

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of The  
Lancashire Insurance Company v. Chapman  
and others, from the Court of Queen's Bench  
for the Province of Quebec (Canada);  
delivered February 18th, 1875.*

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Present:

SIR JAMES W. COLVILLE.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.  
SIR HENRY S. KEATING.

IN this case their Lordships do not think it necessary to hear the Respondents, as the case has been very fully gone into in the arguments that have been brought forward on the part of the Appellant, and the evidence in the case very fully adverted to.

This is an appeal against a judgment pronounced by the Court of Queen's Bench for Lower Canada, reversing a judgment previously pronounced by a single judge of the Superior Court of that province.

The action brought in the Superior Court of Lower Canada, was an action upon a fire policy, which was effected by the present Respondents, or those whom they represent, with the Appellants on the 12th of November 1864. The terms of that policy have been very fully adverted to in the course of the argument, and it appears that the insurance was described as being an insurance upon certain goods, &c. "whether their own property held on trust or "on consignment" contained in the basement and third story of a house known as the western chambers, occupied by the assured as a bonded

and general warehouse, St. John Street, Montreal, and was for the sum of 15,000 dollars. The conditions of the policy provided, that "goods *on storage* must be separately and "specifically insured," and also as is not unusual in such cases, that notice should be given to the insurance company of any previously existing policies, and that such should be endorsed on the policy in question or acknowledged in writing, otherwise the policy to be of no effect, and further, that any subsequent policies effected should be communicated to the insurers. There was at the time of making the policy notice of a previously existing policy to the amount of 15,000 dollars, effected upon the goods in the same building, with the London and Lancashire Insurance Company, and that was the only policy endorsed upon the one now in dispute. There was a great deal of conflicting evidence in the case, as to how far there was a disclosure of a further policy also previously effected upon the same goods for 10,000 dollars with the Liverpool and London Insurance Company, but it will not be necessary very closely to consider the effect of that evidence. The goods insured were goods that were contained in the third storey, and also in the cellar of this building, the occupation of which was described, as stated, as being that of the assured. At the time of the insurance, when the policy was effected, there is no doubt that so far as the occupation was concerned, that was a true description. The goods also were described as being the property of the assured, and that, at the time of the effecting of the policy, was likewise a true description of the property in the goods. The fire took place upon the 7th of December, following the date of the policy, and the whole of the goods contained in the third story of the building

were totally destroyed, whilst the goods covered by the policy, but being in the cellar portion of the building were damaged but not destroyed.

Between the date of the policy and the occurrence of the fire, certain changes took place which have caused all the subsequent litigation between the parties, and first with respect to the occupation. The assured having occasion to raise a sum of money, applied to a Mr. Stanton for that purpose, and in order to secure the advance made by Stanton, to the amount of some 10,000 or 12,000 dollars, there was a deposit of certain promissory notes, and further, a transfer of the policy of insurance for 10,000 dollars which had been effected by the present Respondents with the Liverpool and London Company upon their goods in this building. As a collateral security for the advances of Stanton, besides the deposit of the promissory notes, he was to have the security of the goods contained in the upper portion of the building, and covered by the policy now in dispute. Those goods so covered by the policy do not appear to have been transferred, as to their property, to Mr. Stanton; but it was proposed that he should have the security of those goods by means of what has been incorrectly described by the parties as a lien. In order to effect that purpose, and in order not to change the actual possession of the goods, a nominal lease was made to a person named Bradford of the premises in question, with the view of making him the warehouseman upon whose receipts the goods should be dealt with. The place where the goods were stored being a bonded warehouse, one key of the premises was delivered to Bradford, the other key, of course, being held by the locker of the Customs. The only approach to the bonded store was through the pre-

mises occupied by the present Respondents. Upon the happening of the fire, appraisers, Messrs. Rimmer and Frazer, were employed to appraise the goods. They proceeded to make a valuation which they found it impossible to complete, because the goods in the cellar being partially damaged by the water, and consisting of cases of wine, it was found impossible for them—or, at least, they conceived it to be impossible—to estimate truly the value of the damaged property whilst in the cellars; and in their opinion it was necessary in order to ascertain the value that a sale should take place of the property at auction.

