S. M. ROSS AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

1918
*Dec. 17.
*Dec. 23.

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

Insurance, Fire—Subject matter—Occupied dwelling houses—Suspension of risk—Change material to risk.

Several buildings were insured against fire by separate policies each of which expressed the risk to be on the building "while occupied by.....as a dwelling."

Held, affirming the judgment of the Appellate Division (41 Ont. L.R. 108; 39 D.L.R. 528), that a building used as a combined store and dwelling was not insured.

Held also, Idington and Brodeur JJ. dissenting, that the contract was intended to insure occupied dwellings only; that the failure of the insurance agent to insert the name or description of the occupant was immaterial; and that the word "by" in the restrictive description quoted could be deleted as not required to express the intention and make the contract sensible. *London Assur. Corp.* v. *Great Northern Transit Co.* (29 Can. S.C.R. 577), followed.

To the knowledge of insurer and insured the buildings were not completed when the policies issued and could not be expected to be occupied for some time.

Held, Idington and Brodeur JJ. dissenting, that though the risk might presently attach to the unoccupied buildings, yet after they were once occupied the insurance would be suspended on any becoming vacant, and a loss occurring during such vacancy would not be covered.

The Appellate Division held that the insured was entitled to recover $1,200 on each building actually occupied as a dwelling at the time of the fire, and ordered a reference to ascertain the amount due.

Held, per Davies C.J., Anglin and Mignault JJ., that as the basis of the claim was certain and the amount, once the facts were established, ascertainable by a mere arithmetical computation, the insured was entitled to interest on the sum eventually found due from the expiration of sixty days after the proofs of loss were furnished.

PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.

Held, further, that the Supreme Court of Canada should not interfere with the discretion of a provincial appellate court in allowing issues of law arising on the documents and facts in the record to be raised though not pressed at the trial.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing in part the judgment on the trial in favour of the plaintiffs.

The facts are stated in the above head-note. The only questions raised were whether or not the insurance policies covered houses that were vacant when destroyed by fire and one used as a store and dwelling combined. Also whether the judgment could provide for payment of interest before the amount due the insurer was ascertained.

Hugh J. Macdonald and *J. E. Lawson* for the appellants, cited *Hawthorne* v. *Canadian Casualty Ins. Co.* (2); *Davidson* v. *Waterloo Ins. Co.* (3); *Toronto Railway Co.* v. *City of Toronto* (4), at pages 120-1.

McKay K.C. for the respondents, referred to *McKay* v. *Northern Union Ins. Co.* (5); *Boardman* v. *North Waterloo Ins. Co.* (6); *The Baltic Case* (7).

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J. (dissenting).—The respondent, on the 9th May, 1913, issued ten insurance policies to the owners of a row or block of ten buildings, insuring for three years said owners (who paid a cash premium for each of same) against losses by fire in respect of any of said buildings.

(1) 41 Ont. L.R. 108; 39 D.L.R. 528.
(2) 14 Ont. L.R. 166; 39 Can. S.C.R. 558.
(3) 9 Ont. L.R. 394.
(4) [1906] A.C. 117.
(5) 27 O.R. 251.
(6) 31 O.R. 525.
(7) 29 Can. S.C.R. 577.

One of said owners, with the consent of the respondent, transferred his interest in said policies to his wife, the appellant B. Langbord.

The houses were all unoccupied, and indeed not quite finished at the time when these transactions took place. None were occupied till at least six weeks had run from the date of the insurance thus professed to have been effected and in fact paid for.

And some further time expired before tenants were got for all. Exactly how long is not made clear. Yet, according to some opinions expressed below, these thrifty people were knowingly paying in advance for nothing. I cannot find on the true interpretation and construction of the contract that such was ever conceived by those concerned to be the nature of their contract.

The said policies were all in the same form and each was designed to cover the tenement corresponding with the number it was applicable to.

