[HIGH COURT OF AUSTRALIA.]

THE WESTERN AUSTRALIAN BANK . APPELLANTS;
PLAINTIFFS,

AND

THE ROYAL INSURANCE CO. . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *Feb.* 28; *March* 2, 3, 4, 27.

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

Fire insurance—Assignment of policy to mortgagee—Insurable interest of mortgagee—New contract with mortgagee—Conditions precedent to action—Subsequent insurance by mortgagor—Notice of loss—Suspension of right of action.

A mortgagee, whether legal or equitable, has an insurable interest in the mortgaged property.

The owners of certain property effected a policy of fire insurance No. 7213012 for £650 over the property, and being indebted to their bank, they, in addition to depositing the deeds of the property and the policy with the bank, executed a memorandum indorsed upon the policy by which they purported to assign all their right, title and interest in and to the policy and every renewal thereof and the moneys thereby assured unto the bank for and on behalf of the bank to the extent of their then present and future indebtedness to the bank, and subject thereto for the benefit of themselves. The insurance company also executed a memorandum indorsed on the policy to the effect that the transfer by the owners to the bank conferred on the bank whatever rights might accrue to the owners under the policy subject nevertheless to all the obligations and conditions of the policy. The next renewal premium was not paid when due, and according to its terms the policy thereupon expired. Subsequently the premium was paid and the agent of the insurance company executed a document whereby he acknowledged that he had received from the owners and the bank as mortgagees the sum of —— for premium deposit for the insurance of £650 "on property as per proposal in consideration of which such insurance is held in force for a period not exceeding fourteen days from issue of this receipt subject to the terms and conditions of

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the company's policies and to the condition that the company reserves the right of rejection or alteration in the terms of the insurance by notice to that effect delivered or posted but the insurance is held in force pending any such notice." This receipt was followed by another by which the agent of the insurance company acknowledged that he had received the premium for "continuance of policy No. 7213012 of this company in the name of" the bank, and a similar receipt was given for the premium due the next year.

Held, that a new contract of insurance was created between the bank and the insurance company upon the terms of the original policy so far as applicable, and upon which the bank was entitled to sue in its own name.

One of the conditions of the policy was:—"The insured must give notice to the company of any insurance or insurances made elsewhere on the property hereby insured or on any part thereof the particulars of which must be indorsed on the policy and unless such notice be given and indorsement be made the insured will not be entitled to any benefit under this policy." After the assignment of the policy to the bank, and after the receipts hereinbefore mentioned had been given, the owners insured the property with another company. In an action by the bank against the first mentioned insurance company:

Held, that the bank was not bound to give notice of the second insurance to the company as a condition precedent to recovery.

By *Griffith* C.J., *Barton* and *O'Connor* JJ., on the ground that the second insurance was not "on the property" insured by the bank.

By *Higgins* J., on the ground that the condition required notice to be given only of insurances effected by the insured.

By *Griffith* C.J. on both grounds.

Another condition of the policy provided that:—"On the happening of any loss or damage by fire to any of the property insured by this policy the insured must forthwith give notice in writing thereof to the company or its agents and within fifteen days at the latest deliver to the company or its agents at his own expense as particular a statement and account as may be reasonably practicable of the property and the several articles and matters damaged or destroyed by fire . . . and in default of compliance with the terms of this condition or any of them no claim in respect of any such loss or damage shall be payable or sustainable unless and until such notice statement account proofs and explanations and evidence respectively shall have been delivered produced and given as aforesaid and such statutory declaration if required shall have been made."

Held, that there was no obligation on the insured to give the notice, statement and account, &c., therein referred to within 15 days, but that the condition merely suspended the right of action until the notice, statement and account, &c., had been given.

Comments by *Higgins* J. on the maxim *Verba chartarum fortius accipiuntur contra preferentem.*

Decision of Supreme Court (*The West Australian Bank* v. *The Royal Insurance Co.*, 9 W.A.L.R., 78), reversed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court of Western Australia by the Western Australian Bank against the Royal Insurance Co., in which the pleadings were as follow:—

"STATEMENT OF CLAIM.

"1. The plaintiffs are an incorporated banking company and the defendants are an incorporated fire insurance company carrying on business in Western Australia and elsewhere.

"2. By a policy of insurance bearing date the 10th April 1899 made by the defendants and numbered 7213012 it was witnessed that Henry William Taylor and Patrick Connolly (hereinafter called the insured) having paid the defendants £32 10s. for insuring against loss or damage by fire as thereinafter mentioned the property therein described that is to say the Tasmanian Hotel situate at South Boulder in the sum of £650 (subject to the said hotel being used and kept open as a licensed hotel) the defendants agreed with the insured (but subject to the conditions on the back of the said policy which were to be taken as part of the policy) that if the property should be destroyed or damaged by fire at any time between 10th April 1899 and 10th April 1900 or (in case of a renewal of the policy) at any subsequent date during the period for which the same should have been renewed the defendants would out of their capital stock and funds pay or make good to the insured the value of the property so destroyed or the amount of such damage thereto to an amount not exceeding £650 and also not exceeding in any case the amount of the insurable interest therein of the insured at the time of the happening of such fire.

"3. The said H. W. Taylor and P. Connolly were at the time of the making of the said policy interested in the said property so insured as aforesaid to the amount insured thereon.

"Further particulars.—The said H. W. Taylor and P. Connolly were interested in the said property as owners thereof.

"4. The said policy was duly renewed from year to year by

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the payment to the defendants of the said premium of £32 10s. to 10th April 1902.

"Further particulars.—The said premium was paid by the cheques of the said H. W. Taylor and P. Connolly drawn on the plaintiff bank by the said H. W. Taylor and P. Connolly to the agent of the defendant company at Kalgoorlie on the following dates:—On or about 10th April 1900; on 18th April 1901.

"5. On or about 13th November 1901 the said H. W. Taylor and P. Connolly duly assigned the said policy by indorsement thereon to the plaintiffs as mortgagees as security for their then present and future indebtedness to the plaintiffs.

"Further particulars.—The then present indebtedness of the said H. W. Taylor and P. Connolly to the plaintiffs was the sum of £1863 13s. 9d.

"6. Due notice of the date and purport of such assignment was afterwards given to the defendants and on 25th February 1902 the defendants noted the said transfer on the back of the said policy.

"Further particulars.—Notice of the said assignment was given by lodging with the agent of the defendants the said assignment indorsed on the said policy between 13th November 1901 and 25th February 1902. The plaintiffs cannot now say whether the said notice was given to the defendants' agent at Kalgoorlie or at Perth.

"7. The plaintiffs duly renewed the said policy from 10th April 1902 for one year and again from 10th April 1903 for one year expiring 10th April 1904 by paying to the defendants the said annual premium of £32 10s.

"Further particulars.—The said premium was paid by the cheques of the said H. W. Taylor and P. Connolly drawn on the plaintiffs. It was paid by the said H. W. Taylor and P. Connolly on behalf of the plaintiffs at Kalgoorlie on the following dates:—On 27th May 1902; on 21st April 1903.

"8. On or about 16th December 1903 whilst the said policy was in full force and effect and whilst the said hotel was being

used and kept open as a licensed hotel the same so insured as aforesaid was burnt down and destroyed.

"9. The plaintiffs were at the time of the said assignment to them and thence until and at the time of the said loss interested in the said property so insured as aforesaid as mortgagees to an extent beyond the sum insured thereon.

"Further particulars.—The plaintiffs were interested to the extent of £1,863 13s. 9d. at the time of the said assignment and to the extent of £1,542 6s. 5d. at the time of the said loss the said amounts being the indebtedness of the said H. W. Taylor and P. Connolly to the plaintiffs at the said respective times.

"10. By reason of the said fire the plaintiffs suffered loss on the said property to the amount insured thereon as aforesaid.

"Further particulars.—The loss sustained by the plaintiffs was in the total destruction by fire of the Tasmanian Hotel and the amount of such loss was £1,000.

"11. The plaintiffs gave notice in writing of the said loss to the defendants and delivered to them a statement and account of the property destroyed with the estimated value thereof at the time of the said fire and also the actual amount of loss occasioned by the fire to the said property estimated with reference to the state and condition and value thereof immediately before the happening of the said fire after making proper deductions for depreciation in the value of such property from use or otherwise and also a statement of the interest of the plaintiffs therein.

"Further particulars.—The said notice was given and the said statement delivered by the plaintiffs to the defendants on 17th December 1904—

"(*a*) The actual loss to the said property was £1,000 and over.

"(*b*) The interest of the plaintiffs was that at the time of the said fire the plaintiffs had a lien over the said building and policy as mortgagees of the said H. W. Taylor and P. Connolly.

"12. A difference having arisen between the defendants and the plaintiffs as to the amount of the alleged loss by fire the same was referred to arbitration as provided by the 14th condition of

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the said policy and by an award of the arbitrators duly appointed by the parties dated 4th December 1905 the said loss was ascertained and awarded to be the sum of £700.

"13. All conditions have been performed and all things have happened and all times elapsed necessary to entitle the plaintiffs to be paid the sum insured on the said policy but the defendants have not paid the same or any part thereof.

