THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.. } APPELLANTS;

AND

FREDERICK WYLD AND HENRY WILLIAM DARLING............... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Interim Receipt—Description of premises in policy —Authority of Agent—Costs.

On the 9th of August, 1871, the Plaintiffs (Respondents) applied to the Defendants (Appellants) through their agent H., at Hamilton, for an insurance on goods to the amount of $6,000 contained in a store on the south side of King street, described in the application as no. 272 in Defendant's special tariff book, and marked no. 1 on a diagram endorsed in pencil by the Secretary of the Company at Montreal; the diagram being a copy of a diagram on a previous application for policy by insured. The premium was fixed at 62½ cts. on the $100, and was paid on the 10th of August. On the said 10th of August the Plaintiffs gave a written notice to H. that they had added two flats next door to their former premises (which would form part of no. 273 in Defendants' special tariff book), and that part of their stock was then in these new flats. A few days later, H. inspected the building, and said the rate would have to be increased in consequence of the cuttings. On the 29th of August, H. notified Defendants of the opening into the adjoining building, but did not communicate the written notice in its entirety. An increased rate, making it one per cent., was fixed, and paid by the 23rd of September, the agent issuing an interim receipt, dated back the 9th of August for the full premium. The policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application of the 9th of August, and referring to the diagram endorsed on the application of the insured, S. T., 272. On the policy there was an N. B. in reference to "an opening in the east end gable of the premises, through which communication is had with the adjoining house occupied by one O——."

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

The policy was handed to the Plaintiffs in September, 1871, and the loss by fire occurred in March, 1872.

The Plaintiffs brought an action in the Court of Queen's Bench on the policy, but failed on the express ground that the description therein did not extend to or cover goods which were in the added flats. Thereupon the Plaintiffs filed their bill to reform the policy or restrain the Defendants from pleading in the action at law that the policy covered only goods contained in S. T., no. 272.

Held:—That the true construction of the application, written notice and interim receipt, read together, established a contract of insurance between the Plaintiffs and the Defendants, embracing the goods situated in the flats added by Plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, Plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats.

(Henry, J., dissenting; and Ritchie and Fournier, J.J., dissenting also, but only on the ground that the evidence did not, in their opinion, establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt and agreement were confined to the goods in the premises, S. T., no. 272.)

As to Costs:—The Judges of the Supreme Court being equally divided in opinion, and the decision of the Court below affirmed, the successful party was refused the costs of the appeal.

But (*Per* the Chief Justice) By 38 Vic. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the Judges.

This was an appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a decree of the Court of Chancery in this cause, which declared that "the contract of insurance between the Plaintiffs and the Defendants embraced the goods situated on the flats, added by the Plaintiffs to the building, no. 272,

S. T., in the Bill mentioned, and that the policy in the pleadings mentioned should be reformed, so as to make the same conform to this declaration." It was referred to the master to take an account of the loss of the Plaintiffs in respect of goods situated on the said flats, and to tax the Plaintiffs their costs.

It appeared that the Defendants' agent at Hamilton, through whom the insurance was effected, was one Frederick L. Hooper, and the Chief Agent in Canada was one George F. Smith, resident in Montreal.

The first application for insurance was made in July, 1871. The receipt given for the premium was cancelled because the rate was too low.

On the 9th August, 1871, another application was made for insurance to the amount of $6,000 on the stock of dry goods contained in a stone building, covered with S. & M., marked no. 1 on diagram and owned by one Irvine. To question seven, contained in the application, enquiring as to distance from other buildings, the answer was "see diagram on policy, 1,377,249, expired." The letters S. T. 272, referred to that number in a book which Defendants had relating to buildings in Hamilton called the Special Tariff Book.

The premium was $37.50 and was paid by cheque dated 10th August.

On the 10th August, 1871, the Plaintiffs gave a written notice to Hooper that they had added two flats over Mr. William's store, next door to the former premises, and that part of their stock was then in these new flats. Hooper a few days after inspected the premises, found that large doorways had been cut in the second and third flats between the original premises, and that part of the Plaintiffs' stock of goods was in these flats. The added flats were in the house, no. 273,

in the special tariff book. Hooper told the Plaintiffs the rate would have to be increased in consequence of these cuttings. On the 29th of August, Hooper wrote to Smith in Montreal, informing him that Plaintiffs had cut an opening into the building adjoining on the east side, formerly occupied by Williams' Canada Oil Company and that the lower portion of that building was then occupied by one Onyon as a coal oil store. He also informed him that he had inspected premises, and he had notified the Plaintiffs their rate would have to be increased at least to one per cent. He added: "The Royal and Hartford have agreed to the same. Will "you please let me know if you will accept the risk at "that figure? The British America have a risk on Mr. "Onyon's stock at 1 per cent."

Before this letter, dated on the 23rd September, 1871, Hooper had received from the Plaintiffs $22.50, which with the $37.50 paid on the 9th of August, made $60, viz.: 1 per cent. on the $6,000, for which Plaintiffs wished their stock insured. And, on the same 23rd September, Hooper gave them an interim receipt, dated 9th August, for the $60, for insuring the $6,000 on the stock for one year from that date. If assurance was approved of, a policy would be delivered, or, if declined, the amount received would be refunded, less the premium for the time so insured.

The Plaintiffs afterwards received from Hooper a policy of insurance "on their stock of goods, &c., con- "tained in a building owned by one Irvine and occu- "pied by insured as a dry goods store, on the south "side of King Street, Hamilton, built of stone, covered "with shingles laid in mortar, and marked no 1 on a "diagram of premises endorsed on application of in- "sured, filed in this office, no. 10,995, which is their

"warranty, and made part hereof, S. T., no. 272, six "thousand dollars.

"N.B.—There is an opening in the east end gable of "above, through which communication is had with "the adjoining house, which is occupied by one Onyon "as a coal oil store. Not more than two barrels of re- "fined coal oil permitted in said store, but 10 barrels of "the same are allowed to be kept in the yard."

The policy bore date the 9th August, 1871.

A fire took place on the 11th March, 1872, originating in the coal oil store occupied by Onyon, occasioning a loss to the Plaintiffs' stock in trade of several thousand dollars, the goods damaged and destroyed being partly in the store first occupied by the Plaintiffs and partly in the two added flats. The Defendants refused to pay for the loss sustained on goods in the latter portion.

The Plaintiffs then brought an action in the Court of Queen's Bench on the policy above referred to, but failed on the express ground that the description therein did not extend to or cover goods which were in the adjoining flats, which had been added when the extra premium was paid, and that the Plaintiffs suing upon the policy were bound by the description contained in it (1).

Thereupon the Plaintiffs filed the Bill in this case. The prayer of the Bill was that the policy so issued and dated the 9th of August, 1871, might be amended by inserting therein appropriate words, shewing that it was intended to and did cover the goods in the two upper flats of no. 273, and that the defendants might be restrained from pleading at law that the policy covered only the goods contained in no. 272, and that

(1) 33 U. C. Q. B., 284.

they might be ordered to strike out the pleas raising such defence.

The cause was carried down for hearing at the sittings of the Court at Hamilton in the spring of 1874, and *Blake*, V. C., declared the Plaintiffs were entitled to a decree against the Defendants, with costs (1).

The cause was then re-heard before the full Court during the December sitting, and the decree was affirmed with costs (2).

From that decision the Defendants appealed to the Court of Appeal for Ontario, and that Court dismissed the appeal with costs (3).

The Defendants thereupon carried the case to the Supreme Court.

JANUARY, 23rd, 24th AND 25th, 1877.

Mr. *James Bethune*, Q. C., and Mr. *Alexander Bruce*, for the Appellants:

The Court of Queen's Bench have properly held by their judgment in the suit between these parties (reported 33 U. C. Q. B. 284), that only the goods in the westerly building, described as S. T. 272, were insured under the terms of the policy issued by the Appellants; and the Respondents, by coming into a Court of Equity seeking to have the terms of that policy altered, admit that the Court of Queen's Bench were correct in so holding. The Respondents cannot complain of the judgment in the Queen's Bench, for they never appealed from it.

There is thus an instrument, solemnly executed by the Appellants as their contract with the Respondents, delivered to the Respondents in the month of September,

(1) 21 Grant, 458; (2) 23 Grant, 442; (3) 23 Grant, 442.

1871, and so accepted by them and retained without question until after a fire takes place in the month of March, 1872. The Respondents do not even then question that this policy contains their contract with the Appellants; but, on the contrary, relying on it as evidencing their contract, they bring an action upon it, and it is not until they find that the construction of the policy by the Court of Queen's Bench is contrary to their contention, that they come forward and say that the policy does not truly state their contract.

After such conduct on the part of the Respondents, it should require a case and evidence of the most conclusive character to warrant a Court in interfering, and the Appellants contend that the Respondents have failed to make out such a case, and that their evidence falls short of what is necessary to entitle them to the relief they seek for.

The insurance effected by the interim receipt was superseded by the issuing of the policy.

The Respondents are not seeking to enforce the contract of insurance as expressed by the policy granted to and accepted by them; but, on the contrary, are seeking to vary the same, and the onus is on them to establish this right by the most clear and incontestible evidence.

Now, it is clear, upon the evidence, that it was not within the scope of Hooper's authority for him to enter into an absolute binding contract of insurance with the Respondents, but his powers were limited both as to extent and duration. He could only grant an insurance for a limited period of time, by issuing an interim receipt, showing on its face that it was to be superseded by a policy, and that the issuing of such policy was a matter which had to be determined by the approval of

the Board of Directors at Montreal. When the Board at Montreal acted, by issuing a policy, all that Hooper had done or could do was superseded :—*Davis* v. *Scottish Provincial Insurance Company* (1).

The increased rate of 62½ cents per $100 paid by Respondents, was for the increased risk in consequence of *the opening into the building adjoining on the east side.*

The Company at their office in Montreal had certainly no notice of any desire or intention on the part of the Respondents to have the portion of their goods in the easterly building S. T. 273 covered by Appellants' policy, and it is equally clear that the Appellants had no intention to insure such goods. This is clear from the language used in framing the policy, which is such as to convey an intimation to the Respondents that only the goods in S. T. 272 are intended to be insured by the Appellants, and is borne out by Mr. Smith's evidence ; and the policy has a notice, prominently endorsed thereon, particularly requesting the insured to read his policy and to return the same immediately if any alteration was necessary. *Linford* v. *Provincial Horse and Cattle Insurance Company* (2) ; *Graves v. Boston Marine Fire Insurance Company* (3).

Solins v. *Rutjer's Fire Insurance Company* (4) ; *Ryan* v. *World Mutual Life Insurance Company* (5).

The most that can be said is, that the evidence does not establish more than this, that the terms of the policy are not in accordance with the wishes and intentions of the Respondents, but this is not sufficient to vary or alter a written document. The mistake must

(1) 16 U. C., C. P., 185 ; (2) 10 Jur., N. S., 1066 ; (3) 2 Cranch, Supreme Court, 225 ; (4) 8 Bosworth's N. Y. R. 578 ; (5) 4 Bigelow, 627.

be *mutual*, in order to correct a written instrument; or, to put it in another way, there was no concensus to any thing different from what was contained in the policy:—

Fowler v. *Scottish Equitable Insurance Company* (1); *Davega* vs. *Crescent Mut. Ins. Co. of New Orleans* (2).

The evidence to entitle them to a change in the policy must be very strong, for they must not only establish that the policy does not contain the contract intended, but must go further and make out that the Appellants entered into a contract different from that contained in the policy, and in the terms contended for by the respondents And, as the happening of the fire has altered the position of the parties, so that they cannot be placed as they should be according to the Respondents contention there is the stronger reason for not interfering with the contract entered into by the Appellants.

Cox v. *Ætna Insurance Company* (3); *Powell* v. *Smith* (4); *Bleakely* v. *Niagara District Mutual Fire Insurance Company* (5); *Lyman* v. *United States Insurance Company* (6); *Andrews* v. *Essex Fire and Marine Insurance Company* (7).

Moreover, by the terms of the interim receipt, the insurance so effected was partly in the nature of an application for insurance, and was only to be binding upon the Appellants until they had an opportunity of accepting the same by the issue of a policy on the terms of such application, or of declining it. The Respondents were bound to the exercise of reasonable care and caution in ascertaining that the policy was issued in accordance with such application and their intention-- and a policy having been issued by the Appellants in

(1) 4 Jur., N. S., 1169; (2) 7 Louisiana, 228; (3) 29 Indiana 72; (4) L. R. 14 Eq., 90; (5) 16 Grant, 204; (6) 2 Johnson, C. C. 632; (7) 3 Mason, 6.

good faith, and in accordance with their understanding of the application, and in terms free from ambiguity—such policy became and was in fact the the only contract of insurance, and it was incumbent on the Respondents to see if it was in accordance with their wishes—and the fire having occurred many months after the delivery of such policy to the Respondents, and after their acceptance of it as representing the true contract between them, they are precluded, after the happening of the loss, and when the Appellants cannot be placed in *statu quo*, by the rules prevailing in a Court of Equity, from any relief.

This is very different from the case of a policy issued in the form desired by the insured and the Company afterwards resisting payment on the ground that their agent had failed to communicate some of the facts to them. In such a case the insured were naturally content with holding a policy which expressed what they desired; but here the policy contained a different contract from what the insured say they intended, and the insured should not have been satisfied with it, but on its receipt, should at once have said to the Company " this is not the insurance we intended to effect," when both parties might have come to a proper understanding; instead of which, by holding the policy without any question or objection, they give the Company to believe that it expresses truly the contract intended.

Atlantic Insurance Co. v. *Wright* (1); *Columbia Insurance Company* v. *Cooper* (2).

It must also be borne in mind that in this case the policy was issued by the Appellants at Montreal, and could be only so issued, and that Hooper had not that extensive power which some local agents have

(1) 22 Illinois, 462; (2) 50 Penn., 331.

who are authorized to fill up and issue policies ; and it will be found that in many of the American cases where Companies have been held liable on their policies, or where policies have been reformed, it has been because the policies were issued by an agent who had these extensive powers, and who combined, as it were, the powers possessed in this case by both Mr. Hooper and Mr. Smith.

Woodbury Savings Bank v. *Charter Oak Insurance Company* (1) ; *Peck* v. *New London Mutual Insurance Company* (2).

All the cases cited by *Blake*, V.C., are cases where the agent had power to issue policies. The agent here was not a party to the contract, and his mistake cannot bind the Company.

The learned counsel also referred to the following authorities :

Patterson v. *Royal Insurance Company* (3); *MacKenzie* v. *Coulson* (4) ; *Acey* v. *Fernie* (5) ; *Hendrickson* v. *Queen Insurance Company* (6) ; *Henkle* v. *The Royal Insurance Co.* (7) ; *Rolland* v. *The North British & Mercantile Insurance Company* (8) ; *Motteaux* v. *The London Assurance Co.* (9).

Mr. *Edward Martin*, Q. C., for Respondents :

The evidence shews that Hooper was the Defendants' agent at Hamilton, authorized amongst other things to accept risks for the Defendants, receive the premiums therefor and issue interim receipts in the form set out in the bill, which are binding contracts of insurance ; to receive notice of changes or alterations

(1) 31 Conn., 517 ; (2) 22 Conn., 575 ; (3) 14 Grant, 169 ; (4) L. R. 8 Eq., 368 ; (5) 7 M. & W., 151 ; (6) 30 U. C., Q. B., 108 ; (7) 1 Ves., sen., 317 ; (8) 14 L. C. Jur., 69 ; (9) 1 Atkyns, 547.

in the application for insurance, or in the risk, receive extra premiums therefor, bind the Defendants by his assent thereto before the issue of the policy; that he was the proper person to receive the notice, dated 10th August, 1871, and to assent thereto, and receive the extra premium therefor, paid on 23rd September, 1871, when the second receipt ante-dated 9th August, 1871, was given, and that, in fact, the Defendants did, by a binding contract prior to the issue of the policy, insure the goods in both the original store "272" and the added flats, as stated in the bill.

