1933

*Oct. 10, 12
*Dec. 22

THE CONTINENTAL CASUALTY COMPANY (DEFENDANT) ..... APPELLANT;

AND

AMY B. CASEY (PLAINTIFF) ..... RESPONDENT.

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

Insurance, accident—Cause of death—Combination of injury and disease—Misrepresentation in the application as to age—Not a warranty and not promissory—Whether an election by insurance company to treat policy as valid—Whether provision as to age limit should be printed in red ink—The Alberta Insurance Act, 1926, c. 31, sections 266, 267 and statutory condition 2—The Accident and Sickness Policy Act, Alta., 1923, c. 48, s. 8—Alberta Insurance Act Amendment Act, 1929, c. 62, s. 10.

The action was brought by the respondent, the daughter of the assured and named beneficiary, against the insurer, the appellant company, on a policy of insurance commonly called an accident policy. On the 11th day of December, 1931, the assured fell from a platform, was seriously injured, his leg being broken, and was removed to hospital; later on, a condition of uraemia ensued which resulted in his death on the 23rd of December, 1931. At the time of the accident, the assured was 70 years of age. The application for the insurance was made six years before and his age was stated then to be 54. One of the "miscellaneous provisions" (No. 5) at the end of the policy provided: "The insurance under this policy shall not cover any person under the age of 18 years or over the age of 65 years." The trial judge dismissed

(1) (1862) 12 C.B. (N.S.) 334. (2) [1877] 2 Q.B.D. 598.

*PRESENT:—Duff C.J. and Lamont, Smith, Cannon and Hughes JJ.

the action, which judgment was reversed by a majority judgment of the Appellate Division, which awarded to the respondent the sum of $7,675, interests and costs.

Held, reversing the judgment of the Appellate Division ([1933] 1 W.W.R. 282), that the appeal should be allowed and the respondent's action dismissed; miscellaneous provision No. 5 of the policy is, under the circumstances of the case, a bar to the claim of the respondent.

Per Duff C.J. and Lamont, Smith and Hughes JJ.—The assured had made a material misrepresentation as to his age in the application for insurance as found by the trial judge, which finding was not disturbed by the Appellate Court, but, under the circumstances of this case, this material misrepresentation made by the assured was not available to the appellant company as a defence to the action—Statutory provision 2 printed in the policy and section 267 and statutory condition 2, schedule E of the *Alberta Insurance Act,* 1926. The misrepresentation by the assured was not a warranty and was not promissory.

Under the circumstances of this case and the documents and letters fyled at the trial, there was no election by the appellant company to treat the insurance policy as valid—*Scarf* v. *Jardine,* 7 App. Cas. 345); and therefore the appellant did not waive by election miscellaneous provision 5 of the policy.

As to the ground raised by the respondent that miscellaneous provision 5 came within section 8 of the *Accident and Sickness Policy Act,* Alberta, 1923, c. 48, and therefore "shall be printed in conspicuous type * * * and in red ink," *held* that miscellaneous provision 5 is a clause limiting and defining the risk rather than a variation of the statutory conditions.

The enactment of section 4 of the *Accident and Sickness Policy Act,* Alberta, 1923, does not preclude the parties to an insurance contract from exercising the right they otherwise would have possessed to define or limit the risk in the manner set out in miscellaneous provision 5; in other words, this section 4 does not curtail the contracting powers of the parties in such a way as to prevent them from defining or limiting the risk, "the event insured against," by providing that it shall not include events happening, after a fixed date or after the insured shall have reached a certain age.

However, the cause of death must be held to have been within the wording of the policy; but even if it was not so, the loss would probably be covered by the wide wording of section 4 of the 1923 Act already referred to.

CANNON J., concurring in the conclusion that the respondent's action should be dismissed, was of the opinion that the assured, being 70 years old when the accident happened, was outside the scope of the contract on which the action was based.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J. (2) and maintaining the respondent's action on an accident policy.

(1) [1933] 1 W.W.R. 280. (2) [1932] 3 W.W.R. 551.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

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

V. Evan Gray K.C. and *F. A. Brewin* for the appellant.

Robert S. McKay for the respondent.

The judgment of Duff C.J. and Lamont, Smith and Hughes JJ. was delivered by

HUGHES J.—This action was brought by the named beneficiary against the insurer on a policy of insurance commonly called an accident policy. The assured was Arthur C. Casey, the father of the beneficiary.

