1879.

*Jan. 24.

*April 15.

JULIUS PETER BILLINGTON.....APPELLANT;

AND

THE PROVINCIAL INSURANCE COMPANY OF CANADA..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Existing Insurance—Notice to agent—Application and policy.

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' Company, through one *S.*, their agent at *D.*, authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed *S.* that there were other insurances on the property, but not knowing *the amount* that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. *S.* failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

office at *T.*, making no mention of the insurance in the Gore Mutual. The Company accepted the risk, and, in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the Company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the Company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

Held: That as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the Company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), which reversed the judgment of the Court of Chancery for *Ontario* (2), pronouncing a decree in favor of the plaintiff.

Action on a policy begun in the Court of Queen's Bench, but subsequently transferred, by an order made in Chambers under the administration of Justice Act, 1873, to the Court of Chancery.

Plaintiff declared on a policy, dated the 9th February, 1875, which, he alleges, was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to to explain the rights and obligations of the parties thereto in all cases not therein otherwise specially providedfor, where by defendants insured plaintiff against loss by fire, not exceeding $6,000, on property described as agricultural machinery in pro-

(1) 2 App. Rep. Ont. 158. (2) 24 Grant 299.

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

cess of construction, finished and unfinished, owned by the plaintiff, and contained in a two-story stone building, with a one-story frame addition, covered with shingles laid in mortar, occupied by the plaintiff as an agricultural implement manufactory, situated on the west side of *Cross* street, in the town of *Dundas*, in the county of *Wentworth*, from the sixth day of February, A. D. 1875, at twelve o'clock, noon, unto the sixth day of April, A. D. 1875, at twelve o'clock, noon; that the plaintiff was interested in the said machinery to the amount insured; that after the making of the said policy, and whilst it was in force, the said machinery was destroyed by fire, whereby plaintiff suffered damage and loss to the amount so insured, and that all conditions were fulfilled and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action, and nothing happened or was done to prevent him from maintaining the same; yet the plaintiff had not been paid.

To this declaration defendants pleaded:

1st. Policy not their deed.

2nd. That it was provided by policy and the conditions endorsed thereon, that the representations made in the application for insurance should and would contain a just, full and true value of the property insured, so far as the same were known to the said plaintiff; and that if any material fact or circumstance should not have been fairly represented, then the policy should and would cease, and be of no further effect. That *the representations in the application for said insurance were contrary to said stipulation and agreement.* There was misrepresentation as to value.

3rd. Alleged that it was further provided, that in case plaintiff should, at the time of effecting said insurance, have any other insurance against loss by fire on the said insured property, and not notified to the defend-

ants and mentioned in, or endorsed upon, the said policy, then the said insurance should and would be void; defendants averred that at the time of effecting said insurance the said property was insured for the sum of one thousand dollars in the Gore Mutual Insurance Company, which fact was not notified to the defendants and mentioned in or endorsed upon the said policy, according to the condition in that behalf, whereby the said policy was void.

4th Alleged provision by conditions for particular account of loss, and until such proofs &c., produced, loss should not be payable.

5th. Alleged that by policy and conditions endorsed, plaintiff should procure certificate, and, under hand of a magistrate most contiguous &c., &c., and no such certificate was procured.

6th. That by policy and conditions, if any fraud or false swearing in proofs, plaintiff should forfeit all claims. Fraud and false swearing as to amount of loss, and so all claim under policy forfeited.

7th. Property not burnt or destroyed as alleged.

Issue by plaintiff.

There was a second count added at trial by leave of Mr. Justice *Burton* with allegation of insurance of $1,000 in the Gore District Mutual Insurance Company, of which the defendants had notice before and at the time they effected the said risk; and the defendants agreed to accept the said risk and to insure the plaintiff's said property, having such knowledge as aforesaid, and to mention the same in the said policy, or have the same endorsed thereon; and defendants, by mistake, omitted to mention the existence of the said policy in the said Gore District Mutual Insurance Company in the said policy, or to endorse the same thereon, which the plaintiff had no knowledge of until after the said stock was so burnt, damaged and destroyed as aforesaid; and

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

the said policy or contract of insurance ought to be reformed and amended by the mention therein of the existence of the said policy in the Gore District Mutual Insurance Company of $1,000; and all conditions &c., as in first count.

