A. A. COOPER INCORPORATED (PLAINTIFF) ..... } APPELLANT;

AND

CANADIAN UNION INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

1928

*May 10, 11.
*May 28.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Insurance—Fire—Warranty—Warehouse—Building to be "used solely for warehouse purposes."*

The appellant was owner of a building formerly occupied by an insolvent company, where machinery and other supplies, its remaining assets, were kept until sold by the appellant. The premises were insured against fire and, attached to each of two policies, was a rider containing the following provision: "Warranted that the building is used solely for warehouse purposes." The building was totally destroyed and action was brought to recover the amount of the policies.

*Held* that, upon the evidence, if used at all "for warehouse purposes" within the meaning of the above clause, the building was never at any time while insured by the respondent company solely used for such purposes.

*Held,* also, that the word "warehouse", whether used as a noun or an adjective, implies a place prepared and used for the storage of goods and effects, whether belonging to the proprietor of the building or to others, and also implies that the building will be properly equipped and managed so as safely to keep the goods stored in it; and that the expression "is used solely for warehouse purposes" implies further that the premises will be put to no other use than the storing and safeguarding of such goods and effects.

Judgment of the Court of King's Bench (Q.R. 45 K.B. 335) aff.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) (1927) 39 B.C. Rep., 70.

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A. A. COOPER INC. v. CAN. UNION INS. CO.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Montreal, Lane J., and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

*D. C. Robertson K.C.* for the appellant.

*F. J. Laverty K.C.*, and *Jos. Blain* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff appeals from a judgment of the Court of King's Bench affirming (Greenshields and Cannon JJ. dissenting) the judgment of Lane J., dismissing its action.

The action is based on two policies of insurance, issued by the defendant company, on a building owned by the plaintiff and therein described as

the three and four storey brick building with metal and composition roof situate, etc.

Both policies were in force at the time of the fire which destroyed the building.

The material facts as found by the learned trial judge, and as the evidence establishes them, were as follows:—

The insured premises had been occupied until the 1st day of March, 1920, by the A. A. Cooper Wagon and Buggy Company, which, as its name implies, manufactured wagons and buggies, and also awnings, and which appears to have done business as well under other names which it sometimes assumed. On the above date it ceased manufacturing or doing business * * * . It has apparently gone into voluntary liquidation, and we are told that the witness Austin A. Cooper, who is treasurer of the plaintiff company, and his brother W. F. Cooper, who Austin A. Cooper says were the shareholders in the extinct wagon and buggy company, had for five years been trying to dispose and had in part disposed of the remaining assets of the last-named company, among which was the old machinery. In March, 1926, they sold the old machinery to a firm of Lewis and Kulp, wreckers and junk dealers, and for about a month before the fire in question the latter had been removing from time to time, this scrap machinery they had purchased. Among that machinery so purchased to be removed was a large fly wheel which they needed to break up for the purposes of transportation, and, in the process of breaking it up they applied an acetylene torch, which igniting the old grease on and about the wheel, started the conflagration, which totally destroyed the premises. Austin A. Cooper says that previous to the fire, Lewis had asked permission to use such a torch, and that he had refused to grant it, and the witness Rafferty said he asked permission from him and he

(1) (1928) Q.R. 45 K.B. 335.

referred him to Austin A. Cooper. The latter claims to have been previously watching the men of Lewis and Kulp removing the machinery, but at the time of the fire, although Lewis and Kulp were strangers to him, and had had in their minds the use of an acetylene torch, the insured premises, where the old machinery was, was (*sic*) deserted by every representative of plaintiff, and the men of Lewis and Kulp were entirely alone in the premises.

Of the several defences raised by the insurance company only one, in the view we take of it, requires consideration.

Attached to each of the policies was a rider containing a clause in these words:—

> Warranted that the building is used solely for warehouse purposes.

Some question arose as to whether this clause formed part of each of the policies. The finding of the learned trial judge that the riders included these clauses to the knowledge and with the concurrence of the assured and that it was bound by them is fully supported by the evidence. Two questions arise as to them: what is their import? and, were they false?

Whether these clauses should be regarded as warranties in the strict sense of the term or as representations as to the character and description of the premises insured is probably of no importance, since, in either view, their untruth, in our opinion, if established, prevents recovery under the policies. Viewed as representations, their materiality, we think, admits of no doubt. They determined the acceptability of the risk and the rate of the premium charged for the insurance.

Although the clauses in question were pleaded as warranties that the building had been "erected as" a warehouse, the real defence based upon them and put forward at the trial, and to which the evidence was directed, was that the use made of the building at the time the policies were effected and up to the time of the fire which destroyed it was not "solely for warehouse purposes"—that at no material time was the building in use solely as a "warehouse" within any meaning which could reasonably be given to that term. We think this appeal should be determined upon the real issue presented by the alleged warranties as found in the policies and as fought out at the trial, rather than upon any erroneous conception of their purport indicated in the defendant's plea. On the issues actually tried—whether the clauses under consideration be regarded as meaning only that the insured building was at the time of effecting the insurance in use solely for

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warehousing purposes, or that it was then, and during the currency of the insurance would continue to be, so used (the latter, we think, was what the parties intended and understood)—the evidence, in our opinion, established conclusively that the warranties or representations were in fact false and were so to the knowledge of the insured. We agree with the view expressed by the trial judge as to the connotation of the word "warehouse" in these policies. Neither when the policies were issued, nor at any time during their currency was any substantial part of the insured building used as a "warehouse" or for "warehouse purposes"; most of it, indeed, was always used for other purposes. As put by the trial judge "the building in question was a defunct or extinct wagon and buggy factory."

As put by Mr. Justice Howard in the Court of King's Bench:

> It was submitted on behalf of the appellant that "warehouse" and "storage" are synonymous and so "for warehouse purposes" means "for the purposes of storage," and it was argued that the warranty in question was strictly fulfilled, inasmuch as the plant, tools, etc., and materials of the defunct buggy and wagon company had been left in storage in the building and that a certain part of it had been set apart, arranged and used for the storage of other effects. That submission is right so far as it goes, but to my mind it does not go far enough, for the word "warehouse," whether used as a noun or an adjective, implies a place prepared and used for the storage of goods and effects, whether belonging to the proprietor of the building or to others, and further implies that the building will be properly equipped and managed so as safely to keep goods stored in it. And the expression "is used solely for warehouse purposes" includes what I have just stated and also that the premises will be put to no other use than the storing and safeguarding of such goods and effects. I consider that the learned judge of the trial court has given a fair and reasonable definition of the expression and what is necessarily implied in it, and I agree with him that the insured premises and the use to which they were put fell far short of complying with the warranty.

If used at all "for warehouse purposes" within the meaning of the clause in question, the building was never at any time while insured by the respondent company solely used for such purposes.

We are, for these reasons, of the opinion that the judgment of the Court of King's Bench should be affirmed and this appeal dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *D. C. Robertson.*

Solicitors for the respondent: *Blain & Simard.*