Each contained the following clause:—

> $1,200.00 on the 2 story brick fronted, roughcast, shingle roof building and additions, including foundations, plumbing, steam, gas and water pipes and fixtures, while occupied by..... as a dwelling, and situated on.....on the east side of Keele Street, Toronto, Lot 50, 51, 52, Plan No. 1612, between Eglinton Avenue and Cameron Avenue, known as house Number —.

In the course of the trial many defences were set up. And as, in my opinion, each and all thereof, except two dependent upon the legal interpretation and construction of their contract, were so effectually disposed of by the findings of the jury in answer to questions submitted, which upon the relevant facts they alone were entitled to pass upon, I will deal only with those excepted which I have referred to.

It seems that four, or possibly five, of the houses in question had been vacant for a considerable time

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Idington J.

before, and at the time of, the fire which destroyed said block and resulted in what is now in question herein.

It is urged that the said policies must be read as if the words "owner or tenant" had been written therein, where a blank space is left after the word "by," and much varying ingenuity has been displayed in filling up in imagination what the respondent, in using the printed form, deliberately left blank.

I respectfully submit we have no right to fill up anything in a contract emanating from the respondent and therefore to be rather construed as against than in favour of it.

At best it stands as an ambiguous contract.

In order to interpret and construe it correctly, we may summon to our aid the surrounding circumstances before and immediately succeeding its execution.

The conduct of the parties in such relation is, in my opinion, fatal to any such contention as set up and maintained on the ground of vacancy, when we consider that the insured was paying, evidently from the outset, on the hypothesis that the policies were intended to insure against loss by fire notwithstanding vacancies of no matter how long duration, unless under circumstances giving rise to conditions beyond what the contracting parties had in that regard in view in contracting.

In such latter event there might arise a question of something material to the risk falling within the terms of statutory condition No. 2.

That possible aspect of the matter has been disposed of by the verdict of the jury to whom it was submitted.

Moreover, the vacancies now claimed to have voided the policies existed at the time when the appellant paid for and got a renewal of each policy in May, 1916, for a further term of three years.

I know not why we should actually fill in the blank with words selected by the manager of respondent instead of what common sense would indicate in light of the conduct of the parties by inserting the word "nobody" if, as I am not, obsessed with the idea that it must be filled in.

The words "occupied by" are in themselves meaningless and should be treated, as they evidently are, as surplusage. I submit that we must ever, if possible, try to fit the language used to the actual situation with which those contracting were confronted and dealing, if we would do justice.

Can there be a shadow of doubt herein that it was the impossibility of fittingly meeting that situation by any ordinary expedient of filling in the blank in a way which could be rendered conformable with the mutual understanding of the parties, that led to the entire omission of any attempt to do so?

That being my view of the situation I forbear from inserting anything, and then the language used to be given effect to can only be rendered intelligible by treating those words "occupied by" as mere surplusage which somebody forgot to draw a pen through in filling up a printed form.

The clearly intelligible purpose was to insure dwelling-houses at the usual rate therefor as agreed upon, and not stores, which would have to pay a higher rate and could not be insurable for a three-year term.

If the respondent could have shewn any such difference of rates had ever been made applicable to distinguish occupied from vacant dwelling-houses, I might have been able to see the situation in another light. But no such distinction has ever been made that the experts called by respondent can tell of. Cases dependent upon the varying conditions which marine

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Idington J.

insurers have to meet and have long provided for in manifold ways can be of no help here.

No one pretends that insurance may not be made to meet conditions of any kind.

What we are asked to do here is make a contract which the parties did not make, never thought of making, and by resorting to another class of insurance business entirely outside the class of insurance business the parties were dealing with to make a series of contracts for them.

I think the appeal should be allowed and the judgment of the trial judge be restored with an amendment thereto excepting the shop or corner store of the block as furnishing any basis for recovery, and hence reducing the judgment to $10,800 with costs to appellants of the trial and in the Appellate Division and two-thirds of the cost of their appeal here, in which they have only partially been successful.

The question of interest should not be meddled with now.

