SCOTLAND.

APPEAL FROM THE COURT OF SESSION (2D DIV.)

NEWCASTLE FIRE INSURANCE CO.—*Appellants.*
MACMORRAN AND CO.—*Respondents.*

Feb. 15, July 8, 10, 1815.

INSURANCE.—WARRANTY.

IT is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void, and there is no contract. And therefore where a cotton and woollen mill was insured as being of one class, and turned out to have been of another class at the time, it was held by the House of Lords, reversing a judgment of the Court of Session, that an action on such a policy could not be sustained—Lord Eldon (C.) observing that whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the other, were questions which had nothing to do with the case; the only question being, is this, *de facto*, the building which I have insured?

Insurance on cotton mill.

MACMORRAN and Co., cotton and wool spinners, at Garschew, insured their premises with the Newcastle-upon-Tyne Fire Insurance Company. The policy was dated April 16, 1805, and contained a receipt for the premium, which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till Sept. 5, 1805, when it was delivered to the insured upon their paying the premium. The policy referred to certain printed proposals, a copy of which was, ac-

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cording to the practice of the office, always delivered to the person transacting the insurance, in which proposals it was stated that, where the persons insuring gave a description of the subject in order to its being insured at a lower premium, and that where there should be fraud or false swearing in stating the amount of the loss, the policy was to be of no force. Certain classes of buildings were likewise specified, according to the particulars of which the premium was to be lower or higher, and the premises in question were warranted to be of the first class, for which the lower premium only was charged. On

Mill burnt.

December 7, 1805, the mill was burnt, and the insurers refusing to pay the sum claimed for the loss,

Action and Defences.

the insured brought an action, regularly preceded by an arrestment *ad Fund. Jur.* before the Court of Session, concluding for payment of 1647*l.*, and interest from December 7, 1805. A condescendance having been ordered, the insurers stated two charges as the ground of their refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; second, that the fire was intentional. Upon proof it appeared that there was no foundation for this latter charge; but it also appeared that, at the time of the date of the policy, the premises were of the second class, contrary to the warranty. In answer to this it was alleged that Hamilton, the agent of the Newcastle Company, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured, and that before the policy was delivered, and the loss happened, the premises had been altered so to bring them within

the first class. It did not appear very distinctly in proof, how the demand of 1647*l.* was made up. The Court below decerned against the insurers in terms of the libel, and from this decision the Newcastle Company appealed.

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Dec. 11, 1811.

Romilly and *Richardson* for Appellants; *Park* and *Brougham* for Respondents.

Lord Eldon (C.) This is an appeal by the Newcastle-upon-Tyne Fire Insurance Company, from a judgment of the Court of Session by which they were held liable in the payment of a sum of 1647*l.* upon a policy of insurance, and the question is whether this judgment was right or not. The summons, which is in the nature of our declaration, stated that the Newcastle Company were indebted to the Pursuers in a sum of 1647*l.*, in terms of a policy dated April 16, 1805 (your Lordships will note the date), and concluded for payment accordingly.

Judgment. July 8, 1815.

The policy itself was in these terms, "Whereas "Mr. Hugh M'Morran and Co. &c. have paid the "Sum of 21*l.* 5*s.* 8*d.* to the society of the New- "castle-upon-Tyne Fire Office; and do agree to pay "or cause to be paid to the said society, at their "office in Newcastle-upon-Tyne, the sum of 17*l.* 17*s.* "on the 24th day of June, 1806, and the like sum "of 17*l.* 17*s.* yearly on the 24th day of June, "during the continuance of this policy, as a pre- "mium for the insurance from loss or damage by "fire, of 50*l.* on millwright's work, including all the "standing and going gear in their mill, which is "used as a cotton and woollen mill, situated at

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" Garschew as aforesaid, being in their own occu-
" pation only, and stone built and slated; 550*l.* on
" clockmakers' work, carding and breaking engines,
" and all moveable utensils in the second floor, occu-
" pied as a cotton mill; 160*l.* on stock of cotton in
" the same; 600*l.* on clockmakers' work, carding
" and breaking engines, and all moveable utensils in
" the first floor, occupied as a woollen mill; and
" 350*l.* on stock of wool in the same;" then followed this very material passage, " *warranted that* " *the above mill is conformable to the first class of* " *cotton and woollen rates delivered herewith.*"

