[HIGH COURT OF AUSTRALIA.]

THE WESTERN AUSTRALIAN INSURANCE COMPANY LIMITED . . . . . Defendant, } Appellant;

AND

DAYTON . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 20, 21, 22.

SYDNEY, *Dec.* 19.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Insurance—Policy of insurance on motor-car—Validity of policy—Untrue answer to question in proposal—Answers filled in by agent of insurer—Authority of agent—Agent for proposer or insurer—Breach of warranty—Non-disclosure of fact—Materiality—Verdict of jury.

Practice—High Court—Appeal from Supreme Court of State—Appeal as of right—Policy of insurance against damage by fire, &c., to extent of £350*—Declaration of validity of policy—Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 35 (1) (*a*) (2).

A policy of insurance effected by the respondent with the appellant, an insurance company, upon a motor-car, stipulated that a written proposal and declaration was the basis of the contract. The proposal form contained certain questions which were untruly answered, and declared and warranted that the answers were in every respect true and correct. The untrue answers had been filled in by an employee or agent of the insurance company after he had obtained the respondent's signature to the proposal form, and the true facts had never been communicated to the company or to the employee or agent. In an action by the respondent for a declaration that the policy was good and binding on the company, the Supreme Court made a declaration to that effect. On appeal therefrom,

Held, by *Isaacs* A.C.J. and *Gavan Duffy* J. (*Starke* J. dissenting), that the declaration was properly made.

Per Isaacs J.: The employee or agent had acted within the scope of his authority and the company was estopped from relying on the untruth of the answers.

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Per Gavan Duffy J. : The rights and obligations arising under the policy still remained open.

Per Starke J. : A breach of warranty had been proved and the company was not estopped from relying on this breach, and consequently the policy was not good and binding on the company.

On the trial of the action the jury had found that the fact that a motor-car of the respondent had previously been burnt, and in respect thereof a claim had been made by him on another insurance company, was not likely to affect the appellant in considering the acceptance of the proposal.

Held, that, the question of materiality being one of fact, the High Court, even if it had jurisdiction to interfere with the finding, should not on the evidence do so.

By the policy the appellant insured the motor-car against loss or damage by collision, fire or theft to the extent of £350. A declaration having been made in the action by the Supreme Court of Victoria that the policy was valid,

Held, by *Isaacs* A.C.J. and *Starke* J. (*Gavan Duffy* J. dissenting), that an appeal lay as of right to the High Court under sec. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1920.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Baxter W. T. Dayton against the Western Australian Insurance Co. Ltd., by which the plaintiff claimed a declaration that a certain policy of insurance issued by the defendant against loss or damage by collision, fire or theft to a certain motor-car to the extent of £350, was good and binding on the defendant.

By its defence the defendant alleged as follows, so far as is material :—

4. On or about 20th April 1923 the plaintiff made a proposal to the defendant for (*inter alia*) insuring against damage to or loss by fire or theft of a Chevrolet motor-car No. 30952 (being the car referred to in the statement of claim); and by the said proposal it was declared that such proposal and the declaration therein contained were the basis of the contract of insurance for which it proposed, and the plaintiff by such proposal declared and warranted that the answers in the said proposal were in every respect true and correct and that the proposal for insurance was not in excess of the actual value of the car described and that he had not withheld any

information likely to affect the acceptance of such proposal, and the plaintiff agreed that such proposal and declaration should be the basis of the contract between the defendant and himself, and the plaintiff agreed to accept the defendant Company's policy subject to the terms and conditions to be contained therein and that all questions not answered should be deemed to be answered in the negative.

5. In pursuance of such proposal and relying on the truth of the statements therein made, the defendant issued to the plaintiff and the plaintiff accepted a policy of insurance dated 30th April 1923, being the policy sued on, and by such policy it was agreed that the written proposal and declaration dated 20th April 1923 hereinbefore referred to should be the basis of the contract of insurance therein contained and incorporated therein and that the particulars therein set forth should be in all cases deemed to be furnished by or on behalf of the insured.

6. The said policy was subject to a condition that all benefits thereunder should be forfeited if such insurance should have been obtained through any misstatement, misrepresentation or suppression, or if any claim made shall be fraudulent.

7. The plaintiff in the said proposal misstated and/or misrepresented to the defendant that he had only once previously had an accident or fire to a motor vehicle, to wit, that a motor vehicle had backed into a lamp and had the hood pulled off.

8. The plaintiff in the said proposal falsely stated to the defendant that he had only once previously made a claim against an insurance company, to wit, a claim against the defendant Company; whereas in fact he had in or about the month of April 1922 made a claim against the Farmers and Settlers Co-operative Insurance Co. of Australia Ltd. in respect of damage by fire to a motor-car and had received the sum of £250 or thereabouts in respect of such claim.

9. The plaintiff in the said proposal suppressed the fact that in or about the month of April 1922 he made the said claim upon the Farmers and Settlers Co-operative Insurance Co. of Australia Ltd. in respect of damage by fire to a motor-car and received the said sum of £250 or thereabouts in respect thereof.

10. The facts mentioned in par. 9 hereof constituted information

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likely to affect the defendant in the acceptance of the said proposal and were known to the plaintiff but unknown to the defendant, and the defendant was induced to make the said policy by the plaintiff suppressing such facts.

By his reply the plaintiff contended that the defendant ought not to be admitted to set up against the plaintiff the allegations above set out because the proposal therein mentioned was made under the following circumstances:—Defendant had previously issued to plaintiff a policy on the same motor-car similar to the one sued upon. On the date on which the said proposal was made one Green an employee and/or agent of defendant called at plaintiff's place of business in Mary Street, St. Kilda, and without seeing plaintiff said to plaintiff's wife: "I have called for the cheque for insurance on Mr. Dayton's motor-car," or words to that effect. Plaintiff's wife thereupon proceeded to another room, where plaintiff was, and obtained from plaintiff a cheque for £13 5s., and returned and handed it to the said Green. The said Green then produced a blank printed form of proposal without any handwriting therein and handed it to plaintiff's wife, saying at the same time:—"The old policy has lapsed and a fresh policy will have to be issued. I have a proposal form with me—just get Mr. Dayton" (meaning plaintiff) "to sign it here" (pointing to the foot of the document) "and I'll fill it in at home. I'm in a hurry to-night as I'm going to a dance"; or words to that effect. Plaintiff's wife there and then took the said proposal form to plaintiff, who was in another room, and told him what the said Green had said to her and handed to plaintiff the said form. Plaintiff thereupon signed the said form of proposal without reading it or filling in any answers to any questions appearing therein and handed it back to his wife, who thereupon took and handed it to the said Green. At the time the said document was handed to the said Green none of the statements referred to in pars. 7 and 8 of the defence appeared in the said document. The answers to the questions appearing therein were not supplied by plaintiff or any one on his behalf.

