1923
*May 29.
*June 15.

THE CANADIAN NATIONAL FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

COLONSAY HOTEL COMPANY AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Fire—Extent of loss—"Actual value"—Replacement value—Statutory conditions—"The Saskatchewan Insurance Act," R.S.S. (1920), c. 84, s. 82.

One of the statutory provisions, made a part of every contract of fire insurance by section 82 of *The Saskatchewan Insurance Act*, R.S.S. 1920, c. 84, is that a fire insurance company is not liable "for loss beyond the actual value destroyed by fire."

Held, reversing the judgment of the Court of Appeal (16 Sask. L.R., 146), that "actual value" means the actual value of the property to the insured at the time of the loss and not its replacement value.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), affirming the judgment of the trial judge and maintaining the respondents' actions.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

P. M. Anderson K.C. for the appellants.

G. H. Yule for the respondents.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin J. I would allow this appeal and direct a new trial.

IDINGTON J.—This appeal arises out of the trial of three actions brought by the respondents against three different insurance companies and consolidated for the purposes of the trial and final determination of the issues raised in each case which are in substance the same.

The said insurance companies had each insured the respondents against loss by fire as alleged in the respective declarations against each company, as follows: The Canadian National Fire Insurance Company on the buildings, $4,600, $200 and $200, and on the furniture and other personal contents $1,500; The Union Insurance Society of

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

(1) 16 Sask. L.R. 146.

Canton, Limited, on the buildings, or one of them $3,000, and on the hotel furniture, $875, and on liquors, cigars and cigarettes, $125; The British Crown Assurance Corporation, Limited, on the buildings, $3,000, and on the furniture, supplies and personal effects, $875, and on liquor, cigars, cigarettes, etc., $125.

Each of these insurances had been effected between the 1st of February, 1920, and the 7th of August, 1920.

The main building was a large structure and with other smaller buildings had been used in carrying on a hotel business and the contents chiefly used for same purpose in a village of only one hundred and fifty inhabitants.

The property had been built in 1910 or 1911, and sold to one Daley with contents in 1912 for $20,000.

That was before prohibition was in sight. The result of the prohibition enactments was so ruinous to the entire property in so small a place that in 1917 Daley turned it over to the Saskatchewan Brewing Company for $3,200, or $3,300, which he owed it.

That company sold it in February, 1920, to two of the individual respondents for $3,000.

A Chinaman who had been using it for his business purposes sold the contents to same parties in same month for $950, which were only slightly added to before the fire.

The individual respondents (Lashkewicz and Rosalia Pura) then entered into a partnership under the name of "Colonsay Hotel Company," now one of the respondents.

They had as part of the articles of partnership agreed to do their business with the Bank of Toronto, then the only bank carrying on business in said village of Colonsay.

From the accounts so kept the business latterly did not seem to be prosperous, indeed would seem to have been a losing one.

Yet respondents pretend that during such losing period Lashkewicz sold to respondent, Peter Pura, his half interest in the hotel property and its contents, on the 20th September, 1920, for $7,000, of which $1,000 was professed to be paid in cash.

No one seems to have been able to trace this alleged $1,000.

1923

CANADIAN NATIONAL FIRE INS. CO. v. COLONSAY HOTEL CO.

Idington J.

A fire took place on the 3rd of October, 1920, which consumed the entire building and most of the contents. The adjuster, one Morkill, after almost a day taken up with Peter Pura, settled, as was supposed by him, the entire loss with which appellants are chargeable, at the sum of $5,700, but his wife, respondent Rosalia Pura, refused to accept any such sum. Hence these actions which were tried by Mr. Justice McLean with a jury.

Many questions were raised by the pleadings and at the trial with which we need not concern ourselves, in the view I take and to which I am about to refer, arising out of the learned trial judge's charge to the jury who, under said charge, returned a verdict estimating the value of the hotel building at $16,500, and of the insured contents at $3,500.

The learned judge then directed a judgment to be entered for a total of $13,376.64, distributed ratably to be borne by the respective appellants as in the formal judgment appears.

A number of the learned trial judge's directions were taken exception to but in the result need not be dwelt upon here.

