[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH MORT AND COMPANY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

MAURICE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24, 25; *Dec.* 14.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Bailment—Goods consigned for sale on commission—Insurance by bailee—Destruction of goods before sale—Insurance moneys—Deduction by bailee of service charges and commission.

The respondent, a wool grower, consigned certain wool to the appellant for sale upon terms entitling the appellant to payment for services rendered by it preparatory to the sale of the wool and to commission upon any sale. The appellant insured the wool, together with wool owned by itself and other growers, against loss by fire under a policy expressed to be "on interest as more particularly described in schedule attached hereto," the interest being described in the schedule as follows: "On merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire." After some only of the preparatory services had been rendered by the appellant, and prior to the sale of the wool, it was destroyed by fire. The appellant received from the insurance company in respect of the respondent's wool a sum representing its gross selling price. From this sum it deducted an amount representing its full charge for all preparatory services, and an amount representing commission upon sale, and accounted to the respondent for the balance.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Evatt* J. dissenting), that the appellant was entitled to deduct its full charge for preparatory

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services whether rendered or otherwise, and also to deduct an amount representing commission on sale.

Decision of the Supreme Court of New South Wales (Full Court): *Maurice* v. *Goldsbrough Mort & Co. Ltd.*, (1937) 37 S.R. (N.S.W.) 76; 54 W.N. (N.S.W.) 16, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by Thelwall Thomas Maurice against Goldsbrough Mort & Co. Ltd. a special case stated under sec. 55 of the *Common Law Procedure Act* 1899 (N.S.W.) for the opinion of the court was, with amendments made at the hearing, substantially as follows:—

1. The plaintiff is a grazier and wool grower, and the defendant is a company liable to be sued in the name of Goldsbrough Mort & Co. Ltd. and carries on business, *inter alia*, as a wool-broker.

2. During September 1935 the plaintiff consigned to the defendant 123 bales of wool pursuant to the course of business between the defendant and its clients whereby *inter alia*, the defendant was to receive the wool into its store, to pay on behalf of the plaintiff the expense of road and rail cartage of the wool to its store, to do all things necessary to prepare the wool for sale, for example, to weigh, lot and value the wool, to sell the wool for a commission payable to it by the plaintiff, deduct from the proceeds of sale payments made on account of the plaintiff and expenses incurred by the defendant in carrying out its obligations to the plaintiff under the course of business and other sums (if any) deductible according to the course of business and its commission and to pay the net proceeds of sale to the plaintiff or as the plaintiff should otherwise direct.

3. The defendant duly received the wool into its store, and on 25th September 1935 a fire occurred at the store which totally destroyed the wool. At the date of the fire the defendant had not lotted or valued the wool and had not contracted to sell the wool to any purchaser.

4. Prior to the fire the defendant had insured the wool. The wool (together with other wool the property of other clients of the defendant and other wool the property of the defendant) was insured in the name of the defendant by insurance expressed to be insurance of merchandise the defendant's own property or held by it in trust or

on commission for which it might be liable in the event of loss or damage by fire whilst contained in the store.

5. The method of insurance followed by the defendant has at all material times been as follows:—At the commencement of the season the defendant takes out a certain number of policies of the kind mentioned above for fixed periods, i.e., some for twelve months and some for shorter periods, insuring "merchandise" up to a certain value. Then, towards the close of each day's business, when the day's receipts and deliveries are known, the defendant communicates by telephone to the Western Assurance Co., an insurance company, and instructs the latter company to cover or arrange to cover the defendant for a certain amount of money additional to the amount already covered, or to cancel or arrange to cancel a certain amount of insurance, which the Western Assurance Co. does in concert with the other insurance companies. No number of bales of wool is ever mentioned nor in fact is wool mentioned in any policy. The insurance is merely for say £5,000 worth of merchandise. The Western Assurance Co. by arrangement with the defendant only takes a certain proportion of the total insurance, but, as a matter of courtesy to the defendant, arranges on behalf of the defendant for cover or cancellation with other insurance companies in various proportions. The insurances by the other companies are effected directly with the defendant and not by way of reinsurance. At the time of the fire there were policies on foot with eighteen insurance companies covering wool in the store.

6. The 123 bales of wool belonging to the plaintiff which were destroyed were not insured specifically. They were received on eight separate days in quantities ranging from 6 bales a day to 30 bales a day and were insured in bulk with other wool in the manner mentioned above. It is impossible to ascertain with what insurance company the plaintiff's wool was insured.

7. The defendant did not charge the plaintiff with the premium for the insurance of his wool. The flat rate of 1s. 6d. per cent charged by the defendant to the grower bears no relation to the premium paid by the defendant or to the length of time the wool of a particular client is in store, and the total amount charged to growers seldom if ever recoups the defendant for the premiums paid

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by it. The defendant has borne as much as £1,200 in one year for insurance premiums paid to the insurance companies but not charged to the growers. In practically every year there is a deficiency in this respect of some hundreds of pounds.

8. The sum of £1,980 0s. 7d. mentioned in the document referred to in par. 9 hereof was the gross selling price which would have been realized by auction for the wool of the plaintiff at the date of the fire as estimated by appraisers appointed for the purpose of appraising and valuing the wool burned, if the defendant in respect of the wool had done all the things mentioned in par. 2 hereof down to and inclusive of the words " value the wool " and in the consolidated charge mentioned in the document referred to in par. 9 hereof (that is, received, weighed and lotted the wool and appraised its value). The insurance companies each paid to the defendant a single sum representing its liability to the defendant under the policies so issued by it, being its proportion of the gross selling price realizable by auction of the wool burned as estimated by appraisers. Out of the total amount so paid to it by the insurance companies the defendant paid or credited to each of its clients the gross selling price of his wool, less deductions as aforesaid.