By the policy the defendant agreed (*inter alia*) to "pay for, or at its option repair or make good, as far as circumstances permit, and in reasonably sufficient manner, all loss of or damage to any

automobile described in the schedule hereon . . . where such loss or damage is caused by (a) accidental collision or impact with any object, or malicious acts . . . excluding the first £5 of each and every claim; (b) fire, lightning, self-ignition, or explosion external to the engine, exhaust or silencer; (c) theft, burglary, house-breaking, larceny, or any attempt thereat . . .". It was a condition of the policy that, if any difference should arise as to the amount of any loss or damage, the difference should be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator should be first obtained.

The action was tried before *Mann* J. and a jury. Two questions were put to the jury; and the questions and the jury's answers to them were as follows:—Question 1—"Did the fact that in or about April 1922 the plaintiff had made a claim on the Farmers and Settlers Co. in respect of damage by fire to a motor-car and received the sum of about £250 in respect thereof constitute information likely to affect the defendant in considering the acceptance of the proposal?" Answer—"No." Question 2—"Did the plaintiff supply to Green the answers to the questions in the proposal, or were they filled in by Green after the plaintiff had signed?" Answer—"They were filled in by Green after the proposal was signed by the plaintiff." *Mann* J. thereupon made an order adjudging and declaring that the policy was good and binding on the defendant.

From that decision the defendant now appealed to the High Court on the following grounds (*inter alia*):—(3) That upon the evidence the fact that the respondent had previously, namely, in the year 1922, made a claim on the Farmers and Settlers Co-operative Insurance Co. of Australia Ltd. in respect of damage done to a motor-car by fire and had received £250 in settlement thereof was a fact material to be known by the appellant in effecting the insurance policy sued on; (4) that upon the evidence the learned Judge should have directed the jury to find that the respondent had concealed or alternatively failed to disclose to the appellant a fact material to be known by it in effecting the insurance policy sued on, being the fact referred to in ground 3 hereof; (5) that by reason of

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the said failure to disclose, the said policy was invalidated; (6) that there was no evidence or alternatively no sufficient evidence to support the finding of the jury that the respondent had not failed to disclose a material fact to the appellant; (7) that upon the evidence the learned Judge should have found or directed the jury to find that the respondent was bound by or responsible for the statements or answers set out in the proposal for insurance signed by the said respondent and/or that the said answers were in fact and in law made on behalf of the said respondent; (8) that the appellant was not in law estopped from relying upon the falsity of statements or answers appearing in the said proposal; (9) that by reason of the said falsity the respondent was disentitled to sue or rely upon the aforesaid policy of insurance; (10) that if the respondent was not bound by or responsible for the said statements or answers the parties to the said insurance were not *ad idem* and no contract of insurance existed; (11) that notwithstanding the findings of the jury the appellant was entitled to judgment.

Other material facts are stated in the judgments hereunder.

Owen Dixon K.C., *L. B. Cussen* and *Robert Menzies*, for the appellant.

Walker, for the respondent, took a preliminary objection: The appeal is not competent. It does not appear that £300 is directly or indirectly involved. The appellant cannot say that he is worse off by at least £300 if the judgment stands than if the appeal were successful (*Beard* v. *Perpetual Trustee Co.* (1)).

Owen Dixon K.C. The objection is too late (*Rules of the High Court*, Part II., Sec. III., r. 11). The appeal comes within sec. 35 (1) (*a*) (2) of the *Judiciary Act*, for it involves a claim respecting a civil right amounting to £350. The right under the policy is a civil right, and the obligation under it to pay an amount up to £350 is a civil right amounting to £350. The introduction of a series of contingencies into a contract which must be complied with in order to entitle a party to a certain named sum does not make a claim

(1) (1918) 25 C.L.R. 1.

as to the contract any the less a claim to a civil right amounting to that sum. The words "amounting to or of the value of three hundred pounds" in sec. 35 (1) (*a*) (2) attach to the words "property or civil right," and not to the words "claim, demand, or question." A civil right amounting to £350 is involved, because a liability on a promise to pay £350 in certain events is involved, and a civil right of the value of £350 is involved because the respondent claims a civil right of that value.

Walker, in reply. The value must be looked at so far as it affects the party seeking to appeal (*Allan* v. *Pratt* (1)).

ISAACS A.C.J. This is an action for a declaration that an insurance policy for £350 or less is good and binding on the appellant Company. The matter has not yet advanced to the stage when that sum of £350 or the reduced sum has become relevant. In my opinion this is a case which is within sec. 35 (1) (*a*) (2) of the *Judiciary Act*, and an appeal lies as of right.

GAVAN DUFFY J. If I were satisfied that this claim was a claim to establish the validity of a policy to secure payment of £350 in a particular event which had happened, I should agree that an appeal lay as of right. But, in my opinion, the policy is not a policy to secure payment of £350, but is a policy to secure payment of an amount representing the actual damage done to the motor-car up to the amount of £350. It is true that the car has been injured, but no damages are claimed in this action, the amount of damage sustained has not been ascertained nor has any sum to be paid in respect of the injury been agreed on by the parties. The pecuniary gain that may accrue to the plaintiff and the pecuniary loss that may be sustained by the defendant either directly or indirectly, by reason of any adjudication in this action, are quite uncertain. I think the judgment sought to be appealed from is not within the provision of sec. 35 (1) of the *Judiciary Act*, and that there is, therefore, no appeal as of right.

STARKE J. I agree with my brother *Isaacs* that this appeal is competent.

(1) (1888) 13 App. Cas. 780.

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Owen Dixon K.C. and *Robert Menzies*. The finding of the jury as to the first question put to them was one that a jury could not reasonably make, and the learned Judge should have disregarded it (*Dewar* v. *Purday* (1)). There was no evidence to support that finding. There was a breach of warranty by the respondent in not including in his answers the claim he had made against the Farmers and Settlers Co-operative Insurance Co., which vitiated the policy (*Condogianis* v. *Guardian Assurance Co.* (2)). The appellant is not estopped from setting up that defence, for Green was not the agent of the appellant so as to make the appellant responsible for what was done in relation to the proposal. When the respondent gave Green the proposal signed in blank, Green was constituted the agent of the respondent to fill it up and the respondent is bound by what Green did (*Biggar* v. *Rock Life Assurance Co.* (3)). There is no evidence of any actual authority from the appellant to Green to bind the appellant by any contract, and there was no holding out of Green which would give him any more authority than he actually had: *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (4) is distinguishable on the facts.

Walker. There is sufficient evidence that Green acted within the scope of his authority, and that that authority extended to taking the signature of a proponent to a blank proposal form. If an agent is allowed to represent, to persons who desire to insure, what it is that the company requires, he does not exceed his authority when he says that all the company requires is a signature to a blank proposal (*Gallagher* v. *United Insurance Co.* (5); *Insurance Co.* v. *Wilkinson* (6); *Insurance Co.* v. *Mahone* (7); *Ballantyne* v. *Mutual Life Insurance Co. of New York* (8); *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (9); *Pearl Life Assurance Co.* v. *Johnson* (10); *Paxman* v. *Union Assurance Society* (11)).

[ISAACS A.C.J. referred to *Thornton-Smith* v. *Motor Union Insurance Co.* (12).

