Boyd, C.] [Nov. 30.

NATIONAL INSURANCE COMPANY v. MCLAREN.

Insurance—Subrogation—Action against wrongdoer—Estoppel by judgment—Res inter alias acta.

The defendant, who owned a lumber yard, insured his property with a number of insurance companies, the value of his whole insurance amounting to $50,000.

In May, 1879, his said property was set on fire by sparks from an engine of the Canada Central Railway Company, and a large portion destroyed. The amount of his loss exceeded the $50,000 insured, and he claimed and obtained from the insurance companies the whole amount of his insurance, viz.: $50,000. Afterwards, on September 22nd, 1879, he commenced an action for damages against the railway, and in March, 1882, he recovered against the railway $100,000 damages and his costs of suit. It appeared that the jury in this last mentioned action had been asked specifically what was "the actual value of the lumber destroyed," to which they gave the answer "$100,000, including ties and rails." The plaintiffs in the present action, who were some of the said insurance companies, now claimed that the defendant obtained from the railway company by his said verdict a sum larger than the difference between the amount of the insurance and the amount of his loss; and that he, the defendant, was a trustee for that excess for the plaintiffs respectively in proportion to the amount of their insurances. They contended that their right to be subrogated into the benefit of a compensrtion received by the defendants from the wrongdoers (the railway company), arose when they (the plaintiffs) made payment of the insurance money to the defendant, and that he then became trustee for them *pro tanto*, and in this character prosecuted his litigation against the railway company, and as a consequence from this they argued that the finding of the jury as to the actual total loss was binding and conclusive on McLaren as well as on them (the plaintiffs), because as beneficiaries they were privies to that judgment, and therefore they said the defendant was now estopped from proving in this action that his actual loss was more than $100,000. The defendant, however, denied that $100,000 correctly represented the whole of his loss, which he asserted exceeded the whole $150,000 which he had received from the insurance company and the railway.

Held, that the defendant was not concluded by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs here was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiff for insurance, in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master.

The right of subrogation, being an equitable right, partakes of all the ordinary incidents of said rights, one of which is that in administering relief the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company, but it is a begging of the question to assert that he is a trustee from the time of payment by the insurers.

C. Robinson, Q.C., and *J. F. Smith*, Q.C., for the plaintiffs.

D. McCarthy, Q.C., and *Creelman*, for the defendants.

PRACTICE.

Ferguson, J.] [November 10.

TAYLOR v. THE SISTERS OF CHARITY OF OTTAWA.

Appeal—New affidavits—Ex parte order.

Upon an appeal by the defendants from an order obtained *ex parte* by the plaintiff, the defendants were permitted to read affidavits which were not before the master who made the order appealed from.

Hoyles, for the defendants.

W. M. Douglas, for the plaintiff.