1926
*Nov. 11.
*Dec. 1.

SUN INSURANCE OFFICE OF LONDON, ENGLAND (DEFENDANT)..... } APPELLANT;

AND

VICTOR G. ROY (PLAINTIFF).....RESPONDENT.

GUARDIAN ASSURANCE COMPANY OF LONDON, ENGLAND (DEFENDANT) .... } APPELLANT;

AND

VICTOR G. ROY (PLAINTIFF).....RESPONDENT.

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

Fire insurance—Renewal—Description of property—Failure to disclose change in description—Misrepresentation—Character of occupancy—Vacancy—Materiality—Statutory conditions—Ontario Insurance Act, R.S.O., 1914, c. 183.

The effect of the renewal of a policy of fire insurance is that the property is insured subject to the terms and conditions of the policy, and the description of the property in the policy operates with relation to the date of renewal; and if, as the property then stands, it does not answer the description in the policy, there is a misdescription, which, if it be material and to the prejudice of the insurer, will, where

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1888) 5 T.L.R. 13.

the policy is subject to such statutory conditions as were provided in *The Ontario Insurance Act*, R.S.O., 1914, c. 183, disentitle the insured to recover.

MacGillivray on Insurance, p. 298, and *In re Wilson and Scottish Ins. Corp. Ltd.* ([1920] 2 Ch. 28) referred to.

A change material to the risk was held to have occurred in the description of premises with regard to their occupancy. The Court referred to evidence going to establish materiality, but also indicated, referring to *Western Assurance Co.* v. *Harrison* (33 Can. S.C.R. 473), that a representation may be held material although no evidence of materiality be given at the trial except the proof of the representation.

Where the property insured is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance does not attach to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied. *Farr* v. *Motor Traders Mutual Ins. Soc. Ltd.* ([1920] 3 K.B. 669) referred to.

A change in the property, from occupation as a residential store to vacancy, not being notified to the insurer, and being material, as found, was held to avoid a policy in question within the intent and meaning of no. 2 of the statutory conditions in R.S.O., 1914, c. 183.

A policy of fire insurance, dated 5th January, 1923, was on a building described as "occupied as general store and dwelling." The tenant had been notified by the insured to quit on 1st January, and began to move out on 2nd January and completed moving on 5th or 6th January, and the building ceased to be occupied as described. It was held that, either the property at the time of the policy did not answer to the description, or it must have been known to the insured that the building was in process of being vacated, and would immediately cease to be occupied as described, and this, having regard to the evidence and findings, constituted, if not a misdescription, a misrepresentation of, or omission to communicate, a material circumstance, or a change material to the risk, by reason of which, under nos. 1 and 2 of the statutory conditions in R.S.O., 1914, c. 183, the policy was avoided.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 351) which, reversing judgment of Riddell J. (58 Ont. L.R. 351), held plaintiff entitled to recover on certain fire insurance policies, reversed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing judgment of Riddell J. (2), held the plaintiff entitled to recover against the defendants under certain policies of fire insurance. The material facts of the cases are sufficiently stated in the judgment now reported. The appeals were allowed.

(1) (1926) 58 Ont. L.R. 351. (2) (1925) 58 Ont. L.R. 351.

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D. L. McCarthy K.C. and *W. R. West* for the appellants.

Peter White K.C. and *W. F. MacPhie* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—These two cases were tried together. The plaintiff (respondent) brought separate actions against the two Insurance Companies, defendants (appellants), to recover upon two policies of fire insurance which these companies had issued to him upon buildings, of which he was the proprietor, situate at the settlement of Earlton in Northern Ontario. There was a storehouse 25 by 36 feet with three rooms in the top fitted for living purposes, attached to which, in the rear, was a small dwelling 25 feet square. These had been occupied as a store and dwelling, but, in 1916, when the plaintiff acquired the property, he constructed a building, 78 by 33 feet, known in the case as the new store, which was attached to and communicated with the storehouse on the north side of the latter, and these buildings, as a group, are, as will presently be seen, described in the policies as the new building "and additions." The policies were thus intended to cover the same property, but the descriptions do not precisely correspond, and it will be convenient to consider each case separately. Both policies were, however, subject to the Ontario statutory conditions, which are printed on the back. These are identical, and the first and second of them are expressed in the following terms:—

1. If any person insures property, and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

2. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the unearned portion, if any, of the premium which has been paid for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

THE SUN CASE

The original policy was dated 14th January, 1919, and it was renewed each year down to and inclusive of 14th January, 1923, the date of the last renewal. It stipulates that the insured, the plaintiff, is insured against direct loss or damage by fire during the year for the actual cash value of the property at the time of the loss, not exceeding $4,000,

On the two story frame building 33 x 78 and additions thereto attached, with metal roofing, occupied as Residential Store, situate on the North West corner of lot No. 6 in the 3rd concession of the Township of Armstrong in the District of Temiskaming, Province of Ontario.

