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*Feb'y. 1.
June 3.

THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY..... } APPELLANTS;

AND

JAMES H. SAMO AND THOMAS JOHNSTON............................... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Misstatement as to incumbrances—Indivisibility of policy.—36 sec., c. 44, 36 *Vict., Ont.*

The Appellants issued to the Respondents, in consideration of $195, a policy of insurance to the amount of $3,000 as follows, viz.: $1,000 on their building, and $2,000 on the stock. In the Respondent's application, which had been signed in blank and delivered to the person through whose instrumentality the policy was effected, it was stated that there were no incumbrances on the property, although there were several mortgages. It was also proved that after the issuing of the policy the Respondents effected a further incumbrance on the land, but did not notify Defendants. The policy was made subject to 36 *Vic.*, c. 44, O., The proviso (since repealed by 39 *Vic.*, c. 7,) to sec. 36, declared, "That the concealment of any incumbrances on the insured property, or on the land on which it may be situate * * shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the Board of Directors shall see fit in their discretion to waive the defect."

One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk.

On an action upon the policy, the Court of Common Pleas (1) refused to set aside the verdict in favor of the Appellants, but on appeal to the Court of Error and Appeal for *Ontario* (2), it was held that the policy was divisible and that Respondents were entitled to recover the insurance on the stock.

(1) 26 U. C. C. P. 405. (2) 1 Ont. App. Rep. 545.

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

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Held,—On Appeal, that the contract of insurance on the building and on the stock was entire and indivisible, and that the misrepresentations as to incumbrances, by the conditions of the policy as well as by the 36 sec. of 36 *Vic.*, c. 44, O., rendered the policy wholly void.

THIS was an appeal from a judgment of the Court of Appeal for *Ontario*, making absolute a rule *nisi* to enter a verdict for the Respondents for two thousand dollars, being insurance on goods.

The action was commenced on the 3rd day of November, 1875, upon a policy of insurance issued by the Appellants to the Respondents, bearing date the 16th of December, 1874, on their property to the amount of three thousand dollars, as follows, viz.: $1,000 on the building only of their wooden furniture manufactory; $2,000 on their stock of lumber and materials, and furniture manufactured and in process of manufacture contained in said building.

The declaration contained four counts on the policy and the common counts. The pleas were:—

1st. One denying the making of the policy.

2nd. That the real estate was encumbered, and that in the application it was alleged to be unencumbered.

3rd. Concealment of the fact of encumbrances.

4th. As to so much of the counts as relate to the insurance on the building; that after the making of the policy, the Respondents transferred the said building, by mortgage, to *Robert Davies*, and gave no notice of such transfer to the Appellants.

5th. Sets up the same defence in a different way; and the

6th. Never indebted to the common counts.

The Respondents replied, taking issue on the first plea, and, to the second plea, 1st. That they did not, in their application, state there were no encumbrances on the property, as in that plea alleged.

2nd. That the policy was not issued on the application in that plea mentioned.

3rd. That the section of 36 *Vic.*, Chapter 44, of the Statutes of *Ontario*, referred to in the pleadings, does not affect the policy as to the goods insured and the risk thereon.

4th. That the application was made through an agent of the Appellants, and that before the application the Respondent informed him of the encumbrances, and that the misrepresentations were by him.

Issue was taken on the replication, and the Defendants rejoined that provision in the policy that if an agent of the company should fill up an application, he, in doing so, should be considered as acting for the applicant, and not for the Respondents. The cause was tried before Chief Justice *Hagarty*, in March, 1876, and a verdict given for the Appellants. Leave was, however, given to move for a rule to enter a judgment for the Respondents for $3,000 and interest, and shortly after a rule *nisi* was granted in pursuance of such leave, on the following grounds:—

1st. That there was no evidence that the Appellants had ever elected to avoid the policy for any cause.

2nd. That the evidence established that the only application made by the Respondents was in blank; that there was no concealment therein of encumbrances; that the policy was issued without the Respondents knowing that any one had represented the absence of encumbrances, and that the agency of *Rosenblatt* had terminated before he signed the application, and that he was then the agent of the Appellant and of *Griffith*, and not of the Plaintiff.

3rd. That no representations were made by the Respondents, but by *Griffith*—not their agent, but the agent of the Appellants.

