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*Jan'y 31.

June 3.

THE HASTINGS MUTUAL FIRE INSURANCE COMPANY..... } APPELLANTS;

AND

THOMAS SHANNON .....RESPONDENT.

ON APPEAL FROM THE COURT OF ERROR AND APPEAL FOR ONTARIO.

Insurance—Misrepresentation as to Situation of Risk—Survey made by Agent.

C. M. Appellants' Agent solicited and prevailed on *T. S.* to insure his premises with the Appellants. Previously he had examined the premises to be insured, and on the 22nd of April, 1874, *T.S.* signed the application which *C. M.* had caused to be filled up, and upon the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. *T.S.* stated at the time of signing the application, that the distances put down in the diagram were not accurate. *C. M.* promised he would go to the property and make an accurate measurement

*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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of the distances. By one of the conditions of the policy it was provided that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, but the company will be responsible for all *surveys* made by their agents personally.

Held,—Affirming the judgment of the Court of Error and Appeal, that with respect to the survey, description and diagram the assured was dealing with *C. M.*, not as his agent, but as the agent of the company, and that therefore any inaccuracy, omissions or errors therein were those of the agent of the company, acting within the scope of his deputed authority, and not of the insured.

APPEAL from a judgment of the Court of Error and Appeal for Ontario (1), affirming the judgment of the Common Pleas (2).

This was an action on a policy tried before *Patterson*, J., and a jury, at *Barrie*, at the Spring Assizes of 1876.

On the 22nd of April, 1874, the Respondent signed an application upon one of the Appellants' blanks for an insurance on fixed and moveable machinery contained in a grist mill, $2,000, annexed to which, or endorsed thereon, was a diagram purporting to represent the exact situation of the said mill in relation to adjoining buildings. The application and diagram represented that the saw mill was distant from the grist mill 140 feet, whereas it was only 110, and also other buildings as 100 feet, whereas they were not over 60 feet. The Respondent paid to *Charles Morris*, the company's agent, $45 for the premium of insurance of the property mentioned in the application and received an interim receipt.

By one of the conditions of the policy it was provided that if an agent should fill up the application he should be deemed to be the agent for that purpose of the insured, and not of the company; "but the company will be responsible for all *surveys* made by their agents personally." In this case *Morris*, who had, a few

(1) 2. App. R. Ont. 81. (2) 26 U. C. C. P. 380.

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days prior to the 22nd of April, 1874, examined the premises with a view of effecting an insurance, filled in the application. The Respondent, thinking that the distances stated in the said diagram were not, or might not be strictly accurate, and that the same might possibly in other respects be imperfect, drew the attention of the said *Morris* thereto, before and at the time of his (the Respondent's) signing the said application. *Morris* alleged that it was sufficiently accurate; that any inaccuracies, if there were any, were of no consequence, and that, at all events, he would go to the property and make an accurate admeasurement of the distances, and, if necessary, correct any errors in the said application or diagram before sending it forward to the Board of Directors of the Appellants.

The agent, in forwarding the application to the head office, wrote them in reference to the risk, but such letter was not produced at the trial. Upon the back of the application, underneath the diagram, is the following:—

The agent is particularly requested to answer the following questions (*inter alia*).

Q. Have you personally examined the premises? A. Yes.

Shortly thereafter the Respondent received a policy from the Appellants, but which was re-delivered to the agent, who got it as he said, for the purpose of making some change therein. The premises were subsequently destroyed by fire, on the evening of the twenty-first and the morning of the twenty-second day of July, 1874, of which the Respondent gave notice to the Appellants on the 26th of the said month of July, in the same manner that he had given notice of the insurance in the Citizens' Insurance Company, with whom he was also insured.

To the notification of the Respondent's loss, the Appellants replied, on the 29th of the same month, inform-

ing him that they had arranged with the Inspector of the Gore District Mutual Insurance Company, who had a concurrent risk on the grist mill, to adjust his loss.

Morris afterwards, and as promised by the said Inspector, handed to the Respondent's Solicitor the forms of application to be used by him in making the usual proof of claim, and the same were used accordingly, and, having been duly sworn and certified to, were, on the sixth day of August following, forwarded by post, in the same manner that all the notices and papers had been forwarded and given to the Appellants, and they were, in fact, duly received.