"Further particulars.—The conditions performed things happened and times elapsed are as follow:—

"The premium payable under the said policy was from time to time actually paid and the receipts therefor issued from the defendants' office as provided by condition 4 indorsed on the said policy.

"Notice of the assignment of the said policy from the said H. W. Taylor and P. Connolly to the plaintiffs was given to the defendants and the subsistence of the said policy in favour of the plaintiffs was declared by a memorandum indorsed thereon and signed by a duly authorized person on behalf of the defendants as required by condition 5 indorsed on the said policy.

"The said hotel was burnt down and destroyed while the said policy was in full force and effect and while the said hotel was being used and kept open as a licensed hotel.

"On the happening of the loss by fire notice thereof in writing was given and a statement and account of the property destroyed by fire was delivered to the defendants or their agents as required by condition 6 indorsed on the said policy.

"A difference having arisen between the defendants and the plaintiffs as to the amount of the loss by fire such difference was referred to arbitration as provided by condition 14 of the said policy. Arbitrators were duly appointed and the amount of the said loss was ascertained and this action was commenced within six calendar months next after the delivery of the award.

"The plaintiffs claim £478 18s. 11d. (being thirteen-nineteenths of £700) under the said policy and interest thereon from 14th December 1904 to judgment at the rate of £8 per centum per annum."

"Statement of Defence.

"1. The defendants admit paragraphs 1, 2 and 4 of the statement of claim.

"2. The defendants do not admit the allegations contained in paragraph 3 of the statement of claim.

"3. The defendants deny:—

"(*a*) That on or about 13th November 1901 H. W. Taylor and P. Connolly assigned the policy by indorsement thereon to the plaintiffs as mortgagees as security for their then present and future indebtedness to the plaintiffs or at all.

"(*b*) That due notice of the date and purport of such alleged assignment was afterwards given to the defendants and that on 25th February 1902 or on any other day the defendants noted the said transfer on the back of the policy.

"(*c*) That the plaintiffs duly renewed the policy from 10th April 1902 for one year and again from 10th April 1903 for one year expiring 10th April 1904 by paying to the defendants the annual premium of £32 10s. The defendants say that if the said policy was renewed (which is not admitted) it was renewed by the said H. W. Taylor and P. Connolly only.

"(*d*) That the plaintiffs were at the time of the alleged assignment of the policy to them and until and at the time of the said alleged loss interested in the property insured as mortgagees or at all to an extent beyond the sum insured thereon or in any other sum.

"(*e*) That by reason of the alleged fire the plaintiffs suffered loss on the said property to the amount insured thereon or to any other amount or at all.

"(*f*) That the plaintiffs gave notice in writing of the said alleged loss to the defendants and delivered to them a statement and account of the property alleged to

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have been destroyed with the estimated value thereof at the time of the alleged fire and also the actual amount of the loss occasioned by the fire to the said property and also a statement of the interest therein of the plaintiffs.

"(*g*) That a difference having arisen between the defendants and the plaintiffs as to the amount of the alleged loss by fire the same was referred to arbitration as provided by the 14th condition of the policy and that by an award of the arbitrators the loss was ascertained and awarded to be the sum of £700.

"(*h*) That all conditions have been performed and all things have happened and all times elapsed necessary to entitle the plaintiffs to be paid the sum insured on the said policy or any other sum.

"(*i*) That the defendants are indebted to the plaintiffs in the sum of £478 8s. 11d. or any part thereof or in any other sum at all.

"4. The defendants do not admit the allegations contained in paragraph 8 of the statement of claim.

"5. The defendants say that the plaintiffs were not the insured under the said policy and that the plaintiffs were not insured against loss or damage under the said policy or at all.

"6. If the policy was assigned by H. W. Taylor and P. Connolly to the plaintiffs (which is denied) the defendants did not agree to any such assignment.

"7. The plaintiffs had not at the time of the alleged fire and have not now an insurable interest in the subject matter of the said insurance or in the said policy.

"8. The plaintiffs did not sustain any loss or damage by the alleged damage or destruction of the property by fire.

"9. The plaintiffs are not entitled to institute or maintain any action or claim against the defendants in respect of the said policy.

"10. The plaintiffs were not and are not claimants entitled to call upon the defendants to proceed to arbitration under condition 14 indorsed on the said policy nor has any arbitration been held nor the amount of alleged loss or damage been referred to

arbitration in accordance with the said condition 14 which is a condition precedent to the commencement or maintenance of any action against the defendants.

"11. The policy was subject to conditions precedent (numbered 6) that upon the happening of any loss or damage by fire to the property insured the insured must forthwith give notice in writing thereof to the defendants and within fifteen days at the latest deliver to the company at the expense of the insured as particular a statement and account as might be reasonably practicable of the property damaged or destroyed by fire and of the actual amount of loss or damage occasioned by fire. These conditions were not complied with.

"12. The policy was subject to a condition (numbered 11) that the insured must give notice to the defendants of any insurance made elsewhere on the property insured the particulars of which must be indorsed on the policy and that unless such notice be given and indorsement be made the insured would not be entitled to any benefit under the policy. The insured under the said policy or alternatively H. W. Taylor and P. Connolly made an additional insurance on the property insured with the Commercial Union Assurance Company Ltd. in the sum of £300 but no notice thereof was given to the defendants nor were the particulars of such additional insurance indorsed on the policy. The plaintiffs are by reason of the said condition and the matters aforesaid not entitled to any benefit under the said policy.

"13. Alternatively the defendants say that if the plaintiffs are entitled to any benefit under the policy (which is denied) or to bring or maintain this action in respect thereof (which is denied) the defendants claim instead of paying the sum of £478 18s. 11d. to the plaintiffs in money the right to exercise the option to reinstate or replace the property alleged to have been damaged or destroyed or any part thereof pursuant to the condition 9 indorsed on the said policy."

"REPLY.

"The plaintiffs say that—

"1. Except as to paragraphs 11, 12 and 13 of the defence they join issue thereon save in so far as the same contains admissions of the plaintiffs' statement of claim.

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"2. As to paragraph 11 of the defence the conditions (numbered 6) indorsed on the said policy are not conditions precedent and they complied therewith before bringing this action. They will contend that the effect of the said conditions (only portions whereof are set out in paragraph 11 of the defence) is merely to postpone the right of payment until complied with.

"3. As to paragraph 12 of the defence they were the insured under the said policy and deny that as such insured they made any additional insurance on the same property within the meaning of condition 11 indorsed on the said policy.

"4. As to paragraph 13—(*a*) The defendants never elected to reinstate the said property and the same has been rebuilt by the said H. W. Taylor and P. Connolly.

"(*b*) The defendants ought not now to be admitted to claim the right to exercise the option to reinstate the property destroyed or any part thereof pursuant to condition 9 indorsed on the said policy because they always wrongfully denied their liability and wrongfully refused to admit any claim in respect of the said loss.

(*c*) The defendants abandoned their right to reinstate the property by repudiating all liability under the said policy.

"Further particulars.—The present building is of brick. Re-building commenced 14th July and finished 29th September 1904."

In addition to the conditions set out in the judgment of *Griffith* C.J. hereunder, there were indorsed on the policy the following conditions (*inter alia*):—

"1. Any material misdescription of any of the property proposed to be hereby insured or of any building or place in which property to be so insured is contained or any omission to disclose the existence of any hazardous trade or of any apparatus in such building or place in or by which heat is produced other than grates in common domestic fire-places with brick or stone chimneys and any mis-statement of or omission to state any fact material to be known for estimating the risk whether at the time of effecting the insurance or afterwards renders this policy void as to the property affected by such misdescription mis-statement or omission respectively and any matter referred to in the proposal form shall be deemed material and such proposal

shall in all cases be deemed to be made by the insured and throughout these conditions the stipulations provisions and requirements applicable to loss on property shall also be deemed to apply in the case of any insurance on rent.

"4. No insurance proposed to the company is to be considered in force until the premium be actually paid. No receipts for any premiums of insurance shall be valid or available for any purpose except such as are printed and issued from the company's office and signed by one of the clerks or duly authorized agents of the company and any condition or proviso contained in indorsed upon or referred to in any such receipt shall be taken as part of this policy.

"5. This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed hereon and signed by some duly authorized person on behalf of the company or if the same become the subject of a contract of sale or if there may be any change in the nature of the interest of the insured in such property.

"12. If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances whether effected by the insured or by any other person covering the same property this company shall not be liable to pay or contribute in respect of such loss or damage more than its proportion rateably with the amount of such other insurance of such loss or damage.

"13. In all cases where any other subsisting insurance or insurances whether effected by the insured or by any other person on any property hereby insured either exclusively or together with any other property shall be subject to average the insurance on such property under this policy shall be subject to average in like manner."

The other material facts are sufficiently set out in the judgments hereunder.

The action was tried before *Parker* C.J. who gave judgment

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for the plaintiffs for £478 18s. 11d., and interest thereon at 8 per cent. per annum to 8th December 1905, with costs.