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4th. That *Griffith* signed the application without any authority from *Samo.*

5th. That the replication proved there were no misrepresentations made by Respondents, and that they were not answerable for acts of *Griffith.*

6th. That the condition that the agent of the Appellants shall be deemed the agent of the Respondents is unreasonable and unjust.

7th. That the policy was divisible; and therefore only void as to the insurance on the factory, and not on the goods therein contained.

The Court of Common Pleas refused to set the verdict aside. The Plaintiffs then appealed from the decision of the Court of Common Pleas to the Court of Appeal of *Ontario*, which held that the policy was divisible, and that Plaintiffs were entitled to receive the amount of the risk, taken in and by the policy on the stock of lumber and furniture.

The material portions of the evidence are set forth in the judgments. The question to be determined on this appeal was, whether or not the policy in question is a divisible policy ; whether it is void in the whole, or only in part, viz. :—Void as to the insurance on the wooden manufactory, and good as to the stock of lumber and materials, and furniture manufactured and in process of manufacture ?

Mr. *Bethune*, Q. C., and Mr. *C. A. Durand*, for Appellants.

One of the covenants of the policy is that, " if the title of the property be transferred or changed without written permission, the policy shall thenceforth be void." Under Sec. 36 of the Statute, 36 *Vic.*, c. 44, O., it is the policy, that is, the whole policy, which is made void in the event of there being any false statement in the application respecting the title or ownership, or his

circumstances, or the concealment of any encumbrances on the insured property or the land on which it may be situate. It is admitted that there was a misrepresentation as to encumbrances on the land, the application stating that there were none, the land at the time being mortgaged to over $4,000. The insurance in this case was an entire insurance for $3,000, for which one rate was fixed and paid. The conditions of the policy apply equally to real and personal property: it cannot be argued that such a policy is divisible.

By the terms of the contract, "the policy," that is, the whole policy (not a part of it, as held by the majority of the Judges in the Court of Appeal) became void if the assured made any erroneous representations in the application, or if the assured was not the sole and unconditional owner of the property, unless the true title were therein expressed:—*Gottsman* v. *Pennsylvania Ins. Co.* (1); *Barnes* v. *The Union Mutual* (2); *Gould* v. *The York County Mutual Fire Ins. Co.* (3); *Lovejoy* v. *The Augusta Mutual Ins. Co.* (4); *Wilson* v. *The Herkimer County Ins. Co.* (5); *Bowman* v. *The Franklin Ass. Co.* (6); *Hinman* v. *The Hartford Fire Ins. Co.* (7); *Lee* v. *The Howard Ins. Co.* (8); *Friesmuth* v. *Agawam M. F. Ins. Co.* (9).

The only American case opposed to this view is that of *Phœnix Ins Co.* v. *Lawrence et al.* (10).

The case of *Date* v. *The Gore District Mutual Ins. Co.* (11) was under a different section of the Act. It is opposed to *Ramsay Cloth Co.* v. *Mutual Ins. Co. of Johnstown* (12); and to *Russ* v. *The Clinton Mutual Ins. Co.* (13); *Kerby*

(1) 56 Penn. 210.
(2) 51 Maine 110.
(3) 47 Maine 401.
(4) 45 Maine 472.
(5) 2 Selden N. Y. 53.
(6) 40 Maryland 620, 632.
(7) 36 Wisconsin 159, 169.
(8) 3 Gray 583, also, at page 594.
(9) 10 Cush. 587; 25 Barbour 503.
(10) 4 Metcalfe Ken. p. 9.
(11) 14 U. C. C. P. 549.
(12) 11 U. C. Q. B. 516.
(13) 29 U. C. Q. B. 73.

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v. *Niagara* (1); and to *Bleakely* v. *The Niagara District* (2). Moreover it is proved that subsequent to the policy being effected, the insured effected a further encumbrance on the property, and never notified the company. The learned counsel referred also to *Cashman* v. *London & Liverpool Ins. Co.* (3); *Flanders* on the law of fire insurance (4); *Bunyon*, law of life insurance (5); *Angell*, law of fire and life insurance (6); and *Phillipp's* law of insurance (7).

Mr. *Read*, Q. C., for Respondents.

The application was for two insurances in one policy: 1st, for the building for which a special rate of 5 p. cent. was fixed; and 2nd, for the stock for which a special rate of 5 p. cent. was also fixed. It makes no difference that the rate should be the same. This rate was subsequently changed to 6½ p. c., and it applies equally to the personal and real property.