(1) (1835) 4 N. & M. 633; 3 A. & E. 166.
(2) (1921) 2 A.C. 125; 29 C.L.R. 341.
(3) (1902) 1 K.B. 516.
(4) (1924) 35 C.L.R. 14.
(5) (1893) 19 V.L.R. 228; 15 A.L.T. 6.
(6) (1871) 13 Wall. 222.
(7) (1874) 21 Wall. 152.
(8) (1891) 17 V.L.R. 520; 13 A.L.T. 161.
(9) (1892) 2 Q.B. 534.
(10) (1909) 2 K.B. 288.
(11) (1923) 39 T.L.R. 424.
(12) (1913) 30 T.L.R. 139.

[STARKE J. referred to *New York Life Insurance Co.* v. *Fletcher* (1).]

Green must, on behalf of the appellant, have undertaken to put correct answers into the proposal, and to have agreed that the appellant had all the information in its possession that was necessary to answer the questions correctly. Another view is that Green represented that the proposal was only a formal application for a renewal of the old policy.

[STARKE J. referred to *Billington* v. *Provincial Insurance Co. of Canada* (2); *Parsons* v. *Bignold* (3).]

Robert Menzies, in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal by the Western Australian Insurance Co. Ltd. against the judgment of *Mann* J. declaring that a policy of insurance in respect of a motor-car, made in April 1923 in favour of Baxter W. T. Dayton, is good and binding on the Company. The action was merely to obtain that declaration, because, although the car had been destroyed by fire, one of the conditions provides as a condition precedent to liability to pay that there shall be arbitration to determine the amount of loss or damage in case of dispute, and here all liability was denied.

The defence set up was rested on one circumstance only—the non-disclosure of the fact that on 11th April 1922 Dayton had made a claim against the Farmers and Settlers Co-operative Insurance Co. in respect of damage by fire to another motor-car and had received £250 in respect of that claim. This non-disclosure the appellant Company avers operates in several ways, namely, (1) it renders untrue the answers in the proposal, and so destroys the agreed basis of the contract; (2) it amounted to a withholding of information likely to affect the acceptance of the proposal, and so destroys the agreed basis of the contract; and (3) it was a suppression which worked a forfeiture of all benefits under the policy under the second condition of the policy.

(1) (1886) 117 U.S. 519.
(2) (1879) 3 Can. S.C.R. 182.
(3) (1844-46) 15 L.J. Ch. 379.

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The case was tried with the aid of a jury of six. By arrangement at the trial two questions only were submitted to the jury and all other questions of fact were to be dealt with by the learned Judge. The two questions put to the jury and the answers they gave are as follows:—(1) "Did the fact that in or about April 1922 the plaintiff had made a claim upon the Farmers and Settlers Co. in respect of damage by fire to a motor-car and received the sum of about £250 in respect thereof constitute information likely to affect the defendant in considering the acceptance of the proposal?" Answer—"No." (2) "Did the plaintiff supply to Green the answers to the questions in the proposal, or were they filled in by Green after the plaintiff had signed?" Answer—"They were filled in by Green after the proposal was signed by the plaintiff." The second question was to determine the conflict of evidence between, on the one hand, Inspector Green (the Company's agent who dealt with the respondent) and, on the other hand, the respondent, his wife and another witness for the respondent.

Mann J., in his reasons for judgment, held that the Company should fail. Shortly his grounds were: (1) as to the warranty of truth, he held, having regard to the facts found by the jury and to the other circumstances of the case, that the Company was, as a matter of justice, estopped from relying on the incorrectness of the answers as appearing from the proposal; (2) as to the other phases of the defence, the jury's findings could not be set aside by him, and they concluded the matter; and (3) as to the second question he expressly agreed with the jury's finding.

The Company has appealed to this Court on various grounds, and claims to have judgment entered for it. I pass by the generality of the first and second grounds. By grounds 3, 4, 5, 6 and 11 the Company contends that on the evidence the fact not disclosed was necessarily material and should have been so held notwithstanding the jury's finding to the contrary. By grounds 7, 8 and 9 it contends that, by reason of the falsity of the answers, there was a breach of warranty and for this reason also the Company should succeed. By ground 10 it contends that, if the respondent was not bound by the answers, the parties were not *ad idem* and there was no contract of insurance.

The last-mentioned ground may be at once disposed of. No special argument was directed to it. The circumstances of the case leave no room for it. That there was, subject to the basis being satisfied, a clear contract of insurance cannot be doubted. The only questions are what were its basic and other terms, and whether these were observed, and, if not, how far the Company is entitled to rely on the non-observance.

As to the first group, raising the question of materiality, the Company's position is that the claim of 11th April 1922 was inherently, and, if not inherently, is shown by the weight of evidence to have been, a fact likely to affect the acceptance of the proposal, and that the learned Judge was at liberty to hold and should have held accordingly. The respondent, on the other hand, contends that the issue was one for the jury, and for its solution depends on the whole of the circumstances, and that the evidence, including that as to the conduct of the Company's representative, is sufficient to support the finding. This includes estoppel. He further contends that *Mann* J. was bound by the finding; that, if it were wrong, it should have been dealt with by the Full Court of the State, and that this Court, on established decisions, cannot interfere with the finding.

The second group deals with warranty. As to this the Company points to the policy, which refers to the "written proposal and declaration dated the 20th day of April 1923" as the basis of this contract, and as "incorporated" in the contract, and declares that the "particulars therein" (that is, in the proposal and declaration) "set forth" shall "be in all cases deemed to be furnished by or on behalf of the insured." The Company then relies on the omission of any mention of the claim on the Farmers and Settlers Co-operative Insurance Co. in answer to a specific question as to former claims and requiring a statement as to "each company claimed upon," and says that the incorrectness of the answer is a complete answer to the respondent's claim under the contract. The document called "Proposal and Declaration," when produced, bears out, so far as its face appearance goes, the contention of the Company, and demands an answer from the respondent. That answer as pleaded, as accepted by *Mann* J. and relied on at this

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bar, is estoppel. Estoppel is, therefore, relied on by the respondent as an answer to the whole defence.