The state of things at the time that the fire occurred, therefore, seems to have been that it was perfectly clear that the London and Lancashire Assurance Company, who had insured for 15,000 dollars, would be liable, and it was also understood at that time that the present Appellants would also be liable. But there was a distinction in the wording of the two policies, because whilst the policy of the London and Lancashire Assurance Company covered goods *in storage*, that which is now in dispute did not cover goods under those circumstances. It was supposed by the present Appellants that the goods in question which had been destroyed were, or a portion of them was, in storage, so as not to be within the terms of their policy; and there can be no doubt that that was the objection which was pressing upon the mind of Mr. Hobbs, the agent for the present Appellants, at the time or soon after the fire took place. That portion of the evidence may be rejected which intimates an opinion at first on the part of Mr. Hobbs that the circumstances under which the fire took place might be questioned, because the other insurance companies who were affected by the fire came to

the conclusion that their liability was established, and Mr. Hobbs acquiesced in that conclusion.

That being so, their Lordships think upon the facts it is clear that the real question between the parties then was considered to be, in what proportions the two companies should contribute to the loss. Mr. Hobbs, on the part of the Appellants, naturally supposed that he had an advantage in consequence of the exemption of *storage goods* in his policy, and things being in that position, submissions to arbitration were agreed upon both by the Appellants and by the London and Lancashire Company.

Now the submissions to arbitration dated 21st December 1864, though separate were in identical terms. The terms in which the powers were given to the arbitrators were these: The submission recited the policy of insurance and that the property and effects were injured by fire, "but that the amount of  
 " such loss and damage has not been established,  
 " and the parties hereto are desirous that the  
 " same should be ascertained and adjusted by  
 " arbitration and friendly composition, upon the  
 " basis that the costs and charges of the effects  
 " destroyed and damaged shall be the measure of  
 " their value." Then they agreed to submit "the  
 " extent and value of such loss and damage,  
 " and the adjustment of the amount thereof, to  
 " the award arbitration and final determination  
 " of " the two arbitrators "as *Arbitrateurs et*  
 " *amiables compositeurs*," the last expression signifying mediators, not, as their Lordships think, with more extended powers than arbitrators would have, but simply as unfettering the mediators with reference to technical rules which might prevail as against ordinary arbitrators—"to value such loss and damage and  
 " to estimate the extent thereof, and to adjust

“ the same,” and then the parties oblige themselves to produce and lay before the arbitrators without delay and within two days from the date “ all facts, documents, matters, and things “ relative to their said loss and damages, to the “ end that the said arbitrators may be fully “ informed in the premises, and thereafter that “ the said arbitrators and *amiables compositeurs* “ do make their award in the premises on or “ before the 24th day of December instant,” in fact the award was to be made in three days, two days being given to the parties to bring any proofs they might desire to bring.

Now upon this, the arbitrators having originally appraised the goods, (for the arbitrators were the same individuals who had acted as appraisers,) considering themselves to be furnished with all the necessary materials for making their award, proceeded to do so before the lapse of the two days allowed to the parties to appear, and there does not appear any evidence—indeed the evidence is the other way—that they called upon the parties or either of them to furnish them with any proofs; nor does it appear upon the evidence that either of the parties tendered to them or expressed a wish that they should examine any proofs nor that they were ready to produce any. In that state of things the award was made. The terms of that award have been the subject of criticism on the part of the learned counsel for the Appellants, and with some justice; because the statements in the preamble to that award undoubtedly are not borne out by the facts, which may perhaps be explained by the fact that the award was drawn by some professional gentleman, and the arbitrators, not being professional lawyers, in all probability adopted the statements made in this preamble, and made their award in the terms in which it was so drawn. They say that

