[HIGH COURT OF AUSTRALIA.]

THE PHŒNIX ASSURANCE COMPANY LIMITED
DEFENDANTS, . . . APPELLANTS;

AND

BERECHREE
PLAINTIFF, ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 19, 20, 22.

MELBOURNE, *March* 16.

Griffith C.J., Barton and O'Connor JJ.

Fire insurance—Policy—Condition for avoidance if untrue statement made—Proposal—Fire claim—False statement in proposal filled in by agent—Agency—Estoppel—Ratification—Holding out.

B. effected a policy of fire insurance with the appellants through their local agent. The policy made the proposal the basis of the insurance, and its incorrectness or untruth in any respect, material or not, was to exonerate the company from all liability; and fraud or falsehood in the notice of claim for loss under the policy was to work a forfeiture of all benefits thereunder. On signing the proposal, B. received from the agent a cover-note signed by him and containing the words: "Accepted by the company subject to the approval of the manager (&c.)." Across the document were written the words: "Fourteen days cover only." In the proposal which was filled up by the agent, and in the notice after the fire, B.'s interest in the premises was falsely described to a material extent. In an action on the policy against the company, the jury found that the false description had been inserted by the company's local agent in the proposal after it had been signed by B. The jury also found that the false description in the claim was not wilfully and intentionally untrue, and that the local agent in falsifying the proposal was acting as the agent of the company, not of B.

Held, that the authority of the local agent was limited to transmitting the proposal to the company, and issuing to the proponent an interim receipt, giving temporary cover; that of this limitation B. had express notice, and that the company was therefore not estopped from setting up the excess of authority of the agent.

Held, also, that, on the facts, the local agent could not be considered as the agent of the company in filling in the answers to the questions in the proposal form.

Biggar v. *Rock Life Assurance Co.*, (1902) 1 K.B., 516, followed.

Held, further, that, if the proposal as transmitted was affirmed by B., the policy was vitiated by reason of the falsity of its basis; and, on the other hand, if the proposal as transmitted was denied, the parties were never *ad idem*, and there was therefore never any completed contract between them. The plaintiff's right could, at most, only extend to recovering the premium in an action not founded on the policy.

Decision of the Supreme Court, *Berechree* v. *Phœnix Assurance Co. Ltd.*, 1 Tas. L.R., 119, reversed.

APPEAL from the decision of the Full Court of Tasmania.

The facts appear fully in the judgment of *Griffith* C.J.

Waterhouse, for the appellants. The jury found that the statement in the fire claim, of April 11th 1904, that plaintiff was the owner, and that no other person had any interest in the premises, was untrue in fact. On that answer the defendants are entitled to judgment. It was a condition of the policy that the company should not be liable if any statement made or information given in the proposal was incorrect or untrue. Condition 8 of the policy requires notice to be given to the company of any loss within 15 days of its happening, stating the amount of the loss, &c. and information to be given, *inter alia*, as to the persons interested as owners or otherwise, and the nature, extent, amount, and value of their interests in the property insured; and condition 9 stipulates that, if any false information be given, all benefit under the policy is forfeited. The declaration made by the claimant comes within condition 9.

[GRIFFITH C.J.—You contend that the word "false," as used in condition 9 of the policy, means untrue.]

Yes; and therefore all benefits under the policy became forfeited.

[GRIFFITH C.J.—Did not the company know on 12th May, when their local manager wrote to respondent's solicitor for details as to all articles destroyed, that respondent was not the owner of the property?]

Yes.

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[GRIFFITH C.J.—Condition 9 provides for forfeiture, on the ground of fraud, at the option of the company. Having asked for particulars of loss through their local manager, can they now be heard to say the policy was at the time avoided ?]

The election by a party entitled to avoid a contract on the ground of fraud must be unequivocal. Here the company went to arbitration, and therefore did not waive their right. In paragraph 4 of the fire declaration respondent states he was lessee with right of purchase, and had been offered on the security of the farm a sum far in excess of that required to complete the purchase, and had always considered himself the owner. There had been an offer by the company to pay some compensation for the furniture ; but as this offer was *ex gratia*, it did not constitute an election. In a letter from the company dated 3rd May it is pointed out that the plaintiff had no insurable interest, and that the misdescription in the proposal was material and affected the whole policy. The company all along refused to pay on the buildings. The plaintiff has been guilty of fraud and falsehood in making his claim, and cannot therefore recover. *Britton* v. *Royal Insurance Co.* (1); *Chapman* v. *Pole* (2); *Levy* v. *Baillie* (3).

[BARTON J. referred to *Reese River Silver Mining Co.* v. *Smith* (4).]

There should have been a new trial ordered on the ground that the answers to questions 3 and 4 were against the weight of evidence. The evidence shows that the respondent left the whole responsibility for the answering of the questions to the agent. It follows that they must have been answered without consideration by the respondent, and therefore recklessly : *Aaron's Reefs Ltd.* v. *Twiss* (5).

[GRIFFITH C.J. referred to *Derry* v. *Peek* (6), and *Brownlie* v. *Campbell* (7).]