Defendants pleaded at trial to second count:

First. Defendants had no notice of the said policy of insurance of $1,000; nor did the defendants by mistake omit to mention the said policy of $1,000 in the policy of the defendants, or to endorse the same thereon; and the said policy of the defendants ought not to be reformed as in the said count mentioned.

And for a second plea, the defendants set out two of the conditions mentioned and referred to in the said policy of the defendants in the said count mentioned, and subject to which the said policy was made and entered into by the plaintiff and defendants, as follows: "Notice of all previous insurance upon the property insured by the Company shall be given to them and endorsed on this policy, or otherwise acknowledged by the Company in writing at or before the time of their making insurance thereon, otherwise the policy subscribed by the Company shall be of no effect; and the applicant shall be bound by his representations on making his insurance; and if the agent of the Company makes the application for the insured, he shall be considered the *agent* of the insured *and not of the company*;" and that the plaintiff made his application for the said insurance through one *R. W. Suter*, the agent of the defendants at *Dundas*, and that the said application was in writing, and was forwarded to the defendants at their head office in *Toronto*; and the policy was issued thereon; that application contained no statement or mention of the said policy of $1,000 in the Gore District Mutual Insurance Company; nor had the defendants or their Directors, or any of the officers of

the Company at the head office, any knowledge or notice of the said last-mentioned policy, before or at the time of the making of the said application or of the said policy of the defendants, although the plaintiff had communicated the existence of the said policy of $1,000 to the said *R. W. Suter* at the time he made his said application for insurance to the defendants; but the said *R. W. Suter* had no authority from the defendants to change, or vary, or waive the said conditions; and the said *R. W. Suter* did not give the defendants any notice thereof, nor had the defendants any notice or knowledge thereof, unless the notice to *Suter* was a sufficient notice to them, which they denied; that immediately after the said application of the plaintiff the said policy of the defendants was made and delivered to the plaintiff, and he was fully aware and had the means of knowing that the said policy of $1,000 was not endorsed by the defendants on the said policy, nor otherwise acknowledged by the defendants in writing, and that the plaintiff has been guilty of laches in not seeking sooner to reform the said policy; and defendants say that the conditions on the said policy were made expressly with the intention of preventing fraud and collusion between the insured and the agents of the Company, by requiring the knowledge of the Company to be evidenced in writing; and if applications are made for insurance by an agent of the defendants, he should be considered the agent of the insured and not of the defendants as to the said application; and that they were not bound by the notice to or knowledge of the said *Suter*, without the acknowledgment of the defendants endorsed on the policy or otherwise expressed in writing; and that the said policy of $1,000 was not omitted to be endorsed on the policy of the defendants, or otherwise

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

acknowledged in writing, through any error or mistake of the defendants.

Equitable replication added at the trial by leave of Mr. Justice *Burton*, sets out the condition referred to in third plea:

"Notice of all previous insurances upon the property assured by the Company shall be given to them, and endorsed on this policy, or otherwise acknowledged by the Company in writing, at or before the time of their making assurances thereon, otherwise the policy subscribed by this Company shall be of no effect; plaintiff says he made application for the insurance, for which the policy made by the defendants in the declaration mentioned was issued, to an agent of the defendants authorized to receive applications for insurance and the payment of the premiums, and to grant interim receipts on behalf of the defendants; and plaintiff says that in and at the time of the making of the said application, he informed and notified the said agent of the defendants of the existence of the insurance in the Gore District Mutual Insurance Company, in the said plea mentioned, and instructed the said agent to have the same endorsed on the said policy or otherwise acknowledged by the defendants in writing, when the same should be made, which the said agent undertook to do; and the defendants omitted or neglected to have the existence of the said other insurance endorsed on the said policy, or otherwise acknowledged in writing; and before the said policy was delivered to the plaintiff, the said loss occurred; and the plaintiff had no notice until after the happening of the said loss that the existence of the said insurance was not endorsed on the said policy, or otherwise acknowledged in writing."