The materiality of it consisted in this (though in one view whether it was material or not did not signify, if it was a condition precedent), that if it was of the second class, and not of the first, a larger premium ought to have been given. And then it goes on: " Now know all men by these presents, that " from the day of the date hereof, until the said " 24th day of June 1806, and so from year to year " so long as the said Hugh M'Morran and Co. " shall duly pay, &c. the sum of 17*l.* 17*s.* &c., and " the same shall be accepted by the trustees or " acting members of the said society for the time " being, the stock and fund of the said society " shall be subject and liable to pay, &c. all such " damage and loss as the said Hugh M'Morran and " Co. shall suffer by fire, not exceeding the sum of " 1700*l.* &c." And then followed at the bottom an entry of receipt of the government duty of 2*l.*; from April 16, 1805, up to June 24, 1806. Their Lordships would observe the materiality of that, as this instrument could never have been produced in

Court, if it were only on account of the revenue, save as a policy of April 16, 1805, on which as a policy so dated the demand could have been made. But whether that was so or not the demand was made on this policy. On June 24, 1806, the premium must again be paid, and the duty to government, and whether the demand was on the policy originally entered into, or on the renewed policy, it must be on a policy liable to such a duty, and of this date.

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In the Appellants' case, it is stated that the printed proposals formed part of the contract, and that, besides being referred to, a copy is always delivered to the party insuring: and that it is there set out, among other things, that if any "person or persons "shall insure his, her, or their houses, mills, &c., "and shall cause the same to be described in the "policy otherwise than as they really are, so as the "same shall be insured at a lower premium than "proposed in the table, such insurance shall be of "no force." As to their so setting it out in their printed proposals, in the case of a warranty, it is unnecessary to consider that; for if there is a warranty, the person warranting undertakes that the matter is such as he represents it; and unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into; there is in reality no contract.

Then they further state that, by another article of these proposals, it is provided "that all persons "insured by this society sustaining any loss or "damage by fire, are forthwith to give notice thereof "at their office in Newcastle, and as soon as possible

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" after to deliver in as particular an account of their " loss or damage as the nature of the case will " admit, and make proof of the same, by their oath " or affirmation, according to the form practised in " the said office, and by their books of accounts, or " other proper vouchers, as shall be reasonably re- " quired." That they shall also procure a certificate, under the hands of the minister, &c. and others, relative to the cause of the loss; " and until " such affidavit and certificate shall be made and " produced, the loss-money shall not be payable; " and if there appear any fraud or false-swearing, " such sufferers shall be excluded from all benefit by " their policies."

They further represent that in the second set of proposals for the insurance of cotton mills, &c. certain classes of buildings were specified, according to the particulars of which the premium is at a lower or higher rate.

Thus, class 1. comprehends " buildings of brick " or stone, and covered with slate, tile, or metal, " having stoves fixed in arches of brick or stone on " the lower floors, with upright metal pipes carried " to the whole height of the building, through " brick flues or chimneys, or having common grates, " or close or open metal stoves or coakles, standing " at a distance of not more than one foot from the " wall, on brick or stone hearths, surrounded with " fixed fenders," I request your Lordships particular attention to the following words, " *and not having* " *more than two feet of pipe leading therefrom* " *into the chimney*, and in which, or in any building " adjoining thereto, although not communicating

" therewith, no drying stove or singeing frame shall July 8, 1815.
" be placed."

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Class 2. comprehends " buildings of brick or " stone, and covered with slate, tile, or metal, which " contain any singeing frame, or any stove or stoves, " having metal pipes or flues, *more than two feet* " *in length*, and in which, or in any building ad- " joining thereto, although not communicating there- " with, no drying stove shall be placed."

As I understand this, very possibly mis-understand it, but it is of no consequence in my view of the case whether I do so or not; but as I understand it, the reason for requiring a higher premium for mills of the second class is that the greater length of the pipe increases the danger. If the pipe of the stove is a yard in length, for instance, the difference arises from this, that if the pipes be more than two feet, the danger is increased beyond what belongs to pipes of that length. But it is immaterial whether I misunderstand this or not; for if the mill was warranted as being of the first class, it must be such as it is warranted to be, unless there is something to oust the warranty, otherwise there is no contract.

Then this mill was burnt; and, as generally happens in these cases, the insured were very anxious to get their money, and the others were not very ready to pay. An action was then brought to compel payment, to which defences were given in. As to that defence which was the most unwelcome to hear, viz. that the premises has been wilfully set on fire, it appeared that there was no ground for it; and the Court of Session seem to have thought that there was no ground for the imputation of fraud and

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overvalue. It is not likely at any rate that the articles were undercharged; and it was extremely difficult to make out a case of overvalue where the books and papers were all destroyed, and when the amount of these improvements, and the value of spinning-jennies, and such articles, were to be calculated. But though one cannot help believing that enough was charged, yet it might be dangerous to say under the circumstances that that defence ought to be sustained.

Warranty.

But there was another very material point of defence stated, that this mill, which was warranted as being of the first class with a pipe of two feet, was in reality of the second class; and that being of the second class, whether there was fraud or not, whether the mis-statement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent (unless they were misled by the agent of the Newcastle Company,) or from whatever other cause, the contract never had effect.

