The Legal News.

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## APPEALS FROM THE SUPREME COURT.

The Judicial Committee of Her Majesty's Privy Council have had under consideration the clause of the Supreme Court Act of Canada, taking away the right of appeal from any judgment or order of the Supreme Court. The question came up in a somewhat memorable case—an action brought by Mr. James Johnston of Montreal against the Minister and Trustees of St. Andrew's Church, in the same place. Mr. Johnston was lessee of a pew in St. Andrew's Church. Before the termination of the year ending 31st December, 1872, he received notice from the trustees that they declined to re-let the pew to him for the year commencing 1st January, 1873. Mr. Johnston complained that this notice was not legal, and that not having received a sufficient legal notice he became the legal lessee of the pew for the ensuing year; but that the trustees had refused to let him have possession, and had removed his hassocks from the pew and allotted it for the use of strangers. For these reasons Mr. Johnston claimed $10,000 damages.

By their pleas the trustees averred that Mr. Johnston had ceased to be lessee of the pew on the 31st December, 1872, and that they had a right to refuse to lease it to him again after that date.

The Superior Court (Johnson, J. presiding) dismissed the action. (18 L. C. Jurist, 113.) The Judge held that the St. Andrew's Church being a voluntary organization, the civil courts could not interfere with the determination of the majority unless some civil right was assailed. In this instance the Judge considered that there was no such interference, and that the minister and trustees had a right to refuse to renew the lease of the pew on the expiration of the term for which it was leased.

There was an appeal by Mr. Johnston to the Court of Queen's Bench, Appeal side, and there the judgment of the Superior Court was sustained by a majority of the Judges, Chief Justice Dorion and Mr. Justice Ramsay dissenting. The case then went to the Supreme Court of Canada, and by the judgment of this tribunal, rendered 28th June, 1877, the decision of the two lower Courts was unanimously overruled, the pretensions of Mr. Johnston were sustained, and the trustees were condemned to pay $300 damages, with the costs of all the Courts. This judgment was based upon the proved usage of the Church, that a member once the lessee of a pew can continue to hold it by paying the usual rent and remaining a member of the Church, unless he is guilty of immoral behavior, and in that case he could only be deprived of his pew by the Kirk Session.

The case was in this position when the defendants in the suit sought to obtain an appeal to Her Majesty. The 47th Section of the Supreme Court Act, 38 Vict., c. 11, takes away the right of appeal in these words: "The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, *saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.*" Their Lordships of the Judicial Committee had, therefore, to determine whether a case had been made out for the exercise of the special prerogative of Her Majesty. On this point the Lord Chancellor expressed himself as follows:

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised to do, is left untouched and preserved by this section. Therefore their Lordships would have no hesitation in a proper case in advising Her Majesty to allow an appeal upon a judgment of this Court. But the question remains, assuming that there is the power to allow an appeal, is this a case in which the special prerogative of Her Majesty should be exercised? Upon that point their Lordships have been unable to discover any adequate grounds for the special exercise of the prerogative in this case. With regard to the particular injury arising as between the trustees on one side and the plaintiff in the action on the other, that of course is

the amount of damage which the trustees have been ordered to pay, the sum of $300, far short of the appealable value which has been defined in Canadian cases, and therefore if the particular value alone is looked to, there is not that amount of injury which should justify any special interposition of the prerogative.

"Then is there any general principle affecting a number of other cases established by the decision which should lead their Lordships to overlook the small amount of damage in the particular case? As I have already pointed out, the issue between the parties appears to have been simply an issue upon the legal construction and effect of a particular contract for the occupation of the pew in question. So far as the declaration and the pleas are concerned, the question apparently raised between the parties was, both of them admitting that the tenure of the pew might properly be styled a lease, whether a pewholder was entitled, by reason of the particular clause in the Civil Code of Canada, to three months to quit, by reason of it having been a verbal lease. It is sufficient with regard to a contest of that kind to say that the decision of the Court below may either have been right or wrong. Their Lordships express no opinion whatever upon that point, but whether right or wrong, it is not a decision which can have any bearing, or which can occasion any inconvenience with respect to a large number of other cases. If there is any want of perspicuity in the terms under which the pews in this church at present are let, if there be any words in the by-laws of the trustees, as to the letting of the pews, which have caused a difference of opinion between the Judges of the Courts, all that can be most easily remedied before any other annual letting of the pews, by an alteration in their wording; and it would appear to their Lordships to be entirely foreign from the principles which should guide them when advising Her Majesty as to when an appeal should be allowed, to advise that an appeal should be allowed for the purpose of testing the accuracy of construction put upon a particular document which is at the will of the party who asks for the exercise of the prerogative, in allowing the appeal.

Their Lordships, therefore, either from the magnitude of the particular case, or from the effect which this decision may have upon the number of other cases, think that this is a case in which they should advise Her Majesty not to assent to the prayer of this petition, but to dismiss it."