Rejoinder to equitable replication re-affirms the two conditions as to notice of all previous insurances, as to

agent of the Company being considered agent of assured and not of Company; re-affirms statement of application being made through *Suter*, agent of defendants, in writing, and forwarded to head office, and policy issued thereon; that application contained no statement of the $1000 policy in the Gore District Mutual Company, &c., as in the plea, although the plaintiff had communicated the existence of the said policy of $1,000 to *Suter* at the time he made his said application for insurance to the defendants; *Suter* had no authority from the defendants to change or vary, or waive the said conditions, and did not give the defendants any notice thereof.

The application in this case was in writing, dated 6th February, 1875, for insurance to amount of $6000 for two months, from 6th February, 1875, to 6th April, 1875, on agricultural machinery. 3 per cent per annum, $2\frac{1}{100}$ two months.

The facts of the case are fully set out in the judgment of the Chief Justice.

Vice-Chancellor *Proudfoot* pronounced a decree in favor of the plaintiff, which was reversed on appeal by the Appeal Court for *Ontario*.

Mr. *Bethune*, Q. C., for appellants:

The defence in this case rests only upon the fact that an insurance of $3000 in the Gore Mutual was not disclosed to the respondents, and that the local agent had power to bind the Company no more than thirty days. It cannot be said that there was not a valid contract of insurance between the plaintiff and the defendants by the verbal application, the payment of the required premium, and the issuing of the interim receipt. This contract was continued by the respondents, for within thirty days they issued in favor of the appellant a certificate or short form policy. The Court

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

must, therefore, read this certificate as if the words—"The non-delivery of a policy within the time specified "is to be taken, with or without notice, as absolute and "incontrovertible evidence of the rejection of *this con-*"*tract* of insurance by the said board," were not there. The legal effect of the issuing of a certificate or short form policy was only the continuation of the contract commenced by the interim receipt. Under that contract, all that was necessary was, that the agent should be notified—not necessarily in writing—what other insurances existed on the property, and the evidence clearly shows that *Suter*, who was also agent of the Gore Insurance Company, was duly notified of the existing insurance in that Company. A notice to the agent is equivalent to a notice to the Company. See *Hendrickson* v. *The Queen Insurance Company* (1). Moreover, before the issue of the policy a notice in writing was sent to the Company of the existence of that insurance with the proof papers. The Company, then, having full knowledge of the double insurance complained of, issued the policy upon which this action is brought, thereby electing to confirm the contract of insurance made by the interim receipt. They elected to and did retain the premium, and, having done so, and issued the policy in consideration therefor, they ought, the plaintiff submits, to issue a binding policy. *Collett* v. *Morrison* (2) ; *Jones* v. *Provincial Insurance Company* (3). Up to the issue of the long policy the contract of insurance was not under seal, and a parole waiver would be good even at Common Law.

See *The Canada Landed Credit Co.* v. *The Canada Agricultural Co.* (4). If the sixth condition was broken they waived it ; *Sherman* v. *Madison Mut. Ins. Co.* (5) ; *Brady* v. *Western Ass. Co.* (6).

(1) 31 U. C. Q. B. 547.
(2) 9 Hare 175.
(3) 16 U. C. Q. B. 477.
(4) 17 Grant 418.
(5) 5 Bennett's Ins. cases 812.
(6) 17 U. C. C. P. 599.

The appellants are even entitled to recover within the terms of the policy, for the conditions of the policy are only to be resorted to in cases not otherwise specially provided for. Now, in this policy provision is made for endorsing other insurances on the policy, and if the insurance in the Gore was not endorsed on the long policy, it was no fault of appellants, but that of respondents' agent; for he was duly notified of all existing insurances when he issued the interim receipt. See *Peoria Mar. & Fire Ins. Co.* v. *Hall* (1); *Insurance Co.* v. *Wilkinson* (2); *Wyld* v. *The Liverpool L. & G. Ins. Co.* (3). Appellants further contend there was no double interest, as the interest of assured in the Gore policy was assigned when the application was made to the respondents. It was a transfer of a policy in a mutual company, which made the mortgagee a member of the mutual company.