The Appellants by their replications have made this case dependant upon the construction of 36 *Vic.*, c. 44, *O.*

The true construction of the 36. Sec. of 36 *Vic.*, Cap. 44, *O.*; which enacts that in case a fraudulent representation, or any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrances on the insured property, or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written assent of the company thereto, shall render the policy void, is that where a policy, as in this case, is for a cash premium, and in the application, a distinct premium is charged for the risk on the building and

(1) 16 U. C. C. P. 573.
(2) 16 Grant 198.
(3) Stevens' Digest N. B. Rep. 230.
(4) P. 302.
(5) P. 68.
(6) Pp. 184, 678.
(7) Pp. 470, 8, 9.

on the goods, that the policy is void as to the buildings only, where any of the defects referred to exist as to the buildings, and not as to the goods or personal property; and void only as to the goods and personal property insured where the defects exist only in reference thereto, and not to the buildings insured.

The 36th Sec. of 36 *Vic.*, Cap. 44, says that the policy shall be void, in case any of the defects therein referred to exist as to the "insured property," and not as to the "insured property or any part thereof," to make the policy void the defects, or some of them, must exist as to all the insured property mentioned in the policy, and not to a part thereof only.

The policy in question, however, was a divisible policy, and only void as to the factory, and not as to the furniture, goods, or other personal property: *Phœnix Insurance Co.* v. *Lawrence et al* (1); *Clark* v. *New England M. F. Insurance Co.* (2); *French* v. *Chemango Co. Mutual Insurance Co.* (3); *Barnes* v. *Union Mutual Fire Insurance Co.* (4); *Gould* v. *York County Mutual Fire Insurance Co.* (5); *Burrill* v. *Chemango Mutual Insurance Co.* (6); *Kuntz* v. *Niagara District Insurance Co.* (7); *Date* v. *Gore District M. F. Insurance Co.* (8).

Most of the American cases holding a policy is indivisible are cases in which there has been a premium note for which the company had a lien on the property, and do not apply.

The policy in this case, and the construction thereof, is not to be governed by the law as applied to whole or entire and divisible contracts without reference to legislative enactments, but must be governed by the legislative enactments referred to therein, and the ap-

(1) 4 Metcalfe K. R. 9.
(2) 6 Cushing 342.
(3) 7 Hill 122.
(4) 51 Maine 110.
(5) 47 Maine 403.
(6) 1, Edmunds' Select Cases N. Y. 233.
(7) 16 U. C. C. P. 573.
(8) 14 U. C. C. P. 548.

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plication therefor, and the construction to be placed thereon.

Even under the Law of Contracts, there is nothing to prevent this contract being a divisible contract, but on the contrary, the application for the contract and the contract itself show that it was intended to be divisible, and the words thereof do not necessarily make it indivisible. *Doran* v. *Reed* (1): Held, that notwithstanding the Consolidated Statutes of U. C. Cap. 85, Sec. 7, of which provides:—"If any such deed (one-third of married woman) be not executed, acknowledged, and certified as aforesaid, the same shall not be valid or have any effect," the deed is good as to husband's interest—in other words, partly good and partly bad. *Rose* v. *Scott* (2); chattel mortgage, held good in part and bad in part.

As to the defence set up by the Appellants in their second plea, viz.:—That the existence of the undisclosed mortgages was a circumstance material to the risk, and to be known to the Appellants, and setting up the failure to disclose them, as a breach of the agreement in the application for insurance, the Respondents submit, that the existence of an encumbrance on the building was not a material fact or circumstance, in regard to the condition, situation, value or risk of the property, nor was there any evidence at the trial that the failure to disclose such encumbrances was material to the risk, *Lindenan* v. *Desborough* (3); *Jones* v. *Provincial Ins. Co.* (4).

Mr. *Bethune*, Q. C., in reply:—

The Appellants did not only plead the Statute.

By the evidence it will be seen that the answers given by the applicant relate to *the risk*, and not to two risks,

(1) 13 U. C. C. P. 393.
(2) 17 U. C. Q. B. 386.
(3) 8 B. & C. 586.
(4) 3 C. B. N. S. 65.

and moreover, when the rate was increased, it was agreed to lump *the risk* at 6½ cent.