We are disposed to concur fully in the views expressed by the Judicial Committee. As a general rule, there can be no doubt that the multiplication of intermediate Courts of Appeal is a serious evil. The more the ladder of litigation is lengthened out, the greater will be the diffidence of honest men to go into Court either for the assertion or the defence of their just rights. They feel that no matter how good their cause may be, they are at the mercy of an obstinate antagonist with a long purse, who can inflict an amount of damage or interpose a delay which may be ruinous. If the Supreme Court, therefore, were to constitute simply an additional stage through which every keenly contested suit must be dragged, such a tribunal would present itself as an intolerable evil. There may be a question whether a party who has been taken to the Supreme Court by his opponent, and who has had the judgment of the lower Court in his favor reversed there, should not be allowed, where the amount is large enough, to take his case to the Privy Council. But the statute constituting the Supreme Court has determined otherwise. With respect to the exercise of the special prerogative, there might have been some ground for it in this case, if the petitioners could have shown that they had been placed in a position of great embarrassment and difficulty by the judgment of the Supreme Court. But this did not appear. Whether the trustees had or had not sufficient reasons to exclude Mr. Johnston from the use of a pew was not decided in the case. All the Supreme Court said was that the trustees had not taken the proper course, under the rules of their Church, to exclude him. As Mr. Justice Ritchie put it: "They and a large majority of the congregation were desirous of getting rid of this gentleman. It is my opinion, with reference to this matter, if they desired to get rid of him legally and properly, they had a right to take such action as would accomplish the object in view; but I cannot assent to the proposition, that to accomplish what they could not do legally, they had a right to pursue another course and refuse to let him have his pew, and

thereby prevent him from continuing to be a member of that congregation." No special reason was apparent, therefore, for the exercise of the prerogative, and to have allowed an appeal under the circumstances would simply have been to encourage similar applications in almost every suit decided by the Supreme Court.

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### *INSURER AND INSURED.*

The judgment of the Court of Appeal of Ontario in the case of *Billington* v. *The Provincial Insurance Company*, which we print in this number, decides a question of vast importance in the law of Fire Insurance. It deals with the power of the Company's agents, or of the party effecting the insurance, to vary by mere loose conversations the contract embodied in the application and the policy. The majority of the Court have adhered to the principle, fully recognized as applicable to contracts of other kinds, that the agreement of the parties must be gathered from the terms of the written contract, and not from parole evidence of what one of the parties supposed to be the agreement. In this case there was an omission to state the previous insurance in another company. The agent was verbally informed that there was another insurance, but the amount was not specified, and there was no mention whatever of the fact in the application or in the policy. It may seem hard in such a case that the insured should suffer. But clearly he could not recover unless the contract were changed, and another contract, to which the Company did not assent, were substituted. If the Courts treat such variations as immaterial, where will the laxity end? Even as it is, insurance contracts in too many cases are not looked upon as solemn agreements imposing obligations on each party as well as giving rights. The premium is paid like a tax bill, and there the matter rests, unless a fire occurs and the policy has to be produced as the basis of a claim. As Chief Justice Moss remarks: "In other business transactions men ordinarily scrutinize with care the terms of important contracts. In the case of insurance contracts inattention seems to be the rule." If the decisions of the Courts encourage this habit of inattention, there will be no safety or certainty for the contracting parties. It is preferable to lay down at once a rule, however stringent, that has the merit of being easily understood and applied, rather than open the door to the tremendous mass of litigation which must inevitably proceed from confusion and uncertainty on so important a subject.

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## REPORTS.

### COURT OF ERROR AND APPEAL.

Toronto, December 17, 1877.

*Present*:—Chief Justice Moss, Justices Burton Patterson, and V. C. Blake.

BILLINGTON v. THE PROVINCIAL INSURANCE COMPANY.

*Fire Insurance—Omission to state previous Insurance—Verbal Notice to Agent.*

The plaintiff when making application for insurance mentioned to the defendants' agent that there was a previous insurance in the Gore Mutual, but could not remember the amount which was on the property insured with the defendants. The policy contained a proviso that in case the insured should have already any other insurance against loss by fire on the property, and not notified to the Company and mentioned in or endorsed upon the policy, the insurance should be void. The policy contained no mention of the insurance in the Gore Mutual. *Held*, that the plaintiff could not recover.

Moss, C. J.—All the facts which, in my judgment, are material to the decision of this case, lie within a narrow compass, and are not open to serious controversy.

On the 6th February, 1875, the plaintiff applied to the defendants, through Robert W. Suter, their local agent at Dundas, to effect an insurance against loss by fire to the amount of $6,000, for two months, on certain agricultural machinery in process of construction in a manufactory in Dundas. He signed the defendant's usual form of application, which contained a direct enquiry as to other insurances, and an express agreement on the part of the applicant, that the application should form a part and be a condition of the insurance contract. Suter's authority extended to receiving applications for insurances, and receiving premiums and issuing interim receipts for policies. These receipts are sent to him by the defendants in blank, and filled up by him as occasion required. Their form was that of an acknowledgment of the receipt of money as a premium for an insurance, to the extent of a named sum, upon property described in an application, subject, however, to the approval of the Board of Directors, in Toronto, to whom power was reserved to cancel the contract at

any time within thirty days from the date of the interim receipt, by mailing a notice. This receipt embodies, in express terms, a mutual agreement that, unless it be followed by a policy within the said thirty days, the contract of insurance shall wholly cease and determine, and all liability on the part of the defendants be at an end; and that the non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of the contract by the Board of Directors, and appropriate provision is made for returning the unearned part of the premium. Although Suter does not appear to have been specially authorized to receive and transmit notices of other insurances, he was, in fact, the medium through which such notices were generally forwarded to the Company's head office. In answer to the enquiry respecting other insurances, the application, as signed by the plaintiff and transmitted to the head office by Suter, stated that there were two, viz., one in the Hastings Mutual of $2,000, and one in the Canadian Mutual of $3,000. The plaintiff had, in fact, a policy with the Gore Mutual for $3,000, which covered the property mentioned in the application to the extent of $1,000. Suter was the agent of the Gore Mutual through whom this insurance had been effected. The plaintiff's own explanation of the way in which all reference to this insurance was omitted from the application may be thus summarized: Suter came to his office to get the application filled up and signed on Saturday night, just before the time for paying his workmen. They found the other policies, but not that of the Gore Mutual. It had been assigned to a building society; but, according to the plaintiff's belief, was still in his possession. The plaintiff spoke particularly of the insurance with the Gore Mutual, a part of which he thought to be on stock; but what part he did not know. As Suter did not know, plaintiff said to him, "I want you to wait until the men are paid, and we will find the policy." He did not want that (application) sent. Suter said, "I have all the particulars over at the office;" to which plaintiff replied, "Write in further insurance in the Gore Mutual, $3,000." He says that he knew that was the insurance, and if defendants had a mind to take exception to it he did not care. Suter told him, "You can rest assured I will put that in before I send it off;" or, as plaintiff elsewhere puts it, that he wouldn't send it off until he saw him again. Plaintiff then signed the application and received the usual interim receipt. He did not see Suter again with reference to the matter until after the fire. He is very emphatic in his statement that he told Suter to put down the insurance in the Gore Mutual at $3,000, and he gives as a reason for clearly recollecting this, that he knew that in the application it was a very important matter that all the particulars should be mentioned, and he did not want the application to go without having all that in, or all that he knew about it. He relied on Suter's promise to insert the statement that there was an insurance in the Gore Mutual for $3,000; and this, although he did not himself suppose that this property was covered to that extent.

