

order of any authority, whether civil or military, but did except loss caused by invasion or usurped power. The question was whether the invasion or usurped power of the rebels or the order of the Commander of the Union forces was the proximate cause of the loss. The Circuit Court held that although the attack was the reason for the order yet the order was the cause, an independent intervening cause, and that therefore the insurer was liable, inasmuch as that cause was not excepted in the policy, (40 Conn. 575; 11 Fed. Cas. No. 1639). But the Supreme Court reversed that decision and held that the invasion or usurped power was the efficient cause and that the order was only "an incident, a necessary incident and consequence of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole." But in *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. (Va.) 613, referred in 13 Am. & Eng. Encyc. of Law, 2nd Ed., 131, where the insured buildings were destroyed by fire which spread from other buildings set on fire by order of the United States authorities under an apprehension of an attack by the Confederate forces, the court held that the insurers were liable, that the threatened attack was not the cause in a legal sense, or, if a cause, only a remote cause of the loss, and that the act of the government authority was an independent intervening efficient cause. In this case there was no attack in progress nor such an urgent necessity as in the other. And in *Harris v. The York Mut. Ins. Co.*, 50 Pa. St. 341, where the loss occurred was that caused "by fire occasioned by mobs and riot," and where the insured buildings were destroyed by the spread of fire from a bridge set on fire by the Commander of the United States forces to prevent the advance of a rebel army, the court held the insurer liable, both because the force in question was not merely a mob or body of rioters and because the fire was occasioned proximately by the order of the military authorities, and only remotely by the invading army.

There seems to be some difference of opinion as to whether the invasion or usurped power, where loss occasioned thereby is excepted, or the order given by the opposing commander in consequence of such invasion or usurped power, where loss occasioned by such order is not excepted, is the proximate cause of the loss in a legal sense. If the decisions of the United States Circuit Court and the Supreme Courts of Pennsylvania and Virginia should be followed, the order of the Board of Health should be considered the proximate cause and the insurers would not be liable. But if the decision of the Supreme Court of the United States is in point and is followed, the plague is the proximate cause and the insurers are liable. It seems to us that these cases are indistinguishable from that decided by the Supreme Court of the United States. In that case as in these cases the insurance was against fire, but in that the expected risk was invasion or usurped power, while in this it is the "order of any civil authority." Would not the court in that case have arrived at a different conclusion if the exception had been the "order of any civil authority" and not "invasion or usurped power?" The question is not merely what the proximate cause is from an abstract scientific point of view or what it might be in some other point of view. It is largely a question of the intention of the parties as determined by the language of the contract and its construction. In that case the court, in order to carry the cause back to the order to the usurped power, laid considerable stress on the intention of the parties. It said, among other things:

"Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and intention of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured. * * * Invasion involved, of necessity, resistance by the constituted authorities of the government, and the employment of its military force. Destruction of property by fire was quite as likely to be caused by resistance to the usurping military power as by the action of that power itself. This must have been foreseen and considered when the insurance was effected. It is difficult, therefore, to believe that the parties intended to confine the stipulated exemption within the limits to which the assured would be entitled to it. * * *

It cannot be said that was not anticipated which military power was recognized. And the insurers and the assured must be looked for such action by the Federal forces as a probable and reasonable consequence of an overpowering attack upon the city by an invading rebellious force. Having excepted from the undertaken responsibility for such an attack, they excepted from it responsibility for the consequences reasonably to be anticipated from it."

When, assuming that we must go back for the cause at least to the order, as shown by all the cases cited above, could it reasonably be contended that the parties did not intend that "loss caused directly or indirectly by order of any civil authority" would cover cases like the present? When loss is caused by the order of a civil authority, the officer or official body, unless it goes far beyond the scope of its authority, that it cannot be regarded as acting as a civil authority at all, necessarily acts in consequence of some cause or reason. It may destroy property to prevent the spread of an epidemic or to prevent an invasion of a city or to accomplish other purposes. Whether, if the civil authority should order the burning of property to prevent the spread of fire, the case would come within the exception, we do not say. In such case the fire, the spread of which is sought to be prevented, is the very risk insured against. In this case, the risk is not the risk insured against. If the exemption was not intended to cover cases like the present, what was it intended to cover? The determination of the proximate cause in the legal sense depends to some extent upon what the main risk insured against is and what the exception is. For instance, if loss by fire is insured against and loss by explosion is the exception, and if this is taken to include loss caused by fire occasioned by explosion as well as that caused by the shock of the explosion, then in case a fire is caused by explosion the exception is in effect "loss caused directly or indirectly by explosion," then in case a fire is caused by explosion and spreads to other buildings, the explosion is regarded as the proximate cause and the insurer is not liable. But if loss caused by explosion is not excepted, the loss is regarded as caused by the explosion and by the explosion only remotely and the insurer is liable. *St. John v. Am. Mut. Fire and Marine Ins. Co.*, 113 N. Y. 519. In neither case would the court go back of the explosion to see what caused that. And yet if invasion were the proximate risk and a shot from the invading army caused an