On the 11th day of December, 1931, the assured fell from a platform. He was seriously injured and was removed to hospital where he died on the 23rd day of December, 1931. At the time of the accident the assured was seventy years of age.

Some of the material provisions of the policy are as follows:

The Continental Casualty Company

General office: Chicago, Illinois. Head office for Canada, Toronto.

Hereinafter called the Company

In consideration of the agreements and statements contained in the application herefor and the payment of an annual premium of $25 as therein provided, does on this 13th day of June, A.D. 1925, hereby insure Mr. Arthur C. Casey (hereinafter called the insured), in class....select of the Company, as a manager, Alazhar Temple, office and travelling duties only, in the principal sum of seventy-five hundred dollars with weekly indemnity of twenty-five dollars, and promises to pay to him or his beneficiary Amy B. Casey his daughter the respective indemnities hereinafter provided.

The insurance given by this policy is against loss of life, limb, limbs, sight or time resulting from personal bodily injury (suicide or self-destruction while either sane or insane not included), which is effected solely and independently of all other causes by the happening of a purely accidental event, all in the manner and to the extent hereinafter provided.

Specific Indemnity

Part I.

If injury such as before described shall at once after the occurrence of the accidental event wholly and continuously disable the insured from performing each and every duty pertaining to his occupation, and if during the period of such total and continuous disability any one of the following losses shall result to the insured necessarily and solely from the injury, the Company will pay the indemnity hereinafter provided, and in addition will pay said weekly indemnity for the period of the preceding

disability; or, if any one of said losses shall result to the insured necessarily and solely from such injury within one hundred and eighty days from the occurrence of the accidental event causing the injury, then the Company will pay the indemnity hereinafter provided irrespective of disability preceding the loss.

A. For loss of life said principal sum
And in addition all premium previously paid on this policy

Miscellaneous provisions

No. 1. No agent has authority to change this policy or to waive any of its provisions. No assignment of this policy or of any claim arising thereunder and no waiver or change of any of its provisions, definitions or limits shall be valid unless approved in writing by an executive officer of the Company and such approval endorsed hereon.

5. The insurance under this policy shall not cover any person under the age of eighteen years or over the age of sixty-five years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

8. The insurance given by this policy does not cover, nor will indemnity be paid for, any loss resulting from injury received (1) while engaged in aeronautics in any form; (2) while in military or naval service in time of war; or (3) while not within the civilized limits of the globe unless it be while travelling by regular lines of passenger conveyance.

The action was tried before Mr. Justice Ives who dismissed the action on the following grounds, firstly, that uraemia caused the death and that it resulted from a combination of the accident with certain pre-existing active diseases of the body; secondly, that the assured had made a material misrepresentation in the application that he was fifty-four years of age when he was in fact sixty-four years of age and, lastly, that the insurance contract ceased to cover the risk after the insured reached the age of sixty-five years.

From this judgment, the plaintiff appealed to the Appellate Division of the Supreme Court of Alberta (1), which reversed the judgment of the learned trial judge by a majority judgment. Chief Justice Harvey considered that the death was covered by the terms of the policy; that, if the assured had made a material misrepresentation, the defendant had elected after knowledge of the falsity and after the death to treat the insurance as valid until the assured was sixty-five years of age and that it was bound by its election and, lastly, that miscellaneous provision 5 was a condition and void because it was not printed in red ink

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

as required by the statute in that behalf. Mr. Justice Clarke, Mr. Justice Mitchell and Mr. Justice Lunney concurred in the judgment of the Chief Justice.

Mr. Justice McGillivray was of opinion that the death was covered by the terms of the policy, that the assured had made a material misrepresentation as to his age, that the defendant had elected after knowledge of the falsity and after the death to treat the insurance as valid until the assured was sixty-five years of age and that it was bound by its election; but he dissented from the remaining members of the Court on the effect of miscellaneous provision 5, which he considered a provision defining and limiting the risk. He was of opinion that the appeal should be dismissed.

The result of the majority judgment was that the appeal was allowed with costs and the plaintiff was awarded judgment against the defendant for $7,675 with interest and costs.

From this judgment the defendant appeals to this Court.

It was contended before us by the appellant,

1. That the assured had made a material misrepresentation in the application and that there was no election by the appellant.

