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*May 21, 25.
*June 24.

THE EVANGELINE FRUIT COMPANY AND ANOTHER (PLAINTIFFS) } APPELLANTS;

AND

THE PROVINCIAL FIRE INSURANCE COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Statutory conditions—Gasoline "stored or kept" on premises—Supply kept near building—Material circumstances—Non-disclosure.

By a condition in a policy of insurance against fire the policy would be void if more than five gallons of gasoline were "kept or stored" at one time in the building containing the property insured.

Held, that keeping 15 or 16 feet from said building, under an adjacent platform a barrel of gasoline for supplying the quantity required for daily use was not a breach of such condition.

Held, also, reversing the decision of the Supreme Court of Nova Scotia (48 N.S. Rep. 39), that as the company, when issuing the policy, knew that a gasoline engine had been installed in the building for use in manufacturing, and must be deemed to have known that a reasonable supply of gasoline for feeding it would be kept close at hand, the keeping of the barrel where it was placed was not a circumstance material to the risk, non-disclosure of which would avoid the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiffs.

The questions raised for decision are stated in the above head-note.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 48 N.S. Rep. 39.

Roscoe K.C. for the appellants.

Newcombe K.C. for the respondents.

THE CHIEF JUSTICE concurred in the judgment allowing the appeal with costs.

DAVIES J.—This appeal is from the judgment of the Supreme Court of Nova Scotia which reversed a judgment of the trial judge in favour of the plaintiff for the amount insured by its policy in the defendants' company on its stock of apples and general stores contained in a two-and-a-half story frame and cement building 60 x 94 and addition 20 x 20, situate in the Town of Windsor.

All kinds of defences were pleaded to the claim of the plaintiff, but they were either dropped or disposed of at the trial and the only two relied on by the court below and at the argument at bar were (1) the omission on plaintiff's part to communicate to the defendants before or at the time the policy issued what was alleged to be a material circumstance under condition 1 of the policy, namely, the presence of a barrel of gasoline under a broad platform running up to the building and about 15 or 16 feet from the building from which the daily supply of gasoline (about 5 gallons) for the gasoline engine in use in the building for evaporating applies was obtained, and (2) condition 11 which prohibited the storing or keeping of more than five gallons of, amongst other oils, gasoline "in the building insured" unless permission in writing from the insurer was first obtained.

The court below did not rely upon this condition for their judgment. On the contrary, I gather that

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they were of the opinion that the keeping of the gasoline in a barrel outside of the building and some 15 or 16 feet away from it for the purpose of obtaining the daily supply of five gallons for the running of the gasoline engine within the building was not in contravention of this eleventh condition.

In that conclusion I fully concur and with respect to the true meaning of that eleventh condition I would call attention to the observations of the Judicial Committee of the Privy Council in the case of *Thompson* v. *Equity Fire Ins. Co.*(1), at pp. 596 and 597.

The ground upon which the court below based its judgment reversing that of the trial judge was the omission on the part of the insured company to communicate the fact of the presence of the barrel of gasoline some 15 or 16 feet away from the building under the platform leading to the building from which the supply for the gasoline engine was daily obtained.

They held that was a material fact affecting the risk which it was the duty of the party insured to have disclosed to the insurance company at or before the date when the policy issued and that the failure to make the disclosure vitiated the policy.

The information given to the general agents of the defendant company and on which the policy sued on was issued, was that the goods, etc., upon which insurance was sought were contained in a factory, the machinery of which was operated by an engine for which gasoline furnished the power and in which factory were furnaces, piping, etc., besides the engine.

This information must have satisfied the insurance company that gasoline was used in the engine and the

(1) [1910] A.C. 592.

protection they required and the prohibition they provided for in consequence were provided for in the eleventh condition of the policy, prohibiting the keeping or storing of gasoline exceeding five gallons in quantity "in the building insured or containing the property insured." There was, as all the courts have held and as this court holds, no violation of that condition.

