Dominion Fire Insurance Co. v. Nakata

The Dominion Fire Insurance Company (Defendants), Appellants; and Minnie Nakata (Plaintiff), Respondent.

(1915), 52 S.C.R. 294

Supreme Court of Canada

1915: October 19 / 1915: December 29.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Brodeur JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Hamilton Cassels K.C., for the appellants.
C.T. Jones K.C., for the respondent

Solicitors for the appellants: Cassels, Brook, Kelly & Falconbridge.
Solicitors for the respondent: Jones, Pescod & Adams.

SIR CHARLES FITZPATRICK C.J.:-- I have come to the conclusion, with some hesitation, that this appeal must be allowed. This is certainly not from any desire to assist the appellants, for I think, as Lord Mansfield says in Holman v. Johnson [Cowp. 341].

> the objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant.

The objection is allowed on principles of public policy which the defendant has the advantage of contrary to the real justice as between him and the plaintiff.

In the appellant's factum it is said:--

> It must be clearly borne in mind in dealing with this appeal that - this is not one of those too frequently occurring cases of an attempt by an insurance company to escape by means of some technicality a liability deliberately assumed by it and for the assumption of which it has received its stipulated recompense.

These are brave words, but unfortunately are not borne out by the facts. The factum proceeds:--

The plaintiff is a foreigner of bad character.

I do not think it is particularly creditable for the appellants to allege a one of the grounds for trying to escape liability that the respondent is a foreigner, and, as to the fact that she is of bad character, it appears on the face of the policy, issued under the corporate deal of the company and the signature of its president, that the premises were kept by the insured as a disorderly house.

The law, I think, is stated in Phillips on Insurance, (5 ed.), in chapter III., section 2, on the legality of the insurable interest. We read sub-section 210:--

> Insurance upon a subject is void if the interest insured is illegal or if the contract contemplates an unlawful use of it;

and this is carried further in sub-section 211,

> though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what is called "the policy" of the law, the owner cannot make a valid insurance upon it.

Again, sub-section 231, after referring to cases partly legal and partly illegal where a valid insurance my be made for the legal part, continues:--

> In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in the case of an agreement to employ a ship in an illegal trade.

In Pearce v. Brooks [L.R. 1 Ex. 213], at page 218, Chief Baron Pollock said:--

> No distinction can be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, ex turpi caus, v. non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either the one or the other.

In the notes to the case of Collins v. Blantern [1 Sm. L.C. (12 ed.) 412], in Smith's Leading Cases (ed. 1915), it is said:--

> Contracts made for immoral purposes are simply void. ... The illegality is equally fatal when created by statute.

Many cases are cited in support of this latter proposition. By section 228 of the Criminal Code the keeping of a disorderly house is an indictable offence and the purpose for which this house is used, being expressly stated in the policy, there can be no doubt of the illegality of the purpose for which it was used.

In Scott v. Brown [(1892) 2 Q.B. 724], at page 728, Lindley L.J. said:--

> Es turpi caus, non oritur actio. This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. ... If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

In his judgment in the case in this court of Clark v. Hagar [22 Can. S.C.R. 510], Mr. Justice Gwynne refers to a number of cases as establishing that the true test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his cause. In the present action the plaintiff, now respondent, could not, of course succeed without proving the policy bearing on its face evidence of illegality. Such proof is offensive to the curt and cannot be received.

That we find in the English reports no case exactly in point is not, I think, a matter of surprise. English Insurance companies, it is well known, rarely dispute their liabilities, never except in gross cases. Further, I should think its probable that respectable companies would be unwilling to state in their policies an immoral purpose. Few people, one may suppose, are willing to advertise their own turpitude unnecessarily.

There is a case in the Circuit Court of Quebec of Bruneau v. LalibertÈ [Q.R. 19. S.C. 425], in which Mr. Justice Andrews held that

> insurance upon the furniture in a house of ill-fame is an illegal and immoral contract and will not be enforced by the courts.

I do not think it is necessary for one to dissent from anything said in the judgment above referred to of Clark v. Hagar [22 Can. S.C.R. 510]. It is relied on in the decision of Morin v. The Anglo-Canadian Fire Insurance Co. [13 West. L.R. 667], in the court of appeal for the Province of Alberta, which the decision now under appeal professes to follow, and also in the later case of Trites Wood Co. v. The Western Assurance Co. [15 West. L.R. 47], in the Court of Appeal for British Columbia. It is, however, unnecessary to examine this judgment particularly, as I am unable to find in it anything to support the decisions in these causes in which, as in the present case, the illegality appear upon the face of the contract sued upon.

For the French law on the subject, see Planiol (6 ed.), vol. 2, para. 1009 et seq., and cases there cited. The modern tendency of the Cour de Cassation would appear to be, however, to maintain the validity of contracts such as the one here in question on the ground that the reciprocal obligations which the parties assume relate exclusively to the payment by the insured of the agreed premium and to the payment by the company of the stipulated indemnity in the event of the destruction of the thing insured. Vide Sirey, 1904, 1, page 509; but see S.V. 1896, 1, 289; Appert's note; S. V. 1913, 1, 497, note, and S. & P. 1909, 1, 188.

There is no provision in the Code Penal which corresponds with section 228 of the Canadian Criminal Code.

The appeal will be allowed and judgement entered for the defendants, the present appellants, but without costs.

DAVIES J.:-- I think this appeal should be allowed upon the grounds submitted by Mr. Cassels.

In the first place, I think Carr was the agent of Nakata for the purpose of procuring the policy of insurance in question.

The insured was the keeper of a "sporting house" which Mr. Jones, for the respondent, candidly admitted was well understood to be a bawdy house or house of ill-frame.

The husband of the plaintiff applied to Carr, an insurance broker, to obtain the insurance and was told by him that he could not take it in the insurance company for which he was agent, but would apply to other companies and was instructed to do so. He applied to the general agent in the province of the appellant company, who agreed to take it. The applicant paid to Carr a part of the insurance premium and shortly afterwards returned to Carr to obtain the policy when he was told it was subject to cancellation at any time. He then paid Carr the balance of the premium and Carr handed over to him the policy.

Carr says that at that time he asked them whether in case of cancellation he would return the money or put the insurance in some other company -- and he was told to put it in some other company.

The same afternoon Carr received notice that the head-office had cancelled the policy, whereupon he wrote and sent by registered post a letter to the plaintiff telling her the policy was cancelled. Carr had received the premium from the applicant, and on receiving notice of the cancellation of the policy made, as instructed, efforts to obtain insurance elsewhere, but was unsuccessful and the premium remained in his hands.

The trial judge was of the opinion that

> the whole thing depended upon the question of the agency of Carr for the insured upon which there is much to he said upon both sides.

The learned judge was not satisfied that Carr was an agent to receive notice of cancellation and this view prevailed in the court of appeal.

I am of opinion, however, that Carr was such an agent and that the premium having been left with him in case of cancellation to obtain insurance in some other company, that he was the agent of the insured for receiving notice of such cancellation.

On the other ground also, that the contract was one for facilitating the carrying on of an illegal and immoral object, I think the appeal should be allowed.

The trial judge and the court of appeal felt themselves concluded by the case of Morin v. Anglo-American Fire Insurance Co. [13 West. L.R. 667]. I am not able to accept that authority or the reasoning upon which it was founded. I think the principle upon which the case of Pearce v. Brooks (2) was decided the proper one to apply in this case.