9. On 30th October 1935 the defendant sent to the plaintiff a document which the defendant termed account sales of realization by insurance of wool destroyed by the fire.

10. The defendant deducted from the sum of £1,980 0s. 7d. in the document *inter alia*, the following sums :—

Commission at $1\frac{1}{4}$ per cent	£24	15 0
Consolidated charge for receiving, weighing, lotting, appraising value ..	36	11 10
	£61	6 10

The defendant claims to be entitled to retain these sums and that the plaintiff has no right thereto.

11. The plaintiff admits that the defendant would have been entitled so to deduct the sum of £24 15s. for commission if the defendant had sold the wool for the plaintiff for the sum of £1,980 0s. 7d. on 25th September 1935.

12. The plaintiff admits that the defendant would also have been entitled so to deduct the sum of £36 11s. 10d. for receiving, weighing, lotting and valuing the wool if the defendant had performed the work for the plaintiff and had sold the wool for the plaintiff as aforesaid.

13. The plaintiff has claimed the sum of £61 6s. 10d. in the writ issued in this cause as money had and received by the defendant for the use of the plaintiff.

The questions for the decision of the court are :—

1. Whether the plaintiff has any right to recover the said sum of £24 15s. or any part thereof from the defendant.
2. Whether the defendant is entitled to deduct or retain the said sum of £24 15s. or any part thereof.
3. Whether the plaintiff has any right to recover the said sum of £36 11s. 10d. or any part thereof from the defendant.
4. Whether the defendant is entitled to deduct or retain the said sum of £36 11s. 10d. or any part thereof.

The Full Court of the Supreme Court answered the questions as follows :—1. Yes, the whole amount. 2. No, no part thereof. 3. Yes, so much thereof as is not referable to receiving the wool and any other services actually performed. 4. Yes, so much thereof as is referable to services actually performed : *Maurice* v. *Goldsbrough Mort & Co. Ltd.* (1).

From that decision the defendant, by special leave, appealed to the High Court.

Maughan K.C. (with him *Cook*), for the appellant. The liability or otherwise of the appellant to insure is not stated in the case. Either the appellant was under no liability to insure, or, if it was under such a liability, its obligation was to insure the respondent against loss by fire and to discharge that obligation in the event of fire by paying to the respondent the amount he would have received had the fire not occurred. The relationships between the parties in this transaction are contractual. There is no fiduciary relationship *qua* the matters in dispute. There was no privity of contract or fiduciary nexus between the respondent and any of the insurance

(1) (1937) 37 S.R. (N.S.W.) 76 ; 54 W.N. (N.S.W.) 16.

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companies concerned. The appellant insured its own merchandise, its own property, and also all property held by it in trust or on commission for which it was liable for loss or damage by fire. The appellant insured its interest in the goods. It was not an insurance of the goods *qua* the goods but an insurance of the appellant's liability in respect of those goods (*North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1)). The respondent was only entitled to that portion of the moneys which would indemnify him against the loss of the wool. There was no contract as between the appellant and the respondent that the appellant should insure the wool. At most the appellant indemnified the respondent against the loss the latter would sustain in the event of a fire instead of a sale. The claim in this action was not based on fairness and equity (*Sinclair* v. *Brougham* (2)). The action was misconceived. The moneys received by the appellant under the insurance policy were not had and received by it for the use of the respondent. The moneys so received became the moneys of the appellant, and the onus was upon the respondent to establish his title thereto or to so much thereof claimed by him in excess of the amount paid to him.

Dudley Williams K.C. and *Stephen*, for the respondent.

Dudley Williams K.C. The wool was at all material times the property of the respondent, subject only, at the date of the fire, to a lien in favour of the appellant in respect of expenses which the appellant had already incurred and services which it had already rendered in respect of the wool. The respondent had at all times the right to revoke the appellant's authority to sell the wool (*Re M.* ; *Ex parte Dalgety & Co. Ltd.* (3)). Any relation of bailor and bailee or agency was *ipso facto* determined by the destruction of the wool (*Rhodes* v. *Forwood* (4) ; *Daly* v. *Perks* (5)), and, consequently, there would be no opportunity thereafter for the appellant to earn commission. The position here is as stated in *Halsbury's Laws of England*, 2nd ed.,

(1) (1877) 5 Ch. D. 569, at pp. 577-579.
(2) (1914) A.C. 398, at p. 415.
(3) (1909) 10 S.R. (N.S.W.) 175.
(4) (1876) 1 App. Cas. 256, at p. 271.
(5) (1914) 14 S.R. (N.S.W.) 461 ; 31 W.N. (N.S.W.) 169.

vol. 18, p. 497, par. 761 (5). The respondent was entitled to be paid such a sum as would have enabled him on the day of the fire to have gone into the open market and bought similar wool. A contract on the part of the appellant to insure the wool in store on behalf of the respondent arose out of the course of business between them over many years. Even if there were no contract, the fact is that the appellant insured the wool on its own behalf and on behalf of the respondent and received the proceeds of the insurance money. There was no contract to insure in *Waters* v. *Monarch Fire and Life Assurance Co.* (1), *London and North Western Railway Co.* v. *Glyn* (2) or *In re Pastoral Finance Association Ltd.* (3).

[DIXON J. referred to *Buchanan & Co.* v. *Faber* (4).]

An insurance against loss of profits—which includes commission—must be *eo nomine*. It is necessary to insure specifically against loss of profits (*MacGillivray* on *Insurance Law*, 2nd ed. (1937), pp. 205, 206; *Lucena* v. *Craufurd* (5)).

[STARKE J. referred to *King* v. *Glover* (6).]