ANGLIN J.—At the trial the plaintiffs recovered $12,000—$1,200 in respect of each of ten houses insured with the defendants. On appeal, as a result of somewhat divided opinions (1), their recovery was restricted to their claims upon policies on such of the houses as were actually occupied as dwellings at the time of the fire, and the occupancy of one house being uncertain, a reference was directed to ascertain the amount of the plaintiffs' enforceable claim.

I think it is not possible to set aside the finding of the jury that the vacancy of the premises was not a change in their condition material to the risk within the meaning of the second statutory condition. While I

(1) 41 Ont. L.R. 108; 39 D.L.R. 528.

should quite probably have found otherwise if trying the case myself, there are circumstances in evidence which make it impossible to say that ten or twelve reasonable men could not honestly have reached such a conclusion. Neither, on the other hand, in view of the fact that there was a separate policy on each house, can it be held that vacancy in any one or more of them was a change material to the risks upon others which were tenanted.

That the words,

while occupied by . . . . . as a dwelling-house,

if, and so far as, they should be taken to form part of the contract of insurance sued upon, are not to be regarded either as a condition or a warranty but are descriptive and restrictive of the subject-matter of the risk is conclusively determined by the decision of this court in *London Assurance Corporation* v. *Great Northern Transit Co.* (*The Baltic Case*) (2). The only possible distinction between that case and the one now at bar arises from the omission to fill in the blank following the word "by" in the policy before us.

Should the court fill in that blank by whatever word the circumstances indicate, in its opinion, as the most likely to have been in the contemplation of the parties, giving due weight to the maxim *verba chartarum fortius accipiuntur contra proferentem?* Or should the result of the omission be the excision from the policy of the entire clause in which it occurs on the assumption that the proper inference from the failure to fill in the blank is that the person issuing the policy intended not to make any use of that portion of the form? Or should only that word, or those words, be deleted which can be given no sensible application without filling in the blank?

(2) 29 Can S.C.R. 577.

1918

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Anglin J.

In *Glynn* v. *Margetson & Co.* (1), at page 358, Lord Halsbury quotes with approval the statement of Lord Ellenborough in *Robertson* v. *French* (2), at page 135, that,

> the same rule of construction which applies to other instruments applies to * * * a policy of insurance.

In my opinion the first alternative of the three suggested should not be adopted. It involves too great a risk of making a wrong guess—too great a probability of making the description, something which neither party intended—unless perhaps the blank should be filled in with the word "somebody" or "anybody," which would be equivalent in effect to striking out the word "by." While

> the law will, as much as it can, assist the frailties and infirmities of men in their employments, who * * * may easily make a slip (*Lord Say & Seal's Case* (3).

the reason underlying the supplying of omitted words is *ut res magis valeat quam pereat* (*Langston* v. *Langston* (4)), and a clear case of necessity to avoid apparent absurdity, repugnancy or inconsistency (*Clements* v. *Henry* (5)), and

> such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties.

(*Coles* v. *Hulme* (6)), are pre-requisites to the exercise of this benevolent curial function. Moreover, since the ambiguity or uncertainty is patent, the intention can be gathered only from the other parts of the instrument, as in *Flight* v. *Lake* (7). It cannot be established by extrinsic evidence. See cases collected in 10 Halsbury's Laws of England, No. 796, notes (k) and (m), and *Turner* v. *Burrows* (8). The policy here affords no

(1) [1893] A.C. 351.
(2) 4 East 130.
(3) 10 Mod. 40, 47; 4 Br. P.C. 73.
(4) 2 Cl. & F. 194, 243.
(5) 10 Ir. Ch. R. 79, 87-8.
(6) 8 B. & C., 568, 573.
(7) 2 Bing. N.C. 72.
(8) 5 Wend N.Y. 541.

clue to the word (if any) which should be supplied to fill the blank.