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RITCHIE, J.:—

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Defendants insured Plaintiffs "in consideration of the receipt of $195, to the amount of $3,000 for the term of one year, ending at noon on 18th Nov., 1875, as follows, viz: $1,000 on the building only of their wooden furniture manufactory, situate on Yonge Street, in *Yorkville*, $2,000 on their stock of lumber and materials and furniture manufactured and in process of manufacture contained in said building." It is admitted there was a misrepresentation as to encumbrances which would invalidate the policy as to the building, but it is contended on Plaintiff's behalf that the contract of insurance is not entire, but divisible, the insurance on the building being, it is alleged, separate and distinct from that on the furniture contained in the building, and that consequently any encumbrance on the building could affect and render void only that portion of the contract applicable to the building, and had no reference to the insurance on the furniture, which, notwithstanding the encumbrance on the building, was valid. But, I am not able so to construe this instrument. The words of the Statute of 36 sec. 36 *Vic.*, Cap. 44, endorsed on the policy, enact that any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any encumbrance on the insured property, or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company, shall render the policy void, and that the concealment of any circumstances on the insured property or the land on which it may be situate, renders the policy void.

* The Chief Justice was absent when judgment was delivered.

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But entirely independent of the Statute, the application set forth :—

Application of *J. H. Samo & Co.*, of *Toronto*, County of *York*, for insurance against loss or damage by fire, by the *Gore District Mutual Fire Insurance Company*, in the sum of $3,000 for the term of one year, commencing the eighteenth day of November, 1874, at noon, on the property, as follows :—On a furniture manufactory two stories high, 50 x 25, built of wood, covered with shingles; present cash value, exclusive of land, amount to be insured ⅔ value, $1,000. Rate, 5 per cent.

On stock of lumber and materials, and furniture manufactured and in process of manufacture, contained in above building, covered with shingles, marked No. on diagram, said building owned by assured, present cash value, exclusive of land, $8,000; amount to be insured, $2,000. Rate, 5 per cent.

The said applicant makes the following statement and gives the following answers to interrogations here put, relating to the risk :—

1. Where is the property to be insured situate? On *Yonge* street, Village of *Yorkville*.

2. Name of owner of property to be insured? *J. H. Samo* and company.

3. By whom and for what purpose is the building occupied? By us as a furniture manufactory.

29. What other insurance is there at present on the property? $2,000.

30. In what companies? Guardian.

31. What is your interest in the property to be insured? Owners.

33. Is property encumbered, and, if so, to what amount? None.

* * * * * *

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 circumstances in regard to the condition, situation, value and risks of the property to be insured, so far as the same are known to the applicant, and are material to the risk, and material to be known by the company, 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.

Signature of applicant,

J. H. SAMO & Co.,
per T. B. G.

Dated 18th November, 1874.

By the policy, it was covenanted :—

It is covenanted and agreed that the interest of the assured herein is not assignable without the consent of said company in writing; and if the title of the property be transferred or changed other than by succession, by reason of death, or the policy be assigned without written permission hereon, this policy shall thenceforth be void; and that the application of the assured upon which this insurance is granted, the survey and diagram of the premises and all things therein contained shall be taken and considered a part and portion of this policy; and that no insurance shall be binding until payment of the premium by cash or note. * * * * That if the assured in the application referred to herein make any erroneous representation or omit to make known any fact material to the risk, or if the assured shall have effected or shall hereafter effect any other insurance on the property hereby insured, or if the risk be increased by any means within the knowledge of the assured without the consent of this company endorsed thereon, or if the assured is not the sole and unconditional owner of the property insured unless the true title be expressed herein, * * * * then, and in every such case this policy shall be void. * * * * That if any 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 statement of the said agent to the contrary shall be received in evidence, but this company will be responsible for all surveys made by their agents personally.

Having a due regard to the terms of this policy and the subject matter of the contract, I think it was an entire agreement to insure the house and its contents in consideration of the gross sum of $195, made up, no doubt, as proposed in the application for the insurance. The consideration is stated in the policy as entire on the one side for all Defendants undertook to do, on the other, the distribution of the risk being simply to limit the extent of the risk assumed by Defendants on each kind of property; in all other respects the contract was entire.

A remark of *Bramwell*, B., in *Harris* v. *Venables* (1); where one question was whether the consideration applied to both promises, and it was held it did, seems very apposite to this case. He says:—

(1) L. R. 7 Ex. 240.

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All that is to be done on one side is the consideration, for all that is to be done on the other; all the promises are referred to all the considerations.

