DEPARTMENT OF INSURANCE.

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HART, APPELLANT, *v.* THE CITIZENS' INSURANCE CO. OF PITTSBURG, RESPONDENT.[1] SUPREME COURT OF WISCONSIN.

Where an insurance policy provides that no action thereon for the recovery of any claim shall be sustained, "unless commenced within twelve months next after the *fire*," the time limited begins to run from the date of the fire, and not from the time when the liability is fixed, and the right of action accrues.

LIMITATION OF ACTIONS WITH REFERENCE TO INSURANCE CONTRACTS.

The general statutes of limitations of the several states require or permit an action to be brought on contracts within a specified time, and not thereafter. Various periods are prescribed by the different laws for the bringing of actions on different kinds of contracts, whether in writing or not. The period, within which contracts in writing must be sued on, is generally longer than in instances of verbal agreements, and, in some states, if the obligation or undertaking is under seal, or is a bond, the time, within which an action may be brought, is even longer than in cases of ordinary written contracts. The various statutes of limitation usually provide that actions on written contracts must be brought within five years and on verbal contracts within three years from the accrual of the right of action. The period of limitation prescribed by contracts of insurance, however, is usually either six or twelve

[1] Reported in 86 Wisc. 77.

months from the time of the loss, death, accident, etc., as the case may be. While there may be instances, in which an insurance company would be liable on an oral contract entered into between the assured and an agent of the company authorized to bind it, as where the agent agreed with the assured that the company should be bound from a certain time, the rate, amount, etc., being agreed upon and understood, but for the delay of the agent the policy is not written and delivered till after the loss. Contracts of insurance are almost uniformly evidenced by an undertaking in writing. The general statute, we will say, limits the time of bringing an action on a written obligation to five years. The contract of insurance, however, on the other hand, expressly stipulates t at no action shall be brought, nor recovery had, unless suit be instituted within a year, or six months from the time of the fire, death, accident, etc., etc. But the insurance contract is supposed in law to reflect the identical agreement and undertaking between the parties, as well as all conditions precedent, which may be embodied therein, and when it is stipulated in the contract of insurance that no action shall be brought except within twelve months next after the loss, no action can thereafter be brought, as a general rule, notwithstanding the provision of the general statute of limitation that it may be brought within five years. The express contract of the parties and the stipulations to which they agree in that contract, supplants, for the purposes of an action on the policy, the general statute of limitations. From an early time in the history of the jurisprudence of this country, the courts have adopted and adhered to this holding in a uniform and unbroken line of decisions, which hold the limitation in the policy to a shorter time than the general statute, valid and binding: *Fullman* v. *Ins. Co.*, 7 Gray, 61; *Cray* v. *Ins. Co.*, 1 Blatchf., 280; *O'Laughlin* v. *Ins. Co.*, 11 Fed. Rep. 281; *Moore* v. *Ins. Co.*, 72 Iowa, 414; *Virginia Fire & Marine Ins. Co.* v. *Wells*, 83 Va. 736; *Riddlesbarger* v. *Ins. Co.*, 7 Wall. 386; *Vette* v. *Ins. Co.*, 30 Fed. Rep. 668; *Thompson* v. *Ins. Co.*, 25 Fed. Rep. 296; *Dwelling House Ins. Co.* v. *Brodie*, 52 Ark. 11; *Tasker* v. *Ins. Co.*, 58 N. H. 469; *Brown* v. *Ins. Co.*,

5 R. I. 394; *Woodbury Savings Bank* v. *Ins. Co.*, 31 Conn. 517; *Chambers* v. *Ins. Co.*, 51 Conn. 17; *Wilkinson* v. *Ins. Co.*, 72 N. Y. 499; *Merchants' Mutual Ins. Co.* v. *Lacroix*, 35 Tex. 245; *McFarland* v. *Ins. Co.*, 6 W. Va. 425; *Virginia Fire & Marine Ins. Co.* v. *Aikin*, 82 Va. 424; *Suggs* v. *Travellers' Ins. Co.*, 71 Tex. 579. Indeed, so uniform and unbending is this holding of the courts that, though the parties to whom the loss may be payable are infants and incapable of suing, unless, perhaps, by guardian, *prochein ami*, or in other representative capacity, they will be bound by the stipulation in the policy: *O'Laughlin* v. *Ins. Co.*, 11 Fed. Rep. 280; *Suggs* v. *Ins. Co.*, 71 Tex. 579.