Stephen. The insurance effected by the appellant was not an insurance against loss of profits; it was merely an insurance of the respective interests of the appellant and the respondent (*Anderson* v. *Morice* (7); *Re Wright and Pole* (8); *Waters* v. *Monarch Fire and Life Assurance Co.* (9); *London and North Western Railway Co.* v. *Glyn* (10)). A sale was not, in fact, effected; therefore the appellant was not entitled to commission (*In re Pastoral Finance Association Ltd.* (11)). The form of the count is appropriate to the circumstances (*Bullen and Leake, Precedents of Pleading*, 2nd ed. (1863), p. 36)). The circumstances in *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (12)

(1) (1856) 5 E. & B. 870; 119 E.R. 705.
(2) (1859) 1 E. & E. 652; 120 E.R. 1054.
(3) (1922) 23 S.R. (N.S.W.) 43; 39 W.N. (N.S.W.) 231.
(4) (1899) 4 Com. Cas. 223; 15 T.L.R. 383.
(5) (1806) 2 B. & P.N.R. 269, at p. 315; 127 E.R. 630, at p. 648.
(6) (1806) 2 B. & P.N.R. 206; 127 E.R. 603.
(7) (1875) L.R. 10 C.P. 609, at pp. 622, 624.
(8) (1834) 1 A. & E. 621; 110 E.R. 1344.
(9) (1856) 5 E. & B., at p. 880; 119 E.R., at p. 709.
(10) (1859) 1 E. & E., at pp. 660-663; 120 E.R., at p. 1058.
(11) (1922) 23 S.R. (N.S.W.) 43, at p. 50; 39 W.N. (N.S.W.) 231, at p. 233.
(12) (1877) 5 Ch. D. 569.

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were peculiar and exceptional, and for that reason the court strained the words of the policies under consideration away from their natural meaning. The appellant, having insured the respondent's merchandise and having received moneys under the policies in a fiduciary capacity (whether it received an excess or not), holds the proceeds in trust for the respondent subject only to a lien for work actually done by the appellant.

Maughan K.C. in reply. The essential question is: What was the obligation of the appellant? In determining that question regard must be confined to the facts stated in the special case. Those facts do not disclose an obligation on the part of the appellant to insure. The respondent has no right other than that of being indemnified against loss in respect of the transaction. There is no obligation upon the appellant to give to the respondent such sum of money as would enable him, on the day after the fire, to replace the wool destroyed thereby. In any event the respondent would still be liable to pay commission on the sale of the wool so purchased, so that commission is properly deductible in determining the value of the wool to the respondent. Thus, he has received the amount insured against. The extent of a grower's interest in his wool is the amount he receives out of the gross sale price. The appellant did not enter into a particular contract of insurance on behalf of the respondent. The appellant insured solely as principal and did not act as agent of and was not in a fiduciary position to the respondent. The moneys received by the appellant under those policies were not trust moneys. The question whether the wool grower should receive, in addition to what he was entitled to, something extra as representing the broker's commission was not debated in *In re Pastoral Finance Association Ltd.* (1). Also, here, the appellant did not take out the policies as agent. The passage in *MacGillivray* on *Insurance Law*, 2nd ed. (1937), pp. 205, 206, that loss of profits are only covered *eo nomine* refers only to the position as between an insured and the insurance company, and is not relevant where the moneys paid in terms do cover the profits. The various cases between insurer and insured referred to on behalf of the respondent are not applicable

(1) (1922) 23 S.R. (N.S.W.) 43; 39 W.N. (N.S.W.) 231.

to this case. Here the action is not between an insurer and the insured. The interest of the appellant intended by it and the insurance companies to be covered included commission payable to the appellant; this was an insurable interest (*Ebsworth* v. *Alliance Marine Insurance Co.* (1)).

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff is a grazier who, with many other graziers, sent wool to the defendant company, which carries on the business of wool-broking. The plaintiff's wool, with other wool, was destroyed by a fire which burned down the warehouse in which it was stored. The company had insured all the wool by eighteen policies with different insurance companies, and questions arise between the plaintiff and the company as to the disposition of the moneys received by the defendant from the insurance companies under the policies.

The facts are stated in the special case. Par. 2 of the case sets out that the company "was to receive the wool into its store, to pay on behalf of the plaintiff the expense of road and rail cartage of the wool to its store, to do all things necessary to prepare the wool for sale (for example, to weigh, lot and value the wool), to sell the wool for a commission payable to it by the plaintiff, to deduct from the proceeds of sale payments made on account of the plaintiff and expenses incurred by the defendant in carrying out its obligations to the plaintiff under the course of business and other sums (if any) deductible according to the course of business and its commission and to pay the net proceeds of sale to the plaintiff or as the plaintiff should otherwise direct." The defendant received the wool into its store, paid for rail carriage, and weighed the wool. The wool was then destroyed by fire, so that the defendant did not lot, value or sell the wool.

According to the course of business followed by the parties, the defendant made a charge of 1s. 6d. per £100 for insurance. The defendant did not make any separate insurances for its clients, but

(1) (1873) L.R. 8 C.P. 596, at p. 609.

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took out policies with eighteen insurance companies in each of which the insurance was expressed to be against loss or damage by fire of "the property hereinafter described," viz., "on interest as more particularly described in schedule attached hereto." The schedule described the interest insured as follows: "On merchandise the insured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire whilst contained in the building" (described) "known as No. 1 store."

The amount of cover was varied daily so as to agree with the estimated value of the merchandise in the store. The amount of 1s. 6d. per £100 charged to the plaintiff bore no relation to the actual moneys paid by the defendant for the insurance of the wool. Generally the defendant paid away more in premiums to the insurance companies than the total amount received from its clients in the payments of 1s. 6d. per centum.