So here, in consideration of an entire sum on one side, the Defendants assumed all the risks on the other.

The character and situation of the building is a prominent consideration in every contract of insurance, and is equally important, whether the policy covers personal property in the building or the building itself. No distinction is indicated in this policy in respect to the character and situation of the building between insurance on personal and on real property, or to indicate in any way that the condition relied on by Defendants refers exclusively to applications for insurance upon buildings. It is equally sensible and intelligible when applied to personal property as to real property, and when applied to personal property in the building as in reference to the building itself; for no one can doubt that if the building takes fire the property in the building is jeopardized. It has been argued that it would necessarily follow that the same rule would be applicable to two descriptions of insurance having no connection whatever with each other, as for instance, on personal property in one city and on a house in another, included in one policy; but this by no means follows. It cannot be doubted, there may be separate insurances in the same policy as there may be separate causes of action, totally distinct from each other, arising upon the same instrument for which an action might be brought on each of them. When questions, such as have been suggested arise, they will have to be decided on the language of the policy, having due regard to the subject matter. In *Hopkins* v. *Prescott* (1); at p. 591, *Wilde*, C. J., says:—

No doubt, you may put two distinct and independent contracts

(1) 4 C. B. 578.

upon one piece of paper, but here the consideration alleged is an entire one.

A[illegible] [illegible]n delivering judgment, he says:—

The declaration sets out an agreement; and one question is, whether it sets out an agreement, which is single and entire, made on one entire consideration, or whether is it severable in its nature, and deals with matters that are *unconnected with and independent of each other*. It seems to me that the matter alleged in the declaration amounts to one entire agreement, which may very well be, although the contract be to perform several distinct things.

The authorities in *Ontario* are, so far as I can judge, in entire accord with the view here put forward, as are those in the *United States*. All the cases, both in *Ontario* and the *United States*, have been so fully put forward and discussed in the Courts below that it is unnecessary to occupy the time of this Court in going through them again. The Supreme Court of the Province of *New Brunswick*, in *Cashman* v. *L. & L. Fire Ins. Co.* (1), acted on the same principle. There the Plaintiffs insured two buildings and the merchandize in one of them against loss by fire; one of the conditions of the policy declared that if there should be any fraud or false swearing, the claimant should forfeit all claim under the policy. One ground of defence to an action brought on the policy was that the Plaintiff made a false declaration as to the value of the goods lost by the fire. Held, that the contract was entire, and if the Plaintiff was guilty of fraud or false statement in reference to the goods he could not recover any part of the insurance.

Therefore, on principle and authority, to use the words of *Wilde*, C. J., in the case before cited, "Looking at this agreement, it appears to me, that it is one entire and indivisible contract, founded upon one entire consideration," and relates to matters that are connected with and dependant on each other.

(1) 5 Allen N. B. R. 246.

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

HENRY, J.:

The rule *nisi* for leave to enter judgment for Respondents was discharged by the unanimous decision of the Court of Common Pleas, and, on an appeal therefrom to the Court of Appeal of *Ontario*, the decision of the Court of Common Pleas was, by a majority of the Court, reversed; and it is now before us, by a second appeal, and, having been heard, we have now to give judgment. The defence is substantially as to the misrepresentations in the application as to the then existing encumbrances, and the subsequent mortgage to *Davies*, or, in case they were not the misrepresentations of the Respondents, that their application omitted to make known facts material to the risk. I do not consider it necessary to say much in regard to the question of the agency of *Rosenblatt* to bind the Respondents as to his acts in regard to the application, as, in the event of a decision that he was not such agent, the Respondents will be found to occupy an equally unfavorable position, for, the section of the Statute incorporated into and forming part of the agreement provides, amongst other things,

> That the concealment of any encumbrance on the insured property, or *on the land on which it may be situated*, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void, and no claim for loss shall be recoverable thereunder unless the Board of Directors, in their discretion, shall see fit to waive the defect.

Mr. *Samo*, in his evidence, admits the agency of *Rosenblatt* to procure the insurance. He says:—

> I gave *Rosenblatt* a blank form, partly filled. The questions in it were not answered or filled up.