And where it was stipulated in the policy that no action should be sustained unless brought within twelve months, and a suit was commenced within the twelve months, but failed without fault of the assured, it was held, nevertheless, that another action could not be begun after the expiration of the year: *Wilson* v. *Ins. Co.*, 27 Vt. 99. Nor will the fact that a statute of a state, which permits a new action to be brought on the same contract at any time within a year after a non-suit suffered in the first action, change the rule. Such a statute existed in Missouri, and an action was commenced by a policy-holder in that state in apt time, but was dismissed by the plaintiff of his own motion. He brought a new action on the same policy within a year after the voluntary dismissal, and sought to excuse the delay in bringing suit by reason of this statute. But it was held that the stipulation in the policy that the action should be brought not later than a year from the loss, controlled, and that assured could not rely on the limitation of one year after the non-suit within which to sue: *Riddlesbarger* v. *Hartford Fire Ins. Co.*, 7 Wall. 386.

The question whether the limitation period shall be construed to commence from the date of the fire, death, etc., strictly speaking, or whether it shall be held to begin to run only after the accrual of the cause of action under the terms of the contract of insurance, is one upon which the courts are very much divided. The following cases hold that the limitation period does not begin to run until a cause of action arises

under the contract: *Mayor, etc.* v. *Ins. Co.*, 39 N. Y. 45; *Mather* v. *Ins. Co.*, 89 N. Y. 315; *Fireman's Fund Ins. Co.* v. *Buckstaff* (Neb.), 56 N. W. R. 697; *Steel* v. *Ins. Co.*, 51 Fed. 715; *Cooper* v. *Mut. Accident Assn.* 57 Hun. 407; *Barber* v. *Ins. Co.*, 16 W. Va. 658; *Hong Sling* v. *Ins. Co.*, 8 Utah, 135; *Matt* v. *Ins. Co.*, 81 Iowa, 135; *Chandler* v. *Ins. Co.*, 21 Minn. 85; *Hay* v. *Ins. Co.*, 77 N. Y. 607; *German Ins. Co.* v. *Davis* (Neb.), 59 N. W. R. 698; *McConnel* v. *Ass'n.*, 79 Iowa, 757; *Spare* v. *Ins. Co.*, 17 Fed. 568; *Vette* v. *Ins. Co.*, 30 Fed. Rep. 668; *Hart* v. *Ins. Co.*, 86 Wis. 77; *Freizen* v. *Ins. Co.*, 30 Fed. Rep. 352; *Ellis* v. *Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller* v. *Ins. Co.*, 70 Iowa, 704; *Sun Mutual Ins. Co.* v. *Jones*, 54 Ark. 376.

The following very respectable list of authorities hold, with much sound reasoning and good logic, that the limitation begins to run from the time stated in the policy, and not from the time of the accrual of the cause of action: *Virginia Fire & Marine Ins. Co.* v. *Wells*, 83 Va. 736; *Ghio* v. *Ins. Co.*, 65 Miss. 532; *Roach* v. *N. Y. & E. Ins. Co.*, 30 N. Y. 546; *Ripley* v. *Ins. Co.*, 30 N. Y. 136; *McElroy* v. *Ins. Co.*, 48 Kan. 200; *State Ins. Co.* v. *Stoffels*, 48 Kan. 205; *Johnson* v. *Ins. Co.*, 91 Ill. 92; *Fullman* v. *Ins. Co.*, 7 Gray (Mass.), 61; *Travellers' Ins. Co.* v. *Ins. Co.*, 1 N. D. 151; *Cray, Recr.* v. *Ins. Co.*, 1 Blatchf. 280; *Meesman* v. *Ins. Co.* (Wash.), 27 Pac. Rep. 77; *Grigsby* v. *Ins. Co.*, 40 Mo. App. 276; *Williams et al.* v. *Ins. Co.*, 27 Vt. 99; *Lentz* v. *Ins. Co.*, 96 Mich. 445; *N. W. Ins. Co.* v. *Phœnix O. & C. Co.*, 31 Pa. 448; *Farmers' Mut. Ins. Co.* v. *Barr*, 94 Pa. 345; *Steel* v. *Phœnix Ins. Co.*, 47 Fed. Rep. 863; *Waynesboro Fire Ins. Co.* v. *Conover*, 98 Pa. 384; *Chambers* v. *Ins. Co.*, 51 Conn. 17; *McFarland* v. *Ry. O. & E. Accident Assn.* (Wyo.), 38 Pac. Rep. 347; *King* v. *Watertown Ins. Co.*, 47 Hun. 1; *Thompson* v. *Phœnix Ins. Co.*, 25 Fed. Rep. 296; *Garido* v. *Ins. Co.*, 8 Pac. Rep. 512; *Tasker* v. *Kenton Ins. Co.*, 58 N. H. 496. The courts of New York have not been at all uniform in their own decisions on the question. They seem to have in some cases adapted a strained construction of the particular wording of policies to justify the contrary decisions. The case of *Cooper* v. *U. S.*