After the fire the defendant received from the insurance companies payments in respect of the wool destroyed. These payments were made in single lump sums under the respective policies. They represented the gross selling price of the destroyed wool as estimated by appraisers. This price was an estimate of the sum which would have been realized at auction for the wool if the defendant had pursued the normal course of lotting and valuing the wool and selling it by auction. The sum paid to the defendant upon this basis in respect of the plaintiff's wool was £1,980. The defendant then rendered account sales to the plaintiff just as if his wool had been sold in the ordinary course for £1,980. The defendant therefore made deductions for railage, insurance and weighing, which are not disputed as proper. The defendant also deducted amounts for selling commission, and for lotting and valuing. These latter deductions are challenged. The Full Court of the Supreme Court of New South Wales has held that they cannot rightly be made, and has answered the questions no; in the special case accordingly.

On the one hand, the plaintiff contends that the defendant is under a duty to pay to the plaintiff the whole of the money received from the insurance company in respect of the plaintiff's wool, less only charges for services actually rendered. The plaintiff, it is argued, is entitled to the sum representing the value of his wool,

though admittedly he is bound to pay for rail carriage and for the services actually rendered by the defendant in receiving and weighing the wool. The defendant is not entitled, it is said, to receive payment for lotting and valuing and selling the wool when in fact it did not do any of these things.

On the other hand, the defendant argues that the result of admitting the plaintiff's contention would be that the plaintiff would receive a greater sum than if the wool had been sold in the ordinary course, and that this would be inconsistent with the principle that insurance can never give more than an indemnity against loss actually suffered. If the wool had been sold, the plaintiff would have received a net sum of about £1,920. Upon the basis of the plaintiff's claim the plaintiff would receive a larger sum, and would in effect receive (it is argued) the amount of commission (£24) together with such portion of an amount of £36 as is attributable to lotting and valuing. The plaintiff's wool had not been lotted, valued or sold. The sum of £1,980 represents what would have been received upon an actual sale of wool that had been lotted and valued. It would have been necessary for the plaintiff to pay for lotting, selling and valuing before such a sum could have been realized. Therefore, it is argued, the plaintiff is really seeking to obtain a sum representing the value of wool which was, in a market sense, better than the plaintiff's wool—viz., wool in respect of which the specified services had been rendered, instead of, as was the fact, wool in respect of which those services had not been rendered. It is for the plaintiff to establish his claim, and he cannot, it is said, have any right to these disputed moneys, which have been received by the defendant by reason of an insurance premium paid by the defendant, and not by the plaintiff, to an insurance company. The defendant also contends that the insurance policy, when rightly construed, covers the defendant against loss of profits (including moneys expected to be received for lotting, valuing and selling), and that on this ground also the defendant is entitled to these disputed amounts.

In order to decide between these opposing contentions it is necessary to ascertain in the first place the nature of the original relations between the parties. The wool was delivered to the defendant for

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the purpose of being sold. The defendant took the wool as bailee for reward and had a lien on the wool for charges for services actually rendered. The course of dealing shows that the defendant was to be paid for insuring the wool and was therefore bound to insure it. (This opinion is the basis of this judgment.) If the defendant had not insured the wool, the plaintiff would have been entitled to damages for breach of contract, the damages being determined by what the plaintiff had lost owing to the breach. In fact the defendant did insure the wool to its full value, and is bound to account to the plaintiff for that value, whatever it may be.

The case is different where a person in possession of another person's goods, as well as of goods belonging to himself, elects to insure all the goods, though he is under no obligation to insure the other person's goods. If the goods are destroyed and the insured receives the policy moneys, he is entitled to retain in full the amount of his own loss. See *Dalgleish* v. *Buchanan & Co.* (1), where coach-builders insured against fire their stock in trade and goods in trust or on commission. There was no contract or course of dealing (as in the present case) which bound them to insure the goods of their customers. Their premises and the contents, including the pursuer's carriage, were destroyed by fire. Moneys were paid to them under an insurance policy. It was held that they were entitled in the first instance to satisfy themselves in full for their own losses out of the moneys so received, without regard to the losses suffered by customers who had goods on the premises. The court emphasized the fact that " the defenders had for their own ends, in their own names, and exclusively at their own expense, without any knowledge, consent, payment or participation whatever on the part of the pursuer . . . effected " the insurance in question (2). (See also *Ferguson* v. *Aberdeen Parish Council* (3).) In the present case there was an obligation upon the defendant to insure the plaintiff's goods, and accordingly the case cited cannot be relied upon as an authority justifying them, in the present case, in satisfying their own losses first, irrespective of the losses of their customers. The defendant company for consideration agreed to insure the plaintiff's wool, being paid a specific sum for the purpose of insuring it.

(1) (1854) 16 Dunlop 332. (2) (1854) 16 Dunlop, at p. 336.
(3) (1916) S.C. 715.

The policy insures "merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire whilst contained in" a specified store. It is clear that the insurance is upon goods. The distinction is well established between an insurance against damage to goods and insurance against loss of profits expected to be made as a consequence of dealing with goods. In *Lucena* v. *Craufurd* (1) the judges advised the House of Lords with respect to a policy under which an interest in ships and goods was insured. It was contended that the insurance covered also profits or commission expected to arise from the sale, management or disposition of the ships and goods. All the learned judges were of opinion that such a policy should not be considered as a policy upon profits, "having been expressly declared upon as a policy upon the plaintiff's interest in the ships and goods themselves; and that if it had been intended as a policy on profits, it should have been so stated." What was insured against in the present case was loss or damage to merchandise and not loss of the profits which might have been gained by the defendant by dealing with that merchandise.