The analogy here is not to an action for deceit, but to a suit to avoid a contract on the ground of misrepresentation of a material fact. Upon the evidence, the respondent did not exercise any

(1) 4 F. & F., 905 ; 15 L.T., 72.
(2) 22 L.T. (N.S.), 306.
(3) 7 Bing., 349.
(4) L.R., 4 H.L., 64, at p. 79, *per Cairns* L.J.
(5) (1896) A.C., 273.
(6) 14 App. Cas., 337.
(7) 5 App. Cas., 92.

consideration upon the subject at all; and the findings of the jury in answer to questions 3 and 4 cannot be supported.

[O'CONNOR J. referred to *Meagher* v. *London and Lancashire Fire Insurance Co.* (1).]

The policy was issued on a proposal which contained a false statement. According to the findings of the jury, this false statement was added by the agent, after the respondent signed it. Even if that were so, Camp was not the agent of the company to make the alteration. The company had no power to make it, and could not therefore give their agent the necessary authority: *Biggar* v. *Rock Life Assurance Co.* (2); *New York Life Insurance Co.* v. *Fletcher* (3). Unless the company can be fixed by an estoppel, it is not bound. *Swire* v. *Francis* (4), referred to in the Court below, was a case of fraudulent representation. In *Bawden* v. *London, Edinburgh and Glasgow Life Insurance Co.* (5) the company was held liable because their agent was acting within the scope of his authority and his knowledge was the knowledge of the company. Here the agent was not acting within the scope of his authority. His appointment contained a direction that "proposals should be filled in by proponent where practicable;" and there was nothing to show the proponent was illiterate or ignorant.

The knowledge, therefore, of the agent was not the knowledge of the principal: *Levy* v. *Scottish Employers' Insurance Co.* (6); *Life and Health Assurance Association* v. *Yule* (7); *Blackburn* v. *Vigors* (8). The case cannot be put either on the ground of agency or ratification.

[BARTON J.—Ratification can only take place with knowledge.]

Yes, with personal knowledge: *Marsh* v. *Joseph* (9). Where there are two innocent parties one of whom must suffer, the loss must fall on the person who enabled the fraud to be committed: *Lickbarrow* v. *Mason* (10). But this doctrine has since been restricted to cases where one person owes a duty to the other:

(1) 7 V.L.R. (L.), 390.
(2) (1902) 1 K.B., 516.
(3) 117 U.S., 519.
(4) 3 App. Cas., 106.
(5) (1892) 2 Q.B., 534.
(6) 17 T.L.R., 229, at p. 230, *per Wills* J., and *Phillimore* J.
(7) 6 F., 437, Ct. of Sess.
(8) 12 App. Cas., 531.
(9) (1897) 1 Ch., 213, at p. 246, *per* Lord *Russell* C.J.
(10) 2 T.R., 63, at p. 70, *per Ashurst* J.

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M. J. Clarke, (with him *A. Inglis Clark*,) for the respondent. In condition 9 of the policy the word "false" must be construed as having a similar meaning to the expressions "fraud," "wilful act," "connivance," and the other expressions there used. It cannot mean the same thing as "incorrect" or "untrue" in condition 1. "False" must mean false to the knowledge of the person making the declaration. The fact that the respondent could have taken over the property at the valuation on the assessment rolls, which was much below its real value, and did not do so, is strong evidence that he was *bonâ fide* under the impression that he was owner. He could have purchased for £1,523, in terms of his lease —the value on the rolls was £1,870—and he had been offered £2,739. It has been decided that the value on the assessment roll is conclusive evidence against the world, and for all purposes, of the value of the property: *Parker* v. *Briseis Tin Mining Co.* (5). The remaining portion of the declaration "and that no other person is interested therein" is merely supplementary to the positive declaration of ownership, and the fact that it was not struck out does not make the whole false.

There was no negligence sufficient to amount to fraudulent conduct on the part of the respondent in leaving it to the agent to fill in the proposal form. The Court will therefore refuse to order a new trial.

Leave was reserved at the trial to move that a verdict should be entered for the defendants on the finding of the jury upon question 2 notwithstanding their answer to question 3. It is not now open to the appellants under that reservation to raise the question of the authority of the agent to make the alteration in the proposal: *Local Courts Act* (60 Vict. No. 48), secs. 82, 83, and 123. Under that Act the verdict of a jury is the judgment of the Court (sec. 82). The recital in the policy that a proposal has

(1) (1901) 2 K.B., 697; (1902) A.C., 325.
(2) 12 App. Cas., 531.
(3) 117 U.S., 519, at p. 535.
(4) 46 Maine, 394.
(5) (Tasmania, unreported).

been received must be construed to refer to the proposal as delivered to the agent, and the company are estopped from saying it refers to the document as the agent delivered it to them. At any rate, the point is not now open: *Robinson* v. *Fawcett & Firth* (1). The verdict being the judgment of the Court, judgment had been entered subject to the points reserved. No application has been made for a nonsuit: *Legal Procedure Act* 1903 (3 Edw. VII., No. 19), secs. 3, (6), (7), and (8), and 6.