Mut. Ben. Assn., 132 N. Y. 334, decided in 1892, was an action on an accident policy which undertook to pay the beneficiary in the policy a certain sum in case of injury to the person, and in case of death of the assured, the Association was to pay a specified sum to his wife. The policy provided that no suit should be commenced unless within one year next after the injury. It was held that the widow, who was only entitled to maintain an action in case of the death of the assured, could maintain it on the policy for the death within one year from the time the assured died, though such period be more than a year from the happening of the injury which caused death. This ruling is reasonable, however. The policy provided that if assured should die in 90 days that the wife should recover. The assured, under the policy, was also entitled to certain indemnity whether the accident proved fatal or not. The wife was only entitled to indemnity in the event it did. Thus there were two beneficiaries under the same policy. The assured himself was entitled to indemnity from the moment he was injured; the wife not till his death. The wife could not proceed to furnish proofs of loss under the policy until the death of the husband. The husband could, however, just as soon as injured. The fundamental rights of the two beneficiaries in the policy are, by its terms, and the possible results of the accident, placed at divergent times. In the case of *Steen* v. *Ins. Co.*, 89 N. Y. 315, the policy required actions to be brought within twelve months after the "loss or damage shall accrue." This clause in a policy would doubtless justify the decision that the action could be commenced within one year after the accrual of the cause of action, as all provisions in a policy which are of doubtful construction are construed strictly toward the insurer, and liberally in favor of the assured: *Vette* v. *Ins. Co.*, 30 Fed. Rep. 668; *Bradley* v. *Ins. Co.*, 28 Mo. App. 7; *Mayor, etc.* v. *Ins. Co.*, 39 N. Y. 35; *Grant* v. *Ins. Co.*, 5 Ind. 23; *Sun Mutual Ins. Co.* v. *Jones*, 54 Ark. 376. And the policies sued on in the cases of *Mayor* v. *Ins. Co.*, 39 N. Y. 45 and *Hay* v. *Ins. Co.*, 77 N. Y. 235, contained a clause similar to the one considered in *Steen* v. *Ins. Co.*, *supra.* Besides

the court seems, in this latest case on the subject, to approve the case of *King* v. *Ins. Co*, 47 Hun 1, which holds that the limitation begins to run from the time of the loss. In the case of *Mather* v. *Ins. Co.*, 89 N. Y. 315, the court held, disapproving the cases of *Johnson* v. *Ins. Co.*, 91 Ill. 93 and *Fullman* v. *Ins. Co.*, 7 Gray (Mass.), 61, that the limitation began to run, not from the time of the loss, but from the accrual of the action. Thus it would seem at least a little difficult to reconcile all the New York decisions on this point. In *Hay* v. *Ins. Co.*, *supra*, the policy provided that no action should be maintained unless within a stipulated time from the "loss." The court seems to play upon this word, and finally construes the policy to mean that it shall be sued on not later than a certain time from the accrual of the cause of action thereunder, instead of from the loss, as the policy plainly says in unambiguous and simple language. The supreme court of Arkansas has adopted this construction, following the New York court. The case of *Johnson* v. *Ins. Co.*, *supra*, though assailed by the New York court, has been expressly approved in the late cases of *McElroy* v. *Ins. Co.*, 48 Kan. 200; *McFarland* v. *Ry. O. & E. Acc. Assn.* (Wyo.), 38 Pac. Rep. 347; *Virginia Fire & M. Ins. Co.* v. *Wells*, 83 Va. 736, and is in harmony with the case of *Riddlesbarger* v. *Ins. Co.*, 7 Wall. 386, and the many other cases herein cited as sustaining the proposition that the limitation begins to run from the time the policy says instead of the accrual of the action. In the case of *Thompson* v. *Ins. Co.*, 25 Fed. Rep. 296, the court held that the limitation began to run from the date of the fire, unless the assured was prevented in some way by the insurer from bringing the action in apt time. The case went to the Supreme Court of the United States where it was held that the failure to bring the action within the time limited would excuse the failure to bring it sooner, if the insurer led assured to believe the claim would be paid without suit: *Thompson* v. *Ins. Co.*, 136 U. S. 287. On remanding the case by the United States Supreme Court, it was again tried in the Circuit Court. That court again adhered to its former ruling that the limitation period began to run from the date of the fire. It

held further, that the insurer had not induced the assured not to sue except for five months of the twelve provided in the policy within which to sue, and the court held this seven months left ample time in which to sue, and that the assured did not commence his action in time, it having been more than the twelve months after the fire. This last decision was reversed by the Circuit Court of Appeals for the Ninth Circuit, the court holding that a delay in suing on the contract of insurance for more than a year, which was superinduced by the representations of the agents of the company that the claim would be settled without a resort to the courts, was excusable when caused by such representations: *Steel* v. *Ins. Co.*, 51 Fed. Rep. 715.