Mr. *Osler*, Q. C., followed on the part of the appellants:—

The whole contract is contained in the original provisional receipt; it does not embody any other document; it does not refer to the application, except for the description of the insured property; it provides for a continuation of the contract *as made*, if accepted, *not* for its alteration. No written notice of existing assurance is thereby required; the notice required by the *nota bene* was given at the time.

The contract was, perhaps, voidable, but the action of the directors is evidence that the contract was not rejected, and they could not make, within the 30 days, a new and more limited and conditional contract. In *Penley* v. *Beacon* (4) evidence was given in order to show that outside of the interim receipt the contract was

(1) 12 Mich. 214.
(2) 13 Wallace 222.
(3) 23 Grant 442.
(4) 7 Grant 130.

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

valid. The short form policy was issued by the company for their convenience, and I contend that the endorsement is not necessary on short form policies, for the conditions say: "On this (long form) policy" and not on the short form policy. There being no change made in the contract by the short date policy, no change was made up to the date of the fire, and the loss should be payable as upon an unconditional insurance. The Court below say there were two distinct contracts, and that by the second contract a notice in writing was necessary. Appellants contend that the application and interim receipt and certificate are but the one contract, and that notice in writing is only necessary when the further assurance is put on after the contract was completed.

They cited, also, *Tough* v. *The Provincial Ins. Co.* (1) and *Royal Ins. Co.* v. *Knapp et al* (2).

Mr. *Boyd*, Q. C., (Mr. *Lyon* with him) for respondents:—

When the plaintiff made his application for insurance, he was aware that information was required by the Company as to other insurances existing on the machinery in question. This is expressly asked by the eleventh query to be answered by the applicant, and he answers it by mentioning: "Hastings Mutual, $2,000; Canada Mutual, $3,000." As a matter of fact, there was a further insurance in Gore District Mutual Insurance Company effected by *Billington*, as to which no information is communicated in the application to the Company.

The interim receipt is provisional, and the moment the Company issue a policy, the agent is out of the question. The basis of the contract is the application,

(1) 20 L. C. Jur. 169. (2) 11 L. C. Jur. 1.

and the Company accepted the risk on the footing of what was disclosed in the application, and the applicant agrees that it shall form part, and be a condition of the insurance contract. That a short date policy was issued cannot alter the case, for it is tantamount to the long policy, and refers to all the conditions of the long policy, of which assured admits cognizance. It is true, *Billington* says he never received the certificate; then he finds himself in this dilemma. If he never received the short form policy, he has no *locus standi* here at all, for the interim receipt provides that, unless it be followed within thirty days, the insurance shall be void, but if he did receive it, he is bound by all the conditions in that policy, and one of the conditions is that all notices of further insurances shall be in writing.

In this case there is no evidence that either *Suter* or *Billington* knew before the fire what amount of insurance was to be mentioned, nor can it be said that the Company had knowledge or notice of this fact? There was no material mistake which would warrant a reformation of the policy, no distinct oral agreement, as in *Wyld* v. *Liverpool L. & G. Insurance Company* (1). They cited *Richardson* v. *Maine Insurance Company* (2); *Cooper* v. *Farmer's Mutual* (3); *Hawke* v. *Niagara District Insurance Company* (4).

Mr. *Bethune*, Q. C., in reply:

The contract is provisional, it is true, but it refers to the application, and the application does not exclude any verbal evidence. The answer to the eleventh query ought to be treated as if there was no answer at all. The fact that there is evidence that we gave the

(1) 1 S. C. Can. R. 604
(2) 46 Maine 394.
(3) 50 Penn. S. R. 307.
(4) 23 Grant 147, 149.