It is all-important to understand the relevant facts. The jury and the learned trial Judge agree that the evidence of the respondent and his wife is to be accepted in preference to that of the Company's representative, Green. There is, however, some evidence of Green which is uncontradicted and relating to the internal affairs of the Company's office which is material, and which I am prepared to accept as reliable. On this basis, the relevant facts begin on 11th April 1922, when the respondent made a claim in writing for £250 for damage by fire to a Singer motor-car insured by the Farmers and Settlers Co-operative Insurance Co. It was allowed in full. On 13th April 1922 a policy of various indemnities up to £400 was applied for, as on behalf of the respondent, to the appellant Company in respect of a Chevrolet motor-car. This car had been purchased by him on that date from a firm called S. A. Cheney Motors for £435 with some accessories. The respondent did not completely pay for the car at first, and he did not apply for that insurance. It was applied for by S. A. Cheney Motors, apparently in the respondent's name. He gave no particulars, these being furnished by S. A. Cheney Motors. The appellant's manager, Mr. Hammond, says: —"The first policy was issued, not to Mr. Dayton, but to clients of ours, S. A. Cheney Motors. I understand that the car was sold on time payment to Mr. Dayton, and S. A. Cheney Motors lodged that proposal mainly" to "cover their interest in the car, but, following the usual trade practice, they took it out in the name of S. A. Cheney Motors and Dayton as regards their respective rights and interests." This was, as I infer from the dates arranged, so that, when the car was fully paid for, there should issue a clean policy to the respondent himself. The policy in evidence was numbered 1908, and is solely in Dayton's name for one year from 13th April 1922. However, both according to Mr. Hammond's testimony and by reference to the document itself, the proposal on that occasion was by S. A. Cheney Motors. *It contained no answers or information whatsoever relative to the matters relied on in this action as being untrue or withheld.* The proposal, indeed, had a blue-pencil line drawn through the warranty declaration and the

whole series of questions printed on the proposal and declaration below the particulars of the motor-car and the insurance required, except as to one question the answer to which was that the car was for private use. This blue-pencil line is initialled apparently by some official of the Company. The respondent paid off the car in about six months, and the policy was then sent on to him. It is to be observed that the policy, though covering the year 13th April 1922 to 13th April 1923, was not actually issued until 15th September 1922; that is, by clear inference, after the appellant Company had learnt from S. A. Cheney Motors that the respondent alone was interested in it. It refers to a proposal of the day before its issue for which the respondent was certainly not responsible. S. A. Cheney Motors are stated by Green and on the face of the proposal itself to be *agents* of the appellant Company, so that the inference is fairly obvious. But the important fact at this point is that policy 1908 was issued to the respondent upon a proposal and declaration containing particulars merely as already mentioned. The policy 1908 referred, as does the one sued on, to "a written proposal and declaration" as the basis of the contract. The respondent, of course, knew perfectly well, as did the appellant Company, that there was, so far, no mention of the claim of 11th April 1922 on the Farmers and Settlers Co-operative Insurance Co., and no request for any such information and no attempt to give any information of the kind. The policy witnessed that in consideration of the premium "the Company, during the said period" (that is, until 13th April 1923) "or during the continuance of this policy by *renewal*" shall indemnify &c. It contained a schedule of the property insured, giving full particulars of the car. The next event of importance is that on 19th April 1923, the respondent not having taken any step to continue the insurance, an inspector of the appellant Company, named Green, called at the respondent's house about 5 o'clock. The interview is thus described by *Mann* J.:—"Green called at my place on 19th April 1923, and remarked did I know my policy had run out, had expired; and I said: 'No, I did not.' He said: 'I have been up to Cheney's and they say they have nothing to do with that car now it is yours.' I said: 'Yes.' He said: 'Do you want to renew it?' I said: 'Yes.' He

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told me I had had it insured last year for £400, and there would have to be a reduction on account of the 12 months' usage. The sum of £350 was suggested. I had nothing to do with the suggesting of it. Green suggested that it should be insured for £350, and I agreed. He said the premium on that would be £13 5s. I did not give him the premium that evening. I told him to call next evening and get a cheque. He then left." The outstanding feature there was that the transaction was initiated by the Company and as a "renewal" of the former transaction. On the morning of the 20th the respondent signed the cheque for £13 5s. and left it under an inkwell in his house. The respondent's evidence is thus continued by the learned Judge :—"I understand he called again on the following afternoon, but I did not see him on that occasion. About 5 o'clock I was engaged in my surgery. My wife came in and spoke to me. My wife asked for a cheque as the insurance man was in the waiting-room and he wished to get the cheque. I told her that was quite right—that it was on the desk. She got it from under the inkstand and took it out to him. A few moments later she returned and she brought a form for me to sign. She said that the gentleman was in a hurry and if I just signed it—she had already told the gentleman he could not see me, and he said it did not matter as long as I signed this—he would fill it in that evening. I signed the form. At the time I signed that form there was no manuscript writing on that document, nothing but printed matter; and, when I handed it to my wife to give it back it was, in the same order, with nothing on that document except my signature. I did not read the form to see what it was. Subsequently I received the policy produced." The evidence of respondent's wife is narrated thus by *Mann* J.: —"I remember a man calling at our place of residence. He was an insurance man. He told me that he had to be there that night for a cheque for the Western Australian Insurance Co. on account of the motor-car. I told him that if he waited a minute I would go in and speak to Mr. Dayton, who was very busy. He said: 'Very well.' So I went in. I told him that an insurance man was in the waiting-room and that this insurance man had told me that he had to call to-night for a cheque for his policy. Mr. Dayton said to me:

'Very well, Else; you get the cheque off my desk under the inkstand and take it to the gentleman in the waiting-room, and tell him I am busy.' After I had given him the cheque he took a form out of his pocket. He gave me the form and said: 'I am in a hurry, I want to go to a dance to-night. Would you mind asking Mr. Dayton just to sign this, and I will fill it in at home.' I said: 'Very well.' So I went into Mr. Dayton's room again. I told him that the insurance man had said that if he would sign his name at the bottom of this form it would be all right—he would fill it in at home. Mr. Dayton took the form and I got the pen and ink and he signed his name at the bottom, and I took the form out to the waiting-room again to this gentleman. He said: 'Thank you very much. I will fill it in at home. I am in a hurry to go to a dance." In cross-examination she added, referring to Green and the yellow form:—"He put his finger at the bottom and said: 'If you ask Mr. Dayton to sign that at the bottom it will be quite all right; I will fill it in at home; I am in a hurry, I want to go to a dance.'" Green's actual position in the Company's service is described in answers to interrogatories as "an inspector of the said Company, his duties being to inspect the agencies of the Company and *secure business* for the Company in the southern suburbs of the City of Melbourne," and he was allowed to obtain proposals for insurance with the Company and collect premiums to be paid on policies to be issued by the Company. It is admitted by answers to interrogatories that the answers referred to in the defence as being misstatements, misrepresentations and false statements are in the handwriting of Green. Green, besides giving an account of the interviews at Dayton's house in violent conflict with that accepted by the Judge and the jury, stated that part of his duties are "*soliciting business* and inspecting," that he filled in the particulars in the proposal at the Company's office, that after the first visit to Dayton he saw the manager and said: "Is it settled to have the insurance for £350 upon the car?" He said: "I put it in with lead pencil for £350 on the day when I came into town and referred it, and everything was all right and I went out." He also said: "I had the information from our proposal in the office," that is, the particulars of the car. There should be finally noted the following passage from the proceedings at the

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trial:—" Mr. *Walker*: 'I apply for permission to recall the plaintiff in order to tender evidence of the circumstances under which the previous fire occurred, and the previous claim was made, for the purpose of showing that the facts were not material to the risk afterwards undertaken.' Mr. *Cussen* objects on the ground that the facts alleged were not within the knowledge of the defendant Company. His Honor:—'I think that evidence is not adducible under the pleadings as they stand. It is not relevant and should not be allowed.' " This is very important if it becomes necessary to consider the " materiality " of the fact not disclosed apart from the agreement for warranty. The appellant thus deliberately excluded evidence which, if the matter be relevant at all, manifestly may have borne upon the materiality of the occasion.

