

OCCUPIED AS A DWELLING.

"VACANT AND UNOCCUPIED."

One of our subscribers asks: "Does a dwelling become vacant and unoccupied when the owner and occupant locks it up with all of the furniture remaining therein, and leaves it in this condition during several weeks' absence upon a pleasure trip?" And under the clause of the policy requiring that when a dwelling is left "vacant and unoccupied" for any time, notice of the same must be endorsed upon the policy or the insurance thereon will be void?"

This question is a delicate one to answer, being rather within the province of the courts and the jury to decide, as to what constitutes *vacancy* on the one hand, and *occupancy* on the other. But as the question is one that frequently arises in the insurance business, we shall endeavor to so far answer it as to give some of the general principles which govern occupancy and vacancy.

The forms used in the policy clause are not always the same, hence it may be well to commence with two of the most common of these expressions, viz., vacant *or* unoccupied, and vacant *and* unoccupied, but evidently supposed to be of the same import and legal meaning. The difference between the two, is small seemingly, but serious in reality, as will be apparent as we proceed to define the legal construction of the words vacant and occupied.

Vacant, applied to a building, means simply empty: not filled, void of every subject, except air, as a vacant space between houses, a vacant room.—(*Webster*).

Vacant possession, A term applied to an estate which has been abandoned by the tenant; the abandonment must be complete in order to make the possession *vacant*, and therefore, *if the tenants have goods on the premises it will not be vacant.*" (*Bourrier's Law Dictionary*. Title "Vacant.")

From these definitions there need be no difficulty in coming to correct conclusions as to the exact meaning of the word "vacant," when used in the fire insurance policy clause. A *vacant dwelling* house is an empty one, containing no household or other furniture suitable for the purpose of a household.

Of occupancy, Webster says: "Occupied: possessed; used, employed. To occupy, to keep in possession, to possess, to hold for use, as a tenant occupies a farm under a lease for twenty-one years, a lodger occupies an apartment: Occupation, possession, holding or keeping, tenure, use; as lands in the occupation of A. B.

Occupancy, in its strict legal signification, means the possession as owner, not necessarily, however, implying that such owner must reside upon the premises. In popular language tenements are said to be occupied by such and such persons, for such and such purposes, though such property may be owned by another termed in such cases *landlords* or *lessees*, and the actual occupants, *tenants*. In many policies the very proper form of "occupied as a dwelling (or family residence) by A. B. tenant." Or, if the ownership be in the insured, who is also the occupant, the form will be: "Owned and occupied by A. B. as a family residence." An occupant, then, is one—owner or tenant,—who has the actual use or possession of a thing, under his own control. Under the phrase "occupied as a dwelling" the occupancy must be substantial and actual, not merely con-

structive. It implies an actual use of the house as a dwelling-place, and involves the consequent presence of property appropriate to the kind of occupancy, as household furniture and the like.

A *dwelling house* is a building occupied by persons—owners or tenants—as a family residence.

A *residence* is the place where one resides; abode, home, dwelling, habitation, domicile.

Of the two phrases first spoken of "vacant *or* unoccupied, and vacant *and* unoccupied, the strict meaning of the conjunction *and* and disjunctive particle *or* is as follows:

And, a conjunction, connective or conjoining word. It signifies that a word or part of a sentence is to be *added* to what precedes. Thus, *vacant and unoccupied*, i.e., both, vacant or empty, and without an occupant.

While *or* is a disjunctive particle, that marks an alternative; and frequently corresponds with the word either; thus vacant *or* otherwise unoccupied; *either* vacant or unoccupied.

Thus under the expression vacant *or* unoccupied, the dwelling may be *either* vacant, that is, entirely empty,—or it may be filled with domestic furniture, and yet be untenanted by the household, which may be temporarily absent. In either case the clause of the policy would be applicable.

Closing a dwelling house for a short absence, leaving the furniture in the building, does not create a *vacancy*, for though there may be a temporary non-occupancy, there is no vacancy; but the policy clause under this form will apply to the non-occupancy.

Under the phrase "vacant *and* unoccupied," the difference in legal construction is essentially different. In order to bring this clause of the policy into operation, the dwelling must be *simultaneously* both vacant *and* unoccupied; but if *vacant*, i.e., *empty*—it would scarcely be occupied; hence the phrase is redundant and illogical. If simply *unoccupied* by the household, yet full of household stuff of the absent family, the term vacant, as we have shown, cannot apply to premises which are not empty.

A curious case illustrating this reasoning occurred in the courts of New York city, sometime since, where the premises were insured in two companies, one which had the phrase "vacant *and* unoccupied," and the other "vacant *or* unoccupied;" the former lost its case and the latter gained theirs, and, further, both cases were appealed, the latter by the assured, and the former by the company.

The law decisions that we find in cases of temporary non-occupancy, as a custom hold, upon general principles, that such vacancy or non-occupancy do not avoid the policy, notwithstanding the restrictive clause. But few companies ever contest this point, deeming it unsafe policy to do so. There are exceptions, however, and we call to mind the case of *Paine v. Ins. Co.*, (5 N.Y. S. C. C. 19) where a house was left unoccupied by the family for three months and a half, though the household furniture remained on the premises in charge of persons living near by and, the policy clause read that "in case the premises shall be left unoccupied.....without giving immediate notice to the company, the policy shall cease and be of no effect." The Court held that "occupation of a dwelling house means living in it, nor mere supervision over it. That which will make occupancy must depend on the circumstances of each case, and is a fact for the jury or reference to determine. That where the policy requires immediate notice of non-occupancy, the non-occupancy that will not work a forfeiture of the policy must be very short indeed."