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

agent of the Company all the information necessary is sufficient.

The judgment of the Court was delivered by

THE CHIEF JUSTICE :—

The pleadings present the plaintiff in a somewhat anomalous position before the Court. In his declaration he sets out a contract of insurance against fire, as made between defendants and himself, and avers a loss by fire of the property insured to the amount insured, and alleges that all conditions were fulfilled, and that all things happened, and all times elapsed, necessary to entitle him to maintain this action, and that nothing happened, or was done, to prevent him from maintaining the same, and claimed the $6,000 insured ; and, having taken issue on defendants' pleas, went down to trial, but, on the trial, changes his ground entirely, and, by the time we reach the end of the new pleadings, we find the case wholly changed. In the first added count, the plaintiff says he had other insurance on the property, of which defendant had notice, and agreed to insure having such knowledge, and to mention the same on the policy, and have the same endorsed thereon ; but, he says, defendants, by mistake, omitted to mention in or endorse same on policy, and of which he, plaintiff, had no knowledge until after the fire, and, therefore, he says, the policy or contract ought to be reformed and amended by the mention therein of the existence of such other insurance ; and an equitable replication to defendants' third plea, which sets up that there was other insurance not notified to defendants and mentioned in or endorsed on policy, whereby policy was void, after setting out the condition of the policy, avers that plaintiff made application for the insurance to defendants' agent, authorized to receive applications for insurance and the payment of premiums, and to

grant interim receipts on defendants' behalf; that at the time of application, plaintiff informed the agent of the existence of this insurance, and mentioned and instructed him to have same endorsed, or otherwise acknowledged by defendants in writing, which agent undertook to do, and defendants omitted or neglected to have same done; and before policy was delivered, loss occurred, and plaintiff had no notice until after loss that same was not done.

In plaintiff's application for insurance, dated 6th February, 1875, of "Questions to be answered by the applicant," in answer to question 11: "What insurance is effected on the property now to be insured, and with what companies? Answer: "Hastings Mutual, $2,000; Canadian Mutual, $3,000." And, at the end of the queries, follows this:

"And lastly, it is expressly agreed on the part of the Applicant that this Application and Survey, as well as the Diagram of the premises herewith, *shall form part and be a condition of this Insurance Contract.* The Company is not to be held liable for any loss or damage by fire caused by locomtive engines, unless special insured against."

On this application the agent granted a provisional receipt in the following form:

"PROVINCIAL INSURANCE COMPANY OF CANADA.

"HEAD OFFICE, TORONTO.

"*Agent's Office, 7th February*, 187

"*Provisional Receipt No.*

"Received from of Post Office the sum of dollars, being the premium for an insurance to the extent of dollars on the property described in application of this date, numbered subject, however, to the approval of the Board of Directors in *Toronto*,

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

who shall have power to cancel this contract at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above Post Office; and it is hereby mutually agreed that, unless this receipt *be followed by a policy within the said thirty days from this date, the contract of insurance shall wholly cease and determine; and all liability on the part of the Company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors.* In either event, the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time which the said property was insured.

"AGENT.

"N. B.—Any existing assurance on the property *must be notified at the issuing of this receipt*, or the contract is *void*. Please read this receipt in order to make yourself acquainted with its terms."

And the Company say they subsequently issued a "Short Policy," as it is termed, in this form:—

"PROVINCIAL INSURANCE COMPANY OF CANADA.

"HEAD OFFICE, TORONTO, ONTARIO.

"*Certificate of Fire Insurance, for a term not exceeding three months.*

"TORONTO, 19th February, 1875.

"No. 2081.

"This certifies that Messrs. *J. Eastwood & Co.*, of *Hamilton*, have insured under, and subject *to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance*, the sum of eight hundred dollars on paper hangings, in bales and in cases in bond in the Grand Trunk Freight Sheds, in *Hamilton*, as per application No. 68,838, for one

month, to wit, from the 18th day of February, 1875, to the 18th day of March, 1875, at noon; amount, $800, premium $2. 40; which premium is hereby acknowledged to have been received. Loss (if any) payable to

" (Signed,) A. HARVEY,

" *Manager.*"

" NOTE.—This Certificate of Insurance will, in the event of loss, be replaced by a policy, if required."