Mann J., observed in his judgment:—" In considering the effect of the evidence above mentioned it is necessary to have regard to the nature and extent of Green's authority from the Company. He was an officer of the Company, called an inspector, whose duties were to solicit business and take proposals and receive premiums. From this evidence and from the methods pursued in the business he was engaged in, he clearly had authority, in my opinion, to obtain from customers proposals for insurance in such forms as the Company would accept, and, what is involved in this, to give all necessary information to applicants as to what was necessary to be done and what the requirements of the Company were as to the form and contents of a proposal which would enable the applicant to obtain a valid contract of insurance." I entirely agree with that conclusion. I add to that, that his evidence as to referring the very matter to the manager and receiving approval of the specific transaction strengthens the conclusion as to his authority to represent the Company in his negotiations with the respondent.

When those facts are collected and considered in order, both for their relative bearing and the proper inferences to be drawn from them, as the parties themselves at the time would naturally do, the position is, to my mind, without serious doubt. The Company and the respondent were mutually aware that policy No. 1908 was issued to the respondent alone on 15th September 1922 for the balance of the current year, 13th April 1922 to 13th April 1923;

that it was so issued without any information being required from or given by him as to former claims; that he knew nothing of any such requirement; that policy No. 1908 referred to a renewal; that the respondent did not solicit, but that the Company did solicit, a renewal; that Green, a responsible officer of the Company, whose ordinary duties included such solicitation and the securing of business in the respondent's district, did, with the specific approbation of the manager of the Company, solicit a renewal, and in fact did so on terms which reasonably would lead any ordinary person to believe that payment of the amount of premium stated by Green, and the formal signature to a document referring, as one in the respondent's position would naturally suppose, unless he read it or was told directly, only to particulars of the motor-car which were already in the possession of the Company. Green entirely threw the respondent off his guard as to the existence of any provisions of the proposal and declaration of the nature now relied on, by bustling him into the formal attachment of his signature without reading the document, inducing him to believe it was useless and unnecessary; thus preventing him from becoming acquainted with the printed terms. So effectually was this done that, as the respondent told *Mann* J., he was surprised when at a later stage he saw the contents of the document to which his name was appended. Green hurried the respondent, not as the respondent's agent nor for the respondent's purposes, but for the purposes of the Company in so far as concerned the securing of the business, and for Green's own motives so far as he desired to hurry off to a dance. Green, possessing large authority, specially authorized by the manager *quoad* this transaction, received the premium, passed it on to the Company, first filling up the document called "proposal and declaration" in consonance with what respondent would naturally expect, namely, the particulars of the property and amount of insurance, and so far filling it up truly. He also took upon himself to fill up further information already in possession of the Company. The Company, knowing the handwriting of their own officer in the details filled in by him, recognized on that very document that it was a replacement or renewal of No. 1908, though now numbered 2376, thus identifying it, as the respondent and Green

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obviously identified it, as virtually a continuation of the former insurance. The Company confirmed this by writing across the former proposal the word "replaced." Since that time, and even up to the present moment, the Company has retained the premium, and so holds fast to the benefit of Green's act, though refusing to pay the price he, and after him the Company itself, bargained to pay.

I am of opinion that, both as to the first group and the second group (and, of course, as to the third also) of the appellant's objections to the judgment appealed from, the appeal must fail on the ground of estoppel.

Estoppel by representation is neither mysterious nor arbitrary nor technical. It is nothing else than the justice of the common law intervening to prevent a lawful and righteous claim or defence being defeated by misrepresentation; and it has effect notwithstanding the most elaborate artificial barriers constructed for the purpose of excluding inquiry. The injustice that it is intended to prevent is so akin to fraud that it vitiates all attempts to control the operation of the doctrine. *Yorkshire Insurance Co.* v. *Craine* (1) is a strong illustration—the only difference between the ground of this Court's decision and that of the Privy Council judgment being as to the construction to be placed on the jury's finding respecting "intention," that is, whether the jury meant it as an existing resolve (see, for instance, *Ayrey* v. *British Legal and United Provident Assurance Co.* (2)) or as a promise for the future. There was no difference as to the law, and the contract there, though extremely severe, was subject to the doctrine of estoppel in respect of inconsistent states of fact. The doctrine is a common law doctrine needing no aid of equity (per Lord *Herschell* in *Bloomenthal* v. *Ford* (3)). The doctrine, says Lord *Macnaghten* in *George Whitechurch Ltd.* v. *Cavanagh* (4), "is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the

(1) (1920) 28 C.L.R. 305; (1922) 2 A.C. 541; 31 C.L.R. 27.
(2) (1918) 1 K.B. 136, at p. 142.
(3) (1897) A.C. 156, at p. 167.
(4) (1902) A.C. 117, at p. 130.

case of *Carr* v. *London and North-Western Railway Co.* (1). Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles." "The principle . . . is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it" (Lord *Shand*, for the Judicial Committee, in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2)). Viscount *Haldane* in *London Joint Stock Bank Ltd.* v. *Macmillan* (3), after quoting the general principle of estoppel by conduct enunciated in *Freeman* v. *Cooke* (4), says that "estoppel in pais is, generally speaking, a mere application not of any technical rule, but of common sense." Lord *Haldane* says (5):—"The principle laid down by *Parke* B. is one the recognition of which is essential to the conduct of business between the members of every well-ordered community. It is generally recognized in ordinary social life as imposing obligation of honour as much as of law. And it may be observed that it is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable not the less on that account of affecting gravely substantive rights." This entirely supports what *Cozens-Hardy* L.J. said in *Lloyd's Bank Ltd.* v. *Cooke* (6): "The well-known doctrine of estoppel by conduct, a doctrine which is applicable to all transactions, unless it is excluded by some express statutory provision, and which really is, after all, only a branch of the law of evidence." And again, on the same page, the Lord Justice observes: "The essential principle of the law of estoppel being that a person cannot be allowed to set up the truth of the matter in a case where by his conduct he has rendered it unjust and unfair that he should do so." In *In re Sugden's Trusts*; *Sugden* v. *Walker* (7), *Neville* J. says the

(1) (1875) L.R. 10 C.P. 307, at p. 317.
(2) (1892) L.R. 19 Ind. App. 203, at p. 215.
(3) (1918) A.C. 777, at p. 817.
(4) (1848) 2 Ex. 654, at p. 663.
(5) (1918) A.C., at p. 818.
(6) (1907) 1 K.B. 794, at p. 804.
(7) (1917) 1 Ch. 511, at p. 516.

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representor cannot be heard to say " that the impression he produced by his conduct was a false impression."

