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*Nov. 11, 12.
*Dec. 13.

THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

BOULTER, DAVIES AND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

D. D. HAWTHORNE AND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance —Sprinkler system—Damage from leakage or discharge—Injury from frost—Application—Interim receipt.

A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire but provided that it would not cover injury resulting, *inter alia*, from freezing. The water in a pipe connected with the system froze and, the pipe having burst, damage was caused by the consequent escape of water.

Held, affirming the judgment of the Court of Appeal (14 Ont. L.R. 166) Davies J. dissenting, that the damage did not result from freezing and the insured could recover on the policy.

In the Hawthorne case the majority of the court dismissed the appeal on the same grounds. The policy in that case was sent to the brokers who had applied for it on behalf of the assured shortly before, and the latter did not see it until the loss occurred.

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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Held, per Davies J. that the contract of insurance was not contained in the policy, which the assured had no opportunity to accept, but in what took place between the brokers and the agent of the insurers on applying for it and, as the latter informed the brokers that damage by frost was insured against, the insured could recover.

APPEALS from the decisions of the Court of Appeal for Ontario (1) affirming the judgments at the trial in favour of the plaintiffs in each case.

BOULTER CASE.

The plaintiffs, Boulter, Davies & Co., applied for and obtained a policy insuring property in their business premises as follows:—

"The Canadian Casualty and Boiler Insurance Company does insure Boulter, Davies & Co. * * * against all immediate loss or damage to the property of the assured * * * situate in that part of the premises occupied by the assured as described hereafter and caused during the term of this insurance by the accidental discharge or leakage of water from the automatic sprinkler system now erected in or upon the entire building at 24 Front Street West, Toronto, occupied by the assured."

Among the conditions of the policy was the following:—

"This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam pipes or steam boilers; nor resulting from any interruption of business or stoppage of any work or plant, nor resulting from freezing."

The plaintiffs claimed for a loss under this policy resulting from the discharge of water from a pipe

(1) 14 Ont. L.R. 166.

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connected with the sprinkler system which had burst after the water in it had frozen. The sole question to be decided on this appeal was whether or not the loss had resulted "from freezing" under the above condition. The trial judge held that it did not, and the Court of Appeal was of opinion that the exception as to freezing was not expressed in terms clear enough to relieve the insurers from liability.

Watson K.C. for the appellants. Both clauses of the policy must be given effect to if possible and there is certainly no repugnancy. See *German Fire Ins. Co.* v. *Roost*(1).

The loss clearly resulted from freezing within the terms of the condition. *German Fire Ins. Co.* v. *Roost*(1); *Cole* v. *Accident Ins. Co.*(2).

Blackstock K.C. and *Rose* for the respondents.

The judgment of the court was delivered by:—

MACLENNAN J.—I think this appeal must be dismissed for the reasons given in my judgment in the appeal of the same company against Hawthorne(3).

DAVIES J. (dissenting).—At the close of the argument of this case I was strongly of the opinion that the appeal should be allowed, the true construction of the contract of insurance upon which the action was brought being that damage resulting from frost causing the bursting of the pipes was not insured against. I agree in the conclusions of Mr. Justice Maclaren of the Appeal Court and in his reasons for them.

As I understood my view was not in accordance

(1) 45 N.E. Rep. 1097. (2) 5 Times L.R. 736.
(3) Page 565.

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with that of the majority of the court, I have gone carefully over the policy and considered its meaning from every standpoint presented by the judgment appealed from and by counsel at bar. The result has been strongly to confirm my first impressions. I shall state very shortly the reasons.

The policy in its formal or insuring part professes to insure the plaintiffs against

all *immediate loss or damage* to the property of the assured and described in the schedule herein given * * * and caused during the term of this insurance by the accidental discharge or leakage of water from the automatic sprinkler system now erected in or upon, etc.

If these words formed the contract without limitations I should not suppose any one would entertain a doubt that they covered losses occasioned by the accidental discharge of water from the sprinkler system whether resulting from frost or otherwise.

There, however, follow a number of "conditions and agreements" which are as much a part of the policy and the contract as the insuring clause quoted above.

The one material to this appeal reads:—

This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam pipes or steam boilers, *nor resulting from freezing*, etc., etc.

The construction put upon the policy by the court below seems to me to add to the words of the insuring part of the policy

loss or damage caused by the accidental discharge or leakage of water from the automatic sprinkler system

the words *"whether caused by freezing or otherwise"* instead of reading into such insuring clause the very words of the condition itself

this policy does not cover loss or damage resulting from freezing.

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If the words of the condition relating to freezing are transferred bodily from the conditions where they appear to the insuring clause of the policy and read with it as in order to construe it properly must be done there would seem to be less danger of going astray as to the real meaning.

To my mind the construction adopted places a liability upon the company which they have expressly contracted against. How it can be held that the loss or damage to plaintiffs' goods did not "result from freezing" where it is admitted that the bursting of the pipes and the consequent discharge of water upon the goods was directly caused by frost is more than I can understand.

It was urged, I thought somewhat faintly, that the provision

> this policy does not cover loss or damage * * * resulting from freezing

was ambiguous and might be intended to provide against loss or damage not caused to the goods insured by the accidental discharge or leakage of water from the sprinkler system as expressed in the policy but which might be caused subsequently to the goods in the contingency of the water freezing on them after they had been soaked by the accidental discharge or leakage insured against.