The learned trial judge, in regard to the measure of loss, directed the jury as follows:—

> The contract of insurance is to indemnify the assured against loss. I suppose the ideal way, or the way that would come most near to indemnifying the plaintiff in this case would be to place upon that site a building of the same dimensions, the same number of rooms, and the same basement, and the same appliances and the same equipment, and from that building and equipment to deduct, in some mysterious way, ten years wear and tear. He is not entitled to a new building, because he did not lose a new building. He is entitled to the same kind of building less the wear and tear on the building that he lost. I am going to instruct you as a matter of law, and if I am wrong there is another court that will set me right, that in respect to this building, and in the condition of the hotel business the proper basis on which you should fix the value of that hotel is this: a similar building erected there, at the time of the loss with the same equipment, and ten years wear and tear and depreciation taken off that;

and as follows:—

> The contract of insurance also contains this clause—you will find it on the back of each of the policies, as these policies are required by law to contain it—that instead of making payment, the insurer can rebuild or replace within a reasonable time the property damaged by loss, giving notice of intention, and so on. That gives the insurer the privilege of replacing. On the strength of that provision, and the interpretation I put on the term "market value," and the interpretation I put on the

contract of indemnity, my instructions to you are that the proper legal basis on which you should fix the value of that building for the purposes of compensation, if they are entitled to compensation under those insurance policies, is the replacement value.

The appellants herein appealed against this and the resultant judgment to the Court of Appeal for Saskatchewan. That court maintained the learned judge's said charge and dismissed the appeal with costs.

Hence this appeal herein therefrom.

The question thus raised is most important in light of the facts which I have outlined above in order to present the salient features and leading facts of the case to which the charge had reference.

I entertain a very decided opinion that the learned trial judge erred in so directing the jury, and that the judgments below should be reversed.

There are, no doubt, many cases in which such a charge might be upheld, where the loss sustained and the cost of replacement might be the equivalent of each other. But I respectfully submit that the statutory condition, imposed by section 82 of chapter 84 of R.S.S., forms part of every fire insurance contract entered into in Saskatchewan, and which reads as follows,

14. The company is not liable for the losses following, that is to say:

(*a*) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy; nor *for loss beyond the actual value destroyed by fire* nor for loss occasioned by ordinance or law regulating construction or repair of buildings

has not been properly applied herein.

Indeed the words therein " nor for loss beyond the actual value destroyed by fire " mean just what they say, and that is the cash market value. Market value is often made up of cash and a credit convertible into cash. They do not permit of any imaginary value the owner may be inclined to hold out for and expect, even reasonably, in the future.

These policies, in question herein, each and all contained also the following as part of the contract:—

Total concurrent insurance including this policy limited to sixty-six and two-thirds per cent of the actual cash value of the property insured.

These words used in framing each of the contracts in question herein as to what the respective insurance policies in question were intended to cover and give the insured, should, I respectfully submit, have put this case, now pre-

1923

CANADIAN NATIONAL FIRE INS. CO. v. COLONSAY HOTEL CO.

Idington J.

sented, beyond all doubt as to the meaning of the words "actual value" in the statutory condition. Indeed I suspect they have escaped the court below.

It is not the appellants alone who are interested for they evidently had over-insured, but also the general public suffering so much from over-insurance.

The counsel for appellants cited the case of *Pitman* v. *Universal Marine Insurance Co.* (1), and *Westminster Fire Office* v. *Glasgow Provident Investment Society* (2), and MacGillivray on Insurance, page 672 and, I should add the cases cited by that author, and the case of *Castellain* v. *Preston* (3).

The cases cited in all these are instructive and useful as a guide. I respectfully submit it would be impossible to find any express decision reaching such remarkable results as herein in question.

I think a new trial should be directed with costs in any event of the appeals below and herein, and costs of the first trial to abide the result of the new trial.

DUFF J.—I am unable to concur in the judgment of the Court of Appeal in this case. A very serious mistake was, I think, made by the learned trial judge. The jury ought to have been told that the pecuniary loss suffered by the insured in the destruction of the hotel was the true and only measure of the indemnity to which it was entitled. It seems to be quite clear that the loss should in the circumstances be measured by the value of the property—not necessarily the selling value, if the insured could establish a value in use greater than the selling value—and I can entertain no doubt whatever that the point upon which a jury should have been told to apply their minds was that of ascertaining the value to the insured of the property destroyed.

The appeal should be allowed and a new trial directed. There seems to be no reason for departing from the usual rule as to costs. The appellants therefore should have their costs on both appeals, and the costs of the abortive trial should abide the event.

(1) [1882] 9 Q.B.D. 192. (2) [1888] 13 App. Cas. 699.
(3) [1883] 11 Q.B.D. 380.

ANGLIN J.—The verdict for the plaintiffs and the judgment founded on it for $13,376.64 must in my opinion be set aside because they involve substantial wrong occasioned by misdirection.

A large hotel containing upwards of twenty-two rooms, in the village of Colonsay (population 150), built in 1910 was sold in 1912 for $20,000. Subsequently deprived of a license because of the introduction of prohibition, after having been occupied for a time by a Chinaman, it was acquired, with its appurtenances and contents, by the plaintiffs, about eight months prior to its destruction by fire on the 3rd of October, 1920, for $3,950. The equipment was supplemented by a further expenditure of about $450. There is no evidence of any increase in the value of the property between the time of its acquisition by the plaintiffs and its destruction. For the six months immediately prior to the fire the hotel appears to have been run by the plaintiffs at a substantial loss and the evidence presents no ground for believing that they entertained any expectation of an improvement in this condition of affairs.