The policies of insurance were taken out by the defendant with the insurance companies. There was no contract between the plaintiff and any of the insurance companies, and the plaintiff had no right to sue the insurance companies. In all eighteen policies were taken out, each covering a stated amount representing the value of some unspecified part of the goods in the store. These goods included the goods of many clients of the defendant, and it is not possible in these circumstances to regard the defendant as having acted as an agent for the plaintiff in making any one or more of these contracts of insurance. Thus, the moneys which the defendant received from the insurance companies cannot be regarded as moneys of the plaintiff.

In the present case the defendant was under an obligation to insure the plaintiff's goods. The defendant is, therefore, liable to account for such moneys as it has received on account of the destruction of the plaintiff's goods. It is well settled that a person in possession of goods belonging to another may insure the goods and that he is

(1) (1806) 2 B. & P.N.R. 269, at p. 315; 127 E.R. 630, at p. 648.

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entitled to be paid under such a policy the whole value of the goods if they are destroyed. This is the case even where the person in possession of the goods was not bound by any obligation to insure. As Lord *Campbell* said in *Waters* v. *Monarch Fire and Life Assurance Co.* (1), "I think that a person entrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods. The defendants say that it was only the plaintiff's personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them." In the case from which this quotation is made the policy was similar in its terms to the policy now under consideration. The policy protected against losses or damage by fire goods "the property of the assured or held by them in trust or on commission" and in certain specified places. In *London and North Western Railway Co.* v. *Glyn* (2) the Court of Queen's Bench had to deal with a fire-insurance policy on goods described as being goods "their" (plaintiffs') "own and in trust as carriers." In that case it was held that, the goods having been destroyed, the plaintiffs were not limited to recovering the value of their own particular interest in the goods which they, as carriers, had in the warehouse when it was burned. It was held that they were entitled to recover the full value of the goods. Reference was made to *Waters* v. *Monarch Fire and Life Assurance Co.* (3), and it was said that that case decided that the

(1) (1856) 5 E. & B. 870, at p. 881; 119 E.R. 705, at p. 709.
(2) (1859) 1 E. & B. 652; 120 E.R. 1054.
(3) (1856) 5 E. & E. 870; 119 E.R. 705.

insurance company was liable to the plaintiffs to the amount of the full value of the goods although "the utmost interest that the plaintiffs themselves had in the goods was to the extent of their warehouse charges, for which they had a lien upon them" (1).

Thus, the position is that the defendant was entitled to recover from the insurance companies the value of the goods destroyed. Having received the policy moneys from the insurance company, representing the market value of the goods, the defendant is entitled to deduct any charges for services actually rendered in respect of the goods for which it had a lien upon the goods and in respect of which it therefore has an interest in the goods. So much is clear. The plaintiff contends that the defendant then holds the whole of the balance in trust for the plaintiff. It is however, contended for the defendant that the result of accepting this view would be that the plaintiff would obtain more than the real value of his wool as it was upon the floor, not lotted, not valued, and not sold, at the date of the fire, and that therefore the plaintiff would receive more than an indemnity if payment is made to him upon the basis of his claim. In my opinion this is not the case. The amount which the plaintiff will receive will be only such an amount as will enable him to go into the market and buy the same quantity of wool of the same quality as he had at the time of the fire. Prima facie the amount to be paid under an insurance policy when goods insured are destroyed by fire is the market value of the goods (See *Halsbury's Laws of England*, 2nd ed., vol. 18, p. 497; see also American authorities cited in *MacGillivray* on *Insurance Law*, 2nd ed. (1937), pp. 837-839). The cost of procuring the sale of an article should not be regarded as a deduction in estimating the value of the article (See *Elder's Trustee and Executor Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (2)).

The value of a commodity is determined by what a purchaser is prepared to give for it. Expenses incurred in finding a purchaser, that is, expenses incidental to selling, should not be deducted when an estimate of value is being made, though such expenses are plainly a proper deduction when it is sought to ascertain, not the market value of the commodity, but the profit made by the vendor upon a

(1) (1859) 1 E. & E., at p. 662; 120 E.R., at p. 1058.

(2) (1934) 51 C.L.R. 694.

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sale. In order to obtain £1,980 for the wool, the plaintiff would have to pay selling commission and other charges. But it is equally true that he would have to pay the costs of producing the wool. All these charges are equally irrelevant when the value of the wool is being determined. If two persons, A and B, have equal quantities of wool of identical quality at the same place, the value of the two lots of wool is the same. A may have agreed to pay 2 per cent selling commission and B may have agreed to pay only 1 per cent. A may have spent twice as much as B in producing the wool. But none of these facts affects the value of either lot of wool. The distribution of the proceeds of sale which a particular vendor makes or is bound to make after he receives the money has nothing to do with the value of the article sold in any particular case. Thus, in this case, the plaintiff receives no more than the value of the wool when he receives the sum of £1,980—which is the sum which a purchaser would have had to pay in order to buy the wool.

The defendant company was bound, by the obligation created by the course of dealing, including the payment of 1s. 6d. per cent for insurance, to insure the wool for its full value, and it is therefore bound to account to the plaintiff for that full value unless it can establish some set-off or counterclaim. To the extent that the defendant has a claim against the plaintiff for services actually rendered in relation to the wool, the defendant is able to establish a right to retain charges for those services, but, subject to this deduction, the defendant is bound to account to the plaintiff for the whole amount received from the insurance companies as representing the value of the plaintiff's wool.

For the reasons which I have given I am of opinion that the decision of the Full Court was right and that the appeal should be dismissed.

STARKE J. This is an appeal from a judgment of the Supreme Court of New South Wales in an action in which the parties stated a case for its decision. The plaintiff—the respondent here—is a grazier and wool grower, and the defendant—the appellant here—is a company which carries on business, *inter alia*, as a wool-broker.