The buildings were totally destroyed by fire on 27th February, 1923. These buildings were wooden structures and the two older ones, the storehouse and dwelling, had wooden roofs, but the new store had a zinc roof. It was a building of two stories, with living quarters in the upper story, where the plaintiff lived while he carried on business there, and in which his tenant, Poirier, who succeeded him in the business, subsequently lived. The plaintiff occupied the premises until 1921, carrying on business as a general merchant, when he leased to Poirier for three years from 1st April, 1921. Poirier leased the dwelling at the rear of the storehouse to Boileau, who occupied it as his dwelling. Subsequently, Poirier having failed in business, his lease became void, and the plaintiff, in the autumn of 1922, notified him to quit, and arranged with Boileau that the latter was to remain in possession of the dwelling and pay rent to the plaintiff. Boileau did remain, and, although temporarily absent, was in occupation of the dwelling as the plaintiff's tenant at the time of the fire. Poirier moved out and quitted the premises on 5th or 6th January, 1923, and from that time until the fire, the buildings were unoccupied, except for Boileau's occupation of the small dwelling in the rear, subject however to the facts now to be stated. Sometime after Poirier gave up the premises, the plaintiff, as he says, decided to re-open his business in the new store. He lived at North Bay, and, on 28th January, he visited the premises, going there and returning to North Bay on that day. Subsequently, on 26th February, he returned to Earlton with two carpenters whom he left there with instructions to clear up, wash the floors, and build a wood shed. They took in a stove, stove pipe, spring

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mattress and blankets from another building belonging to the plaintiff at Earlton. The plaintiff remained with them, helping them with their work, for the day. The two men slept upstairs in the new store that night, and, on the night of the 27th, they slept downstairs, in the same building, to be near the stove, as the weather was cold. It was during that night that the fire occurred. The plaintiff testifies that it was his intention to return on 1st March, as it is suggested, then to re-open the shop.

It was, as I have stated, on 14th January that the policy was renewed. The effect of the renewal, as I interpret it, is that the new store, with metal roofing, occupied as a residential store, and the other two buildings, being the "additions thereto attached," were insured subject to the terms and conditions of the policy; this description must be held to operate with relation to the date of renewal; but it is certain that the building was not then occupied as a store, whatever may be the meaning of the qualification introduced by the word "residential," and this fact must be considered having regard to the first statutory condition quoted above.

In *In re Wilson and Scottish Insurance Corporation, Limited* (1), it was held by Astbury J., as appears to be accurately stated in the head note, that

The renewal of a fire policy is impliedly made on the basis that the statements in the original proposal are still accurate.

This was a case where, in 1915, a motor car had been insured for its full value on a proposal stating the present value at £250. The policy was renewed from year to year and the car was burned in June, 1919, when it was found worth £400, and the question was whether the insured was entitled to indemnity upon the latter estimate of value. Counsel for the corporation argued that each renewal was a fresh insurance, re-incorporating the original statements in the proposal, and made on the basis of their continued accuracy at the date of renewal. He cited MacGillivray on Insurance, p. 298, and *Pim* v. *Reid* (2). The learned judge said in his judgment:

There is no decision directly applicable, but I cannot help thinking that on renewing the policy on November 8, 1918, the insured must be deemed to have continued or repeated his "estimate of present value" at £250.

(1) [1920] 2 Ch. 28. (2) (1843) 6 Man. & G. 1, at p. 25.

The actual decision in *Pim* v. *Reid* (1), is not in point, but Cresswell J. said: "No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance.

Mr. MacGillivray, in the passage referred to in his valuable work, says:

In fire policies and similar risks, where the insurers may decline to renew the policy at the expiration of the original period, each renewal is made on the faith of the continued truth of the original representations, and if there has been any change, that must be disclosed when the renewal premium is tendered.

The view thus expressed appears, in my judgment, to be sound and reasonable, and I have no hesitation in accepting it. It is true that the effect of the misdescription may be limited by the first condition to which I have referred, but, if the findings of the learned trial judge be accepted, the misdescription is material, and to the prejudice of the company. He finds that:

The plaintiff knew January 6 at the latest that the property was no longer a "residential store": he may have contemplated reoccupying it as a "residential store," but he did nothing in that direction for some 8 weeks, and he had not in fact reoccupied it as such at the time of the fire. This was a change material to the risk, increasing the risk, on principle and authority, evidence and common sense.

These findings, it must be remembered, relate to buildings in a frontier settlement; they seem, according to the evidence in the case, to rest upon reason and experience, and I should be reluctant to disturb them. Witnesses were called who were skilled in the business of insurance, an agent, an adjuster and appraiser, an inspector of agencies and the manager of two insurance companies. These gentlemen testified, having regard to their knowledge and experience, that vacancy was a condition material to a fire risk; that the risk was thereby increased. It was shown that three of the insurance companies, including the Sun (defendant), would not take unoccupied risks in the north country. Another witness, who is an adjuster, extends that statement generally to the insurance companies in the north country. None of this evidence was contradicted, although the plaintiff was offered an adjournment to make inquiries. The testimony of these witnesses is, it may be

(1) (1843) 6 Man. & G. 1, at p. 25.

