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*Oct. 17, 21.
*Oct. 22.

MARY MAHOMED (PLAINTIFF) ..... APPELLANT;

AND

THE ANCHOR FIRE AND MARINE INSURANCE COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Fire insurance—Blank application—General agent—Misrepresentation—Knowledge of company—Over-valuation—"Dwelling-house"—"Lodging-house."

F., the manager, for British Columbia, of a fire insurance company, with power to accept risks and issue policies without reference to the head-office of the company, received an application from M. for insurance for $2,100 on merchandise, furniture and fixtures contained in a building described as a store and dwelling-house. The application was accepted and a policy issued by him apportioning the insurance upon the three classes of property separately. A loss having occurred, payment was refused on the grounds that the stock was over-valued and the premises improperly described as a dwelling-house whereas, in fact, it was also used as a lodging-house. At the trial it appeared that a portion of the premises was fitted up for lodgers; the plaintiffs testified that F. inspected the premises before the policy was issued and that they had made no apportionment of the insurance, but left the matter altogether in the hands of F. F. testified that he sent an agent to have the application signed and the apportionment made and that he filled in the figures upon the blanks in the application from the agent's report. The jury found that F. inserted the description of the premises and apportioned the insurance.

Held, reversing the judgment appealed from (17 B.C. Rep. 517) that the company was affected by F.'s knowledge of the premises and of the property insured; that the questions as to who had made the apportionment was properly left to the jury; that the evidence justified the jury in finding that it had been made by F.,

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

and that the insured, therefore, had made no valuation as to the stock or the apportionment thereof and could not have misrepresented its value.

Held, per Fitzpatrick C.J. and Davies and Duff JJ.—That the evidence justified the jury in finding that F. had described the premises as a dwelling-house and that the company was bound by his act in doing so.

Per Davies and Duff JJ.—A dwelling-house does not lose its character as such from the fact that it is occupied by one or more lodgers.

Held, per Duff J.—As, under the conditions of the policy in question, notwithstanding an over-valuation the company would still be liable for a certain proportion of the actual value of the property insured, the policy should not be avoided.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), whereby the judgment entered by Murphy J. at the trial, stood affirmed on an equal division of opinion among the judges in the Court of Appeal.

The circumstances of the case are stated in the head-note and the questions in issue on the present appeal are fully referred to in the judgments now reported. At the trial the jury answered the questions submitted to them favourably to the plaintiff and found a verdict in her favour for $940.05. After hearing arguments on objections taken on behalf of the defendants, and upon a motion for the dismissal of the action, the learned trial judge reserved judgment and, subsequently, dismissed the plaintiff's action with costs; his judgment granting a nonsuit is reported at pages 517-519 of the report of the judgment rendered in the court below. On an appeal to the Court of Appeal for British Columbia their Lordships the Chief Justice of British Columbia and Mr. Justice Martin considered that the judgment of the trial judge should be reversed and their Lordships Justices Irving and

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Galliher were of opinion that the judgment then under appeal should be affirmed. On this division of opinion the judgment of the learned trial judge stood affirmed, and the plaintiff appealed to the Supreme Court of Canada.

S. S. Taylor K.C. for the appellant.
J. McDonald Mowat for the respondents.

THE CHIEF JUSTICE.—This is an action on a policy of fire insurance covering certain stock and merchandise, household furniture, etc. There were several defences, but those chiefly relied upon in the Court of Appeal and here have reference to (1) over-valuation, and (2) misrepresentation of the uses to which the premises, in which the property insured was at the time of the application, were put. As to this latter objection I agree with Mr. Justice Duff that the knowledge of the agent was the knowledge of the company; *Holdsworth* v. *The Lancashire and Yorkshire Insurance Co.*(1) and the cases there cited.

The over-valuation is complained of only with reference to the distribution of the total amount of the insurance over the different classes of property covered by the policy. It is alleged that the insured did not have in hand a stock of merchandise to the value represented. It is not contended that the total value of all the property covered by the risk was misrepresented.