No objection was ever made to the form of the claim papers, nor was it contended that they did not contain all that the Respondent was bound to put therein, but on the 11th day of November, more than three months after the claim papers had been received, the Appellants, in answer to a demand for payment of the loss, answered, without objecting in any way to the form of the claim papers, that they had placed the matter in the hands of the Gore Mutual Insurance Company for adjustment, and they would, in all probability, concur in any settlement that company might make.

No further communication having been made, the Respondent commenced his action on the seventeenth day of February following the happening of his loss.

The declaration contained one count on the policy, to which the Defendants pleaded several grounds of objection.

The special replications and rejoinders raised the question on which this appeal was decided, viz.:—

Whether the company had not assumed a direct responsibility for the acts of their agent, *Morris*, in reference to surveys, and, if so, whether a notice to and knowledge by him as to the position of the adjoining buildings were binding on the company.

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Mr. *George D. Dickson*, for Appellants:—

The question is one of contract. The Appellants contend that they are free to make such contracts for insurance as may be agreed upon, subject to such conditions, restrictions and stipulations as their governing body may impose, and the insured agree to, and that when a contract has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, so as to add or subtract from, or in any manner vary or qualify, the written contract, *Goss* v. *Lord Nugent* (1); *Woolam* v. *Hearn* (2); *Forsyth* v. *Boyle* (3); *Mason* v. *Hartford Fire Ins. Co.* (4); *Mason* v. *Scott* (5); *Jones* v. *Victoria Graving Dock Company* (6); *Direct U. S. Cable Company* v. *Anglo American Telegraph Co.* (7); *Shannon* v *The Gore Ins. Co.* (8).

In the construction of a contract, the general intent to be gathered from the writing is to prevail, regard being had to the clear intent of the parties rather than to any particular words used. *Pollock* on Contracts (9); *Southwell* v *Bowditch* (10); *Smith* v. *Hughes* (11). In the application it is specially provided that "a special survey must be filled by the applicant on all mill and factory risks," and one of the conditions of the policy is:—

That if an agent of this company fill up an application for insurance therein, such agent shall be considered as acting for the Applicant, and not for this company, and no verbal or written statements of the said agent to the contrary shall be received in evidence, but the company will be responsible for all *surveys* made by their agents personally.

I take it, then, looking at the whole contract, that the intention of the parties was that the insured should be

(1) 5 B. & Ad. 60.
(2) 7 Ves. 211.
(3) 28 U. C. Q. B. 21.
(4) 28 U. C. Q. B. 31.
(5) 22 Grant 592.
(6) L. R. 2 Q. B. Div. 323.
(7) L. R. 2 App. C. 412.
(8) 27 U. C. Q. B. 405, 409.
(9) P. 407.
(10) L. R. 1 C. P. Div. 379.
(11) L. R. 6 Q. B. 607 and 610.

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responsible for any errors in the description in the annexed diagrams, and that he is estopped from saying it is not his. *Pickard* v. *Sears* (1); *Cornish* v. *Abington* (2); *Hammersley* v. *DeBiel* (3); *Beattie* v. *Lord Ebury* (4); *Thomas* v. *Brown* (5).

Then, did the agent make the survey within the meaning of the words of the policy? It is evident, by the terms of the application, that the survey for which the company, by the policy, agrees to be responsible is not applicable to mill risks; and, moreover, what constitutes a survey, according to all authorities, is something more and quite different from looking all round the place, making no measurements, and this several days before the application was made, and before the applicant had made up his mind to insure with Appellants. See *Rowe* v. *The London and Lancashire Ins. Co.* (6); *Denny* v. *Conway* (7); *Bunyon* on Fire Insurance (8), and authorities cited in the judgment of *Harrison*, C.J., in court below.

In this case, the Respondent knew the application and diagram, misrepresented the facts and risk, and trusted to his friend to correct the same. This was not done, and the company cannot be held to have accepted the risk otherwise than as disclosed by the application.

The policy, also, was voided by reason of the further insurance, notice thereof not having been *received* by the company. *McCann* v. *The Waterloo County Fire Ins. Co.* (9).

