

*Judgment of the Lords of the Judicial Committee of the Privy Council, on a Petition in the Appeal of the Montreal Assurance Company v. Dame Elizabeth McGillivray, from the Court of Queen's Bench (Appeal side) Lower Canada; delivered February 8, 1861.*

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Present :

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JOHN T. COLERIDGE.

THIS was a petition for the purpose of procuring an alteration in the Order which had proceeded from Her Majesty in Council in the Appeal of the Montreal Assurance Company *v.* Dame Elizabeth Mc Gillivray.

In the proceedings below there had been first an action brought in the Superior Court in Canada, on a contract for insurance against loss by fire, in which judgment had passed for the Respondent Elizabeth Mc Gillivray, the Plaintiff below, in a large sum. An appeal to the Court of Queen's Bench in Canada had been instituted, and that Court, by a majority of the Judges, had confirmed the Judgment in all respects.

A great number of points were mooted in the argument before their Lordships, but ultimately their Lordships gave their judgment expressly upon one point only, which they considered to involve, and finally to involve, a decision upon the whole merits of the case, and by that Judgment, as they recommended that the Judgment of the Court of Queen's Bench should be reversed, an order to that effect was consequently made.

Upon this order being transmitted to the Court of Queen's Bench in Canada, the Judges of that Court have filed it, on the prayer of the Appellants, but they have declined to do anything more ; so that

the Appellants, the Montreal Assurance Company, who have been successful in the Appeal, are unable to reap any benefit from the decision which has been pronounced in their favour.

On the hearing of the present Petition it appeared that both sides were desirous that some alteration should be made in the form of the Report of this Committee to Her Majesty on which the Order has been made.

It has already been stated that the Montreal Assurance Company complain that they can reap no benefit from the Judgment which has been pronounced upon the merits in their favour, and on the other side it was contended by the Counsel for the Plaintiff below that the Judgment having proceeded in effect upon that which in substance may be said to be, and at all events in form is, analogous to a Bill of Exceptions in the English Courts, no other Judgment could properly be pronounced than that of directing a *venire de novo* to issue.

Without expressing any opinion (and their Lordships desire to express none) as to how far the position of the Counsel for the Plaintiff below is correct in its application to that which is analogous to a Bill of Exceptions in this country, their Lordships are certainly of opinion, under the circumstances of this case, that in point of form the Report and Order should be amended, and therefore they have determined that they will humbly recommend to Her Majesty that so much of the former Order as directed a reversal of the Judgment of the Court of Queen's Bench be altered, and that that Court be ordered to remit the cause to the Superior Court, with directions to issue a writ of *venire de novo*.

The present Order in all other respects to stand, and there will be no costs of this Petition.

And their Lordships desire it distinctly to be understood that they express no opinion upon any other points raised by the record and argued before them, upon which no judgment was given before, and also that they make this correction in a matter of form, as they deem it, and not at all as affecting their decision upon the merits of the case.

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