From this judgment the defendants appealed to the Full Court, which allowed the appeal, directed the judgment for the plaintiffs to be set aside and judgment to be entered for the defendants with costs: *West Australian Bank* v. *Royal Insurance Co.* (1).

From this judgment the plaintiffs now appealed to the High Court.

Irvine K.C. (with him *Coldham*), for the appellants. Either the appellants were the insured under the original policy or there was a novation. The appellants were to get the policy money if a fire occurred, and were responsible for the premiums. The appellants have an insurable interest. Although this is a contract of indemnity, the appellants, as mortgagees who had insured, are entitled to be compensated in respect of the whole property insured, and not merely in respect of their interest in it as mortgagees: See *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (2); *Castellain* v. *Preston* (3); *Irving* v. *Richardson* (4). The mortgagee, mortgagor, and insurer may agree to any contract they like as to insurance. The indorsement on the policy is an assent by the respondents to the assignment, and not merely a promise by the respondents to pay to the appellants the insurance moneys that may become due under it, and the appellants became the insured: *Ellis* v. *Insurance Company of North America* (5). The receipts for premiums show that there was a new contract of insurance. Each of those receipts shows a renewal of a policy as to which the appellants are the insured. The policy will be read most strongly against the respondents: *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (6); *Broom's Legal Maxims*, 7th ed., p. 444; *Fowkes* v. *Manchester and London Assurance and Loan Association* (7); *Braunstein* v. *Accidental Death Insurance Co.* (8).

(1) 9 W.A.L.R., 78.
(2) 5 Ch. D., 569, at p. 583.
(3) 11 Q.B.D., 380, at p. 397.
(4) 1 Moo. & R., 153; 2 B. & Ad., 193.
(5) 32 Fed. Rep., 646.
(6) 5 Ch. D., 569.
(7) 3 B. & S., 917.
(8) 1 B. & S., 782.

[HIGGINS J. referred to *Norton on Deeds*, p. 118.]

The Court will struggle against a general and literal meaning of such words as are in clause 11 of the conditions of the policy: *Anderson* v. *Fitzgerald* (1). That clause refers to insurances effected by the insured, and not to those effected by anyone else. At any rate, it does not refer to insurances of which the insured has no notice. As to clause 6, the respondents cannot now rely on it because they repudiated any liability before the time when notice was to be given, and the clause is too uncertain in its meaning for the respondents to gain any advantage from it. See *Bunyon on Fire Insurance*, 5th ed., p. 216; *Weir* v. *Northern Counties of England Insurance Co.* (2). It is sufficient under that clause if the particulars required by it are given before trial: *Grau* v. *Colonial Insurance Co. of New Zealand* (3); *Davis* v. *National Fire and Marine Insurance Office of New Zealand* (4).

Mitchell K.C. (with him *Downing*), for the respondents. The effect of the assignment was not to assign the policy but to assign certain rights Taylor and Connolly had under it, and that is all that the respondents assented to.

[HIGGINS J. referred to *Crossley* v. *Glasgow Life Assurance Co* (5); *Ettershank* v. *Dunne* (6).]

The appellants had only an equitable mortgage and their insurable interest was limited to the amount from time to time due from the mortgagors. If the fire had occurred while the mortgagors' account was in credit, the appellants would have had no insurable interest. What the parties intended was that the appellants should get a security to the extent of their debt, but, subject to that, the insurance was to be for the benefit of the mortgagors. There was no novation, for there is no evidence of consent of all the parties. The policy after the assignment was not a new contract. An acceptance in the form used here is a renewal only. If this had been a new contract a higher stamp duty would have been payable: *Stamp Act* 1882 (46 Vict. No. 6,) secs. 5, 13, 60; *Stamp Act Amendment Act*

(1) 4 H.L.C., 484.
(2) 4 L.R. Ir., 689.
(3) 2 Q.L.J., 53.
(4) 10 N.S.W.L.R. (L.), 90.
(5) 4 Ch. D., 421.
(6) 5 V.L.R. (E.), 99.

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1902 (2 Ed. VII. No. 21). There was no evidence that the payment of premiums by Taylor and Connolly was with the authority of the appellants or was ratified by them. See *Buffalo Steam Engine Works* v. *Sun Mutual Insurance Co.* (1); *State Mutual Fire Insurance Co.* v. *Roberts* (2). Whether the appellants became the insured or not, Taylor and Connolly did not cease to be the insured, for the person who can sue in law is not the only person who can be the insured.

Assuming the appellants are the insured and not Taylor and Connolly, then under clause 11 the applicants should have given notice of the second insurance. The reason for that clause is to enable the respondents to get out of the risk if they think fit: *Sinnamon* v. *New Zealand Insurance Co.* (3). That reason would apply in the case of a second insurance by the mortgagor when the first was by the mortgagee.

[GRIFFITH C.J.—That clause may refer to policies already existing.]

That case is covered by clause 1.

[GRIFFITH C.J. referred to *Queen Insurance Co.* v. *Parsons* (4).]

Clause 11 requires notice of all policies of which the insured knows: *Harris* v. *Ohio Insurance Co.* (5); *Stacey* v. *Franklin Fire Insurance Co.* (6).

[HIGGINS J. referred to *Ætna Fire Insurance Co.* v. *Tyler* (7).]

The appellants knew of this second policy and had control over it, for it was entered in their securities book and they had a lien over it. See also *Carpenter* v. *Providence Washington Insurance Co.* (8); *Ebsworth* v. *Alliance Marine Insurance Co.* (9); *Bunyon on Fire Insurance*, 5th ed., p. 383. The policy of which the insured must give notice is one of which they have knowledge and which effects the danger against which clause 11 is intended to guard.

[GRIFFITH C.J. referred to *Foster* v. *Equitable Mutual Fire Insurance Co.* (10).]

(1) 17 N.Y. St. R., 401.
(2) 31 Pa. St. R., 438.
(3) 8 Q.L.T., 144.
(4) 7 App. Cas., 96.
(5) 5 Ohio St. R., 467.
(6) 2 Watts & Sergeant (Pa.), 506.
(7) 16 Wendell (N.Y.), 385; 30 Amer. Dec., 90.
(8) 16 Peters, 495.
(9) L.R. 8 C.P., 596.
(10) 2 Gray (Mass.), 216.

As to clause 6 no amendment to raise a plea of waiver should now be allowed. The clause must be interpreted *reddendo singula singulis*. The fact that the respondents said they would not pay does not excuse the appellants from complying with the clause. Compliance with the clause within 15 days of the fire is a condition precedent to recovery under the policy. See *Trask* v. *State Fire and Marine Insurance Co. of Pennsylvania* (1); *Friemansdorf* v. *Watertown Insurance Co.* (2).

Irvine K.C., in reply, referred to *Lazarus* v. *Commonwealth Insurance Co.* (3); *Bunyon on Fire Insurance*, 5th ed., p. 375.

Cur. adv. vult.

The following judgments were read :—

March 27.

GRIFFITH C.J. This action in its original form was an action by the appellants claiming to be assignees of a policy of fire insurance effected in April 1899 by H. W. Taylor and P. Connolly with the respondents. During the progress of the case, however, it became apparent that the real nature of the plaintiffs' claim, if any, was in respect of a contract of insurance between themselves and the defendants, the terms of which were to be found by reference to Taylor and Connolly's policy. No formal amendment of the pleadings was asked for, but the case was contested, and evidence was adduced, upon this footing.

Various defences were set up. The defendants denied the plaintiffs' right to sue as assignees of the policy, and denied that any fresh contract had been established. They also denied the existence of any insurable interest in the plaintiffs at the time of the loss. They also alleged failure to comply with two conditions of the policy, viz., condition 6, relating to notice and proof of loss, and condition 11, requiring the insured to give notice to the defendants of "any insurance made elsewhere on the property."

The facts of the case, except on one point, appear to be free from doubt. The policy, which was for £650 upon a building at

(1) 29 Pa. St. R., 198.
(2) 1 Fed. Rep., 68.
(3) 2 Hare and Wallace's American Leading Cases, 797, at p. 825.

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Kalgoorlie, was effected by Taylor and Connolly, the insured, on 10th April 1899, and was to continue in force till 10th April 1900, and so from year to year so long as the annual premium was paid. In 1901 the plaintiffs were Taylor and Connolly's bankers. On 1st February and 23rd August in that year they executed in favour of the plaintiffs two instruments called "general liens," by which they charged to the extent of their indebtedness, *inter alia*, all fire policies and all property real and personal evidenced by any documents which had been or might be deposited with the plaintiffs by them, or which belonging to them might come into the custody of the plaintiffs. On 13th November 1901 Taylor and Connolly executed a memorandum (indorsed upon the policy of April 1889) in the following terms:—

> "For valuable consideration we hereby assign all our right title and interest in and to the within policy and every renewal thereof and the moneys thereby assured unto the Western Australian Bank for and on behalf of the said Bank to the extent of our present and future indebtedness to the said Bank and subject thereto for the benefit of us the transferors. The receipt of the said Bank to be a full discharge for the said moneys.
>
> "Dated at Kalgoorlie the 13th day of November 1901."