During September 1935 the plaintiff consigned to the defendant one hundred and twenty-three bales of wool pursuant to the course of business between the defendant and its clients, whereby, *inter alia*, the defendant was to receive the said wool into its store, to pay on behalf of the plaintiff the expense of road and rail cartage to its store, to do all things necessary to prepare the said wool for sale, for example, to weigh, lot and value the said wool, to sell the said wool for a commission payable to it by the plaintiff, to deduct from the proceeds of sale payments made on account of the plaintiff and expenses incurred by the defendant in carrying out its said obligations to the plaintiff under the said course of business and other sums (if any) deductible according to the said course of business and its commission, and to pay the net proceeds of sale to the plaintiff or as the plaintiff should otherwise direct.

" It is undoubtedly the law that wharfingers, warehousemen and commission agents having goods in their possession may insure them in their own names and in case of loss may recover the full amount of the insurance for the satisfaction of their own claims first and hold the residue for the owners " (*Home Insurance Co. of New York* v. *Baltimore Warehouse Co.* (1); *Waters* v. *Monarch Fire and Life Assurance Co.* (2); *London and North Western Railway Co.* v. *Glyn* (3); *De Forest* v. *Fulton Fire Insurance Co.* (4); *Bennett's Fire Insurance Cases*, vol. 1, p. 223).

The defendant had an interest in the safety and preservation of the wool and, further, would be entitled to its commission on sale and other charges (*Ebsworth* v. *Alliance Marine Insurance Co.* (5); *Park* on *Marine Insurances*, 8th ed. (1842), vol. 2, p. 563). The insurable interest of the defendant is therefore clear.

The defendant was in the habit of effecting insurance to cover wool consigned to it, and the policies were thus expressed: " On merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire." The subject matter of the insurance as therein expressed covers the defendant's interest in the wool entrusted to it or on

(1) (1876) 93 U.S. 527.
(2) (1856) 5 E. & B. 870; 119 E.R. 705.
(3) (1859) 1 E. & E. 652; 120 E.R. 1054.
(4) (1828) 1 Hall (N.Y.) 94.
(5) (1873) L.R. 8 C.P. 596, at p. 608.

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commission and also the owner's interest in that wool, but the insurance companies have limited their risk to wool for the loss of which the defendant would be liable in law to the true owners (*North British and Mercantile Insurance Co.* v. *Moffatt* (1); *Engel* v. *Lancashire and General Assurance Co. Ltd.* (2)). But it is said that the subject matter of the insurance is merchandise, "and though that is to be construed liberally as covering any interest in the merchandise it cannot be construed as covering an interest" in commission and charges that might arise from handling or selling the wool (*Lucena* v. *Craufurd* (3); *Anderson* v. *Morice* (4)). Charges in respect of which a lien existed were admittedly covered by the words of the policies. Expected commissions and other charges, though they might be insured *eo nomine*, were, it was argued, beyond the liability undertaken by the insurance companies. But the argument should not, I think, succeed. "Interest," said *Lawrence* J. in *Lucena* v. *Craufurd* (5), "does not necessarily imply a right to the whole, or a part of the thing, nor necessarily or exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring. . . . To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction." Or, to use the language of *Chambre* J., "there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions regarding property, still however, excluding mere speculation or expectation, and interests created no otherwise than by gaming" (*Lucena* v. *Craufurd* (6)). It is on this basis that profits and expected commission may be insured.

(1) (1871) L.R. 7 C.P. 25.
(2) (1925) 30 Com. Cas. 202.
(3) (1806) 2 B. & P.N.R. 269; 127 E.R. 630.
(4) (1875) L.R. 10 C.P. 609, at p. 621.
(5) (1806) 2 B. & P.N.R., at p. 302; 127 E.R., at p. 643.
(6) (1802) 3 B. & P. 75, at p. 102; 127 E.R. 42, at p. 56.

"Profits," as *Parke* B. said in *Stockdale* v. *Dunlop* (1), "may be insured but that is on the ground that they form an additional part of the value of the goods, in which the party already has an interest." The subject matter of the insurance must be properly described, but the nature of the interest may, in general, be left at large (*Crowley* v. *Cohen* (2); *Mackenzie* v. *Whitworth* (3)). *Parsons* on *Marine Insurance*, 1868 ed., vol. 1, p. 201, asserts that a commission merchant may insure for the full value of the goods consigned to him and may recover not only what will indemnify him for the loss of his commission but the full value. But he would be accountable to his principal for the proceeds of the insurance "on the principles which would have applied to the proceeds of the sale of goods" (*De Forest* v. *Fulton Fire Insurance Co.* (4); *Bennett's Fire Insurance Cases*, vol. 1, p. 238). Profits which have been ascertained at the date of insurance need not be separately specified (See *Welford and Otter-Barry* on *Fire Insurance*, 1st ed. (1911), p. 31; *Equitable Fire Insurance Co.* v. *Quinn* (5)). But in the case of prospective or anticipated profits "the destruction of the property out of which profit is expected to be earned cannot be said to carry with it as a necessary consequence the loss of such profit, for the profit might never be earned even though the property were not destroyed" (*Welford and Otter-Barry* on *Fire Insurance*, 1st ed. (1911), p. 31). Different considerations apply, I think, to commissions and charges payable according to the ordinary course of business or the agreement of the parties. The rates are known, and the commission and charges are capable of estimation. The proceeds of the insurance take the place of the goods and the full value of the goods if so insured. In such a case the commission merchant's interest in the goods is direct and not merely a prospective advantage to be derived from their safety. That the commissions and charges may not have been earned in the case of the loss of the goods is immaterial, for it is against their loss that the insurance on the goods has been effected. The authorities are, I think, consistent with

(1) (1840) 6 M. & W. 224, at pp. 232, 233; 151 E.R. 391, at pp. 394, 395.
(2) (1832) 3 B. & Ad. 478, at p. 485; 110 E.R. 172, at p. 175.
(3) (1875) 1 Ex. D. 36, at p. 41.
(4) (1828) 1 Hall (N.Y.) 94.
(5) (1861) 11 L. Can. R., at p. 170.