If with the knowledge the insurance company possessed when issuing the policy sued on of the facts that gasoline supplied the power which operated the engine in the factory or building the goods in which they were insuring and that such supply of gasoline had to be daily obtained from some outside source as it was prohibited from being kept or stored in the building or believed so to be; then if they desired further security and to know where the source of supply was kept or obtained, they should surely have asked for the information.

I am of the opinion that under the facts and circumstances proved in this case and in view of the knowledge of these facts possessed by the insurance company, the keeping of the barrel of gasoline under the platform some 15 or 16 feet away from the building for the purpose of furnishing the daily supply required for the running of the engine, was neither a breach of the eleventh condition nor such a material circumstance within condition 1 as it was the duty of the insured company voluntarily and without being asked to communicate to the insurance company.

I would allow the appeal with costs in this court and in the court of appeal and restore the judgment of the trial judge.

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IDINGTON J.—This is an action brought by appellant against respondent on a fire insurance policy, dated 7th January, 1912, for a year from that date, upon stock contained in a building in Windsor, Nova Scotia, for $2,500, to recover losses caused by fire on the 21st March, 1912.

The numerous defences pleaded were at the trial practically reduced to three in number, each resting upon one of the statutory conditions. That upon the condition No. 1 is relative to the alleged omission of the insured to communicate a circumstance material to the risk. Another was rested upon condition No. 9, relative to prior and subsequent insurances. And the third is dependent upon condition No. 11, so far as relative to the quantity of gasoline stored or kept in the building.

The learned trial judge, Mr. Justice Drysdale, held none of these defences established and entered judgment for the appellant for the amount claimed.

On appeal therefrom the Supreme Court of Nova Scotia does not seem to have been asked to pass upon anything arising out of condition No. 9 as only that raised by the others of said conditions is dealt with.

Of these that court maintained only the defence raised upon condition No. 1. We are not favoured by a copy of the reasons of appeal (if any) presented to that court.

It may be observed that, if no objection was raised in that court to the ruling of the learned trial judge relative to condition No. 9 and hence assented to or accepted by respondent, it should not now be entertained here.

The validity of the defence maintained by the court of appeal must depend on how we look at the cir-

cumstances under which the insurance was effected, and the facts which are alleged to have materially increased the risk.

The authority of the local agency which accepted the risk and issued the policy sued upon may also have to be considered.

The risk had been presented to these local agents in October, accepted by them and a policy issued accordingly by them but rejected by the head office under a misapprehension of the nature of the building in which the stock was.

The head office, on explanations, desired to retain the risk, but were too late on that occasion as another company had (upon such rejection) meantime taken it for three months. This is only material in considering the knowledge they in said head office must have acquired in course of that dealing; and its bearing upon the authority these local agents had relative to such matters as are involved in this defence.

The insurance now in question was asked for by Mr. Blanchard, another insurance agent, asking the local provincial agents of respondent over the phone when the three months' policy already referred to had expired, or was about to expire, to take the risk.

Mr. Pryor, of the firm representing the respondent for that province, states the matter thus:—

Q. Do you recognize this policy ? L.B./8
A. Yes, sir.
Q. That was issued by your firm at your office ?
A. Yes.
Q. And forwarded to whom ?
A. To Mr. Blanchard in Windsor.
Q. How did it come to be issued ?
A. Through a telephone message from Mr. Blanchard.
Q. Applying for ?

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A. For extra insurance on stock of the Evageline Fruit Company at Windsor.

Q. At that time were you aware of any other insurance on this stock ?

A. Yes.

Q. In what companies, and how much ?

A. $1,000 in the Nova Scotia and $2,500 in the Dominion.

Q. Can you tell me whether you were referred to any place by Mr. Blanchard to get particulars

A. Yes, to the Nova Scotia Fire.

Q. What did you do ?

A. I went to their office and took a copy from the daily report in their office of the stock item and building which they had.

Q. What was the daily report in reference to which you saw ?

A. Building, stock and machinery.

Q. Of what ?

A. Of the Evangeline Fruit Company.

Q. Made in respect to what ?

A. From inspection report.

Q. This daily report was in respect to what ? Was it in respect to a policy issued by the Nova Scotia Fire ?

A. Yes, it was.

Q. You saw that ?

A. Yes.

Q. What information did you get from that with reference first, to the building, if any, machinery, gasoline engine or gasoline ?