When insurance agents, in soliciting business, undertake to prepare the application of the insured, or make any representation to him as to the character or effect of the statements in the application, they will be regarded in doing so as the agents of the insurance companies and not of the insured: *Insurance Co.* v. *Wilkinson* (2); *Insurance Co.* v. *Mahone* (3); *New Jersey Mutual Life Insurance Co.* v. *Baker* (4).

An insurance company, after holding out a person as its agent, cannot disavow responsibility for his acts: *Insurance Co.* v. *McCain* (5); *In re Universal Non-Tariff Fire Insurance Co.* (6). *The Local Courts Acts* (60 Vict. No. 48), sec. 74, empowers the Court to apply equitable principles: *Legal Procedure Act* 1903 (3 Edw. VII., No. 19), sec. 3.

When the agent received the proposal without the words "nearly paid up," his knowledge that the words were not there was the knowledge of the company.

The policy recites (1) delivery to the company of a proposal, and (2) that it was signed by the plaintiff. That clearly refers only to what the plaintiff signed: *Hough* v. *Guardian Fire and Life Assurance Co. Ltd.* (7), in which the proposal was treated as if it had been settled by the company itself. The company are responsible for any alteration made in it after it came into their custody, which was immediately the respondent entrusted it to Camp with his signature on it: *Couch* v. *Rochester German Fire Office* (8). In *Bawden's Case* (9), *Lindley* L.J. said the policy must be construed as if it contained a recital that the plaintiff was a

(1) (1901) 2 K.B., 325
(2) 13 Wall., 222.
(3) 21 Wall., 152.
(4) 94 U.S., 610.
(5) 96 U.S., 84.
(6) L.R. 19 Eq., 485.
(7) 18 T.L.R., 273.
(8) 32 Hun., 469.
(9) (1892) 2 Q.B., 534.

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one-eyed man; so here this must be construed as if it did not contain the words "nearly paid up," but that the land was held on a lease with an option of purchase: *Pimm* v. *Lewis* (1). In *Richardson* v. *Maine Insurance Co.* (2), there was a warranty of the accuracy of the application. There the reference to the proposal put the plaintiff on his guard. Here the plaintiff knew he had made a proposal and so the reference in the policy gave him no light. Camp was held out to the world by the company as a man who might be relied upon to transmit proposals faithfully.

[GRIFFITH C.J.—In this case the agent did not transmit the proposal to his principals.]

Waterhouse, in reply. The reservation of leave to move on the ground of the answer to question 2 was not the only reservation (3). The objection was taken by way of appeal at the prescribed time. *McIntyre* J. would not entertain it, but the Full Court allowed it to be argued. The delivery was not complete until the proposal reached someone authorized to make a contract on behalf of the company. Any acceptance was subject to the approval of the manager at Launceston. There can be no estoppel against the company, except upon the doctrine of *Lickbarrow* v. *Mason* (4); *Farquharson Bros. and Co.* v. *King & Co.* (5); *Rimmer* v. *Webster* (6); *Parsons* v. *Bignold* (7); *Frazer* v. *Phœnix Assurance Co.* (8).

Melbourne, March 16.

The following judgments were read:—

GRIFFITH C.J. This is an action on a fire policy alleged to have been issued to the respondent by the appellants in respect of, amongst other things, certain buildings erected upon a piece of land in the occupation of the respondent. The appellants pleaded, with other pleas, that the policy was made in pursuance of a proposal signed by the respondent on 21st November 1903, in which it was stated that the buildings were held under a purchasing lease nearly paid up, that it was a condition of the policy that the company should not be liable if any statement made or information given in the proposal was incorrect or

(1) 2 F. & F., 778.
(2) 46 Maine, 394.
(3) 1 Tas. L.R., 123.
(4) 6 T.R., 131.
(5) (1902) A.C., 325, at p. 342, *per Lindley* L.J.
(6) (1902) 2 Ch., 163.
(7) 15 L.J., Ch., 379.
(8) 10 N.S.W. L.R., 246.

untrue, and that in fact the plaintiff held the land and buildings under a lease for a term of five years from 30th June 1902, with an option to purchase the freehold on giving notice in writing, that no notice had been given, and no part of the purchase money had been paid. They also pleaded a condition of the policy that all benefits under the policy should be forfeited if the claim to be made in the event of a loss were in any respect fraudulent or if any false declaration were made, and alleged that the plaintiff after the loss signed a declaration in proof of his claim in which he stated that he was the owner of the property at the time of the fire, and no other person had any interest therein, whereas in fact one S. (the lessor) was the owner of the buildings insured.

The facts as to the ownership of the land and buildings were not in dispute, and were as pleaded by the defendants. The declaration made by the plaintiff in support of his claim was also in the form alleged by the defendants. At the trial in the Local Court before *McIntyre* J. with a jury the policy was put in evidence. It was in the following form: "This Policy of Insurance witnesseth that T. S. Berechree as owner (hereinafter called the insured) having delivered to the Phœnix Assurance Co. Ltd. a proposal in writing dated the 21st day of November 1903, and signed by or on behalf of the insured as the basis of this insurance, and having paid to the company &c. for insuring against loss or damage by fire &c.," (describing the property and the amounts respectively insured in respect of each item), "the company hereby agrees with the insured (but subject to the conditions at the back hereof)" &c. in the usual form of a fire policy.