The interim receipts granted by Hooper, including the one given to the Plaintiffs, were "subject to the "approval of the Board of Directors, Montreal; the said "party to be considered as insured until the determi-"nation of the said Board of Directors be notified; if "approved of, a policy receipt and afterwards a policy "will be delivered; or, if declined, the amount received "will be refunded, less the premium for time so in-"sured."

The Directors never declined the insurance on the goods in the original premises and added flats, effected through Hooper, nor was the premium ever refunded.

The Directors afterwards issuing a policy, it was an acceptance on their part of the contract entered into by their agent, and Respondents are entitled to a policy in accordance with the terms of the interim receipt.

Until then the Defendants are bound by the interim contract made by Hooper, who was the proper officer to receive the original application for insurance, and the notification of 10th August, 1871, which, together, constituted the application, and to act thereon, as proved by demanding and receiving the extra premium for insuring the whole stock in both the original shop and

added flats, and giving the interim receipt therefor. *English & Foreign Credit Co.* v. *Arduin* (1).

The fact that the Company were bound by the interim receipt distinguishes this case from *Fowler* v. *Scottish Equitable* (2), and that class of cases where the agents of the Company had merely authority to receive and submit applications for insurance, but had no authority to bind the Company to any contract of insurance.

The acts, notice and knowledge of Hooper, who admits that he always thought he was insuring the whole stock, are to be treated as the acts, notice and knowledge of the Defendants, and the contract so made through Hooper was never put an end to by the Defendants; but, on the contrary, the acts and conduct of the Defendants confirmed the contract made by Hooper, and the Defendants are bound and estopped by the acts and conduct of Hooper.

Wing v. *Harvey* (3), is a case in point. Also *Patterson* v. *Royal Insurance Co.* (4).

The learned counsel on this point referred also to *Wyld* v. *L., L. & G.* (5); *Penley* v. *Beacon* (6); *Rossiter* v. *Trafalgar Ins. Co.* (7); *Davis* v. *Scottish Prov. Ins.* (8); *Re Universal non-Tariff Co.* (9); *Columbia Ins. Co.* v. *Cooper* (10); *Ellison* v. *Albany Ins. Co.* (11); *Meadowcroft* v. *Standard Ins. Co.* (12); *Phillips* on Insurance (13); *Pimm* v. *Lewis* (14); *Smith* v. *Hughes* (15); as to receiving evidence of what is the subject matter mentioned in the contract—*Macdonald* v. *Longbottom* (16); *Newell* v. *Radford* (17); *Joindes* v. *Pacific Ins. Co.* (18);

(1) L. R. 5 H. L., 64; (2) 4 Jur., N. S., 1169; S. C. 28. L. J. Chy., 225; (3) 18 Jur., 394; S. C. 5 DeG. M. & G., 264; (4) 14 Grant, 169; (5) 33 U. C., Q. B., 284; (6) 7 Grant, 130; (7) 27 Beav., 377; (8) 16 U. C. C. P., 176; (9) L. R. 19, Eq., 500; (10) 50 Penn., 331; (11) 4 Lansing, 433; (12) 61 Penn., 91; (13) vol. 1 p. 222, Ed. of 1867; (14) 2 F. & F., 778; (15) L. R. 6, Q. B., 607; (16) 1 E. & E., 977; (17) L. R. 3, C. P., 54; (18) L. R. 6 Q. B. 674; S. C. L. R. 7 Q. B., 517.

and the cases cited in the judgment in Chancery and in the Court of Appeal. *Brown* v. *British American Insurance Company* (1); *Campbell* v. *National* (2); *Redford* v. *Mutual Insurance Company* (3); *Montreal Assurance Company* v. *McGillivray* (4); *Johnson* v. *Provincial Insurance Company* (5).

The notice to Hooper was in effect the same thing as a notice to the Company and Respondents cannot be made responsible for the neglect or mistake of Hooper, while acting within the scope of his authority, nor for any neglect, error, or omission of Hooper in forwarding or communicating any documents, notices or information to the defendants, or any of their agents, or otherwise; nor for the neglect of any officer of the Company in conveying information to Hooper, or to the Plaintiffs or otherwise. The Defendants are therefore estopped on the facts proved from denying that the Plaintiffs were insured on the whole of their stock, both in original building and added flats.

Laidlaw v. *London and Liverpool and Globe Ins. Co.* (6); *Rowe* v. *Lancashire* (7); *Ross* v. *Commercial Union Ins. Co.* (8); *Gale* v. *Lewis* (9); *Marsden* v. *City Plate Glass Co.* (10); *Hough* v. *City Ins. Co.* (11).

The Appellants knew that the stock was partly in no. 272 and partly in 273, and still they kept the money which was intended to insure the whole stock which interim receipt covered. Then, if the policy differs from the actual agreement, equity will decree relief on the agreement and not on the policy, and this after happening of the loss insured against.

(1) 25 U. C. C. P., 517; (2) 24 U. C. C. P., 133; (3) 38 U. C. Q. B., 538; (4) 13 Moore P. C., 121; (5) 26 U. C. C. P., 113; (6) 13 Grant, 377; (7) 12 Grant, 311; (8) 26 U. C. Q. B., 559; (9) 9 U. C. Q. B., 730; (10) L. R. 1 C. P., 232; (11) 29 Conn., 10.

Collett v. *Morrison* (1); *Jones* v. *Provincial Insurance Company* (2); *Franklin Fire Insurance Company* v. *Hewett* (3).

It cannot either be argued that the Respondents ever agreed to accept a policy on stock in the original building alone. If the agent had thought the additional premium was only for increased danger, he would have given a receipt to that effect as did the Royal, and not a renewal receipt, thinking it a new insurance. In point of fact, the Appellants contend that they had a right to accept the whole risk; to take the premium and retain it, and yet to so frame their policy as to escape liability. Now the policy, not being in accordance with the previous actual agreement between the parties, it could not supersede the interim receipt.

Earl Beauchamp v. *Winn* (4); *Xenos* v. *Wickham* (5); *Cooper* v. *Phibbs* (6).

As to the power to reform a policy after the loss, the learned counsel referred to *Phœnix Ins. Co.* v. *Gurnee* (7); *Phœnix Ins. Co.* v. *Hoffeums* (8); *Manhattan Ins. Co.* v. *Webster* (9); *Philips on Insurance* (10); *Collett* v. *Morrison* (11).

And as to the effect to be given to the finding on the facts by the Judge who heard the evidence and tried this cause in the first instance, to "*The Alice*" (12).

Mr. *Bethune*, Q. C., in reply:—

The meaning of the interim receipt is that the party is insured until another contract is agreed upon. The Company could not have returned the premium, for Mr.

(1) 9 Hare 173 (see page 175); (2) 16 U. C., Q. B., 477; (3) 3 B. Monroe, 231; (4) L. R. 6, H. L., 324; (5) L. R. 2, H. L., 296 & 324; (6) L. R. 2, H. L., 170; (7) 1 Paige's N. Y. C. R., 278; (8) 46 Miss., 655; (9) 59 Penn., 227; (10) 5th edition, p. 71 and 72, ss. 116 & 117; (11) 9 Hare, 173; (12) L. R. 2, P. C., 245.

Smith knew nothing more than that the risk had been increased in consequence of the cutting. The language used in the *N. B.* on the policy is clear and positive, and yet the Respondents keep the policy for six months; and it is only after the loss and after an action on the policy has been decided against them that they come and ask to have the policy reformed. The mere misinterpretation cannot affect this matter unless the Court is satisfied that the mistake is *mutual.*

June 28th, 1877.

The CHIEF JUSTICE:

The first question to be considered is, whether Hooper, the Defendants' agent, had authority to bind the Company by granting interim receipts on taking risks for them, and as to alterations made requiring additional premiums on the substitution of one policy or interim receipt for another. Mr. Smith, the Defendants' secretary and chief agent in Canada, said: "Hooper's duties were to receive proposals or applications for insurance and give interim receipts subject to confirmation by the Montreal office; if not confirmed by that office, the risk was to be cancelled and the premium returned less the amount earned by the Company. His duty was to receive notices of changes in the risk; to inform the Montreal office of them; and his action in these matters was subject to the approval of the head office. On cross-examination, he said changes in the character of the risk take place frequently during the course of the risk, and changes in the stock and its location; and, in these cases, the local agent has the same power

as in the acceptance of a risk in the first instance. If what he does is not approved of, the Company returns the premium less the amount earned. The agent has the same power to make alterations or modifications of an insurance, as he has to make an original insurance. In all cases the agent has a power subject to the control of the head office. The agent has this power of modification, pending the issue of the policy, and Plaintiffs were certainly insured up to the 23rd September. It was within his power to assent to the continuance of this insurance, notwithstanding the change notified by the letter of the 10th of August. He did not make us aware of the fact that a part of the property insured was moved; it was his duty to have done so, &c." * * *

"If Mr. Hooper had insured deliberately the goods "in these buildings, as one risk, it would have been "binding as long as this receipt was in force ; that is, "until the receipt is cancelled in some way or other "the risk is binding, nothwithstanding it is in violation "of our standing rule as to splitting up the risks."

Mr. Ball, Defendants' agent and inspector, stated that he placed Hooper in charge as agent at Hamilton, and gave him instructions as to his powers and duties.

That Mr. Smith had stated the powers and duties of Hooper, as he (Ball) informed him they were at the time he gave him his instructions.

In addition to this, if the fact be, as is not denied, that Hooper was the Defendants' agent to solicit and receive insurances, and to take the monies therefor, and grant interim receipts, which, on the face, shewed the party paying the money was to be considered insured until the determination of the board was notified, there are decided cases, both in England and in the United States,

which shew that the acts of such an agent, relating to the taking or changing of risks before the issue of a policy, would be binding on the Company.

In what position did the Plaintiffs and Defendants stand in relation to the insurance on the stock of goods owned by the Plaintiffs, which were contained in the premises on King Street, in the town of Hamilton, on the 24th September, 1872, and before the issue of the policy granted to Defendants, bearing date 9th day of August, 1871 ?

The application signed by Plaintiffs, per J. J. Jermyn, is dated the 9th August, 1871, and is for insurance against loss or damage by fire by Defendants' Company on the usual terms and conditions of the Company's policy, in the sum of $6,000 for the term of one year, commencing the 9th day of August, 1871, at noon, on the property specified, to wit: on their stock of dry goods, chiefly clothes and tailor's furnishings contained in a stone building covered S. & M., marked No. 1 on diagram, and owned by Irvine. Amount insured, $6,000 ; rate, 62½c. ; amount of premium, 37.50 ; S. T. No. 272. On the same day, 9th of August, Hooper, in a letter addressed to Plaintiffs, certified that he had received the $37.50 premium for insuring that stock for $6,000 for a year in S. T. 272, and stated that if at the expiration of four months they wished to cancel the policy they might do so, and he would refund the money for the unearned period. The cheque for the premium of $37.50, payable to Hooper, appears to be dated the 10th of August. Whether this date is erroneous or not is, perhaps, of little consequence. On that very day (the 10th of August) Plaintiffs wrote Hooper as follows: "We beg to advise you that we "have added two flats over Mr. Williams' store, next

" door, to our former premises, and *that part of our stock* "*is now* in these new flats." What is the proper effect to give to this notice. It was given within twenty-four hours of the date of the application ; had reference to the same goods and the same premises ; and it was well known, both to Plaintiffs and Defendants' agent, that no policy at that time had been issued on the application. The interim receipt only had been given. The reasonable view to take was, that the Company would, as to the policy they were about to issue, make it to cover the goods as the premises were when the last notice was given on the 10th August. If the Company required a payment of increased premium, such increase would be for the whole year. It would not occur to any one that the premium for 364 days would be at one rate, and for one solitary day at another and less rate. It seems to me to be absurd to suppose that either Plaintiffs or Hooper thought, that after the letter of the 10th of August, they were to treat the matter in any other way than as virtually a new application for insurance on their goods in the premises as they were on that day. Combining, then, the letter of the 10th of August with the application of the 9th, it would read as follows : Application for insurance against loss or damage by fire, on the usual terms and conditions of the Company's policy, in the sum of $6,000 for the term of one year, commencing on the 9th day of August, 1871, at noon, on their property specified, to wit : On their stock of dry goods, chiefly of cloths and tailors' furnishings, contained in a stone building, and the two flats over Mr. Williams' store added thereto as part of these premises, which stone building is covered with S. in M., marked no. 1 on diagram, owned by Irvine.

It ought to be so read, for this was the true state of

the matter, and it had been so notified to Defendants' agent, who had examined the premises. The delay that arose from giving the new receipt was occasioned by the Hamilton agent wishing to learn at what rate the Montreal office would take the risk as changed. In one of his letters, that of 2nd September, he refers to the Hartford having risks of $5,000, Ætna $10,000, Lancashire $10,000, and Scottish Imperial $10,000, at 1 per cent. on the premises ; at this rate the matter was closed and a new receipt given. It was given on the 23rd of September, though ante-dated. The object of that date being put there by Hooper evidently was that the Company should receive compensation for the time the insurance had been running. It could not have been to confine the Plaintiffs to the description of the premises contained in the application of the 9th August, because they all then knew that a change had taken place. But what is now contended for by the Defendants is that the insurance should be confined to the building marked no. 1, because the application of the 9th August so asks for it. It is admitted that if that application had stated in express terms "We wish insurance on all our "stock contained in the building, marked No. 1 on the "diagram, and the two flats added to our premises," and Mr. Hooper had given a receipt for the premium, based on such an express application, that it would have bound the Company, though their general rule, as they said, was to consider property so situated as being in two or more buildings, and the value to be insured on each should be separately stated ; but the application, modified by the notice of the 10th, does, in effect, ask for the insurance on the whole stock as it was then situated.

Without going beyond the general rule laid down

for the interpretation of agreements between merchants, and men engaged in the every day business of life, I think the proper inference to draw from the letter of the 10th of August, to Mr. Hooper, is that they desired the insurance to continue on their stock in the whole of their premises as they were after the two flats were added to their former premises (the building marked No. 1 on the diagram).

They not only inform him, that they have taken in the two flats, but *that part of their stock was* in those *new* flats.

If the object had been merely to notify the Company of the change that had been made, and to submit whether they should pay additional insurance on that part of the stock in the building marked No. 1 on the diagram, there would have been no necessity of referring to the fact that "*part of their stock was then in the new flats.*"

Suppose the receipt given by Hooper had been dated the 23rd September, the day it was actually made out and signed, and it had been filled up to read:

"Received from Messrs. Wyld and Darling, the sum "of sixty dollars, being the premium of an insurance to "the extent of $6,000 on their stock, consisting chiefly "of cloths and tailors' trimmings, all contained in a "stone building on south side of King Street, Hamilton, "as described in agency order of the 9th of August" (the effect of a description in the agency order, after the notice of the 10th of August, being to include the two flats referred to) "for twelve months *from that date*, "subject to the approval of the Board of Directors, Mont-"real, the said party to be considered insured until the "determination of the said Board of Directors be notified; "if approved of, a policy receipt, and afterwards a

"policy will be delivered, or, if declined, the amount
"received will be refunded, less the premium for the
"time so insured.

"*N.B.*—This receipt is issued subject to all the conditions of the policy issued by the Company.

"(Signed,) F. L. Hooper,
"Agent."

If after the granting of this receipt, and before any other was issued, or a policy granted, a fire had occurred, I cannot doubt that Defendants would have been liable to make good their proportion of any loss on the Plaintiffs'. stock of goods, whether situated in the two flats or in the other portion of the building, used by them as a dry goods store.

The insurance is on their stock of goods, not on a part of it. There is nothing to shew that at the time the money was paid, or the receipt given, that any of the parties contemplated such an alternative as insuring part of the stock in one part of the premises, and part in another. The probability is, that when Hooper thought he was insuring their stock, it did not occur to him that the Company might consider it in the nature of two risks, and to confine the amount they insured to a particular part of the premises, and so he gave the receipt without so limiting the insurance.

After a good deal of vacillation in his evidence, this seems to me to be the proper deduction from it.