The Supreme Court of Nebraska, with the Supreme Court of Arkansas, and perhaps some other courts, seems to take the position that all the six or twelve months, as the case may be, may be taken up in making proofs of loss and complying with the conditions precedent contained in the policy. But if the assured can consume a whole year in preparing proofs of loss which, according to the stipulation in the policy, must be furnished within sixty days, and which stipulation all courts hold and agree to be a condition precedent to any recovery at all, when made such by the policy, why can he not consume more than a year, or two years, or three, or an indefinite time? Yet he unquestionably must furnish these proofs as required by the policy, in manner and form laid down by the insurance contract itself, or he must be forever and all time barred from maintaining any action thereon: *Bowlin* v. *Ins. Co.*, 36 Minn. 433; *Shapiro* v. *Ins. Co.*, 51 Minn. 239; *Gould* v. *Ins. Co.*, 90 Mich. 302, affirmed on rehearing, Id. 308; *Steel* v. *Ins. Co.*, 93 Mich. 81, and many other cases that might be mentioned.

It is difficult to see how the courts can call the time of the loss mentioned in the policy the time of the accrual of the cause of action thereon. Surely, if the parties had intended so simple and commonplace a word as loss to mean the time of accrual of a cause of action, they would have embodied the latter term in the contract, instead of the simple word "loss,"

which has a plain, popular, commonplace and unambiguous meaning, and is nowhere defined by any of the standard lexicographers to mean the accrual of a cause of action. But it is argued by some of the courts that all the provisions of the policy must be taken together, and the policy construed as a whole. But, taking this horn of the dilemma places such an argument in no better attitude. Suppose a policy provides that the action shall not be brought till sixty days after the fire, and not later than one year therefrom. Construing these provisions together, the suit must not be brought sooner than the sixty days, nor later than the twelve months, or, in other words, must be brought within the ten months that elapses after the furnishing of the proofs and before the expiration of the year. There is nothing unreasonable in such a requirement. A clause limiting the time within which to bring the action to six months has never been held unreasonable, and has often been held valid, though the assured must furnish the proofs of loss within sixty days after the fire. A number of cases to this effect may be found in the authorities cited to sustain the limitation in its strict and plain terms.

In the case of *Johnson* v. *Ins. Co.*, *supra*, the Supreme Court of Illinois, with much good sense and sound reason in discussing the question of the time of the occurring of the loss, say: "When did the loss occur? Manifestly at the time the fire destroyed the property. In what consisted the loss? Obviously in the destruction of the building by fire. We are wholly unable to perceive that language could have been used that could have rendered the meaning plainer." In *Bradley* v. *Ins. Co.*, 28 Mo. App. 7, the court say: "When did the loss occur? Certainly, on the day, at the instant, when the property was destroyed by fire. The term employed in the contract is apt and unambiguous." The policy in the case provided that no action should be brought on the policy unless within six months next after the loss should occur. The Supreme Court of Connecticut discussed the same question where a policy was sued on, containing the provision that an action should be brought to recover thereon within "twelve months next after any loss or damage shall occur."

The court, in passing upon this clause of the policy, say: "This limitation is lawful and reasonable. In words of common use and plain meaning, an event is referred to as a starting point, that is, the destruction or injury to plaintiff's property by fire. It is certain they intended to surrender a very large portion of the time allowed them by law; and there is nothing either in the structure or the subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant and the institution of the suit. The contract keeps the day upon which a fire occurs entirely distinct from the day upon which the right to sue for indemnity accrues. Each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement:" *Chambers* v. *Ins. Co.*, 51 Conn. 17. And the Supreme Court of Virginia, in considering an action on a policy which stipulated that "No suit or action shall be maintained in any court upon this policy unless the same be instituted within six months next succeeding the day upon which the loss or damage is alleged to have taken place," among other things, said: "It is undeniable that a policy must be construed with reference to all its provisions like any other contract. And it may not be gainsaid that the condition of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that when the terms and stipulations of a contract are plain and clear, we are bound to adhere to the terms, as the only authentic expression of the intention of the parties. None would be rash enough to claim that there is obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next succeeding the time when the loss is alleged to have taken place. The position is that the sixty days in which the company is entitled to delay the payment of the