The circumstances of the case are quite exceptional. The company is incorporated in the Province of Alberta. The agent, Freeze, who issued the policy, was the manager in the Province of British Columbia,

(1) 23 Times L.R. 521.

and he had authority to accept risks and to issue policies without consulting the head-office. To the application, which was admittedly signed in blank by the insured to the knowledge of Freeze, the latter attached a certificate intended for the private information of the head-office to the effect that he, the agent and manager of the company, had personally inspected the risk and, after having done so, fixed the cash value of the property insured at the amount of $3,000. The total amount of the insurance applied for was $2,100. It must be accepted as admitted also that the application was signed in blank by the insured to the knowledge of Freeze and that the total amount of the insurance asked for was distributed over the different classes of goods insured in the office of the agent by one of his two employees, his brother or one Howden, presumably on knowledge acquired when the latter visited the premises to get the insurance at the request of Freeze. The insured were foreigners with a limited knowledge of the English language. They say that they went to the office of the agent and that the amount of the insurance was there apportioned without reference to them. How that apportionment was really made does not appear, as neither Howden nor the agent's brother was examined, and an inspection of the document does not tend in any way to clear up this point. It is filled up in lead pencil and the figures which purport to represent the value of the different classes of goods insured appear to have been altered at least twice, if not oftener. As this document has been in the possession of the company ever since it was first filled up and it is now produced and relied upon to defeat this claim, it was incumbent on them to give some explanation of the circumstances under which the figures were altered.

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The Chief Justice.

In the absence of such evidence I am disposed to believe the plaintiff and her husband, and I am quite satisfied that, on the facts as they state them to have occurred, it would be impossible to hold that Freeze or either one of his two employees acted with respect to the application as the agent of the insured or that there is evidence of misrepresentation by them with respect to the value of the property.

The policy provides that the application contains a just and true statement of all the facts, condition, value and risk of the property insured, and that if, in case of loss, the property is found by appraisement or otherwise to have been over-valued, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given, not exceeding three-fourths of the allowed cash value.

There is no suggestion of fraud here. On the contrary, at the argument, this was entirely repudiated. The only evidence of over-valuation must be extracted from the statement of the appraiser, Rankin, who says that, when he visited the premises after the fire, he came to the conclusion that goods to the value mentioned in the application could not be put into the premises. The jury refused to accept this evidence and I entirely agree in their conclusion.

The appeal should be allowed with costs.

DAVIES J.—In this case the trial judge, on a motion for a nonsuit, reserved the points on which the motion was based, and submitted a number of questions to the jury. The learned judge, afterwards, pursuant to leave reserved, dismissed the action and this judgment was, on appeal, to the Court of Appeal for British

Columbia, sustained on an equal division of opinion in that court.

The grounds on which the learned trial judge dismissed the action were that the premises could not reasonably be regarded as a "dwelling-house and store" because the occupiers took in boarders, and the house was a crowded lodging- house, and that there was an over-valuation of the stock of merchandise on the premises. The two judges of the Court of Appeal who sustained the judgment dismissing the action did so on the ground of over-valuation of the stock of merchandise only.

With regard to the alleged misdescription of the premises as a dwelling-house, I am not able to concur in the holding that the presence of "lodgers," one or more, on the premises proves that the designation of dwelling-house was such a misdescription as vitiated the policy. A dwelling-house does not cease to be such simply because one or more lodgers are taken in by the occupants and, if the facts as found by the jury on ample evidence of the knowledge on the agent's part of the presence in the house of these lodgers or "roomers" at the time the policy was taken out, is considered, this objection must fail.

The substantial objection was as to the alleged over-valuation of the groceries in the shop. It is not contended that the total amount insured under the policy on the fixtures, furniture and groceries was an over-valuation, but that the "apportionment" of that amount was excessive as regards the stock of groceries.

The plaintiff contends that she did not make any valuation of the groceries, but left that expressly to the agent to do and that she did not herself know anything about it or that, in fact, there had been any specific apportionment of the insurance.

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Davies J.

The jury find that Freeze, the agent, made the apportionment himself, and I think there is ample evidence to sustain that finding. Indeed, it seems to me, although Freeze's evidence is somewhat contradictory and hard to reconcile, that, when the application was signed by Mahomed, at her residence, in the presence of one Howden, who had been sent by Freeze to obtain Mahomed's signature, no apportionment of the amount had been made. That was done subsequently by Freeze in his own office after the application had been signed and brought back to him by his clerk, Howden, and was done by Howden and Freeze themselves. In this view, there was no misrepresentation of values on the part of the applicant at all.