He says: "it never crossed my mind as to the effect "of the change on the goods moved into these two flats; "* * * * the original insurance had been in respect "of the whole stock; it did not occur to me to divide "the risk; if it had, I should have asked that the risk "should be divided; * * * * I swear I did not know "that by this letter the Plaintiffs wanted me *to cover*

" *these* removed goods; I do not now know what they "intended; I conjecture they intended me to cover "these goods by this insurance; I entertained this "conjecture shortly after the fire."

Further on in his examination, he said, if he had stated before the fire that he always considered the stock in both buildings covered by the insurance, it would have been true.

"I could truly have made this statement; I certainly "thought all the goods were insured; I told Mr. "Ball the same thing; * * * I always "thought I was insuring the whole stock; I "thought all the other companies, to which I have "referred, were placed in the same position, so far as "the goods covered were concerned; I thought all the "companies were covering the stock in both build-"ings."

On being recalled he said he thought he told Darling, after the fire that he always considered the stock in both buildings was insured, and that he so intended it.

If it had been the intention of Hooper to receive the additional premium of $22.50, merely to cover the increased risk on a then subsisting insurance, which it was intended to confine to one building, the proper course, as a business man, for him to pursue, was to have given the receipt for that sum, stating what it was for. But the taking up of the first receipt and giving a new one for the full amount, referring to their stock of goods, after he was notified of the adding of the two flats, and a portion of the stock being there, looks like the effecting of an insurance on the premises in the state they then were in, as the other companies did who charged the same rate of one per cent.

If Hooper himself were the insurer, I should say there could be no doubt that he would be liable as for an insurance on the whole stock, up to the time the policy was issued. I think it is satisfactorily shewn that Hooper had the fullest power to bind the Company with regard to all preliminary matters connected with the effecting of an insurance, until what he did was disapproved or affirmed by the company.

Looking at the written application and the notice of the 10th of August as to the alterations in the premises and the payment of the additional premium, making the rate on Plaintiffs' stock one per cent.; the giving up of the old receipt and the granting the new one on the 23rd September, though dated 9th August, I think the insurance under this receipt did cover the Plaintiffs' stock in the whole of the premises, and was not confined to the part of the stock that was not in the flats that had been added.

When, in addition to these written documents, Mr. Hooper himself admits that he considered he was insuring the whole of the stock in both buildings, I am relieved from the feeling that he might possibly have misapprehended the effect of the application and notice, and of the receipt he was signing.

It does not appear that Mr. Smith understood so clearly what was intended, though he seems to have had a lively apprehension of it when he came to prepare the policy. But if Hooper had done his duty, and sent forward the notice to him that part of the stock had been removed into the added flats, I cannot doubt he would have had a clear understanding of what was meant. This omission of Hooper, however, is not a matter of much consequence when considering the construction that should be given to the receipt he signed

on the 23rd September, and certainly it should not prejudice the Plaintiffs. It may have had the effect of inducing Mr. Smith to make out a policy granting an insurance different from that which had been agreed upon, and so have caused the mistake which it is the object of this suit to remedy.

The effect of the receipt, then, being a contract to insure the Plaintiffs on their whole stock in their premises as they were on the 23rd September, how are they to be deprived of the benefit of the contract?

That contract was not accepted by the Company. The policy sent has been held to be not an acceptance of that contract. If it was intended to accept the interim contract and ratify it, that was not done, and there must be a mistake which should be rectified. If it was not intended to accept that contract, then there has not been another made which both parties assented to, and so the one made on 23rd September remains The terms of the interim receipt being: if approved, a policy will be sent; if declined, the proper amount will be refunded. The only evidence of the Plaintiffs having accepted the contract, as contained in the policy, was that the policy was sent to them, and they kept it. That might be *primâ facie* evidence of acceptance, but it seems clear that they thought the policy was such as they had stipulated for, and brought an action on it in that view. Two of the learned Chief Justices, as well as the learned Q. C. before whom the case at law was tried, were not of opinion that the language of the policy so clearly confined the insurance to one building that they would have so decided on reading it.

It would certainly be laying down a very harsh rule to say, that an unskilled person should be held as accepting a contract, created by an instrument framed in such

a way that learned Judges thought it would bear a construction which accorded with that put on it by the party who received the instrument, because a Court of Law, after serious consideration and argument, thought another construction that the framer of the instrument put upon it, was that which was the strictly legal one. In such a case, a party would be held constructively to have assented to an agreement which, in truth and in fact, was the reverse of what he intended to agree to. In this particular case the Plaintiffs were undoubtedly expecting a policy to cover the whole of their stock, and reading over the policy, supposing the Company knew what Hooper knew as to the change of their premises after the 8th of August, they would naturally suppose that the policy referred to their stock contained in a building owned by Irvine, occupied by them as a dry goods store, situated on the south side of King street (as it was occupied when they paid the additional premium), particularly as it referred to the opening into the adjoining house, and the coal oil kept there. They had no reason to anticipate anything different was intended by the policy from the receipt which Hooper had given, nor could they suppose that Defendants, without notice to them, would send a policy which neither they nor the Defendants' agent intended should be sent.

If the policy itself were the only contract, and there was no interim receipt, and no slip or statement showing what the contract was, it might be difficult, if not impossible, for the Plaintiffs either to reform the contract or to enforce their claim on the interim receipt given on the 23rd September. In such a case no binding contract of any kind would be shewn; the policy itself being the only evidence of the contract. The

Plaintiffs might have meant one thing and the Defendants another; and the Defendants could not be bound by a contract they had never entered into or intended to enter into. But if an insurance slip contained the true terms of the intended policy which both parties assented to, and the Insurance Company, in entering the matter in the policy, admittedly made a mistake, then the authorities are clear that the contract should be reformed.

Here, however, Hooper having power to make the interim contract to bind the Defendants, under it Plaintiffs continue insured until the Company have notified the acceptance or rejection of the application. As I have already stated, I do not think they are bound by the terms of the policy because they did not return it; they supposing that it really carried out what they agreed for.

Practically, it is of little consequence whether the decree is to reform the policy so as to make it conform to the insurance effected by the receipt signed on the 23rd of September, or to hold that the Company is bound by the insurance effected by the receipt referred to, and in that way answerable for the loss claimed.

I refer to the opinions expressed in the very able judgments of the learned Judges in the various courts through which this long pending case has passed in the Province of Ontario. All the Judges in the different Courts of Law and Equity before whom this case has been brought, including the trial at *Nisi Prius*, eleven in number, with singular unanimity, have had strong convictions that these Plaintiffs are entitled to recover the amount they claim in this matter.

Were it not that three of my learned brothers in this Court entertain a different opinion I should have thought

that the undisputed facts in this case shewed such a clear right on the part of the Plaintiffs to recover, that any respectable Insurance Company, after the opinions expressed by so many Judges, would not have persisted in refusing to indemnify the Plaintiffs for the loss they have sustained, and to protect themselves against which they had in good faith paid their money to the Defendants, and which they still keep.

The authorities referred to on the argument, many of them cited in the various judgments in the Courts below, seem to me to be sufficient to sustain the conclusions arrived at by the learned Judges.

I shall only refer to two or three cases not referred to in the Courts below, which seem to me to accord with them.

Motteaux v. *The London Assurance Co* (1) ; where Lord *Hardwick* amended a policy by a slip which was signed at the time. In subsequent cases he refused to reform the contract of insurance, unless it could be clearly shewn that it was a mere mistake that was to be corrected.

In one of the American cases (2), the doctrine is laid down in these words : "There must be a distinct show-"ing, by clear and unequivocal allegations * * * that "there was, before the policy was framed, an agreement, "a concurrence of the minds of the assured (or his agent), "and the underwriter to protect risks, which were "afterwards, by mistake or fraud of the underwriter, "left out of the formal instrument."

In Phenix Insurance Company v. *Gurnee* (3) ; the complainant applied to the company for insurance on

(1) 1 Atkyns, 547 ; (2) *Davega* v. *Crescent Mutual Insurance Company of New Orleans*, 7 Louisiana, 228 ; (3) Paige's N. Y., Chy. C., 278.

a two story and a half frame grist mill, one run of stones, two bolts, &c., with privilege to use a stove in second story; cost $1750; insurance, $1,200. He signed the application, the policy was made out and delivered to complainant, and the insurance was as follows: "On "his frame mill house, two and a half stories high, "privileged as a grist mill only." The mill was afterwards burnt down, Defendants insisted the policy was on the mill house only. The Complainant applied to them to correct the policy according to the written memorandum; Defendants refused to do so; Complainant filed a Bill to correct the mistake, and the Circuit Judge decided the policy should be corrected agreeably to the written memorandum. There was an appeal to the Chancellor *Walworth*.

He said the difference of description must have been clearly a mistake of the clerk, in filling up the policy, or an intentional fraud upon the insured, and the latter is certainly not to be presumed.

Although the Complainant read over the policy, it is hardly to be presumed that a plain countryman, unacquainted with the law of insurance, would have noticed or understood the difference which was produced by the change of phraseology in the policy from the plain and intelligible memorandum which was probably taken down from the lips of the insured.

The case of *The Franklin Fire Insurance Company* v. *Hewett* (1); in the Court of Appeals, in the State of Kentucky, is in some respects like the case before us. The assured held goods consigned to them, and the question was whether the insurance covered the loss of goods. The effect of the receipt was considered in connection with the facts under which it was granted,

(1) 3 B. Monroe's R., 231.

and the Court came to the conclusion that the certificate or receipt covered that class of goods, though not specially named as such in the contract; the judgment then proceeds: "whatever degree of particularity might be "required in the policy itself, it is sufficient that the "certificate indicates with reasonable certainty, and "without any ambiguity on its face, that the insurance "was in fact made upon goods which the agent knew "were held, and expected to be received on commission. "But the certificate, though it evidences a contract which "the Defendants are bound to comply with by furnish-"ing a policy covering the subject which it indicates as "having been insured or by furnishing the indemnity "which the insurance implies, is enforceable against "them in chancery only (per Woodworth, 4 Cowen, "661). * * * If they had delivered no "policy as, according to the import of their agent's "acts, they were bound to do, the insured would "have a remedy against them in a court of "equity, perhaps for coercing the execution of the "policy before a loss, and certainly for enforcing the "indemnity implied in the insurance, upon the "occurrence of a loss by fire within the period fixed "by the terms of the agreement. And the only "remaining question in this case is, whether, by "reason of the delivery to their clerk of a policy, "materially varying in its effect from the original "contract as evidenced by the certificate, and by their "failure to object to it until after the loss had occurred, "they are precluded from claiming the benefit of the "original contract.

"They allege in their bill, that they had not seen the "policy, and did not know of it until after the fire "occurred which occasioned the loss * * * If, as may

" be assumed, they never saw it, there could have been " no such acceptance of it by them, as would prove that " they had waived the original contract, or taken this " policy as a consummation of it. And although their " neglect to enquire whether it had been delivered, or to " examine it if they knew of its delivery, shows a high " and culpable degree of carelessness, we think it would " be visiting upon them too heavy a penalty for " this neglect, to say by that alone they had forfeited " the indemnity for which they had paid the stipulated " price, and especially as they held the certificate, " which bore evidence of the contract, and as they had " no reason to anticipate a variance from it in any " policy which had been or might be furnished. * * * " It is by no means certain, nor even very probable, " they would have at once detected the variance, or " become aware of its importance until they demanded " payment upon it. * * * * The question is " not whether they (the Plaintiffs) shall be allowed, " after the loss has fallen, to make an election, which " they might not have made before and thus throw a " heavy loss on the insurers, which, if the election " had been made before the event, might nothave fallen " on them; but whether the complainants have, by " their mere delay in examining a policy which they " would undoubtedly have rejected as soon as they " understood it, lost the advantage of their actual contract, " or whether the insurers shall, by that delay, which can " be attributed to no sinister motive, be saved from a loss " of $5,000, which, under the original contract they were " liable to sustain, and which they would have been " bound to sustain under the policy, if, as was their duty, " they had framed it so as to effectuate the object of the " actual insurance, * * * In the view of the case

" which we have taken, we have not deemed it material
" to enquire whether the variance in the policy from the
" certificate was not occasioned by fraud, accident or
" carelessness. We think the policy, as made out, is not
" such an instrument as the Defendants were bound to
" make in consummation of the contract of the agent,
" that the delivery of the policy, as made, did not dis-
" charge them from the obligation to comply with that
" contract, and that the Complainants are not precluded
" by their own acts or conduct from the benefit of that
" obligation, but may enforce it in equity. * * * *
" Although the facts were not originally within the
" knowledge of the Defendants themselves, they were
" within the knowledge of their agent, * * * and
" his knowledge of facts materially affecting the trans-
" action, is to be attributed to them. * * * If he
" understood the matter differently (from the Com-
" plainants), surely it was his duty to let them know
" they were mistaken in supposing they had applied for
" insurance on consigned goods, and were negotiating for
" such an insurance."

Then *Collet* v. *Morrison*, (1) is a strong case in favor of the Plaintiffs. There, one Richardson, on the 9th September, 1844, went to the office of the Company, of which the Defendant was the managing director, and signed a printed form of a proposal for insurance. It contained amongst other things four enquiries: 1. Name, residence and description of the party proposing the insurance. 2. Name, &c., of party whose life is to be insured. 3. If of sober and temperate habits. 4. If now or ever afflicted with fits or any other of the enumerated disorders, or any other disorder tending to shorten life. Richardson answered the enquiries

(1) 9 Hare, 161.

in the form which he then filled up: To the first, "Mrs. Emma Collett, of, &c., by her Trustee, W. J. Richardson, of, &c." To the second, "daughter of the late Sir Thomas Gage, and wife of John Collett, Esq., M.P." To the third, "both." To the fourth, "not that I know of;" and Richardson signed the proposal. The usual enquiries having been made as to the health of Mrs. Collett, the proposal was, on the 16th September, laid before the directors, who agreed to accept the life and to insure it for the amount proposed. The usual notice having been given to Richardson that the life was accepted, and that the premium was to be paid within 30 days, he, on the 19th September, went to the Company's office, filled up, and signed another of the ordinary printed forms of proposal, in which, in answer to the first of the questions above mentioned, he said not as before, but simply: "W. J. Richardson, of, &c., Esquire;" and to the fourth, instead of: "Not that I know of," the answer was "No." The answers to the other two questions were the same as in the former proposal.

On that occasion Richardson paid them the first year's premium and stamp duty on the policy, for which a receipt was given by an officer of the Company: "Bri- "tannia Life Office, 1 Prince's Street Bank, London, 19th "September, 1844. Policy No. 5,194. Date, 9th "September, 1844. Sum assured, £999; premium, "£34 9s. 2d."

"Sir: I beg to acknowledge the receipt of £36 9s. 2d. "being first year's premium and stamp duty for an "assurance of £999, effected by you with the Britannia "Life Insurance Company, on the life of Mrs. Emma "Collett, the particulars of which will be expressed on "a policy bearing the number and date above men- "tioned."

The policy was made out in the name of Richardson, without describing him as Mrs. Collett's trustee; and, when completed, was sent to Mrs. Collett, who died in June, 1845. One of the conditions on the policy was, that if it was or should be at any time subject to any trusts, the receipt of the trustee for the time being shall be an effectual discharge to the Company.

On Mrs. Collett's death, Richardson set up a claim to the policy for his own benefit. The Plaintiff, as the personal representative of Mrs. Collett, claimed the policy also. There had been some litigation about the matter, and the Bill was filed to have it declared that the insurance should be treated as an insurance effected by Mrs Collett, through Richardson, as her trustee, for her separate use on her own life, and that Plaintiff was entitled to have the policy rectified accordingly, or treated and considered as if so rectified.