The application was forwarded by Suter without any alteration or addition, and after some hesitation the Board, or the General Manager, decided to accept the risk, but no person connected with the Company, except Suter, had any knowledge of the existence of the policy in the Gore Mutual; nor does Suter appear to have made any further investigation. According to him, neither the plaintiff nor he knew whether the policy in the Gore covered the stock.

It was not the practice of the defendants to issue for risks extending over so short a period as two months, any formal policy, but a certificate stating that the person has insured under and subject to all conditions of the defendants' policies, of which the assured admits cognizance. To this certificate there is appended a foot note that, in the event of loss, it will be replaced by a policy, if required. Within thirty days from the date of the application the defendants seem to have issued such a certificate in favor of the plaintiff. The fire happened after the expiration of the thirty days, but within the two months. Curiously enough, the plaintiff denies the receipt of any such document. If we were to accept this denial as conclusive, the plaintiff would probably be out of court; for by the express terms of the interim receipt the non-delivery of a policy (for which the certificate is only a substitute) within the specified time is absolute and incontrovertible evidence of the rejection of the application by the Board of Directors. The plaintiff's own statement, if treated as conclusive, must place him in a plain dilemma. He could not sue upon the interim receipt because the loss occurred after the thirty days, during which, at most, it protected him. On the other hand, the continuance of the insurance was expressly made dependent upon the delivery to him of a policy, and his inability to produce one would have defeated any assertion of claim against the defendants.

After the fire the defendants did issue a policy to the plaintiff, in their usual form, endorsed with their ordinary conditions, one of which is that notices of all previous insurances shall be given to the defendants and endorsed on the policy, or otherwise acknowledged by them in writing, at or before the time of the making assurance thereon, or otherwise the policy shall be of no effect. In the body of the policy is a proviso that in case the assured shall have already any other insurance against loss by fire on the property, and not notified to the Company, and mentioned in or endorsed upon the policy, then the insurance shall be void and of

no effect. The only insurances mentioned in or endorsed upon the policy which the defendants issued to the plaintiff are those in the Hastings Mutual and Canada Mutual.

The plaintiff commenced one action in the Court of Queen's Bench upon this policy, and daclared in the usual way. The defendants pleaded, with other pleas, the conditions to which I have referred. To this the plaintiff replied on equitable grounds, and also added a count to his declaration by which a reformation of the policy was sought. This count, after stating the terms of the policy as in the first count, alleges that at the time of effecting the insurance the plaintiff had an insurance in the Gore Mutual to the extent of $1,000, of which the defendants had notice before and at the time they effected the risk, and that with such knowledge they agreed to accept the risk and to insure the plaintiff's property, and to mention the other insurance in the policy, or have it endorsed thereon; and that by mistake they omitted to do either, of which the plaintiff had no knowledge until after the loss; and that the policy ought to be reformed and amended by the mention therein of the existence of the policy in the Gore Mutual of $1,000. It then claims in effect that the policy should be treated as reformed, and the plaintiff be entitled to recover upon that footing. The defendants answered this count by two pleas. By the first they denied notice of the Gore Mutual policy, and the agreement to mention it in or endorse it on their policy, and the alleged mistake. The second plea set up the conditions previously referred to, and that the applicant shall be bound by his representations on making his insurance, and if the agent of the Company makes the application for the insured he shall be considered the agent of the insured and not of the Company; that the plaintiff made his application through Suter, the agent of the defendants at Dundas, and that the application was in writing and was forwarded to the defendants at their Head Office in Toronto; and the defendants' policy now in question was issued thereon, that the application contained no statement or mention of the policy of $1,000 in the Gore Mutual, nor had the defendants, or their directors, or any of the officers of the Company at the Head Office any notice of such policy before the making of the application, or of the defendants' policy, although the plaintiff had communicated the existence of the said policy of $1,000 to Suter at the time he made his application, but Suter had no authority from the defendants to change, or vary, or waive the said conditions, and he did not give the defendants any notice thereof, and the defendants had no notice unless the notice to Suter was notice to them, which they deny. That immediately after the application of the plaintiff the defendants' policy was delivered to him, and he was aware and had the means of knowing that the policy of $1,000 was not endorsed or otherwise acknowledged by the defendants in writing, and that he was guilty of laches in not seeking sooner to reform the policy. That the conditions on the policy were made expressly with the intention of preventing fraud and collusion between the insurer and the agents of the Company by requiring the knowledge of the Company, and that if applications are made for insurance by an agent of the defendants he shall be considered the agent of the insured and not of the defendants as to the application, and that they are not bound by the notice to a knowledge of Suter without their acknowledgment endorsed on the policy, or otherwise expressed in writing, and that the policy of $1,000 was not omitted to be endorsed on the policy of the defendants, or otherwise acknowledged in writing through any error or mistake of the defendants. Similar allegations are contained in the plaintiff's equitable replication to the third plea to the first count and the defendants' rejoinder thereto.