That principle is that one who makes a contract for sale or hire with the knowledge that the other party intended to apply the subject-matter off the contract to an immoral purpose cannot recover on the contract. As Pollock C.B. said in that case if an article was required and furnished "to facilitate the carrying on of the immoral purpose" that is sufficient. The courts would not lend their aid to carry it out. It seems to be that the facts of the case now before us are stronger against the en-

forcement of the contract than those in the case of Pearce v. Brooks [L.R. 1 Ex. 213], which the Exchequer Court refused their aid to enforce. In that case, the plaintiffs sued for the hire of a brougham by a woman known by them to be a prostitute and who used the brougham to their knowledge for the purpose of making a display favourable to her immoral purposes.

In the case of Johnson v. Union Marine and Fire Insurance Co. [127 Mass. 555], the court followed a previous decision of their own in Kelly v. Home insurance Co. [97 Mass. 288], and held that if a person engaged in the unlawful business of selling intoxicating liquors without a licence at the time of the making and acceptance of a policy of insurance on his stock in trade and a month afterwards, the policy does not attach, although he made application for a licence immediately after he began such business.

The grounds on which the decision was placed in Kelly v. Home Insurance Co. [97 Mass. 288] above referred to were that the object of the assured in, obtaining the policy was to make their illegal business safe and profitable and that the direct and immediate purpose of the contract of insurance being to protect and encourage all unlawful traffic the contract was illegal and never attached.

The same principle was held by Andrews J. to govern in the case of Bruneau v. LalibertÈ [Q.R. 19 S.C. 425].

I think this principle should apply to this case, the contractual obligation of the company being in case of loss either to pay the same up to the amount insured or to "replace the property damaged or lost." Could it be fairly argued that the replacement of the property would not be an aiding or facilitating of the immoral purpose for the carrying on of which the house and furniture were used? I think the courts of this land should not lend their aid to enforce contracts made too facilitate the keeping of houses of ill-fame, which, in my judgment, this insurance policy was calculated to do.

IDINGTON J. (dissenting):-- This is an action upon a policy of insurance against fire on a house in Calgary owned by respondent and used gas a bawdy house, in modern slang phrase described, ads it was in the said policy, as a "sporting house," and on furniture therein.

The chief ground of defence set up was that, pursuant to a statutory condition indorsed thereon the policy had been cancelled long before the fire.

It is quite clearly established, indeed not seriously disputed, that the policy was duly issued by the general agents of the appellant and the premium therefor paid.

It was procured by a local broker from the said general agents. A good deal of what was, I respectfully submit, needless discussion, has taken place as to the details of how this payment and its alleged return was dealt with. I assume, upon the facts in evidence, that the general agents received the premium, but failed to return same in any way for more than six weeks after the date of the policy, although the alleged cancellation is claimed to have taken place within ten days after said date.

This alleged repayment is only material in considering the contention set up by appellant that Mr. Carr, the broker, was the respondents agent to receive the return of the money.

The power of cancellation relied upon is that contained in the condition, No. 19, of the statutory conditions in force in Alberta.

I think it is necessary for any company seeking to avail itself of the power therein contained to follow the very simple band clear terms of that condition.

I cannot find in what was done anything even resembling what the power requires. Nor can I find that what the respondent's husband said to Carr could entitle him, as her agent, to set aside or waive that condition and all implied therein.

The details of all that have been so fully dealt with by the learned judges in the courts below that I do not think I can serve any good purpose by setting forth an additional elaboration thereof.

The appellant stoutly maintains Carr was not its agent, though appearing on the policy as agent. I accept its contention in that regard.

The doing so relieves me of the necessity for considering the possible effect of his sending her a notice. The only notice alleged to have been given the insured was one mailed to her by Carr, but never received by her, or heard of by any one acting for her as her agent for that purpose.

There never was, unless Carr was appellant's agent, anything done, I repeat, resembling what the statutory condition imposes upon the insuring company to be done by it in such cases, but not by some one else.

Again, it is contended that the policy was illegal upon the ground that the owner of a bawdy house cannot insure himself, or herself, against loss thereof by fire.

We have all heard of leases made of a house to be used for such like purposes being illegal, either because it obviously promotes the illegal purpose had in view, or because the consideration for such a lease may be tainted thereby and, hence, the contract is void.

I am unable to understand how the policy of insurance can, as of course, in itself promote the carrying on of such a traffic, or in law be held to fall within the principles upon which I suggest a lease, for example, may be illegal and be thereby void.

It is urged the house had become vacant and that change of condition so increased the risk as to violate the condition. The learned trial judge upon the facts found against the appellant, and no appeal was made against that finding.

Though neither set up in the pleadings, nor urged at the trial, nor presented to the court of appeal, counsel for the appellant seeks now, for the first time, in this court to set up the further defence that there was an undisclosed encumbrance on the property and some false statement of proof of loss in that regard.

The manifest injustice of allowing such an issue of fact to be raised at this stage for the first time has always been held a sufficient answer here to permitting any such course.

The appeal should be dismissed with costs.

DUFF J. (dissenting):-- The first question is whether the policy was in force at the time of the fire and that subdivides itself into: (a) Did the appellant company receive payment of the insurance premium? and (b) Was the power of cancellation with which the insurers were invested by the terms of the policy effectively put into operation?

The answer to the former question must be in the affirmative or the negative according as the appellant company is held or not held to be precluded from disputing both that payment to Carr and that payment to Tavender & Co. would be payment to themselves. As to Carr -- for some purposes

he no doubt was the agent of the respondent, but it does not necessarily follow that he was not also the agent of the appellant company for the purpose of receiving payment of the premium. The policy was delivered by Carr to the respondent's husband and on the policy there was a declaration to the effect that Tavender & Co. were the general agents of the company and there was also a statement that Carr was the company's agent. In the appellant's factum it is said that the designation of Carr as agent was adopted as a matter of office procedure in recognition of Carr's right to a commission for the introduction. For our present purpose we are not concerned "with the appellant's office procedure." Carr held the policy for delivery to the respondent on payment of the premium and the designation of him as agent correctly describes the character in which he had possession of the policy which he unquestionably held for the company and delivered to the respondent on their behalf; the description of him as agent and his possession of the policy for the company together constituted a representation upon which the respondent was entitled to act on paying the premium. Counsel for, the respondent did not, of course, dispute, it would have been hopeless to do so, that if a loss had occurred immediately after the delivery of the policy and before the transmission of the premium by Carr and before any steps had been taken looking to cancellation, that it would have been impossible to deny that the risk had attached. As to Tavender & Co. -- the premium was in fact paid by a set off of the accounts between Tavender & Co. and Carr -- the repudiation of Tavender & Co.'s action by the company could have no effect upon the rights of the respondent, who, having no notice of any limitation of authority was entitled to assume that Tavender & Co. were acting within the scope of that conferred upon them.

As to cancellation. It is not disputed that notice of cancellation was not received by the respondent. The appellant's contention rests upon the proposition that Carr had been constituted the respondent's agent for the receipt of such notice. The contention breaks down on the facts, there being simply no evidence to support a conclusion that the parties intended that the policy should be subject to cancellation without notice to the respondent personally. The direction alleged to have been given to Carr to retain the premium in the event of cancellation cannot fairly be held to imply authority to receive notice of cancellation. The learned trial judge found against agency in fact and I entirely agree with his view on this point.

We now come to the difficult question: Was the policy invalid as tainted with illegality by reason of the purported contract being a contract entered into for the purpose of assisting the respondent in carrying on an illegal business by securing her indemnity against loss of property by fire while the property was being employed for an illegal purpose?