explosion which in turn caused the fire, the loss would be regarded as caused proximately by the invasion and not by either the fire or the explosion and the insurer would not be liable. So here where loss by fire is insured against and "loss caused directly or indirectly by order of any civil authority" is excepted, the order and not the fire should be regarded as the proximate cause; and if loss caused directly or indirectly by plague were excepted and not loss caused by order of any civil authority, the plague and not the order might be regarded as the cause, within the meaning of the contract. But since loss by plague is neither insured against nor excepted, the plague cannot be regarded as the cause of the loss of property destroyed by fire ordered by civil authority, though in consequence of the plague. We may add also that here as in the Virginia case there was not the same pressing necessity for the destruction of the property either in point of time or as to the method of destroying it as there was in the case of *Insurance Co. v. Boon*. Nor was there the same recognized duty to destroy it at all. In cases of that kind there was a well recognized military necessity and duty to destroy property of that kind under such circumstances, so that in making the contract such losses could fairly be considered as intended to come within the scope of the exception. But there is no well known necessity or duty or practice of burning buildings in case of plague or other infectious or contagious diseases. On the whole we are of opinion that within the meaning of these policies the loss must be regarded as caused by the order of the Board of Health and not by the bubonic plague. Whether the Board was justified in issuing the order is a question not before us.

Judgment for the defendant in the first of these cases. Exceptions overruled in the second.

J. T. De Bolt for the plaintiff in the first case.
W. R. Castle and *P. L. Weaver* for the defendant.
P. Neumann and *W. A. Whiting* for the plaintiffs in the second case.
A. G. M. Robertson and *L. A. Thurston* for the defendant.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SEPTEMBER TERM, 1900.

WONG CHOW, WONG CHEW YOU, LAM KAI CHOW and LAM YING CHIN, partners doing business under the firm name of YEE WO CHAN & CO. v. THE TRANSATLANTIC FIRE INSURANCE COMPANY, Limited.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 6, 1900. DECIDED OCTOBER 30, 1900.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an epidemic of bubonic plague the Health authorities set fire to certain buildings declared to be infected, from which the fire spread by accident to other buildings including the plaintiffs' store containing goods covered by a policy of insurance. Held, that the circumstances set forth in the opinion did not show that the loss was caused by a civil commotion so as to exempt the insurers under the clause in the policy that they should not be liable for any loss or damage caused by civil commotion.

OPINION OF THE COURT BY FREAR, C.J.

This is one of three fire insurance cases argued at this term, representative of many others, arising out of the burning of "Chinatown" in the city of Honolulu on the 20th of last January. The action is for \$5,000 upon a policy issued by the defendant company, of Hamburg, Germany, upon the merchandise contained in the plaintiffs' store on Maunakea street, a little above King street, in this city.

The case was tried by the circuit court, jury waived, and judgment rendered for the plaintiffs and now comes here on several exceptions.

The only questions raised are whether there was a "civil commotion" and, if so, whether that caused the fire—so as to bring the case within the provision of the policy that the company should "not be liable for any loss or damage caused by means of invasion, insurrection, riot, civil commotion, or military or usurped power."

The facts are briefly as follows: The bubonic plague broke out in Honolulu on December 12, 1899. A number of cases occurred in Chinatown, which was in an insanitary condition, and several in other parts of the city. Chinatown, consisting of fifteen blocks, bounded by the Nuuanu stream and Kukui, Nuuanu, Marine and Queen streets, was placed in quarantine by the Board of Health, and to maintain the quarantine the local militia was placed on duty. Subsequently the city of Honolulu was quarantined from the rest of the island and traffic with that as well as with the other islands and foreign ports was carried on only to a limited extent and under regulations of the Board of Health. The people organized "The Citizens' Sanitary Committee," which, acting under the directions of the Board, undertook the work of making a house to house inspection of the city twice a day. Several hundred people were engaged in this work. For a time the courts suspended business for the most part and business houses opened late and closed early in order to enable employees to assist in the work of inspection and other work connected with the plague. The quarantine was finally raised in the month of May, 1900.