they have valued the loss and damage, and estimated the extent thereof at a sum of 23,962 dollars, and then they proceed to determine that the effects forming part of the goods covered by the policies, which are enumerated in papers there referred to, "be abandoned by the said " firm of Henry Chapman & Co., and be delivered over to the said companies upon their " joint order, or sold for their joint benefit in " equal proportions as they may see fit." So far as that would direct an abandonment in the technical sense of the term, their Lordships entertain no doubt that it would be beyond the terms of the submission to arbitration. "They " then award and determine," that one-half of the loss shall be paid by the Lancashire Company, namely, 11,981 dollars, and one-half by the other Company. In other words, they assumed to themselves the power of apportioning between the Companies the amount which each should pay.

When this award was communicated to Mr. Hobbs, he was evidently dissatisfied with it, because in effect it disposed of the question which he had wished to raise as to how far some or all the goods on the third storey were to be considered as goods *in storage*; and the award did in effect get rid of that question by apportioning the amounts in the way that it did. Indeed if the award stood simply upon its terms without reference to subsequent events it would undoubtedly be open to many of the objections which were made to it on the part of the Appellants. But after that award had been communicated to the parties, Mr. Hobbs although dissatisfied with it, yet did certain acts with reference to it, and the claim by the parties under it, which have a most material bearing upon this case, for having called, under the terms of the policy, for information and

explanations which were furnished to him, and having then become aware, as he states for the first time, that this prior insurance with the Liverpool Company existed in favour of Mr. Stanton, who had made the advance upon the goods, he nevertheless at that time seems to have treated the policy as binding; and proceeded to admit distinctly the liability of the company in respect of the goods contained in the cellage of the premises and, without reference to what their actual value might be to the present Respondents, he paid to them a sum of 2,000 odd dollars, confessedly on the footing of liability under the policy. With reference also to the terms of the award, he seems to have recognized at that time that the arbitrators in ordering this sale, called in the award an abandonment, had not exceeded their powers, for he not only assented to the sale so ordered, guarding himself by the phrase "for those whom it may concern," but he also, upon being applied to for his consent to the payment over of one half of the proceeds to the present Respondents, whilst saying that he did not conceive his assent was necessary, still stated that he had no objection to the payment being made, and upon that statement the payment was made to the present Respondents. In respect of both of those payments the Insurance Company represented by him have credit, and have had credit all through. He appears, however, to have still held to the storage question, and to have contended that the circumstances already referred to, namely, the making of the lease to Mr. Bradford, and the security thereby afforded to Mr. Stanton, as well as the transfer to him of the policy, constituted the goods as being goods *on storage* within the terms of the policy.

Now their Lordships are of opinion that the



circumstances as stated did not constitute those goods as "goods on storage" within the meaning of the policy, and that therefore the question which Mr. Hobbs himself appears to have treated as the only question between the parties, and that which afterwards in the subsequent communication with the office in England, appeared to be put forward and to be insisted upon as the only question, must be decided against the Appellants.

The transaction was however sought to be impeached not only as showing that the goods were goods on storage, but also that the change that was made both in the occupation of the premises and in the transfer to Mr. Stanton was such a change in both respects as violated the conditions of the policy. But with reference, first, to the change in the occupation, there is no doubt that the lease to Bradford was a colourable lease, it was made to Bradford without consideration for the sole purpose of constituting him a warehouseman upon whose receipts the goods would be dealt with for the security of Stanton. The transaction was not a real transaction in the shape of really changing, although in point of law it may have changed, the apparent occupation of the premises, but the representation as to the occupation at the time the policy was effected was a true representation, and their Lordships are of opinion that although the warranty with reference to the occupation would have continued so as to render it necessary to communicate any change which would increase the risk, yet that it did not impose that obligation where the change did not in any way affect the risk. They are of opinion that in this case the change, such as it was, did not increase the risk, and consequently that there was no breach of the condition under the circumstances by that subsequent alleged change in the occupation.