Again:—

> The question in the paper as to encnmbrances was not answered

by me. It was to oblige *Rosenblatt* that I dealt with him instead of going to the company's office. I thought *Rosenblatt* would fill up the blanks. I intended trusting him with signing the application, having done the like before. I did not ask *Rosenblatt* to show me the application, not thinking it necessary. The mortgage (to *Davies*) was dated 28th April, 1875, and was for $525. It was on the factory.

The policy in this case was made and delivered to the Respondents in December, 1874. The fire did not take place till the following July. It was for over six months in the hands, for inspection, of the Respondents, and, after having signed a blank application, their duty was to read it, and there they would have seen their own covenant and agreement, that if they were not the sole and unconditional owners of the property insured, unless the true title be expressed herein, *the policy should be void.* Their duty was clearly to have read the policy, and given notice for and send the necessary amendment made or the policy cancelled before loss. If they did not accept the policy as it was, they did not accept it at all, and, therefore, have no action on it. From this evidence, I think the agency of *Rosenblatt*, to make an application binding on the Respondents, cannot be questioned, and that for his misrepresentations the Respondents are answerable. See *Richardson* v. *Maine Ins. Co.* (1), where the assured applied by mail to the agent for insurance. The agent filled up and signed an application, which contained a statement that there were no encumbrances. A policy was issued referring to the application, and accepted, with the application attached to the policy. Held—1st. That by accepting the policy the assured covenanted for the truth of the application, and ratified it. 2nd. That the representation as to the property was material; and lastly, that the contract was entire, and a misrepresentation as to one of the subjects insured avoided the policy. If, by the acts of an agent, one or

(1) 46 Maine 394, (1859.)

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other of two innocent parties must suffer, the law says it must be the one whose agent he was, provided the acts complained come within the scope of his agency, or was in reference to a matter the agent had authority to deal with. I think that in this case the Respondents are responsible for the acts of *Rosenblatt*, including that of getting *Griffith* to put their names to the application. In addition to the defence raised on the "concealment" referred to it in the Statute, which is virtually a re-enactment of the common law on the point, I think we must hold the Respondents answerable for the misrepresentations in the application.

That they are false is admitted; and, therefore, in respect of the building, there can be no doubt they are fatal to the success of the Respondents.

The same may be said of the consequences of the subsequent assigment to *Davies.* There can be no question, that, under the terms of the policy and section 36 of the Act before mentioned, "the failure to notify the company" of the transfer to *Davies* being a "change in the title or ownership of the insured property, and to obtain the written consent of the company thereto," rendered "*the policy void.*" That provision of the statute is incorporated into and became a part of the agreement for the insurers, the Respondents independently of the other legal principles involved, having adopted it as a condition precedent to their right to recover on the policy, are estopped from denying its application, and cannot ask the Court to pronounce, what they would, for other reasons, be disinclined to do; and which, by the terms of the section in question, which itself makes the provision for the notice "and written consent of the company," it would be prevented from doing, that the requirement, either of the notice or of the written consent is unreasonable or unjust.

It is contended, however, that these objections cannot

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be raised against the claim for loss on the goods, although a good one, as to the claim for the loss on the building, and that, therefore, the Respondents are entitled to recover for the loss on the goods.

To determine that question, we must first examine the policy and see the nature of the agreement entered into. By it the Appellants "in consideration of the receipt of one hundred and ninety-five dollars, do insure *J. H. Samo & Co.*, of the City of *Toronto*, * * * to the amount of three thousand dollars for the term of one year * * * as follows, viz: $1,000 on the building only, of their wooden furniture manufactory, and * * * $2,000 on their stock of lumber and materials and furniture manufactured, and in process of manufacture, *contained in same building*." The goods, therefore, and the building are insured for one lump consideration. It is one agreement; and the Respondents covenant in respect to the insurance generally, that if the title of the property be transferred or changed, other than by succession by reason of death, without written permission thereon, or that if the application referred to therein make any erroneous representation or omit to make known any fact material to the risk, or if the assured is not the sole and unconditional owner of the property insured, unless the true title be expressed therein, that *the policy should be void*. The consequence therefore, the policy being legally construed, of the misrepresentation &c., was settled by it, and, being the agreement of the parties themselves, is binding on them; and by it the whole policy is void. Both parties agree by the incorporation of the statute that in any of the cases mentioned the *policy*, not the *insurance on the building*, shall be void. There are few, if any, cases that suggest an opposite construction; but not only in *Upper Canada*, but in the *United States* the ruling authorities are the other way, and properly so,