The first condition indorsed was as follows:—"1. The company shall not be liable upon this policy if the description therein, or in the proposal referred to therein, of any of the property expressed to be hereby insured, or of any building or place in which any of the property is contained, or if any statement made or information given to the company upon such proposal or otherwise before or at the time the risk is undertaken by the company is in any respect (whether material or not) incorrect or untrue, or if any fact material to be known to the company for estimating the risk, is not disclosed to the company before the risk is undertaken by the company."

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The 8th condition provided that on the happening of any loss or damage the insured should forthwith give notice to the company, and should within a specified time deliver to them a claim in writing for the loss or damage, giving particulars of the things damaged or destroyed and their value. He was also to give full information as to, *inter alia*, the persons interested as owners or otherwise, and the nature, extent, amount, and value of their interests in the property insured, and, if required, to verify the claim by declaration on oath or affirmation.

Condition 9 was as follows:—"IX. If the claim be in any way fraudulent, or if any fraudulent or false plan, specification, estimate, deed, book, account, entry, voucher, invoice, or other document, proof, or explanation be produced or given, or if any fraudulent means or devices are used by the insured, or anyone acting on his behalf, to obtain any benefit under this policy, or if any false declaration be made, or if any loss or damage be occasioned by the wilful act or with the connivance of the insured, all benefit under this Policy is forfeited."

The proposal of 21st November signed by respondent was also put in. It was made out upon a printed form which contained a number of questions asking particulars as to the nature of the risk. One of them was as follows:—"Property—whether freehold or leasehold, if latter how long to run?" In the document as produced at the trial the printed word "leasehold" had been struck through, and the words "but held under purchasing lease nearly paid up" had been interlined above it. The next question was:—"Is there any covenant to erect a new building in the event of fire at end of lease?" to which the answer "Yes" was written. Below the list of questions were printed in leaded type the words "Policy in the name of . . . . as . . . . ," with a marginal note "State nature of interest." The blanks in this line were filled up with the plaintiff's name and the word "owner." Then followed a printed note as follows:—"N.B. The information required by this proposal to be given and the answers to the questions asked in it shall be deemed material to the risk and must be supplied by the proponent. This proposal is also made subject to the usual conditions of the Phœnix Assurance Company's Policies, and is the basis of the Contract and is to be

taken as a part of the policy, and the truth of the information and of each of the answers and statements contained in it is warranted."

The statutory declaration in respect of the claim was also put in. It was made out on a printed form, the third paragraph as printed being as follows:—"3. That I was . . . of the said property at the time of the fire, and that no other person or persons has or had an interest therein except . . . ," with a marginal note: "Insert 'owner' 'mortgagee' 'lessee' 'trustee' or otherwise." The first blank had been filled in with the word "owner." It was not in contest that the statement in the proposal as to the ownership of the land was material, or that there had been a breach of warranty if the plaintiff was bound by the proposal as produced.

The plaintiff's answer to this difficulty was an allegation that the words "nearly paid up" were not in the proposal when he signed it, but had been afterwards added by the defendant's local agent without his knowledge. It was not disputed that they were, as was the rest of the manuscript of the answers to the questions, in the agent's writing, or that they were in the proposal when it was received and accepted by the defendants' Manager at Launceston, who alone had power to enter into contracts of insurance. The instructions given by the defendants to their local agents were put in evidence, from which it appeared that they were directed that proposals should be filled in by the proponent when practicable; but it appeared to be a usual practice for the local agent to write down answers given to him orally by the proponent, which the local agent said that he did in the present case. He denied that the alleged alteration was made after signature by the plaintiff. Contemporaneously with the signing of the proposal the local agent gave to the plaintiff a document in the following form:—

"PHŒNIX ASSURANCE COMPANY, LTD.

Stamp Duty
Tasmania
21/11/03
Revenue
One penny.

Wynyard SUB-AGENCY,
21st November, 1903.

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No. 2531

ACCEPTED, subject to the approval of the Manager of the PHŒNIX ASSURANCE COMPANY LTD., in Launceston, an Insurance against FIRE from Mr. T. S. Berechree on House & Furniture & Dairy
Two Stables & Machinery & Men's hut for the period of twelve months Should the risk not be approved of, the Premium will be returned ; but should a loss have occurred in the meantime the Company will be liable.

Amount Insured, £300 : :

Premium £2 : 5 : W. J. CAMP,

Policy No. Sub-Agent.

N.B. This cover which is subject to the terms and conditions of the Company's Policies, will in no case hold good for more than fourteen days from date ; and if that period should elapse without an official receipt being obtained from LAUNCESTON BRANCH, the Proposal must be considered declined, and the amount of the deposit paid to the Agent will be returned in full."

Across this document were the words :—"Fourteen Day Cover Only."

Except as appears by this document and the printed statements on the proposal the plaintiff had no notice of the extent or limitations of the authority of the local agent. On 5th December an official receipt was issued to the plaintiff for the premium, which was described as the premium on an insurance in specified amounts on specified things "as described in the proposal, for which a policy expressive of particulars will be issued."

