

1887
 • Feb. 15. THE SOVEREIGN FIRE INSUR- } APPELLANTS;
 ANCE CO. (DEFENDANTS)..... }

AND

WILLIAM C. MOIR, JAMES W. }
 MOIR AND JAMES R. GRAHAM } RESPONDENTS.
 (PLAINTIFFS)..... }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Condition in policy—Not to carry on hazardous or extra hazardous business—Violation of condition—No increase of risk.

A policy on a building described in the application for insurance as a spool factory contained the following conditions:—

“That in case the above described premises shall at any time during the continuance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or extra hazardous unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing or added to or endorsed on this policy, then this policy shall become void.

“Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent.”

Held, reversing the judgment of the court below, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured.

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, and Gwynne JJ.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) refusing to set aside a verdict in favor of the plaintiffs (respondents).

1887
 SOVEREIGN
 FIRE INSUR-
 ANCE CO.
 v.
 MOIR
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This is an action on a policy of insurance bearing date 19th November, 1880, issued by defendant company to William C. Moir and James W. Moir, insuring "the machinery in spool factory, situate at Bedford Basin," in the sum of \$3,000. The policy was renewed for one year from the 27th of October, 1881.

In the application for insurance, which, by its terms, is made a part of the policy, the building containing the machinery insured is thus described :

"g. For what purpose is building used ? As a spool factory.

"h. What kind of goods are made and of what material ? Spools made of hardwood.

"3. a. How occupied—Give full description under heading referring to class of property sought to be covered ? Spool factory."

The policy contained the following, among other, conditions :

"And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above described premises shall at any time during the continuance of this insurance be appropriated, or applied to, or used, for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous ; or for the purpose of storing, using or vending therein any of the goods, articles or merchandize denominated hazardous or extra-hazardous, unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to or endorsed on this policy, then this policy shall become void.

"2. Any change material to the risk, and within the

1887

SOVEREIGN
FIRE INSUR-
ANCE CO.

v.
MOIR.

control or knowledge of the assured, shall avoid the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy or may demand in writing an additional premium, which the insured shall, if he desire the continuance of the policy, forthwith pay to the company, and if he neglect to make such payment forthwith after receiving such demand, the policy shall be no longer in force."

After the issue of the policy the insured, in addition to the manufacture of spools, manufactured on the said premises excelsior, made from wood cut by machinery into shreds and used for upholstering, and also stored such excelsior, after it had been pressed into bales, on the premises.

The machinery insured having been destroyed by fire the company refused payment of the policy on the ground that the manufacture of excelsior in the said building was a breach of the above conditions and rendered the policy void. On the trial of an action for the insurance in which the defence relied wholly on the ground just stated, evidence was offered as to the manufacture of excelsior as an insurance risk, and the relative risk between its manufacture and that of spools. Certain questions were submitted to the jury, and among them were the following:—

"Q. Which is the more hazardous risk, if any, the manufacture of spools or the manufacture of excelsior?

A. The manufacture of spools.

"Q. Is the risk increased by adding the manufacture of excelsior to that of spools in the same building? A. No."

A verdict was found for the plaintiffs for the amount insured by the policy and interest, which verdict was

sustained by the Supreme Court of Nova Scotia. The company then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants.

If there is a breach of the condition in the policy it is void even if the risk is not thereby increased.

Excelsior is a particularly hazardous article, and its manufacture is a clear breach of the condition. *Lee v. Howard Insurance Co.* (1).

Borden for the respondent.

There is no evidence that excelsior is hazardous and the verdict could only be interfered with on that ground by sending the case to another jury.

But there is no necessity for a new trial as the jury have found that the risk was not increased by the change and the company, therefore, are not prejudiced.

Refers to Wood on Insurance, sec. 233 *Stokes v. Cox* (2).

Sir W. J. RITCHIE C.J.—Where there is a condition like this annexed to a policy I think that, independent of the representations, it forms a stipulation in the policy itself, and it seems to me that the question to be determined is: What was the condition?

The respondent agreed that he would not allow the insured premises to be used for carrying on any business denominated hazardous or extra-hazardous, or for storing any goods or articles so denominated. Then the question is: Did he allow the premises to be so used?

He placed in the building in question, in addition to the spool factory which, by the express terms of the application for insurance and the policy, was what was insured, facilities for the manufacture of excelsior, and the evidence seems to me clear that that was a hazard

(1) 3 Gray (Mass.) 583.

(2) 1 H. & N. 320, 533.

1887
 SOVEREIGN
 FIRE INSUR-
 ANCE Co.
 v.
 MOIR.
 Ritchie C.J.

ous business, and being such there was a breach of the conditions of the warranty. It seems to me clear that the evidence shows this beyond all reasonable doubt, and there is no evidence to the contrary. And there is further evidence of the hazardous character of the business in the rate of premium which is charged for insuring premises in which it is carried on. The condition of warranty was not complied with, and therefore, by well known principles of insurance, the defendants were relieved.

The plaintiff offered no evidence, either in his own case or in reply, to show that the evidence given by defendants as to the character of this business was in any way incorrect, and that it was not a hazardous, or extra-hazardous business.

For these reasons I think it is our duty to give the judgment which should have been given by the court below and allow the appeal.

STRONG J.—Concurred.

FOURNIER J.—I think this is a very clear case of a breach of the warranty in the policy, and the appeal should be allowed.

HENRY J.—The contract that these parties entered into was clearly to insure a building used for the manufacture of spools, and the policy contained a warranty that no material change from that manufacture, calculated to increase the risk, should be made, otherwise the policy was to be void.

The only question to be put to the jury was, whether the manufacture of excelsior was hazardous or not. I would almost go further, and say that it was the duty of the judge, after that question was answered, to have found, not a verdict for the plaintiff, but a verdict for the defendants.

The contract, as appears from the application, was that the company should insure a building used for the manufacture of spools.

I think the evidence was quite strong enough to enable the jury to arrive at the conclusion that the risk was increased. The question simply was: Was the new business hazardous? Not: Was it more hazardous than the other? If that question had been submitted to the jury, and the evidence admitted of a doubt, the jury could have exercised the judgment upon it.

I think this court must give the judgment that should have been given in the court below, and I therefore concur in allowing the appeal.

GWYNNE J.—The 14th plea expressly raises a question which determines the case. If manufacturing excelsior or keeping it on the premises is a risk denominated hazardous or extra-hazardous the policy is by its express terms avoided unless the company be notified, and an increased premium be paid, and the evidence does establish the manufacture to be extra-hazardous. I concur therefore in allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants: *Henry, Ritchie & Weston.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*

1887
SOVEREIGN
FIRE INSUR-
ANCE CO.
v.
MOIR.
Henry J.