

DECEMBER 20TH, 1906.

DIVISIONAL COURT.

LONDON AND WESTERN TRUSTS CO. v. CANADIAN FIRE INSURANCE CO.

Fire Insurance—Subletting of Premises—Change in Nature of Risk—Notice to or Knowledge of Assured—Landlord and Tenant—Control of Landlord.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., ante 273, dismissing an action by the liquidators of an insolvent company, the owners of a building in the town of Sudbury, insured by defendants for 3 years from 4th October, 1904, and destroyed by fire on 30th November, 1905, to recover the amount of the insurance.

The substantial defence was that the insolvent company leased to one Ferres, a Syrian merchant, a portion of the insured building, and that Ferres took possession thereof and put and kept therein for sale a stock of merchandise, and carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

G. C. Gibbons, K.C., for plaintiffs.

N. W. Rowell, K.C., for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—This case requires that the legal effect of the statutory condition as to change of risk in a fire policy should be considered, as found in R. S. O. 1897 ch. 203, sec. 168 (3).

It is laid down in . . . Am. & Eng. Encyc. of Law, 2nd ed., vol. 13, p. 286, that under the usual form of policy it is avoided only by an increase of risk by any means within the knowledge or control of the assured, and therefore such an increase, if unknown to him or not within his control, is not fatal. To support this text is cited *Brenner v. Liverpool, etc., Ins. Co.*, 57 Cal. 101, 21 Am. R. 703, and the Canadian case *Heneker v. British America Assurance Co.*, 14 C. P. 57.