Another point on which Appellants rely is, that the non-compliance with the requirements of the contract as to the certificate being given by the most contiguous Magistrate or Notary Public, accompanied by an affi-

(1) 6 Ad. & E. 469.
(2) 4 H. & N. 549.
(3) 12 Cl. & F. 45.
(4) L. R. 7 H. L. 102.
(5) L. R. 1 Q. B. Div. 714.
(6) 12 Grant 311.
(7) 14 Gray, Mas. 31.
(8) 2nd Edition, pp 67-68.
(9) 34 U. C. Q. B. 376.

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davit as required, voids the policy. *Lampkin* v. *The Western Assurance Co.* (1); *Davis* v. *The Canada Farmers' Mutual Fire. Ins. Co.* (2).

Under 36 *Vic.*, c. 44, sec. 36 *O.* the company had no power to contract except under seal, signed by the President and Vice-President, and countersigned by the Secretary. The written contract could only be altered in writing by the company, under seal, and no agent could vary a written contract by parol evidence.

Mr. *Dalton McCarthy*, Q. C., and Mr. *H. H. Strathy* for Respondent:—

As to the condition requiring the Respondent to furnish a certificate "under the hand of the Magistrate or Notary Public most contiguous to the place of fire," it is an unjust and unreasonable condition, and was properly so found by the Judge at *Nisi Prius*, and his ruling is right, and ought to be sustained. See 36 *Vic.*, c. 44, s. 33, *O.*; Imperial Act, 17 & 18 *Vic.*, c. 31, s. 7; *Rooth* v. *The North-Eastern Railway* (3).

The objections as to the form of the claim papers, and as to the preliminary proofs, were not taken at the trial, but, even if they were, the Appellants, having supplied the forms for the Respondent through their agent, cannot be heard to contend that they are not in the proper form; the Appellants are, in fact, estopped. These conditions are voidable, and the case of *Armstrong* v. *Turquand* (4) shews that they can waive their right by mere acquiescence, and we have more than that here. See also, *Webb* v. *The Commissioners of Herne Bay* (5); *Best's* Evidence (6).

The questions arising under the 7th and 8th pleas are, in effect, whether the finding of the jury upon the

(1) 13 U. C. Q. B. 237.
(2) 39 U. C. Q. B. 453, 465, 466.
(3) L. R. 2 Ex. 173.
(4) 9 Ir. C. L. 32.
(5) L. R. 5 Q. B. 642.
(6) 5th Ed., p. 684.

alleged misrepresentations in the application should be disturbed or not.

The alleged misrepresentations, as to the nature and situation of the risk, and as to the value of the insured premises, are said to have been contained in the written application for insurance. But the said application for insurance was not produced, but is alleged to have been lost, and the Appellants, being allowed to give secondary evidence thereof, endeavored to establish that a certain paper, which they put in, was a true copy thereof; the jury, however, in answer to the first, second, fifth and sixth questions put to them by the learned Judge before whom the case was tried, in effect, found that the said paper was not a true copy of the application. Such finding is supported by the evidence, and, if correct, disposes of all the grounds of alleged misrepresentation.

The alleged misrepresentations or errors are not in the application, but in the diagram thereon endorsed, and there is no clause in the policy avoiding it for errors or mistakes in the diagrams. It is for "erroneous representation," or for omitting "to make known any fact material to the risk" in the "application," that the policy is declared to be void.

As to the alleged misrepresentations of the nature and situation of the risk, the Appellants' agent, having himself made an examination and survey of the premises before the insurance was effected, knew, or must be taken to have known, whether the nature and position of the risk, proposed for insurance in the Appellants' Company, was correctly described, and the Appellants, possessing such knowledge, (for they must be taken to have known all their agent knew—all, at any rate, acquired in the discharge of his duty as their agent) cannot rely, as a ground of defence to the Respondent's claim, on any inaccuracies or misstatements in the application or diagram as misrepresentations.

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The agent of the Appellants, having made a survey and examination of the insured premises prior to the acceptance by him of the risk, and having caused the Respondent's application for insurance to be filled up in the form in which it was, and having promised to correct any errors that may have been therein, the Appellants cannot set up the mistakes (if any) therein as misrepresentations to avoid the contract of insurance.

But, even under the terms of the policy, it is declared that "the company (the Appellants) will be responsible for all surveys made by their agents personally." And the said *Morris* did personally make a survey of the insured premises and agreed to correct the diagram that was made, if it required correction, by making another and more accurate survey, all of which was within the scope of his authority.