The plaintiffs had insured the buildings with the defendant companies for $11,000 and the contents, including supplies, for $3,500—$14,500 in all.

Defences of fraud in making proofs of loss were negatived by the jury and were not further pressed here, the sole ground of the present appeal being that the jury's valuation of the buildings at $16,500 and the contents at $3,500 at the time of the fire were grotesquely excessive, and that the recovery awarded on that footing by the trial judge of $13,376.64 far exceeded any possible actual value of the property destroyed.

After the fire, Peter Pura, one of the plaintiffs, would appear to have been ready to settle the amount of the loss with the adjusters, representing the three defendant companies, at $5,100 which they offered to pay; but his co-plaintiff, Rosalia Pura, would not assent thereto.

The jury was instructed by the learned trial judge in these terms:

> My instructions to you are that the proper legal basis on which you should fix the value of that building for the purpose of compensation, if they are entitled to compensation under those insurance policies, is the replacement value.
>
> * * * *

1923

CANADIAN NATIONAL FIRE INS. CO. v. COLONSAY HOTEL CO.

Anglin J.

> You will take the same basis for valuing the hotel and for valuing the furniture, that is, replacement value.

There is nothing in the charge to qualify these directions, which have since had the approval of the Court of Appeal.

Each of the policies insures against loss or damage by fire the property therein described and each contains on its face this stipulation:

> Total concurrent insurance, including this policy, limited to 66⅔ per cent of the actual cash value of the property insured.

In the case of the National Fire Insurance Company's policy on the furniture and supplies for $1,500 there is an unfilled blank for the percentage of the concurrent insurance. That policy may therefore be read with the words " * * * per cent of " deleted from it. Each of the policies was also subject to the statutory conditions imposed by the Saskatchewan Insurance Act (c. 84, R.S.S. 1920), one of which (s. 82, s.s. 14 (*a*)) provides that

> The company is not liable * * * for loss beyond the actual value destroyed by fire.

I am, with great respect, very clearly of the opinion that " replacement value " (by which I understand is meant what the replacement *in statu quo ante* the fire of the insured property destroyed or injured would cost, less a reasonable allowance for depreciation) is not either " the actual value destroyed by fire " or " the actual cash value of the property insured." Both these phrases—one in a statutory condition, the other on the face of each policy—I think mean the same thing and that is " the actual value of the property to the insured at the time of the loss," having regard to all the conditions and circumstances then existing—not necessarily its market value on the one hand and certainly not, on the other, its " replacement value " which, while it may sometimes be less than its actual value to the insured, will more often exceed that value and sometimes, as in the present instance, very grossly exceed it. The right of recovery by the insured is limited to the actual value destroyed by fire.

That there was in the direction I have quoted from the change manifest error in my opinion is indisputable; that it directly induced the jury's findings whereby they valued the hotel building at $16,500 and the insured contents at $3,500 is equally clear; that substantial wrong or mis-

carriage was thereby occasioned in the trial (Con. R., 650) admits of no doubt.

The appeal must therefore be allowed with costs here and in the Court of Appeal and a new trial had. Costs of the abortive trial will abide the event of the new trial.

MIGNAULT J.—The learned trial judge in these three cases instructed the jury that the proper legal basis on which they should fix the value of the hotel building under the insurance policies was the replacement value.

With much deference, I think this was clearly misdirection in law. According to statutory condition 14 (contained in The Saskatchewan Insurance Act, chapter 84, R.S.S. 1920, section 82) the insurance company is not liable for loss "beyond the *actual value* destroyed by fire." Condition 17 gives the company the option, instead of making payment, to repair, rebuild or replace, within a reasonable time, the property damaged or lost on giving notice of its intention within fifteen days after the receipt of the proofs of loss.

The construction of the contract adopted by the learned trial judge would render this option of no possible benefit to the insurers, for they would be called upon to pay the cost of replacing the property whether they chose to replace it or not. Moreover, it is the "actual value" which they have to pay, subject to their right to replace if they elect to do so, and this is not necessarily the "replacement value."

I cannot help thinking that this instruction of the learned trial judge to the jury was the cause of the large award which they made for this hotel and its furniture. Had they been properly instructed as to the mode of determining the amount of the loss, there would have been no ground for complaint on the question of quantum, but I am constrained to hold that the instruction given them was erroneous.

I would allow the appeal with costs here and in the Court of Appeal, and direct a new trial. Costs of the abortive trial should abide the event of the new trial.

Appeal allowed with costs.

Solicitors for the appellants: *Anderson, Sample, Bayne & Noonan.*

Solicitor for the respondents: *G. H. Yule.*