In regard to the second and third alternatives, an analysis of the clause under consideration may be helpful. Its apparent purpose is to provide for a triple restriction upon the subject matter of the risk; (a) it must be a dwelling-house as distinguished from a building of any other character; (b) it must be occupied as such; (c) assuming the blank to be restrictively filled in, the occupant must be the person designated or answer the description given. It would seem to have been intended to leave a discretion to the person issuing the policy only as to the third restriction.

In the construction of an instrument the rejection of words is sometimes permissible but only so far as they are repugnant or insensible—only so far as is necessary to make that sensible which their presence renders insensible. *Grey* v. *Pearson* (1), at page 106. In delivering the opinion of the judges advising the House of Lords in *Smith* v. *Packhurst* (2), Lord Chief Justice Willes said, at page 136:—

> Before I proceed to the questions I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.
>
> Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, *and may reject any words that are merely insensible:* these maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the astutia, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel, but is very ill-becoming a judge.

(1) 6 H.L.Cas. 61. (2) 3

1918.
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Anglin J.

Here the lacking word is the objective of the preposition "by." If that word "by" be deleted the rest of the clause makes perfect sense. The failure of the person issuing the policy to fill in the blank no doubt precludes the company invoking any restriction as to the personality of the occupant. But what possible justification can there be for rejecting or ignoring such distinct restrictions placed upon the nature of the risk assumed as the words "occupied" and "as a dwelling-house" import? I can find none. I am prepared to treat the failure of the agent issuing the policy to fill in the blank as apparently an exercise of his discretion not to place any restriction on the personality of the occupant, but I am not prepared to treat it as warranting the excision of the entire clause—something apparently not intended to be left to his discretion at all. I would strike out the word "by" to make the contract sensible; but to attain that object no further deletion is requisite; none is permissible. To excise the remainder of the clause would be to make a new contract for the parties.

The meaning of the words

while occupied as a dwelling-house

read consecutively, as I think they must be, in my opinion admits of no doubt. As the *Baltic Case* (1), establishes, the word "while" imports an intermittently suspensive negative. The quest of a difference in shades of meaning between the adverbial conjunction "while" of the policy now before us and the "whilst" of that dealt with in the *Baltic Case* (1), would be even more vain than pedantic. If not merely two forms of the same word, they are certainly synonymous. The Imperial Dictionary; The Century Dictionary, Vbo. "Whilst." The risk ceases to attach

(1) 29 Can. S.C.R. 577.

during periods when the subject matter may not answer to the restrictive description "occupied as a dwelling-house." See, too, *Langworthy* v. *Oswego Ins. Co.* (1), cited by Riddell J. and Huebner on Property Insurance, page 20.

Although the word "occupied" used alone as a word of description may only mean occupied at the date of the assumption of the risk (*O'Neil* v. *Buffalo Fire Ins. Co.* (2), *Maher* v. *Hibernia Ins. Co.* (3)), used as it is here with the word "while" it clearly imports continued occupation during the term of the risk, and that that occupation should be actual as distinguished from mere legal possession as the basis of the risk.

It was long since (28 Car. 2) held that:—

> Occupant and occupier are always in law taken for an actual possessor, one that useth, enjoyeth or manureth the land. *Ironmongers Co.* v. *Nayler* (4).

Occupied means actual *de facto* occupation. *Robinson* v. *Briggs* (5). To treat the word "occupied" otherwise in the present context would be to deny it all effect, just as Mr. Justice Sedgewick points out the word "running" had been denied effect by the provincial courts in the *Baltic Case* (6). The building would be insured simply as a dwelling-house, not as an occupied dwelling-house, or, "while occupied." If there could be any doubt as to the signification of the two words "while occupied," the addition of the word "by," which, although to be deleted for other purposes, may if necessary be looked at to ascertain the meaning of the word "occupied" to which it is appended, would seem to remove it. While vacant, as they were for many months prior to, and at the time of, the fire because of failure to rent them, the houses in respect

(1) 85 N.Y. 632.
(2) 3 N.Y. 123.
(3) 67 N.Y. 283, 288.
(4) Pollexfen's Rep., 207, 216.
(5) L.R. 6 Ex. 1.
(6) 29 Can. S.C.R. 577.