2. That miscellaneous provision 5 was a provision defining and limiting the risk and not a condition.

3. That the loss of life of the late Arthur C. Casey was not effected solely or independently of all other causes by the happening of a purely accidental event.

All of these contentions were denied by the respondent.

1. The learned trial judge found that the late Arthur C. Casey has made a material misrepresentation as to his age in the application for insurance. This finding was not disturbed by the Appellate Division of the Supreme Court of Alberta and no valid reason is disclosed to disturb it here.

As to election, the rule was stated in the House of Lords by Lord Blackburn in *Scarf* v. *Jardine* (1) in the following words:—

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended

(1) (1882) 7 App. Cas. 345, at 360 and 361

it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

On February 9th, 1932, the appellant prepared a draft for $151.23, payment of which was stated on its face to be conditional upon surrender of the policy and execution by the respondent of a receipt worded in part as follows:

In full compromise, payment, satisfaction, discharge and release of any and all claims * * * under policy or certificate 2719.

Second—In consideration of the surrender by me of said policy.

Third—As full consideration for the unearned premium or money heretofore paid on said policy or certificate.

The above draft was sent to the solicitor of the respondent in a letter dated February 9th, 1932, from Chas. E. Hanslip, who styled himself chief adjuster, which letter read in part as follows:

We would also refer you to section 5 of part XI, miscellaneous provisions of the policy, which reads as follows:

Insurance under this policy shall not cover any person under the age of 18 years or over the age of 65 years. Any premium paid to the company for any period not covered by this policy will be returned upon request * * * The indemnity payable, therefore, if covered by the policy, would only be for the loss of time intervening between the date of injury and date of death * * *

We also find that the deceased was born on May 25th in the year 1861, so that he was 70 years, 6 months and 17 days of age when he became disabled on December 11th last. The policy is dated June 13th, 1925, and if you will refer to statement no. 2 of his signed application, copy of which is endorsed on the policy and made a part thereof, you will observe the age was stated to be 54 years. The deceased, however, had already passed his 64th birthday when he made application for our policy in June of 1925, and as he attained the age limit of 65 on May 25th in the year 1926, the policy therefore has been null and void since that date, as provided by section 5 of the miscellaneous provisions referred to herein.

You will therefore understand in view of the foregoing that the claim is not covered, the policy having been null and void since May 25th of 1926, and as the premiums paid since that time amount to $151.23, we are pleased to enclose our draft for this sum, made payable to the order of Amy B. Casey, the beneficiary of the Deceased, to which the policy should be attached when being deposited in the bank for collection.

The remaining correspondence is with the general manager of the appellant.

On the 29th day of February, 1932, the appellant wrote the solicitor of the respondent a letter reading in part as follows:

I take it that we are agreed that the deceased had attained the age of 70 years and 6 months at the time he sustained injuries on December 11th, 1931, and that our policy contains an age limit of 65 years.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

The age limit in the policy is a limitation, and is not a variation of or an addition to the statutory conditions. The Act does not require us to print, in red ink, exclusions or limitations which may be part of the policy.

* * *

Considering that the immediate cause of death was uraemia, and that he was afflicted with an enlarged prostate, myocarditis and arteriosclerosis, the loss of life was not caused "solely and independently of all other causes" by the happening of a purely accidental event, as provided by the policy.

* * *

At the time the application for this policy was signed, he was in his 65th year. The statement, in his application, as to age was material to the acceptance of the risk by the company, and if his true age had been stated, the policy would not have been issued.

After considering all of the circumstances, I am sure that you will agree with me that the limit of our liability is a refund of the premium paid on the policy, which has already been forwarded.

To this letter the solicitor of the respondent on the 2nd day of May, 1932, wrote a reply stating fully his views in support of the respondent's claim. The letter concluded with the following request that the appellant should further consider the matter:

I am sure that after further consideration of the matter you will agree with me that the company is liable to pay the beneficiary the full indemnities under the policy and I would be glad if you would give the matter your early consideration. If however you decide that you are not prepared to make settlement I would ask you to advise me as soon as possible and in that case it will be necessary to have the matter decided by the courts. In order to save time I would appreciate it if you would let me have the names of your solicitors here in Calgary who would accept service of the statement of claim on your behalf.

The solicitor of the respondent again wrote on the 23rd day of May, 1932, and submitted further authorities to the appellant.