loss incurred by the fire should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so as to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in its terms, to indicate any such intention:" *Va. Fire & M. Ins. Co.* v. *Wells*, 83 Va. 736. The conclusions of these courts evince sound reason, common sense and good logic and are in harmony with the best considered cases and the clear weight of authority. The loss of the property is that which is insured against, not the production of the proofs of that loss. The insurer is not, in law, supposed to lose anything. The loss to the assured by reason of the fire is the loss in every proper sense. The insurer for a valuable consideration undertakes to pay the assured the loss by fire sustained. It is in a sense a guarantor, and binds itself to indemnify the assured against loss. The contract of insurance, the payment of the premium, and the loss by fire, or the accident, etc., are the fundamental elements of liability. The furnishing the proofs of loss is only an initial step to be taken looking to an action. This can and must be done in a certain time. And if, after the proofs of loss are furnished, and the other conditions precedent of the policy are complied with on the part of the assured, and there remains a reasonable time before the expiration of the stipulated limitation period in the policy for bringing the action, the assured will be required to take advantage of that opportunity, or his claim must be adjudged forever barred. No court, certainly, would close its doors to the litigant who has been as diligent as a reasonable person could be required to be in complying with conditions precedent in his policy, and, in spite of this due diligence, the limitation clause has elapsed. In cases of this kind the courts would not hesitate to hold that, the assured having done all that could have been required of him and used proper diligence to get his claim in apt condition for a suit, will be entitled to maintain it, and against such a suitor, the doors of justice never should be closed. In harmony with this principle, it has been held that where the last day of the limitation prescribed by the contract falls on Sunday, the assured will be

permitted to maintain his action if begun on the Monday following: *Owen* v. *Howard Ins. Co.*, 87 Ky. 571. See, also, *Edmonson* v. *Wragg*, 104 Pa. 501; *L. R. & Ft. S. Ry.* v. *Dean*, 43 Ark. 529.

Sometimes it is not an easy matter to ascertain with precision, the exact time when the cause of action under an insurance contract accrues. This inquiry may be of much importance, too, in those jurisdictions where it is held that the limitation period does not begin to run until the cause of action first accrues. To avoid any doubt or difficulty, the prudent practitioner will bring his actions in seasonable time; but this is not always done, and it then is necessary often to stretch the terms of the policy all they will admit, in order to show a right to come into court at all. Thus, where the insurer flatly denies any liability whatever, and unconditionally refuses to pay the loss alleged to have been sustained, this will place the company and the assured at arms length, as it were, and the cause of action, if well founded in fact, will become mature at once. The limitation period will then be set in motion, and it becomes the duty of the insured to proceed at once with his action. After such renunciation by the company of any liability, he cannot then wait and make his proofs of loss at any time within the sixty days, because these are dispensed with by reason of the general denial of liability. Upon such general repudiation of any liability by the insurer, the right of action is complete, and the period of limitation begins to run: *Hartford Fire Ins. Co.* v. *Josey* (Tex.), 25 S. W. R. 685; *Allegre* v. *Ins. Co.*, 6 H. & J. 408; *Tayloe* v. *Mercantile F. Ins. Co.*, 9 How. 390; *Daniher* v. *Grand Lodge A. O. U. W.* (Utah.), 37 Pac. R. 245; *Lazensky* v. *Supreme Lodge Kights of Honor*, 31 Fed. R. 592; *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S. 696; *Continental Ins. Co.* v. *Chew*, (Ind.), 38 N. E. R. 417; *German Ins. Co.* v. *Frederick*, 58 Fed. R. 144; *Vankirk* v. *Ins. Co.*, 79 Wis. 627; *Phœnix Ins. Co.* v. *Bachelder*, 32 Neb. 490; *German Ins. Co.* v. *Gibson*, 53 Ark. 494; *California Ins. Co.* v. *Gracie*, 15 Colo. 70; *Phœnix Ins. Co.* v. *Weeks*, 45 Kan. 751; *Steamship Samana* v. *Hall*, 55 Fed. R. 663; *Hahn* v. *Ins. Co.*, 23 Ore. 576; *Savage* v.

