

1899 THE NORWICH UNION FIRE }  
 \*Feb. 24, 27. INSURANCE COMPANY (DE- } APPELLANT;  
 \*May 30. FENDANT)..... }

AND

CHARLES LEBELL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW  
 BRUNSWICK.

*Fire insurance—Application—Ownership of property insured—Misrepresentation.*

A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known a fact material to the risk would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway.

*Held*, reversing the judgment of the Supreme Court of New Brunswick, that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are fully stated in the judgment of the court.

*Wallace Nesbitt* and *C. J. Coster* for the appellant  
 The representation that the applicant was owner of

\*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

the land was untrue, at the time the application for the insurance was made, to the personal knowledge of the applicant. He deliberately misrepresented this material fact in order to obtain the insurance, and concealed the circumstance of the building being upon the highway. The policy incorporates the application by reference and under its conditions this misrepresentation and breach of warranty avoided the insurance. We contend that a non-suit should be entered pursuant to leave reserved at the trial.

Reference is made to *Sowden v. The Standard Fire Ins. Co.* (1); *London Assurance v. Mansell* (2), at pages 368-370; *Draper v. Charter Oak Fire Ins. Co.* (3); *Billington v. The Provincial Ins. Co. of Canada* (4); and *Watkins v. Rymill* (5) with cases there collected.

*Baxter* for the respondent. There is no special condition incorporating the application as part of the policy and it is not a warranty or part of the contract. The mention of an application made in the policy does not constitute an incorporation by reference; *North British and Mercantile Ins. Co. v. McLellan* (6). The applicant had an insurable interest and made truthful statements to the company's agent who filled up the application and bound the company by his knowledge of the actual facts. The applicant did actually own the building and stock insured; *Miller v. Alliance Ins. Co.* (7). And even if he were on the highway without title, he would take a fee until dispossessed by some one; (see notes to *Nepean v. Doe* (8),); and he would be correctly described as owner. Even if the answer be treated as a warranty, it is strictly and technically fulfilled. On the other hand as a repre-

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(1) 5 Ont. App. R. 290.

(2) 11 Ch. D. 363.

(3) 2 Allen (Mass). 569.

(4) 3 Can. S. C. R. 182.

(5) 10 Q. B. D. 178.

(6) 21 Can. S. C. R. 288.

(7) 7 Fed. Rep. 649.

(8) 2 Smith's L. Cas. (10 ed.)

542; see also Hobart 323.

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sensation it was true "so far as known to the applicant." See May on Ins. (2 ed.) sec. 284. See also *Benson v. Ottawa Agricultural Ins. Co.* (1), at page 293 per Harrison C.J.; *Naughton v. Ottawa Agricultural Ins. Co.* (2); *Graham v. Ontario Mutual Ins. Co.* (3), at page 372; *Sinclair v. Canadian Mutual Fire Ins. Co.* (4); *Ashford v. Victoria Mutual Assur. Co.* (5); *Connely v. Guardian Ass. Co.* (6), at page 327, per King J.; *Hough v. City Fire Ins. Co.* (7); *Curry v. Commonwealth Ins. Co.* (8); *Stevenson v. London & Lancashire Ins. Co.* (9), per Draper C.J. at page 152; *O'Neill v. Ottawa Agricultural Ins. Co.* (10).

Treating the house as a chattel, LeBell's title to it and the rest of the personal property was that of sole owner. Williams Personal Property (10 ed.) pp. 8 and 37. *Lingley v. Queen Ins. Co.* (11).

There was evidence upon which the finding of the jury could be sustained and the court should consequently refuse to interfere.

We rely also upon the following authorities: *Bean v. Stupart* (12); *Fisher v. Crescent Ins. Co.* (13); *Standard Life & Accident Ins. Co. v. Fraser* (14); *Bawden v. The London, Edinburgh & Glasgow Assur. Co.* (15); *Porteron Ins.* p. 154, 155, 157-8, p. 159, 168, 455; *Liverpool & London & Globe Ins. Co. v. Wyld* (16); *Brogan v. Manufacturers Mut. Ins. Co.* (17).

