

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Connecticut Fire Insurance Company v. Kavanagh from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 30th July 1892.

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD SHAND.

[*Delivered by Lord Watson.*]

In this case the argument addressed to their Lordships was not confined to the points which were submitted for the decision of the Courts below. Before dealing with these controverted questions, whether old or new, it will be convenient to notice the facts which are not now in dispute.

The Respondent, Walter Kavanagh, in the year 1888, acted as agent in Montreal for three different Companies carrying on the business of fire insurance. A gentleman, named Warden King, had insured with him certain premises in Montreal, occupied as a paper-box factory, under a policy from one of these concerns, the British America Assurance Company, which expired on the 8th July 1888. Before that date the Company intimated to the Respondent that they declined to renew the policy on any terms; whereupon he, being desirous to keep the insurance in his office, communicated with the son of the assured, who

acted for his father in these matters, and, with his assent, opened an insurance with the Scottish Union and National Insurance Company. On behalf of that Company he issued to Mr. King a document termed an interim receipt, and received in exchange for it a year's premium of \$68. 75. The receipt, which the Respondent had admittedly power to issue, constituted an insurance for thirty days from the 8th July, subject to cancelment at any time within that period, upon written notice to the assured. On the 12th July he received a letter from the manager of the Scottish Company, instructing him to cancel, in reply to which he wrote a letter of remonstrance, urging that the risk was one which the Company ought to have no hesitation in accepting. On the 13th July an answer from the manager, confirming previous instructions, reached his office, was there opened by Mr. Stanger, his chief clerk, and was then forwarded to and received by the Respondent on the evening of the same day.

The Respondent went to his office early on the morning of Saturday the 14th July, when he directed Mr. Stanger to transfer the insurance from the Scottish to the Appellant Company, and was informed that, in accordance with usual practice, the transfer had already been made in his books. The Respondent left early in the forenoon; and, after his departure, Mr. Stanger posted, about 2 p.m., a report to the Appellants, informing them, *inter alia*, that an insurance of Mr. King's premises had been effected on their behalf. The office was then closed for the day, and immediately afterwards Mr. Stanger learned that there was a fire on the premises, but could not ascertain the amount of damage which had been done.

The Respondent heard of the fire for the first time on the Sunday forenoon, from Mr. King,

junior, whom he then informed that the insurance had been transferred from the Scottish to the Appellant Company. Mr. King, whose father still held the interim receipt of the Scottish Company, without notice of cancellation, states that he said in reply, "Well, I will expect you to see me out of the matter." According to the Respondent's account, the answer he received was, "All right; do whatever you like with it." On the Monday, a written claim for the amount of his loss was preferred by Mr. King against the Appellants, and the claim and an estimate of the loss was, on that day, sent to them by the Respondent. On the same day the premium which had been received by the Respondent was transferred, in his cash book, from the credit of the Scottish Company to that of the Appellants. Charles D. Hanson, an insurance adjuster, was, with their assent, appointed to act on behalf of the Appellants; and, after receiving his report, they, on the 1st August 1888, paid the sum of \$2872.32 to Mr. King.

The Appellants filed a writ and declaration against the Respondent in January 1889, in which they alleged that he had been guilty of wilful deceit, and had fraudulently effected, or purported to effect, a transference of the insurance in his books after the fire had occurred, in the knowledge that the Scottish office, and not the Appellants, were the only insurers at the time, with the fraudulent purpose of relieving himself of a possible claim at the instance of the Scottish Company in consequence of his neglect to give a written notice of cancellation, pursuant to their instructions. Upon that issue, the case went to trial before Mr. Justice Wurtele, who acquitted the Respondent of all imputations of fraud, and dismissed the action with costs. The Appellants then carried

the case to the appeal side of the Court of Queen's Bench, where, admitting that the transfer had been made in the Respondent's books before the fire occurred, they nevertheless insisted that the charge of fraud had been proved. The Court of Queen's Bench, consisting of five judges, unanimously affirmed the decision of Mr. Justice Wurtele, and dismissed the appeal with costs.

Upon the argument of this appeal, the Appellants maintained that the charges of fraud which they prefer are borne out by the evidence. It certainly appears to their Lordships that the conduct of the Respondent, when subsequently called upon to explain the particulars of the transaction, was neither candid nor creditable, and was well-calculated to excite suspicion; but, upon the facts proved, their Lordships are unable to differ from the conclusion at which all the learned judges below have arrived.