It was argued for the Defendant, there was nothing in the fact of Richardson having at one time made a proposal as a trustee, to prevent the Company afterwards contracting with him on his own account. Vice Chancellor *Turner* in his judgment referred to the cause of *Motteaux* v. *The London Assurance Company* (1) as an authority authorising the amendment of the policy. He said: "This case appears to me fully to establish "that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office "in a different form, varying the right of the party "assured, a Court of Equity will interfere and deal "with the case upon the footing of the agreement and "not of the policy." The learned Vice Chancellor proceeded to argue on the facts. He asks, did they or did they not take the second proposal and prepare the

(1) 1 Atkyns, 545.

policy in its present form for the purpose of carrying out the first proposal. He arrives at the conclusion that the Directors must be held to have accepted the first proposal wholly, and not in part only, and that at the time the policy was issued, the agreement made with the Directors by the acceptance of the first proposal remained in force. Further on in his judgment he used these significant words: "In dealing with this case I "have abstained from entering into the question of "fraud, as I do not believe that any actual fraud "was intended; but in having taken this course, "I must not be understood to give any coun-"tenance to the notion that insurance companies, "preparing and issuing policies under such circum-"stances as occur in the present case, would not be held "liable in equity on the ground of fraud. The case of "fraud is more strong for the interference of the Court "than the case of mistake. Lord *Eldon*, in *ex parte* "*Wright* (1), refers to the distinction in cases where the "duty of perfecting an instrument rests on the party "who is to become liable under it; and the distinction "is clearly well founded in principle, and, I believe, "supported by authority."

I think, therefore, this appeal should be dismissed.

RITCHIE, J.:—

Commented on the evidence at considerable length, and stated he had been unable to satisfy his mind that the Plaintiffs had made out, beyond all reasonable doubt, that the agreement entered into between Plaintiffs and the agent of Defendants, was for the insuring of the stock in the added premises. But, that as so many

(1) 19 Vesey, 257.

judges had arrived at a different conclusion, he wished to put forward his views on this question of fact with diffidence. Assuming there was a valid contract to insure, and the policy was drawn up in a form different from the agreement, altering the substance of the agreement and varying the rights of the parties assured, he thought the case should be dealt with on the footing of the agreement and not of the policy. The Defendants not having been notified that the risk as so agreed on by the Plaintiffs and Defendant's agent was declined, and there having been no refunding or offer to refund the premium or any part thereof, the Plaintiffs might fairly assume, without examination, that the policy delivered was the policy referred to in the receipt, and not a new or other policy covering a risk which they had not offered the Company; and if the Company inadvertently or intentionally sent a policy not contemplated by the receipt, the Plaintiffs would not be bound by it. That this is not within the privilege conceded to the Company by the receipt of determining the risk under the receipt, but ought to be looked on either as an approval of the risk as agreed on by the agent, or an act *dehors* the receipt altogether; tantamount to a new offer on the part of the Company which the evidence fails to show has ever been acquiesced in by the Plaintiffs, leaving the receipt a valid outstanding instrument till so acquiesced in, and he could not think that the holding of the policy under the circumstances of this case could be considered such an acquiescence in a new agreement. That the mere transmission of the policy and retention by the Plaintiffs, would not as a matter of law, constitute an acceptance on Plaintiffs' part. That the original agreement would continue in force until cancelled or

modified by mutual consent. Whether there had been such consent, was a question of fact; that the keeping the new policy was matter proper for consideration as having some tendency to show an acceptance; but under the peculiar circumstances of this case he thought the Plaintiffs were, without being open to the charge of negligence, or laches, excusable in depositing the policy in their safe without examination, and relying with reasonable confidence, that the policy was transmitted not as a new offer on the part of the Company or as embodying insurance on a new or different subject matter, but as the policy referred to in the receipt, there being no understanding or agreement between the parties directly or through their agents, that any policy whatever was to be transmitted other than one covering the risk indicated in the receipt, and which policy was only to be transmitted on the Board of Directors approving of what the agent had done.

STRONG, J.:—

The Chief Justice has already so fully stated the facts established by the evidence that I need not repeat them.

The first enquiry is as to the extent of Hooper's powers. It is not disputed that he had authority to bind the Company by insurances effected by means of interim receipts, such as those he gave to the Respondents when the original risk was accepted, and subsequently on the 23rd September, 1871, on the payment of the increased premium. It is also conceded by Mr. Smith, the Defendants' chief agent, that notice of an increase in the risk during the currency of the interim insurance was properly given to Hooper. Indeed the

necessary requirements of an insurance business, carried on through an agent at a distance from the head office of the Company, make such a course of business indispensable.

The important question in the cause on which its decision must depend, is that respecting the terms of the contract entered into between the Respondents and Hooper on the 23rd September, 1871, when the interim receipt for the premium of $60 was delivered. That receipt is, in my opinion, consistent with the contract alleged by the Respondents to have been verbally concluded between them and Hooper, for it is written evidence of an agreement for the insurance of the Respondent's stock of goods in the stone building mentioned in the receipt, as that building had, on the 23rd of September, 1871, been altered by the addition of the new premises. The receipt, it is true, contains a reference to a supposed description of the premises contained in a document called an agency order, but Mr. Smith says that the use of these agency orders had been discontinued for some years, so that we must regard the words "*as described in the agency order of this date*" as struck out of the receipt. It is true Mr. Smith says, that in the place of this agency order they had the application, but the Company cannot import the description contained in the application into the receipt, merely because they had made the application serve the purpose of an agency order, there having been no assent on the part of the Respondents that the description in the application should be considered as that referred to in the receipt. The reference being to a document of the latter description, and there being no such instrument, the receipt must be read as though the words were altogether omitted from the printed

form. The receipt should then, if I am right in this view, be read as follows:—"Received from Messrs. "Wyld & Darling the sum of $60, being the premium "on an insurance to the extent of $6,000 on their stock "of dry goods, consisting chiefly of cloths and tailor's "trimmings, all contained in a stone building on south "side of King Street, Hamilton, for twelve months, "subject to the approval of the Board of Directors, "Montreal; the said party to be considered insured "until the determination of the said Board of Directors "be notified—if approved of, a policy receipt and after-"wards a policy will be delivered, or, if declined, the "amount received will be refunded, less the premium "for the time so insured."

A reference to the extrinsic facts, which is always permissible for the purpose of identifying persons or things, would shew that on the 23rd September, 1871, the stone building on the South side of King Street, in the city of Hamilton, which was occupied by the Respondents as a store, and in which was contained their stock of dry goods, consisted of the house originally occupied by the Respondents prior to the 9th of August, with two flats, extending over the adjoining house, added. To warrant the conclusion the Appellants contend for, we should have to read the receipt as though it provided for insurance on "so much" of the Respondents' stock of dry goods as was contained in a stone building, on the South side of King Street; but the fact being that, on the 23rd September, the old and new premises were being used indiscriminately for the storage of the stock, we must, in order to give effect to the agreement to insure the stock, consider the added flats as being included in the description "stone building." This construction is consistent

with the facts, for the added flats had been incorporated with the stone building originally occupied by the Respondents, and notice of the alteration and addition had been given by the Respondents, by the letter to Hooper of the 10th August, 1871, and the place had been inspected by Hooper, who had himself seen that a portion of the stock had been placed in the new premises.

Assuming, however, that the application, Exhibit A., is to be referred to for the purpose of identifying the premises, we must read that document in connection with the interim receipt and as modified, as regards the description of the premises, by the letter of the 10th of August. Then, collecting the agreement from these three documents, the true contract between the parties appears to me to have been precisely that which the Respondents allege, and Hooper admits it to have been. The letter gives notice of the alteration in the premises. The insurance existing at the date of the letter was on the whole stock of goods, which the original premises had up to that time been used for the storage of. The letter is not confined to the notice of the alteration to the premises, but goes further, and shews by the intimation that part of the goods had already been placed in the added flats, that the extended premises were intended to be used for the same purpose as those originally occupied by the Respondents; that their stock, as a whole, which was the subject of the insurance, was intended to be thereafter kept indiscriminately in their newly arranged business premises without distinction between the old and the new parts of the building.

Had this letter read in this way: "And part of our " stock, *on which we have your insurance*, is now in these

"new flats," there would have been, to the satisfaction of the most hypercritical mind, on the face of the letter, an indication of an intention to continue the insurance on the whole stock. But, the fact was, that these goods were originally covered by the insurance existing; that they were parts of a whole so insured; and, in an ordinary letter of business, framed with the conciseness peculiar to such correspondence, and not with the fullness and accuracy of a legal document, there was nothing unusual in the writers leaving their obvious intention to be implied.

I regard the letter of the 10th August, read in the light of the circumstances which preceded and accompanied it, and making those implications and inferences which have always to be made in construing ordinary correspondence between men of business, as indicating a proposal to continue the insurance on the whole of the Respondents' stock, just as clearly as if that intention had been verbally expressed. It is a much more reasonable and natural presumption to make—one more consistent with the well known usages of business, that a merchant, having an insurance on his whole stock in trade, and having enlarged his premises, giving such a notice as the Respondents gave, shall be considered as proposing to the insurers a continuance of the insurance on the same subject matter rather than that he intended to abandon the insurance which originally covered that portion of the constantly fluctuating stock which, from time to time, as convenience and the exigencies of business should require, he might deposit in the new as distinguished from the old portion of the premises.

No reason is suggested for making any such distinction. It would be wholly arbitrary. Let me put a case

identical in principle with this, but, perhaps, more familiar in its circumstances. Suppose an insurance on the household furniture contained in the dwelling-house of the party insured, who, during the continuance of the risk, gives notice that he has built an addition of some rooms to his house, upon which the Insurance Company, after inspecting the premises, make a charge for increased risk which is paid, would any one suppose that on a loss occurring, a distinction was to be made by the Company between the furniture in the old part of the house, and that in the new, the former being treated as insured, and the latter as uninsured? In such a case, the objection of the insurer would surely be treated by a jury, or by any judges of fact, as an unworthy quibble.

Then, in what respect, as regards the inferences to be drawn from the conduct of the parties, does the supposed case differ from that now before us?

Sitting in appeal from a Court of Equity, this Court in dealing with a question of fact, has to make the same deductions and inferences as a jury would be called upon to make in a Court of Common Law, and making these inferences, there is, in my judgment, ample written evidence of the contract which the Respondents have set up and sought to enforce by their Bill.

But even if the written evidence should be deemed an inaccurate expression of a contract between the parties, such as the Respondents contend for, is not the oral testimony amply sufficient to warrant such an alteration of the receipt as will make it accord with the agreement set up by the Bill? There is the direct evidence of Hooper, who still continued at the date of the hearing to be the Appellants' agent at Hamilton, that the contract was as the Respondents alleged it. If it is said

his deposition contains self contradictions, it is to be remarked that he was a hostile witness, and that his admissions were adverse to his own interest. In several portions of his testimony he distinctly states that he intended to insure all the stock without making any distinction with regard to its situation. The question of the sufficiency of this evidence became one of preponderance of testimony—it was for the learned Vice Chancellor, before whom the cause was tried, to weigh the evidence of Hooper. No one can say that there was no evidence to support the finding, and after two judgments in courts below affirming that finding, hardly anything short of that should, I venture to say with sincere respect for the opinion of those from whom I differ, be sufficient to warrant a reversal here.

Then, if the contract as alleged by the Respondents is proved out of the mouth of the agent who made it, to the entire satisfaction of the judge in whose presence the witness was examined, I see no reason why that testimony, taken in conjunction with the evidence of the Plaintiffs' other witnesses, Mr. Darling and Mr. Jermyn, and the circumstantial evidence, which, to my mind, makes a presumption in favor of the probability of the Plaintiffs' case almost irresistible, should not be sufficient to authorize the Court so to reform the interim receipt as to make it express what Mr. Hooper admits to have been the true agreement.

So that, if the construction of the receipt and the letter, read either by themselves or in conjunction with the application for insurance, was, as in my judgment it is not, against the Respondents, they would still have the verbal evidence to fall back upon as a ground for the rectification of the receipt. In saying this, I am not unmindful of the strict principles which Courts of

Equity apply when called upon to grant relief by way of rectification of written instruments in requiring strong, clear, irresistible evidence of mistake; but I think this condition is amply complied with without treating this case as one of exemption from the general rule.

It was Hooper's duty to prepare the interim receipt, and it is a well established principle that Courts of Equity will afford relief by way of rectification much more readily when the preparation of the instrument was the peculiar duty of one of the parties, than in others where the parties are to be regarded as participating in it (1).

Further, if it is the duty of one party to a contract, to prepare the written memorandum, and he does so in such a way as to mistake the real agreement, and then refuses to correct the mistake, such conduct amounts to equitable fraud; that is, fraud in the sense of unfair, unconscionable conduct, and a Court of Equity, on that ground alone as distinguished from mistake, will give relief (2).

The Respondents are, therefore, as it seems to me, entitled to say, first :—That the true construction of the application, receipt, and letter read together is such that the agreement which they insist on is expressed in writing :—Secondly, that even if such is not the true construction, a verbal agreement, such as the Plaintiffs set up, is proved in the clearest possible manner to have been completed between them and Hooper, which Hooper, on this hypothesis, incorrectly expressed in the receipt dated the 9th of August, and delivered on the 23rd September; and that therefore they are entitled, on the

(1) See *Collett* v. *Morrison*, 9 Hare, 162; (2) See *Collett* v. *Morrison* ubi sup. and *ex parte King*, 19 Vesey 257.

ground of mistake, if not of fraud, to have that receipt rectified, and made to accord with the contract really entered into.

The result is, that on the 23rd of September, 1871, there was completed, through the agency of Hooper, a contract, subject to the conditions of the interim receipt, binding the Defendants to an insurance of the Plaintiffs' whole stock, including such portions of it as they might choose to place in the premises which they had added to their original store. From that date all the stock on the premises as forming one building was insured.

Then, when was this contract of 23rd September, 1871, put an end to? By the terms of the interim receipt two alternatives were provided for: if the contract made by the agent was approved of, a policy receipt, and afterwards a policy, was to be sent, if declined the amount received was to be refunded, less the premium for the time insured. Neither of these modes of determining the receipt having been adopted by the Appellants before the loss, it seems clear, on general principles, that the only other mode of putting an end to the interim agreement, was a rescission by the concurring assent of the parties.

There is no pretension of any express agreement to rescind. Therefore, if the Respondents are now to be debarred from setting up the receipt as having been a binding contract of insurance at the date of the loss, it must be on one or the other of these two grounds, either because the assent of the Respondents to the new contract, embodied in the policy, is to be inferred from their retention of that instrument, or because their conduct has been such as to amount to an equitable estoppel, or *estoppel in pais*, precluding them from now insisting on the receipt.

The construction of the policy having been determined by the appropriate court of construction, the judgment of the Court of Queen's Bench, in which the action was brought, is now *res judicata*, and I am therefore bound, whatever my own opinion might otherwise have been, to assume that the goods in the new premises were not assured by that instrument.

Then the facts being that the Appellants delivered a policy, but not one according with the terms or in consummation of the contract entered into with the agent; that this policy, thus containing what, in law, would be no more than a proposal from the Company for an assurance which the Plaintiffs never contemplated, came into the possession of the Respondents' clerk or book-keeper, and was by him deposited in the Respondents' safe, where it remained without ever having been read by either of the Respondents until after the fire, it is out of the question to say that there was ever such an assent on the part of the Respondents to the terms of the insurance embodied in the policy as to constitute an original contract independently of the receipt, and in that way to rescind or supersede the contract evidenced by the receipt. No contract, then, having been entered into between the parties subsequent to that of the 23rd September, 1871, made through the agency of Hooper, on the part of the Appellants, there has never been any rescission of that contract by an agreement, either expressed or implied.

Then, have the Respondents, by their conduct in retaining the policy, induced the Appellants so to alter their position as to entitle them now to set up an equitable estoppel against the claim of the Respondents to treat the policy as inoperative, and to fall back on the receipt? I cannot see that they have. Though it has

been said, that if the Respondents had promptly read the policy, they would have discovered the mistake in time to have returned it, and have given the directors an opportunity of declining the risk and returning the premium before a loss; still, actual knowledge of the contents of the policy is an indispensable element of such a defence; and the evidence not only fails in shewing such knowledge, but the testimony of Mr. Jermyn and of Mr. Darling shows that the policy was never actually read, or even seen, by the Defendants. *Franklin Insurance Co.* v. *Hewitt* (1).