These authorities effectually dispose of the idea that lies at the root of the Company's arguments in this case that, because the written contract on its face refers to a " proposal and declaration," the only means of identifying that document is by producing the proposal and declaration in the state in which it actually stands. It may be in any given case—and, in my view of the facts as I have stated them, this is such a case—that by reason of a representation by conduct as to an existing fact or, as Lord *Macnaghten* in *George Whitechurch Ltd.* v. *Cavanagh* (1) more accurately phrases it, " as to some fact alleged to be in existence," the proposal and declaration mentioned in the policy must as between the parties be taken to be different as to its contents. That is, as Lord *Blackburn* said in *Burkinshaw* v. *Nicolls* (2), in cases of true estoppel it is " of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

The most recent, and one of the most authoritative statements of the principle is that of Lord *Birkenhead* L.C. in *Maclaine* v. *Gatty* (3) : " Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

Those high authorities establish the principle, and establish it so clearly that it might be accepted as a very simple proposition. Nevertheless, there has in the course of this case been found room for contentions which I think may be dealt with by reference to two judicial expressions—(1) " representation " and (2) " unambiguous." The word " representation " is not to be understood in any rigid sense. In the domain of estoppel it includes an inference from conduct—per Lord *Shand* in the Indian case above cited (4); and this is exemplified in *Craine's Case* (5).

(1) (1902) A.C., at p. 130.
(2) (1878) 3 App. Cas. 1004, at p. 1026.
(3) (1921) 1 A.C. 376, at p. 386.
(4) (1892) L.R. 19 Ind. App., at p. 217.
(5) (1920) 28 C.L.R. 305; (1922) 2 A.C. 541; 31 C.L.R. 27.

The word "unambiguous" is explained by *Kay* L.J. in *Low* v. *Bouverie* (1), the word and its explanation occurring on the same page. The Lord Justice says: "It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it." *Bowen* L.J. (2) says: "It must be such as will be reasonably understood in a particular sense by the person to whom it is addressed." This is confirmed in *George Whitechurch Ltd.* v. *Cavanagh* (3) by Lord *Brampton* and in *Bloomenthal* v. *Ford* (4) by Lord *Herschell*.

It was argued that the respondent was negligent; that is, that, notwithstanding the direction of Green that he should simply sign and leave Green to do what filling up was required, he ought to have opened and read the document and, if he had done so, he would have seen the necessity for disclosing the fact of the claim. It seems to me that argument was effectually answered by the House of Lords in *Bloomenthal* v. *Ford*. Lord *Halsbury* L.C. says (5):—"It appears to me that it is hopeless to contend that, after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say, 'You should have inquired. You should have observed certain circumstances; and if you had done that you would have been better advised.'" And again (6):—"I do not think any case can be found in the books in which it has been suggested that the legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say, 'I told you so-and-so; but you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool.' I do not believe that any such case can be brought forward or that there is any authority for such a proposition." Lord *Herschell* says (7):—"Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, there is no estoppel. But, supposing he did believe it and did act

(1) (1891) 3 Ch. 82, at p. 113.
(2) (1891) 3 Ch., at p. 106.
(3) (1902) A.C., at p. 145.
(4) 1897) A.C., at p. 166.
(5) 1897) A.C., at p. 161.
(6) 1897) A.C., at p. 162.
(7) (1897) A.C., at p. 168.

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on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, 'If you had thought more about it you would have seen it was not true.' The very person who makes a statement of that sort has put the other party off making further inquiry. *He has produced on his mind an impression as a result of which further inquiry is thought to be unnecessary or useless.*" The same view was taken by Lord *Shand* in the Indian case already cited (1).

The principle of estoppel as expounded by the authorities I have quoted, all of the highest order, finds no more necessary field than that of insurance in all its branches. Fraud, and indeed any departure from the good faith which every person owes to an insurer as well as his strict adherence to contract, are of course essential to be repressed. Otherwise insurers would be unable to meet their just obligations. But at the same time it cannot be ignored that insurance companies are avid competitors for business, and, in their eagerness to secure it, are not content to await spontaneous applications but send out gatherers in all directions. They arm these gatherers with some authority. The nature of that authority is to direct in some way the flow of premiums to the coffers of the society, and the extent of the authority varies. Who is to suffer when the emissary of the society misleads the insured and induces him, by conduct amounting to a representation regarding some state of facts, to pay a premium which the emissary accepts for the company and which the company receives from him and retains? In my opinion, to the extent to which the restrictions upon authority are not known or fairly and reasonably disclosed or discoverable, they do not in such a state of things exist for the insured. If a person is constituted or held out or adopted by an insurance company as its agent in respect of any insurance transaction, whether it consists in the making of a contract or the receipt of a premium or the preparation of a proposal or otherwise, then, except to the extent of any restriction upon his agency which is communicated to or known or reasonably to be inferred by the person with whom the transaction takes place, the transaction stands on the same footing as if it had been transacted in precisely

(1) (1892) L.R. 19 Ind. App., at p. 213.

the same circumstances at the head office. The agent's contract or his representations as to the matter entrusted to him are in that case as effectual to bind the company as if the directors themselves were acting. Two things have to be carefully kept apart, though they are frequently confused. One is the authority of the agent to bind the principal quite apart from any subsequent recognition of his act by the principal himself; and the other is the effect of such subsequent recognition, even where without it the agent's act would not be sufficient to bind the principal. As to the first, the grant of an authority to do an act or class of acts carries with it, in the absence of express or necessarily implied restriction, what are called "medium" or "incidental" powers. In *Howard* v. *Baillie* (1) Lord Chief Justice *Eyre* says: "By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power." Lord *Selborne* enunciates the same principle in *Small* v. *Smith* (2). An agent, for instance, sent out to secure insurance business, including receiving the premium and procuring the signature to a document, has, in the absence of express or necessarily implied restriction, all the medium powers necessary for that purpose, quite as much as if he were the whole board of directors. He may in the course of acting mislead the other party, and it then becomes a question whether he has nevertheless acted in the scope or apparent scope of his authority. It may in some cases be hard on the principal of the agent that he should be met with a representation not in fact authorized, but there is a principle well established for over two hundred years and reaffirmed in 1912 (*Lloyd* v. *Grace, Smith & Co.* (3)), that "it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." Some of the cases rest simply on the act of the agent. But there are other cases where the facts go further, that is, where the principal adopts the agent's act and completes the matter. The agent's act may be merely to do something short of making the contract and the principal may go further and complete it. If he does not, the case

(1) (1796) 2 H. Bl. 618, at p. 619. (2) (1884) 10 App. Cas. 119, at p. 129.
(3) (1912) A.C. 716, at p. 727.