Such a construction does not commend itself to my mind as a reasonable, fair or just one, but seems somewhat forced and unreasonable.

It was not the extent or character of the damage which might be caused by the accidental discharge of the water which the provision in the condition contemplated but the exclusion of any liability arising from frost: "This policy shall not cover loss or damage

resulting from freezing." The policy itself expressly provided in its insuring clause only for the *immediate loss or damage* to the property insured. Not for any remote loss caused by the happening of some subsequent event and which had no necessary relation to the accident insured against. When it said the policy did not cover loss or damage resulting from freezing I understand it to mean that while it did cover all immediate damages or loss caused by any accidental discharge or leakage of water it did not cover any damage or loss caused by such discharge or leakage if such discharge or leakage was the result of frost. The insurance was against the accidental bursting of the pipes. They were to be liable for all damages caused by that unless such accidental bursting was caused by frost. If so caused the company was not to be liable.

To hold that the words of this exemption exclusively apply to some additional damage which frost might cause to the wetted goods after they had been so wetted by the accidental discharge of water from the pipes and that they do not apply to frost causing such accidental discharge does not commend itself to my mind as a fair, reasonable construction of the contract or one which the parties to it contemplated.

I would allow the appeal and dismiss the action with costs.

Appeal dismissed with costs.

HAWTHORNE CASE.

In this case a policy issued similar to that in the former appeal and a claim was made for a loss resulting from the same accident. The policy, however, which was procured through a broker, was not de-

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livered to Hawthorne & Co. until after the loss, though the broker had received it before, and the former claimed that they were not bound by its terms and relied on a verbal contract with the agent of the defendant company when the insurance was applied for.

The broker instructed to procure the insurance went to the head office of the company where he found in charge the accountant to whom he made the application. He asked the accountant if the policy would cover "frost damage" and was told that it would. The accountant gave him an interim receipt in the following terms:—

No. 3568. Premium, $30.00.

SPRINKLER LEAKAGE INSURANCE INTERIM RECEIPT OF THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY, HEAD OFFICE, TORONTO, CANADA.

Received from D. D. Hawthorne & Co., of Toronto, the sum of thirty dollars, being the premium for 12 months from date, for Insurance to the extent of five thousand dollars on merchandise,..... .....dollars on machinery, ...dollars on buildings at 24 Front St. West, Toronto, against loss or damage to the property of the assured in consequence of the accidental discharge or leakage of water from the Automatic Sprinkler system erected in or upon the premises above named.

The application for this insurance is subject to the approval of the Directors, and if same be rejected the above premium will be returned to the address given on the application, less the proportion for the time the risk has been in force.

Dated twenty-third day of December, 1905.

Countersigned by A. G. C. DINNICK,
J. M. GOUINLOCK, Managing Director.
Acct.

The formal application was delayed for some days but the policy was eventually issued though it did not reach the plaintiffs until after the loss.

At the trial judgment was given for the plaintiffs. The Court of Appeal affirmed such judgment and held that the plaintiffs could recover on the verbal contract. The defendants appealed.

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Watson K.C. for the appellants.

Blackstock K.C. and *Rose* for the respondents.

GIROUARD J.—I would dismiss the appeal.

DAVIES J.—In this case I agree that the contract of insurance is to be found in the verbal application of the plaintiffs and the receipt issued in pursuance thereof to them. The policy containing the clause exempting the company from liability for damages resulting from frost was not in accordance with the terms of the application and receipt. Under the circumstances in which the policy came to the hands of the plaintiffs just before the loss occurred, I agree that they cannot be held as having accepted it or as being bound by its terms. I concur in dismissing the appeal.

Davies J.

IDINGTON J. concurred with Maclennan J.

MACLENNAN J.—I am of opinion that this appeal fails.

I agree with the judgment of the Court of Appeal on the question of the payment of the premium.

In my opinion the policy ought to be construed according to the contention of the respondents.

The operative part of the policy and the condition must be read together.

The insurance is against all *immediate damage* to the property of the assured, whether their own or in trust, in a certain warehouse, caused by the accidental discharge or leakage of water from the sprinkler system.

It is clear that the damage which occurred is expressly within this language. It was caused by water

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resulting from accidental discharge or leakage from the system. That discharge or leakage of water was the immediate cause of the damage.

Then the condition declares that the policy is not to cover damage, that is, having regard to the operative words, *immediate* damage, resulting from various things, and among others resulting from freezing. Now while in a certain sense the damage did result from freezing, the immediate damage arose, not from freezing at all but from the accidental discharge or leakage of water. There was no *immediate* damage to the goods from freezing. The freezing was a remote, not the immediate cause of the damage to the goods. The frost congealed the water in the pipe leading to the sprinklers. The expansion of the water at the moment of freezing opened the seam of the pipe, and allowed the discharge or leakage of the water which did the damage, but the frost or ice never came near the goods and did them no immediate damage. The only *immediate* damage done by the frost was the bursting of the pipe.

In expressing this opinion, I do not desire to be understood as dissenting from the other grounds upon which the judgment is rested in the Court of Appeal.

The appeal should, in my opinion, be dismissed with costs.

DUFF J. concurred with Maclennan J.

Appeal dismissed with costs.

Solicitors for the appellants: *Watson, Smoke & Smith.*

Solicitors for the respondents: *Beatty, Blackstock & Fasken.*