The facts are that the house and personal effects, the subjects insured, were at the time of the application in the possession of the respondent ho carried on in the house and used the furniture for the purpose of carrying on the business (as it is described in the application) of a "sporting house," in other words, a house of ill-fame. This fact, being stated in the application, was, of course, known to the company. At the time the fire occurred the house was not occupied by the respondent, butt was in the card of a caretaker who kept there at nights. The usual premium was charged, there being no augmentation because of any special hazard that might be supposed to exist by reason of the character of the occupation, and there is no suggestion that this last mentioned circumstance in itself, according to insurance practice, would be regarded as entailing any special hazard or as affecting the character of the risk from the actuarial point of view. It appears further that the appellant company was unwilling to accept the risk and directed the cancellation of the policy as soon as they became aware of the facts. The point, however, upon which the appellant company based its objection was a rather narrow one. The officials of the company appear to have had no objection to ac-

cept a risk of this character if the place was situated within what was described as a "licensed district," in other words, if the place was permitted to flourish by the openly understood sanction of the police. The house in question not being as I have said within a "licensed district" these officials decided to put an end to the risk.

The argument for the appellant is now put in this way. The respondent, it is said, sought insurance to enable her the more safely to carry on a business which is not only a violation of the law itself, but is a public trading in immorality. It is said that the performance of such contracts of indemnity by the insurer has a tendency directly to encourage illegality and immorality and such contracts are, therefore, in such circumstances, within one of those classes which the courts refuse to enforce, as being in the traditional phrase "tainted with illegality." I have come to the conclusion that this view does not furnish the governing rule for the decision of this appeal; but I am far from suggesting that there is not a great deal of force in the strictly legal considerations that may be adduced in support of it, however little one may be disposed to look with anything but impatience upon the posture of this company whose interest in the public morals finds adequate expression in a distinction between bawdy houses protected by the police, according to clearly understood convention, and bawdy houses whose toleration ifs more irregular and precarious.

The question is, of course, a dry question of law. This contract of insurance is not in itself illegal in the sense that it is a contract directly forbidden by law or in the sense that it is intended to create an obligation to do anything forbidden by law. If the appellant company had paid the respondent's claim, nothing in the making or the performance of the contract could be described as illegal. A contract, however, on the face of it collateral to an unlawful act or to an unlawful course of business or to an unlawful design may be so connected with the illegality as to be vitiated by it; the question as Marshall C.J. said in Armstrong v. Toler [11 Wheaton 258, at p. 272] very often is a question of considerable nicety whether the connection is or is not of such a character as to have that effect.

There is a number of decisions in cases similar to this in which the insurance contract is treated (1) as an agreement to indemnify against the consequences of an illegal curse of action or (2) as a mere incident in the carrying on of some transaction or business forbidden by law.

The former is the interpretation which has been given to marine policies insuring a voyage illegal in its inception, such policies being held void as attempts to contract for indemnity against the loss suffered by reason of carrying out an unlawful enterprise. See Wilson v. Rankin [L.R. 1 Q.B. 162]; Ocean Insurance Co. v. Polleys [13 Peters 157]. The latter is the interpretation upon which rest certain decisions in the American courts, notably in the courts of Massachusetts in which policies of insurance effected upon stocks of liquor held for sale by unlicensed dealers in violation of the law have been thought void as transaction in reality constituting in part the carrying on of an unlawful business.

These interpretations cannot, I think, be said to fit the case before us. The fact that in accordance with settled practice an applicant for insurance is required to state the business, if any, carried on on the premises proposed for insurance, and the fact that the business named is illegal and the fact that this statement with other statements in the application constitute the basis of the contract do not justify the interpretation of the contract as a contract to indemnify against loss incurred by reason of the carrying on of an illegal business; the policy being in the usual form, the risk insured against being the risk of fire from causes usually insured against in a policy in that form, the premium, as I have already said, being the usual premium. One would not think of describing a policy of

insurance upon his office furniture taken out by a promoter whose chief business was to effect mergers obnoxious against the provisions of the Criminal Code as an agreement to indemnify against loss incurred in the course of his illegal business; and yet the parallel if not exact is approximate.

Neither ought the latter of the above mentioned views (which has been given effect to in Massachusetts in the cases referred to) to govern in this case. It would be a quite unreasonable interpretation of the intentions of the parties to this contract to hold that the terms of the bargain in any way turned upon the character of the business carried on. One could better interpret their intentions by saying that the contract was made in spite of the fact rather than because of the fact that the occupation was of the character mentioned.

A distinction suggested by a series of English cases dealing with the enforceability of contracts made with persons of the respondent's class may, I think, well serve as a key to the solution of the question before us. In Lloyd v. Johnson (1) Mr. Justice Buller, in Bowry v. Bennett (2) Lord Ellenborongh, and in Pearce v. Brooks (3) the Court of Exchequer had such contracts before them and the net result, I think, of the authorities of which these are typical examples, is summed up with accuracy in the treatise on contracts by Mr. Manisty, in Halsbury Laws of England, vol. 7, p. 400, in these words:--

> An action lies to recover the price of goods sold or work done even though that the plaintiff knew that the person with whom he was dealing was a prostitute (Lloyd v. Johnson [1 Bos. & P. 340]; Bowry v. Bennett [1 Camp. 348]), unless it appears that the goods were sold or the work was done for the purpose of enabling her to exercise or assisting her in the exercise of her immoral calling. (Hamilton v. Grainger [5 H. & N. 40]; Pearce v. Brooks [L.R. 1 Ex. 213].

In Pearce v. Brooks [L.R. 1 Ex. 213] Baron Bramwell, who had tried the action, says:--

> I told the jury that, in some sense, everything which was supplied to a prostitute is supplied to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must not merely be such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view.

This insurance company, no doubt invites us to bold that when they do enter into contracts for the insurance of such places (being, of course, let it be well understood, within a "licensed district") they do so with the object of enabling the proprietors to exercise and to assist them in the exercise of their immoral calling. In fact, of course, it is not so and it would be ridiculous to say that they ever thought of assisting the respondent in the exercise of her trade or of supplying her with anything that had any special reference to her trade or of contracting with her in any other character than that of the proprietor of a furnished dwelling simply.

The above mentioned cases were applied in this court in the case of Clark v. Hagar [22 Can. S.C.R. 510], and the judgment of Mr. Justice Gwynne, who spoke for the majority of the court, contains an exhaustive but luminous exposition of the effect of the decisions and his conclusions are substantially in harmony with the passage quoted above from Mr. Manisty's treatise.

Mr. Justice Gwynne's judgment was applied in a case similar to the present by the British Columbia Court of Appeal, Trites Wood Co. v. Western Insurance Co. [15 West. L.R. 475].

I must not omit a reference to Bruneau v. LalibertÈ [Q.R. 19 S.C. 425] (Mr. Justice Andrews), in which it was held that a policy of insurance on the furniture of a house of ill-fame was an illegal and immoral contract and non-enforceable. The decision is, in part, based on an interpretation of Pearce v. Brooks [L.R. 1 Ex. 213], which is not, I think, an admissible interpretation; and upon certain French authorities which were supposed to support the conclusion at which the learned trial judge arrived. In France, however, the jurisprudence is by no means uniformly in favour of the learned judge's view as is shewn by the following passages from Carpentier, Rep. Supplement, 2 Assurance contre l'incendie, Nos. 64 and 207(2), giving the effect of two comparatively recent decisions of the Cour de Cassation:--

> 64. Le contrat d'assurance contra l'incendie passÈ par le tenancier d'une maison de tolÈrance ne peut Ítre annulÈ comma ayant une cause immorale, alors qua, dans ce contrat, les prestations qua les parties se sont mutuellement promises consistaient, d'une part, dans la paiement de l'assurÈ des primes convenues, d'autre part, dans le paiement par la compagnie dune indemnitÈ pÈcuniaire, ou, ‡ son choix, dans la reconstruction ou la rÈparation des b‚timents incendiÈs et le replacement en nature des objets dÈtruits; ces prestations licites en elles-mÍmes, n'ont pu devenir illicites par cela seul que les risques assures dÈpendaient d'une maison de tolÈrance, et elles na sauraient Ítre considÈrÈes comme ayant eu en vue la crÈation, la maintien on l'exploitation d'un Ètablissement de cette nature. Cass., 4 mai, 1903.