At first sight this record seems rather complicated and embarrassing, but I think there is no doubt that the substantial question to be determined is whether the plaintiff has an equity to have the policy reformed. He cannot succeed if the policy remains in its present shape. Either the condition as to giving notice of existing insurances must be expunged or the policy must be reformed and amended as the added count puts it by the mention therein of the existence of the policy in the Gore Mutual of $1,000. The former alternative is out of the question for the defendants have an undoubted right to provide for the case of the insurances in the Hastings Mutual and the Canada Mutual. The case then is to be determined on precisely the same principles as if the more correct and convenient course had been adopted of filing a bill for the rectification of the policy. It might perhaps be surmised that the plaintiff would have sought relief in that mode, and from the appropriate forum, if he had not clung to the hope that by suing at law he might obtain the advantage of the opinion of a jury.

The plaintiff's right to recover being dependent on his right to a reformation of the instrument, the question is whether he can consistently, with the established doctrines of equity, obtain that relief. I take it that the principles upon which the Court acts are clear and well-defined. They have been amply illustrated and explained in modern cases, but they were long since enunciated with considerable precision. Before the Court will assume to rectify an instrument it must be satisfied beyond all reasonable doubt that there was a common intention different from the expressed intention, and a common mistaken supposition that it was correctly expressed. It is essential that clear proof should be adduced of a real agreement between the parties different from

the written agreement. If it appears that the instrument was executed under a common mistake as to its contents, but no real agreement had ever been concluded between the parties, there may be rescission but there is no foundation for rectification. In order that a decree for reforming the instrument may be made, the plaintiff must prove not only that by mistake the written agreement does not correctly represent the real agreement, but that there was a mutual binding assent by him and the other party to a complete agreement.

*Hinkle* v. *Royal Exchange Assurance Company*, 1 Ves. Senr., 317, which came before Lord Hardwicke in 1749, was a suit brought for the rectification of a policy on the ground that there was a mistake in stating the intention of the parties, which was that the warranty should not have been so general, viz., should take place from Ostend only and not from London. The evidence on the part of the plaintiff was the deposition of one Knox, who seemed to support the plaintiff's view, and another person, whose account of the transaction was not precisely the same, although the report is silent as to the extent of the variance. His Lordship said: "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced into writing contrary to intent of the parties on proper proof that would be rectified, but the plaintiff comes to do this in the harshest case that can happen of a policy after the event of loss happened to vary the contract, so as to turn the loss on that insurer who otherwise it is admitted cannot be charged. However, if the case is so strong as to require it, the Court ought to do it. The first question is whether it sufficiently appears to the Court that this policy, which is a contract in writing, has been framed contrary to the intent and *real agreement*." "As to the first, it is certain that to come at that there ought to be the strongest proof possible, for the agreement is twice reduced into writing, in the same words, and must have the same construction, and yet the plaintiff seeks, contrary to both these, to vary them, and that in a case where the witnesses on the part of the plaintiff vary from each other."

*Rooke* v. *Lord Kensington*, Sir W. Page Wood, V. C.

In *Mackenzie* v. *Coulson*, L. R., 8 Eq. 368, a bill was filed by underwriters for rectification of a policy of marine insurance delivered to the defendants, so as to make it conformable to that which they alleged was the real contract. The defendants denied that they ever entered, or intended to enter, into any contract other than that expressed by the policy. Sir William James, then Vice-Chancellor, held that there was no evidence of any other contract, and in delivering judgment, observed: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument. It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiations which preceded it."

The judgment of Lord Chelmsford in *Fowler* v. *Fowler*, 4 Dig. & J., is very valuable and instructive. He points out that while the power which the Court possesses of reforming written agreements, where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and usefully exercised, it is also one which should be used with extreme care and caution, and that to substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. He refers to Lord Thurlow's opinion that the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence; and after intimating that the word "irrefragable" may require some qualification, he proceeds: "It is clear that a person who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest and most satisfactory manner, that the alleged intention, to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution; and also must be able to show, accurately and precisely, the form to which the deed ought to be brought. In these is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties, for whom the Court is virtually making a new written agreement."

The rule seems to be very well expressed by Spencer, C. J., in *Lyman* v. *United Insurance Co.*, 17 Johns, 373, to which I refer because its object was to have a policy of insurance amended after the loss. The learned Judge forcibly observed that it is not enough in cases of this kind to shew the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it, in other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and as in fact it was, but for the mistake. He adds: "If it be clearly shewn that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shewn that the other party agreed to it in the same way, and that the intention of both of

them was by mistake misrepresented by the written contract."