On May 31st, 1932, the appellant wrote to the solicitor of the respondent a reply reading in part as follows:

We have your letter of May 2nd, 1932, which we have carefully considered, although we believe you have gone rather far afield in your consideration of points of law which may arise in the litigation of it.

If we believed in the merits of this claim, you would not need to quote authorities at such length to persuade us to pay it, but believing, as we do, that there never was a binding contract because of misrepresentations contained in the application and that the cause of death was not an accident, within the meaning of our contract, we cannot be persuaded by your citations of legal decisions, in other cases, that the claim ought to be paid.

* * *

However interested you may have become in the pursuit of the technical features of this contract, and the decisions which seem to you

to relate to them, you will appreciate that this company never undertook to pay and cannot be expected to pay a claim for principal sum under an accident policy on the life of a man seventy years of age who died from uraemia and myocarditis.

The draft sent by the appellant was retained by the solicitor of the respondent but not cashed. The offer of this draft by the appellant can scarcely be termed an unequivocal act within the rule as stated by Lord Blackburn in *Scarf* v. *Jardine* (1), as its payment was conditional upon its acceptance by the respondent as a compromise as well as a payment of all claims. The letter, moreover, in which it was enclosed and upon which the respondent relies strongly to shew election, was from one, Chas. E. Hanslip, who styled himself chief adjuster. There was no evidence that Chas. E. Hanslip had any authority to make an election for the appellant. In *British Empire Underwriters* v. *Wampler* (2), Duff J., now Chief Justice of Canada, said,

> There is not, I think, any satisfactory evidence of authority reposed in the adjuster to enter into a contract to pay and it appears to me to be more than doubtful whether the facts relied upon establish a contract even assuming such authority.

And in the same case, page 598, Anglin J. afterwards Chief Justice of Canada said,

> In the absence of express authority enabling an employee such as Marsh was to commit the company to a liability not covered by its policy, I cannot conceive that it is within the scope of his powers to do so.

Atlas Assurance Co. v. *Brownell* (3). *Commercial Union* v. *Margeson* 29 (4). As late as May 2nd, 1932, the solicitor of the respondent, as appears above, urged further consideration of the claim to full indemnities and on May 23rd, 1932, submitted further authorities in support. It cannot be said, in the words of Lord Blackburn, that the appellant led the respondent to believe that it had made its choice to consider the policy valid and subsisting until the 25th day of May, 1926. The correspondence as a whole does not assist the respondent when read with the draft, or without the draft, the substantial effect being that the appellant was offering the draft both as a compromise and a payment with a reservation of its contention that the appellant was not liable on the policy at all and the solicitor of the respondent was endeavouring to secure more fav-

(1) (1882) 7 App. Cas. 345.
(2) (1921) 62 Can. S.C.R. 591, at p. 596.
(3) (1889) 29 Can. S.C.R. 537.
(4) (1889) 29 Can. S.C.R. 601.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

ourable consideration. It is worthy of note in this connection that the last pleading of the respondent was delivered on the 21st day of July, 1932, but that election was not mentioned in the pleadings until it was incorporated by amendment at the opening at the trial on the 3rd day of November, 1932.

Election has been discussed here at some length, because the respondent contended that by this means the appellant had also waived miscellaneous provision 5 of the policy.

The material misrepresentation made by the insured, however, is not available to the appellant as a defence to the action.

Statutory provision 2 printed in the policy reads as follows:

2. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall be used in defence to a claim under this policy unless it is contained in the copy of the application for this policy which is endorsed hereon or attached hereto.

Section 267 of *The Alberta Insurance Act,* 1926, which was in force at the time of the last renewal and at the time of the death of the late Arthur C. Casey reads as follows:

267. The conditions set forth in schedule E to this Act shall be deemed, subject to the provisions of sections 268 to 272, to be part of every contract of accident and sickness insurance in force in Alberta, and shall be printed on every policy hereafter issued under the heading "Statutory Conditions."

Statutory condition 2, schedule E, reads as follows:

2. All statements made by the insured upon the application for this policy shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defence of a claim under this policy unless it is contained in the written application for the policy and unless a copy of the application, or such part thereof as is material to the contract, is indorsed upon or attached to the policy when issued.

