1895

*May 20.
*Dec. 9.

THE DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION (DEFENDANT)..... APPELLANT;

AND

FRANCIS J. BRADT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Mutual Insurance Company—Contract—Termination—Notice—Statutory conditions—R. S. O. (1887) *c.* 167—*Waiver—Estoppel.*

B. applied to a mutual company for insurance on his property for four years giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50 being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B. and no policy was issued within the said time which expired on March 4th, 1891. On April 17 B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph and on April 29th the latter wrote returning the money remitted by B. who afterwards sent it again to the manager and it was again returned. B. then brought an action which was dismissed at the hearing and a new trial ordered by the Division Court and affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the

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

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

Ontario Insurance Act (R.S.O. [1887] c. 167) governed such contract though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions it was ineffectual for non-compliance with condition 115 requiring variations to be written in a different coloured ink from the rest of the document and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19 which provides that notice shall not operate until seven days after its receipt.

Held, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2), by which the verdict for the defendants was set aside and a new trial ordered.

The action in this case was brought by one Barnes on an alleged contract by the defendant company to insure his property for $1,500. Barnes applied to the company for insurance to this amount for four years, and gave an undertaking to make the payments that should be required from time to time and a note for the first premium. He received a receipt from the company for such undertaking, describing the amount mentioned therein as the premium for insurance on the property described in his application, and providing that the company could cancel the contract within fifty days by written notice mailed to Barnes, and that non-receipt of a policy within such time was to be taken, with or without notice, as absolute evidence of the application. Barnes received no notice of rejection and no policy within the fifty days, but after the time had expired payment of his note was demanded and the amount sent, his letter of remittance crossing one from the manager notifying him that his application

(1) 22 Ont. App. R. 68, sub nom. Barnes *v.* Dom. Grange Assoc. (2) 25 O.R. 100.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

was not accepted and enclosing his undertaking and note. Two days after this letter was received the insured property was destroyed by fire, of which Barnes notified the company, and shortly after received back the money he had remitted, which he sent to the company again and was again returned to him. He then brought his action for the insurance.

The documents above referred to and the correspondence between the parties are all set out in the judgment of the Chief Justice on this appeal.

Barnes died while the action was pending and it was revived in favour of his executrix, Frances J. Garroway, who is the present respondent Francis J. Bradt. The trial judge held that the contract of insurance was at an end when no policy was received by Barnes at the expiration of the fifty days. His judgment was reversed and a new trial ordered by the Divisional Court, confirmed by the Court of Appeal.

Aylesworth Q.C. for the appellant. If there was any contract at all between the company and Barnes, it was one for only fifty days certain, to be enlarged in the discretion of the board of directors. See *Billington* v. *The Provincial Ins. Co.* (1).

The demand for payment of the note was no waiver of the condition for terminating the contract. *McGeachie* v. *The North American Life Ins. Co.* (2); *Frank* v. *The Sun Life Association* (3).

Cameron for the respondent, referred to *Hawke* v. *The Niagara Mutual Ins. Co.* (4); *Smith* v. *Mutual Ins. Co.* (5).

THE CHIEF JUSTICE :—This is an appeal from a judgment of the Court of Appeal for Ontario, affirming

(1) 3 Can. S.C.R. 182.
(2) 23 Can. S.C.R. 148.
(3) 20 Ont. App. R. 564; 23 Can. S.C.R. 152 note.
(4) 23 Gr. 139.
(5) 27 U.C.C.P. 441.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

an order for a new trial of the action granted by the Queen's Bench Divisional Court.

The original action was instituted by Benjamin Barnes against the appellant to recover on an alleged contract of insurance against fire, and upon the death of Barnes was revived by the respondent as the executrix of his will. The property had originally been insured by the appellants under a policy which expired on the 15th January, 1891. On the 13th of January, 1891, Barnes applied to the appellants, through their local agent at Parkhill, in the neighbourhood of which the insured property was situated, for a renewal of his policy for a further term of four years, and he thereupon signed and delivered to the agent three documents, viz: an application for the insurance, being a printed form filled in, a document described as an undertaking, and a promissory note for the premium. The application was headed as follows:

Application of B. Barnes of the Township of West Williams to the Dominion Grange Mutual Fire Insurance Association, for insurance against loss or damage by fire or lightning to the amount of $1,500 for four years from the 13th January, 1891, on the following property:

Then followed a description of the property and certain questions to be answered by the agent and his answers thereto. The paper called "The Undertaking" was as follows:

Undertaking.

$46.50. January 13, 1891.

Policy No. 19960.