> 207.(2) Y a-t-il fausse dÈclaration de la part du tenancier d'une maison de tolÈrance qui se qualifie de loger en garni? La question s'est posÈe devant la cour de cassation. La pourvoi soutenant l'affirmative par les motifs suivants: L'exploitation d'une maison de tolÈrance, disait-il "prÈsente des risques considÈrables. Le danger d'incendie, en effet, est plus grand qua partout ailleurs dans une maison frÈquentÈe la nuit par des gens souvent avinÈs, o˘ l'orgie est quotidienne, la drame frÈquent, et dont la personnel par sa profession mÍme, est une perpÈtuelle menace d'imprudence, sinon d'actes malveillants. Ces risques considÈrables entraÓnent les compagnies, quand elles consentent ‡ assurer les tenanciers de maisons de tolÈrance, ‡ exiger d'elles le paiement de primes fort chËres." Mais les juges du fond avaient refuse d'accueillir le moyen de nullitÈ, par la raison que la compagnie ne pouvait se mÈprendre sur le sens et la portÈe des expressions "logeur en garni" dans les circonstances ou elles avaient ÈtÈ employÈes. C'est la solution qu'a fait prÈvaloir la Cour de cassation. Cass., 4 mai, 1903, Comp. d'assur, terr. Le Monde (S. & P., 1904, D. 1906, 5,33).

The appeal should be dismissed with costs.

BRODEUR J:-- The first question in this case is whether the contract of insurance was valid.

In the application for insuring the premises, it was stated that the plaintiff (respondent) was keeping a "sporting house," which was understood as being a house of ill-frame.

The policy was procured through the appellants' agents in Calgary. They had the power to accept risks, subject to cancellation by the head-office, ads is the usual insurance practice. The head-office of the insurance company refused to maintain the policy and a notice of cancellation was given.

The agents of the appellant company in Calgary immediately notified the broker through whom the application had been made. This broker, Carr, on the same day, wrote to the plaintiff telling her the policy was cancelled and asking for its return. He did not enclose the premium, because, as instructed by the plaintiff, he intended to try and get insurance elsewhere.

This letter was not received by the plaintiff and was subsequently returned to Carr.

A fire having taken place on the premises, the present action has been instituted for the purpose of recovering the amount of the insurance.

The company claims that the contract was illegal because it facilitates immorality.

It has been decided in a case of Bruneau v. LalibertÈ [Q.R. 19 S.C. 425], by Mr. Justice Andrews that an

> insurance upon the furniture in a house of ill-frame is an illegal and immoral contract, and will not be enforced by the courts.

Addison, on Contracts, p. 72, summarises thin matter in stating --

> Contracts tending to promote fornication and prostitution void.

And Beach on Contracts, p. 2019, says that

> any contract auxiliary to the keeping of a bawdy house is void.

Halsbury, Lawns of England, vol. 7, No. 829, p. 400, relying on the case of Pearce v. Brooks [L.R. 1 Ex. 213], says that if it appears that a work was done for the purpose of enabling a prostitute to exercise or assisting her in the exercise of her immoral calling, no action would lie.

Pollock on Contracts (7 ed.), p. 370, in speaking of transactions where there is an agreement for a transfer of property for a lawful consideration, but for the purpose of an unlawful use being made of it, says that --

> The later authorities shew that the agreement is void not merely if an unlawful use of the subject-matter is part of the bargain, but if the intention of one party so to use it is known to the other at the time of the agreement.
>
> * * * * *
>
> If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose he cannot recover the price.

I find in Dalloz, Repertoire Pratique, vo. "Contrats et Conventions en general," Nos. 398 and 401, that the contract whose consideration is the maintenance of a house of ill-fame is illicit and the

action for the price of the service of a domestic in a house of ill-frame should not be accepted. I must say, however, that this latter decision has been severely criticized by some authors. Baudry-Lacantinerie, vol. 11, No. 313, say:--

> C'est l'obligation sur cause illicite que l'art. dÈclare sans effet. II en est autrement de l'obligation dont le motif seulement est illicite. Ici donc apparaÓt encore l'utilitÈ de la distinction entre l'a cause et le motif. Cette distinction est nettement Ètablie dans quelques dÈcisions judiciaires. Mais beaucoup d'autres l'ont perdue de vue et la confusion a engendrÈ des dÈcisions vraiment fantastiques. N'a-t-on-pas vu le tribunal de commerce de la Seine, refuser sur le fondement de la cause illicite, tout effet a l'obligation contractÈe par le directeur d'une maison de tolÈrance pour acquisition de vins de champagne destins ‡ Ítre consomme dans son Ètablissement?

On that first ground, I would be of opinion that the contract of insurance was illegal and that it should be set aside. The appeal should be allowed with costs.

Appeal allowed without costs.

REPORTS

OF THE

SUPREME COURT

OF

CANADA

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Charles Fitzpatrick C.J., G.C.M.G.

" Sir Louis Henry Davies J., K.C.M.G.

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Arthur Meighen K.C.

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*Oct. 19.
*Dec. 29.

THE DOMINION FIRE INSURANCE COMPANY (DEFENDANTS) } APPELLANTS;

AND

MINNIE NAKATA (PLAINTIFF) ..... RESPONDENT.

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

Fire insurance—Bawdy house—Immoral contract—Legal maxim—"Ex turpi causâ non oritur actio"—Cancellation of policy—Statutory condition—Notice to insured—Return of premium—Principal and agent.

On application by plaintiff, through an insurance broker, the company insured her house and furniture against loss by fire, the premises being described as a "sporting house" (a house of ill-fame), and, soon afterwards, the local general agent of the company received notification from the head-office that the policy had been cancelled. On being notified the broker wrote to plaintiff informing her of the cancellation, but his letter was not delivered and was returned through the mails. In an action on the policy,

Held, reversing the judgment appealed from (9 Alta. L.R. 47), Idington and Duff JJ. dissenting, that on the face of the policy of insurance it appeared that the effect of the contract was to facilitate the carrying on of an illegal or immoral purpose and, therefore, it would not be enforced in a court of justice. *Pearce* v. *Brooks* (L.R. 1 Ex. 213), applied; *Clark* v. *Hagar* (22 Can. S.C.R. 510), *Johnson* v. *Union Marine Fire Insurance Co.* (97 Mass. 288), and *Bruneau* v. *Laliberté* (Q.R. 19 S.C. 425), referred to.

Per Davies J.—In the circumstances of the case the broker through whom the plaintiff effected the insurance became her agent for all purposes in connection therewith and he was also constituted the agent of the company for the purpose of giving notice of the cancellation of the policy.

Per Idington and Duff JJ. (dissenting).—The mere description of the premises insured as a bawdy house is not sufficient evidence

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

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to justify the inference that the contract had the effect of promoting illegal or immoral purposes. *Clark* v. *Hagar* (22 Can. S.C.R. 510); *Lloyd* v. *Johnston* (1 Bos. & P. 340); *Bowry* v. *Bennett* (1 Camp. 348); *Hamilton* v. *Grainger* (5 H. & N. 40), and *Pearce* v. *Brooks* (L.R. 1 Ex. 213), referred to. *Bruneau* v. *Laliberté* (Q.R. 19 S.C. 425), discussed.