The appellant contended before us that a copy of such part of the application as was material to the contract was indorsed upon or attached to the policy within the wording of the statute. But the indorsement on the policy omitted the particulars of the kind of insurance applied for and the amount thereof, and further the indorsement contained at least one material alteration and addition made without authority by the appellant. The words "office and travelling duties only" were added after the words "Manager, Alazhar Temple" which latter words had constituted the

statement of the applicant to question 4—Occupation and duties. The words "No Exceptions" were inserted by the appellant without authority as the statement of the assured to questions 10 and 14, respectively, of the application in response to which the applicant had not made any statement at all. It is not necessary to consider the unauthorized additions to 10 and 14 because the omission by the appellant from the indorsement on the policy purporting to be a copy of the application or such part as was material to the contract of the particulars of the kind of insurance applied for and the amount thereof was an omission of material parts of the application; and, further, the addition of the words "office and travelling duties only" was an unauthorized material alteration. It is worthy of note that the appellant considered the latter words false and material when it delivered its statement of defence on the 13th day of July, 1932, paragraphs 22 and 23 of which were as follows:

22. Some of the said statements were false and materially affected the acceptance of the risk and the hazard assumed by the Defendant.

23. The statement that his occupation was manager of Allazhar Temple, and that his duties consisted of office and travelling duties only was false, as he had other and more hazardous duties to perform, one of which he was performing at the time of the accident.

The appellant, however, urged that, in any event, the misrepresentation as to age formed a basis of the contract of insurance and bound the respondent when suing to enforce the contract and referred us to the following authorities.

St. Regis Pastry Shop and Baumgartner v. *Continental Casualty Co.* (1). In this case there was not a written application at all.

Newsholme Brothers v. *Road Transport and General Insurance Company Limited* (2). In this case the proposal form contained the following clause

We hereby warrant that the answers stated above are true, that we have withheld no information which might influence the acceptance of this proposal and that the warranty hereby given shall be deemed to be promissory and shall be the basis of the contract between us and the company.

Some of the answers were untrue in material respects and the plaintiff failed. In the case before us, however, the mis-

(1) (1928) 63 O.L.R. 337. (2) [1929] 2 K.B. 356.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

representation was not a warranty and was not promissory. *Dorst* v. *Trans Canada Insurance Company* (1). In this case, there was not a written application and the false statement of the insured was promissory in nature. The exact wording of it was as follows: "The automobile is and will be usually kept in a Public or Private-Both-Garage." In truth, the automobile was not kept in a garage. It was usually kept in an open driveway and that is where it was on the night it was stolen and burned.

2. Miscellaneous provision 5.

The respondent urged that miscellaneous provision 5 came within section 8 of *The Accident and Sickness Policy Act, Statutes of Alberta,* 1923, chapter 48, which read as follows:

8. (1). If an insurer desires to vary, omit or add to the statutory conditions or any of them except as provided in sections 6 and 7 there shall be printed in conspicuous type not less in size than ten point, and in red ink, immediately after such conditions, the proposed variations or additions or a reference to the omissions, with these introductory words: "This policy is issued on the above statutory conditions with the following variations, omissions and additions which are, by virtue of The Accident and Sickness Policy Act, in force so far only as they may be held to be just and reasonable to be exacted by the insurer."

(2). No variation, omission or addition except as provided in sections 6 and 7 shall be binding upon the insured unless the foregoing provisions of this section have been complied with, and any variation, omission or addition shall be so binding only in so far as it is held by the Court before which a question relating thereto is tried, to be just and reasonable.

None of the statutory conditions deal with such a subject as that covered by miscellaneous provision 5. In *Curtis's and Harvey (Canada) Limited, in Liquidation and North British and Mercantile Insurance Company Limited* (2) Lord Dunedin said, page 312:

Their Lordships think that it is the policy of the statute to make a hard-and-fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk and also receive effect in so far as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion

(1) [1933] O.R. 98. (2) [1921] 1 A.C. 303.

incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect.

See, also, *The London Assurance Corporation* v. *The Great Northern Transit Company* (1), *Ross* v. *Scottish Union and National Insurance Company* (2), and *The W. Malcolm Mackay Company* v. *The British America Assurance Company* (3).

I am of opinion that miscellaneous provision 5, like miscellaneous provision 8, is a clause limiting and defining the risk rather than a variation of the statutory conditions.