The policy had apparently been previously deposited with the plaintiffs. On 25th February 1902 the defendants by their agent executed a memorandum (also indorsed on the policy) as follows:—

> "Perth 25th February 1902. The transfer of the 13th November 1901 confers on the Western Australian Bank whatever rights may accrue to Henry William Taylor and Patrick Connolly under this policy subject nevertheless to all the obligations and conditions of this policy."

At this time the premium for the year ending 10th April 1902 had been duly paid. The plaintiffs' claim as assignees was founded upon these two documents. The Supreme Court were of opinion that they did not operate to confer on the bank a right to sue in their own name, and this view was not contested before us.

The renewal premium due on 10th April 1902 was not paid,

and the policy, according to its terms, thereupon expired. On 22nd May 1902 the defendants' agent at Kalgoorlie signed a document in the following form:—

"ROYAL INSURANCE COMPANY
(Western Australian Branch)
253 St. George's Terrace, Perth.
Kalgoorlie (c) Agency, 22nd May 1902.

"No. 533.

"Received from Connolly and Taylor and the W.A. Bank as mortgagees on account of the Royal Insurance Company the sum of——for premium deposit for the insurance against fire of six hundred and fifty pounds on property as per proposal in consideration of which such insurance is held in force for a period not exceeding fourteen days from issue of this receipt subject to the terms and conditions of the company's policies and to the condition that the company reserves the right of rejection or alteration in the terms of the insurance by notice to that effect delivered or posted but the insurance is held in force pending such notice. Further acceptance of the proposal will be notified by the issue of receipt by the Perth office.

"Premium £32 10s. G. W. A. Cross, Agent."

It is to be noted that this document is not in the form used for a receipt for a premium upon an existing policy, but is a form apt for a receipt given by an agent for money paid upon a proposal to effect a new insurance, which proposal may or may not be accepted by the principal—which, indeed, was in law the real nature of the transaction. This provisional receipt was followed on 27th May 1902 by another in these words:—

"Received the undermentioned premium for the continuance of policy No. 7213012 of this company in the name of Western Australian Bank insuring the sum of £650 for 12 months from 10th April 1902 to 10th April 1903 at four o'clock in the afternoon.

"This receipt shall not be valid until countersigned by the duly authorized agent of the company at Kalgoorlie.

"Premium £32 10s. A. W. Pike, Local Manager.
per W. E. H.

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"Countersigned at Kalgoorlie this twenty-seventh day of May 1902. G. W. A. Cross, Agent."

A receipt in similar terms was given for the premium due in April 1903.

The plaintiffs contend that the effect of these documents was to create a new contract of insurance between them and the defendants upon the terms of the original policy so far as applicable. The Supreme Court rejected this argument on the ground, as I understand them, that this was not the intention of the parties. There was no evidence beyond the documents themselves to show the intention of the parties. Such evidence, indeed, if given, could only be used to show that the documents were not intended to have a contractual effect at all—not to qualify the nature of the contract, if any, disclosed by them.

In my opinion these receipts, properly construed, establish a new contract between the plaintiffs and the defendants upon which the former are entitled to sue in their own name. It was contended before us that from this point of view the receipt of May 1902 ought under the Western Australian *Stamp Act* to have been stamped as a policy. Probably this is so, but, if the point had been taken before the trial Judge, he could under the Act have allowed it to be stamped then and there, and it is too late now to raise such an objection.

I turn to the other defences, as to which we have not the advantage of knowing the view of the learned Judges of the Full Court.

The objection that the plaintiffs had no insurable interest cannot be sustained. There is, I think, no doubt that under English law a mortgagee has an insurable interest in the mortgaged property, whether the mortgage is legal or equitable. (See *per Bowen* L.J. in *Castellain* v. *Preston* (1)).

Difficult questions, not solved by any English decision, may arise with respect to the extent of his insurable interest, whether it is co-extensive with the value of the property or only with the amount due on the mortgage at the date of the loss, or even a less sum. It is sufficient to say that they do not arise in the present case, since the debtors, Taylor and Connolly, were

(1) 11 Q.B.D., 380, at p. 398.

indebted to the plaintiffs at the time of the fire in a sum exceeding the amount of the policy.

I will deal next with the defence raised under condition 11, which is as follows:—"The insured must give notice to the company of any insurance or insurances made elsewhere on the property hereby insured or on any part thereof the particulars of which must be indorsed on the policy and unless such notice be given and indorsement be made the insured will not be entitled to any benefit under this policy."

It appears that on 18th June 1903 Taylor and Connolly effected a policy in their own name upon the same property with the Commercial Union Assurance Company for £300, and that no notice of this policy was given by the bank to the defendants, nor were the particulars of it indorsed on the policy of April 1899. The defendants contend that this was a breach of the condition, the plaintiffs that the condition does not apply to such a case. On the one hand, it is said that the words "the property hereby insured" mean the building; on the other, that they refer to the interest insured. No doubt, under the contract between Taylor and Connolly and the defendants evidenced by the policy alone they have the former meaning. But it does not follow that in the new contract between the plaintiffs and the defendants evidenced by the receipts they have the same meaning. It may be, indeed, that as between plaintiffs and defendants they would have that meaning in other parts of the policy, and that this may be one of the rare cases in which the same words have different meanings in different parts of the same instrument. But, having regard to the subject matter of the insurance, that is, the bank's interest as mortgagees, I am disposed to think that the words "the property hereby insured" were intended to refer to that interest, and not to the interest of the mortgagors, or to the property regarded as a physical object. If, however, they have the latter meaning, I think that the condition refers only to insurances effected by the insured, and not to insurances effected by other persons.

It is open to argument whether condition 11 applies at all to insurances effected after the date of the principal policy, but I express no opinion on this point.

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In this regard I will cite a very cogent argument contained in the judgment of Chancellor Walworth of New York in the case of *Ætna Fire Insurance Co.* v. *Tyler* (1) when a similar condition as to prior insurances was under consideration. "No one can suppose for a moment that these underwriters intended to be so unreasonable as to require a person insuring with them, under the penalty of a forfeiture of his policy, to give notice of every insurance which any former owner of the property might have made thereon, although he had no interest in that insurance, and the rights of the company could not in any way be affected thereby; that if there was any such insurance, even in those cases where the fact was notified to the underwriters, the person insured with them should only recover a part of his loss from them, although he had no interest in and could not be benefited by the other insurance. To suppose the underwriters intended that such a construction should be given to this part of the policy, would be to suppose that they intended to entrap those who insured with them. The plain and obvious meaning of the whole clause is, that if the assured has any other policy or insurance upon the property, by assignment or otherwise, by which the interest intended to be insured is already either wholly or partially protected, he shall disclose that fact and have it indorsed on the policy, or the insurance shall be void; and the same where he shall make any subsequent insurance; also, that in case of any such prior or subsequent insurance, although it is notified to the company and indorsed on the policy, the underwriters in the two policies shall contribute rateably to his loss, so that in no event he can recover more than the amount of his actual loss."

The case of *Foster* v. *Equitable Mutual Fire Insurance Co.* (2) is to the same effect.

I think, therefore, that this defence fails.

I pass now to the defence raised under condition 6, which so far as material is as follows:—"On the happening of any loss or damage by fire to any of the property insured by this policy the insured must forthwith give notice in writing thereof to the

(1) 16 Wendell, 385; 30 Amer. Dec., 90, at p. 97.
(2) 2 Gray (Mass.), 216.

company or its agents and within fifteen days at the latest deliver to the company or its agents at his own expense as particular a statement and account as may be reasonably practicable of the property . . . . . and in support of such statement and account shall produce and give all such invoices vouchers proofs and explanations and other evidence as may be reasonably required by or on behalf of the company . . . and in default of compliance with the terms of this condition or any of them no claim in respect of any such loss or damage shall be payable or sustainable unless and until such notice statement account proofs and explanations and evidence respectively shall have been delivered produced and given as aforesaid and such statutory declaration if required shall have been made."

It appears that when the loss occurred Taylor and Connolly's solicitor, who was also the plaintiffs' solicitor, endeavoured to comply with this condition by giving notice of the loss, nominally on behalf of Taylor and Connolly. It appears also that the defendants thereupon repudiated all liability either to Taylor and Connolly or to the plaintiffs. But it does not appear whether this repudiation took place within fifteen days from the loss or not.

The defendants contend that the obligation to deliver the statement within fifteen days at the latest is absolute, or, if not absolute, that there is no evidence of waiver of it by them. The plaintiffs contend that the concluding words of the condition beginning with "unless and until" preclude this construction, which, they say, would give no effect to the latter words.

There is no doubt that, in order to give an intelligent and consistent construction to the condition, it is necessary either to reject the words "at the latest" or else to read the word "until" as not applying (except for fifteen days) to the words "statement and account" which immediately follow it. In the case of *Weir* v. *Northern Counties of England Insurance Co.* (1) a condition substantially the same as that now in question, except that the word "unless" was not used, was held to require only that the statement and account should be made before action, and that the words "at the latest" must be rejected. *Parker* C.J.,

(1) 4 L.R. Ir., 689.

