reported 16 O.R., 544, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 13th and 14th of November, 1889.

The appeal was dismissed with costs.

Per HAGARTY, C.J.O. The agreement was void for uncertainty, the land in question not being in any way defined or ascertained or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved.

Per BURTON, OSLER, and MACLENNAN, JJ.A. The plaintiffs were unable to give to the defendant the right of selection they had agreed to give him, so that the action necessarily failed, and the defendant was entitled to judgment on his counter-claim, there being a failure of consideration.

Per BURTON, J.A., also. The agreement was in itself sufficiently certain, and was not void for misrepresentation.

Per MACLENNAN, J.A., also. No misrepresentations justifying a rescission of the contract were proved, but the agreement was void for vagueness and uncertainty.

McCarthy, Q.C., and *A. H. Marsh* for the appellant.

McLaren and *McClive* for the respondent.

Queen's Bench Division.

Div'l Ct.] [March 8.

COCKBURN *v.* BRITISH AMERICA ASSURANCE COMPANY.

Insurance—Fire—Interim receipt—Powers of local agent of insurance company—Approval by company—Indorsements of application—Non-repudiation of contract—Prior insurance—Eighth statutory condition—Assent of company—Election not to avoid—Extension of policy.

A local agent of the defendants effected an insurance against fire upon the plaintiff's steam power saw-mill and machinery, and issued to the plaintiff an interim receipt therefor, dated 4th July, 1888, purporting to be issued by the defendants. The plaintiff at the same time insured the property in other companies. The plaintiff had a prior insurance upon the same property effected by the defendants, and held a policy therefor, and had also a prior insurance in another company.

The local agent enclosed the application for the second insurance to the defendants in a letter dated 17th July, 1888, in which he stated that he sent the policy representing the prior insurance by concurrent book post, to be extended in a manner specified. The defendants received the policy and made the desired extension, and in an action upon the policy and the subsequent interim receipt the jury found that they had also received the letter enclosing the application. The defendants, however, acted throughout as if they had not received it, and on the 7th September, 1888, after they had been furnished with a copy of the application, they wrote to their agent requesting him to take up the interim receipt and return it to them, and informing him that as it had run one-half of the term they had debited him with one half of the premium as earned, and on the same day they re-insured half the risk in another company. The plaintiff was never informed that the defendants had refused the risk, and he was ignorant of it until after the fire, and the defendants never returned him any portion of the premium paid.

The application for the second risk correctly stated the amount of insurance on the property, but not the names of the companies insuring. In the copy of the application subsequently sent to the defendants it was not stated that the defendants had a prior insurance. Indorsed on the application was the following: "Special. To be submitted to the company for approval before receipt is issued;" and "Applications for insurance on property where steam is used for propelling machinery must be approved by the head office at Toronto before the company will be liable for any loss or damage." The plaintiff's attention was not called to these indorsements, and he was not aware that the agent had no authority to grant the interim receipt on this account. The agent swore that he had never received instructions not to grant an interim receipt under such circumstances.

Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it, and