Plaintiff says he never received any such instrument; in fact, in his evidence, repudiates any knowledge of it. But he says, after the fire he applied for, and the Company issued a policy, that on which the plaintiff originally declared.

If there was no short policy, plaintiff is clearly out of Court. Unless followed by a policy within 30 days from date of the provisional receipt, the insurance, by the terms of the receipt, wholly ceased, and, without any " short " policy on which to base it, the long policy, issued after the 30 days and after the fire, if of any force or effect at all, must necessarily be an entirely new and distinct contract, as to which there could be no pretence for saying any conditions should be expunged, or into which, it could be contended, any new provisions should be incorporated. Notwithstanding, however, what plaintiff says, the evidence shows a short policy was issued, whether it ever reached plaintiff or not, and, no doubt, would bind the Company from the moment they issued it and put it *en route* for plaintiff, though he may never have received it. This, though immaterial, as the Company do not deny the issue of the short policy, and have substituted the long policy sued on, shows how very loosely and with almost reckless indifference plaintiff treated this insurance, and may perhaps account for the manner he acted in reference to the application, as we shall see; for if, as he says, he never did receive the short policy, and never

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

had any intimation that it had been issued,—as the thirty days named in the receipt expired thirty days after the 7th February, which would be the 9th or 10th of March,—he must, from that time till the issue of the policy after the fire, have been under the impression that he was wholly uninsured by defendants, and it is not easy to understand upon what principle he applied for and expected a policy, for by the terms of his agreement, as contained in the provisional receipt, the non-delivery of a short or long policy within the 30 days from the date of the receipt is made absolute and incontrovertible evidence of the rejection of the contract of insurance, and the contract of insurance under the provisional receipt wholly ceased and determined, and all liability of the Company was at an end. But, assuming, as I think we must, that a short policy was issued, I think the evidence shows that, while both the agent *Suter* and *Billington* knew there was insurance in the Gore on the premises, neither actually knew whether any of it was on the stock. *Suter* says positively:—

> At the date of application I was not aware of it (that the property was insured in the *Gore*). I knew there was existing insurances on the property, but I was not aware there was in the Gore Mutual.

And again:

> I was well aware there was a policy in the Gore Mutual on the premises, but neither Mr. *Billington* nor I knew that the Gore policy covered the stock.

And Mr. *Billington* says:—

> I spoke particularly of the Gore Mutual, and we could not find it (the policy) We knew there was a policy existing, and I thought there was a part on stock, but I did not know what part.

Mr. *Billington* appears to have been anxious to have had any insurance that was on the stock mentioned in the application, and was even willing to have had the whole amount of the $3,000 inserted as on stock,

though he knew that sum was not on stock. The contract certainly contemplates a true statement in this particular. It is not necessary to enquire whether, had he done this, it would have helped him, for it was not done, evidently, with *Billington's* knowledge and acquiescence. Instead of providing himself with the information necessary to enable him properly to fill up his application, he appears to have signed an application in blank, or partly in blank, for the greater part was filled in by the brother of the agent, at the agent's place of business, in the absence of the plaintiff, who trusted to the agent to obtain for him the amount, if any, of the insurance actually on the stock in the Gore Mutual and have it inserted in the application, which the agent never did, and could not do, because he never obtained the necessary information.

The answer to the question in the application was written by the brother of the agent; the agent says his handwriting stops at the word "unfinished," which is in the description of the property, at the first line of the application following the heading. That question was:—

> What insurance is effected on the property now to be insured, and with what company? Hastings Mutual, $2,000; Canadian Mutual, $3,000.

Billington was quite alive to the necessity of transmitting a statement of all other insurances to the Company, and appears to have known full well the consequences of not doing so, for he says, in answer to the question:—

> I suppose you knew the effect of concealing these particulars? Yes. Q. You knew the effect that it would have on your policy? I thought it would vitiate policy.