Owing to the non-production of the letter that the said *Morris*, as agent of the Appellants, sent to his principals, and on which, as well as on the application, the insurance policy seems to have been made out, it cannot be safely assumed, much less established, that the said *Morris* did not do as he agreed.

The application, survey and diagram are not so described or made part of the policy as to constitute their contents warranties; a mere reference to them is not sufficient for the purpose. If there is a doubt about the words, the Court will interpret them not as a warranty but as a mere representation. All that is declared in the application is that "the descriptions in the annexed diagram are true and complete in all particulars," which certainly does not necessarily or reasonably imply or import that the diagram showed, accurately or particularly, more than a *description* of the proposed risk, possibly the dimensions, etc., of the building in which the property to be insured was situate. See *Lothian* v.

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Henderson (1); *Parsons* v. *Watson* (2); *Stokes* v. *Cox* (3); *Budd* v. *Fairmaner* (4); *Scanlon* v. *Scales* (5); *Turley* v. *North American Ins. Co.* (6); *Bunyon* on Fire Insurance (7); *Hide* v. *Bruce* (8); *Davis* v. *Scottish Provincial Ins. Co.* (9); *Hopkins* v. *Provincial Ins. Co.* (10); *In re. Universal Non-tariff Fire Ins. Co.* (11).

The proof of there being a double insurance was on the Appellants, and it was not established, nor was it admitted or conceded at the trial. The Secretary of the company was a witness in the case and was not questioned. On application for a new trial, there was no affidavit that the notice had not been received. The presumption of fact is in favor of the Respondent.

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The judgment of the Court was delivered by RITCHIE, J.:—

Charles Morris was Defendant's local agent, and, as such, solicited risks, received applications, transmitted them, received premiums, granted interim receipts, and appears to have been and acted as Defendant's agent in all particulars connected with insurance, save only in the matter of filling up applications, when, and when only, it would seem he was to be considered as acting for the assured.

Galt, J., in his judgment, says :—

The seventh ground, on which, in fact, the defence really rested, remains to be considered. That objection is, *that the situation of the insured premises, as respects adjoining buildings, was not properly described in the application.* It is beyond question that the diagram on the back of the copy of the application produced at the trial does

(1) 3 Bos. and Pul. 499.
(2) Cowper, 790.
(3) 1 H. & N. 533.
(4) 8 Bing. 48.
(5) 5 Ir. L. R. 139, 154.
(6) 25 Wend. 374.
(7) Pp. 57 & 58.
(8) 3 Doug. 213.
(9) 16 U. C. C. P. 176.
(10) 18 U. C. C. P. 74.
(11) L. R. 19 Eq. 485.

* The Chief Justice was absent when judgment was delivered.

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not show correctly the position of the premises, but the Plaintiff, by his replication to the seventh and eighth pleas, says "that the insurance was effected by the Plaintiff with the local agent of the Defendants, having authority to solicit risks and to inspect premises offered or proposed or about to be insured by the Defendants, and to make out applications, receive premiums, and effect interim insurances;" and the Plaintiff says that the said agent personally inspected the property insured, and was fully aware of the position of the building containing the same, and its contiguity to other buildings; and the said agent afterwards made out the said application, or caused the same to be made out; and the Plaintiff says that the same was signed by him at the instance and procurement of the said agent, and upon the undertaking of the said agent that he would amend the same by inserting in the said application the distance of any building within one hundred feet from the building containing the property insured, before forwarding the said application to the head office of the Defendants, and the Plaintiff, relying on the said application, completed the effecting of the said insurance, by paying the premium to the said agent, and took from him an interim receipt effecting the said insurance of the said property against loss until the policy should be issued by the Defendants; but the said agent neglected to amend the said application by inserting therein the fact that there was a building within the distance of one hundred feet from the building containing the property insured, of which the Plaintiff had no notice or knowledge until after the happening of the loss in the declaration mentioned, and the Defendants did not make or raise any objection to the contiguity of any other building, or to the same not being mentioned or referred to in the said application; and the Plaintiff further says that there was no fraud or fraudulent misrepresentations on his part in reference to the matters herein pleaded to.

The clause in the policy is this:—

That if an agent of this company fill up an application for insurance therein, such agent shall be considered as acting for the applicant and not for the company, and no verbal or written statement of the said agent to the contrary shall be received in evidence, but the company will be responsible for all *surveys* made by their agents personally.