The respondent contended, however, that miscellaneous provision 5 was invalid by virtue of section 4 of *The Accident and Sickness Policy Act*, statutes of Alberta, 1923, chapter 48, which read as follows:

4. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

This statute was repealed in 1926 and section 4 re-enacted as section 266 of *The Alberta Insurance Act*, statutes of Alberta, 1926, chapter 31. The latter section was repealed by *The Alberta Insurance Act*, 1926, Amendment Act, 1929, chapter 62, section 10, and a new section 266 substituted as follows:

266. Every policy shall contain the names and address of the insurer, the name and address and occupation or business of the insured, the name of the person to whom the insurance money is payable, the premium for the insurance, the indemnity for which the insurer may become liable, the event on the happening of which such liability is to accrue, and the term of the insurance.

At the time of the last renewal and at the death of the insured, *The Interpretation Act*, R.S. of Alberta, 1922, chapter 1, was in force. Section 13 (*b*) of that Act provided as follows:

13. Whenever any enactment is repealed or regulation revoked (hereinafter called the old enactment or regulation), such repeal or revocation shall not, subject to section 14 hereof—

(*b*) Affect any act done, or right or liability accruing or accrued or incurred under the old enactment or regulation.

(1) (1899) 29 Can. S.C.R. 577. (2) (1918) 58 Can. S.C.R. 169.
(3) [1923] S.C.R. 335.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

The respondent contended that the event insured against included "any bodily injury occasioned by external force or agency," as provided in section 4 of the 1923 Act, that section 4 restricted the right of the insurer to define or limit the risk beyond the words "the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy," that the accident to the late Arthur C. Casey did not arise from any hazard or class of hazard expressly stated in the policy, that miscellaneous provision 5 was an exclusion not permitted by section 4, and that the subsequent repeal of section 4 did not affect the rights and liabilities of the parties accruing or accrued or incurred respectively under it at the time the policy was written and thereafter as long as it remained in force.

Main v. *Stark* (1); *Reynolds* v. *The Attorney-General for Nova Scotia* (2); *Green v. Blackburn* (3), and *Abell* v. *The Corporation of the Township of York* (4).

It is important, then, to determine whether the insurance was provided by a continuing contract to which the 1923 Act applied or by a new contract each year.

The policy insured Arthur C. Casey

in consideration of the agreements and statements contained in the application and the payment of an annual premium of $25 as therein provided.

One agreement in the application was as follows:

I agree to pay an annual premium of $25 for said policy as follows: Annually.

The first renewal receipt dated April 26th, 1926, was worded in part as follows:

Received of A. C. Casey $25 * * * being the yearly premium to continue Policy No. C.D. 2719 in force to June 1st, 1927, subject to the provisions and conditions stated in the policy.

On June 20th, 1931, the Alberta managers of the appellant wrote the late Arthur C. Casey in part as follows:

We acknowledge receipt of your cheque in the amount of $25 being an annual premium on Commercial policy of the above name and number. We are enclosing herewith Renewal Certificate No. R. 268721 shewing your contract in good standing until the thirteenth of June, 1932.

The appellant urged before us that the insurer had a right to refuse to accept the premium for any renewal and that each renewal, including the renewal of June, 1931, constituted a new contract and that accordingly the statute law

(1) (1890) 15 App. Cas. 384.
(2) [1896] A.C. 240.
(3) (1908) 40 Can. S.C.R. 47.
(4) (1920) 61 Can. S.C.R. 345.

applicable to the case was as it existed at the time of the last renewal, namely in June, 1931. It is true that each party had a statutory right to cancel the policy at any time, but neither party did in fact cancel it, and it is by no means clear that the insurer had a right to refuse to accept premium, properly tendered, for any renewal of the policy on the facts of this case. Joyce on Insurance, volume 2, page 1122. I am of opinion that each renewal did not constitute a new contract, but was a continuation of the original contract. *Howard* v. *Lancashire Insurance Company* (1), *Liverpool and London and Globe Insurance Co.* v. *Agricultural Savings and Loan Co.* (2), *Royal Exchange Assurance Co.* v. *Hope* (3).