Per Idington and Duff JJ.—The broker, who was handed the policy for delivery to insured and collection of the premium, became the agent of the company for those purposes. He, however, had no authority from the insured to receive notice of cancellation of the policy on her behalf nor to waive the requirements of statutory condition 19 of the "Northwest Territories Ordinance," ch. 16 (1st sess.), 1903, as to notice of cancellation of policies of insurance and return of premiums paid.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Beck J., at the trial, maintaining the plaintiff's action with costs.

The circumstances of the case are stated in the head-note.

Hamilton Cassels K.C. for the appellants.

C. T. Jones K.C. for the respondent

THE CHIEF JUSTICE.—I have come to the conclusion, with some hesitation, that this appeal must be allowed. This is certainly not from any desire to assist the appellants, for I think, as Lord Mansfield says in *Holman* v. *Johnson* (2).

> the objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant.

The objection is allowed on principles of public policy which the defendant has the advantage of con-

(1) 9 Alta. L.R. 47. (2) Cowp. 341.

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trary to the real justice as between him and the plaintiff.

In the appellants' factum it is said:—

It must be clearly borne in mind in dealing with this appeal that this is not one of those too frequently occurring cases of an attempt by an insurance company to escape by means of some technicality a liability deliberately assumed by it and for the assumption of which it has received its stipulated recompense.

These are brave words, but unfortunately are not borne out by the facts. The factum proceeds:—

The plaintiff is a foreigner of bad character.

I do not think it is particularly creditable for the appellants to allege as one of the grounds for trying to escape liability that the respondent is a foreigner, and, as to the fact that she is of bad character, it appears on the face of the policy, issued under the corporate seal of the company and the signature of its president, that the premises were kept by the insured as a disorderly house.

The law, I think, is stated in Phillips on Insurance, (5 ed.), in chapter III., section 2, on the legality of the insurable interest. We read sub-section 210:—

Insurance upon a subject is void if the interest insured is illegal or if the contract contemplates an unlawful use of it;

and this is carried further in sub-section 211,

though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what is called "the policy" of the law, the owner cannot make a valid insurance upon it.

Again, sub-section 231, after referring to cases partly legal and partly illegal where a valid insurance may be made for the legal part, continues:—

In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in the case of an agreement to employ a ship in an illegal trade.

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In *Pearce* v. *Brooks*(1), at page 218, Chief Baron Pollock said:—

No distinction can be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either the one or the other.

In the notes to the case of *Collins* v. *Blantern*(2), in Smith's Leading Cases (ed. 1915), it is said:—

Contracts made for immoral purposes are simply void. * * * The illegality is equally fatal when created by statute.

Many cases are cited in support of this latter proposition. By section 228 of the Criminal Code the keeping of a disorderly house is an indictable offence and the purpose for which this house is used, being expressly stated in the policy, there can be no doubt of the illegality of the purpose for which it was used.

In *Scott* v. *Brown*(3), at page 728, Lindley L.J. said:—

Ex turpi causâ non oritur actio. This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. * * * If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

In his judgment in the case in this court of *Clark* v. *Hagar*(4), Mr. Justice Gwynne refers to a number of cases as establishing that the true test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to estab-

(1) L.R. 1 Ex. 213.
(2) 1 Sm. L.C. (12 ed.) 412.
(3) (1892) 2 Q.B. 724.
(4) 22 Can. S.C.R. 510.

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lish his case. In the present action the plaintiff, now respondent, could not, of course, succeed without proving the policy bearing on its face evidence of illegality. Such proof is offensive to the court and cannot be received.

That we find in the English reports no case exactly in point is not, I think, a matter of surprise. English insurance companies, it is well known, rarely dispute their liabilities, never except in gross cases. Further, I should think it probable that respectable companies would be unwilling to state in their policies an immoral purpose. Few people, one may suppose, are willing to advertise their own turpitude unnecessarily.

There is a case in the Circuit Court of Quebec of *Bruneau* v. *Laliberté*(1), in which Mr. Justice Andrews held that

> insurance upon the furniture in a house of ill-fame is an illegal and immoral contract and will not be enforced by the courts.

I do not think it is necessary for me to dissent from anything said in the judgment above referred to of *Clark* v. *Hagar*(2). It is relied on in the decision of *Morin* v. *The Anglo-Canadian Fire Insurance Co.* (3), in the court of appeal for the Province of Alberta, which the decision now under appeal professes to follow, and also in the later case of *Trites Wood Co.* v. *The Western Assurance Co.*(4), in the Court of Appeal for British Columbia. It is, however, unnecessary to examine this judgment particularly, as I am unable to find in it anything to support the decisions in these cases in which, as in the present case, the

(1) Q.R. 19 S.C. 425.
(2) 22 Can. S.C.R. 510.
(3) 13 West. L.R. 667.
(4) 15 West. L.R. 475.

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illegality appears upon the face of the contract sued upon.

For the French law on the subject, see Planiol (6 ed.), vol. 2, para. 1009 *et seq.*, and cases there cited. The modern tendency of the Cour de Cassation would appear to be, however, to maintain the validity of contracts such as the one here in question on the ground that the reciprocal obligations which the parties assume relate exclusively to the payment by the insured of the agreed premium and to the payment by the company of the stipulated indemnity in the event of the destruction of the thing insured. *Vide* Sirey, 1904, 1, page 509; but see S.V. 1896, 1, 289; Appert's note; S. V. 1913, 1, 497, note, and S. & P. 1909, 1, 188.

There is no provision in the Code Penal which corresponds with section 228 of the Canadian Criminal Code.

The appeal will be allowed and judgment entered for the defendants, the present appellants, but without costs.

DAVIES J.—I think this appeal should be allowed upon the grounds submitted by Mr. Cassels.

In the first place, I think Carr was the agent of Nakata for the purpose of procuring the policy of insurance in question.

The insured was the keeper of a "sporting house" which Mr. Jones, for the respondent, candidly admitted was well understood to be a bawdy house or house of ill-fame.

The husband of the plaintiff applied to Carr, an insurance broker, to obtain the insurance and was told by him that he could not take it in the insurance

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company for which he was agent, but would apply to other companies and was instructed to do so. He applied to the general agent in the province of the appellant company, who agreed to take it. The applicant paid to Carr a part of the insurance premium and shortly afterwards returned to Carr to obtain the policy when he was told it was subject to cancellation at any time. He then paid Carr the balance of the premium and Carr handed over to him the policy.

Carr says that at that time he asked them whether in case of cancellation he would return the money or put the insurance in some other company—and he was told to put it in some other company.

The same afternoon Carr received notice that the head-office had cancelled the policy, whereupon he wrote and sent by registered post a letter to the plaintiff telling her the policy was cancelled. Carr had received the premium from the applicant, and on receiving notice of the cancellation of the policy made, as instructed, efforts to obtain insurance elsewhere, but was unsuccessful and the premium remained in his hands.

The trial judge was of the opinion that

> the whole thing depended upon the question of the agency of Carr for the insured upon which there is much to be said upon both sides.

The learned judge was not satisfied that Carr was an agent to receive notice of cancellation and this view prevailed in the court of appeal.

I am of opinion, however, that Carr was such an agent and that the premium having been left with him in case of cancellation to obtain insurance in some other company, that he was the agent of the insured for receiving notice of such cancellation.