The question, therefore, whether Mahomed made or as a fact assisted, in the valuation of the groceries was not one which should have been withdrawn from the jury. Accepting the finding of the jury on this point as justified by the evidence, I am unable to see how the plaintiff can be held guilty of misrepresentation or over-valuation. If she is to be believed, and the jury had a right to believe her and did so, she neither as a fact valued the groceries or, in any way, misrepresented their value. She left that question to the company and their agent apportioned the insurance as he thought best. I do not think that the evidence warrants the conclusion that it was Howden who made the valuation at Mahomed's request. The valuation and apportionment was made and inserted in the application in Freeze's office after the application had been signed and when the applicant was not present. Possibly, Freeze was influenced in making it by the information he received from the clerk, Howden. The latter person was not examined at the trial.

Bearing in mind the fact that Freeze was the general agent of the company in and for the Province of British Columbia, and had authority to accept risks and issue policies without consulting the head-office of the company, I have, after reading the evidence, concluded that the submission of the question to the jury, whether Freeze or the plaintiff made the valuation of the groceries complained of, was a proper submission to them. On their finding on this point, which I think there is ample evidence to support, I cannot conclude that the plea of over-valuation or misrepresentation by the plaintiff has been sustained.

I would, therefore, allow the appeal and direct judgment to be entered for the amount claimed, namely, $940.05.

IDINGTON J.—On the findings of the jury, founded upon evidence which we cannot discard, judgment should have been entered for the plaintiff.

The local manager of the respondents did not stand, in this case, on the same footing, in relation to them and the duties to be discharged, as a mere soliciting agent. For our present consideration and purposes, he rather represented the company in the business of settling the contract and signing and issuing the policy, just as the Board of Directors might have stood in relation thereto.

The company cannot, therefore, be heard to say that it was either defrauded or warranted against what its manager obviously knew.

The appeal should be allowed with costs throughout.

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DUFF J.—There was evidence from which the jury might properly infer, first, that it was the duty of Freeze, as general manager of the company for Vancouver, to inform himself of the value of the property to which the appellant's application related, and, generally, of the nature of the risk, before forwarding the application to the company. Secondly, that the valuation and the apportionment, as they appeared in the application, were, in fact, made either by Freeze himself or by the employees of the company acting under his direction and with his knowledge and sanction. In these circumstances, the defences relied upon by the company disappear.

First, as to the description of the risk. It is impossible, in my judgment, to contend that the word "dwelling-house" in its primary meaning necessarily bears a signification which would exclude from the objects denoted by it a "lodging-house" of such a character as the appellant's was and, according to the finding of the jury, Freeze knew or ought to have known it to be. That being so, it is our duty to construe the description of the risk in the light of the facts known to Freeze, or, in other words, known to the company: viz., that the property described as a "dwelling-house" was a "lodging-house" of that character. *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.*(1). And, so construing it, there is, of course, no misdescription of which the respondents are entitled to complain.

Secondly, as to the alleged over-valuation: the fact being once established that the valuation and apportionment were made by the company, through their general manager at Vancouver, we are entitled, on the

(1) [1892] 2 Q.B. 534.

authority of the *Bawden Case*(1) to read the application as if that fact were stated in it. The application contains this passage:—

> In case of loss, if the property insured is found by appraisement or otherwise to have been over-valued in the survey and description on which the policy is founded, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given in such survey or description, not exceeding three-fourths of the allowed cash value at the time of the fire.

Reading this passage, together with such a recital, it appears to me to be impossible to contend that the over-valuation, if there were any, would have the effect of nullifying the policy.

I have not examined with care the evidence relating to the value of the property insured, and I desire to express no opinion upon it.

ANGLIN J.—There was evidence upon which a jury might properly find that there had been no misrepresentation by or on behalf of the plaintiff of the value of her stock of meat and groceries.

In regard to the misdescription of the premises relied upon by the defendants, assuming it to be such, if it has been sufficiently shewn to have been material (which I doubt), it has been found by the jury that it was known, or should have been known to the defendant company through their agent, Freeze, who inspected the premises for them.

I agree with Macdonald C.J. and Martin J.A. that there was a proper case for submission to the jury; that there is evidence to support its findings; and

(1) (1892) 2 Q.B. 534.

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that, on them, the plaintiff is entitled to judgment for the amount of her claim with costs throughout.

BRODEUR J.—I concur in the opinion of Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Craig, Bourne & McDonald.*

Solicitors for the respondents: *Russell, Russell & Hancox.*