A. They were carrying $4,000 an the building, and $1,000 on the stock. I took a note of the stock item and also of the building, I understood there was machinery and gasoline engine, but there was a permit on the policy that no gasoline was to be kept in the building, but as we were not interested in the machinery, why I thought it was not worth taking notice of.

Q. You got this information before issuing the policy ?

A. Yes.

Q. When you came over to your office, what steps did you take ?

A. I simply handed the memorandum over to the stenographer and asked her to issue the policy.

It is not disputed now that said firm must have known, and, I should suspect, the head office of respondent must also have known unless it neglected to pay attention to that which had previously been before it that a gasoline engine was in use in the building containing the stock in question.

It turned out that instead of the supply cask from

which five gallons of gasoline were daily drawn to keep the engine running being in the building, it was kept under a platform running at right angles to the building and used for delivery of goods from or to waggons unloading or loading in the adjacent yard.

I should infer the end of this platform touched or at least came very near to the building. I understand any one inspecting in the most casual way could see this cask.

When insurers know that a gasoline engine is in use in a building regarding which they are concerned as insurers I cannot think they should be heard to say that they were ignorant of the fact which common sense tells them, that a reasonable quantity of gasoline is kept in or near by for purposes of keeping that engine running. No one has ventured to say that the quantity so kept was unreasonable under such circumstances.

It is not stated exactly what the size of the cask or barrel as it is sometimes referred to, really was, but if of an unusual capacity I think we would have heard of it.

It is shewn that in the case of a gasoline engine on the premises, an extra charge is made for the insurance on account of its use, but it is not shewn or pretended that the mere keeping of what is reasonably necessary to its use is still further taxed by any further increased rate. We have had in the case of *Anglo-American Fire Ins. Co.* v. *Morton*(1), an insurance company setting up this defence and claiming change of occupation whereby gasoline came in use and for other reasons policy voided. The appeal

(1) 46 Can. S.C.R. 653.

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failed. *The Prairie City Oil Co.* v. *The Standard Mutual Fire Ins. Co.*(1), though turning upon a condition similar to No. 11 in this case seems in principle adverse to respondent's contention herein.

I, therefore, conclude this defence is not open to the respondent.

The defence under condition No. 11 has, if possible, still less to be said for it. It only applies to the keeping or storing in the building, and what was done here cannot come within the language used.

Besides that the case of *Thompson* v. *The Equity Fire Ins. Co.*(2), reversing the decision of this court (3), seems to make the point hardly arguable, and, indeed, was not pressed on argument.

The remaining defence under condition No. 9, though apparently discarded in the court of appeal, was strongly pressed upon us by counsel for respondent.

But for the decision of this court in *Parsons* v. *Standard Fire Ins. Co.*(4), I should be inclined to think it much more arguable than the other foregoing defences.

I cannot, however, distinguish it in principle from that case and decision.

There is to my mind just one notable fact that might, but for what I am about to refer to, enable us to distinguish it. That is this: In that case the total of the other insurance in question would seem to have been noted upon the policy sued upon and the only change was in substituting one subsequent policy for part of said total. That decision related only to a

(1) 44 Can. S.C.R. 40.
(2) [1910] A.C. 592.
(3) 41 Can. S.C.R. 491.
(4) 5 Can. S.C.R. 233.

subsequent insurance and Mr. Newcombe has quite properly put forward this as one where there was also a prior insurance without express notice in writing or written waiver. I hardly think there is sufficient therein to distinguish this from that unless the fact, to which I have already adverted, that in that case the total of the existing insurance having been noted on the policy sued upon would bring the matter of the subsequent insurance more directly to the mind of the insurer than the knowledge I am about to refer to in this case.

Both the questions of prior and subsequent insurance are involved herein.

The question raised must, therefore, turn upon the effect of the knowledge of the local agents who were provincial agents for transacting the business of the respondent.