There could be no imputed knowledge of the contents of the policy, inasmuch as there was no obligation binding the Respondents to read it; indeed, on the other hand, the Respondents might well assume that it was sent to them to carry out the only contract of insurance they had with the Appellants, that entered into through their agent, Hooper, and not, as according to the contention of the Insurance Company it must have been, as a proposal for a contract entirely different in its terms from that just mentioned. Moreover, had the Respondents read the policy, it is by no means sure that they, relying as they naturally would upon Hooper having communicated to the Company all the circumstances, including the letter giving notice of the change in the risk and the particulars stated in his evidence, as to the inspection of the premises and the extent of the new insurance, might not have construed the policy, as did the learned Queen's Counsel who tried the action, as covering all they now claim to recover for. The reference to the diagram which had been added to their application by Mr. Smith, the agent at Montreal, after it came into his hands, and the letters and figures "*S. R. no.* 272," which

(1) 3 B. Monroe, 231.

were mere symbols, of which the Defendants alone had the key, would, for the reasons given, have necessarily been without meaning to the Respondents, if they had read the policy. They would, therefore, scarcely have been led to any other conclusion than that the policy was delivered in execution of the contract they had made with Hooper on the 23rd of September, 1871.

The result, in my judgment, is that the original agreement for insurance evidenced by the receipt remained undetermined at the date of the loss, and the Respondents are entitled to enforce that contract. If the Appellants have been greatly prejudiced in having been deprived of the option of rejecting the risk, their loss is attributable to the negligence of their own agent, Hooper, in omitting to communicate to the Company's office, at Montreal, the letter of the 10th August, 1871, in its integrity. The importance of this letter is, it will be seen, conceded by Mr. Smith, who says in his evidence it was Hooper's duty to receive it and forward it to the head office. This was a matter entirely between Hooper and the Appellants. It was not for the Respondents to enquire, either of the Appellants or of Hooper, if the latter had performed his duty to the Company. They had a perfect right to assume that the knowledge and contract of Hooper within the limits of his authority was the knowledge and contract of the Company, and to act accordingly.

In short, the case is one which, as far as legal principle is involved, depends on the application of that familiar rule of the law of agency which throws the loss occasioned by the neglect of an agent on his principal, though innocent, rather than on another equally innocent third party.

As, for the reasons already stated, I am of opinon that

the true construction of the proposal, the letter and the interim receipt read together, establishes the contract which the Respondents set up, I consider no rectification of the receipt is called for.

I do not think there ought to be any rectification of the policy for the reason that the Directors at Montreal, to whom alone the Appellants had given authority to contract by means of policies, never assented to the terms of the contract entered into between the Respondents and the local agent, and, therefore, the Respondents and the Appellants never were "*ad idem*" as to an insurance to be carried out by policy. I think the decree should be slightly varied by striking out in the first paragraph the words directing that the policy should be reformed. The decree so altered will, I think, give the Respondents the relief to which they are entitled. Subject to this formal variation, I am of opinion that the appeal should be dismissed with costs.

TASCHEREAU, J.:—

I think the facts of the case are clear enough, and need no special mention at the present moment.

I think, also, that the Respondents were entitled to have the decree granted in their favor by the Court of Chancery confirmed by the Court of Appeals, and this decree, in my opinion, was warranted both in Law and Equity.

The whole transaction between the Respondents and the Appellants, from the beginning to the end, was conducted through one Hooper, agent for the Company. He (Hooper) was informed by the Respondents, on the 10th August, 1871, that Respondents had added two flats in Mr. William's store, next door to their former premises, and that part of their stock was then in these new

flats, and that they wanted the whole of their stock insured. He gave a clear statement of the premises in which were contained the goods they intended to insure. No two different meanings can be inferred ; and I think that this part of the case is so understood. On this information, Hooper, as agent, claimed an increased rate on account of the addition of the flats. The Appellants contend they had only partial notice of such alteration and of the payment of the increased rate, by Hooper's letter of the 10th August, in which he did not fully, as he was bound to do, state that part of the goods were in the flats through which the Respondents had made an opening. The secretary, it is to be remarked, took note of this opening and pencilled it in the application, by these words : "There is an opening on the east end of "the above through which communication is had with "the adjoining house."

The policy was, notwithstanding, issued, in very short and ambiguous wording, as is very frequently the case, I must admit, (very likely to save time, pen and ink); and though the increased premium, after full notice that some change had taken place, has been received by the Appellants, the policy issues without specially alluding to the occupation of the two flats; the Appellants pocket the money, and do not call the Respondents' special attention to the fact that the insurance on that part of the goods in the added premises has been repudiated; but on the contrary, they allow the Respondents to believe, as their own agent did, that they were fully insured, and that the new risk was covered *in toto*. Such conduct, in my humble opinion, should not be countenanced ; and I see that the full Bench in Toronto, before whom the case was brought, have entirely sustained this view. But the Appellants further contend

that their only contract was the one expressed in the policy issued, on the back of which was printed a requisition to Respondents, to read that interesting document, and come to the conclusion that this was sufficient notice. I think no intelligent twelve jury men (if such a case had been submitted to them) could come to this conclusion, and that if material alteration was intended, the Appellants should have taken the trouble of informing the Respondents in a more forcible way than by a *banal formule*, which is seen in every policy, and that in default of this, we may infer two things, either that they considered the policy sufficient to cover the risk as described by their agent, or that they repudiated the acts and opinions of their agent, and in such case should have informed the Respondents and their own agent of the fact of their repudiation of the interim receipt, and return the increased premium. They do nothing of the kind ; and I infer (taking the most favorable view of their conduct), that they considered the policy sufficient in its terms to meet the intention of the Respondents, and of their own agent, and binding on themselves. To say the contrary, I think, would be an insult to them, and might lead one to question very much the regularity of the Appellants conduct throughout this transaction. I observe that no fraud is reproached to the Respondents, and that they have fully disclosed their true position and intention to the Appellants' agent, Mr. Hooper, who visited the place, and had the most ample power to assent to any change. I think the omission by the Appellants' agent to give them the fullest information, is, notwithstanding, binding on his principals.

But, moreover, the information given by Hooper to

Mr. Smith, by his letter of the 27th August, 1871, must have conveyed to the principal not only a faint idea, but an entire conviction that these flats would be occupied by them in their trade of merchant tailors: for, *cui bono*, open these two flats? Surely it was not for the pleasure of looking through them, and seeing what other people were doing. It certainly was not to sell coal oil, which was not part of their trade, and which seems, as it appears by the record, to have been sold only on the lower flats by Mr. Onyon; and, I remark, that the secretary of the Insurance Company insisted on this gentleman keeping only a certain quantity of oil in his premises. What, then, would be the object of the Respondents in cutting an opening in these flats, if it was not to place their goods in them. This surely must have struck the manager of the Company at the head office in Montreal, and if he did not so understand it, he should have made further enquiries from the agent, Mr. Hooper, at Hamilton. I infer such knowledge from all the surrounding circumstances of the case, and principally from the evidence of Mr. Smith. But, moreover, I think the Company bound by Mr. Hooper's act; he should have communicated *totidem verbis* the frank declaration of the Respondents that they had put in part of their stock in these flats. The authorities, to show that the acts of the agent in the execution of his duties bind his principal, need not be cited here. I am also of opinion that the Appellants were bound by the interim receipt, insuring the whole of Respondents' stock; and that any change, if intended by Appellants, should have been notified by them to Respondents. That interim receipt, in the usual course of business, should have been sent

to the principal office, and the policy issued on it; at least, the Respondents had every ground to think so, and could not suppose that the Company could materially alter their position by sending the full policy with a mention of the flats, without believing that this short allusion to it did not cover the whole of their risk; even taking the most lenient view of the case, I do say that there was a common error—the Respondents wanted the whole of their stock insured in the flats as well as in their other building, they having paid full value, and having their interim receipt to that effect, and the Appellants, by some acts of irregularity of one of their officers, having issued a policy which did not cover all the Respondent's goods, this policy should be so amended as to meet the facts and equity of the case. On the whole, I am of opinion that the Respondents are entitled to the affirmance of the decree, and that the appeal should be dismissed with costs.

FOURNIER, J:—

La question à résoudre en cette cause consiste suivant moi, à savoir quel a été précisément l'objet du contrat d'assurance intervenu entre l'Appelante, d'une part, et les Intimés, de l'autre. Les faits qui ont précédé l'émission de la police d'assurance dont la reformation est demandée en cette cause, sont ainsi: après une première proposition d'assurance, demeurée sans effet, les Intimés en firent une autre en date du 9 août 1871, ainsi conçue.

"Application of MESSRS. WYLD & DARLING, of "Hamilton, of County of Wentworth, (profession or "occupation)———for Insurance against loss or damage "by Fire, by the *Liverpool and London and Globe Insur-*

"*ance Company*, on the usual terms and conditions of the "Company Policy, in the sum of $6,000 (Dollars), for the "term of one year, commencing the *9th day* of *August*, "1871, at noon, on the property specified, to wit:

"On their stock of Dry Goods, consisting chiefly of "Cloths and Tailors' Furnishings, contained in a *Stone* "*Building*, covered with S. in M., marked *no.* 1 on "Diagram, and owned by———

"Amount insured, $6,000. Rate, 62½.

"Amount of Premium, $37.50 S. T., *no.* 272. †."

Cette application était accompagnée de réponses aux questions faites par la Cie. dans lesquelles les Intimés déclarent que le fonds de commerce qu'ils désirent faire assurer se trouve dans une maison située sur le côté sud de la rue King, à Hamilton, entièrement occupée par eux comme magasin de *marchandises sèches*, " The whole as a Dry Good Store." Pour plus ample désignation ils réfèrent au diagramme sur leur police expirée, no. 1, 377, 249. Ils déclarent aussi qu'ils sont déjà assurés à la Compagnie "Royal Insurance Company", pour $6,000, et que c'est comme propriétaires (owners) qu'ils sollicitent cette assurance. Ces réponses sont suivies d'une adhésion formelle aux conditions suivantes:

"And the said Applicant hereby *covenants and agrees* "to and with the *said Company*, that the foregoing is a "just, full and true exposition of all the facts and circum-"stances in regard to the condition, situation, value and "risk of the property to be insured, so far as the same "are known to the applicant, and are material to the "risk; and agrees and consents that the same be held to "form the *basis of the liability of the said Company*, and "shall form a part, and *be a condition of this Insurance* "*Contract.* It is further agreed between the con-"tracting parties, that if the Agent of the Company fill

" up the application, he will in that case be the Agent of " the Applicant, and not the Agent of the Company.

" Dated at Hamilton, 9th August, 1871.

" (Signed,) WYLD & DARLING, *Applicants.*
per T. J. JERMYN."

Cette application fut acceptée par Hooper, l'agent de l'Appelante, lequel donna aux Intimés un certificat daté du même jour, 9 août 1871, constatant qu'il avait reçu d'eux une prime de $37.50 pour l'assurance de leur fonds de commerce, pour un an, *in* S. T. no. 272. Ce paiement, quoique fait en réalité le 10, par un chèque, n'en est pas moins reconnu comme régulièrement fait.

Jusqu'ici point de difficulté ni d'ambiguité. L'application et le certificat de paiement forment un contrat complet, quoique conditionnel, ne pouvant donner lieu à aucun malentendu. Mais la difficulté commence dès le lendemain de l'application, 10 août, par l'avis donné par les Intimés à Hooper, en ces termes.

"MEMORANDUM."

" WYLD & DARLING,
" Hamilton, Ont., " To F. L. HOOPER, ESQ.,
10th August, 1871. Hamilton.

" We beg to advise you that we have added two flats over Mr. Williams store, next door to our former premises, and that part of our stock is now in these flats."

En recevant cet avis, Hooper se transporta sur les lieux pour les inspecter, ce qu'il fit en présence de l'un des Intimés, Darling. Après avoir constaté que des ouvertures (large doors) avaient été pratiquées dans les 2me et 3me étages pour mettre en communication la maison voisine (no 273) avec celle décrite dans l'application, il fit les observations suivantes sur l'augmentation du risque causée par ces changements :

"I think I said that the Plaintiffs had *not improved the* "*risk by cutting these doorways;* I said to Mr. D. that "the former risk was *endangered by these cuttings;* I told "them that I thought their rate would have to be in-"creased; I can't remember any thing else I then told "them; I don't remember telling them how much the "rate would have to be increased; I told them I would "have to satisfy the Head Office, and that they would "have to settle what the extra rate would be; the "Plaintiff said he did not think the risk increased by the "cutting of the doorways."

Par lettre du 29 août, Hooper donne information à M. Smith, l'agent principal, à Montréal, des changements faits à la nature du risque, l'informant en même temps que la partie inférieure de la maison avec laquelle cette communication a été établie est occupée par un nommé Onyon, marchand d'huile de charbon. Il ajoute qu'il avait averti les Intimés que le taux de leur assurance serait augmenté de 1 p. c., que les Compagnies "Royal et Hartford" avaient adopté ce taux.

Dans une lettre du 1er sept., M. Smith l'agent principal demande s'il doit comprendre que le total de l'assurance doit être de $12,000 "*in this S. T. no.* 272," ou si l'application no. 691 doit remplacer celle du no. 680. Il est ensuite informé par Hooper que l'application no. 691 est la seule en force. Dans la même lettre Smith ajoute "if coal oil in any greater quantity than "10 barrels is stored I think we are much better with-"out the risk. I notice the assured has cut an opening "into the adjoining building on the East side, and that "the lower part of said adjoining building is occupied "as a coal oil store." Le 23 sept., Hooper reçut des Intimés la somme de $22.50 formant avec les $37.50, payées le 9 août, la somme de $60.00 pour prime

d'assurance à 1 p. c. sur $6,000, et donna aux assurés le reçu suivant portant la date du 9 août, qui est celle de l'application afin de faire remonter la responsablité de la Compagnie à cette date.

"THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

" Agent's Office, *Hamilton*,
" 9th August, 1871."

" $60. Received from *Messrs. Wyld and Darling* the " sum of $60.00, being the premium on an insurance to " the extent of $6,000 *on their stock of dry goods, consist-* " *ing chiefly of cloths, and tailors' trimmings, all contained* " *in a* STONE BUILDING ON SOUTH SIDE *of King street*, " *Hamilton*, as described in the agency order of this " date for *twelve* months, subject to the approval of the " Board of Directors, Montreal, the said party to be " considered as *insured until the determination* of the " said Board of Directors be notified, if approved of, *a* " *policy receipt*, and afterwards a policy, will be deliver- " ed, or if declined the amount received will be refunded, " less the premium for time so insured.

" N. B.—This receipt is issued subject to all the con- " ditions of the *policy issued* by the Company.

" *F. L. Hooper*, Agent."

Après toute cette correspondance qui n'a évidemment pas d'autre objet que celui d'apprécier le risque et d'en fixer la valeur, la Compagnie émet en faveur des Intimés une police d'assurance dans laquelle les prémisses assurées sont décrites comme suit :

" *This Policy of Insurance Witnesseth* that Messrs. " Wyld & Darling, of Hamilton, Ont., Merchants, having " paid to the Liverpool and London and Globe Insurance " Company the sum of sixty dollars, for the Insurance " against loss or damage by fire *subject to the conditions*

" and stipulations endorsed hereon, *which constitute the* " *Basis of the Insurance*, of the property hereinafter " described, to the amount hereinafter mentioned, not " exceeding upon any one Article the Sum specified on " such Article, namely—On their Stock of Dry Goods, " consisting chiefly of Cloths and Tailors' Trimmings, " contained in a building owned by one *Irvine*, and " occupied by the Insured *as a Dry Goods Store*, situated " on the South side of King Street, Hamilton, Ont.; built " of stone, covered with shingles laid in mortar, and " marked No. 1 on a diagram of the premises, endorsed " on Application of Insured, filed in this office as no. " 10,995, which is their warranty and made part hereof. " S. R. no. 272. Six Thousand Dollars.