Upon the back of the application, underneath the diagram, is the following:—

The agent is particularly requested to answer the following questions (*inter alia*):—

Have you personally examined the premises?—Yes.

Are there any other circumstances connected with danger of fire to the property proposed for insurance ?—No.

It is, therefore, true that, so far as the application is concerned, the Plaintiff was contracting, through *his* agent, with the Defendants, through their agent, though one and the same person. But, with respect to the survey, description and diagram, the assured was dealing with *Morris*, not as his agent, but as the agent of the company. The company are not, I think, to be released or excused from consequences resulting from the carelessness or want of skill of their agent in a matter within the scope of his deputed authority, because he is also employed by the assured in another portion of the same transaction. If the company had not assumed a direct responsibility for the acts of their agent in reference to surveys, the case might possibly be in a different position. It is clear that the error, if any, in the description or diagram did not occur by or through the default, negligence or mistake of the assured, who appears to have acted throughout with the most perfect good faith, and to have furnished to the agent of the company every opportunity of examining and surveying the premises, and of testing and correcting his description and diagram before transmitting it to the company. He never, in fact, assumed the false representation or the responsibility of it, he never put it forward, but, on the contrary, when put forward by the company's agent, he repudiated it, calling attention to the inaccuracies of the agent's description and diagram, and pointing out minutely the particulars in which they were incorrect. He never authorized the transmission of anything but a correct description and diagram; he was guilty of no concealment, and he in no way directly or indirectly, by himself or in collusion with the agent of the company, attempted to obtain from the Defendants an insurance upon false represen-

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tations. If the difficulty in this case has arisen by or through the default, negligence or mistake of the agent of the insurers, I think it cannot be disputed that the policy would be valid. The insurance was pressed on Plaintiff by the agent of the company authorized to obtain insurances for the company, and when so pressed to insure, *Morris*, the agent, was taken through the grist mill and all round the place, and after that undertook to make out, with the assistance of an amanuensis selected by himself, the application; this he did as Plaintiff's agent—if adopted by him. But as regards the diagram and description, he must, I think, be considered as the company's agent, that being within the scope of his deputed authority, and he having inspected and examined the premises, or, in other words, surveyed them—and for which the company must be responsible. The meaning of the word "survey," as applicable to this subject matter, as given in the imperial dictionary is "to examine with reference to condition, situation and value, as to *survey* a building, to determine its value and exposure to loss by fire." The agent appears to have adhered, notwithstanding the objections of the assured, to the description and diagram; the assured signed the application with the description the agent had put forward in the application and diagram which must be assumed to have been the result of his examination and enquiries, the agent, at the same time, stating that he would go again to the premises and measure and alter the paper to suit the measurements. This account of the transaction the jury have found to be correct. Now, the company having undertaken to be responsible for all surveys made by their agents personally, how then can they escape responsibility for an inaccurate examination or survey by their agent *Morris*, or an inaccurate description and diagram of that examination or survey prepared by him,

this being a matter unquestionably within the scope of his agency. Who but the company is to be responsible for his not making a more accurate examination and survey in the first instance, or for his not making the resurvey and measurements as he promised, or for not correcting the description and diagram before transmission to the company, as the assured desired and he agreed to do, and as it was his duty to the company to do, or for not furnishing the company with the information the assured gave him as to the inaccuracy of his description and diagram, and which, being connected with what was clearly within the scope of his agency, must have the same effect as if communicated directly to the company, the knowledge of the agent in such a case being the knowledge of the company, or, in other words, in such a case notice to the agent being notice to the principal; or for transmitting contrary to the evident wish of the assured an incorrect description and diagram, he being for the purpose of transmission the agent of the company, but who, on the contrary, transmitted the documents with his certificate or written assertion that he had personally examined, that is surveyed the premises, and that there were not any other circumstances connected with danger of fire. Surely under such circumstances the Plaintiff had a right to rely on Defendants' agent's assertion that he would transmit a correct description, and I think the survey and diagram must be considered the survey and diagram furnished by the agent of the company, and made part of the application by him, and for which the company, through him, are responsible; and so establishing their agent's description, diagram and assertion as the basis of the contract, which they cannot now dispute, it operating to estop the Defendants from disputing its correctness; for if the Defendants are responsible for the surveys of their agent, and for the information of the agent in

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respect thereof as being the information of the company, it would be a gross fraud in Defendants to receive through their agent a premium with the intention of avoiding the insurance in case of loss, and retaining the premiums in case no loss should occur.