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Anglin J.

of which it has been held that the plaintiffs cannot recover did not answer the description of the subject matter in the policy and were therefore not covered by the insurance. Mere temporary vacancy, such for instance as that due to the whole family of the occupant being absent over night would involve entirely different considerations. See *Meeks* v. *The State* (1).

The fact that the houses were uncompleted and therefore not occupied as dwelling-houses when the risks were assumed and for several weeks thereafter was much relied on as indicating that the parties must have intended that the restriction of actual occupation should not apply. No doubt the insurance agent knew of this state of facts; and the policy expressly provides that the risk is to begin from noon on the 8th of May, 1913, the date of the plaintiffs' application. It may be that, having regard to these circumstances, had one (or more) of the houses been burned before it had become tenanted, assuming the lapse of time not to have been greater than the parties might reasonably be taken to have contemplated for the completion of the building and the securing of a tenant, the courts would have held the plaintiffs entitled to recover in respect of it. But I am quite satisfied that as soon as each house became occupied the suspensive restriction in the policy on it applied and vacancy thereafter, so long as it lasted, took that house out of the risk. Moreover, the action is not upon the original policies, but upon renewals, which are to be regarded as new contracts; *Agricultural Savings and Loan Co.* v. *Liverpool, &c. Ins. Co.* (2); and the evidence is not entirely clear as to the conditions as to occupation at the date of the renewals of the houses that were vacant at the time of the fire, and

(1) 102 Ga. 572.

(2) 3 Ont. L.R. 127.

there is no evidence that they were made with knowledge of vacancy on the part of the company.

The controverted suggestion of counsel for the appellants that the defence based on vacancy was confined at the trial to change material to the risk not notified as required by the second statutory condition, if well founded, cannot assist him, inoccupancy as a departure from the description of the risk having been neither pleaded nor pressed. The fact of vacancy was distinctly pleaded (R. 141) and there is no suggestion that any additional evidence bearing on it could have been adduced. The defence which succeeds is purely one of law arising from the construction of the policy sued upon. It was certainly raised and passed upon by the Appellate Division, and it is not usual for this court to interfere with the discretion exercised by a provincial appellate court in regard to raising on appeal issues of law arising on the documents and facts in the record though not pressed at the trial. A case of surprise within R. 143 is scarcely made out. The argument based on the 8th statutory condition is answered by the learned Chief Justice of the Common Pleas.

I agree with the disposition made by the Appellate Division of the claims in respect of the corner building occupied as a store and of the dwelling-house as to the occupancy of which there is some uncertainty.

Counsel for the respondent pressed his plea for a reduction in the amount allowed for the loss upon each house only in the event of the court holding that the plaintiffs should recover in respect of the vacant houses.

On the claim for interest I agree with Mr. Justice Rose that the plaintiffs are entitled to succeed, but their right to interest dates from the expiry of sixty days after proofs of loss were furnished. In *Toronto Rly. Co.*

1918
Ross
v.
Scottish
Union
and
National
Insurance
Co.
Anglin J.

v. *City of Toronto* (1), the Judicial Committee impliedly, if not expressly, approved the statement of Armour C.J. in *McCullough* v. *Newlove* (2), at page 630, as to the scope of the provision of the "Ontario Judicature Act" which makes interest payable in all cases in which it has been usual for a jury to allow it. The learned Chief Justice said:—

> Judging from my own experience, I may say that I think it has been usual to tell juries in cases where money is claimed under what were formerly called the common counts, that they might give interest from the time when the money claimed became payable, and that juries have usually given it.

In the *City of London* v. *Citizens Ins. Co.* (3), Ferguson J. held that the fact that the amount to be paid had not been ascertained until the termination of the action did not prevent the plaintiffs, suing on an insurance contract, from recovering interest on

> the sum now ascertained to have been, and to be, owing to the plaintiffs. The money was payable by virtue of the defendants' deed and I think the interest should be allowed.