The jury found a verdict for the plaintiff for the amount of loss (which had been assessed by an arbitrator), and also answered specific questions left to them by the learned Judge as follows :—

1. Were the words "nearly paid up" in the proposal at the time plaintiff signed it ? Answer: No.

2. Was the statement in the fire claim dated April 11, 1904, that plaintiff was owner and that no person had any interest therein untrue in fact ? Answer: Yes.

3. If untrue, was such statement wilfully and intentionally untrue ? Answer: No.

4. If untrue, was such statement made recklessly and without proper consideration ? Answer: No.

5. Was Camp the agent of the company or the agent of the plaintiff in filling in the answers? Answer: Yes, agent for company.

This last question, we were informed, was put in view of a possible affirmative answer to the first question.

It was arranged that a general verdict should be taken, but that the parties should be at liberty to argue that the points involved in questions 2 and 5 were points of law and not of fact. The learned Judge in effect directed the jury that if they answered the first question in the negative they should find for the plaintiff. No objection to this direction was taken at the trial. After the jury had retired, leave was reserved to the defendants to move to enter a verdict for them if the answer to question 2 should be in the affirmative, whatever might be their answers to questions 3 and 4. Motion was accordingly made to the learned Judge (in accordance with the practice of the Court) to enter judgment accordingly, or for a new trial on the grounds that the answers to questions 3 and 4 were against the evidence. This motion having been refused, the defendants gave notice of appeal from the decision of the learned Judge to the Full Court, and in their notice of appeal claimed that they were entitled to judgment notwithstanding the answer to question 1. This point had been taken before the learned Judge on the motion, but he refused to entertain it on the ground that it was not covered by the leave. It was, however, in our opinion, open to the defendants under the *Local Court Statute* on the appeal to the Full Court, as a matter of misdirection; and it was entertained and dealt with by the Full Court, who were of opinion that Camp, the local agent, was acting as the agent of the company when, as found by the jury, he falsified the proposal by inserting the words in question. They also thought that the declaration, although untrue in fact, was not a false declaration within the meaning of condition 9, and that the findings of the jury in answer to questions 3 and 4 were not against the evidence. They therefore dismissed the appeal.

The finding of the jury in answer to question 1 is not impeached. The case must therefore be dealt with on the assumption that the proposal when signed contained a true statement as to plaintiff's title to the land and buildings, and was improperly

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altered in the interval between its being signed and its being received by the company's manager at Launceston, while it was in the custody of their local agent, who was admittedly authorized to receive it from the proponent and transmit it to the manager for acceptance or rejection. It was not contended by the appellants that the local agent had authority from the respondent to alter the proposal after signature, nor by the respondent that he had actual authority from the appellants to alter it after receipt by him. But the respondent contended that as between the appellants and himself the former must be held responsible for his wrongful act, which consisted in substance in not sending to the appellants' manager the proposal signed by the plaintiff, but another and a different proposal. The question that arises under these circumstances is, in one sense, a question of construction of the policy. That instrument recites and incorporates a document described as a proposal dated 21st November and signed by plaintiff. There is no doubt that the document intended by the appellants' manager when he executed the policy was the document received by him containing the words on which the controversy arises. On the other hand, the plaintiff on receipt of the policy would naturally understand those words to relate to the document signed by him, which was not the same.

Three possible views may be taken of the legal consequences of such a state of facts:—

(1) That the document incorporated must be taken to be that existing at the date of the execution of the policy on which the plaintiff sues, and which he sets up as a contract;

(2) That the defendants cannot take advantage of the misconduct of their agent while the document was in his custody, and that the document incorporated must therefore be taken to be the proposal as signed; and

(3) That, the parties having never in fact been *ad idem*, there is no contract. In either the first or third view the plaintiff's case fails. In the second view he succeeds.

Let us suppose the simple case of a letter written by A. to B. containing an offer to enter into a contract subject to certain terms. Before the letter reaches B. it is altered by the insertion of additional terms more onerous to A. B. accepts the offer con-

tained in the letter as received by him. In this case, if no more happens, it is clear that B. cannot hold A. bound by the contract expressed in the documents in their existing state. In order that A. may be bound it must be shown that the alteration was made by his authority, which may be proved, certainly by evidence of antecedent authority given by him to the person by whom the alteration was made, and, possibly, by evidence of ratification. But this would seem to depend upon whether the falsifier should be regarded as having purported to act as agent for A. in making the alteration: see *Keighley, Maxsted & Co.* v. *Durant* (1). It is clear also that B. would not be bound by the offer as written by A. unless he were estopped from denying the alteration. And, since a contract must be mutual, it would seem that, as B. could not sue A. upon the contract contained in the altered document, so also A. could not sue B. upon that contract. If this is the correct view, there could not in such a case be any binding contract at all. If, however, A. could sue B., and did sue him, upon the contract evidenced by his letter of acceptance, it is clear that A. would be bound by the terms of the letter which B. actually received. Another case may be put, which in principle seems identical. A writes a letter to B., making an offer of a contract, and hands it to C. for delivery to B. C., instead of delivering the document written by A., delivers a different document containing a different offer, which B., by letter to A., accepts. Here again, if A. can sue B. on the contract evidenced by the substituted letter, it must be either on the ground that C. was A.'s agent to make the substitution, or on the ground that A. by suing ratifies C.'s act. This latter view was accepted by the Supreme Court of Maine in the case of *Richardson* v. *Maine Insurance Co.* (2) cited with approval by the Supreme Court of the United States in *New York Life Assurance Co.* v. *Fletcher* (3). If, however, B. is to be held bound to the terms of A.'s genuine offer, it must be on the ground that he is estopped from denying that C. made the substitution. Such an estoppel must arise from his own conduct, and can only arise if he has failed in some duty which he owed to A. in the particular transaction. See *Farquharson Bros. & Co.* v.