This judgment of the court was delivered by:

SEDGEWICK J.—On the 31st August, 1896, the respondent insured his dwelling house and store,

(1) 42 U. C. Q. B. 282.

(2) 43 U. C. Q. B. 121.

(3) 14 O. R. 358.

(4) 40 U. C. Q. B. 206.

(5) 20 U. C. C. P. 434.

(6) 30 N. B. Rep. 316.

(7) 29 Conn. 10.

(8) 10 Pick. (Mass.) 535.

(9) 26 U. C. Q. B. 148.

(10) 30 U. C. C. P. 151.

(11) 1 Han. 280.

(12) 1 Doug. 11.

(13) 33 Fed. Rep. 549.

(14) 76 Fed. Rep. 705.

(15) [1892] 2 Q. B. 534.

(16) 1 Can. S. C. R. 604.

(17) 29 U. C. C. P. 414.

with the goods and stock in trade therein, with the appellant company for the sum of \$1,430. On the 24th November, 1896, the property insured was burned and the company contested the loss. The case was tried before Mr. Justice McLeod and a jury, judgment being entered for the plaintiff.

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This judgment was confirmed by the court *en banc*, Tuck C.J. and Vanwart J. dissenting.

Among the conditions indorsed on the policy were the following :

(1.) If an application, survey or plan or description of the property herein insured is referred to in this policy such application, survey, plan or description shall be considered a part of this contract and a warranty by the assured ; and if any false representations be made by the assured of the condition, situation or occupancy of the property, or if there be any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise \* \* \* then and in every such case this policy shall be void.

(4.) If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured \* \* \* it must be so represented to the society, and so expressed in the written part of this policy, otherwise the policy shall be void.

The application for insurance, by the first condition just set out made a part of the insurance contract, and a warranty, contained the following questions and answers :

Q. Are you the sole owner of the property to be insured ?—A. Yes.

Q. Are you the owner of the land on which the above described building stands ?—A. Yes.

The application, which was signed by the plaintiff in his own hand, contained at the foot the following clause :

And the said applicant declares that the foregoing is a full and true exposition of all the facts and circumstances in regard to the property to be insured, so far as the same are known to the applicant, and that the annexed diagram (if any), shows all buildings or combustible

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materials within 150 feet of the property proposed for insurance, and agrees that the whole shall form the basis of the insurance contract. If the agent of the company fills up or signs this application, he will in that case be the agent of the applicant, and not the agent of the company.

(Sgd.) CHARLES LeBELL,  
*Merchant.*

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The building was originally owned by Messrs. Ross & Company, of Quebec, who carried on large lumbering operations in the locality. They sold it to one Charles LaPoint, with the understanding that it was to be removed from the property of Ross & Company, on which it then stood. LaPoint in pursuance of this arrangement moved it, not upon any land which he himself owned or had an interest in, but upon the edge of the travelled highway adjoining the property of Ross & Company, where it remained until it was burned. LaPoint subsequently died leaving a widow and several children, the widow in the following year, 1895, marrying the assured, Charles LeBell. Evidence is produced to show that she, then Mrs. LeBell, verbally gave the house to her husband upon condition that he should stay at home and support her family. LeBell subsequently made an addition to the house and kept a small store, the goods in which together with the building forming the subject matter of the insurance in question in this case.

The only question open upon this appeal is as to whether there was such misrepresentation in the application for the insurance as would avoid the policy. The evidence upon the point is very short and is not contradicted, and the finding of the jury is in accordance with the evidence. One David McAllister was the local sub-agent of the company, the head agency for the province being in St. John, N.B. McAllister had no authority other than to receive and forward to the provincial head office any applications

for insurance which he might receive from time to time. In fact the jury found that he acted as agent for the defendants only for the purpose of receiving applications. The evidence in regard to the alleged misrepresentation on the part of the assured is substantially uncontradicted, it being that of McAllister and the plaintiff. The former testifies that LeBell made application to him for an insurance on his building and stock; that subsequently he, McAllister, went to the house taking a blank application with him, and that he read over to him all the questions contained in the application. His evidence proceeds:

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Q. With reference to the first question—can you remember the words you used in asking this question?—A. I read this to LeBell and he said he was on the highway.