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who tried the present case, followed this decision. In the case of *Grau* v. *Colonial Insurance Co. of New Zealand* (1), in which *Weir's Case* (2) was not cited, the Supreme Court of Queensland arrived at a contrary conclusion on a similar condition. The Full Court of Western Australia expressed no opinion on this point.

The text writers who have written since *Weir's Case* (2) was decided have referred to it as establishing that such a condition when the word "until" alone is used merely suspends the right of action, so that the failure to render the statement and account within the prescribed time is not fatal.

At the trial, as already said, the actual facts relating to the claim made on behalf of Taylor and Connolly were not fully gone into, and I cannot help thinking that the rights of the parties so far as they depended on this condition were not really considered.

If I felt compelled to adopt the construction contended for by the respondents I should be disposed to think that the case ought to be remitted, on proper terms, for further investigation on this point. But I understand that my learned brothers are all of the opinion that the effect of condition 6 is merely to suspend the right of action. I confess to entertaining some doubt, but I am disposed to take the same view for reasons which I will state very briefly. The sentence beginning "and in default" does not come into operation at all until there has been a failure to comply with the preceding provisions of the condition. In the absence of this sentence the failure would be an absolute bar, and the object of the sentence is to make the bar qualified and not absolute. The words "unless and until" are often used together as words of futurity, and might reasonably be so interpreted by an insurer. The doctrine *verba chartarum fortius accipiuntur contra proferentem*, although seldom to be resorted to, rests on a solid foundation of justice. If one party to a transaction uses, verbally or in writing, language reasonably susceptible of two constructions, the party to whom they are used may fairly say that he understood them in the sense most favourable to his contention: *Ireland* v. *Livingston* (3) (a case of principal and agent).

(1) 2 Q.L.J., 53.

(2) 4 L.R. Ir., 689.

(3) L.R. 5 H.L., 395.

So far, therefore, from dissenting from the conclusion of my brethren on this point, I am prepared to assent to it.

In my judgment the respondents have failed to establish any of the defences set up, and the appellants are entitled to succeed.

BARTON J. Having regard to the conduct of the case at the trial, the first and the principal question for decision is whether at the time of the loss there was a contract of fire insurance between the plaintiff bank, the appellants, and the defendant company, the respondents. The answer to that question depends, (1) on the fact that the renewal premium for the year beginning 10th April 1902 was not duly paid, and remained unpaid at the time of the alleged new contract, so that in law the policy to Taylor and Connolly had before that time ceased to be in force: *Bunyon*, 5th ed., pp. 174-178; and (2) on two receipts dated respectively 22nd and 27th May 1902. These receipts have already been read. The first of them is undoubtedly in the form appropriate to the inception of a new proposal, provisionally accepted by an agent. That this is so is made more apparent by a comparison of it with the last previous receipt for a premium accepted to renew the original policy from 10th April 1901 to 10th April 1902, which is in the ordinary form of a renewal receipt. The receipt of 22nd May 1902 shows that the premium *deposit* was accepted "from Taylor and Connolly, and the W.A. Bank as mortgagees," not for "continuance," but for "insurance against fire." In consideration of it, "such" insurance—*i.e.*, that proposed—is held in force for a period not exceeding 14 days from the issue of the receipt, "subject to the terms and conditions of the company's policies," &c., clearly as if it were then first written on one of their usual proposal forms; and "further *acceptance* of the *proposal*" is to be notified by the issue of the receipt by the Perth office. This is signed by the respondents' Kalgoorlie agent. This was followed by another receipt given by the local manager at Perth for the premium of £32 10s. on the form adopted by the respondents for the continuance of policies, but describing the policy as "in the name of Western Australian Bank." It was countersigned by the Kalgoorlie agent and dated 27th May 1902. The next year's renewal premium was in the like form. That

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was the last receipt, for the hotel was burnt down before another premium became due. The documents, namely those mentioned together with the two indorsements on the policy, to which the Chief Justice has referred, constitute, together with the fact of the failure in due payment of the renewal premium due 10th April 1901, the whole of the evidence to support the appellants' contention that a new contract was made between them and the respondents. The two indorsements on the policy were antecedent to the due date of the 1902 renewal, as they were made in November 1901 and February 1902.

I think there was sufficient evidence to establish a new contract with the appellants in substitution for or in succession to that which the respondents had granted to Taylor and Connolly: *Thompson* v. *Adams* (1). It was argued that the fact that the premiums of May 1902 and April 1903 were paid by Taylor and Connolly, like any other mortgagors, was some evidence that they continued to be the insured. To my mind it is quite immaterial who it was that actually paid them. They were received by the respondents as consideration for an "insurance" (not to call it a contract) which they acknowledged to be in the name of the bank.

It is not necessary to rely on the case of *Ellis* v. *The Insurance Co. of North America* (2), though it might be strongly argued that that case and the present one rest on the same principle. Here, at any rate, the central fact that the original policy had lapsed gave the bank, the assignees under it, sufficient reason to propose to substitute a new contract; and that lapse together with the terms of the receipts in my judgment afford material supporting the inference that a contract, in substitution for the assigned policy and embodying the same terms, was concluded, and that this was the intention both of the appellants and the respondents. I think, therefore, that the plaintiffs were entitled to sue in their own name, being the insured.

The next question is whether the appellants, as the insured, had an insurable interest. They were equitable mortgagees of the insured premises under their liens and the deposit of securities. *Bunyon on Fire Insurance*, 5th ed., at p. 42, summarizes insurable interests as "any legal or equitable estate, or right which

(1) 23 Q.B.D., 361.

(2) 32 Fed. Rep., 646.

may be prejudicially affected, or any responsibility which may be brought into operation by a fire." Of the case of a mortgagee, *Bowen* L.J., says in *Castellain* v. *Preston* (1):—"If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest." And his Lordship points out that the whole matter is regulated by the doctrine of indemnity. As the Chief Justice has pointed out, the debtors owed the appellants more than the amount of the policy at the time of the loss, so that there can be no problem to solve as to the extent of the mortgagees' insurable interest. They can recover at any rate to the amount of the debt due to them when the fire took place, upon proof and within the value insured. A further defence was raised under condition 6 of the policy, which, if there is a new contract such as I have endeavoured to show, is a condition of that contract. It will be observed that it is almost *totidem verbis* with the condition which was the subject of the decision in *Weir* v. *Northern Counties of England Insurance Co.* (2). The only difference on which counsel placed serious reliance was that in the present case the words "unless and" are inserted, and precede "until" in the last sentence of the condition. Notice, with a statement and account under this condition, was not sent to the insurers until 17th December, a year after the fire, and as we are told, after the buildings had been reinstated. It was argued that the delivery of the statement, and within fifteen days after the happening of the loss, was a condition precedent to the right to recover. I think *Weir's Case* (2), so far as it goes, ought to be followed by us. It is now more than 28 years old, and so far as I can learn, has not been challenged during that time, although

(1) 11 Q.B.D., 380, at p. 398. (2) 4 L.R. Ir., 689.

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there must have been many opportunities of raising the question in British Courts. The decision has, no doubt, been followed in the transaction of insurance business throughout the interval, and we should do nothing to disturb it now. Moreover I am strongly disposed to think it correct. For very many years the clause existed without the addition of the words beginning "and in default thereof," and in that state it was repeatedly construed as imposing a condition precedent on the right to recover. No doubt its very plain terms justified that interpretation, which it received in the several instances cited in *Weir's Case* (1). The distinct inference from the words was that if the fifteen days had elapsed without delivery of the notice, account, &c., on the part of the insured, he could not afterwards be allowed to sustain his claim. But *expressum facit cessare tacitum*, and in *Weir's Case* (2), it was held that the added words "have the effect of only deferring the right to payment until the notice and account are given, and thus enlarging the time." The Court thought that the words had been added with the purpose of defining what should be the consequence of failure to comply with the requirements within the time limited. Instead of saying (as tacitly it had said) that in default no action shall be brought or payment made, it says that no claim shall be payable until such notice and account &c. are given. "Besides," added the Court (3), "the words are those of the company's own form, and the maxim applies, *fortius contra preferentem.*" It was held, therefore, that the delivery of the notice, account, &c., within fifteen days was not a condition precedent.

We have now to inquire what difference is made by the insertion of the words "unless and" before the word "until." I am not disposed to hold that there is any alteration in the sense. The important words are "in default thereof." On failure to deliver the notice, account &c., within the fifteen days, the insured shall have no claim unless he afterwards gives the notice and account and until he gives them. These two things are about equal to one another if we consider their effect after default. It is presupposed that the fifteen days have elapsed without com-

(1) 4 L.R. Ir., 689, at pp. 691, 692. (2) 4 L.R. Ir., 689, at p. 692.
(3) 4 L.R. Ir., 689, at p. 693.

pliance with the requirement. After that time, no claim is to prevail unless and until, &c. Given the end of the fifteen days as the starting point, I doubt whether the addition of "unless" adds to the stringency of the clause. There is, no doubt, an ambiguity, and when we consider also the prior words "at the latest," I do not see how that ambiguity is solved by the application of the ordinary rules of construction. But if that point of intractability is reached we are entitled to apply the maxim *verba chartarum fortius accipiuntur contra proferentem*: *Lindus* v. *Melrose* (1). Lord *St. Leonards*, in *Anderson* v. *Fitzgerald* (2), said:—"A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it: nothing ought to be wanting in it, the absence of which may lead to such results." And this passage affords the strongest reason for his having said a little earlier, speaking of the policy (3):—"It is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." I am therefore content to hold that the clause does not impose a condition precedent as to the fifteen days, and that sufficient notice has been given, there being no other objection taken to it and the accompanying documents.