These authorities leave no room for uncertainty as to the principles upon which this remedial equity should be administered. Let us endeavor to apply them to the facts of this case. The plaintiff is bound to prove clearly that there was a real agreement between him and the defendants different from that expressed in the policy. He must show that there was a mutual assent to the terms which he says should be expressed in the policy. In order to succeed he must shew that there was an assent by the company to the insertion in the policy of the existence of the $1000 insurance in the Gore Mutual; or, to put it in the broadest and most liberal manner for the plaintiff an agreement mutually assented to that he should be insured from the 6th February until the 6th of April notwithstanding the existence of this other insurance. Nowhere did the company enter into such an agreement. How or by whom was their assent given to any such term? The answer given is: by the agent Suter. But this seems to me to rest on an entire misapprehension of his functions, either actual or assumed. He neither had nor pretended to have authority to give the Company's assent to any contract of insurance for two months. He did not undertake, either expressly or impliedly, that the policy should be issued in a certain form or embody certain terms, for he did not undertake that a policy should be issued at all. The plaintiff did not suppose that in what took place between him and Suter the latter was binding the Company to such a contract as that which he now seeks to enforce. He knew that Suter was not assuming to do more than to forward his application for the consideration of the Board, and to insure him until he was advised of the result, or for 30 days at most. He was perfectly well aware that the proposal to which the Board was asked to assent was his written application and his own statement already quoted shows that he was fully alive to the importance of the application containing correct information as to existing insurances. Conceding that the evidence establishes with sufficient clearness that Suter had notice of the fact that the particular property in question was insured in the Gore Mutual, that does not advance the plaintiff's case. His knowledge of that fact would not create a contract of the Company which neither he nor the plaintiff supposed was being made. Notice to him might reasonably and justly be treated as notice to the Company for the purposes of any contract which he was then, as agent, making on behalf of the Company; but I cannot perceive how it can import a term into a contract which was not to be made through him, but which, to the knowledge of the plaintiff, was beyond his functions.

Then if the assent was not given by Suter it was never given, for it is clear that the authorities at the head office had no idea of the existence of the other insurance. If Suter did not no one on behalf of the defendants did, agree to insure the plaintiff for two months, notwithstanding the other insurance. On the 19th February, when the Board agreed to insure the plaintiff for that period, they acted upon the application and upon it alone. It appears that it was after some hesitation they accepted the risk. The Court is not at liberty to assume that it would have been accepted had the Board been aware of the additional insurance. Indeed, this case appears to me to involve precisely the same considerations as led Sir John Stuart to afford relief in Fowler v. Scottish Equitable 28 L. J. Ch. 225.

I believe that the soundness of that decision has never been questioned and its appositeness will justify a brief reference to it although it has been frequently referred to in our reports. The Plaintiff applied to the London agent of the Defendants to effect an insurance upon the life of a person named Haire, in whom they were interested. Haire was a merchant residing at Gibraltar, and in the course of his business was in the habit of visiting ports in Morocco and other ports on the Mediterranean and on the coasts of Africa and Asia. The plaintiffs allege that they notified the London agent of these facts, and that they expressly stipulated with him that the policy proposed to be granted on the life of Haire should not be vitiated by his visiting such ports on certain conditions, which were only arranged after much discussion. Upon the faith of this agreement and before any policy was actually issued, the plaintiff paid the first premium. The policy, when issued, provided that if Haire should depart beyond the limits of Europe, it should be void, but upon it was endorsed a memorandum that Haire should be at liberty, without license or extra premium, to visit Tangiers or any other port within the Mediterranean; but that it was understood that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia or Africa. It was alleged that the mistake was in the endorsement being limited to Tangiers and ports in the Mediterranean, instead of extending to any ports on the coasts of Africa or Asia.

The Queen's Counsel pointed out that the course of dealing and the evidence in the cause shewed that whatever the general authority of Cook might have been as an agent, what actually took place was that the agreement which the plaintiff intended to make was to have its force and legal effect from an instrument to be executed in Edinburgh. The London agent could negotiate the terms of a policy with any person desirous of effecting one with the Society, but the policy itself was an instrument to be made in Edinburgh, which was the headquarters of the Society. The agreement, in the opinion of the V. C., was made in plain and

distinct terms, as the plaintiffs contended. But the proposal in writing was, by mistake, made in different terms. The agent in London communicated this proposal with its erroneous terms. Upon this the V. C. proceeds to say: "To that proposal which was not the real agreement the Edinburgh directors assented, and what is sought to be reformed is the memorandum which was signed by the Edinburgh agent and adopted by the Board as that which constituted the agreement. That Edinburgh manager is now sought to be made to sign under the decree of the Court as having agreed to it, a certain stipulation of which he never heard. It seems quite enough to say that an agreement means that both contracting parties are of one mind. Here one of the contracting parties to the instrument which is now sought to be reformed confessedly never heard of that which is said to be the real agreement. The result, upon the whole, is plain that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. The plaintiff who made the agreement with the London agent never intended to be bound by the stipulation, which he himself proved is a mistaken form. The result is that there is no agreement at all." He afterwards points out that the agreement sought to be rectified is that which was made by the managers in Edinburgh, just as the instrument sought to be reformed here is the policy made by the head manager in Toronto. The parallelism between the two cases is so plain that commentary is superfluous. Although I have not taken into consideration in arriving at a decision the mode of procedure followed in this case, I cannot help observing that it appears to me highly inconvenient and anomalous. The plaintiff sues upon a policy as a perfect and complete instrument, under which he is entitled to certain rights. Then in the same action he is permitted to say:—"That is all a mistake. The instrument on which I am suing is not the real contract, which is something else." Elastic as are our present rules of pleading, they cannot be stretched to the length of sanctioning such a record. In the words of Wood, V. C.:—"No single instance has been produced in which a plaintiff bringing forward a document on which he founds his right, has been allowed to say that the instrument which he himself produces to the Court, does not express the real agreement into which he has entered."