(1) (1901) A.C., 240. (2) 49 Maine, 394. (3) 117 U.S., 579.

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King & Co. (1). In that case Lord *Macnaghten* referred to *Bank of Ireland* v. *Evans' Trustees* (2) in which the respondents, who were a corporate body, called upon the appellant Bank to replace stock sold under a forged power of attorney bearing the genuine impression of their corporate seal. The defence was that the carelessness of the trustees in the custody of their seal enabled their clerk to impose on the bank and disentitled them to relief. The Judges were summoned, and their unanimous opinion, which was adopted by the House of Lords, was delivered by *Parke* B. They thought that the negligence, if any there was, in the custody of the seal was only remotely connected with the transfer which the Bank set up as good against the trustees. The opinion proceeded in these words (3) :—

"If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?"

The illustrations which I have given seem to me to be in principle identical with the present case. Can it then be contended that, if the defendants were so negligent in the custody of the proposal after it came into the hands of their local agent that that person was enabled to falsify it without immediate detection, they must be considered as having themselves made or concurred in the alteration? The actual authority of the local agent after receipt of the proposal was limited to sending it to the Launceston manager, and he had not authority to enter into any contract of insurance except for a period not exceeding 14 days, as expressed in the interim receipt of 21st November. That document was express notice to the plaintiff of the limits of the agent's authority. There is, therefore, no case of holding out the agent as having any greater authority than he actually had.

(1) (1902) A.C., 325. (2) 5 H.L.C., 389. (3) 5 H.L.C., 389, at p. 410.

I have some difficulty in formulating any proposition, consistent with the recognized law of agency, by which a principal can be held responsible for the falsification of a document entrusted to his agent for delivery to him, when his agent has not, and is known by the person who entrusts the document not to have, any authority except to transmit it. If the responsibility exists in the present case, it must be by reason of some doctrine peculiar to the case of agents for insurance companies. No English authority had been cited suggesting that the ordinary law of agency does not apply to them and their principals. In America, it is true, it is said to have been held that, if an agent of an insurance company forwards, instead of the genuine proposal, another and different document, the principals cannot take advantage of any defects in it (*Conway* v. *Insurance Co.*) (1), quoted in 2 *Hare & Wallace L.C.*, 922. The distinction between the acts of a general agent authorized to accept risks and a special agent merely employed to obtain and forward applications is recognized by the learned editors of the book just cited, but they suggest that an action on the case might lie against the principal for the fraud or negligence of the agent, and that, if so, the principal may be equitably estopped from setting up that fraud or negligence. This, however, must depend on the apparent authority of the agent. And it would seem that such a case must really be based on an implied contract, not only that the agent will forward the original and genuine proposal, but that the rights of the parties shall be the same as if he had forwarded it, and the principal had accepted the offer contained in it. It is not unreasonable to imply the first of those stipulations, but the consequences of a breach of such a stipulation would apparently be limited to a liability to return the premium. The second stipulation is so improbable that it ought not lightly to be implied, when we remember that the ground for holding that a term not expressed is to be implied in a contract is that it must have been in the contemplation of the parties. If this latter stipulation could be implied, the damages for breach of it would be identical with those recoverable under the contract which in that case would have been made if the principal had

(1) 4 Rh. I., 141.

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accepted the offer, and the point might be regarded as one of form rather than substance. But I cannot see my way, consistently with any recognized rules of law, to imply any such stipulation. Nor do I know of any doctrine of English law by which a principal is estopped by a fraudulent act of his agent not done within the apparent scope of his authority. The cases relied upon by the Supreme Court on this point were all cases where the fraudulent act was so done. The learned Judges thought also that the facts supported the finding of the jury that Camp was the agent of the defendants in filling in the answers to the questions in the proposal form. In the face of the express terms of the proposal and the interim receipt I cannot accept this view, which is contrary to the opinion of *Wright* J. in *Biggar* v. *Rock Life Assurance Co.* (1), and the opinion of the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (2), which I think are good law. Camp's statement that it was his duty to fill in the answers is nothing to the purpose. Upon the evidence the jury might have found that Camp knew the actual facts as to the plaintiff's title to the land and buildings, but I cannot find any ground for holding that his knowledge bound the company. In the case of an express warranty, *e.g.* of title, it is ordinarily immaterial that the person in whose favour it is given knows that it is untrue at the time. If the untruth can be relied upon, it must be on some ground which would justify the rectification of the contract by excepting the fact known from the warranty. In the present case the reasons which I have given would be equally applicable as an answer to a claim to rectify the contract of insurance sued upon. For these reasons I am unable to concur in the judgment of the Supreme Court. I think that the better view is the third of those above suggested, and that there was never any completed contract except that evidenced by the interim receipt. The plaintiff's rights, therefore, cannot be more than to have a return of the whole or part of the premium. His right to recover the whole was not disputed by the appellants, and the plaint may be taken to be amended by including a claim to that effect.