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this view. In *Waters* v. *Monarch Fire and Life Assurance Co.* (1) the subject matter of insurance was, in substance, goods held in trust or on commission. The contest was whether the plaintiff could recover the value of the goods or only the amount of their charges for landing, wharfage and carting in respect of goods deposited with them by their customer and consumed by fire. The plaintiffs in this case had a lien over the goods which gave them an insurable interest, but Lord *Campbell* C.J. does not stress the existence of the lien. " As the property is wholly destroyed, the value of the whole must be made good, not merely the particular interests of the plaintiffs. They would be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest " (2).

In *London and North Western Railway Co.* v. *Glyn* (3) the subject matter of the insurance was " goods their own and in trust as carriers in a warehouse belonging to the plaintiffs." The contest was, again, whether the plaintiffs were entitled to recover the full value of the goods or only a sum paid in respect of them. Again the court held the full value. " It is a trust," said *Wightman* J., " clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place in satisfaction of their own claims, and in the next, as to the residue, in trust for the owners " (4). " There can be no objection to the plaintiffs," said *Crompton* J., " recovering the full value of the goods : for an equity will arise, in favour of the owners, from the mere circumstance that the plaintiffs will have received more than enough to cover their own interest : as to the excess above the sum which will cover that interest, the plaintiffs will be compellable, in equity, to pay it over to the owners " (5).

Again, in *Ebsworth* v. *Alliance Marine Insurance Co.* (6), the plaintiff effected insurances on cotton &c. " as well in their own name as for and in the name or names of all and every person and persons to whom the same doth, may, or shall appertain, in part or in all."

(1) (1856) 5 E. & B. 870 ; 119 E.R. 705.
(2) (1856) 5 E. & B., at p. 881 ; 119 E.R., at p. 709.
(3) (1859) 1 E. & E. 652 ; 120 E.R. 1054.
(4) (1859) 1 E. & B., at p. 661 ; 120 E.R., at p. 1058.
(5) (1859) 1 E. & B., at p. 664 ; 120 E.R., at p. 1059.
(6) (1873) L.R. 8 C.P. 596.

The plaintiffs accepted a draft against shipping documents. Afterwards the acceptance was paid and the shipping documents handed over, but in the meantime the ship with the cotton on board was lost at sea. The question was whether the plaintiffs were entitled to insure and recover the full value of the cotton or were limited to their own beneficial interest in the goods. The court was equally divided, but the former view was sustained. " The bill of exchange being drawn by the shippers," said *Bovill* C.J., with whom *Denman* J. agreed, " and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of the acceptance ; and they would have been entitled in equity to have the cotton appropriated for their reimbursement. . . . The plaintiffs would further be entitled to their commission on the sale of the goods, and also to be reimbursed the cost of the insurance, and their other expenses in respect of the consignment ; and it was their business to sell, manage, and dispose of the cotton as consignees. The equitable interest of the plaintiffs, after coming under acceptance against the shipment, was not in any particular portion of the cotton, but in the whole and in every part of it. . . . The plaintiffs, having an interest in every part of the cotton, would, as it appears to us, stand in the same position in equity as a strict mortgagee in a court of law, and would clearly be entitled to insure themselves against the loss of the cotton, as affecting not only their security for reimbursement of the amount of their acceptance, but also their commission on the sale " (1). *Brett* and *Keating* JJ., on the other hand, were of opinion that the plaintiffs were only entitled to insure the cotton to the extent of their own beneficial interest. " It " (the cotton and position of affairs), said *Brett* J., " gave a present interest in the cotton to the plaintiffs, that is to say, a right by an existing contract to have the bill of lading indorsed to them on payment of their acceptance, so as to enable them to sell the cotton to pay themselves £3,000 and their expenses, and to earn their commission and to hold the surplus proceeds as agents " for the owners (2). They had an insurable interest " because they had an existing contract with regard to the cotton, by virtue of which they had an

(1) (1873) L.R. 8 C.P., at pp. 607, 608. (2) (1873) L.R. 8 C.P., at p. 635.

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expectancy of benefit and advantage arising out of or depending on the safe arrival of the cotton. The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of £3,000, their advance, and their expenses and expected commission " (1).

In *Home Insurance Co. of New York* v. *Baltimore Warehouse Co.* (2) it was said that in case of loss of the goods warehousemen and commission agents may recover the full amount of the insurance for the satisfaction of their own claim first and hold the residue for the owners. Technical considerations respecting property are not of much importance so long as the insurers have a real interest arising out of the thing insured. And in *Sidaways* v. *Todd* (3) it was held that the owner could enforce his right against the insurer as well at law as in equity.

In the present case, the insurance, as already stated, was on merchandise the assured's own property or held by it on trust or commission for which it may be liable in the event of loss or damage by fire, and the promise of the insurance company was to " pay reinstate or make good to the insured such loss or damage which shall be occasioned by fire to the property above mentioned." The wool was totally destroyed by fire, and the insurance company paid to the defendant the full market value of the wool at the time of the fire. The defendant accounted to the plaintiff for the value so received after deducting various charges. Among these charges were the defendant's commission and a consolidated charge for receiving, weighing, lotting and appraising the value of the wool which it would have earned if the wool had not been destroyed by fire.