Q. And to this, “Are you the sole owner of the property to be insured?—A. Yes; I read that question to him.

Q. What was the answer?—A. He said, “Yes he was.”

Q. *To the first part of the question—are you the owner of the land on which the above described building stands. Did you read that to him?—A. Yes.*

Q. What reply did he make to you?—A. He said he was on the highway.

Q. Did you make any reply to that?—A. Yes.

Q. What?—A. I told him “I will put you down in the application that the ground belongs to you.”

Q. And then you wrote this word “yes” in there?—A. Yes.

From this evidence it would clearly appear that both McAllister and the plaintiff had a clear idea of the fact that the latter was not the owner of the land on which the building stood, but that it was on the highway, and that they deliberately, for what object does not expressly appear, agreed in answering the question incorrectly. The plaintiff's evidence substantially agrees with that of McAllister.

I asked McAllister (he swears), if he was an insurance agent. He told me he was, and I told him I would like to be insured, and he told me he would come up some day, so a few days afterwards he came to my place, and he asked me about the size of my building,

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and I measured it right before him, and I gave him the size, and he came into the store and he asked what was the stock, and I told him I thought I had \$1,000 or \$1,500, to the best of my knowledge. That is, \$1,000 at cost.

Q. And when you say \$1,500 you mean selling price?—A. Yes; he looked over it and thought it was all right, and he asked me about who owned the land where the building stood, and I told him it was on the public highway, and he said we will call it your own, and I said it was all right, and that was all said about it.

Mr. Justice McLeod in his judgment upon appeal gives this account of it:

When he, the plaintiff, made his application to McAllister, in answer to the question in the application, "Are you the owner of the land on which the above described building stands?" he told McAllister that he was not, that the building stood on the highway. McAllister told him that the proper answer to that was "Yes," and therefore in the application the answer was put down "Yes."

The application after it was filled up and signed was sent by McAllister to the head office and the policy sued on was eventually returned.

I am clearly of opinion that the statement made by the assured in answer to the question as to ownership of the land upon which the building was erected was a misrepresentation sufficient to avoid the policy. He was not, it would seem, an illiterate man; he knew perfectly well what he was saying and doing, and irrespective of McAllister altogether, he knew that he was putting his name to a false statement in regard to the ownership of the land. It is not necessary to inquire minutely as to what his object might be, but it seems patent that both he and the sub-agent must have had a strong suspicion that had the principal officers of the company known that the house to be insured was within the limits of the public highway, not indeed upon the roadway itself but within the fences and boundaries defining it from the adjoining land, they would have refused the risk. So that it was alike the interest of the sub-agent as well as of

the plaintiff to make the misstatement. Neither has attempted in his evidence to make any explanation of the motives or objects they had in view prompting them to the extraordinary course they took, and to my mind the object I have suggested is the only one at all probable. It is clear to me they both participated with a view to their common benefit in misrepresenting the true facts upon a point most material to the company in determining upon the risk and the plaintiff must therefore bear the necessary consequences which such conduct involves.

It does not, therefore, appear to be necessary to discuss the effect of that clause in the application which purports to make the agent where he fills up the blanks in the application the agent of the assured instead of the agent of the company. Being in collusion for the purpose of perpetrating a fraud upon the company for their joint benefit neither of them can contend that McAllister was the company's agent for that purpose.

At the argument before us it was strongly contended that the application was not made part of the policy. But the answer to this contention is that the application is referred to in the policy more than once and the first condition of the policy makes the application if referred to in the policy a part of the contract as well as a warranty of the assured.

We are therefore of opinion that the appeal should be allowed, and that a non-suit should be entered pursuant to the leave reserved at the trial; the whole with costs.

*Appeal allowed with costs.*

Solicitor for the appellant : *C. J. Coster.*

Solicitor for the respondent : *J. B. M. Baxter.*

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