It is now necessary to consider whether section 4 of the 1923 Act did really preclude the parties to the contract from exercising the right they otherwise would have possessed to define or limit the risk in the manner set out in miscellaneous provision 5. Section 4 deals with the scope of the risk—"the event insured against"—in this sense that it extends the coverage to bodily injuries of every kind occasioned or happening in the manner indicated notwithstanding any term of the policy; and it goes on to provide that from this wide field there may be excluded accidents arising from any hazard or class of hazard specially described. The primary subject matter of the section is the kind or nature of the bodily injuries in respect of which the insured is covered, and the coverage is declared to include bodily injuries of every description subject to the proviso mentioned. It is quite clear that the enactment of this section dealing with this subject matter does not curtail the contracting powers of the parties in such a way as to prevent them from defining or limiting the risk—"the event insured against"—by providing that it shall not include events happening after a fixed date or after the insured shall have reached a certain age.

3. Cause of Death.

As mentioned above, the learned trial judge found that uraemia, which caused the death of the late Arthur C. Casey, resulted from a combination of the accident with certain pre-existing active and not latent diseases of the

(1) (1885) 11 Can. S.C.R. 92. (2) (1903) 33 Can. S.C.R. 94.
(3) [1928] Ch. Div. 179.

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

body, that therefore, the death of the insured was not from accident within the meaning of the policy and that the case was distinguishable from *Fidelity and Casualty Company of New York* v. *Mitchell* (1).

This finding of the learned trial judge was not affirmed by the Appellate Division of the Supreme Court of Alberta. Chief Justice Harvey stated in his reasons for judgment:

> Assuming that upon the construction placed by the learned trial judge upon the relevant clause of the policy, this case could be distinguished from the authoritative decision, as regards which there is room for argument, yet, in my opinion, there was a wrong construction of the clause.

Mr. Justice McGillivray said:

> My Lord, the Chief Justice, has set out the facts with admirable succinctness. I have nothing to add to his statement. I agree that the accident was the cause of the death,

and he later proceeded to deal with Miscellaneous Provision 5.

It was admitted by the appellant that the late Arthur C. Casey had fallen (from a scaffold) a distance of about five feet to a cement floor and that he had sustained a compound fracture of the leg. The evidence of Dr. Follett was that the general condition of the man prior to the accident had been very good. In December, 1928, he had consulted Dr. Follett, who appeared to have been his regular physician, for myocarditis—a weakness of the muscles of the heart—and he had had a consultation again in September, 1931. For this condition he had been taking Tr. Digitalis once in a while for three or four years. The condition of the heart was serious but it did not incapacitate the patient from doing his work. The physician had not been consulted in respect of any other ailments and did not know that the patient had an enlarged prostate until after the accident. The patient then told Dr. Follett that he had an enlarged prostate for about two years but there is no evidence in the record that he had been unable to void before the accident. He was, however, thereafter unable to void and a catheter was tied in. For the first three or four days he seemed to do very well, but in six or seven days infection spread locally, gradually went thorugh the system and, forty-eight hours before death, the patient became unconscious. Dr. Follett said that the patient had never suffered from uraemia to his knowledge prior to the

(1) [1917] A.C. 592.

accident and that he would think that the infection of the kidneys came from the wound. There was also well-marked arteriosclerosis, which injuriously affects the functioning of kidneys, but the physician would not say that before the accident arteriosclerosis had injuriously affected the functioning of the kidneys of the patient, although such was possible. Dr. Follett lastly would not admit that myocarditis had anything to do with uraemia but agreed that arteriosclerosis was a possible cause of it.

The appellant called as its medical witness, Dr. Willis Merritt, who, apparently, had not seen the late Arthur C. Casey and who gave his evidence after hearing the evidence of Dr. Follett. Dr. Merritt was of opinion that arteriosclerosis degenerates kidneys so that they cannot excrete enough waste product and causes uraemia, and that, when the prostate is enlarged so that the patient is unable to void, a back pressure on the kidneys results and thus assists in bringing on uraemia. In his opinion death was the result of the accident, the condition of arteriosclerosis and the condition of the enlarged prostate. He agreed that the poison from the wound would set up a diseased condition of the kidneys.

It is clear from the foregoing that up to the time of the accident the late Arthur C. Casey had been able to carry on his duties as Manager of Alazhar Temple, and there is nothing in the record to suggest that, if the accident had not happened, he would not have been able to continue so to do indefinitely. There is no direct evidence that he had been unable to void before the accident, that myocarditis had anything to do with lessening the functioning of his kidneys or that the arteriosclerosis had in fact up to that time lessened their functioning. There is, on the contrary, evidence that infection first appeared at the end of five or six days at the site of the wound and gradually spread locally.