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On the other ground also, that the contract was one for facilitating the carrying on of an illegal and immoral object, I think the appeal should be allowed. The trial judge and the court of appeal felt themselves concluded by the case of *Morin* v. *Anglo-American Fire Insurance Co.*(1). I am not able to accept that authority or the reasoning upon which it was founded. I think the principle upon which the case of *Pearce* v. *Brooks*(2) was decided the proper one to apply in this case.

That principle is that one who makes a contract for sale or hire with the knowledge that the other party intended to apply the subject-matter of the contract to an immoral purpose cannot recover on the contract. As Pollock C.B. said in that case if an article was required and furnished "to facilitate the carrying on of the immoral purpose" that is sufficient. The courts would not lend their aid to carry it out. It seems to be that the facts of the case now before us are stronger against the enforcement of the contract than those in the case of *Pearce* v. *Brooks*(2), which the Exchequer Court refused their aid to enforce. In that case, the plaintiffs sued for the hire of a brougham by a woman known by them to be a prostitute and who used the brougham to their knowledge for the purpose of making a display favourable to her immoral purposes.

In the case of *Johnson* v. *Union Marine and Fire Insurance Co.*(3), the court followed a previous decision of their own in *Kelly* v. *Home Insurance Co.*(4), and held that if a person engaged in the unlawful business

(1) 13 West. L.R. 667.
(2) L.R. 1 Ex. 213.
(3) 127 Mass. 555.
(4) 97 Mass. 288.

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of selling intoxicating liquors without a licence at the time of the making and acceptance of a policy of insurance on his stock in trade and a month afterwards, the policy does not attach, although he made application for a licence immediately after he began such business.

The grounds on which the decision was placed in *Kelly* v. *Home Insurance Co.*(1) above referred to were that the object of the assured in obtaining the policy was to make their illegal business safe and profitable and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic the contract was illegal and never attached.

The same principle was held by Andrews J. to govern in the case of *Bruneau* v. *Laliberté*(2).

I think this principle should apply to this case, the contractual obligation of the company being in case of loss either to pay the same up to the amount insured or to "replace the property damaged or lost." Could it be fairly argued that the replacement of the property would not be an aiding or facilitating of the immoral purpose for the carrying on of which the house and furniture were used? I think the courts of this land should not lend their aid to enforce contracts made to facilitate the keeping of houses of ill-fame, which, in my judgment, this insurance policy was calculated to do.

IDINGTON J. (dissenting).—This is an action upon a policy of insurance against fire on a house in Calgary owned by respondent and used as a bawdy house,

(1) 97 Mass. 288. (2) Q.R. 19 S.C. 425.

in modern slang phrase described, as it was in the said policy, as a "sporting house," and on furniture therein.

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The chief ground of defence set up was that, pursuant to a statutory condition indorsed thereon, the policy had been cancelled long before the fire.

It is quite clearly established, indeed not seriously disputed, that the policy was duly issued by the general agents of the appellant and the premium therefor paid.

It was procured by a local broker from the said general agents. A good deal of what was, I respectfully submit, needless discussion, has taken place as to the details of how this payment and its alleged return was dealt with. I assume, upon the facts in evidence, that the general agents received the premium, but failed to return same in any way for more than six weeks after the date of the policy, although the alleged cancellation is claimed to have taken place within ten days after said date.

This alleged re-payment is only material in considering the contention set up by appellant that Mr. Carr, the broker, was the respondent's agent to receive the return of the money.

The power of cancellation relied upon is that contained in the condition, No. 19, of the statutory conditions in force in Alberta.

I think it is necessary for any company seeking to avail itself of the power therein contained to follow the very simple and clear terms of that condition.

I cannot find in what was done anything even resembling what the power requires. Nor can I find that what the respondent's husband said to Carr could

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entitle him, as her agent, to set aside or waive that condition and all implied therein.

The details of all that have been so fully dealt with by the learned judges in the courts below that I do not think I can serve any good purpose by setting forth an additional elaboration thereof.

The appellant stoutly maintains Carr was not its agent, though appearing on the policy as agent. I accept its contention in that regard.

The doing so relieves me of the necessity for considering the possible effect of his sending her a notice. The only notice alleged to have been given the insured was one mailed to her by Carr, but never received by her, or heard of by any one acting for her as her agent for that purpose.

There never was, unless Carr was appellant's agent, anything done, I repeat, resembling what the statutory condition imposes upon the insuring company to be done by it in such cases, but not by some one else.

Again, it is contended that the policy was illegal upon the ground that the owner of a bawdy house cannot insure himself, or herself, against loss thereof by fire.

We have all heard of leases made of a house to be used for such like purposes being illegal, either because it obviously promotes the illegal purpose had in view, or because the consideration for such a lease may be tainted thereby and, hence, the contract is void.

I am unable to understand how the policy of insurance can, as of course, in itself promote the carrying on of such a traffic, or in law be held to fall within the principles upon which I suggest a lease, for example, may be illegal and be thereby void.

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It is urged the house had become vacant and that change of condition so increased the risk as to violate the condition. The learned trial judge upon the facts found against the appellant, and no appeal was made against that finding.

Though neither set up in the pleadings, nor urged at the trial, nor presented to the court of appeal, counsel for the appellant seeks now, for the first time, in this court to set up the further defence that there was an undisclosed encumbrance on the property and some false statement of proof of loss in that regard.

The manifest injustice of allowing such an issue of fact to be raised at this stage for the first time has always been held a sufficient answer here to permitting any such course.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—The first question is whether the policy was in force at the time of the fire and that subdivides itself into: (*a*) Did the appellant company receive payment of the insurance premium? and (*b*) Was the power of cancellation with which the insurers were invested by the terms of the policy effectively put into operation?

The answer to the former question must be in the affirmative or the negative according as the appellant company is held or not held to be precluded from disputing both that payment to Carr and that payment to Tavender & Co. would be payment to themselves. As to Carr—for some purposes he no doubt was the agent of the respondent, but it does not necessarily follow that he was not also the agent of the appellant company for the purpose of receiving payment of the premium.

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The policy was delivered by Carr to the respondent's husband and on the policy there was a declaration to the effect that Tavender & Co. were the general agents of the company and there was also a statement that Carr was the company's agent. In the appellant's factum it is said that the designation of Carr as agent was adopted as a matter of office procedure in recognition of Carr's right to a commission for the introduction. For our present purpose we are not concerned "with the appellant's office procedure." Carr held the policy for delivery to the respondent on payment of the premium and the designation of him as agent correctly describes the character in which he had possession of the policy which he unquestionably held for the company and delivered to the respondent on their behalf; the description of him as agent and his possession of the policy for the company together constituted a representation upon which the respondent was entitled to act on paying the premium. Counsel for the respondent did not, of course, dispute, it would have been hopeless to do so, that if a loss had occurred immediately after the delivery of the policy and before the tranmission of the premium by Carr and before any steps had been taken looking to cancellation, that it would have been impossible to deny that the risk had attached. As to Tavender & Co.—the premium was in fact paid by a set off of the accounts between Tavender & Co. and Carr—the repudiation of Tavender & Co.'s action by the company could have no effect upon the rights of the respondent, who, having no notice of any limitation of authority was entitled to assume that Tavender & Co. were acting within the scope of that conferred upon them.

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As to cancellation. It is not disputed that notice of cancellation was not received by the respondent. The appellant's contention rests upon the proposition that Carr had been constituted the respondent's agent for the receipt of such notice. The contention breaks down on the facts, there being simply no evidence to support a conclusion that the parties intended that the policy should be subject to cancellation without notice to the respondent personally. The direction alleged to have been given to Carr to retain the premium in the event of cancellation cannot fairly be held to imply authority to receive notice of cancellation. The learned trial judge found against agency in fact and I entirely agree with his view on this point.