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is of the class represented by *Montreal Assurance Co.* v. *McGillivray* (1). If he does, the case is of the *Wing* v. *Harvey* (2) type, and the principal is bound, not simply by an unauthorized act of the intermediary, but by personally adopting it with all its benefits and just burdens (*Lloyd* v. *Grace, Smith & Co.* (3)). It is not necessary for me to say whether all the cases are reconcilable in principle or in decision. *Hough* v. *Guardian Fire and Life Assurance Co.* (4), *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (5) and *Keeling* v. *Pearl Assurance Co.* (6) are among the latest, and they, like *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (7), are recognitions of *Wing* v. *Harvey*. Further, they are, like some still more authoritative decisions above quoted, strong testimony to the growing consciousness of the Courts that, without a fearless application of the doctrine of estoppel, the grossest wrongs might be performed, sometimes on innocent and trusting applicants for insurance and sometimes on the companies themselves. *Biggar* v. *Rock Life Assurance Co.* (8) is a case where the proponent was not in any way misled as to any state of facts: he knew there were questions to be answered by him, and he knowingly allowed the agent to invent answers for the proponent. Estoppel in his favour was out of the question. *McMillan* v. *Accident Insurance Co.* (9) is also a case of full knowledge of requirements but neglect to fulfil them, entrusting that duty to another being no absolution.

I think I ought to say a word about an American case which has at various times been much quoted. I refer to *New York Life Insurance Co.* v. *Fletcher* (10). In that case the assured knew perfectly well that he was required to answer in writing certain questions appearing in a printed form. He answered truly to the agent, who wrote down false answers; and then he blindly signed, without reading, the answers he knew he was expected to verify. It was assumed that the agent was not in any way the agent of the company to put down the answers. The proponent was negligent in relation to a duty which he knew was expected of him personally by the company. He

(1) (1859) 13 Moo. P.C.C. 87, at p. 124.
(2) (1854) 5 DeG. M. & G. 265.
(3) (1912) A.C. 716.
(4) (1902) 18 T.L.R. 273.
(5) (1907) 23 T.L.R. 521.
(6) (1923) 129 L.T. 573.
(7) (1892) 2 Q.B. 534.
(8) (1902) 1 K.B. 516.
(9) (1907) S.C. 484.
(10) (1886) 117 U.S. 519.

could not truthfully assert that he was misled by a misrepresentation as to a state of facts made within the scope of the agent's authority. So far, there is nothing in conflict with the principle I have stated. There are some observations in the judgment which, with the deepest respect, I should not be prepared to adopt without qualification. *Wright* J. in *Biggar's Case* (1) used words of caution with respect to its doctrines. In *Mutual Life Insurance Co. of New York* v. *Hilton-Green* (2) it is cited by the Court as an authority for the position that "beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties." It is quite in line with that, that *Scrutton* L.J. (when *Scrutton* J.) in *Wells* v. *Smith* (3) observed: "The case of *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (4) would, I think, have been decided differently if the one-eyed assured had actually put on the proposal a statement that he had the sight of two eyes."

On these grounds I am of opinion that the respondent is entitled to hold the judgment of *Mann* J.

With respect to the independent—but in my view unnecessary—questions of whether the jury's finding of immateriality can be supported, and whether *Mann* J. had jurisdiction in any event to disregard it, I need say but very little. As to materiality, that is always a question of fact, dependent on "all the circumstances at the time" the contract was made (*Carter* v. *Boehm* (5)). The test of materiality is whether in view of "all the circumstances at the time," which include, of course, the full circumstances of the fact undisclosed, that fact would have influenced the Company as a prudent insurer in fixing the premium or in determining to accept the risk. But it must not be forgotten that "the circumstances" include the knowledge, the practice and the proved conduct of the insurer. If, for instance, it were the known practice of a company to disregard a certain class of facts, the non-disclosure of such a fact would not prima facie *qua* that company be material, however

(1) (1902) 1 K.B. 516.
(2) (1915-16) 241 U.S. 613, at p. 624.
(3) (1914) 3 K.B. 722, at p. 725.
(4) (1892) 2 Q.B. 534.
(5) (1766) 3 Burr. 1905, at p. 1911.

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it might be with regard to another company. In the present case two circumstances are, to my mind, decisive that the Court, even supposing jurisdiction in a proper case, would not be warranted by the facts here in setting aside the finding and entering judgment for the appellant on the question of materiality. Those circumstances are the issue of the policy No. 1908 to Dayton on 15th September 1922 without any reference to prior claims by him; and, next, the deliberate exclusion by the appellant at the trial of evidence as to the circumstances in which the claim was made. The claim might have been shown to be one which, using the test of *Moulton* L.J. in *Joel* v. *Law Union and Crown Insurance Co.* (1), no "reasonable man would deem material or of a character to influence the insurers in their action." If the non-disclosure of the claim be relevant, its nature and circumstances are necessarily relevant; for, without them as proved or assumed, the alleged failure of duty to disclose cannot be pronounced upon. It is needless, therefore, to pursue the inquiry whether *Mann* J. could in a proper case have substituted his own judicial view for that of the jury on the question of materiality.

In the result, I am of opinion that the appeal should be dismissed with costs.

GAVAN DUFFY J. I agree with my brother *Isaacs* in thinking that the appeal should be dismissed with costs. I desire to add that, though the learned Judge who tried the case elaborately discussed the rights and obligations arising under the policy of insurance, the judgment appealed against, in my opinion, does no more than adjudge and declare that the policy of insurance is good and binding on the defendant.

STARKE J. The Western Australian Insurance Co. Ltd., about the month of April 1923, issued a motor vehicle policy to Dayton, covering damage caused both to the vehicle itself and to third parties through or in connection with it. The policy recited that Dayton had made a written proposal and declaration to the Company which it was agreed should be the basis of the contract, and should

(1) (1908) 2 K.B. 863, at pp. 884, 885.

be considered as incorporated therein. It was also agreed that the particulars set out should in all cases be deemed to be furnished by or on behalf of the insured. The proposal form contained the following questions and answers:—Q. "Have you ever had an accident or fire happen to a motor vehicle?"—A. "Yes." Q. "If so, state date and name of each company insured with, and give full particulars of accident."—A. "Backed into lamp. Hood pulled off. Small claim Western Australian Insurance Co." Q. "Have you ever made a claim of any kind against any insurance company?"—A. "Yes." Q. "If so, state date and name of each company claimed upon."—A. "Western Australian Insurance Co." And it was declared and warranted that the answers given above were in every respect true and correct, and that the proposal and declaration should be the basis of the contract between the Company and Dayton. In point of fact, a motor vehicle belonging to Dayton had, about the month of April 1922, been destroyed by fire and he made a claim in respect of the loss so sustained on the Farmers and Settlers Co-operative Insurance Co. and received a sum of £250 in full settlement and discharge of his loss. It is clear, on these facts, that the answers to the above questions were untrue. Prima facie, therefore, there is a breach of warranty, and Dayton cannot recover on the policy (*Condogianis* v. *Guardian Assurance Co.* (1)).

But, as is usual, the insured seeks to throw upon the insurance Company the responsibility for this untruth. Dayton in 1922 purchased the motor vehicle from the Cheney Motors Pty. Ltd. Apparently that company had some sort of agency for the Insurance Company. At any rate, a proposal was made in September 1922 to the Insurance Company by the motor company, in the name of Dayton, for insurance of the car. The proposal was headed "Cheney Motors Pty. Ltd.: Agency." But though some particulars of the car were given, a number of questions on the proposal form were left unanswered, and, in particular, the questions "Have you ever had an accident or fire happen to a motor vehicle?" and "Have you ever made a claim against any insurance company?" As we know, a motor-car belonging to Dayton had in April 1922 been destroyed by fire, and he had claimed for the loss, and received,

(1) (1921) 2 A.C. 125; 29 C.L.R. 341.