" N. B.—There is an opening in the East End Gable " of above, through which communication is had with " the adjoining house, which is occupied by one *Onyon* " *as a Coal Oil Store*. Not more than two barrels of refined " Coal Oil permitted in said Store, but 10 barrels of the " same are allowed to be kept in the yard."

Enfin le 11 mars 1872, le feu prend au magasin d'huile de charbon et cause des dommages considérables aux marchandises qui se trouvaient dans les bâtisses nos. 272 et 273. Les Intimés prétendent alors que leur contrat d'assurance avec l'Appelante doit s'étendre aux pertes subies dans les deux bâtisses; que par l'avis donné le 10 août, ils avaient l'intention de modifier et que de fait ils ont amendé leur application de manière à comprendre dans l'assurance tout le fonds de marchandises qui se trouvait dans les nos. 272 et 273.

L'Appelante refusant d'admettre cette prétention, les Intimés se sont pourvus contre elle en Chancellerie pour obtenir une réformation de leur police d'assurance

de manière à couvrir les pertes essuyées dans le no. 273.

D'après cet exposé de faits la seule question qui s'élève en cette cause est de savoir quel était l'objet spécial du contrat d'assurance en question. Devait-il seulement couvrir les pertes qui pouvaient être causées au fonds de commerce des Intimés dans le no. 272? ou bien, doit-on considérer l'avis du 10 août comme étant une demande d'assurance pour le no. 273 et en conclure que la police d'assurance s'applique aux deux bâtisses nos. 272 et 273? Telle est la question à décider. Suivant moi elle se borne à une question d'interprétation des écrits rapportés ci-dessus; c'est là principalement que l'on doit chercher la preuve du contrat qui a eu lieu.

Il n'y a pas à contester le fait que par l'application du 9 août et le certificat de paiement de la même date, il y a eu consentement entre les parties pour l'assurance de la bâtisse no. 272. En est-il de même du no. 273 dont les Intimés n'ont fait aucune mention dans leur avis? Ils ont bien pu avoir l'intention par cet avis, comme ils le disent maintenant, de modifier leur application; mais ils ne s'en sont nullement expliqués. Cet avis ne comporte aucune nouvelle proposition d'assurance; le but évident était sans doute, en avertissant la Compagnie des changements faits dans les prémisses, de se conformer à cette condition de la police d'assurance obligeant l'assuré à donner avis de tout changement qui peut affecter la nature et l'étendue du risque. Rien ne fait voir qu'on ait voulu aller au-delà du côté des Intimés, non plus que de la part de l'Appelante, au contraire, cette dernière dans toute sa correspondance n'a pas d'autre chose en vue, et ne parle que du no. 272, auquel seul elle veut limiter ses risques. Comment

les Intimés peuvent-ils prétendre que le no. 273, dont ils ne font pas mention, soit compris dans l'assurance, lorsque la Compagnie n'en fait, non plus, elle-même, aucune mention. S'ils avaient cette intention ils auraient dû en informer la Compagnie. Celle-ci parle du no. 272 et les Intimés ont dans leur esprit l'idée que le no. 272 veut dire l'assurance sur nos. 272 et 273, mais ils se gardent bien de le dire. S'ils ne l'ont point fait, c'est sans doute parce qu'ils s'en sont tenus à leur application, et que cet avis n'était donné que pour se protéger, comme je viens de le dire.

Peuvent-ils maintenant se plaindre d'avoir été induits en erreur lorsque leur demande d'assurance référant au diagramme sur la police expirée qui était pour le même no. 272, indique que c'est encore le no. 272 que l'on veut assurer ; le reçu du 9 août réfère à la maison no. 272 désignée dans l'application, enfin la police est aussi émise pour le no. 272. A toutes ces informations précises sur les prémisses particulières que la Compagnie entend assurer, les Intimés n'ont à opposer que leur avis du 10 août. Mais cette notification n'est pas une demande d'assurance. Il n'y est pas question d'ajouter les deux étages de la maison voisine dans l'application de la veille. En a-t-on donné une description ; a-t-on fourni à l'assurance les informations demandées par la série de questions auxquelles les Intimés avaient répondu pour obtenir l'assurance sur le no. 272. A ces dernières questions on peut répondre, il est vrai, que Hooper connaissait les nouvelles prémisses et les avait visitées. Mais on a vu par cette partie de son témoignage citée plus haut ce qu'il en a dit. Il observe seulement que les Intimés ont augmenté les risques sur l'assurance demandée et dit qu'en conséquence il faut augmenter la prime ; mais ni lui, ni

Darling qui était présent, ne disent alors que le no. 273 doit être compris dans l'application déjà faite. La visite a pour but seulement l'augmentation du risque créé par le changement dans l'état des prémisses et de fixer le montant de la prime additionnelle. Il n'est encore là aucunement question d'assurer le no. 273.

Si l'agent principal Smith qui, seul avait pouvoir d'obliger finalement la Compagnie, avait eu en vue d'assurer le no. 273, aurait-il parlé des prémisses assurées, en les désignant toujours, comme il le fait dans sa correspondance avec Hooper, sous le no. 272. Sa lettre du 1er septembre fait voir qu'il a eu un doute sur le montant de l'assurance, mais il n'en exprime aucun sur les "prémisses" qui devaient en faire l'objet. C'est pour le no. 272 qu'il croit que les deux applications nos. 680 et 691 ont été faites. S'il avait eu en vue le no. 273 se serait-il exprimé comme il le fait dans son observation concernant l'ouverture pratiquée entre les deux bâtisses. Il parle évidemment de la bâtisse voisine (no. 273) comme étant tout-à-fait étrangère à la transaction. "I notice the assured has cut an opening into the adjoining building on the East side." Le côté Est de quoi ? Evidemment celui de la maison no. 272 sur laquelle il est question d'effectuer une assurance. En parlant de la quantité d'huile qui pourra être gardée, Hooper s'exprime de la même manière dans sa lettre du 2 sept., en désignant le magasin d'huile de charbon au dessus des deux étages en question, comme le "*Coal Oil Store* to the East of the risk." Si le risque n'est pas au no. 273, où se trouve le *Coal Oil Store* ; il ne peut donc être qu'au no. 272. Si Hooper eût compris dans l'assurance le no. 273, il ne se serait certainement pas exprimé de cette manière, il aurait dit le "Coal Oil Store under the risk."

Comme les Intimés se sont beaucoup appuyés sur le témoignage de Hooper, je dois dire que j'y ai ajouté peu de foi, préférant, à cause de ses nombreuses contradictions, m'en rapporter plutôt à ses écrits qu'à ses paroles et à l'interprétation qu'il leur a donnée après coup. Comme les Intimés, il s'imagine après l'incendie qu'il a compris dans l'assurance les marchandises transportées au no. 273; mais chose extraordinaire, il ne paraît jamais avoir eu cette idée pendant la négociation de cette assurance qui a duré depuis le 9 août jusqu'au 23 sept.

D'après tout ce qui précède, il me paraît clair que l'intention des agents de la compagnie n'a jamais été d'assurer le no. 273 ; en admettant que telle ait été l'intention des assurés qu'en résulte-t-il ? C'est qu'à aucune époque les deux parties ne se sont entendues sur l'objet précis de l'assurance ; que par conséquent il ne peut y avoir de contrat quant au no. 273, puisqu'il n'y à pas eu consentement sur ce qui devait en faire l'objet. Dans le contrat d'assurance comme dans les autres contrats synallagmatiques, le consentement des parties est un élément essentiel, il doit intervenir sur les choses qui sont la substance même des conventions. Pour qu'il y ait eu contrat d'assurance sous les circonstances ci-dessus rapportées, il y a une condition essentielle qui a manqué : c'est l'accord des volontés de l'Appelante et des Intimés sur l'objet du contrat.

La preuve établissant, suivant moi, que les parties ne se sont jamais entendues pour effectuer une assurance sur le no. 273, je crois que la police émise et dont on demande la reformation, contient leur véritable contrat et que par conséquent il n'y a rien à y changer et que l'appel devrait être alloué.

Pour ces raisons, avec toute la déférence possible

pour les opinions exprimées dans un sens contraire par les Honorables Juges qui ont pris connaissance de l'affaire, je suis obligé d'en venir à la conclusion qu'il na pas été fait en cette cause preuve d'un contrat différent de celui que constate la police d'assurance.

HENRY, J. :—

This is an action to reform a policy of insurance so as to include property destroyed by fire in a building adjoining one in which goods were insured, which the Respondents allege should have been, but was not, covered by a policy granted by the Appellants, dated 9th August, 1871.

The law applicable to such a case is, I apprehend, very well settled, and is fairly stated in *Bennett* on Fire Insurance cases at page 334, in the case of *Davega* v. *The Crescent Mutual Insurance Company of New Orleans.* The judgment in that case says: "We do not "doubt that a policy of insurance may be reformed "where it is demonstrated by legal and exact evidence "that there has been a mistake in filling it up, which "has violated the understanding of both parties; but a "petition for such relief should set forth by distinct "and direct averments, not only that the petitioner "contemplated a different protection from that expressed "in the policy, but that his wishes were communicated "with reasonable certainty to the underwriter, and "were by him also understood and assented to, and "that the subsequent failure to embody them in the "policy was the result of fraud or mistake on the part "of the underwriter. There must be a distinct show-"ing, by clear and unequivocal allegations, not, as in "this case, argumentatively and by ambiguous infer-

" ence that there was, before the policy was framed, an " agreement--a concurrence of minds of the assured or " his agent and the underwriter to protect risks which " were afterwards by mistake or fraud of the under- " writer left out of the formal instrument." I have not cited the dicta of the case just referred to as, in itself, an authority binding on us; but as a statement of the law as administered in British courts of justice.

Mr. Justice *Story* in his work on Equity Jurisprudence, s. 157, says: " Relief will be granted in cases of " written instruments, only where there is a plain mis- " take clearly made out by satisfactory proofs," and he quotes a number of English and American cases which sustain that position. He says again: " But the quali- " fication is most material since it cannot fail to operate " as a weighty caution upon the minds of all judges. "See Lord *Eldon's* remarks in *Townshend* v. *Stangroom* (1). " See also *Hall* v. *Clagett* (2); *Leuty* v. *Hillas* (3); and " it forbids relief were the evidenceis loose, equivocal or " contradictory, or it is, in its texture, open to doubt or " *to opposing presumptions.* The proof must be such as " will strike all minds alike as being unquestionable " and free from reasonable doubt" Lord *Thurlow* in one case said that the final evidence must be strong irrefragable evidence. *Shelburne* v. *Inchiquin* (4).

" But in all such cases it must be plainly made out " that the parties meant, in their final instruments, " merely to carry into effect the arrangements designated " in the prior contract or articles. For, as the parties " are at liberty to vary the original agreement, if " the circumstances of the case lead to the supposi- " tion that a new intent has supervened, there can

(1) 6 Ves., 333 & 334; (2) 2 Md. Ch. Dec. 153; (3) 2 DeG. & J., 110; (4) 1 Bro. Ch., 347.

"be no claim for relief upon the ground of mis-
"take. The very circumstance, that the final in-
"strument, of conveyance, or settlement, differs
"from the preliminary contract, affords of itself some
"presumption of an intentional change of purpose or
"agreement unless there is some recital in it, or some
"attendant circumstance, which demonstrates that it was
"merely in pursuance of the original contract. It is
"upon a similar ground that courts of equity, as well
"as courts of law, act, in holding, that where there is a
"written contract, all antecedent propositions, negotiat-
"ions, and parol interlocutions on the same subject, are
"to be deemed merged in such contract."

These propositions are sound law and sense, and are established by numerous reliable English, French and American authorities and cases. I need not have cited authorities or cases to show that conclusive evidence of *mistake* of *both* parties, or fraud on the part of one, must be given; for it is only in that event relief will be given. Here, it is not the *mistake* of the Respondents, that is relied upon so much after all, for they do not tell us they made one, having left us ignorant of the fact of their having read, or having failed to read, the policy when they received it, or at any time before the loss, but rather leave us to grope our way to the conclusion they did not. In that case, if they, *under the circumstances*, having the policy in their possession for months, (for it is shown Wyld received it), did not take the trouble to read it, by which they would have found (as was patent on the face of it) that the goods in question were not covered, but those only in the building shown on the back of the policy, I feel bound to say that they should have, and the law in my opinion gives them, no redress. The clerk and agent

of the Respondents who made the application for insurance, read the policy, and must, or at least should, have at once seen that it covered only the goods covered by the written application, and not those removed to the other building. To avoid the imputation of culpable negligence, I think parties receiving policies *under such circumstances as are detailed in this case*, should be held bound to use some diligence to ascertain exactly what goods are covered. In this case, however, the Respondents failed to shew that they did not read, and fully understand the policy as given to them. It was their duty to have shown that, and cleared up every doubtful position in regard to it; but they have not done so in any way, and for all that, Wyld, who received the policy, may have read and been quite satisfied with it. I can understand that a party in *ordinary circumstances*, and, in the hurry of business, thinking all has been rightly done, may fail to read a policy, and, *proving that fact*, ask the court for relief; but here we have no such evidence, nor have we any evidence that had they read and fully understood it, they would have been dissatisfied with it. On the contrary, in view of the fact in evidence, that they had other policies to the extent of $25,000 covering the goods in both buildings, it is not at all unreasonable to conclude that previous to the loss they were satisfied that the policy should cover only the goods in the one. They certainly do not show *the opposite*, which I think it was their duty to do, had they so wished. If the policy was not such as they expected, they should have returned it to the agent in Montreal, and requested an amendment of it, and their failure to do so, occasioned by their failure to read it, if such were the fact, or from some other cause, has produced the whole trouble. In the event of their so returning

the policy, the agent would then have had the right, either to have accepted their proposal so changed, in which case he would, no doubt, have required the amount to be covered in each building to be stated, or have declined the risk and returned the premium for the unexpired term. Both of those alternatives he was deprived of, through the retention of the policy by the Respondents, and by what principle of law or justice can a company be made amenable for the negligence, or worse than negligence of others, and thereby have the effects of a policy forced upon them which they or their agent never contemplated issuing, and which, if requested in plain terms, the agent would not, as he alleges, have issued. These views are in accord with the case cited at the argument, *Cooper* v. *The Farmers Mutual Fire Ins. Company* (1). The Respondents were bound to make an application of so definite a character that it could be readily understood, and if, on the contrary, taking everything into consideration, they have not done so, and have even left it doubtful, and in that way misled the agent in Montreal, they, and not the Company, should suffer. It is not hard to understand that a sharp dealer would prefer having the risk on $6,000 worth of goods in *each building*. Should all the loss be in number one, he would recover the amount of it up to the $6,000. If, in number two, he would be equally fortunate; and had the loss in this case been all, or mostly all, in the building covered by the policy, a complaint would never have been heard, that the goods removed from it had not been covered; and no question of average would have been raised as to the latter. Had, however, such a position been clearly asked for, we are bound by the evidence to conclude

(1) 50 Penn. S. R., 299.

that the agent at Montreal would have at once declined to grant it. The applicants would have been required to state the amount in each building, and who knows now how they would have divided the risk? They might possibly have put only a small proportion of the insurance on the goods removed. They give us no evidence on the point, but leave us as completely in the dark as in respect to other important features of the case. How then, can we saddle the Company with a policy, which their agent would certainly not have issued, and which the Respondents, I maintain from the evidence, never asked for, unless indeed, if at all, by doubtful inuendos. It has so happened that the loss on the goods removed was $14,705.14, while on those covered by the policy it was but $1,340 Under the policy in the one case, the Respondent could only recover the latter comparatively small sum ; but *after the loss* it was clearly the interest of the Respondents to have had the goods in the "added flats" covered, rather than the others.