I, B. Barnes, being desirous of becoming a member of the Dominion Grange Mutual Fire Insurance Association for four years from the date hereof, agree to hold myself liable to pay to the said Association, at such times and in such manner as the Directors thereof may determine, such amounts as may be required from time to time, not to exceed in any case forty-six dollars and fifty cents.

(Signed) B. BARNES

And in the margin was the following "Received on this undertaking by note $15.25."

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

The promissory note for the premium was as follows:

January 13, 1891, No. 19960.

On the first day of May next I promise to pay to the Dominion Grange Mutual Fire Insurance Association fifteen $\frac{25}{100}$ dollars at the head office of the company, Owen Sound, value received, being for premium on the application for insurance to the amount of $1,500 this day made. And in case this note is not paid at maturity the policy to be issued to me will become void, although the holder of the note may proceed to collect the same.

(Signed) B. BARNES.

And on the margin of the note was the following:

Premium	$ 13 95
Policy fees	1 30
	$ 15 25

In exchange for these documents the agent gave Barnes a receipt as follows:

Provisional receipt No. 16. January 13, 1891.

Received from B. Barnes, post office, Parkhill, an undertaking for the sum of $46.50, being the premium for an insurance to the extent of fifteen hundred dollars, on the property described in his application of this date numbered 16. Subject however to the approval of the Board of Directors who shall have power to cancel this contract at any time within fifty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office. And it is hereby mutually agreed, that unless this receipt be followed by a policy within the said fifty days from this date the contract of insurance shall wholly cease and determine, and all liability on the part of the Association shall be at an end.

The non-receipt by the applicant of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said board of directors. In either event the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time during which the said property was insured.

And in the margin of this receipt were written the following words: "Paid per note on above $14.25; agent's fee $1. January 13, 1891.

On the 4th of March, 1891, the term of fifty days from the date of the receipt expired. No policy was

sent to Barnes, nor was any communication whatever made to him up to the 17th of April, 1891, when the manager of the appellants' association sent him by mail a postal card, in these words:

The Dominion Grange Mutual Fire Insurance Association. } To B. BARNES, Parkhill, P.O.

OWEN SOUND, April 17th, 1891.

DEAR SIR,—Your note given for policy No. 19960, amounting to $15.25, falls due on the first day of May next. Please remit promptly, returning this card with cash or post office order.

Yours fraternally,

R. J. DOYLE, *Manager.*

On the 20th of April Barnes mailed at Parkhill a registered letter, addressed to the appellants' manager at Owen Sound, containing $15.25, the amount of the premium note, which fell due on the first of May, 1891, for the payment of which they had asked by their postal card of the 17th. This letter reached the appellants on the 23rd of April, 1891, and the money enclosed was entered in their cash book as having been received from Barnes.

A letter dated 18th of April, 1891, but bearing the Owen Sound postmark of the 20th April, 1891, was written by appellant's manager to Barnes:

We return herewith undertaking No. 19960 and your short date note. The board have decided not to receive application. Thanking you for the offer of the risk.

This letter must, of course, have crossed Barnes' letter containing the remittance of the money to pay the note.

On the 24th of April the insured property was destroyed by fire, and on the 27th of April, 1891, Barnes by telegraph notified the manager of the appellants of the loss.

On the 29th of April, 1891, the appellants' manager wrote and posted the following letter to Barnes:

We received your application for insurance dated the 13th of January last, on the 21st of January, and we wrote on the 3rd of

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

February to our agent, Mr. McLeish, on the subject. The deposit should have been $18, instead of $13.95, and the undertaking should have been $60 instead of $46.50. On the 18th of April this application came before the board and was declined. We mailed you your undertaking and short date note on the 18th inst. We received your money here on the 23rd inst., and we now return it herewith, viz., $15.25, as we cannot enter it in our book.

On the 9th of May, 1891, Barnes returned the money to the appellants in a letter in which he says:

I return you your insurance money, $15.25, which you dunned me for.

And on the 13th of May, Doyle, the respondent's manager, again sent back the money and wrote Barnes as follows:

We received to-day $15.25 from you for note which was returned to you on the 18th of April last. We have no note against you for this amount. We have no insurance in this company in your favour in force since the expiry of your provisional receipt on the 3rd of March last. Your application for insurance was declined by the Board, of which you were duly notified. There was no use in your sending this money here, as we have no claim against you.

On the application which was produced from appellants' custody there appeared this memorandum:

4-2-91. Unless agent give satisfactory explanation respecting question 28.

(Signed) A. E.
" G. F.

Declined 18-4-91. Cancelled and notes returned 18-4-91.

This action was commenced on the 29th of June, 1891. The original plaintiff died in October, 1891, leaving a will by which he appointed the respondent his executrix. Probate having been granted to the respondent the action was revived by her.