I venture to think that the principles which underlie the judgment I have formed in this case are neither harsh nor unreasonable. It is the duty of Courts to give effect to the rights of Insurance Companies, as well as to protect the just interests of the assured. This is a mere truism, and perhaps, on that account, is in danger of sometimes being treated with neglect. It may be reasonable and proper to hold a Company bound even by loose dealings with, or informal notices to a local agent authorized to grant *interim* receipts, so far as may be necessary to support the *interim* assurance. The Company has accredited him to the public as their representative for the purpose of making those temporary insurances, and for that purpose he may fairly be treated as the full equivalent of the Company. But when a Company has taken every precaution to limit his powers to that extent, when they do their best to secure correct statements in writing from applicants, when they endeavor to make it be understood that it is upon the faith of these statements, and not upon any conversations with, or notice to, their agent, they intend to act there seems to be no injustice or harshness in requiring applicants to use some degree of caution. If a Company is to be held bound after a loss has occurred to alter a policy, which they have deliberately issued in strict accordance with the terms of the written application, containing all the information their governing body had for the exercise of their judgment, simply because their local agent knew and did not communicate some material circumstances, it is almost equivalent to transferring to the agent the power of issuing the policy. In other business transactions men ordinarily scrutinize with care the terms of important contracts. In the case of insurance contracts inattention seems to be the rule. No doubt this arises in some degree from the length and complexity frequently characterizing policies. But it is to be remembered that Courts of Equity demand reasonable vigilance. In the words of James, V.C.:—"Men must be careful if they wish to protect themselves, and it is not for this Court to relieve them from the consequences of their own carelessness."

I think the appeal should be allowed, but as the company incurred no risk after the 20th February when the short date policy was presumably received by the plaintiff, there should be an order for the return to him of $ , being 4-5th of the premium, and as to costs, I think justice will be done by following the course taken in Fowler's case and awarding none to either party.

BURTON, J.—I agree with the learned Chief-Justice, that although the issues on this record are most inartificially framed, presenting claims of a wholly inconsistent character, the substantial question presented for determination is whether a case has been made for a reformation of the contract; and giving full effect to the Vice-Chancellor's view of the evidence, I am unable to discover any grounds upon which, according to the rules of equity, as I understand them, such relief can be granted.

Had the policy been executed and delivered to the plaintiff, and retained by him for any length of time before the fire, and he had, under such circumstances, brought an action

upon it, it would have required evidence of the most conclusive and unquestionable character to warrant a Court of Equity in interfering.

In the present case the policy was not delivered until after the fire, but to give the plaintiff a *locus standi* at all it must be assumed in his favor that a short-date receipt or certificate was issued within thirty days from the issue of the interim receipt.

That short-date receipt entitled him to a policy from the Company in their usual form containing the usual conditions, and based upon the written application which the directors had before them when determining whether to accept or reject the risk.

Taking the view most favorable for the plaintiff, and laying aside for the present any questions arising upon the pleadings or the necessity of reforming the contract, in what position was he to enforce his claim upon the short date receipt at the time of the fire had he elected to file a bill in equity, instead of requiring the issue of a policy, and proceeding upon it at law?

Suter, as agent of the Company, had authority to do two things: 1st. To receive and forward to the board of directors for their acceptance or rejection written applications for insurance. 2nd. To grant *interim* receipts insuring the applicant, pending the consideration of that application, not extending under any circumstances beyond the period of 30 days.

Within these limits the Company were liable upon his contracts as fully as if made under the Corporate Seal, and they would be subject to all the incidents attaching to contracts generally, and notice therefore to him would be notice to them as far as that *interim* contract was concerned.

I take it also to be clear that so far as the *interim* contract was concerned, a verbal notice to the agent of existing assurances would have been sufficient, the *nota bene* at the foot of the *interim* or provisional receipt, which is the only portion of *that* contract which renders it necessary to take any notice of other insurances, not requiring the notice to be in writing. But for this N. B., no notice of other insurance would as regards the *interim* insurance have been necessary at all, and one can see a reason therefore for its being thus pointedly called to the attention of the applicant, whilst the dispensing with the necessity of a written notice to the agent is apparent, as the information was merely to enable him to judge whether he should entertain the application or reject it.

This, however, is the only condition applying to the provisional insurance—with that exception, it is an absolute and unconditional contract—but that contract was subject to cancellation at any time by the Board of Directors by causing a notice to that effect to be mailed to the applicant, and unless a policy were issued upon the application to be forwarded to the directors for their approval within 30 days, the provisional contract ceased and determined.

But the plaintiff was aware that the agent's power to bind the company was limited to a provisional contract of this kind, and that the ultimate contract of insurance depended upon the view which the directors might take of the risk, founded upon the information contained in his written application. He was aware that the directors attached importance to the full disclosure of other insurances, for his attention had been expressly called to it in the foot-note to his receipt, and was himself under the belief that such disclosure was material, as is evidenced by his anxiety to have it inserted in the application—whether it was in fact material must depend upon the contract itself which was entered into.

It is expressly agreed that the application shall form part and be a condition of the contract of insurance.

On that application the enquiry is made, what insurance is effected on the property now to be insured and with what companies. To this the applicant applies: "Hastings Mutual $2,000, Canadian Mutual $3,000," saying nothing of that of the Gore.

This is forwarded to the Board of Directors, and is in fact the only information before them when called upon to form their opinion upon the risk.

The Directors accepted the risk, but as was their practice with short date policies, instead of issuing a formal policy, granted a certificate to the effect that the plaintiff had insured under and subject to all the conditions of the defendants' policies, of which the plaintiff admits cognizance, the property in question.

The policies issued by the company contain a proviso that in case the assured shall have already any other insurance upon the property not notified to this company and endorsed on this policy, the insurance shall be void, and a covenant that the representation given in the application contains a just, full and true exposition of all the facts and circumstances in regard to the risk and to the condition, situation and value of the property and the interest of the assured therein, and if the same be not truly represented the policy shall be void.

The sixth condition required that notice of all previous assurance shall be given to the company and endorsed on the policy or otherwise acknowledged by the company in writing, otherwise the policy will be of no effect.

