ONG GUAN CAN AND THE BANK OF THE PHILIPPINE ISLANDS, PLAINTIFFS AND APPELLEES, VS. THE CENTURY INSURANCE CO., LTD., DEFENDANT AND APPELLANT.

G.R. No. 22738. December 02, 1924

Ponente: VILLAMOR, J.

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VILLAMOR, J.:

On April 19, 1924, the Court of First Instance of Iloilo rendered a judgment in favor of the plaintiff, sentencing the defendant company to pay him the sum of P45,000, the value of certain policies of fire insurance, with legal interest thereon from February 28, 1923, until payment, with the costs. The defendant company appealed from this judgment, and now insists that the same must be modified and that it must be permitted to rebuild the house burnt, subject to the alignment, of the street where the building was erected, and that the appellant be relieved from the payment of the sum in which said building was insured.

A building of the plaintiff was insured against fire by the defendant in the sum of P30,000, as well as the goods and merchandise therein contained in the sum of P15,000. The house and merchandise insured were burnt early in the morning of February 28, 1923, while the policies issued by the defendant in favor of the plaintiff were in force.

The appellant contends that under clause 14 of the conditions of the policies, it may rebuild the house burnt, and although the house may be smaller, yet it would be sufficient indemnity to the insured for the actual loss suffered by him.

The clause cited by the appellant is as follows:

> "The Company may at its option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or may join with any other Company or insurers in so doing, but the Company shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonable sufficient manner, and in no case shall the Company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, nor more than the sum insured by the Company thereon."

If this clause of the policies is valid, its effect is to make the obligation of the insurance company an alternative one, that is to say, that it may either pay the insured value of the house, or rebuild it. It must be noted that in alternative obligations, the debtor, the insurance company in this case, must notify the creditor of his election, stating which of the two prestations he is disposed to fulfill, in accordance with article 1133 of the Civil Code. The object of this notice is to give the creditor, that is, the plaintiff in the instant case, opportunity to express his consent, or to impugn the election made by the debtor, and only after said notice shall the election take legal effect when consented by the creditor, or if impugned by the latter, when declared proper by a competent court. In the instant cape, the record shows that the appellant company did not give a formal notice of its election to rebuild, and while the witnesses, Cedrun and Cacho, speak of the proposed reconstruction of the house destroyed, yet the

plaintiff did not give his assent to the proposition, for the reason that the new house would be smaller and of materials of lower kind than those employed in the construction of the house destroyed. Upon this point the trial judge very aptly says in his decision: "It would be an imposition unequitable, as well as unjust, to compel the plaintiff to accept the rebuilding of a smaller house than the one burnt, with a lower kind of materials than those of said house, without offering him an additional indemnity for the difference in size between' the two houses, which circumstances were taken into account when the insurance applied for by the plaintiff was accepted by the defendant." And we may add: Without tendering either the insured value of the merchandise contained in the house destroyed, which amounts to the sum of P15,000.

We find in the record nothing to justify the reversal of the finding of the trial judge, holding that the election alleged by the appellant to rebuild the house burnt instead of paying the value of the insurance is improper. To our mind, the judgment appealed from is in accordance with the merits of the case and the law, and must be, as is hereby, affirmed with the costs against the appellant. So ordered.

Johnson, Street, Malcolm, Avancena, Ostrand, Johns, and Romualdez, JJ., concur.

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