In the view which I take of the first point it is not necessary

(1) (1902) 1 K.B., 516. (2) 117 U.S., 519.

to consider the second defence, or to express any opinion as to the construction of the 9th condition of the policy. I therefore abstain from offering any opinion as to the proper meaning to be attributed to the words "false declaration" as used in that condition, but I think it right to say that the cases relied upon by the learned Judges of the Supreme Court are not in my opinion authorities for the conclusion at which they arrived, whether that conclusion can or cannot be supported as a matter of construction of the condition itself. I think it right to add, also, that I have great difficulty in seeing how the finding of the jury that the statement that no other person had any interest in the buildings was not made recklessly (if that fact was material) can be supported. Leave to appeal would probably however not have been granted on this point, if it were the only one in the case.

The result is that the appeal must be allowed and the judgments appealed from discharged, and instead thereof judgment in the action must be entered for the respondent for £2 5s. without costs.

In accordance with the terms of the order giving special leave to appeal the appellants will pay the respondent's costs of this appeal.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion. I propose to deal with only one of the points raised in the case, that is, that beyond the fourteen days cover embodied in the interim receipt there never was any contract of insurance concluded between the parties. The view which I take of that question makes it unnecessary for me to express an opinion on any other. The appellant company have a branch office at Launceston under the management of Mr. Cuff, described in the policy as local manager, who has authority to bind them by contracts of insurance. At a place called Wynyard they have an agent named Camp. He is described in the proposal as agent for Wynyard, and in the receipt given by him to the respondent he is described as a sub-agent of the company. As far as the respondent is concerned, Camp must be taken to have whatever powers he has been held out by the

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company as having. Those powers cannot be cut down by anything in the letter of instructions of the 28th July 1903, of which the respondent had no notice. But even if that were not so, there is nothing in the instructions that bears on the matter one way or the other. The jury have found that Camp was the agent of the company in filling in the answers. That is, of course, the answers which the respondent gave him. It is apparent on the face of the receipt dated the 21st November 1903, given by Camp for the premium received at the same time as the proposal, that, although the receipt of the premium operated as a cover for 14 days and was to that extent a contract of insurance, there could be no further or other contract made to bind the company until the proposal had been approved by the manager in Launceston. On the other hand it must be taken that Camp was the agent of the company to transmit the respondent's proposal together with the premium to the manager in Launceston. It must also be taken that the proposal so made and delivered by the respondent to Camp, and assented to by the respondent as the basis of the insurance, did not contain a representation that the purchase money under the purchasing option had been nearly paid up—Camp afterwards, and clearly without the respondent's authority, altered the proposal by inserting that representation, sent it on to the company as being the repondent's proposal, and the company's manager having considered the proposal in that form, accepted it in that form as the basis of the insurance. On these facts, if the matter rested there, it is clear that the respondent's proposal as assented to by him was never assented to by the appellant company, and that the proposal actually assented to by them was never assented to by him, that the parties were thus never *ad idem*, and that there never was any completed contract between them. But, notwithstanding these facts, there would be a contract binding in law on the respondent if, as was contended by the appellants, Camp in making the alteration was the respondent's agent. There is however no ground for that contention. The principle laid down in *Biggar* v. *The Rock Life Assurance Co.* (1) relied on by Mr. Waterhouse, cannot be applied to the facts of such a case as this where the alteration was made after the proposal had been signed and without the respon-

(1) (1902) 1 K.B., 516.

dent's authority. On the other hand Mr. Clarke contends that, notwithstanding the real facts, it must be taken in law that there is a completed contract between the parties binding upon the appellant company in the terms of the proposal as signed by the respondent. He puts his case in two ways. Camp, he says, was the agent of the company for receiving the proposal. Handing it to him was the same as handing it into the office at Launceston. When it was in Camp's hands it was the same in law as if it were in the Launceston manager's hands, and the alteration made by Camp after he received it is no more material than an alteration would be if made by the manager after he had personally received it. In either case the acceptance of the proposal must be taken to mean an acceptance of the proposal as originally received. The assumption underlying that contention is that Camp had all the authority of the company, not only in regard to the receipt of the proposal, but also in regard to its consideration and acceptance. The documents however are inconsistent with that position. It is clear from the body of the interim receipt given by Camp on the 21st November 1903, and from the red ink note at its foot, that the proposal was subject to the approval of the manager at Launceston, that Camp's authority extended only to giving a cover for fourteen days, and that, if after the lapse of fourteen days an official receipt was not sent from the Launceston branch for the premium received by Camp, the proposal would be taken as declined and the deposit returned in full. There was thus on the face of the receipt given by Camp full notice to the respondent that Camp's receipt was not the company's receipt for all purposes, not only so but that Camp's receipt of premium had only a limited effect, and that there could be no contract of insurance beyond the fourteen days' cover until the proposal lodged with Camp had been sent on by him and actually received and considered by the manager, and the receipt officially notified to the respondent from the Launceston office. Such being the limitations of Camp's authority appearing in the interim receipt, I find it impossible to infer, as Mr. Clarke would have us do, that the company held out Camp as having the same authority as the company itself in the receipt and acceptance of the proposal.

