMMERCIAL UNION ASSURANCE COMPANY
 Of London, England.

Capital.....£2,500,000 stg.
 Address—P. O. Box 64, Halifax.

HALIFAX, N.S., 22nd March, 1884.

WM. N. LOGAN, Truro, N.S.

DEAR SIR,—Yours 20th inst. received and noted. Papers *re* your case have been returned, and I have looked into them. If you care to compromise the matter for \$300 without prejudice I will pay, otherwise will contest the case.

Yours faithfully,

(Sgd.)

WM. S. SALTER.

The plaintiff says :

Last of February I went to Halifax again and said to Salter, How are things progressing in my case? He replied, "Your papers and every thing are quite satisfactory, there are one or two cases ahead of yours and when they are settled yours will be." After waiting awhile I wrote to Salter and got D. T. in reply; wrote to him again and got E. T. in reply (D. T. and E. T. put in;) I then went to Halifax and saw Salter, with McCully, my attorney; McCully asked why he objected to pay the full amount; he said he did not like the loss; McCully asked if that was the only objection; he replied he did not think it was a square loss and made some reference to the location of the building.

And Mr. McCully says :

Went to Halifax in March as agent of plaintiff; latter end; on a Saturday and on Monday went with plaintiff who had just got the letter with the offer; we went to plaintiff's office; I asked what his objections were and he shrugged his shoulders and said he did not like the loss; I asked what he meant and he replied, I do not think it is a square loss; I asked if there were any other objections; he replied the same as in Murphy's case, the premises are not accurately described, you are not entitled to anything, but rather than have trouble I will pay \$300.

So far from this being a waiver, the very reason assigned for not paying the loss, namely, that the agent did not think it a square loss, may have been, and probably was, based on the rumors the witness Ryan who, though not residing near the fire sent a certificate, said were afloat. His language was "I was there shortly after the fire and heard a great deal about it; some people said the place had been set afire." Or, at any rate, the very fact of the plaintiff's neighbors, two Justices of the Peace contiguous to the fire, refusing to sign the certificate, or even the fact of the plaintiff not producing such a certificate, would be quite sufficient to raise the agent's suspicion that it was not a square loss, and assigning such a reason, so far from being evidence of a waiver of the condition, shows, on the contrary, inferentially, that it would be relied on. But apart from this, the 19th condition is conclusive against the plaintiff. It is as follows :

19. No one of the foregoing conditions or stipulations, either in

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whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement upon this policy signed by the agents of the company at Halifax (N.S.)

There is no pretence for saying that this condition was complied with, nor does it appear to have been in any way, directly or indirectly, referred to by either party. I think, therefore, the appeal must be dismissed with costs.

STRONG J.—The appeal in this case is from a judgment of the Supreme Court of Nova Scotia making absolute a rule for a new trial. The action is brought on a policy of insurance against fire, granted by the respondents in favour of the appellant on property described as a “Stock of Liquors, &c. contained in the bar” in a building occupied by the appellant near Wallace, in Cumberland County, N.S.

The policy was subject to several conditions, twenty in number, of which, however, two only require notice for the purposes of the present decision. By one of the stipulations contained in the 14th condition it was provided that, in case of loss,

The assured must also procure a certificate under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or the assurance as creditor or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent enquiry into the facts set forth in the statement and account of the assured, and know or verily believe that the assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned.

The 19th condition was as follows :—

No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement upon this policy, signed by the agents of the company at Halifax, N.S.

By the 9th plea the respondents pleaded non-per

formance of the provision requiring the certificate of two justices of the peace contained in that portion of the 14th condition already stated. This the appellant answered by two replications—the first taking issue on the plea, and the second alleging that before action brought the respondents, by express renunciation and waiver, waived the performance of the condition. To this the respondents rejoined that by the 19th condition waiver could only be by writing endorsed on the policy, and that there had been no such written waiver. This the appellant met by taking issue on the rejoinder and by a sur-rejoinder that the 19th condition itself had been waived by the respondents. At the trial which took place before Mr. Justice Thompson and a jury at Truro the appellant, being examined on his own behalf, deposed that in an interview with Crowe, who was the local agent of the respondents at Truro, subordinate as such to Salter, the agent at Halifax, the following conversation took place :

I said he must not delay me, as I had to get a certificate from the two J.P.'s nearest the fire. He said that was of no consequence, as any two responsible J.P.'s would do.

The appellant also proved and put in a certificate to the effect required by the condition, signed by two justices of the peace, Ryan and Sutherland, who were not, however, the justices living most contiguous to the premises. Mr. McCully, the plaintiff's attorney, proved that application had been made to Messrs. Clarke and Logan, two justices of the peace residing near the place of the fire, and, as I gather from the judgment, more contiguous than Messrs. Ryan and Sutherland, but they refused to certify. The appellant also swore that having gone twice to Halifax to see Salter, the agent of respondents there, who granted and signed the policy, on the second occasion and when Salter had had in his hands for some time the papers

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furnished by the appellant as proofs of loss, the following conversation took place :

I said to Salter, "How are things progressing in my case?" He replied, "Your papers and everything are quite satisfactory. There are one or two cases ahead of yours, and when they are settled yours will be."

This conversation was denied by Salter, who says in his evidence :

I did not tell him his papers were right.

This was all that could be put forward as evidence of waiver. The learned judge refused to non-suit, although he was of opinion there was no evidence of waiver of the 19th condition, and left three questions to the jury as follows :

Did the agent of the defendant company waive the requirement of a certificate under the hands of two magistrates, as stated in the 14th condition on the back of the policy ?

Did the agent of defendant company waive the 19th condition ?

Do you accept the account of the conversation between plaintiff and the agent (in February) as testified to by the plaintiff, or as testified to by the agent ?

Upon all three of these questions the jury found in favour of the appellant. A new trial was moved for on several grounds, one of these grounds being "that there was no evidence of waiver of the conditions of the policy to go to the jury." And a rule *nisi* having been granted it was, after argument, made absolute.

I am of opinion that, irrespective altogether of the requirement of the 19th condition requiring that any waiver should be in writing, there was no evidence showing that the stipulations as to the magistrate's certificate required by the 14th condition had been, in fact, waived in such a way as to bind the respondents, even if a verbal waiver had not been provided against. Salter, as agent, apart from the authority expressly conferred on him to waive in writing, had no power so to bind the respondents, and granting that the plaintiff's account of what passed at the interview at Halifax was,

as the jury found, the true one, what was then said could not in any way have precluded the company from setting up the want of the certificate as a defence, simply for the reason given that Salter was exceeding his powers in assuming (even if the plaintiff's evidence is to be so construed) to dispense with it. Further, even if there could have been any doubt of this in the absence of the 19th condition, that condition clearly excludes any authority in the agent to waive otherwise than according to its terms. Lastly, there was not the slightest evidence of any waiver of the 19th condition itself, and moreover it is manifest that nothing Salter, the agent, might have said, could have had the effect of enlarging the limited powers to waive which the company had thought fit to impose upon him. The appeal is therefore totally unfounded, and should be dismissed with costs.

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HENRY J.—I am of the same opinion. I think the appellant is clearly not entitled to recover, and that there is not the slightest evidence of waiver. I think the waiver must be indorsed on the policy.

FOURNIER and G-WYNNE JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Sedgewick, Ross & Sedgewick.*

Solicitors for respondent: *Henry, Ritchie & Weston.*