Ins. Co., 12 Mont. 458; *Sheanon* v. *Ins. Co.*, 83 Wis. 507; *Stepp* v. *Ins. Co.*, 37 S. C. 417; *Dial* v. *Ins. Co.*, 29 S. C. 560; *Weiss* v. *Ins. Co.*, 23 Atl. R. 991; *Lebanon Mut. Ins.* v. *Erb*, 112 Pa. 149; *Young* v. *Ins. Co.*, 92 Mich. 68; *East Texas Fire Ins. Co.* v. *Brown*, 82 Tex. 631; *American Central Ins. Co.* v. *Sweester*, 116 Ind. 370; *Niagara Ins. Co.* v. *Lee*, 73 Tex. 641; *Com. Union Ins. Co.* v. *Scammon*, 12 N. E. 324; *Kansas Protective Union* v. *Whitt*, 14 Pac. R. 275; *Unsell* v. *Ins. Co.*, 32 Fed. R. 443; *Phœnix Ins. Co.* v. *Spiers*, 87 Ky. 285; *German Ins. Co.* v. *Gueck*, 130 Ill. 345; *Sun Mut. Ins. Co.* v. *Mattingly*, 77 Tex. 162. The courts have uniformly held that the requirements of proofs of loss; to submit to arbitration; to furnish certificate of a magistrate or officer; and, in short, that any or all the conditions precedent prescribed in the policy, are for its advantage; and, if it chooses to do so, it may waive them or any of them. When they are so waived, they become, for all purposes of the bringing of an action after the waiver, just as though they had never been incorporated into the contract of insurance: *Gooden* v. *Amoskeag Fire Ins. Co.*, 20 N. H. 73; *McFarland* v. *Ins. Co.*, 6 W. Va. 425; *Mickey* v. *Ins. Co.*, 35 Iowa, 174; *Veile* v. *Ins. Co.*, 29 Iowa, 9; *Georgia Home Ins. Co.* v. *Kinniers*, 28 Gratt. 88; *Gans* v. *Ins. Co.*, 43 Wis. 108; *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102; *Grant* v. *Ins. Co.*, 5 Ind. 23; *Coursin* v. *Ins. Co.*, 46 Pa. 323; *McFarland* v. *Ins. Co.*, 134 Pa. 590; *Keenan* v. *Ins. Co.*, 12 Iowa, 126; *Hartford Fire Ins. Co.* v. *Davenport*, 37 Mich. 609; *Jennings* v. *Ins. Co.*, 148 Mass. 61; *St. Paul F. & M. Ins. Co.* v. *McGregor*, 63 Tex. 399; *Home Ins. & B. Co.* v. *Meyer*, 93 Ill. 271; *Continental Ins. Co.* v. *Chew* (Ind.), 38 N. E. R. 417; *Heidenreich* v. *Ins. Co.* (Ore.), 37 Pac. R. 64; *Merchants Ins. Co.* v. *Gibbs*, 29 Atl. 485; *Western Home Ins. Co.* v *Richardson* (Neb.), 58 N. W. R. 597; *Trippe* v. *Prov. Fund. Soc.*, 140 N. Y. 23; *Enos* v. *Ins. Co.* (S. D.), 57 N. W. R., 919; *Vergeront* v. *Ins. Co.*, 86 Wis. 425; *Emory* v. *Ins. Co.*, 88 Cal. 300; *Bromberg* v. *Ins. Co.*, 45 Minn, 318; *Morely* v. *Ins. Co.*, 85 Mich. 210; *Waiver* v. *Ins. Co.*, 153 Mass. 335; *Continental Ins. Co.* v. *Wilson*, 45 Kan. 250; *Green v. Ins. Co.*, 84

Iowa, 135; *Wright* v. *Ins. Co.*, 12 Mont. 474; *Carpenter* v. *Ins. Co.*, 135 N. Y. 298; *Star U. L. Co.* v. *Finney*, 35 Neb. 214; *Fisher* v. *Ins. Co.*, 33 Fed. R. 544; *Travellers Ins. Co.* v. *Harvey*, 5 S. E. R. 553; *Continental Life Ins. Co.* v. *Rogers*, 19 Ill. 474, and many other cases.

But the courts will not construe every suggestion that the company may make to the assured to be an unqualified waiver of all the conditions precedent. For instance, it may be objected by the insurers that the proofs of loss have not been furnished in apt time; that they are not sworn to as required; that there is no certificate of the nearest magistrate as to the loss; that immediate notice of loss was not given as required; that there was fraud in procuring the insurance; that there were false answers to questions in the application upon which the insurance was based. An objection of this kind would doubtless be a waiver of any other similar defence not specified. But any number of such objections could not be held to be a waiver of the clause requiring suit to be brought within a year, because there would be nothing in such objections leading to the assured to believe that such a stipulation would not be insisted upon, and for the further reason that in the very nature of things, this limitation stipulation would not be waived unless the assured at the trial failed to set it up as a defense. It has until the time of trial to plead this in bar. Every one of these objections could be made before the time of bringing suit expired. But such objections would doubtless waive a stipulation that the proofs of loss were not furnished within the time specified, or that they were not full and complete, or that there had been no arbitration, etc. Generally, the requirements to submit more perfect proofs of loss, or some other objection to the non-compliance with a condition precedent to a right to sue, could in no way affect the right of the insurer to set up the limitation period, or false swearing, or fraud in procuring the insurance, or any breach of the warranties in the application or policy. These go to the foundation of the action. They are matters of defence that will not be considered waived unless it clearly appear from the facts that the company has done or omitted some act which

may have induced assured, acting with reasonable prudence, to have relied on the assumption that the company would not plead or set up such defence. And if the conduct of the company in connection with a loss under its policy be such as to justify any one of ordinary intelligence in believing that the claim will be settled without a suit, and, relying on this representation, the assured defers bringing his action, until after the period of limitation expires, the action may nevertheless be maintained within a reasonable time thereafter: *St. Paul Fire & M. Ins. Co.* v. *McGregor*, 63 Tex. 399.