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£250 from the Farmers and Settlers &c. Co. in satisfaction of his claim. I do not know why answers to these questions were not insisted upon: possibly because the insurance was proposed by an agency of the Company, and stood in substance as a cover for both Dayton's and the motor company's interest in the car. The policy was issued in Dayton's name, but he did not obtain possession of it until he completed payment for the car to the motor company. This policy expired in April 1923, and the critical features of this case then commence.

An employee of the Insurance Company named Green called on Dayton, and told him that his policy had run out, and asked him if he wished to renew. Dayton said Yes. Green said that the vehicle had been insured for £400, but there would have to be a reduction on account of the twelve months' usage, and he suggested it be insured for £350. Dayton agreed, and Green said the premium would be £13 15s. Green then left; but it was arranged that he should call the next evening for a cheque. He did so, and saw Dayton's wife. He asked for the cheque, and Mrs. Dayton obtained it from her husband and gave it to him. Green then took a form out of his pocket, which in fact was the proposal form, gave it to Mrs. Dayton, and said to her:—"I am in a hurry. I want to go to a dance to-night. Would you mind asking Mr. Dayton just to sign this, and I will fill it in at home?" Mrs. Dayton took the form to her husband, who is an osteopath and was treating his patients at the time, and conveyed Green's message to him. Dayton took the form and hurriedly signed it in blank and without reading it. It was admitted on discovery that Green was allowed to obtain proposals for insurance with the Company and to collect premiums, and that his duties were to inspect agencies and secure business for the Company in the southern suburbs of the City of Melbourne. And it was found as a fact that Green filled in the answers to the questions in the proposal forms, including, of course, the untrue answers, after Dayton had signed it. *Mann* J. was of opinion that Green "had authority to obtain from customers proposals for insurance in such form as the Company would accept, and, what is involved in this, to give all necessary information to applicants as to what was necessary to be done and what the requirements of the

Company were as to the form and contents of a proposal which would enable the applicant to obtain a valid contract of insurance." He added that "in the circumstances of this case the meaning and effect of Green's conduct amounted to an assertion that the proposal might properly be signed in blank so long as the blanks were afterwards correctly filled up, and that the information *necessary to correctly fill up* the blanks was in this case information that was already in his possession or available to him as an officer of the Company."

I am unable to accept these conclusions, either in fact or in law. Green was, no doubt, an agent to receive proposals for the Company in such form as the Company would accept. But the Company, as we know, had and used a form of proposal upon which it was willing to contract, and from which it did not ordinarily depart. The policies issued by the Company, and Green's action in relation to the renewal of Dayton's insurance, make that plain, and demonstrate the ordinary form used in the Company's business as well in cases of renewals of insurances as in cases of original proposals for insurance. And no doubt it was within the scope and sphere of Green's employment to do acts necessarily involved in his authority to receive proposals. It would be, according to the cases, within an agent's authority to see that the proposal form was correctly filled up, and answers put in proper shape, and in some cases to explain the meaning of the questions and authoritatively state whether the disclosure of given information was required by the questions in the proposal. Knowledge acquired by the agent in such circumstances has been imputed to the company although not stated in the proposal (*Bawden's Case* (1) ; *Joel's Case* (2) ; cf. *Taylor* v. *Yorkshire Insurance Co.* (3)). This class of case is useless here, for the facts undisclosed to the Company were never communicated to Green. But to suggest that Green was authorized to dispense with the Company's form and its questions, and to negotiate and settle, and bind the Company by, some proposal that was not contained in or was in some material sense different from that contained in the written documents submitted to the Company as the proposal

(1) (1892) 2 Q.B. 534. (2) (1908) 2 K.B. 863.
(3) (1913) 2 I.R. 1.

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of Dayton, is unwarranted by the evidence, improbable from a business point of view, and wholly opposed to the ordinary course of the Company's business operations so far as they are disclosed by the evidence.

Again, the finding of the learned Judge as to the representations made by Green divides itself into two questions: (1) what the representation was; (2) whether that representation binds the Company. The surrounding circumstances have been already detailed. The words, however, were few:—"I am in a hurry. . . . Sign this and I will fill it in at home." Green must have believed that he had sufficient information within his knowledge to fill up truly the answers in the proposal form. But I cannot bring myself to believe that his words or his conduct represented that this was the limit within which disclosure was required by the Company to be made. Such a representation would have been very improper, and, in a man in his position, really dishonest. And a statement to operate as an estoppel must be clear and unambiguous (*Low* v. *Bouverie* (1)). Both Green and Dayton were careless. Green, in pursuit of his own pleasure, neglected his duties; and Dayton, in the press of his professional engagements, trusted Green "to do for him what he ought to have done for himself, and, too late, discovered" (*Billington's Case* (2)) that Green had not within his knowledge information that was most material if true answers were to be made to the insurance company. In their hurry both forgot the Company, and paid no proper attention to the business they were engaged upon. But if an assurer chooses to sign a proposal form in blank and leave it to another to fill up, then he must, in justice, and, in my opinion, in law, accept responsibility for the inaccurate answers filled up by that other (*Biggar's Case* (3); *Parsons* v. *Bignold* (4)).

Further, such a representation as that found by *Mann* J. would not, in my opinion, operate as an estoppel against the Company. It might, perhaps, afford a ground for repudiating the contract; but, if Dayton is desirous of availing himself of the contract, then he must establish that the representation was within the scope of

(1) (1891) 3 Ch. 82.
(2) (1879) 3 Can. S.C.R., at p. 200.
(3) (1902) 1 K.B. 516.
(4) (1844-46) 15 L.J. Ch. 379.

Green's authority. I have already sufficiently dealt with Green's authority. It may be within his power to determine that certain facts communicated to him do not require disclosure, and it may be that his knowledge of those facts would be imputed to the Company, but to attribute to him a general authority to say that the Company has sufficient information for its purposes, whether he knew the facts or not, is wholly unreasonable, and, in my opinion, untenable as a point of law.

Another ground of appeal argued was that Dayton failed, in breach of his duty, to disclose facts to the Company, namely, the destruction of a motor-car by fire, which would have affected the minds of prudent insurers in deciding whether to accept the insurance. This is a question of fact, and was found in favour of Dayton. I do not think we should interfere with this finding, and I doubt, having regard to the cases of *Musgrove* v. *McDonald* (1) and *Commonwealth* v. *Brisbane Milling Co.* (2), whether we have any power to do so.

But, for reasons above stated, the appeal should, in my opinion, be allowed, and judgment entered for the Company.

Appeal dismissed with costs.

Solicitors for the appellant, *Gillott, Moir & Ahern.*

Solicitors for the respondent, *Rostron Roy & Son.*

B. L.

(1) (1905) 3 C.L.R. 132.

(2) (1916) 21 C.L.R. 559.