In the early part of January the Board adopted fire as a means of disinfection and thereafter from time to time until the 20th of that month burned a number of buildings. After inspecting the locality, the Board on the 10th of that month passed a resolution declaring that a certain portion of what was known as Block 15, the block in Chinatown furthest inland or to the windward when the trade winds blew, was in an insanitary condition and infected by bubonic plague, that the infection could not be removed by any means but fire, and ordering that all the buildings within that portion of the block be destroyed by fire. The President of the Board thereupon directed one of the Fire Commissioners to burn such buildings. The Fire Commissioner caused the fire to be started by and under the supervision of the Honolulu Fire Department on the morning of the 20th of January. The fire, having been so started, accidentally spread to Kaumakapili Church in the same block and thence through near-

ly all the blocks in Chinatown to the water front, including the store of the plaintiffs, which was several blocks from where the fire started. There was only a moderate breeze blowing at the time and no efficient cause intervened between the setting of the fire under the orders of the Health authorities and the burning of the merchandise in the plaintiffs' store. Such substantially are the facts as found by the trial court and supported by the evidence. That court found that these facts did not show a "civil commotion" within the meaning of the policy and it is to this that objection is taken.

Counsel for the defendant would have the court find that a civil commotion was occasioned upon the outbreak of the plague and continued until the 20th of January when the fire in question was started by the Health authorities. The phrase "civil commotion" is no doubt of broad meaning but it cannot be stretched to cover the condition prevailing in this city during the period preceding the fire in question. Naturally, courts have seldom been called upon to construe this phrase. Lord Mansfield, applying it to the riot acts of 1780, said: "I think a civil commotion is this, an insurrection of the people for general purposes, though it may not amount to a rebellion while there is a usurped power." *Langsdale v. Mason*, quoted in *Joyce, Ins.*, Sec. 2581. This is said to have been quoted in *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. (Va.) 622. 6 Am. & Eng. Enc. of Law, 2nd Ed. 291. In *Sprull v. N. C. Mut. Life Ins. Co.*, 46 N. C. 126, a case of insurance upon the life of a fugitive slave who was shot by persons attempting to capture him, the court, holding that there was no civil commotion, said: "A commotion is defined by the lexicographer referred to, (Worcester) to be a tumult; and a tumult to be a promiscuous commotion of a multitude; an irregular violence; a wild commotion. A civil commotion, therefore, requires the wild or irregular action of many persons assembled together." It is true that in this case the business of the courts and of the community was more or less interrupted, but that is not sufficient to make a civil commotion. There was nothing of a wild, tumultuous, violent, turbulent or seditious nature which the phrase is generally understood to imply and which it was intended to imply in this policy as shown by the words with which it is associated. The interruption to business was orderly, deliberate and for peaceful and laudable purposes. These words cannot be taken strictly in their etymological meaning—as a moving together not military, ecclesiastical, &c. If so, they would include the ordinary celebration of a holiday—when business is more interrupted than it was during the plague here, or they would even include many occurrences in the ordinary course of business or social life. The words have grown to have a different meaning. The plague or epidemic itself was not a civil commotion nor did it cause a civil commotion. There was, it is true, considerable excitement after the fire department lost control of the fire, for several thousand people were obliged to leave their homes in haste in order to escape the flames and had to be safely conducted elsewhere and not allowed to scatter in the uninfected portions of the city, but if there was a civil commotion then, it did not cause the fire. The fire caused it.

It may be that a fire of this kind is so unusual that the insurance company did not in fact contemplate it and that it contemplated only ordinary risks, but we must go by the terms of the policy and hold it to cover all loss or damage by fire not included in one of the excepted risks. The probable intention of the parties may aid in the construction of doubtful phrases in the policy, but cannot alter the plain meaning of its language.

If bubonic plague were named in the policy as one of the excepted risks it might be a nice question whether that was the proximate cause of the fire, but that was not mentioned as an excepted risk.

The plague itself was not a civil commotion and the facts of the case do not show that it caused a civil commotion prior to the fire in question. It is unnecessary to go further and say whether, if the condition existing prior to the fire could be properly described as a civil commotion, it, rather than the plague or the order of the Health authorities, was the cause of the fire. The policy excepts losses caused by civil commotion, not losses which merely occur in time of civil commotion.

The exceptions are overruled.

Paul Neumann and *W. Austin Whiting* for the plaintiffs.
L. A. Thurston and *Robertson & Wilder* for the defendant.

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