In *Home Ins. & Banking Co.* v. *Meyer*, 93 Ill. 271, suit was brought on a policy within the time prescribed. The company after the action was begun promised repeatedly to pay the loss, insisting that there was no need to resort to the courts to enforce collection. The suit was pending for about two years, and finally dismissed for want of prosecution. Like promises were made by the company after the suit had been dismissed for want of prosecution. An action was subsequently brought on the same policy, and it was held that the promises and assurances of the company that the claim would be paid without suit were a sufficient excuse, not only for the failure to prosecute the first action, but for not bringing the last within the limitation period as well. But the mere fact that there may be negotiations carried on between the parties looking to a settlement will not toll the limitation period stipulated in the contract of insurance, unless there be an express agreement that the limitation be suspended pending the negotiation: *Gooden* v. *Ins. Co.*, 20 N. H. 73; *McFarland* v. *Ins. Co.*, 6 W.Va. 425.

But any holding out by the company that would naturally and reasonably lead the assured to defer his action will estop and preclude the company from setting up any defense that it may have inveigled the assured into losing by reason of such inducements: *Dwelling House Ins. Co.* v. *Brodie*, 52 Ark. 11; *Bish* v. *Hawkeye Ins. Co.*, 69 Iowa, 184; *Miller* v. *Ins. Co.*, 70 Iowa, 704; *Eggleston* v. *Ins. Co.*, 65 Iowa, 308; *Moore* v. *Ins. Co.*, 64 N. H. 140; *Ames* v. *Ins. Co.*, 14 N. Y. 253; *Ripley* v. *Ins. Co.*, 30 N.Y. 136; *Thompson* v. *Ins. Co.*, 136 U. S. 287.

This principle is unquestionably right. The law requires

good faith and fair dealing on the part of both the assured and the insurer as well. It would be contrary to equity and good conscience, as well as manifestly unjust, to permit the insurance company to profit by its own unfair acts and conduct, which have resulted in the injury of its adversary whom it has thus made its confiding victim.

In a case where the company was notified of a loss, and it replied that the matter was in the hands of its state agent, and advised the assured to be patient, it was held that this was no waiver of the condition requiring proofs of loss to be furnished within a certain time. And though such letter be written before the proofs are furnished, yet the cause of action on the policy will not accrue until this condition be complied with: *German Ins. Co.* v. *Davis* (Neb.), 59 N. W. R. 698.

Again, where a loss occurred, and assured was advised by the company that an adjuster would be on hand at a certain time, and for assured to get his appraiser ready. This was held not to obviate the necessity of proofs of loss: *Harrison* v. *Ins. Co.*, 59 Fed. Rep. 732. Likewise, a letter acknowledging receipt of a notice of loss, and stating that the claim of the assured would receive prompt attention, does not waive the requirement that proofs of loss be first furnished before commencing suit: *Kirkman* v. *Ins. Co.* (Iowa), 57 N. W. R. 952.

Where the contract of the parties requires that a certain condition precedent shall be performed, if it is attempted to be complied with by the assured and he fail, the failure of the company to require more is but silence, and silence is not a waiver of the condition: *Keenan* v. *Ins. Co.*, 12 Iowa, 126.

So, where the assured furnished the proofs of loss after the time stipulated and the company thereupon denied any liability because the proofs were not furnished in time. The assured thereupon sent additional proofs, but the company remained silent thereafter. It was held that this was not a waiver of the condition requiring proofs to be furnished: *Peninsular L. & T. Mfg. Co.* v. *Franklin Ins. Co.*, 35 W. Va. 666.

And where the insurance company received proofs of loss and claimed that the policy was void, it was held that the company was not precluded from setting up the limitation

clause in the policy in bar: *Vore* v. *Ins. Co.*, 76 Iowa, 548.

By the mere fact that an adjuster of the company visited the place of the fire and offered to compromise the claim of assured upon a certain basis, which offer was refused by the assured, it was held that the clause requiring proofs of loss was not waived: *Maddox* v. *Ins. Co.*, 39 Mo. App. 198.

Nor does the failure of the company to demand proofs of loss and furnish blanks therefor waive the requirement that proofs be furnished before the cause of action accrues: *Continental Ins. Co.* v. *Dorman*, 125 Ind. 169.

Where the adjuster of the company visits the place of fire and makes an offer of settlement which is rejected by assured, and threupon the adjuster tells assured that he will have to proceed under his policy, this is not a waiver of the conditions in a policy required to be performed before suit brought: *Knudson* v. *Hekla Ins. Co.*, 75 Wis. 198.

The failure of an insurance company to object to the proofs of loss furnished, while waiving the necessity of further proofs, does not waive the sixty days allowed by the policy within which to pay the insurance after the proofs are received. The failure to object to the proofs is nothing more than the receiving proofs properly made out, and the privilege of delaying payment for sixty days after receipt of proofs is retained in any event. So, in cases of this kind, the cause of action will not accrue until the expiration of the sixty days: *German-American Ins. Co.* v. *Hocking*, 115 Pa. 198.