We now come to the difficult question: Was the policy invalid as tainted with illegality by reason of the purported contract being a contract entered into for the purpose of assisting the respondent in carrying on an illegal business by securing her indemnity against loss of property by fire while the property was being employed for an illegal purpose?

The facts are that the house and personal effects, the subjects insured, were at the time of the application in the possession of the respondent who carried on in the house and used the furniture for the purpose of carrying on the business (as it is described in the application) of a "sporting house," in other words, a house of ill-fame. This fact, being stated in the application, was, of course, known to the company. At the time the fire occurred the house was not occupied by the respondent, but was in the care of a caretaker who slept there at nights. The usual premium was charged, there being no augmentation because of

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any special hazard that might be supposed to exist by reason of the character of the occupation, and there is no suggestion that this last mentioned circumstance in itself, according to insurance practice, would be regarded as entailing any special hazard or as affecting the character of the risk from the actuarial point of view. It appears further that the appellant company was unwilling to accept the risk and directed the cancellation of the policy as soon as they became aware of the facts. The point, however, upon which the appellant company based its objection was a rather narrow one. The officials of the company appear to have had no objection to accept a risk of this character if the place was situated within what was described as a "licensed district," in other words, if the place was permitted to flourish by the openly understood sanction of the police. The house in question not being as I have said within a "licensed district" these officials decided to put an end to the risk.

The argument for the appellant is now put in this way. The respondent, it is said, sought insurance to enable her the more safely to carry on a business which is not only a violation of the law itself, but is a public trading in immorality. It is said that the performance of such contracts of indemnity by the insurer has a tendency directly to encourage illegality and immorality and such contracts are, therefore, in such circumstances, within one of those classes which the courts refuse to enforce, as being in the traditional phrase "tainted with illegality." I have come to the conclusion that this view does not furnish the governing rule for the decision of this appeal; but I am far from suggesting that there is not a great deal of force in the strictly legal considerations that may be adduced in support of it, however little one may be disposed to look with anything but impatience upon the posture of this company whose interest in the public morals finds adequate expression in a distinction between bawdy houses protected by the police, according to clearly understood convention, and bawdy houses whose toleration is more irregular and precarious.

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The question is, of course, a dry question of law. This contract of insurance is not in itself illegal in the sense that it is a contract directly forbidden by law or in the sense that it is intended to create an obligation to do anything forbidden by law. If the appellant company had paid the respondent's claim, nothing in the making or the performance of the contract could be described as illegal. A contract, however, on the face of it collateral to an unlawful act or to an unlawful course of business or to an unlawful design may be so connected with the illegality as to be vitiated by it; the question as Marshall C.J. said in *Armstrong* v. *Toler*(1) very often is a question of considerable nicety whether the connection is or is not of such a character as to have that effect.

There is a number of decisions in cases similar to this in which the insurance contract is treated (1) as an agreement to indemnify against the consequences of an illegal course of action or (2) as a mere incident in the carrying on of some transaction or business forbidden by law.

The former is the interpretation which has been given to marine policies insuring a voyage illegal in its inception, such policies being held void as attempts

(1) 11 Wheaton 258, at p. 272.

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to contract for indemnity against the loss suffered by reason of carrying out an unlawful enterprise. See Wilson v. *Rankin*(1); *Ocean Insurance Co.* v. *Polleys*(2). *The latter is the interpretation upon which rest certain decisions in the American courts, notably in the courts of Massachusetts in which policies of insurance effected upon stocks of liquor held for sale by unlicensed dealers in violation of the law have been thought void as transactions in reality constituting in part the carrying on of an unlawful business.*

These interpretations cannot, I think, be said to fit the case before us. The fact that in accordance with settled practice an applicant for insurance is required to state the business, if any, carried on on the premises proposed for insurance, and the fact that the business named is illegal and the fact that this statement with other statements in the application constitute the basis of the contract do not justify the interpretation of the contract as a contract to indemnify against loss incurred by reason of the carrying on of an illegal business; the policy being in the usual form, the risk insured against being the risk of fire from causes usually insured against in a policy in that form, the premium, as I have already said, being the usual premium. One would not think of describing a policy of insurance upon his office furniture taken out by a promoter whose chief business was to effect mergers obnoxious against the provisions of the Criminal Code as an agreement to indemnify against loss incurred in the course of his illegal business; and yet the parallel if not exact is approximate.

(1) L.R. 1 Q.B. 162.

(2) 13 Peters 157.

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Neither ought the latter of the above mentioned views (which has been given effect to in Massachusetts in the cases referred to) to govern in this case. It would be a quite unreasonable interpretation of the intentions of the parties to this contract to hold that the terms of the bargain in any way turned upon the character of the business carried on. One could better interpret their intentions by saying that the contract was made in spite of the fact rather than because of the fact that the occupation was of the character mentioned.

A distinction suggested by a series of English cases dealing with the enforceability of contracts made with persons of the respondent's class may, I think, well serve as a key to the solution of the question before us. In *Lloyd* v. *Johnson*(1) Mr. Justice Buller, in *Bowry* v. *Bennett*(2) Lord Ellenborough, and in *Pearce* v. *Brooks*(3) the Court of Exchequer had such contracts before them and the net result, I think, of the authorities of which these are typical examples, is summed up with accuracy in the treatise on contracts by Mr. Manisty, in Halsbury Laws of England, vol. 7, p. 400, in these words:—

> An action lies to recover the price of goods sold or work done even though that the plaintiff knew that the person with whom he was dealing was a prostitute (*Lloyd* v. *Johnson*(1); *Bowry* v. *Bennett*(2)), unless it appears that the goods were sold or the work was done for the purpose of enabling her to exercise or assisting her in the exercise of her immoral calling. (*Hamilton* v. *Grainger*(4); *Pearce* v. *Brooks*(3).

In *Pearce* v. *Brooks*(3) Baron Bramwell, who had tried the action, says:—

(1) 1 Bos. & P. 340.
(2) 1 Camp. 348.
(3) L.R. 1 Ex. 213.
(4) 5 H. & N. 40.

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I told the jury that, in some sense, everything which was supplied to a prostitute is supplied to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must not merely be such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view.

This insurance company, no doubt invites us to hold that when they do enter into contracts for the insurance of such places (being, of course, let it be well understood, within a "licensed district") they do so with the object of enabling the proprietors to exercise and to assist them in the exercise of their immoral calling. In fact, of course, it is not so and it would be ridiculous to say that they ever thought of assisting the respondent in the exercise of her trade or of supplying her with anything that had any special reference to her trade or of contracting with her in any other character than that of the proprietor of a furnished dwelling simply.

The above mentioned cases were applied in this court in the case of *Clark* v. *Hagar*(1), and the judgment of Mr. Justice Gwynne, who spoke for the majority of the court, contains an exhaustive but luminous exposition of the effect of the decisions and his conclusions are substantially in harmony with the passage quoted above from Mr. Manisty's treatise.

Mr. Justice Gwynne's judgment was applied in a case similar to the present by the British Columbia Court of Appeal, *Trites Wood Co.* v. *Western Insurance Co.*(2).

I must not omit a reference to *Bruneau* v. *Laliberté*(3) (Mr. Justice Andrews), in which it was

(1) 22 Can. S.C.R. 510.
(2) 15 West. L.R. 475.
(3) Q.R. 19 S.C. 425.