If *Billington* chose to trust to *Suter* to obtain the information for him, and he failed to do so, how can this effect the Company? Instead of getting himself

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

the precise information required to enable him to make a proper application, as was his interest and his duty to the Company, he trusts to *Suter* to get it for him. Surely, he must take the consequences of any neglect on *Suter's* part. He says:—

> I supposed every thing was satisfactory or he would let me know. He took my money and I supposed the thing was all right.

In other words, he trusted *Suter* to do for him what he ought to have done for himself, and, too late, discovers he has trusted to a broken reed.

In all this, *Suter* was in no way representing the Company in any matter within the scope of his authority or duty; he was acting solely for *Billington's* accommodation. The plaintiff, evidently under the impression that the insurance in the Gore partially covered the stock, and knowing the necessity of putting a true statement in reference thereto in his application, gives an incomplete application to the agent, and relies upon his ascertaining the facts for him, not for the Company, as to this insurance, and putting the information so to be obtained in the application before transmitting it. The agent or friend, without ascertaining the state of the Gore's insurance, transmits the application filled up by his brother, in which no reference is made to the Gore's insurance. The Company, acting on the application so transmitted (after being pressed by the agent), apparently, somewhat reluctantly issue the short policy. It is very clear that, as between *Billington* and the agent, the latter should have obtained the information as he promised, and which he said was accessible to him, or he should have notified *Billington*, but he did neither.

Without obtaining this information, it is equally clear that neither plaintiff nor the agent were in the position to fill in a proper application, for neither knew for a certainty that there was really any insurance on stock

in the Gore, though plaintiff thought there was, but neither knew how much, and, therefore, neither could fully and truthfully fill in the application.

Had *Billington* been desirous of repudiating any contract based on this application, I can well understand how he might, with much force, contend that the agent transmitted an application he had never authorized him to send. But if, on the contrary, he is desirous of availing himself of a contract, based on the application so sent, I am at a loss to understand how he can accept the contract, and say it was based on any mistake or error on the part of the Company, and that they should have inserted in the policy the amount of an insurance, of which both the assured and the agent were ignorant, and which does not appear to have been ascertained by either of them till after the fire occurred and the Gore policy was found.

The insurance under the provisional receipt was clearly superseded by the short policy, and by the terms of that contract must the plaintiff be bound if he claims to be insured at all. How can he claim to have the policy reformed and a new contract made.

The agent's power to bind the Company by a contract of insurance was limited to the provisional contract. If no certificate or short term policy was issued, this contract was unquestionably at an end at the expiration of 30 days. If a certificate was issued by Company and accepted by plaintiff, that became the contract between them, and, by the terms of that contract, both parties are bound. The insurance under this certificate was made subject to all the conditions of defendants' policies, "of which the assured admits cognizance."

The condition as to other insurance was not complied with, and, according to the terms of the contract, the insurance was at an end.

I can discover nothing whatever to justify any Court

1879

BILLINGTON v. PROVINCIAL INSURANCE COMPANY.

in saying that the defendants ever agreed to insure plaintiff on any other terms or conditions than were contained in the original receipt during the time that was in force, or than were contained in the subsequent certificate of insurance, or the policy by which it was afterwards replaced, or that the plaintiff ever expected to be insured on any exceptional terms; or that, so far as the Company is concerned, there was any mistake in the terms of this contract; or that the Company were ever asked or expected by the plaintiff to alter, vary, expunge, or waive, any one of the conditions contained in their policies.

In my opinion, the whole trouble has arisen from no fault or default on the part of the Company, but from plaintiff's relying on others to do for him what he should have done for himself, or that he should have taken care to see that those he entrusted had done as they promised.

As I can discover no omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake, and, therefore, nothing to reform, I think the appeal should be dismissed with costs of appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Osler, Gwynne & Teetzel.*

Solicitors for respondent: *Murray, Barwick & Lyon.*