Since the defendants no longer contest the plaintiffs' right to recover the full amount of each of the policies on the tenanted houses and since by their general repudiation of liability they precluded themselves from objecting to the sufficiency of the proofs of loss, the face amounts of such policies should be deemed to be debts that became payable according to their terms on the expiry of sixty days after the proofs of loss were furnished. These features distinguish this case from *McCullough* v. *Clemow* (4), in which a different result was arrived at by Osler J.A.

In view of the very limited measure of success that has attended the plaintiffs' appeal our discretion as to costs will, I think, be judiciously exercised if we allow to the respondent five-sixths of its costs in this court.

(1) [1906] A.C. 117, 121.
(2) 27 O.R. 627.
(3) 13 O.R. 713, 723.
(4) 26 O.R. 467.

BRODEUR J. (dissenting)—The main question on this appeal is as to the construction of the contract.

In May, 1913, ten insurance policies were issued on ten houses built in a row of buildings in Keele Street in Toronto. When the policies were made the houses were not yet finished and were unoccupied. It took several weeks before the work was finished. However, the company, being aware of the fact that those houses were unoccupied, issued a policy for three years and charged the owners the usual rates for a dwelling-house for such a period. The three years having expired, renewal receipts were issued for another period of three years, during which the fire occurred on the 29th of August, 1916.

The insurance company having denied liability, the plaintiffs had to institute the present action to recover the amounts of those ten insurance policies. At the trial the issues fought were as to the amount of the loss and as to the contention of the insurance company that the vacancy of some houses caused a change material to the risk not only for those vacant houses but also for those which were occupied at the time.

The findings of the jury were that the losses as claimed were proved and that the vacancy of some houses would not constitute a change material to the risk.

There was evidence that the fire actually started upon one of those occupied premises and there were other circumstances proved which justified the jury in finding that there was no material change in the risk, and, according to the provisions of the "Insurance Act," such a question is a question of fact which should be left to the jury (sec. 156, sub-sec. 6).

A judgment was rendered in favour of the plaintiffs,

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Brodeur J.

by the trial judge, for the losses on the whole of the ten houses.

In appeal that judgment was maintained as to the occupied houses but was reversed as to the corner house (because it was a store) and as to the houses which were vacant at the time of the fire.

The plaintiffs now appeal to this court. There is no cross-appeal on the part of the company; so we have to determine here only whether or not the losses incurred with regard to the store and the unoccupied houses are covered by the contract.

I will first deal with the unoccupied houses, which is the more important item.

The ten policies are all drafted in the same way, with the exception of the house number. Here are the material parts of the policy concerning house No. 1:—

Scottish Union and National Insurance Company . . . . . does insure Rass Bros. and M. Langbord *for the term of* three years, *from the* 8th *day of* May *1913, at noon to the* 8th *day of* May *1916, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding* Twelve hundred xx/100 *Dollars to the following described property while located and contained as described herein and not elsewhere, to wit:*

Then follows the description of the subject-matter of the insurance on a printed slip pasted into a blank space in the policy, which slip is headed "Dwelling House Form":—

On the 2 *story,* brick fronted, roughcast, shingle *roof building and additions, including Foundations, Plumbing, Steam, Gas and Water Pipes and Fixtures, while occupied by . . . . . as a Dwelling, and situated No. — on the* east *side of* Keele *Street* Lot 50, 51, 52, Plan No. 1612, between Eglinton Avenue and Cameron Avenue known as House No. 1 Toronto.

The parts in italics are printed the others are written.

It is contended by the appellant that it was not necessary that those buildings should be occupied.

On the other hand, it is contended by the respondent that the words

while occupied by . . . . . as a dwelling

are descriptive of the thing insured and they rely on the judgment rendered by this court in the case of *The London Assurance Corporation* v. *The Great Northern Transit Co.* (1), which is known as the *Baltic Case*. That case was concerning the insurance against fire on the hull of the S.S. "Baltic"

whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building.