Then evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class, and was really of the second class, the judgment of the Court below was clearly erroneous; for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies

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. The only question in

nothing. The only question is as to the mere fact. It is proposed then that the matter should stand over for a day or two in order to examine the case again for the purpose of further inquiry as to that fact; but my present impression is that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the question, unless it can be effectually answered that the insured were misled by the insurers, or their agent. Then they say that the mis-representation was owing to the agent of the Newcastle Fire Company. I cannot say however that they have made out that point, and it is denied on the other side, and may therefore be laid out of the question.

Then they say further that there was no effectual policy till the premium was paid, and refer to the terms of the 4th article of the printed proposals, which declares "that no insurance is considered by "this office to take place till the premium be actually "paid by the insured, his, her, or their agent, or "agents." The premium, they say, was not paid till a considerable time after the date of the policy, that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been comunicated to the agent of the Company. The Company deny that any such communication was made, and even if it had been made it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. But as the fact was denied, and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the

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such cases is merely as to the fact whether the thing was or was not as represented.

But it seems that it would be a good answer, even in the case of a warranty on the part of the assured, that they were misled by the insurers or their agents.

Defence, that the premises were brought within the warranty before the policy took effect.

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article referred to, the Appellants contend that it did not relate to the first policy, but to the renewals of policies. But in the present case it is not necessary to consider whether it related to the first policy or any renewals of it, as they say that as between the Respondents and them the premium had in point of fact been paid before the alteration took place, as the Scotch agent had accounted for it to his constituents the Newcastle Company before the period of the alteration, and it had therefore become a personal debt due to him from the Scotch Company. That may be considered as an answer to the argument raised upon that ground. But suppose that were entirely out of the question, we must in this case as in all others proceed *secundum allegata et probata*, according to what is alleged and proved. If they could succeed at all on this summons it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only, they cannot afterwards in that action turn round and say, though we cannot succeed on that policy, we are entitled to recover on a subsequent contract. See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid; and it was agreed that a certain premium should continue to be paid on June 24, *de anno in annum*. Can your Lordships convert that into a transaction commencing not in April, but in September, 1805?

The pursuers can only succeed on the policy stated in the summons, which is one dated April 16, 1805.

Suppose the fire, after being smothered for some time in the mill, had burst out the day before the money was paid to the agent of the Newcastle Com-

pany, could that Company say, 'Though the pre- 'mium has been paid us by our agent, and we own 'the receipt of the money, yet as you did not pay the 'agent we are not bound.' Acquitting M'Morran and Co. then of all fraud in the business, the question is reduced to this; 'Are you M'Morran and 'Co., looking to the facts and evidence as applicable 'only to the policy of April 1805, entitled to recover 'under this contract?'

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I have said so much because I consider it as of the greatest importance that the mercantile law should be uniform all over the country, and because it is dangerous therefore to decide these questions of insurance without being sure what may be the effect of the decision and the nature of the doctrine which may result from it. If this is to be taken as a contract of April 1805, and the premises were not of the class of which they were warranted to be, it appears to me quite clear that the Respondents ought not to recover. If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, 'What is the building *de facto* that I have 'insured.'

It signifies nothing in the case of a warranty that the risk might have been as great in one class of buildings as in another. The only question is, what is the building *de facto* which I have insured.

Lord Eldon (C.) Since I had the honour of addressing your Lordships the other day on this case, I have looked again at all the papers. I repeat what I before said, and what indeed the Appellants themselves have authorized me to say, that there is no ground whatever for the imputation that the mill

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had been wilfully set on fire. As to the question of fraud and falsé swearing, on the best consideration I have been able to apply to the case, though there appears a tendency to state the loss as high as it can be fairly carried, I cannot say that there is any thing which amounts to fraud and falsehood. Another ground was that this Summons proceeded on a policy, dated April 16, 1805, and that it contained a warranty that the building belonged to the first class, described as having the stoves not more than one foot from the wall, with pipes or flues not more than two feet in length. I stated the doctrine of warranty, and on the best consideration I have been able to give the case, I do not think that the warranty was made good. The remaining question then was whether attending to the nature of the summons the Respondents could be considered as having insured of a date posterior to April 1805, and after the alteration had taken place in the description of the building. I stated my opinion that they could not on this summons. It appears to me then that the Appellants ought to be assoilzied in this action, and if the Respondents have other special circumstances to allege, they may take advice whether they ought to proceed upon another summons. But I think they cannot succeed on this, and I am therefore of opinion that the judgment of the Court below ought to be REVERSED.

Judgment accordingly.

Agents for Appellants, CLAYTON and SCOTT.
Agent for Respondents, MUNDELL.