The evidence of Darling establishes the fact, that they had in all $37,000 worth of goods covered ; and that of that amount $25,000 covered the goods in *both buildings*, independently altogether of the policy of the Appellants. What then became of the Respondents' claims against the other offices for their loss ? The whole amount of the loss in the building, not covered by the Appellants' policy was amply covered by the other policies. Did they recover the whole loss, and if not, why not? I have sought in vain for some evidence or explanation on this point, but none has been given, and, as far as the evidence goes, the Respondents may have received the whole of their loss for the goods in the "added flats" from the other

Companies. The case, in many particulars, is very unsatisfactory and much confused, and, on the part of the Respondents, much is left in doubt that should have been cleared up, and which it was clearly easy to have done.

It is, too, rather significant that Wyld, *who received the policy*, was never examined. He was present at the trial at law but gave no evidence. It is true he was, at the time of the last trial "either in England or on his way out," but his evidence could have been taken before he left, and I cannot help expressing my opinion that the Court should at least have had from *him* evidence as to *whether he read the policy*, and if so how he understood it. Jermyn, his clerk, who negociated the insurance in question, says he received it from Wyld, and, to use his own words "did not read it, but examined it casually." The "casual" examination, I presume, had some object, but we are not told to what extent it was made, or how it was understood by those two parties. We have heard nothing to rebut the fair presumption that they not only read the policy, but understood it to cover only the goods in the application as originally made. Are we, therefore, to reform the policy when the interested parties themselves do not tell us they were deceived in any way? Wyld does not give any evidence, and Jermyn does not, in the slightest manner, even hint that the policy did not cover all he expected or intended. Darling, the only other party interested, is equally reticent; all he appears to have known was, that "there were instruct- "ions given to have the insurance effected with the "Defendants; some one was told to do so;" and he further says: "I did not know of the existence of the policy till after the fire." He, therefore, gave no

specific instructions to include *the goods in the "added flats.*" Nor does he, nor could he, say that he expected them to be included. It is true, that on the occasion of Hooper's inspection of the openings made in the walls between the two buildings, and when disputing with him about the extra premium demanded on account thereof, he said that "under any circumstances they must have the stock insured," and added "this has re-"curred to me since the trial at law, when it was not "clearly before my mind." Apart from the suspicious fact, as to his memory, just mentioned, what did such a remark amount to? He had made an application to have "the stock" insured in one building only, and *the amount of premium* was then a matter for adjustment, and his remark would be most suitable and applicable to "the stock" in the application then pending, without any reference to the goods removed; and I think we should so construe it, when the further fact is in evidence that the Respondents, by other policies covered *all* their stock in the "added flats" to the extent of $25,000. If he meant so, he should have expressly said to Hooper, that he wished the policy to cover *both stocks*, and, from not doing so, not leave Hooper in a position to think and believe otherwise. And when we look at the notice of the 10th of August, we find it equally unsuggestive of any desire to have the goods removed to the "added flats" *covered by the policy*; and the Respondents (persons in the habit of effecting insurances) thus fail distinctly to ask it to be done, if they wished it—leaving it open to the most vague surmises, and thus failing to give the parties applied to an opportunity of accepting or refusing insurance on goods more dangerously situated than when in the first building, and as the result fully proved. Taking the whole evidence

together, there is no positive declaration of any of the parties that there was any *intention of having the goods in the added flats covered*, or that there was any mistake or fraud in restricting the policy to the one building. *The parties themselves do not say so*, and why should they expect us to do so ?

If, indeed, as held by Mr. Justice *Story*, Equity refuses to reform an instrument where the evidence is *loose*, *equivocal*, *contradictory*, or in its texture *open to doubt* or *to opposing presumptions*, it is irresistibly clear to me that we cannot give relief in this case upon the evidence before us, which is, in every respect, precisely such insufficient evidence.

The only pretence of evidence to sustain the Respondents' case is, that which refers to what took place on or about the tenth of August; whereas the balance of the premiums was not paid till some five weeks afterwards (the 23rd September,) when the final receipt was given for the premium. What then were the views of the Respondents *at this latter date ?*—the really important time! They at one time may have intended that the policy in this case should cover the goods in the two buildings, but during the interim may have changed their minds. They did not, however, say so to the Appellants. We have in evidence the fact that, at the time of the loss, they had $25,000 insured on *all the goods*. When that insurance was effected we are not told. It was certainly *after the 10th of August*, and in the absence of proof to the contrary, the fair inference is that it was before the 23rd of September, and if so, they may have had *at that date*, no desire or intention that the policy of the Appellants should cover any other than the goods in the one building. If the case were otherwise it was the duty of the

Respondents to have given evidence on the point, and, in its absence, I feel bound to conclude against them. That the extra primium was charged and paid *solely for extra endangerment*, because of the openings made into the building in which the oil business was carried on, I have not the slightest doubt. The remarks of Hooper when he saw it "that the former risk was "endangered by these cuttings, this is a bad job or "mess, you have made the risk all one;" that "*the rate* "*would be at least one per cent. on the stock*," and, according to Darling's testimony, "that we (Respondents) "had made the risk all one;" and from what we all know of the dangerous character of the oil business, clearly establishes that position. And, that the Respondents would have had to pay the extra rate, had none of the goods been removed, is further evidenced by the payment of the extra rate to the Royal Insurance Company. The goods had been previously insured by the latter company, to the extent of $6,000, and, on the 5th September, the Respondents paid that company a further premium of $22.17, as appears by the receipt of that date for that sum, "being the premium on an insurance *for extra endangerment* on property described in policy dated 1st August," before then issued. Upon this point we have also the testimony of Darling. He says "We had been insured in the 'Royal' before the "change." "We notified them of the change as *we did* "*the Defendants*." "They *continued* the insurance on the "goods." "We have made a claim which they have not "recognised." "They set up that they only insured the "stock in the old building, and that they charged the "extra premium *for the increased risk covered by these* "*openings*," &c. What is the meaning of the statement: "they *continued* the insurance on the goods?" On

what goods? Clearly only on those *remaining*. They were not asked to allow the insurance to follow the goods removed, and have such allowance indorsed on the policy, as was necessary. The Respondents could have no legal claim against the "Royal," and I cannot see that, until after the fire, they had any idea the goods removed were covered by the policy of the "Royal," and their claim against the Appellants is, in my view of the law and evidence, equally unsustainable. Having thus disposed of the case upon the testimony of the witnesses examined, so far as I have at this stage thought it necessary to refer, it is proper to consider it as affected by what the Respondents, in their Bill, improperly term the "amended application," of the 23rd of September, but dated the 9th August, the date of the previous one which was cancelled. It is admitted on all sides that the latter covered, and was at first, at all events, only intended to cover, the stock in the building in which the Respondents did business, and which adjoined, to the west, the oil store occupied by Williams, and subsequently by Onyon. On the 9th of August, the application was made for insurance "on their stock of dry goods, consisting "chiefly of cloths and tailors' furnishings, contained in "a stone building, covered with S. in M. (shingles in "mortar), marked one on diagram." On reference to question 7 of the application, the Company, or their agent, is referred again to the diagram. In answer to that question: "State the distance to the nearest build-"ing on the south side; —— feet; of what constructed "——; covered with ——; owned by ——; and occupied "by ——, as ——." Answer: "See diagram on "Pol. 1,377,249, expired." Looking, then, at that diagram, it, in the most satisfactory and certain manner,

points out the location of the goods to be insured, and none of the parties imagined it to cover anything outside of the *one building* as then and previously occupied. It is distinguished by having upon it "Wyld and Darling "(No. 1);" and at the end of this division "S. T., 272." On the adjoining division to the east is marked "Canada "Oil Co., S. in M.;" and at the end "S. T., 273." The two places of business are here plainly distinguished in a way that no person occupying either could be mistaken. The Respondents must, therefore, be held to have known *on the 23rd of September*, that their application of the 9th of August covered only the *one building*. On the previous application, on the day first mentioned, they paid $22.50 extra premium, and deliberately received and took from Hooper a receipt for $60, which included $37.50 previously paid as follows: "Received from Messrs. Wyld and Darling the sum of "$60, being the premium on an insurance to the extent "of $6,000 on their stock of dry goods, consisting chiefly "of cloths and tailors' trimmings, all contained in a "stone building, on south side of King Street, Hamilton, "*as described in the Agency Order* (*clearly meaning the* "*application*) *of this date* for twelve months, &c." Thus, then, the application previously made is accepted as the measure of the risk as fully and effectually as if written and first used on that day, and binds the Respondents just as fully. By accepting the receipt in that shape they plainly waived anything previously said or understood by them. "This receipt is issued "subject to all the conditions of the policy issued "by the Company." Thus, on the 23rd of September, the Respondents pay for the extra risk demanded, and, knowing that the application only covered the *one building*, accept, without making any attempt

to inform Hooper, or any one else, that they wished a change made, a receipt, *in express terms referring to that application.* The policy is, in terms, in exact agreement with this application so originally made, but not attempted to be altered by the Respondents; and now they seek to reform the policy in opposition to the application, and we are asked to violate every principle of evidence as to written documents, upon the most loose oral testimony, which does not even in any way contradict the written. The Respondents certainly knew the application of the 9th August did not cover goods out of the one building described. Without any amendment of that application, how could they be presumed to have thought it covered any other goods on the 23d September. They either wanted *at that time* the goods in the added flats covered, or they did not. If the former, they were bound *then* to have said so; and the Company could in that event have exercised their alternative rights by accepting or declining the risk; but from the fact of their silence on this important point, at that particular and important time, and by their acceptance of the receipt in the terms stated, I feel the evidence conclusive of the fact that no change was desired by them, or that, at least, we are bound so to decide. They produce this receipt *as a part of their case*, and I feel bound to conclude them by it. Upon every principle of evidence established, for wise and just reasons I would be constrained to uphold that receipt in its most plain and obvious terms and meaning, against evidence of an opposite nature, of conversations and remarks had and made, and even against agreements previously entered into, unless that evidence clearly showed a mutual mistake or fraud. No proof is offered of any misconception as to the terms

of the receipt, but we are asked, *in violation of them*, to reform a policy fairly giving to the insured all the security that the receipt contemplated. The judgment of the Appeal Court at Toronto seems altogether founded on the allegation of an essential difference in terms between the application and receipt and the policy. I must confess my inability to discover the slightest conflict between the former two and the latter. They all unite in describing but the one building, and clearly distinguish it from the other. If a mistake is made in an executory contract, it can be reformed, and compliance with its amended terms enjoined; or, if the final conveyance or other instrument be executed, it, too, may be reformed. The receipt here taken with the application forms the executory contract, and if it failed to provide the necessary security, and was equally defective with the policy—as contended for by the Respondents--the Bill should have so claimed. The Respondents, however, virtually say the receipt is in proper terms, and seek no reformation of it, as forming a part of such executory contract; but even, in that case, they would have to go back a step further still, and seek to reform their own application; for in it, too, will be found evidence conclusively against the Respondents. The latter was the document of the Respondents themselves, and, sustaining the terms of the receipt and policy, it destroys the effect of any statements in August, at least five weeks previous to the receipt, which so pointedly refers to it. It cannot be treated otherwise than as the document of the Respondents, as it distinctly provides that it shall be so considered. Everything done and said previously became merged in what took place on the 23rd of September, when the first receipt was cancelled and an extra premium paid; and the whole

negotiations culminated in the receipt that day given; by which, all previously done was cancelled, except the previous payment of $37.50, and the retaining intact of the application as first made.

If, on that 23rd of September, they (the Respondents) really intended the policy to cover all the goods, they should have altered their application. They knew it referred to but *one building*, and it was a duty incumbent on them to have had it amended, if they so desired, and if they failed to have it done, it would be gross injustice to levy a contribution for their loss upon a company that possibly might never have accepted the extra risk; and that result, too, to arise from the gross negligence of the Respondents to communicate their wishes and seek an adoption of them. Two parties are necessary to make a contract, but if the policy here should be reformed, such will not hereafter be considered necessary. The ground will be clear for a party to enter into negotiations with another calculated to impress him with certain ideas, as to positions to be taken by each. Each having, up to a certain point, the alternative of proceeding or stopping—the one induces the other to proceed—documents are written, executed and acted upon, and months afterwards, when a loss takes place for the first time, the party originally moving, alleging *under the altered circumstances* not that he had made a clear and plain agreement, but, that he was himself guilty of negligence in failing to communicate to the other his intention to have had something done beyond what that other expected, is permitted to obtain a remedy where no contract existed. In vain would the other contend that had his opponent informed him in time he would have broken off the negotiations. That is a correct version of this case, as presented by the

evidence. Smith swears positively he would not have issued a policy, such as it would be if reformed as the Respondents demand.

The application to reform a policy should be sustained by evidence uncontradictory, and, in other respects, satisfactory, so as to leave no reasonable doubt as to the portion of the contract alleged to have been written erroneously or omitted. An applicant seeks to be relieved from the effect, in a large measure, of his own negligence and mistake, and he does so in opposition to the terms of a written document. If the error or omission is capable of proof by written testimony, Equity more readily relieves; but where the mistake is to be otherwise shown, the evidence should be strong and almost irresistible, as well as clear and circumstantial, so, at least, as to leave no reasonable doubt that the contract was fairly made and understood *by both parties.* I am bound to hold that it must have been understood *by both* parties, *and must be so proved.* The active parties in this case were the Respondents and Jermyn, on the one part, and Smith and Hooper, on the other Let us consider for a moment what the evidence is as to *the agreement* to insure the goods in the "added flats." The Respondents' case rests wholly on an alleged *agreement* with Hooper. I have already shown that no evidence of such can be discovered in the testimony of either Darling or Jermyn. It is not pretended by them, or either of them, that Hooper, on the only occasion they spoke to him (in August), ever made any remarks from which they could conclude he would take any risk on goods in the "added flats." They made general remarks as to having the "stock insured," but they did not expressly say anything as to the goods in the added flats. They might, or might not, have intended their

remarks to include them, but if *they* did, how do we arrive at any conclusion as to how *he* understood *them*? He made no reply, and we have, therefore, no statement from *them* to enlighten us. Had he replied, we might have had something from the nature of it to guide us, but this fact is clear, that no express request was made to him as to the goods in the "added flats;" and I cannot conceive how such general remarks, without any reply, can be tortured into *an understanding*, much less *an agreement*.

The power of Hooper to bind the Company, I maintain, is limited, as testified to on the trial; but let us now look at his and Smith's testimony, having already disposed of that of the other witnesses, and, considering it all together, and weighing it, ascertain how far it goes to make out the Respondent's case, admitting, for the present, his (Hooper's) power to bind the Company, but bearing in mind the character of the evidence necessary to sustain such a case.

Hooper, the Respondents' own witness, whose evidence is certainly contradictory, says: "I said nothing to them "about being insured, or not, in respect of the stuff in "the two flats; I did not suppose the insurance "covered the stuff in the two flats; I never considered "whether they were insured or not, in respect of these "goods; *nothing was said on the subject*; I swear I did "not know that by this letter the Plaintiffs wanted me "to cover these removed goods; I do not now know "what they intended; I conjectured they intended me "to cover these goods by this insurance; I entertained "this conjecture shortly after the fire." There is here, not only no evidence of any understanding that the goods in the "added flats" were to be covered, but positive proof to the contrary. This evidence is in

relation to facts and circumstances which took place five weeks before the final agreement, which is evidenced by writing binding on both parties which this evidence sustains; but the greater portion of his testimony, relied on by the Respondents, is to my mind, wholly inadmissible. After all the negotiations had ended in the issue of the policy, founded as it was upon the previous documents, any *opinion* of Hooper as to what the legal effect of them was, or what *he* thought the policy covered, or was intended by the framers of it to cover, or how he read it, was not legitimate evidence, and should have no bearing on the case. The evidence of what he said to Jermyn, and to Ball, after the fire, that *he* considered the stock in both buildings covered by the insurance, is after all but an opinion as to the construction of the policy. He says, "I told him (Mr. Ball), I considered the policy "covered both buildings; that is the way I read the "policy, when I wrote it out in my Registry. "That is "not the way I understood the application, &c." But, he says, "I always thought I was insuring the whole "stock;" and further, "I did not warn the Plaintiffs I "was insuring less goods than formerly." There is, however, nothing in all this evidence (too contradictory to base upon it the reformation of a policy, founded on written agreements) to shew that there was any specific application to him to cover the goods in the added flats. Much less any agreement to cover them. He says unequivocally, "nothing was said on the subject;" if so, there could have been no agreement; and that portion of his evidence, not being in any way contradicted, but sustained by the evidence of Darling and Jermyn, his or their *surmises*, as to what was, or was not, covered can have little bearing on the case. What is wanted is

satisfactory proof of *an agreement* entered into; if the evidence does not establish one understood clearly by both parties, it establishes nothing; and I feel bound to say that, taking Hooper's whole testimony, and considering it with that of Darling and Jermyn, I can come to but one conclusion, and that is, that no *agreement* or *contract* was ever made to insure the goods in the "added flats."