The "Baltic" was laid up in 1893 and was never afterwards sent to sea. In 1896, she was destroyed by fire.

The Supreme Court came to the conclusion that the ship was insured only while employed on inland waters during the navigation season or laid up in safety during the winter months.

It was pretty plain and evident in that case that what was insured was a navigating vessel and that the insurance could not cover that vessel when she was laid up, except during the winter months. For several years that vessel had been out of commission and in such a case I could understand very well the decision of this court that the assurance could not cover the time when she had ceased to be used as a navigating vessel.

But the facts in this case are very different. First, the circumstances under which the contract was made shew the intention of the parties. When the policies were issued, the houses insured were not quite finished and they were vacant and were likely to be unoccupied for weeks and months. The insurance company knew

(1) 29 Can. S.C.R. 577.

1918
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Brodeur J.

that the houses were vacant. However, the company was willing to insure them as vacant dwellings, since it was stipulated in the contract prepared by the company itself that the insurance would cover the period from the 8th day of May, 1913, to the 8th day of May, 1916.

Can it be said, in view of that formal stipulation and in view of the fact that the company knew that the houses would be unoccupied for weeks and months, and in view also of the fact that the company charged for the full three years, that it was not intended on its part to insure the dwelling-houses, whether vacant or not?

I think that those circumstances shew conclusively that the contract intended by the parties was purely and simply to insure those dwellings; and it was not absolutely necessary that they should be occupied, because if they wanted to stipulate such a condition, it was very easy for them to fill the blank which was in their policy. But they left a phrase there,

while occupied by . . . . . as a dwelling house,

which did not mean anything by itself, except by striking out the word *by* or by adding some others, like *the owner*, *the tenant* or *anybody*.

The stipulation is the stipulation of the company and it was its duty to make it clear and if there is any ambiguity then it should be construed against the company. According to my view, those printed words,

while occupied by . . . . . as a dwelling-house

should be considered as non-existing. *Chapman* v. *Chapman* (1); *Gill* v. *Bagshaw* (2); Cyc. vo. Accident Insurance, p. 245; *Hull* v. *American Employers Ins. Co.* (3); *Merritt* v. *Yates* (4).

(1) 4 Ch. D. 800.
(2) L.R. 2 Eq. 746.
(3) 96 Ga. 413.
(4) 71 Ill., 636.

The subject-matter of the insurance was a dwelling. Its vacancy might constitute a change material to the risk. But it would then be a question to be determined by the jury, and, in this case, we have a finding that those vacancies did not constitute a material change.

It has been suggested that the word *by* in the phrase,

while occupied by . . . . . as a dwelling-house.

could be struck out and that the policy would then read as on a *building while occupied as a dwelling-house.*

That condition would not change the liability of the company. It would not necessarily mean that the dwelling should be vacant, but it would mean simply that this building should be used as a dwelling-house, and not as a store, as a barn, as a garage, or something different from a dwelling-house.

Now as to the store. The building was insured as a dwelling-house. It is in evidence that the property was partly occupied by a store and partly for residential purposes. By the "Insurance Act of Ontario," it is provided that policies for stores should be made on a different footing. The company never intended in this case to insure a store, because the policy should have been for a period not of three years but of one year, as required by the law, and should have described the property not as a dwelling-house but as a store. We have no evidence to shew whether, when the insurance was taken out, it was considered as a store or as a dwelling. If the change was made after the policy was taken out, it became the duty of the insured to notify the company of the change, which I consider as being a material one: and, in that regard, I am of opinion that the jury came to a wrong conclusion which the evidence did not justify.

The judgment of the Court of Appeal should be

1918

ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.

Mignault J.

maintained as to that corner house but it should be reversed with regard to the vacant houses.

The appeal should be allowed with costs.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellants: *Hugh J. Macdonald.*

Solicitors for the respondents: *Ryckman, Denison & Foster.*