The nineteenth condition requires that all notices required for any purpose must be in writing.

The issuing of the policy by the Company with notice of any existing insurance must, of course, be regarded as an assent to such additional insurance, and they could be compelled in the event of their refusal to endorse it on the policy as required by the condition. And the

same effect must be given to the certificate, but the question still remains, What was the contract effected by this proposal and acceptance? Can it be anything more than this? We have accepted the risk offered upon the premises, and agree to insure them for the time specified, provided the facts and circumstances in regard to the risk and the condition, situation and value of the property be as represented in the application, and that the insurances which you have notified us of in that application are the only other insurances existing upon it, and we will, if you require it, issue you a policy containing similar stipulations.

That it was the intention of the Company that all such notifications should be made to the head office in writing is manifest, I think, not only from the fact of their making a specific enquiry as to such further insurances in the application, but also from the proviso near the foot of the policy which, after referring to the sixth condition, further provides that if any additional insurance be effected on the property the assured shall at once give notice to the head office, and have it endorsed on a certificate of consent given.

They appear to have endeavored to guard against any misapprehension or mistake by providing that the information upon which the Directors were to act should be in writing, and in guarding in the body and conditions of the policy against being bound by notices given to agents, except only in the case of the provisional receipt. If they have failed to accomplish this object it is in consequence of the insufficiency of the language used to convey their meaning, and to my mind they have sufficiently expressed it, and all parties, I think, clearly understood that the application was the basis, and the only basis upon which the plaintiff proposed for insurance, and by which alone the Directors intended to be bound; that and its acceptance alone constituted the contract, and the sooner people learn that this is the mode in which these insurances are effected, and that their effect is not to depend upon loose conversations with agents, in my opinion, the better.

I am quite unable to concur in the view that the Company can be prejudiced, because they issued the policy after receiving the proofs of loss in which this additional policy was referred to. They were bound in accordance with the certificate they had granted to issue a policy, but they were not bound to endorse upon it the fact of another insurance existing of which they had not been notified. I am of opinion, therefore, that if this were a bill filed upon the short date certificate to enforce payment of the insurance money the plaintiff must have failed, as he must fail now, because he establishes no such contract as alleged, and there is nothing, therefore, to reform by. I am of opinion, therefore, that the appeal should be allowed.

BLAKE, V. C.—The evidence is not satisfactory to my mind, in support of the allegation of notice to the agent, of the insurance in the Gore District Mutual Insurance Company. In the Court below the testimony given was considered sufficient to support this finding which must be taken in appeal as the true conclusion from the evidence. I think a verbal notice to the agent, such as that here found to have been given, is sufficient on an application for the usual *interim* receipt. This receipt, however, only binds for 30 days from its date. As the fire took place after the expiration of the 30 days, the plaintiff can have no claim thereunder. He is, therefore, obliged to base his claim to recover either on the short date or usual policy. It then becomes a dealing between the plaintiff and the Company. The short form of policy was issued "subject to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance." Looking at the application, and looking at clauses 6 and 19 of the conditions on the policy, it is clear that it was intended that the information as to prior insurances should be in writing. The power of the agent ended in the matter with the dealing on the footing of the certificate. Then came the contract between the plaintiff and the Company represented by the short form policy. This required the notice in writing, which was not given, and I therefore think the plaintiff is disentitled to succeed.

I coincide in the view taken by the Chief Justice of the Court as to the disposition of the costs of the litigation.

PATTERSON, J., dissented from the judgment of the Court, and held that the notice to Suter was sufficient. He considered it quite clear that the plaintiff was anxious to have the Gore Mutual policy inserted in the application, and that Suter spoke of having some memorandum at his office which would enable him to state the particulars of it. The plaintiff depended upon Suter inserting the particulars. It appeared, however, that Suter had only a note of the gross amount of the Gore Mutual policy, and not of the particulars, and he sent away the application as it was. The plaintiff's rights must depend not on any estoppel, but on the effect of what was done as a matter of contract. On this branch of the enquiry, the learned Judge remarked that he had had great fluctuations of opinion, and he was still by no means free from doubt. But after anxiously considering all the data from which the contract was to be deduced, he could not see that the defendants could insist upon more than was done by the plaintiff. The insurance effected by an interim receipt and that evidenced by a policy is one contract of insurance, evidenced in the first place by the receipt and continued by the policy. The omission to notice the existing policy in the application was not of itself fatal. Undoubtedly there must be notice given of the

insurance—the reasonable import of the form of application and the express provision of the policy agreed in that, but did not make it indispensable that notice should be contained in the application paper. In entire consistency with this was the N. B. at the foot of the interim receipt: "Any existing assurance on the property must be notified at the issuing of this receipt or the contract is void." The agent had verbal notice that there was an insurance, the amount of which the plaintiff could not at the moment state, but which he emphatically insisted on as one to be taken notice of. If what was proved to have been said about it had been written on the face of the application, it would have been out of the question to urge that the want of more particular information made the notice of no avail. It would have been there to be acted on or remitted for further particulars, as the Company chose. It, therefore, seemed indisputable that notice of the existing insurance was given to the agent, the proper person to receive it. If the Company had then done what the receipt intimated was the routine, and either declined the risk or issued a policy, the matter would have been simple. The first case would speak for itself. In the second the plaintiff would have had notice that the continuance of the insurance from henceforth depended not on the notice alone, but on a further act, viz., the mention in or endorsement on the policy, which was at once the stipulated evidence of receipt of a notice, and of the Company's assent to the double insurance.

Appeal allowed.

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## COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, Dec. 14, 1877.

*Present*:—Chief Justice DORION and Justices MONK, RAMSAY, TESSIER and CROSS.