It certainly was competent for the head office to waive this condition. If the management there, possessed of actual knowledge of the existence of a prior insurance, chose to accept in face of such knowledge payment of the insurance premiums, and deliver as valid a policy of insurance, and thereby induce the insured to accept same, surely such insurers could not be heard to set up the omission on their part to make the necessary entries as an answer to the insured after the loss.

Now it seems to me that it is clearly established the provincial agents of respondent were authorized not merely to solicit business and give an interim receipt, but to make the contract and issue the policy. Those agents, as shewn by the evidence already quoted, knew of the existence of the prior insurance and that

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it should have been shewn upon the policy. That, however, and the omission to enter a record thereof upon the policy and knowledge of the substitutionary subsequent policy on the property are exhibited in their true light by the further evidence of Mr. Pryor as follows:—

Q. Did you know that the prior insurance should have been mentioned on the policy ?

A. I did not see the policy when it was sent out of the office. Had I checked it, I would probably have noticed it and made the correction.

Q. Tell me what you intended in reference to this prior insurance with regard to your policy ?

A. I intended to put it on the policy, in addition to other concurrent insurance. It was simply a mistake it was not there. It was my intention to have it on. As I said before, I did not see the policy before it went out of the office.

Q. Was the policy signed by you ?

A. No.

Q. It was sent out without you having an opportunity of seeing it ?

A. Yes.

Q. You say at the time there was what other insurance, to your knowledge, on the stock ?

A. $2,500 in the Dominion and $1,000 in the Nova Scotia.

Q. Who were the agents for the Dominion ?

A. Mr. Renwick.

Q. What became of the Dominion policy, was it ever replaced ? When it expired what happened ?

A. It was replaced by the Provincial.

Q. By a policy in the Provincial ?

A. Yes.

Q. And was this the policy L.B./8 by which that was replaced ?

A. Yes, sir.

Q. Do you know anything about a policy in the London Mutual ?

A. Yes.

Q. What was that on ?

A. On stock.

Q. The same stock ?

A. Yes.

Q. Did that expire ?

A. Yes, sir.

Q. What became of that ?

A. I think that was placed on the property.

Q. How much was the insurance on this property in the London Mutual ?

A. I think it was $2,500. I would not swear to it.

Q. You knew that was outstanding at the time this policy was prepared ?

A. Yes.

Q. And you say the same about that as of the other policies that were outstanding, that they should have been inserted in here, and would have been except for your mistakes ?

A. Yes, if I had seen the policy, no doubt it would have been done.

It seems to me that under the foregoing statements of fact and having regard to the authority of such agents who received the premium, the respondent cannot be heard to set up as defence the result of its own neglect to note on the policy the facts. And as to the subsequent substitution of a policy in the Provincial Company for that in the London Mutual which had expired, any objection thereto is met by the *Parsons* v. *Standard Fire Ins. Co.*(1) case, already referred to, where we find the responsibility for failure to note the latter on the policy is shewn to have rested with the respondent.

There is not so far as I have been able to see any English case exactly covering the questions raised by this defence under condition No. 9. This no doubt arises from the fact that English companies do not habitually use such like conditions.

There are many cases in the American courts and in our Canadian courts which are not binding upon us but amply cover this case. The many text books referred to by Mr. Roscoe on the law of insurance deal with and refer to waiver of such a condition as set up by the conduct of the insurers. Besides the case already referred to in this court there is the case of *Billington* v. *The Provincial Ins. Co.*(2), which seems

(1) 5 Can. S.C.R. 233.

(2) 3 Can. S.C.R. 182.

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clearly distinguishable and shews how the promise of an agent who had merely power to issue an interim receipt, would not bind his company.

The case of *Richard* v. *Springfield Fire and Marine Ins. Co.*(1) shews the distinction observed between the authority of such an agent and the authority of such agents as respondent's provincial managing and contracting agents in question herein.

I think the principle observed in the numerous cases cited in the text books referred to and in which the facts fit this case should be followed; though not binding upon us, they seem in line with the *Parsons* v. *Standard Fire Ins. Co.*(2) case, which does bind us.