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But there is a second ground upon which Mr. Clarke contends that, notwithstanding the actual facts, the respondent is entitled to insist that there exists a contract based on the proposal as signed by the respondent, which is binding on the appellant company. Admitting for the purposes of his argument that the proposal was altered by Camp after he had received it, and before it was transmitted to the Launceston office, that the alteration was without the knowledge of the appellants and without any authority from them, and that in accepting the proposal as altered they believed that they were accepting the proposal in the form assented to by the respondent, he contends that the law will not under these circumstances allow the appellants to set up the actual facts. His contention in other words is that the appellant company are estopped from denying that the proposal accepted by them was any other than the proposal in the form as signed by the respondent. It is essential to estoppel in a case of this kind that there should be either knowledge in the principal express or implied of the act of the agent relied on, or that there should have been some breach of duty to the other party which enabled the agent to do the act complained of, or which prevented the principal knowing of it. It is clear that the appellant company had no express knowledge of Camp's alteration, nor any reason to suppose that the proposal as it reached them was not in the same form as when Camp signed it. Nor could the knowledge be imputed to them by reason of any authority which Camp was held out as having. On the contrary the interim receipt given by Camp to the respondent showed, as I have already pointed out, that Camp could have no authority to make the alteration, and there was nothing in the proposal itself, or in the circumstances in which it reached the company, to indicate to them that Camp had on this occasion exceeded his authority as agent by making an alteration behind the back of the proposer. Neither was there neglect of any duty owing by the appellant company to the respondent. It is difficult to suggest the existence of any duty to the respondent arising under the circumstances which the appellant company did not fully discharge. *Clark* J. in delivering the judgment of the Supreme Court implies that there was in the opinion of the Court some

such duty in the following passage when speaking of Camp's receipt of the proposal, (1):—"The proposal was, therefore, in the possession and under the control of the appellant company, through its proper agent for that purpose, at the time the alteration was made in it; and when it was subsequently received by the manager and the directors, they had an ample opportunity to make any inquiries they though fit, in respect of the contents of the proposal, from both Camp and the respondent, and to obtain from the respondent a confirmation or repudiation of the alteration Camp had made in it." If the proposal had been sent back by the appellant company to the respondent probably the alteration would have been discovered and either assented to or repudiated by the respondent. But as I have pointed out there was nothing on the face of the proposal or in the circumstances surrounding the appellant company's receipt of it from Camp to indicate an alteration by their agent or even to put them on inquiry for such an alteration. Nor was it shown to be the usual course of business to send the proposal back for information to the applicant for insurance after it has been received by the company from their agent. If the company had adopted that precaution in this instance the alteration would probably have been discovered. But an insurance company, in the absence of anything to indicate fraud or unauthorized conduct on the part of their agent, are under no obligation to the proposed insurer to take unusual and extraordinary precautions for the discovery of acts of fraud or acts in excess of authority by their agents which they have no reason to suspect. They are not bound to do more under the circumstances than follow the ordinary course of business which the appellants appear to have done in this case. For these reasons the ground of estoppel fails, and there is no reason in law to prevent the appellant company from relying upon the real facts of the transaction. Upon the real facts as proved in evidence and found by the jury it is clear that, beyond the fourteen days' cover embodied in the interim receipt, there never was any binding contract of insurance between the parties, and the plaintiff respondent cannot recover in this action. I do not think it necessary to add anything to what has been said by my

(1) 1 Tas. L.R., 119, at p. 137.

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learned brother the Chief Justice in examination of the authorities. The American decisions upon which Mr. Clarke has relied, some of which certainly go a long way in making insurance companies liable for the acts of their agents in dealing with proposals, are all decisions upon the particular facts in each case. In none of the cases do the facts resemble the facts to be dealt with here. Nor can any general principle be gathered from them, which would be a guide in this case. I am of opinion, therefore, that the respondent's contention must fail upon each of the grounds put forward by him, and that, as there never was any completed contract of insurance, the respondent cannot succeed in this action. In the view of the case with which I am dealing, the plaintiff, if he had so shaped his claim, might have recovered back the premium paid. But that is not his present claim, which affirms the contract and is based upon its existence, and cannot be successful unless a completed contract is proved. For these reasons I think that the Supreme Court of Tasmania came to an erroneous conclusion, and that the appeal must be upheld. As however the appellants have consented to an amendment which will enable the plaintiff respondent to recover in this action the amount of premium paid, I approve of the judgment being entered in the form mentioned by my learned brother the Chief Justice.

Appeal allowed; *judgments appealed from discharged*; *judgment entered for respondent for* £2 5*s. without costs.*

Solicitors, for appellants, *Ritchie & Parker.*
Solicitor, for respondent, *T. J. Crisp.*

H. E. M.