THE CANADIAN NAVIGATION CO., (Plffs. below) Appellants; and MCCONKEY (Deft. below) Respondent.

*Common Carriers—Loss of baggage—Fire on Passenger Steamer—Liability of carriers—Serment Supplétoire.*

*Held*, that a steamboat company is liable for the value of passengers' baggage destroyed by a fire on the steamer, unless it be clearly proved that the fire occurred from some cause over which the Company had no control.

2. That the Court of Review in the Province of Quebec may send a case back to the Court below, in order that the *serment supplétoire* may be deferred.

On the 10th June, 1872, the minor daughter of McConkey, the respondent, was a passenger on the steamer "Kingston," belonging to the Company, appellants. A fire having occurred on board, the minor's trunk and contents, valued at $142.50, were destroyed. An action was brought for the value of the baggage destroyed and other damages.

The appellants pleaded that the fire happened through *force majeure*, and by no fault of theirs, every precaution to guard against fire having been taken.

The Superior Court dismissed the action, holding that the Company were not guilty of negligence.

In Review this decision was reversed, and the respondent held entitled to recover; but the Court, considering that the value of the trunk and contents was not satisfactorily proved, ordered the record to be sent back to the Superior Court, in order that the *serment supplétoire* of the respondent might be taken as to such value. This was done, and subsequently judgment was entered for the amount so established.

The Company having appealed,

RAMSAY, J., for the Court, remarked that the evidence showed a reasonable amount of care on the part of the appellants, but there was no attempt to show how the fire occurred. The question arose, whether the Court had to consider a fire the result of *force majeure* in all cases where the cause did not appear. This view could not be adopted. The appellants ought to have established something more than they had done; they ought to have shown that it was not through their fault that the fire occurred. As to the principle of the action, the respondent rightly succeeded. As to the amount, the appellants had drawn the attention of the Court to the order of the Court of Review, sending the record back in order that the *serment supplétoire* might be deferred. Under the circumstances this was proper, and the judgment would not be disturbed.

Judgment confirmed.

*J. L. Morris* for appellants.

*Macmaster & Hall* for respondent.

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## *NEW PUBLICATIONS.*

THE AMERICAN LAW REVIEW, January, 1878. Boston: Little, Brown & Co.

The *American Law Review*, which appears quarterly, has entered upon its twelfth year. It is edited with great care by Messrs. Moorfield

Storey and Samuel Hoar, and its summaries of decisions, to which we are indebted for many of the latest cases, are especially valuable. The January number contains, among other matter of interest, a well-written paper on "The Parliaments of France," from which we shall make some extracts in another issue.

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ALBANY LAW JOURNAL, Vol. 17, No. 1, January 5, 1878; edited by Isaac Grant Thompson. Albany: Weed, Parsons & Co.

There is no falling off in the interest which the contents of the *Albany Law Journal* possess for the legal reader. The current number has a very readable notice of Rufus Choate, and his opinions on the celebrated trial of Professor Webster for the murder of Dr. Parkman.

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CHICAGO LEGAL NEWS, December 29, 1877. Chicago: Legal News Printing and Publishing Company.

This journal, issued weekly, and edited by a lady, Mrs. Myra Bradwell, evinces the same energy with which it was established ten years ago. It presents the bar with a large number of judicial opinions in advance of the regular reports, and in other respects fills, with marked ability, the position which it marked out for itself.

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## *RECENT ENGLISH DECISIONS.*

*Bailment.*—The plaintiff left his bag, worth more than £10, at the cloak room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak room, and the words "See Back." On the back it was stated that the Company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room, in a conspicuous place. The Judge left these questions to the jury: "1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the conditions?" Both questions were answered in the negative, and the Judge ordered judgment for plaintiff. *Held*, that there must be a new trial.—*Parker* v. *The South Eastern Railway Co.*, s. c. 1 C. P. D. 618.

*Bill of Lading.*—One hundred barrels of oil and one hundred and six palm baskets, consigned to defendants, were shipped under a bill of lading, signed by plaintiff, containing the clause: "Not accountable for rust, leakage, or breakage." Some of the oil escaped and caused damage to the baskets. In an action for the balance of freight, the consignees set up a counter claim for this damage. *Held*, that the exemption in respect of leakage did not extend to the damage by the oil which leaked out.—*Thrift* v. *Zoule*, 2 C. P. D. 432.

*Company.*—At a general meeting of the shareholders of a company, B., who owned no stock, was unanimously elected director. The shareholders at the time consisted of seven directors of the company, and there were no others. The articles of the company provided that no person who had not owned twenty shares for two months should be eligible as director, unless he had been recommended by the board of directors. B. refused to act, but the company sent him an allotment of twenty shares. On an order to wind up the company, *held*, that B. was not a contributory.—*In re East Norfolk Tramways Co.*, 5 Ch. D. 963.

## *RECENT UNITED STATES DECISIONS.*

*Accomplice.*—A conviction may be had on the evidence of an accomplice, corroborated only by that of his wife.—*Blackburn* v. *Commonwealth*, 12 Bush, (Ky.) 181.

*Action.*—A city established waterworks, which any one might connect with his house and use, paying rates. The pipes in front of the house were so negligently laid, near the surface of the ground, that they froze and burst. In an action by the owner of the house against the city, *held*, that he could recover the rates paid while deprived of the use of the water, but not for damage to the house or loss of tenants.—*Smith* v. *Philadelphia*, 81 Penn. St. 38.

*Adverse Possession.*—Possession by a corporation cannot be tacked to a previous possession by the individuals forming the corporation, organized as a voluntary society for the same purposes, so as to make a title by adverse possession.—*Reformed Church* v. *Schoolcraft*, 65 N. Y. 134.