The remaining question is that raised under condition 11, exacting notice of insurances made "elsewhere" on the property insured, and any such insurance must also be indorsed on the policy.

It is not disputed that the appellants have never given the respondents notice of a certain other policy granted to Taylor and Connolly by the Commercial Union Company for £300 on the same building that their old policy covered, with £50 on furniture. It is equally clear that the original policy bears no indorsement of it. In clause 11, as applied to the new contract, I think the interest (or "property") meant is not such an interest

(1) 3 H. & N., 177, at p. 182. (2) 4 H.L.C., 484, at p. 510.
(3) 4 H.L.C., 484, at p. 507.

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as is the subject of Taylor and Connolly's second policy. The parties have treated the bank's mortgage interest as "the property insured," and it is quite capable of that meaning in its relation to the receipts, from which and from the expiration of the original policy I have held that a new contract of insurance is deducible. It is only the interest of the appellants that can be the subject of that insurance, and although that may be described as property, it remains only the kind of interest which they as mortgagees can insure, and that is not the kind of interest or "property" which Taylor and Connolly have insured. There has been no other insurance of the appellants' interest or of any part of it.

Further, I have grave doubts whether the words "made elsewhere" are so comprehensive as to include insurances of which "the insured" have no knowledge. But it is not necessary to give an actual opinion on that point. As to condition 11, therefore, the respondent company fails as it does on the other questions. On the whole case I think *Parker* C.J. was right in his judgment at the trial. That judgment should be restored and the appeal be allowed.

O'CONNOR J. The Supreme Court of Western Australia disposed of this case on one only of the various grounds that were argued before us. They came to the conclusion that Taylor and Connolly remained "the insured" within the meaning of the policy, thereby reversing the finding of *Parker* C.J. on that question. If they were right in that conclusion it would follow that there had been a breach of the 11th condition of the policy which would prevent the plaintiffs from succeeding in the action. But that, in my opinion, was not the right conclusion to draw from the evidence and documents.

The transaction between Taylor and Connolly, the bank, and the insurance company, may be regarded in either of two ways. Either there was an assignment to the bank by consent of the insurance company of Taylor's and Connolly's rights to any moneys which might become payable under the policy, Taylor and Connolly remaining the contracting parties with the insurance company, or there was an arrangement by which a

new contract between the bank and the insurance company was entered into by which the bank became the contracting party under the policy instead of Taylor and Connolly. The arrangement between these three parties was in all its essentials reduced into writing.

It is to be found in the receipts given by the insurance company and the memorandum indorsed on the policy in pursuance of clause 5, and the relation of the parties depends really upon the proper interpretation to be put on these writings.

The policy, it will be noted, covered fire risks for a year from the 10th April in one year to 10th April in the following year; and on its renewal in each year it was open to the parties to continue it in any form they thought fit. There might be, I think, good ground for interpreting the assignment of Taylor and Connolly of 13th November 1901 and the respondents' assent of 25th February following, taken together, as amounting merely to an assignment, with the assent of the insurance company, of Taylor's and Connolly's right to receive the policy moneys in the event of their becoming due. The insurance under that agreement expired in April 1902. The renewal took place on the 22nd May 1902, over a month afterwards; and it will be noted that the receipt given by the insurance company's local agent at Kalgoorlie acknowledges payment of the premium by Taylor and Connolly and the bank as mortgagees as on an original proposal for insurance which would begin at the date of the receipt. That document gave an interim cover for fourteen days only.

A receipt was issued by the Perth office of the insurance company in pursuance of the interim cover, and was countersigned on 27th May 1902 by their agent at Kalgoorlie, and the latter document it seems to me must be taken to embody the terms of the contract as finally agreed to. The policy was renewed in precisely similar terms in the following year, the receipt of the Perth office being countersigned at Kalgoorlie on 21st April 1903. It was that insurance which was current when the fire occurred.

According to the interim receipt of 22nd May 1902 the premium had been paid by Taylor and Connolly and the Western

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Australian Bank as mortgagees. The Perth office's receipt, countersigned on 27th May, embodying the terms of the 12 months' insurance, declares that the premium was received for the continuance of the old policy from 10th April 1902 to 10th April 1903, in the name of the Western Australian Bank. The plain inference to be drawn from these documents, in my opinion, is that the premium was paid by the original policy holders and the bank jointly as the consideration for the making of a new contract by which the insurance company were to hold the Western Australian Bank assured under the terms and conditions of the old policy. In other words, the agreement was that there was to be a new contract under which the person insured was to be the Western Australian Bank instead of Taylor and Connolly. The Western Australian Bank having become the "insured," it follows that the insurance effected by Taylor and Connolly with the Commercial Union Assurance Company was not made by "the insured" within the meaning of the 11th condition. The ground, therefore, upon which the Supreme Court decided against the claim of the appellant bank must fail. But the respondents further contend that, even if the bank are to be taken to be "the insured" within the meaning of the 11th condition, the appellants were bound under that condition to give notice to the insurance company of the second policy although it was effected by Taylor and Connolly.

There are two answers to that objection. In the first place, the condition does not require a notice where the second insurance has been effected by a person other than "the insured." Having regard to the terms of the 12th and 13th conditions, which must be read with the 11th, the latter does not, in my opinion, put the insured under an obligation to notify insurance on the property effected by other parties. If the second insurance were effected by some other person by direction of the insured or for his benefit, or with the knowledge of the insured and in his interest, different considerations would of course arise.

In connection with this aspect of the matter a question of fact was raised as to whether the appellant bank had any knowledge of the second insurance. There was no evidence before the Judge at the trial of any such knowledge. The Supreme Court

had before it some additional evidence from which, perhaps, an inference of knowledge on the part of the bank might have been drawn, but it became unnecessary from the course the case took before that tribunal that any conclusion upon that question should be arrived at. So also the bank's knowledge of the second insurance becomes immaterial in view of the second answer to this ground of objection, namely, that the second insurance was not on the same property within the meaning of the condition.

The condition provides that the insured must give notice to the company of any insurance or insurances made elsewhere on "the property hereby insured," and the material question to be determined is whether the second insurance effected by Taylor and Connolly was an insurance "on the property insured." Taking the words in their literal sense no doubt it was an insurance "on the property hereby insured" because the insurance covered the risk of fire on the same building. But the question is in what sense have the words been used in this condition. They must be interpreted in view of the context, and the nature and effect of the contract of insurance. Some observations of *Sir George Jessel* M.R. in construing a somewhat similar condition in the *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1) are worthy of consideration:—

"The word 'property,'" he says, "as used in several of the conditions, means, not the actual chattel, but the interest of the assured therein. What is the meaning of the words 'covering the same property' in the 9th condition? They cannot mean the actual chattel. The most absurd consequences would follow if you read those words in that sense. I am satisfied that this condition was put in to apply to cases where it is the same property that is the subject-matter of the insurance, and the interests are the same. It never could have been meant to apply, for example, to the cases of a tenant for life and remainderman, or a first mortgagee and second mortgagee, both insuring the same goods."

Mortgagor and mortgagee may each have an insurable interest

(1) 5 Ch. D., 569, at p. 577.

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in the same building, just as a remainderman, a tenant for life, or a tenant for years, may have. Each may take out a separate and independent insurance on his own interest. In each case the "property insured" is the particular interest of the insured in the building covered by the policy, and, on settlement in the event of fire, none of them could receive for his benefit more than the amount of loss sustained by him in respect of his interest. In America similar words in similar clauses have been for many years interpreted on the same principle as that enunciated by *Sir George Jessel*. A number of cases in which the meaning of a condition similarly worded was discussed are referred to in the second volume of *Hare and Wallace's American Leading Cases*, and in a passage at page 899 the result of them appears to be correctly summarized as follows:—"A subsequent will not avoid a prior insurance, unless the parties are the same, nor when the interest covered by the policy is different. *Nichols* v. *Fayette Insurance Co.* (1); *Cox* v. *Phœnix Insurance Co.* (2); *Tyler* v. *The Ætna Insurance Co.* (3); *Mutual Insurance Co.* v. *Hall* (4). Hence a mortgagee may enforce an insurance effected for his benefit, notwithstanding a subsequent insurance of the premises by the mortgagor. *Foster* v. *Equitable Insurance Co.* (5); *Woodbury Bank* v. *The Charter Oak Insurance Co.* (6); and a policy obtained on the freight of the vessel by the consignee, will not preclude the consignor from enforcing a prior policy containing a warranty that there is no other insurance." Applying these principles to the words of this policy, I am of opinion that the second insurance was not "on the property insured" within the meaning of the 11th condition, and that it was not necessary, therefore, for the appellant bank to give notice of it to the respondent company.