Several defences were set up. First, it was insisted that on the proper construction of the application, interim receipt, premium note and undertaking, there was no subsisting contract at the time of the loss, but that the same had lapsed by reason of non-delivery of

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

a policy within the fifty days. It was also pleaded that there was fraudulent misrepresentation in the application; that there was fraud in making the claim for loss; and a release which was obtained from the respondent *pendente lite* was set up at the trial. This release was impeached by the respondent as having been obtained by fraud, intimidation and undue influence.

The action came on for trial before Mr. Justice Falconbridge and a jury. The burthen of proving the loss and the facts impeaching the release was upon the respondent, and it also lay upon her to establish that there was an existing contract at the date of the loss. At the conclusion of the plaintiff's case the learned judge, considering that, according to the proper construction of the written contract, the agreement for insurance had lapsed at the end of the fifty days, and also considering that there was no evidence of waiver or estoppel, withdrew the case from the jury and entered judgment for the defendants (the present appellants.)

As regards the issue as to the release, there can be no doubt but that evidence impeaching it sufficient to establish a *primâ facie* case was given by the respondent.

A motion for a new trial having been made before the Divisional Court of Queen's Bench, two questions arose, viz. First, a pure question of law, involving the legal construction of the provisional contract of insurance and the applicability to it of the Ontario Insurance Act R. S. O. ch. 167, and the further question, whether, if there had been a lapse of the insurance according to the contract by the non-delivery of a policy within the fifty days, the condition providing for such lapse had not, by reason of the conduct of the appellants in relation to the demand for payment and the receipt of

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

the money, been waived by them, and whether they were not estopped from setting up the condition. The first question is purely one of law, the determination of the second depends upon the sufficiency of the evidence to establish a *primâ facie* case of waiver or estoppel.

The learned judges who constituted the Divisional Court (the Chief Justice and Mr. Justice Street) were of opinion that there was one provisional contract of insurance, not merely for the fifty days, but for four years, subject to determination by the Association by notice within the fifty days, or by non-delivery of a policy within that term; that to this contract the provisions of the Ontario Insurance Act were applicable; that the conditions of the interim receipt were at variance with the standing conditions as to determination of contracts of insurance by notice; that the conditions of the statute applicable to variations of the standing conditions not having been complied with these standing conditions governed the contract, and therefore, notice not having been given to the insured in compliance with the 19th standing condition (section 147 of the statute), the provisional contract of insurance created by the interim receipt had not been determined at the time of the loss. The court, therefore, ordered a new trial, and directed that the appellants should pay the costs.

On appeal to the Court of Appeal that court was equally divided. The learned Chief Justice of Ontario was of opinion that the appeal should be dismissed for the reasons relied upon by the Divisional Court, and also, apart from the statute, for the additional reason that there had been a waiver of the condition as to the effect of non-delivery of a policy within fifty days. Mr. Justice Maclennan concurred in this conclusion, for the reason that the statutory condition as

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

to notice had not been complied with. Mr. Justice Burton and Mr. Justice Osler agreed with the trial judge. These learned judges considered that there had been a completed contract of insurance only as to the fifty days, and that as to the residue of the four years term no contract was created by the interim receipt; that there was as to that at most a mere proposal for insurance, requiring for the constitution of a contract the assent of the appellants, which was never given.

I am unable to agree with the learned judges of the Court of Appeal who treated the contract embodied in the interim receipt as one limited to the fifty days. The application is for an insurance for four years; it is so specifically stated in the introductory paragraph of that document. The words are:

> Application of B. Barnes * * * for insurance against loss or damage by fire or lightning * * * for four years from the 13th of January, 1891, on the following property:

This is the only contract Barnes is shown to have ever proposed or assented to. The receipt must be considered as an acceptance of this proposal. In terms it is so. What other meaning can be attributed to the initial clause:

> Received from B. Barnes an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date, numbered 16.

What is this but an acceptance of the proposal embodied in the application? Then the premium secured by the note is the entire instalment of the premium then due for the whole four years, not a part of it proportioned to the term of fifty days. The receipt also speaks of the contract as an entire contract, that is, a contract according to the terms of the application. The appellants recognize that some contract was created by the receipt; then that contract could only have

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

been an agreement in the terms of the application, for Barnes never assented to any other. These and other considerations convince me that, in the construction of the contract, the Queen's Bench Division and the judges in appeal who concurred in their view were entirely right. This provisional contract was, however, subject to two conditions subsequent; first, it might be put an end to by the appellants at any time within the fifty days by notice; secondly, it was to lapse and determine *ipso facto* if no policy was delivered within the fifty days. Were these provisions subject to the Ontario Insurance Act? It has been determined, and cannot, on the strong, clear and express language of section 114, be open to dispute, that that enactment applies to all contracts of insurance against fire, and is not restricted to contracts in the form of policies. The words are:

> 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.