In the case of *Steel* v. *Ins. Co.*, Judge Deady held, that where the insurance company had held out inducements and allured the assured into not suing the company for a time, but that the inducements were withdrawn and seven months of the limitation period was still left within which to sue, that this time was sufficient and reasonable, and that assured was barred for not bringing the action within that time. This doctrine is controverted in a late case determined in the Supreme Court of Illinois, affirming the ruling of the appellate court of that state: *Illinois Live Stock Ins. Co.* v. *Baker*, 38 N. E. R. 627. It is there held that where the company has once waived the limitation period, it cannot be revived, and that the claim

can then be considered by the assured as governed by the general statute of limitations. The question is not without some difficulty, but it would seem on principle that if the company should notify the assured that it would insist on every defence provided by the policy, though it had previously estopped itself from claiming the limitation stipulation, it would be reasonable to hold the assured to the period provided by the policy from and after such notice. The parties *in limine* contracted with reference to this stipulation. By allowing the assured the full period after he is notified that his claim will be resisted because not brought in the twelve months, we will say, he is then in *statuo quo*. He is just where he was before the clause was waived. He is not injured by reason of the inducements not to sue, if he has notice that he must proceed under his policy and is allowed the full time that would have been allowed had he not been misled. And though the insurer may have acted in bad faith or fraudulently with assured, and thereby have induced him to postpone his action too long, yet when he is put on notice that he will have to sue, he is not injured if he have as long thereafter in which to sue as he would have had if he had not been misled. As a general rule, fraud will not entitle any one to relief which he could not have had before the fraud if he has not been injured by the fraud or bad faith. And in all cases, as a general rule, where a waiver or estoppel is relied on by the assured to toll the limitation period, the *onus* is on the party alleging the waiver, not only to show it, but to establish that the person waiving the provision had the authority to do so: *German Ins. Co.* v. *Davis*, 59 N.W. R. 698.

It is generally held that a clause in a policy requiring any differences that may arise to be submitted to arbitrators is valid. And when such submission to arbitrators is made a condition precedent by the terms of the policy, it must be complied with before an action can be brought: *Mutual Fire Insurance Co.* v. *Alvord*, 61 Fed. Rep. 752. These stipulations in the policy, if they do not have the effect of ousting the courts of their jurisdiction, but simply provide for ascertaining the amount of the loss, are held valid and binding. The

courts can, nevertheless, be resorted to to inforce the payment of the loss found by the arbitrators. In such instances, suit can only be brought after the award, and for the amount found by the arbitrators. See *Hamilton* v. *Ins. Co.*, 136 U. S. 242; *Liverpool L. & G. Ins. Co.* v. *Wolff*, 50 N. J. L. 453; *Hall* v. *Ins. Co.*, 57 Conn. 105; *Hanover Ins. Co.* v. *Lewis*, 28 Fla. 209; *Gauche et al.* v. *Ins Co.*, 10 Fed. K. 347; *Adams* v. *Ins. Co.*, 70 Cal. 198; *Old Sancelito L. & D. Co.* v. *Ins. Co.*, 65 Cal. 368. But where the policy does not stipulate that the making of the award is a condition precedent to the bringing of the action, it may be commenced, so far as the arbitration clause is concerned, at any time: *Mutual Fire Ins. Co.* v. *Alvord*, 61 Fed. Rep. 752; *Crossley* v. *Ins. Co.*, 27 Fed. Rep. 30; *Hamilton* v. *Ins. Co.*, 137 U. S. 370; *Seward* v. *Rochester*, 109 N. Y. 164; *Birmingham Fire Ins. Co.* v. *Pulver*, 126 Ill. 329; *Smith* v. *Assn*, 51 Fed. Rep. 520.

The limitation clause in policies of insurance is usually inserted for the benefit of the insurer, though it results in an advantage to the honest policy holder. These limitation clauses are founded upon the general experience of mankind. In a sense they are based upon the observed result of events. They hasten diligence on the part of the insurer, and require him to present his claim for indemnity while the circumstances of the loss entitling him thereto are vivid in his mind, and can be intelligently and fairly presented and contended for. They protect the insurer, too, by placing a limit on the time within which the action may be brought, and prevent suit at a late day when time may have to a large extent, and perhaps totally, destroyed evidence that might defeat a dishonest recovery. The law presumes that one having a good cause of action will not needlessly delay from time to time until it may be difficult for him to establish his claim with reasonable certainty on the one hand, and equally as difficult for the company to resist a claim that may not be just, on the other. "It is not an unreasonable term that, in case of a controversy upon a loss, resort shall be had by the assured to the proper tribunal, whilst the transaction is recent and the proofs respecting it are accessible:" *Riddlesbarger* v. *Ins. Co.*, 7 Wall. 386.

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