So long ago as 1815 Lord *Eldon*, in the House of Lords, recognized that while it is a first principle of the law of insurance that, in the case of a warranty, the thing must be exactly as it is represented to be, it would be an effectual answer, even in the case of a warranty, that the insured were misled by the insurers or their agents; *Newcastle Fire Ins. Co.* v. *Macmoran* (1); and, in *Hartford Protection Ins. Co.* v. *Harmer* (2), *Ramsay*, J., referring to this case, says *Stephens*, in his *Nisi Prius*, (3) says:—

> Upon the authority of *Newcastle Insurance Company* v. *Macmoran* (4), it seems that, even in case of warranty, it would be a good answer that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agent; and finally, the Supreme Court of *Pennsylvania*, in the case of *Bruner* v. *Howard Fire Insurance Company*—determined during the present year, and not yet reported—has decided that parol evidence is admissible to show that the description of property insured, annexed to a policy, though signed by the insured, was drawn up by the agents of the insurer; that they knew all about the property from verbal description by the insured and from actual survey, and that, therefore, omissions and errors therein were those of such agents, and not of the insured, notwithstanding a provision in the policy that the description should be taken as part thereof, and as a warranty on the part of the insured. 2 Am. Law Reg. 510.

In the case of *Peoria Marine and Fire Ins. Co.* v. *Hall* (5), it is stated:—

> But the counsel for the Plaintiff in error insists that the printed conditions were notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that this assent could be given only by the company itself. This, at first view, would

(1) 3 Dow. 255.
(2) 3 Bennett Fire Ins. cases 656.
(3) Vol. 3, p. 2,081.
(4) 3 Dow. 255.
(5) 4 Bennett Fire Ins. cases 743.

seem plausible, and might be sound but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition; and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss.

And *In re Universal Non Tariff Fire Ins. Co.* (1) the same principle is put forward; the marginal note is:—

A fire insurance was effected in respect of certain property through an agent named *Donald*, who inspected the premises. One condition of the policy was, that any material mis-description of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate, but with tarred felt. The company alleged that *Donald* was not their agent, but the agent of the insured and that the mis-descripfion rendered the policy void.

Held,—That the mis-description was immaterial, and not sufficient to vitiate the policy; but that, if material, it was made by *Donald* as the agent of the insurance company, and the insured were not responsible for it.

As in *Wing* v. *Harvey*, (2), it was held that the company having held out *L. & S.* to the world as their agents for the purpose of receiving the premiums, it became the duty of *L. & S.*, and not that of the Plaintiff, to communicate to the head office at *Norwich* the circumstances under which those premiums had been paid to and received by them, and the representations which were made on the occasions of such payments and receipts. So here, the Plaintiff having held out to the world *Morris* as their agent to obtain insurances, trans-

(1) L. R. 19 Eq. 485. (2) 5 DeG. McN. & G. 271.

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mit applications, receive premiums, and make personal surveys, it became the duty of *Morris*, and not of Plaintiff, to communicate to the company all the circumstances connected with the description and diagram and the transmission of the application.

I by no means wish to be understood as intimating that if this application had been signed by Plaintiff, and placed in the agent's hands as containing a correct description, simply to be transmitted as Plaintiff's act, independent of any personal survey or examination made by the agent, or description thereof furnished by him, that, in such a case, knowledge by the agent that it was not correct would be evidence of a waiver by Defendants of the condition that a misrepresentation in the application should avoid the policy, because, in such a case, the agent would be acting simply as the transmitter of that for which the assured alone was responsible, though it is not necessary to discuss or determine this point.

There were two or three minor points suggested, but scarcely relied on, viz.: As to the notice of additional assurance; and as to the preliminary proof. We think there is nothing in either of these objections that was not disposed of by the finding of the Jury; and, as to the objection that the certificate of the magistrate most contiguous was not furnished, we agree with the Court below that this was an unreasonable condition.

STRONG, TASCHEREAU, FOURNIER and HENRY, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellants: *George D. Dickson.*

Solicitors for Respondent: *Dalton McCarthy & H. H. Strathy.*