It must, therefore, necessarily apply to such a contract as that before us, at least according to the construction I place upon it. Then what is the effect of the statute as applied to this receipt? The statutory condition 19 provides how insurances are to be terminated by notice from the insurers. It requires that such termination can only be at the end of five days after a formal service of notice to that effect, or seven days after the receipt at the post office of the assured's address of a registered letter containing the notice. If the contract before us is to be considered as one terminated by notice it is manifest that it had not been terminated according to this statutory condition at the date of the fire. There was no formal service of notice, and the appellants' letter dated the 18th of April,

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

posted at Owen Sound on the 20th April, was only received at Parkhill on the 22nd of April, and the fire occurred on the 24th of April. There was therefore no interval of seven days as required by the statutory condition. It must, however, be remembered that the receipt provides that the non-receipt of a policy within fifty days shall operate as incontrovertible evidence of the rejection of the contract by the directors. Is this, or is it not, a variation of the statutory condition in question? If it is, as Mr. Justice Maclennan points out, it is ineffectual for non-compliance with section 115, which requires such variations to be printed in a different coloured ink from the rest of the document in which it is contained. If that requirement had been complied with the question would then have been raised, to be determined by the court, as to whether it was a reasonable condition. Still it might stand with the statutory condition if not inconsistent with it. This depends on whether the negative fact of the non-receipt of the policy is or is not intended as an equivalent for notice, in other words, whether it is not intended as a negative mode of giving notice. I think there can be no doubt that it must be so considered. What is a written notice of rejection but evidence of rejection. Then where the appellants say in their receipt that the non-receipt of a policy shall be taken as incontrovertible evidence of rejection, they say in effect that it shall operate as a notice. The law, however, says that notice shall be in writing, and most reasonably requires that a defined interval shall elapse between its receipt and its operation as a termination of the contract. It would, in my opinion, be to sanction an evasion of the wholesome provision of the statute, to hold that this condition of the receipt is not entirely inconsistent with standing condition 19. Had the device of printing it in a different coloured ink

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

The Chief Justice.

been adopted I think no court could have held it to be a reasonable condition.

I therefore with great respect must entirely dissent from the ruling of the learned trial judge and the opinions of the learned judges in the Court of Appeal who concurred with him.

Upon another point I also concur with the learned Chief Justice of Ontario. I am of opinion that there was at least some evidence of waiver for the consideration of the jury in the facts, that the payment of the premium was demanded by the letter of the 17th of April; that it was paid accordingly and retained for six days by the appellants; that at the time the letter of the 17th of April was written the directors had not determined to reject the risk. Whether this is sufficient to establish waiver or to estop the appellants we are not called upon now to determine. All I do say is, that there was some evidence for the jury. I cannot treat the post-card of the 17th of April as the mere mistake of a clerk; of course a jury might so consider it, but it is entirely a question for a tribunal called upon to decide on the facts. No one can deny, that in the interval between the receipt of the post-card and the receipt of the letter posted at Owen Sound on the 20th of April, Barnes was justified in believing that his insurance was carried by the appellants, and that he was thus relieved from the necessity of protecting his property by other insurance.

I am of opinion that the appeal must be dismissed with costs.

TASCHEREAU J.—The appellant has, in my opinion, made out a strong case, but I will not dissent from the conclusion reached by the majority of the court that the appeal should be dismissed.

1895

THE DOMINION GRANGE MUTUAL FIRE ASSURANCE ASSOCIATION v. BRADT.

Gwynne J.

GWYNNE J.—It appears to me to be free from doubt that there was no contract of insurance in force at the time of the fire. *Billington* v. *The Provincial Insurance Co.* (1) seems to me to be a conclusive authority in favour of the appellants. There the company accepted the risk and, in accordance with their practice where the risk extended only over a short period, instead of a formal policy they issued a certificate which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by the policy. The late Chief Justice of this court, Sir Wm. Ritchie, delivering the judgment of the court there says (2):

> If there was no short policy plaintiff was clearly out of court. Unless followed by a policy within thirty days from the date of the provisional receipt the insurance by the terms of the receipt wholly ceased.

That appears to be the case here, and I am, therefore, of opinion that the appeal should be allowed and the action in the court below dismissed with costs.

SEDGEWICK and KING JJ, concurred in the judgment of the Chief Justice.

Solicitors for the appellant: *Creasor & Smith.*

Solicitors for the respondent: *Meredith, Cameron, Judd & Drumgole.*

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(1) 3 Can. S. C. R. 182. (2) At p. 197.