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remarked, not confined to mere matter of opinion. Moreover I would direct attention to the fact that it was held by this court in *Western Assurance Co.* v. *Harrison* (1), that a representation was material, although no evidence of materiality was given at the trial, except the proof of the representation.

There are many cases referred to in the factums, and more in the books, with regard to the effect of words forming part of the description in a fire policy and intended to describe, sometimes in the present and sometimes in the future tense, the user of the premises, but there is none inconsistent with the view, the reasonableness of which commends itself, that, where the property is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance is not attached to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied. See *Farr* v. *Motor Traders Mutual Insurance Society, Ltd.* (2).

Moreover, by the second statutory condition, to which the learned trial judge gave effect, it is declared that any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to the part affected thereby, unless the change be promptly notified in writing to the company or its local agent. The change, from occupation as a residential store to vacancy, not being notified, and being material as found, therefore voids the policy within the intent and meaning of this condition. In this particular there appears to be an error of fact in the judgment of the Appellate Division, in that the change is described as occurring after the renewal, whereas, from the time of the renewal until the fire, there had been no occupation of any sort, except by the two carpenters on 26th and 27th February.

This appeal must therefore be allowed.

(1) (1903) 33 Can. S.C.R. 473. (2) [1920] 3 K.B. 669.

THE GUARDIAN CASE

In this case the policy is dated 5th January, 1923, and by it the property, as described in the body of the policy, is insured in the sum of $2,000:

On the two story 33 x 78 frame building and additions attached thereto with metal roofing, occupied as General Store and dwelling, situate on the North West corner of lot No. 6, in the 3rd concession of the Township of Armstrong, Dist. of Temiskaming, Ont. Marked risk on diagram.

Warranted that no paints, oils or varnishes or other inflammable liquids (coal oil excepted), kept therein except in hermetically closed packages, bulk not broken.

It is a condition of this insurance and for which the premium has been reduced, that the property hereby insured is detached or is contained in a building detached not less than 40 feet, from any other building or shed and further that the building is and will be continually occupied during the currency of this policy for dwelling purposes above the ground floor.

Conditions nos. 1 and 2 and the evidence and findings are the same as in the Sun case already considered. The building which is prominent in the description, and the only one described by that name, is "the two-story 38 by 78 frame building," or new store, which, up to the date of the policy, had been occupied as a general store and dwelling by Poirier, or his trustee in bankruptcy, or his wife, who had bought the bankrupt stock from the trustee. It was the smaller of the two buildings described as additions, and which was situated at the rear of the addition known as the storehouse, that Boileau occupied as a dwelling. There were in this small building five rooms in all, two or three on the ground floor and the others on the upper floor. I do not think that the description admits of any interpretation other than that the building required by the condition to be continually occupied for dwelling purposes above the ground floor is the new store; a different meaning is not only incompatible with the text, but, in my view, too improbable to be seriously considered. Now it is not proved whether Poirier completed his moving on 5th or 6th of January, but it is certain that, from one or the other of these dates, there was, during the currency of the policy, no occupation of the new store for dwelling purposes above the ground floor, except in so far as the fact that the two carpenters slept there on the night before the fire constituted such an occupation for that night. The following day they moved down with their

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effects, because they found the place too cold, and so left the upper story unoccupied. Neither, it may be added, was there any occupation of any part of the new store for any purpose, except that of the carpenters, such as it was. There was thus a breach of the stipulation, but if this be a condition within the meaning of the *Ontario Insurance Act,* as distinguished from a limitation of the risk, a question which was not discussed, it is ineffective by the provisions of the statute, and therefore I shall put my decision upon the short ground which I am going to state.

Poirier's lease, according to the terms of it, became void by his bankruptcy. The plaintiff had notified him to quit on 1st January. He had made his arrangements for quitting; the moving began on 2nd January, and was completed on the 5th or 6th. In these circumstances, either the property at the time of the policy did not answer to the description, or it must have been known to the insured that the building described as "occupied as general store and dwelling" was in process of being vacated, and would immediately cease to be so occupied. This, having regard to the evidence and findings to which I have already referred, constituted, if not a misdescription, a misrepresentation of, or omission to communicate, a material circumstance, or a change material to the risk, by reason of which, under statutory conditions 1 and 2, the policy was avoided.

This appeal should therefore likewise be allowed.

Appeals allowed with costs.

Solicitors for the appellants: *McCarthy & McCarthy.*

Solicitor for the respondent: *W. F. MacPhie.*