It was also contended that the appellant bank have not complied with the 6th condition of the policy, and, therefore, cannot recover. For the purposes of my decision I assume that they did not give notice of the fire "forthwith," and that they did not deliver particulars of their claim within fifteen days, although

(1) 1 Allen 63.
(2) 52 Maine 355.
(3) 16 Wend. 385.
(4) 2 Comstock 35.
(5) 2 Gray 216.
(6) 31 Conn. 517.

the questions of facts as to this and the alleged waiver of the condition do not seem to have been really inquired into. It follows that, if compliance with these requirements is a condition precedent to their right to sue, they cannot succeed in the action. The contest between the parties is as to the proper interpretation of the condition. A condition to that effect, though not always in that form, is to be found in practically all fire policies, and, if it were not for the qualifying words of the last three lines, it would come within the class of conditions which have been always interpreted by the Courts as conditions precedent.

The last sentence of the condition is in these words: "and in default of compliance with the terms of this condition or any of them no claim in respect of any such loss or damage shall be payable or sustainable unless and until such notice statement account proofs and explanations and evidence respectively shall have been delivered produced and given as aforesaid and such statutory declaration if required shall have been made." It is the last few words of qualification beginning "unless and until such notice," &c., that create the difficulty. If the qualifying words were omitted, compliance with the requirements in question would be clearly a condition precedent. On the other hand, if the words "unless and" were omitted, there is direct authority for the position that failure to give the notice forthwith, or to deliver the particulars and account within the time named, would not deprive the plaintiffs of their right of action, but would suspend it until the condition was in these respects complied with. The qualifying words of the condition in *Weir* v. *The Northern Counties of England Insurance Co.* (1) were substantially identical with those of the condition now under consideration, except for the occurrence in the latter of the words "unless and" before "until." The decision in that case has never been questioned, and is quoted as settled law in all the text books on insurance. *Lawson* J., in delivering the judgment, says (2):—"Why then are those words added, without which the clause would have had the stringent operation of a condition precedent? Is it not for the purpose of defining what shall be the consequence of failure to comply with the requirements of

(1) 4 L.R. Ir., 689.

(2) 4 L.R. Ir., 689, at p. 692.

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giving notice and account within the time limited; and instead of saying that in default no action shall be brought or payment made, it says, that no claim shall be payable *until* such notice and account, etc., are given, thus giving an enlarged time for doing it, provided it is done before the claim is payable? This is the ordinary grammatical construction of the words, and it may well be that those words were added in order to get over in favour of the assured the stringency of the prior words, as interpreted by the cases to which I have referred."

That argument is unanswerable in reference to the condition with which the learned Judge was then dealing, and the same line of reasoning seems to me to be applicable to the condition now under consideration, notwithstanding the words "unless and."

I was at first impressed by Mr. *Mitchell's* argument that these words made it necessary to construe the qualifying sentence distributively, "unless" being taken in connection with the direction to give notice of the fire forthwith, and to deliver the particulars of loss; "until" being taken as applying to the proofs, explanations, and evidence, which are to be furnished on request. But when the whole clause is examined it will appear that, if that is the meaning of the condition, the qualifying words are surplusage, because without them the different consequences set forth would follow the neglect to comply with the different requirements of the condition respectively.

On the other hand, it is clear that the full meaning cannot be given to the expressions "forthwith" and "within fifteen days at the latest" if the requirements as to notice of the fire and delivery of particulars of loss within fifteen days are not conditions precedent. Indeed, the only way a substantial meaning of any kind can be given to the condition as a whole is to treat its terms as being requirements which the assured undertakes to comply with, the consequence of failure to comply being, not loss, but postponement of the right of action until they have been complied with.

It cannot, however, be denied that such a construction fails to give effect to every word of the condition. It is in fact impossible to find any construction which will give full effect to every word. The case is just one of those in which, by reason of the

obscurity of the language used by the parties, a fair adjustment can be made only by the application of the principle of construction embodied in the maxim *Verba chartarum fortius accipiuntur contra proferentem* which was adopted by *Lawson* J. in *Weir* v. *The Northern Counties of England Insurance Co.* (1).

We were referred to some observations of *Sir George Jessel* M.R., in which he appears to have expressed a doubt as to whether the maxim could be considered as having any force at the present day. But it is now too firmly established as a rule of interpretation to be seriously questioned, and it has since those observations been judicially recognized and applied in *Burton & Co.* v. *English & Co.* (2), by *Brett* M.R. In the interpretation of insurance policies the maxim has been frequently used in cases where the application of the ordinary rules of interpretation have failed to elucidate the meaning of some obscurely worded condition. In *Notman* v. *The Anchor Assurance Co.* (3) the terms of a memorandum indorsed on the back of a life policy giving the assured leave to reside abroad were under discussion. In delivering judgment *Cockburn* C.J. said (4):—"Nothing could be more easy than to express that in plain terms in the instrument itself: the permission might be granted for a residence from a given day to another given day. They have not, however, done so here: the permission is given simply for a twelve months' residence at Belize, without specifying any period from which that residence is to date. This instrument being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them."

In *Fitton* v. *The Accidental Death Insurance Co.* (5), *Willes* J. applied the same principle, although he did not refer to it in express terms. He says:—"It is extremely important with reference to insurance, that there should be a tendency rather to hold for the assured than for the company, where any ambiguity arises upon the face of the policy."

In *Braunstein* v. *Accidental Death Insurance Co.* (6), the meaning of a condition in an accident policy was under con-

(1) 4 L.R. Ir., 689.
(2) 12 Q.B.D., 218, at p. 220.
(3) 4 C.B.N.S., 476.
(4) 4 C.B.N.S., 476, at p. 481.
(5) 17 C.B.N.S., 122, at p. 134.
(6) 1 B. & S., 782.

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sideration. *Blackburn* J. in delivering judgment said (1):—"I quite admit that parties may make what they please a condition precedent, but it must be shewn that they so intended. Here the stipulation is the language of one party, the Company, and '*verba fortius accipiuntur contra proferentem.*' No doubt they might have stipulated that no money should be payable under a policy unless the directors obtained any evidence they chose to ask for, but it would require very distinct language, and much stronger than any used here, to show that the parties so intended."

It is abundantly clear from these instances that, in dealing with obscure conditions in policies where, notwithstanding the application of all ordinary rules of interpretation, the meaning of the condition still remains doubtful, the Courts have adopted the governing rule of resolving the doubt by holding against the insurance company, which sought to gain advantage from the condition.

The question of construction may, therefore, be narrowed down to this. The insurance company's interpretation does not give any substantial effect to the qualifying words of the condition. The bank's interpretation, although not giving full effect to the earlier words of the condition, gives some substantial effect to every part of it. Without applying the maxim which I have been discussing, I should have felt bound to follow the latter interpretation. But applying the maxim, as it has been applied in the cases I have cited, I have no doubt that the condition must be construed against the insurance company which prepared the condition, and now puts it forward as a defence against a claim made under the policy. I am, therefore, of opinion that the condition does not make compliance with the requirements in question a condition precedent, and that on that ground of objection also the respondents must fail.

On the whole case, therefore, the objections against the judgment of the learned Chief Justice in the Court below are untenable. In my opinion his judgment was right and the judgment of the Supreme Court of West Australia setting it aside must be reversed, and the appeal upheld.

(1) 1 B. & S., 782, at p. 799.

HIGGINS J. The Full Court of Western Australia reversed the judgment of *Parker* C.J. on appeal, on the ground of condition 11 of the policy:—"The insured must give notice to the company of any insurance or insurances made elsewhere on the property hereby insured or on any part hereof the particulars of which must be indorsed on the policy and unless such notice be given and indorsement be made the insured will not be entitled to any benefit under this policy." It appears that in 1903, after the policy, the original insured, Messrs Taylor and Connolly, effected another insurance with another company, and that no notice was given to the defendant company. The position at the time was that Taylor and Connolly had borrowed money from the bank, had lodged the policy with the bank, had given a general lien over this policy and other documents, and had, on 13th of November 1901 by indorsement on the policy, made an equitable assignment to the bank expressly by way of security. The local manager of the defendant company had signed another indorsement stating that the assignment conferred on the bank whatever rights might accrue to Taylor and Connolly under the policy. The Full Court has held that these two indorsements did not pass to the bank the legal title to the policy moneys, and did not make the bank "the insured" within the meaning of condition 11; and if Taylor and Connolly were "the insured" when the second policy was effected, they did not comply with the condition, and they could not, nor could their assigns, recover the policy moneys. I concur with the Full Court in the view that the two indorsements did not of themselves pass the legal title, and did not make the bank "the insured": *Buffalo Steam Engine Works* v. *Sun Mutual Insurance Co.* (1); *State Mutual Fire Insurance Co.* v. *Roberts* (2). I concur with *McMillan* J. in his view of the case of *Ellis* v. *Insurance Company of North America* (3). There, the interest of the insured was assigned absolutely—not by way of mortgage. The insured ceased thereby to have any insurable interest; and the Court came to the conclusion that the consent of the company could have no meaning unless the intention was to create a new contract on

(1) 17 N.Y., 401. (2) 31 Pa., 438.
(3) 32 Fed. Rep., 646.

