

JANUARY 17TH, 1911.

## DODGE v. YORK FIRE INSURANCE CO.

*Fire Insurance—Builder's Risk—Building in "Course of Construction"—"Vacant or Unoccupied"—Payment of Higher Premium—Knowledge—Estoppel—Insurable Interest—Questions of Fact—Reversal of Finding of Trial Judge.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 1 O.W.N. 1098, dismissing the action.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

W. J. McWhinney, K.C., and E. P. Brown, for the plaintiff.  
M. H. Ludwig, K.C., for the defendants.

MACLAREN, J.A.:—The action was brought on an insurance policy for \$2,000 issued by the defendants in favour of the plaintiff, as second and third mortgagee, on certain buildings, etc., at Sturgeon Falls, which were being erected for a smelter by the North Ontario Reduction and Refining Company.

The principal grounds of defence were: 1. That the buildings were not in course of construction, as represented by the plaintiff, but were really abandoned; (2) that the insurance was void under the 4th addition to the statutory conditions, which provided that, "if any building herein described be or become vacant or unoccupied, and so remain for the space of fifteen days, or, being a manufactory, shall cease to be operated for that length of time, this policy shall be void;" and (3) that the defendant had no insurable interest in the property, it not being worth more than the insurance in favour of the first mortgage.

The trial Judge gave effect to the first of these grounds and dismissed the plaintiff's action.

In effecting the insurance in question the plaintiff acted through A. M. Thompson . . . and the defendants through J. C. Wilgar, their assistant manager. . . . Negotiations . . . were begun by Thompson speaking to Wilgar over the telephone on the 24th June, 1909. He stated that the property was the same as that covered by a policy No. 035751, issued by the defendants in favour of the North Ontario Reduction and Refining Company on the 9th March, 1909; told him of the other insurance on the property, and that the plaintiff wanted \$2,000 insurance on his interests as second and third mortgagee; that, on account of the watchman having been withdrawn since the issue of the defendant's previous policy, the rate had been