So with reference to the alleged transfer of these goods, it is said by the third condition,—  
“If the interest in property to be insured be a  
“leasehold trustee, mortgage, or reversionary  
“interest, or other interest not absolute, it  
“must be so represented to the company, and  
“expressed in the policy in writing, otherwise  
“the insurance shall be void.” Now it was said that that was a warranty that the property was and should continue to be absolutely the property of the assured, that that property had been changed by the transaction with Stanton, that it became a reversionary interest, and that that warranty continuing, it vitiated the policy. Their Lordships are of opinion however that that clause extends to real property, and would not include the case of these personal chattels, but, further than that, they are of opinion that there was no change strictly speaking of property, the property in the goods remained still in Chapman and Company, although subject to a charge to the extent of the advances made by Stanton, that the risk was not thereby in any way increased, and, therefore, that the policy was not vitiated in that respect.

The objection, however, taken subsequently by Mr. Hobbs, with reference to the non-disclosure of the Liverpool policy, their Lordships think was quite competent for Mr. Hobbs on behalf of the Appellants to raise. They are further of opinion that unless the want of indorsement of the Liverpool policy upon the present policy was waived, the latter would have been vitiated, because its terms are express, and it is clear that the policy was not endorsed upon the present policy as it ought to have been, but they think that the circumstances that afterwards took place amounted to a waiver of that objection as well as of the formal objections

which were made to the way in which the transaction with Stanton and the transaction with Bradford affected the policy, even supposing them to come within the terms of that instrument. The waiver appears to have been of the most precise character, not only by the two payments to which reference has been made, but also by the office in England recognising a state of things which involved a waiver of any question going to make the policy null and void.

A question was raised as to whether, even if the acts done—if done by an authorised agent—might waive the defects insisted upon, still whether Mr. Hobbs was such a properly authorised agent as could by his acts affect the policy? It was said that it would be, as it were, the creation of a new contract, and that he had no authority to effect such a waiver. It is to be observed, however, that he was the General agent for the English company in Canada. He was the only agent, as far as appears, the company had in Canada. He seems to have managed all the insurance business in Canada in all its branches and in every way. If it were sought to show, that although in general manager and agent, he had not the necessary authority to make this waiver, the question of waiver having been agitated from the beginning of these proceedings, it lay upon the present Appellants to establish this limitation of his authority by evidence or otherwise, but the great probability is that they could not have done so, because when the reference is afterwards made to Mr. Stewart, the general manager in England, and all the facts and documents laid before him, he never suggests that there was no authority on the part of Mr. Hobbs to make the waiver, but he seems in his communications not only to have recognised the authority of Mr. Hobbs, but to have

himself affirmed the waiver, because in his letter of the 23d January 1865, which was a letter written to Mr. Hobbs, but by his desire communicated and read to the Respondents, he distinctly took the very same ground that Mr. Hobbs had originally taken, namely, that the question, and the only question between the parties, was as to the proper appropriation of the sums to be paid by the one company and by the other, his company obtaining credit in respect of the goods in storage. The acts therefore of Mr. Hobbs which constituted the waiver were affirmed by Mr. Stewart, who never suggested any want of authority on the part of the Canadian agent of the company.

In the Court below Mr. Justice Makay delivered a very elaborate judgment in favour of the present Appellants. That was reversed by the Court of Queen's Bench, who gave a less elaborate judgment, but the difference between the two judgments resolves itself rather into a difference as to the conclusions to be drawn from facts than anything else, and the judgment pronounced by the Court of Queen's Bench appears to their Lordships to be the proper judgment.

Their Lordships therefore being of opinion that the judgment pronounced by the Court of Queen's Bench, which is appealed against, was the right judgment, will humbly recommend Her Majesty to affirm it and to dismiss this Appeal, with costs.