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as I think. The contract contained no provision that the risk should continue on that part in reference to which no misrepresentation was made, but it was entire, and the risk to cease and the policy to be avoided altogether. It is matter of no small moment that the insurers, in the case of the application for insurance on goods, should be correctly informed in regard to the building containing them. If a party says, "I want to insure on goods in my store, which is a valuable one, totally unencumbered, and there is no "concealment by me of any encumbrance" on the property sought to be insured, "or *on the lands on which it is situated*"; and, upon this application, the risk is taken, we have to say, whether or not under the provision of the thirty-sixth section and the written misrepresentations, the policy would be avoided; if, at the time, the building containing the goods, and the land on which they both were at the time of the application, either did not belong at all to the applicant or were heavily encumbered by mortgages. In the statute and in the policy adopting them, the words are "the insured property or *on the land on which it may be situate*." The word "property" in the first part of the quotation, includes goods as well as buildings. The words are general and include goods, unless there is something elsewhere to induce a different construction. And, I think, we may construe the Statute and policy, as saying in substance, that if there be any concealment of encumbrances on the land of any building in which goods are insured, it will be sufficient to avoid the policy on the latter. There are good reasons why the insured should be truthfully informed as to the state of the ownership of a building. If unencumbered, more care is reasonably expected on the part of the owner. If it be a rented building, or one in which the applicant has little or no interest, and his

stock be fairly covered, the personal inducements to care and caution are absent. In such a case, truly represented, the insured would have the option of declining the risk or demanding a higher premium. By a false representation of a different state of things the insured would be entrapped and a policy obtained that he would not otherwise have granted at all, or granted only upon different terms. In representations for insurance, where the knowledge of certain things resides wholly or principally with the applicant, the law requires the truest and fullest statements; and when they are not so in respect of important matters, the policy is always avoided. There is not the slightest suspicion of fraud on the part of the Respondents in this case; but were we to decide this matter in their favor, the door would be opened to fraud which might be difficult of proof, and, as I think, legal principles, founded in justice and equity, violated.

There is no more reasonable or necessary requirement than that where one party is induced to enter into a contract with another, the latter is required to give *bonâ fide* and intelligible information in regard to material matters of which the other is ignorant, and in no case is the rule more necessary than in applications for insurance. If in the administration of justice that rule be neglected or slighted, insurance companies could not safely do business; and those who would be careful and truthful applicants, would be made to suffer for the careless and untruthful. It is necessary, therefore, that rules so salutary should be maintained, not only in the interest of insurance companies, but in that of the public. Carelessness and recklessness often mark the conduct of applicants for insurance, and the aid of Courts are constantly invoked to release them from the necessary results; and sometimes with undeserved success. In no class of cases have the legal principles in regard

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to contracts been more strained than in respect of careless applicants for insurance. Experience has shown insurance companies, that certain precautions and guards are necessary for the prevention of fraud and consequent loss. They guard against such by the terms provided in the application and policy. The law gives them the right to dictate the terms and conditions upon which they will issue a policy, and the right to say afterwards, that by the terms of the mutual agreement their liability was at an end and the policy avoided. The Respondents here, by representing that the building in question was theirs and unencumbered may have, by that means, induced the company to accept the risk on the goods contained in it, when they otherwise would not have done so. And by making an application for the joint insurance, and warranting that the representations are all true, the insurers may well say, "we took and accepted the two risks together at a rate less than we would have taken either separately, or we would otherwise have declined the risk altogether. The whole position on that point affected, in our view, the safety of the goods and by your misrepresentations in regard to the building, we insured the goods which we otherwise would not have done; and you, having in that respect deceived us, either innocently or otherwise, we disclaim the contract as a whole."

We have been asked to say, that the words in question may be read so as to avoid the insurance on the building only, but, my reply is, that the parties themselves have agreed that the "policy," not the insurance or any part of it, should be avoided; and all the governing principles and authorities sustaining this view, I am unable to substitute a new or different agreement from that entered into by the parties themselves.

The authorities cited by my learned brother *Ritchie*, I need not repeat.

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I think, therefore, the appeal should be allowed, the judgment of the Appeal Court of *Ontario* reversed, and the rule *nisi* for a judgment for the Respondents discharged with costs.

Appeal allowed with costs.

Solicitor for Appellants: *C. A. Durand.*

Solicitors for Respondents: *Read & Keefer.*