The Appellants did not confine their argument to the issue which alone was raised before Mr. Justice Wurtele and the Court of Appeal. They argued at great length that their pleadings, taken in connection with the evidence adduced at the trial, disclose such negligence, or breach of duty, committed by the Respondent acting in the capacity of their agent, as is in law sufficient to infer his liability to them for the sum claimed in this action. On the other hand, the Respondent maintained that the new cause of action, brought forward here for the first time, was not within the Appellants' declaration, that the evidence led at the trial was not directed to it, and that it ought not to be entertained by this Board.

Upon the merits of the new question, the argument of the Respondent, shortly stated, was this:—That he had authority from Mr. King, junior, to transfer the risk from the Scottish Company to the Appellants, and that notice to

cancel the receipt of the Scottish Company was therefore unnecessary; that, according to the practice of insurance agents, a valid substitution was made by the entries of Saturday, 14th July, of the Appellants for the Scottish Company as insurers of the premises; and that the practice was in conformity with the principles recognized in *Routh v. Thompson* (13 East 274) and similar decisions. In any view, he maintained that his representations to the Appellants, to the effect that they were the insurers at the time of the fire, were made by him in good faith, and in the reasonable belief that such was the fact, derived from the general understanding and course of dealing in that part of the world. He also maintained that Mr. Hansen, according to the custom of insurance offices there, was charged with the duty of inquiring into the legal liability of the Appellants; and that the whole circumstances bearing upon that liability, as they appeared in the Respondent's books, were fully disclosed to him.

Their Lordships are of opinion that, in the circumstances of this appeal, the Appellants are not entitled to raise any issue except that of fraud. They do not question the accuracy of the general rule laid down by the Court of Exchequer in *Swinfen v. Lord Chelmsford* (5 H. and N. 890), to the effect that, when a declaration discloses a certain state of facts, the Plaintiff may recover upon the liability which the facts disclose. One material difference between that case and the present consists in the fact that the point there raised had been put forward at the trial, so that the Defendant had notice of it. *Thom v. Bigland* (8 Exchq. 725), the other authority upon which the Appellants relied, in which the Plaintiff was held to be precluded from raising any other issue than fraud in the Appeal Court, comes much nearer to the present case. Baron Parke ob-

served (8 Exchq. 730), "If the words 'falsely
'and fraudulently' can be struck out of a
"declaration so as to leave a good cause of action,
"that may be done." In this case it is of the
essence of the Appellants' declaration that the
Respondent was guilty of fraud, and that is not
proved. If the allegations of fraud and wilful
misrepresentation were expunged, it is ex-
ceedingly doubtful whether there would remain
an intelligible charge of negligence.

Their Lordships do not find it necessary to rest
their decision upon that ground. When a
question of law is raised for the first time in a
Court of last resort, upon the construction of a
document, or upon facts either admitted or proved
beyond controversy, it is not only competent but
expedient, in the interests of justice, to entertain
the plea. The expediency of adopting that course
may be doubted, when the plea cannot be disposed
of without deciding nice questions of fact, in con-
sidering which the Court of ultimate review is
placed in a much less advantageous position than
the Courts below. But their Lordships have no
hesitation in holding that the course ought not, in
any case, to be followed, unless the Court is satisfied
that the evidence upon which they are asked to
decide establishes beyond doubt that the facts, if
fully investigated, would have supported the new
plea. To accept the proof adduced by a Defendant
in order to clear himself of a charge of fraud, as
representing all the evidence which he could have
brought forward in order to rebut a charge of
negligence, might be attended with the risk of
doing injustice.

In this case, there are various points upon
which the evidence does not appear to their
Lordships to be so full and satisfactory as
it might and probably would have been, had
the question of negligence been raised at the
trial. The points touching the authority of the

Respondent to make a transfer of the risk on behalf of the assured, and the honesty of his belief in the validity of the transaction of which the Appellants complain, depend, as was shown by their argument, upon the degree of credibility to be attached to different witnesses, a matter which ought to have been submitted to the Judge before whom they were examined. There are two other points upon which light might have been thrown, had the plea of negligence been taken before him, these being (1) the ordinary course of insurance business, and (2) the position and duties of an insurance adjuster. Were their Lordships to decide upon the evidence as it stands, and the arguments addressed to them, they could only be guided by their own knowledge of the course of insurance business in this country, which the evidence shows to be so far different from that followed in the city of Montreal, as to make it unsafe to assume that conduct which might tend to show negligence in the one case would do so in the other.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal, the costs of which must be borne by the Appellants.