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the same terms as the old (1). But the bank relies on certain subsequent receipts for premiums as showing a new contract between the bank and the company, whereby the bank became "the insured." There is a receipt of the company dated 27th May 1902 as follows :—"Received the undermentioned premium for the continuance of policy No. 7213012 of this company in the name of *Western Australian Bank* insuring the sum of £650 for twelve months from 10th April 1902 to 10th April 1903." It will be noticed that this premium was received after the due date, and dated back to it. There was a similar receipt given on 21st April 1903 for the year 10th April 1903 to 10th April 1904. The fire occurred on 16th of December 1903. Now, I can give no other meaning to these receipts than that the defendant company insure the bank as they had insured Taylor and Connolly; and on the conditions which appear in the policy. The name of the bank is to be substituted for the names of Taylor and Connolly; but the terms of the contract are to be the same as in the expired policy. This is the substantial effect of the receipt. The bank becomes the contracting party with the company. The bank becomes "the insured." There was no need for a novation in the strict sense. The contract of insurance made with Taylor and Connolly had expired, and the bank was now insured on the same terms. It is true that the premiums for which these receipts were given were paid out of rents which Cross—agent for the defendant company and also for Taylor and Connolly—collected for Taylor and Connolly. It does not appear whether the rents were collected from properties subject to the bank's general lien; nor does the reason appear for the substitution of the bank as the insured. But the payment of the premium was made on behalf of the bank; and the bank has ratified the transaction. It is also true that the statement of claim does not treat the receipts as being fresh contracts with the bank, and speaks of the plaintiff as "renewing" the policy by paying the premiums for April 1902 and April 1903. But the receipts are in evidence; there has been no surprise on the defendants; the case of new contract was fully discussed in Perth before and by the Full Court; and it would

(1) See 17 N.Y., 401, at p. 407.

be a ridiculous technicality, as well as unjust, to refuse now to give to the receipts their full effect.

But the defendant company urges that, under condition 11, the bank, even if it is to be treated as the insured, is under a duty to give notice of any insurance effected by anybody, at all events if it knows the particulars. I cannot find any sufficient evidence that the bank knew the particulars of the second policy; and indeed the learned Chief Justice at the trial found expressly that it did not know. But I am prepared also to hold that condition 11 does not apply to policies effected by others than the insured. In the next succeeding conditions, where the parties refer to other insurances, they expressly add the words "whether effected by the insured, or by any other person;" and the fair inference is that condition 11 refers to insurances effected by the insured. No explanation whatever has been suggested of the difference in language in these conditions on the defendants' interpretation. Cases can easily be suggested of extreme injustice should an insured lose his right to policy moneys because of some other person effecting an assurance without his knowledge; and it is laid down that we are to avoid a construction which will produce injustice "if another and more reasonable interpretation is present in the Statute:" *Knowlton* v. *Moore* (1). Mr. *Mitchell*, indeed, felt the force of this consideration, and suggested a limitation of the section to the case of another policy effected with the knowledge of the insured. But the context does not refer to knowledge, and does not warrant the insertion of any such words of limitation. The condition must, in my opinion, mean either all policies by whomsoever effected, or policies effected by the insured; and, as *Jessel* M.R. says in *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (2), it is our duty, if the words admit of a reasonable construction to adopt it, rather than a construction equally admissible but absurd or unlikely. "You must read the condition in a sensible way, and not assume that these great companies intended to entrap their policy-holders and to destroy the value of the contract of indemnity by reason of the accidental contract of somebody else,

(1) 178 U.S., 41 at p. 77.

(2) 5 Ch. D., 569, at p. 577.

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which had no connection with the subject-matter of the contract, or with the price paid for the insurance."

As to condition 11, I think I ought to say that I do not rely for my judgment on the view that "the property insured" means the interest of the mortgagee in the property, and that the second insurance effected by Taylor and Connolly was therefore not within the terms of the condition. The words of *Jessel* M.R. just quoted were directed to a peculiar policy in which it was clear that in several of the other conditions the word "property" meant, not the actual chattel, but the interest of the assured therein; and he came to the conclusion that this same meaning was carried on into condition 9. But in this policy, contract and conditions, there is not to be found any instance of such a meaning. The "property" is always the iron building—"The Tasmanian Hotel"; and, so far as I can find, there is no place in the policy or conditions in which the word is used as referring to a mere interest (see policy and conditions 1, 2, 3, 5, 6, 8, 9, 10). In short, the meaning of the word "property" in the London and Liverpool policy is not a guide to the meaning in this policy. Of course, each policy has to be construed according to its own language. As for the new contract made with the bank, the word "property" is not used in the final official receipt—the document that binds the parties; but, as it provides for the "continuance" of the former policy, it must be read as applying to the same property.

There appeared to be a formidable objection to the bank's claim in paragraph 11 of the defence—that the bank had not forthwith after the fire given notice thereof to the defendant company, or within 15 days delivered to the company a statement and account, as prescribed by condition 6. The evidence is not very distinct as to notice, but there is no doubt that the statement and account were not given within 15 days after the fire. Condition 6 is very long, and in parts very obscure. But, for the present purpose, it is sufficient to say that it prescribes notice "forthwith," and a statement and account within 15 days, showing the property destroyed, the value, the loss, the interest of the insured, &c.; and the insured is to give such proofs, explanations and evidence as may be required, and, if required, a

statutory declaration as to truth. If condition 6 had stopped here, there is little doubt that the delivery of the statement and account within the 15 days would be a condition precedent to the right to recover: *Roper* v. *Lendon* (1). But the words which follow state the consequences of failure to comply with the course prescribed:—

> "And in default of compliance with the terms of this condition or any of them no claim in respect of any such loss or damage shall be payable or sustainable unless and until such notice statement account proofs and explanations and evidence respectively shall have been delivered produced and given as aforesaid and such statutory declaration if required shall have been made."

It is urged that by force of such a condition the insured must within fifteen days give all the particulars prescribed, or lose all right to the policy moneys—even if he happen to be in England when the fire occurs in Kalgoorlie. If such is the meaning, the subordinate sentence beginning "unless and until," and indeed all the words beginning with "and in default" are unnecessary. The previous words made the policy useless, unenforceable; what more do these words effect? To give effect to all the words of the condition, it seems to me that the claim is not payable or sustainable *unless and until* the notice, statement, &c., be delivered. The policy is useless only until the notice, statement, &c., have been supplied. No action can be brought until they have been supplied. The position of the words "as aforesaid" certainly tend to show that they relate to the verbs "delivered produced and given," and not merely to the nouns "notice statement," &c. But there is no necessary inference that "as aforesaid" relates to the time prescribed for giving the notice, &c., as well as to the description of and the manner of giving the notice. It is purely a question of construction of the conditions of this particular policy, and I do not place much reliance on any decision under a policy which contains conditions similar but not the same; but the decision and the reasoning in *Weir* v. *Northern Counties of England Insurance Co.* (2) are favourable to the view that the notice, statement, &c., may be given after the time

(1) 1 El. & E., 825.

(2) 4 L.R. Ir., 689.

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specified, but before action. Personally I do not attach much practical importance to the maxim, *verba chartarum fortius accipiuntur contra proferentem*. I think that contracts ought to be construed in the same way whether they are framed or put in evidence or relied on by one party or the other. In many cases the verb *proferentem* seems to be treated as if it referred to the drafting or framing of an instrument: *Broom's Legal Maxims*, 7th ed., pp. 441, &c. I do not know on what grounds. I confess that I am in sympathy with the words of *Jessel* M.R. in *Taylor* v. *St. Helen's Corporation* (1) on the subject of this rule of construction. The maxim is taken from a bundle of maxims collected in *Coke Litt.*, 36*a*; and it is followed by a maxim equally sound, no doubt, and equally valuable: *Generalia verba sunt generaliter intelligenda*. If the maxim in question means merely that a document written by A. is to be read as outsiders would read it, and not as A. would read it, the doctrine is true, but trite, and not warranted by the words used. Yet if the maxim is applicable as the last resort in construction, it certainly ought to be applied to such a condition as this in a policy, inasmuch as the insurance company frames the language of the conditions in its own way and in its own interest. I am of opinion that the defendants fail as to this defence also.

A further defence might possibly have been raised under condition 3—that the bank was not the legal owner of the land and buildings—that it held only a general lien; and that it did not expressly describe its position. But this defence has not been raised by the pleadings or urged by the company at the bar; and I pronounce no opinion with regard thereto. On these grounds I concur in the judgment.

Appeal allowed. Order appealed from discharged. Respondents to pay costs of appeal.

Solicitors, for the appellants, *Stone & Burt*.
Solicitors, for the respondents, *Downing & Downing*.

B. L.

(1) 6 Ch. D., 264.