The appeal should, therefore, be allowed with the costs throughout.

DUFF J.—I see no reason why the policy upon which the action was brought should not be construed according to the usual rule *contra proferentem*. I think the insurance of a going factory where the motor power is supplied by a gasoline engine must be taken to contemplate the keeping of a reasonable supply of gasoline for the engine and the keeping of it in a reasonably convenient way. I think, therefore, that the condition of the policy prohibiting the storing of the gasoline in larger quantities than five gallons does not apply to gasoline kept for that purpose. I think, moreover, that the language of Lord Macnaghten in *Thompson* v. *Equity Fire Ins. Co.*(3), at page 596, is applicable and that "stored or kept" imports a notion of warehousing or depositing for safe custody or

(1) 108 Am. St. Rep. 359. (2) 5 Can. S.C.R. 233.
(3) [1910] A.C. 592.

keeping in stock for trade purposes; Lord Macnaghten's illustration of the keeping of it for domestic uses seems to cover the ground.

As to non-disclosure; as the keeping of a reasonable quantity of gasoline must be taken to have been within the contemplation of the parties to the contract, I do not think there was any change of conditions of which the appellants were under any obligation to notify the insurance company.

ANGLIN J.—I am, with great respect for the Supreme Court of Nova Scotia, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Drysdale, who tried the action, restored.

Because the insurers were referred to a former policy with another company for a description of the property to be insured they seek to incorporate the terms of that policy with regard to the presence of gasoline into the risk assumed. In their policy, however, they saw fit to substitute for the special provisions of the former policy dealing with gasoline the usual statutory condition, and, in my opinion, they are thereby precluded from contending that the risk was subject to any other condition in that particular.

By the statutory condition in the defendants' policy it is provided that the insurer shall not be liable for loss or damage occurring while gasoline is "stored or kept" in the building containing the property insured unless permission in writing is given by the insurer. I doubt whether the supply of gasoline which the plaintiffs had on hand in order to furnish fuel for a gasoline engine known by the insurers to be in use in the building containing the stock insured, and which consumed five gallons of gas-

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oline per diem, can properly be said to have been "stored or kept" within the meaning of this condition. *Thompson* v. *Equity Fire Ins. Co.*(1). But if it was otherwise within it, I am satisfied that the gasoline was not in the building which contained the insured property. It was in fact outside the building and under an adjacent platform used for purposes of loading and unloading wagons. There is no reason why the word "building" should here be given a meaning other than that which it ordinarily bears. *Moir* v. *Williams*(2).

Neither do I think that the policy is avoided because of non-disclosure of the proximity of this supply of gasoline to the building under the condition requiring communication by the insured of all circumstances material to the risk. Being aware that the insured were using the gasoline engine in the building for manufacturing purposes, the insurers must be taken to have had knowledge that a reasonable supply of gasoline for fuel would be kept close at hand. Having this knowledge, they saw fit to stipulate expressly against this supply being kept in the building and did not see fit to inquire at what distance from the building it was placed, although they must have known that convenience required that it should be reasonably close. They can scarcely be heard to say that its precise location was so material to the risk that the insured must have specially communicated it at the peril of the policy being avoided by his failure to do so.

The defence that subsequent assurance was effected without notice to the company in breach of the 9th

(1) [1910] A.C. 592. (2) [1892] 1 Q.B. 264.

statutory condition, is not referred to in the judgment in the full court, and I am of opinion that it is satisfactorily dealt with by Mr. Justice Drysdale. The general agents of the insurers who issued the policy in question were fully apprised of the amount of the plaintiffs' concurrent insurance when the defendants' risk was assumed. Their knowledge was that of the defendants, and I think the latter cannot set up their failure to note their assent in or upon the policy as a defence. The subsequent transfer of one of the policies from one company to another was immaterial, there having been no increase in the amount of the concurrent insurance. *Parsons* v. *Standard Fire Ins. Co.*(1).

I would, for these reasons, allow this appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *W. M. Christie.*

Solicitor for the respondents: *W. H. Fulton.*

(1) 5 Can. S.C.R. 233.