The learned trial judge, however, in his reasons for judgment said:—

> Dr. Follett was the attending physician of the insured for some years before he died. In his evidence he tells us that in December, 1928, he examined his patient and found him suffering from myocarditis and arteriosclerosis.
>
> The cause of death was uraemia and the doctor states that the uraemia resulted from a combination of the accident and arteriosclerosis;

1933

THE CONTINENTAL CASUALTY COMPANY v. CASEY

Hughes J.

that the accident alone, or the arteriosclerosis alone should not have caused death at that time.

The learned trial judge was clearly in error. The following is the relevant evidence of Dr. Follett, who alone had any actual knowledge of the condition of the late Arthur C. Casey before the accident.

Q. You also said there was no kidney trouble and you said "Not to your knowledge" and your knowledge I believe was of September, 1931?—A. No, from December, 1928, the first time I saw Mr. Casey as a patient.

Q. I am speaking of the last occasion?—A. From September, 1931, I think I have examined his urine on a couple of occasions. I don't know whether each time or one, I could not say.

Q. Then along until the accident?—A. No, first hand knowledge.

Q. Had you previously catheterized him?—A. Never. I did not know he had an enlarged prostate until he got into the hospital and told me.

Q. There is no doubt in your mind that this arteriosclerosis lessened the function of the kidney, no doubt about that?—A. That is correct.

The COURT: Let me get that, you say that before the accident the function of the kidneys by reason of the condition must have been lessoned?—A. No, I would not want to say that. I have no direct knowledge, I never had anything to do with the man except for his heart on some occasions, and I examined his urine once I remember distinctly and it seemed all right so far as the ordinary test was concerned.

In Fidelity and Casualty Company of New York v. *Mitchell* (1), Lord Dunedin, delivering the judgment of their Lordships said, page 596,

But their Lordships agree with the result reached in the exceedingly careful and able judgment of Middleton J., confirmed unanimously by the learned judges of the Court of Appeal. His view is most tersely expressed in a single sentence; "This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident.

Mr. Justice Middleton had also said in his judgment (2),

The tuberculosis of the system was harmless until, as the direct result of the accident, it was given an opportunity to become active.

In the case before us, it is not shown that the myocarditis, arteriosclerosis or enlarged prostate were, before the accident, active in injuriously affecting the functioning of the kidneys. I am therefore of opinion that the cause of death was within the wording of the policy. But even if this is not so, much may be said for the view that the loss is covered by the wide wording of section 4 of the 1923 Act, which has already been discussed at length.

The respondent also urged that the assured was misled by the agent who solicited the insurance into believing that the policy would be good if the assured lived to be one hundred years old, and that the appellant through its agent

(1) [1917] A.C. 592. (2) (1916) 35 O.L.R. 280, at 285.

thereby waived miscellaneous provision 5. *Wing* v. *Harvey* (1). This contention cannot prevail in view of miscellaneous provision 1 of the policy and in view of statutory condition 20 of the 1923 Act or statutory condition 20 of Schedule E of the 1926 Act. See also *Biggar* v. *Rock Life Assurance Company* (2).

Miscellaneous provision 5 of the policy is, as above stated, a bar to the claim of the respondent. The result, therefore, is that the appeal must be allowed and the action dismissed. Under all the circumstances, it is not a case for costs.

CANNON J.—I concur in the conclusions of my brother Hughes that the action should be dismissed. The plaintiff brings forth a contract which expressly limits the insurer's risk in such a manner that, on attaining the age of 65 years, the insured automatically ceased to be covered. His capacity to be "insured" under the policy ceased because the risk as assumed by the company, no longer existed. He reached 65 years of age without accident causing him bodily harm and, therefore, the risk, as assumed by the company, never became a liability. It is common ground that when the accident happened, Casey was 70 years old; therefore, outside the scope of the contract on which the action is based.

I would allow the appeal without costs.

Appeal allowed, no costs.

Solicitors for the appellant: *Smith, Egbert & Smith.*

Solicitors for the respondent: *Robt. S. McKay.*

(1) (1854) 5 DeG. B. & G. 265. (2) [1902] 1 K.B. 516.