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held that a policy of insurance on the furniture of a house of ill-fame was an illegal and immoral contract and non-enforceable. The decision is, in part, based on an interpretation of *Pearce* v. *Brooks*(1), which is not, I think, an admissible interpretation; and upon certain French authorities which were supposed to support the conclusion at which the learned trial judge arrived. In France, however, the jurisprudence is by no means uniformly in favour of the learned judge's view as is shewn by the following passages from Carpentier, Rep. Supplément, 2 Assurance contre l'incendie, Nos. 64 and 207(2), giving the effect of two comparatively recent decisions of the Cour de Cassation:—

64. Le contrat d'assurance contre l'incendie passé par le tenancier d'une maison de tolérance ne peut être annulé comme ayant une cause immorale, alors que, dans ce contrat, les prestations que les parties se sont mutuellement promises consistaient, d'une part, dans le paiement de l'assuré des primes convenues, d'autre part, dans le paiement par la compagnie d'une indemnité pécuniaire, ou, à son choix, dans la reconstruction ou la réparation des batiments incendiés et le replacement en nature des objets détruits; ces prestations licites en elles-mêmes, n'ont pu devenir illicites par cela seul que les risques assurés dépendaient d'une maison de tolérance, et elles ne sauraient être considérées comme ayant eu en vue la création, le maintien ou l'exploitation d'un établissement de cette nature. Cass., 4 mai, 1903.

207. (2) Y a-t-il fausse déclaration de la part du tenancier d'une maison de tolérance qui se qualifie de loger en garni? La question s'est posée devant la cour de cassation. Le pourvoi soutenant l'affirmative par les motifs suivants: L'exploitation d'une maison de tolérance, disait-il "présente des risques considérables. Le danger d'incendie, en effet, est plus grand que partout ailleurs dans une maison fréquentée la nuit par des gens souvent avinés, où l'orgie est quotidienne, le drame fréquent, et dont le personnel par sa profession même, est une perpétuelle menace d'imprudence, sinon d'actes malveillants. Ces risques considérables entrainent les compagnies, quand elles consentent à assurer les tenanciers de maisons de tolér-

(1) L.R. 1 Ex. 213.

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ance, à exiger d'elles le paiement de primes fort chères." Mais les juges du fond avaient refusé d'accueillir le moyen de nullité, par la raison que la compagnie ne pouvait se méprendre sur le sens et la portée des expressions "logeur en garni" dans les circonstances ou elles avaient été employées. C'est la solution qu'a fait prévaloir la Cour de cassation. Cass., 4 mai, 1903, Comp. d'assur, terr. Le Monde (S. & P., 1904, D. 1906,5,33).

The appeal should be dismissed with costs.

BRODEUR J.—The first question in this case is whether the contract of insurance was valid.

In the application for insuring the premises, it was stated that the plaintiff (respondent) was keeping a "sporting house," which was understood as being a house of ill-fame.

The policy was procured through the appellants' agents in Calgary. They had the power to accept risks, subject to cancellation by the head-office, as is the usual insurance practice. The head-office of the insurance company refused to maintain the policy and a notice of cancellation was given.

The agents of the appellant company in Calgary immediately notified the broker through whom the application had been made. This broker, Carr, on the same day, wrote to the plaintiff telling her the policy was cancelled and asking for its return. He did not enclose the premium because, as instructed by the plaintiff, he intended to try and get insurance elsewhere.

This letter was not received by the plaintiff and was subsequently returned to Carr.

A fire having taken place on the premises, the present action has been instituted for the purpose of recovering the amount of the insurance.

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The company claims that the contract was illegal because it facilitates immorality.

It has been decided in a case of *Bruneau* v. *Laliberté*(1), by Mr. Justice Andrews that an

insurance upon the furniture in a house of ill-fame is an illegal and immoral contract, and will not be enforced by the courts.

Addison, on Contracts, p. 72, summarises the matter in stating—

Contracts tending to promote fornication and prostitution are void.

And Beach on Contracts, p. 2019, says that

any contract auxiliary to the keeping of a bawdy house is void.

Halsbury, Laws of England, vol. 7, No. 829, p. 400, relying on the case of *Pearce* v. *Brooks*(2), says that if it appears that a work was done for the purpose of enabling a prostitute to exercise or assisting her in the exercise of her immoral calling, no action would lie.

Pollock on Contracts (7 ed.), p. 370, in speaking of transactions where there is an agreement for a transfer of property for a lawful consideration, but for the purpose of an unlawful use being made of it, says that—

The later authorities shew that the agreement is void not merely if an unlawful use of the subject-matter is part of the bargain, but if the intention of one party so to use it is known to the other at the time of the agreement.

* * * * *

If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose he cannot recover the price.

I find in Dalloz, Répertoire Pratique, vo. "Contrats et Conventions en général," Nos. 398 and 401, that

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the contract whose consideration is the maintenance of a house of ill-fame is illicit and the action for the price of the service of a domestic in a house of ill-fame should not be accepted. I must say, however, that this latter decision has been severely criticized by some authors. Baudry-Lacantinerie, vol. 11, No. 313, says:—

> C'est l'obligation sur cause illicite que l'art. 1131 déclare sans effet. Il en est autrement de l'obligation dont le motif seulement est illicite. Ici donc apparaît encore l'utilité de la distinction entre la cause et le motif. Cette distinction est nettement établie dans quelques décisions judiciaires. Mais beaucoup d'autres l'ont perdue de vue et la confusion a engendré des décisions vraiment fantastiques. N'a-t-on-pas vu le tribunal de commerce de la Seine, refuser sur le fondement de la cause illicite, tout effet a l'obligation contractée par le directeur d'une maison de tolérance pour acquisition de vins de champagne destinés à être consommés dans son établissement ?

On that first ground, I would be of opinion that the contract of insurance was illegal and that it should be set aside. The appeal should be allowed with costs.

Appeal allowed without costs.

Solicitors for the appellants: *Cassels, Brook, Kelly & Falconbridge.*

Solicitors for the respondent: *Jones, Pescod & Adams.*

PAUL A. PAULSON (DEFENDANT) ....APPELLANT;

AND

HIS MAJESTY THE KING, (ON THE RELATION OF THE ATTORNEY-GENERAL FOR CANADA,) AND THE INTERNATIONAL COAL AND COKE COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 29.
*Dec. 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Dominion lands—Lease of mining areas—"Dominion Lands Act," s. 47—Statutory regulations — Conditions of lease — Defeasance — Notice—Cancellation on default—Forfeiture of rights—Principal and agent—Solicitor.

A lease granted under the regulations regarding the leasing of school lands in the North-West Territories for coal mining purposes, made pursuant to section 47 of the "Dominion Lands Act," provided that, on default by the lessee to perform conditions of the lease, the Minister of the Interior should have power to cancel the lease by written notice to the lessee, whereupon the lease should become void and the Crown might re-enter, repossess and enjoy its former estate in the lands.

Held, reversing the judgment appealed from (15 Ex. C.R. 252), Idington and Brodeur JJ. dissenting, that in order to determine such a lease it is essential that the cancellation should be effected by a notice in writing from the Minister which actually reaches the lessee.

Per Fitzpatrick C.J.—The notice should declare the intention of the Minister to make the cancellation on account of breach of the conditions, and the lessee should be given an opportunity to remedy the breach in question or, at least, to be heard before forfeiture. No proposed cancellation can be effective against the lessee unless such a notice has been given to him before the forfeiture is declared.

Per Duff J.—In the absence of special authority, solicitors employed by the lessee in respect of his business with the Department can-

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