The Respondents depend on Hooper's testimony to make out their case, but if his testimony falls short, it is the Respondents' misfortune. We cannot supply it by receiving one portion of his testimony,and rejecting another, when we have nothing by which we can safely do so; for the part heretofore rejected is probably as correct as that adopted, and, I think, more so. What *either* of the parties individually *thought* or *intended* at the time is not what the law requires, but that they should, by communications between them, have come to a mutual understanding and agreement, that the conclusion at which they arrived should form a portion of the policy to be subsequently issued. Nothing of the kind appears, any more from the testimony of Hooper than from that of Darling or Jermyn.

Let us now look for a moment at the testimony of Smith, upon which much stress has been laid, and but a part of which has been considered. It is somewhat contradictory, but must be taken *as a whole.* I have selected some of the more important passages: He says "I understood the risk was in building no. 272." "If I had supposed the risk was intended to have been on the stock in 272 and 273, *I should not have issued the policy.*" "I first heard that the Plaintiffs contended that the policy covered the goods in both buildings after the fire." This witness, so far, does not help the Res-

pondents' case, but the opposite. He says again: "The Plaintiffs were certainly insured up to the 23rd of September." Insured as to what goods? We cannot certainly assume he meant to include those in the "added flats," for, looking at the whole of his testimony and the application and receipt, we are bound to assume the contrary.

I now come to refer to and consider another part of his testimony, evidently given in reply to a hypothetical case put to him, and upon which, in my opinion, too much stress has also been laid. He says: "*If* Mr. Hooper had insured deliberately the goods in "these buildings as one risk, it would have been bind- "ing so long as this receipt is in force, that is, until the "receipt is cancelled in some way or other. The risk "is binding, notwithstanding it is in violation of our "standing rule as to splitting up risks." I cannot see why this statement should be quoted as bearing on the issue. It is not evidence as to any of the governing facts, but merely Smith's interpretation of the legal construction of the receipt, when considered in relation to the character of Hooper's authority under his instructions; and whether or not the part referring to his acceptance of risks, as to goods *in more than one building* should be held to be merely directory or otherwise. Mr. Smith's construction may be quite correct, but it is nevertheless not properly evidence; and certainly not in any way binding on any court—even if, as in this case, against his own company.

After quoting that part of Smith's evidence, Mr. Justice *Patterson* very significantly and properly says: "The important enquiry is, what did Hooper insure?" By which must be understood, not by vague and doubtful remarks, but by a legal and binding contract. In reason-

ing it out the learned judge decides that the goods *in both buildings* were contracted to be covered, but, with all deference, I regret to have to differ with him. He says: "*The application was to insure the whole stock.*" I can find no evidence to sustain this statement. The application at the first and last, and all through, was for insurance on goods in the building no. 1 upon the diagram, with the name of the Respondents' firm on it. The goods were covered by both the interim receipts while they remained *in that building*, *and no longer*. It must be conceded that when removed from that building the interim receipt ceased to cover them just as the policy would do—for the former provides that it "is issued subject to all the conditions of "the policy issued by the Company." The result of the removal, therefore, into No. 273, was just the same, in law, as if they had been moved a mile away. The insured would be bound, in either case, to give notice of the removal, and, in order to continue the risk, have an endorsement made on the policy, if issued, or, on the same principle, on the interim receipt, if the policy had not been issued, or by some other binding contract. The interim receipt operates in the meantime as a policy. It is a binding contract in writing as much as a policy, and cannot be varied by the act of *one party* in giving a notice of removal. It requires not only the concurrence of the other party, but requires a new *binding contract* to be entered into. Where, I ask, is the evidence of any such to override the contract contained in the receipt? I have sought in vain for it. The notice of the 10th of August does not ask for it, and, for all the Respondents have proved, was not so intended; but, even were it so, it is all on one side. There is not the slightest evidence that Hooper, *then*, so understood it

or in any way agreed that the risk should follow the goods; and had he done so, in the most explicit terms, could his mere words, without any new consideration, be considered as effectual to change and vary the then existing *written* contract? I repeat, however, the objection before taken, that everything which transpired in August became merged in the cancelling of the first interim receipt, the payment of the extra premium and the acceptance of the receipt on the 23rd September, which referred to, and *adopted the application previously made.* A new and binding contract was then made in express substitution of the one previously existing, and to alter the terms of which, evidence of previous words or understanding between the parties cannot be received. By cutting the openings in the walls the Respondents avoided the insurance effected by the interim receipt given on the 9th August, which the notice of the 10th (the day following) could not alone remedy—and the risk had, by their unauthorized act, been increased and thereby cancelled. They had consequently no insurance *on any goods* pending the subsequent negotiations, nor until the new terms as to the extra premium had been agreed upon and the money paid. The transactions of the 23rd of September are the only ones to be relied on as binding the parties. To go behind them would be in complete opposition to the binding acts of the Respondents themselves, which they cannot be permitted to repudiate, but which they don't even ask to be permitted to do. I have read and considered all the cases and books presented for our guidance, and others, and can find none to establish a precedent to sustain the application of the Respondents, but many clearly against it. Before making reference, however, to some authorities, I think it not out of place

to refer to a remark in the judgment of the learned Chief Justice *Hagarty*, as to the evidence and conduct of Smith. His Lordship says: "If he (Smith) thought "the Plaintiffs might have believed that they were so "insured, the straightforward course was to at once "notify them to the contrary. Knowing the proba-"bility of their holding this view, he prepares the "policy as he thinks to prevent their having the benefit "of it." I think that remark is hardly justified by the known facts. In the first place, Smith was only in communication with Hooper. He sent him the policy, and might rightly conclude that if there was any error in it, Hooper or the Respondents would discover it and have it rectified. He did not seek or expect to bind the Respondents in the dark. He knew they would shortly receive the policy, upon the back of which was printed "You are particularly requested to read this "policy and the conditions, and to return the same "immediately, should any alteration be necessary." And in the policy was written: "N. B.—There is an "opening in the east end gable of above through which "communication is had *with the adjoining house, which* "*is occupied by one Onyon as a coal oil store, &c.*" Smith had no reason to presume that the Respondents would be so negligent as not to look at and read their policy, if they really were so. On the contrary, the correct assumption was that they would do so, and in that case, would, not only from the general description of the premises, but in the note just quoted, see that no goods were covered in the "adjoining house occupied by Onyon," the whole of which was plainly excluded. Smith had every right to conclude the parties meant what they subscribed their names to, and he was not, in any way, called upon, as I think, to ask them direct-

ly if they did not want something else or further. Whatever surmises he may have had, he gave them every opportunity of knowing exactly the extent of the risk undertaken, and led them not astray. Having, in this plain and open manner, given notice to the Respondents, I cannot agree with the suggestion that the course pursued by Mr. Smith was not straightforward, or that he was bound to give notice in any other way.

The language of Vice-Chancellor Sir *W. James*, in *McKenzie* v. *Coulson* (1), is applicable in every way to this case. He says: "If all the Plaintiffs can say is: "We have been careless,—whereas the Defendants have "not been careless,—it is useless for them to apply to "this Court for relief. The Defendants say they would "not have accepted the policy on any other terms. It "is too late, now that the loss has been incurred, for the "Plaintiffs to set aside the policy, &c." That is exactly this case. The "Plaintiffs were careless," not only in respect to the application if they wanted all the goods covered, but in not reading the policy, if such was the case—"but the Defendants were not so." The Defendants in that case say they would not have accepted the policy *on any other terms.* Smith, the agent, swears positively in this case, that he would not have issued the policy in the terms which are now sought to be added. The learned Vice-Chancellor further says: "Courts of Equity *do not rectify contracts.* They may, "and do, rectify *instruments* purporting to be made in "pursuance of the terms of *contracts.* But it is always "necessary for a Plaintiff to shew 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." And

(1) L. R. 8 Eq., 753.

again: "It is impossible for this Court to rescind or "*alter a contract* with reference to the terms of the nego- "ciations *which preceded it.* The Plaintiffs cannot escape "from the obligation of the contract on the ground that "they verbally informed the junior clerk of the Defend- "ants' agent something different from what they after- "wards, in writing, agreed to. *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.*" If, then, the learned Vice-Chancellor correctly laid down the legal principles applicable to the circumstances before him, we have, in this case, the opportunity and requisition to apply them to circumstances, as far as those principles go, singularly identical.

In *Henkle* v. *Royal Exchange Association Co.* (1), Lord Chancellor *Eldon* lays down the law, which, as far as treatises and reports are to guide us, has ever since been applied. He says: "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 con- "tracts. So that if reduced into writing *contrary to* "*intent of parties*, on *proper proof*, that would be recti- "fied. But the Plaintiff comes to do this in the harsh- "est case that can happen of a policy, after the event "and loss happened, to vary the contract so as to turn "the loss on the 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 agree- "ment? * * * As to the first, it is certain

(1) 1 Ves., 317.

" that to come at that *there ought to be the strongest* "*proof possible*, for the agreement is twice reduced to " writing in the same words, and must have the same " construction, and yet the Plaintiff seeks, contrary to " both these, to vary them, &c. * * * "

How exactly like the case under consideration ?

It is "of a policy," "*after the loss has happened*" "to turn the loss on the insurer," "for the agreement" is not only "twice" but *thrice* "reduced into writing in the same words," or at least words which "must have the same construction," and the Plaintiffs seek, contrary to all these, to vary them. The decisions appealed from, to this Court, in this case, in my opinion, exhibit two important errors. First, the fact of the application *in its original terms* having been recognized by the acceptance of the receipt referring to it on the day the balance of the premium was paid (the 23rd September) is not at all referred to as the binding contract, but loose remarks —without any thing like a *contract entered into* weeks before, are erroneously taken as the ground-work upon which the judgments are based; and second, they are founded on the fallacy *that the receipt and application differ so essentially from the policy*, that while the latter does not cover the goods in the "added flats," the two former do—when, to my mind, they, as to the particular building and risk indicated, are completely identical. The receipt refers us to the application, and the latter is for insurance "on their stock of dry goods * * * contained in *a* stone building covered with S in M marked no. 1 on diagram," and "*the* diagram" is clearly indicated by the answer to question 7, answered in the application in these words and figures. "See diagram on Pol. 1,377,249, expired." No one is rash enough to venture the assertion that that description

has the slightest reference to the goods in the "added flats," of another building particularly referred to as an adjoining building to the one containing the goods to be insured. Away, then, must go the idea that the interim receipt, thus pointing to the application for the location of the goods to be insured, covered such last mentioned goods; and any judgment founded on such a supposition cannot be, in my opinion, anything but erroneous. Had, indeed, notice of opening the walls and removal of part of the stock and the loose conversations, such as they were, been all that took place before the issuing of the policy, there might have been some reason, but still, I think, an insufficient one, for an application to reform the policy--but why should the more important subsequent transactions of the 23rd of September be entirely winked out of sight, when they, as I cannot help concluding, completely estop the Plaintiffs from setting up previous ones, which, on every acknowledged legal principle of law, became merged in the binding documents then executed, received, renewed, and adopted? On the 10th of August the Plaintiffs, although they do not prove it, *may have intended* to cover the goods in the "added flats," but, for the reasons I have heretofore suggested, or others, may not have so intended on the 23rd of September; and on which point they are singularly silent, but whether they did so intend or not, it is not, in my opinion, important to consider; for if they did so intend they were then bound to have so amended their application as to have included them; and that in plain unmistakable terms. See the concluding paragraph of judgment of Lord *Westbury* in *Proprietors*, &c., *of English and Foreign Credit Co.* v. *Arduin* (1). By not

(1) L. R. 5 H. of L., 86.

doing so they led the principal agent of the Appellants to conclude differently ; and they are properly estopped from the effects of what would, *by the suppression of their intentions*, operate as a fraud on the insurers; resulting in (what the Company would not knowingly have issued) a policy covering an oscillating risk between the goods in two buildings to insure to the benefit of the Respondents, as an accident to the one or the other might occur. This is not, therefore, such a position as we should be expected strain our eyes to pick out evidence to establish; much less make guesses, however shrewd they might be, of the unexpressed intentions or wishes of the parties when obtaining the insurance. There is nothing in the whole evidence, apart from the application and receipt, in the shape of an agreement in any terms, that the policy could be reformed by, and, were it desirable that it should be *reformed*, instead of awarding judgment for the amount claimed under the policy, I believe it would be no easy task to supply them from a specific agreement by words spoken at any time by the parties. I am clearly of opinion there is nothing proved to reform by in this case, and that the appeal should be allowed with costs, and judgment given for the Appellant.

The Chief Justice :—

As to costs the Court being equally divided :

Under sec. 38 of the Supreme and Exchequer Court Act, this Court has power to dismiss an appeal, or to give the judgment and to award the process or other proceedings which the Court, whose decision is appealed against, ought to have given or awarded; and the

Supreme Court may, in its discretion, order the payment of the costs of the Court appealed from, and also of the appeal or any part thereof, and as well when the judgment appealed from is reversed, as when it is affirmed. By sec. 42 of the Common Law Procedure Act of 1854, "The Court of Appeal shall give such judgment as "ought to have been given in the Court below."

By sec. 42 the Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process or otherwise.

The practice after the passing of that act was that, when the Court of Appeal affirmed the judgment below, they gave costs to the successful party, but no costs of appeal were given when the judgment below was reversed. *Young* v. *Moeller* (1) so laid down the rule.

Afterwards in the Exchequer Chamber, in 1862, *Archer* v. *James* (2), the question arose, when the Court were equally divided. *Pollock* said, after considering the matter, "the Court being equally divided, there will "be no costs." The judgment of the Court below was affirmed without costs.

In *Anderson* v. *Morice* (3) the matter was discussed, there being an equal division of opinion in the House of Lords, when, in consequence, the appeal was dismissed. It was there decided that nothing should be said about costs. The entry was, judgment affirmed, and appeal dismissed.

In a subsequent case, *Prudential Assurance Company* v. *Edmonds* (4), where there was an equal division of opinion, three of the learned Lords refer to the question

(1) 6 E. & B., 683, (1856) ; (2) 2 B. & S., 105 ; (3) L. R. 1, H. L. 752, (1876) ; (4) L. R. 2, H. L., 498, decided 15 June, 1877.

of costs. Lord *Hatherly* said : "Following the precedent "of a former case, I shall not feel disposed to advise your "Lordships to give costs of the appeal in such a case."

Lord *O'Hagan* said: "We are equally divided, and the "Judgment must stand, but I think, with my noble and "learned friend on the Woolsack, that, with a view to "uphold a decision which we came to last Session, "there should be no costs of the appeal."

Lord *Blackburn* said: "If your Lordships are equally "divided, as I believe you are, the result of the judgment "will not be disturbed, but that no costs will be given "of the appeal to this House." The ruling was, their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

The authorities seem to show that, both in the Exchequer Chamber and the House of Lords, when a judgment appealed against is affirmed because of the Judges being equally divided in opinion, the appeal is dismissed, but without costs.

Even if there were no decided cases on the subject, as our Statute authorizes this Court, in its discretion, to order the payment of the costs of the appeal, unless that discretion is exercised in favour of one party or the other, I fail to see how either would be entitled to the costs of the appeal.

The majority of the Court do not order the Appellants to pay the costs of the appeal. The Respondent is therefore not entitled to them.

This view, however, does not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in cases where there is an equal division of opinion amongst the Judges which causes the affirmation of the judgment appealed from.

Their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

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