In my judgment the defendant is, for the reasons already appearing, entitled to make these deductions. The proceeds of the insurance stand in the place of the wool and represent, in a way, its realization (Cf. *J. Gliksten & Son Ltd.* v. *Green* (4); *R.* v. *B.C. Fir and Cedar Lumber Co.* (5)). The defendant had a real and insurable interest in the wool " in respect of their commission and charges." The words " on merchandise " &c. in the policy cover

(1) (1873) L.R. 8 C.P., at p. 637.
(2) (1876) 93 U.S. 527.
(3) (1818) 2 Stark. 400; 171 E.R. 685.
(4) (1929) A.C. 381.
(5) (1932) A.C. 441.

the interests or claim of the defendant in the wool as well as the interests of the plaintiff for which the defendant was liable in the event of loss or damage by fire. And further I should say that it would be wholly inequitable for the party who insured the wool and recovered its full value to be deprived of the claim he would have had on the wool if it had not been destroyed by fire.

In my opinion the appeal should be allowed and the questions stated for the decision of the Supreme Court answered: 1. No; 2. Yes; 3. No; 4. Yes.

DIXON J. The insurances under which the moneys now in question arose were floating policies on merchandise the assured's own property or held by it in trust or on commission for which it might be liable in the event of loss or damage by fire whilst contained in certain buildings occupied by the assured. Under such an insurance an assured holding goods of his own and goods of others as bailee may recover the full value of all the goods destroyed by fire. He may recover the full value alike of his own goods and of those held as custodian only, provided that in the latter case he is responsible in some degree to the owner for the safety of the goods (*Waters* v. *Monarch Fire and Life Insurance Co.* (1); *North British and Mercantile Insurance Co.* v. *Moffatt* (2)).

In the absence of the qualification expressed in the words "for which they may be liable in the event of loss or damage by fire," the assured could recover the full value of goods held as bailees only, whether they were or were not responsible for their safety (*London and North Western Railway Co.* v. *Glyn* (3)).

The goods destroyed by fire in the present case consisted in wool in the store of the assured, who is a wool-broker. Some of it was the property of clients, of whom the plaintiff was one, and some of it was the property of the assured. That belonging to clients had been consigned or delivered to the store for sale. The insurers paid over to the assured as an indiscriminate sum the full value of the wool destroyed, computed according to the gross selling price which

(1) (1856) 5 E. & B. 870; 119 E.R. 705.
(2) (1871) L.R. 7 C.P. 25.
(3) (1859) 1 E. & E. 652; 120 E.R. 1054.

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it was estimated would have been obtained for the wool if it had been sold at auction at the date of the fire.

A bailee or custodian of goods destroyed while in his possession by a risk against which he has insured them as goods, although entitled to recover the full value from the insurers, cannot retain the entire fund for his own benefit. After satisfying all lawful claims of his own, he must pay over the surplus to the owners who have entrusted the goods to him.

If the wool of the wool-broker's clients had not been destroyed by fire but had been sold by auction, the wool-broker would have been entitled to deduct from the proceeds three charges which it makes for the services it performs. It charges a commission of $1\frac{1}{4}$ per cent. It makes a consolidated charge of so much a bale, butt or bag for receiving the wool into store, weighing it, lotting it and appraising its value, and so on. And it charges eighteen pence per cent, less ten per cent, for maintaining an insurance upon the wool while in the store. This last is not a sum representing the actual premium payable in respect of the particular client's wool. It is a charge for the service of insuring the wool, a service performed by keeping all wool in the store from day to day covered by floating policies for its full value. The cost to the wool-broker of doing so is not fully met by the charge.

In accounting to the plaintiff and its other clients for the insurance moneys referable to the wool consigned by them to the wool-broker, the latter claims to deduct these three charges. The right to deduct the charge for insurance is conceded ; but in the present proceedings the plaintiff seeks to recover from the wool-broker the amount which it claims to deduct in respect of the other two charges, viz., that for commission and the consolidated charge for receiving, weighing, lotting and appraising the wool.

For the plaintiff it is said that these charges have not been earned, at all events not completely earned, and that the wool-broker has neither a right to set off the sums as a debt nor to retain them as part of the insurance moneys representing any lien or other interest of its in the wool.

For the wool-broker, on the other hand, it is contended that the actual loss suffered by the plaintiff and its other clients who consigned

or delivered wool to them for sale is represented by the net proceeds, not the gross price, which would have been obtained from the sale of the wool and that the difference represents moneys which, if the wool had been sold and not burnt, would have been retained by the wool-broker for its own benefit; that the insurance was on account of all interests at risk and represented in the value of the wool; and that the plaintiff and the other clients of the wool-broker ought not to receive, at its expense, more money than would have been returned if the wool had been preserved and sold.

In considering the question so raised, it is desirable to begin with the nature of the liability of a bailee who has covered all interests by insuring the full value of the goods to account to the bailor or owner for the insurance moneys. A fire insurance is a contract of indemnity, that is to say, a contract insuring against loss by fire is so understood and dealt with. It must be remembered, however, that insurances on goods are not affected by the *Gaming Act*, that is, the *Life Assurance Act* 1774 (14 Geo. III. c. 48), which contains an express provision exempting goods (See the argument of *Mellish* and the concession of *Lush* in *Waters* v. *Monarch Fire and Life Assurance Co.* (1) and the decision of *Roche* J. in *Williams* v. *Baltic Insurance Association of London Ltd.* (2)). It is, therefore, unnecessary to insert in a policy on goods the names of the persons interested or for whose benefit the insurance is made, and there is no enactment restricting the amount recoverable to an indemnity to the assured (*Johnson* v. *Union Fire Insurance Co. of New Zealand* (3)).

The principle that the insurance is an indemnity and amounts to no more is satisfied by requiring that a bailee or other person having a limited interest in the goods should intend at the time of the insurance to cover the other interests making up full property in the goods (See *Johnson* v. *Union Fire Insurance Co. of New Zealand* (3), and per *Bowen* L.J. in *Castellain* v. *Preston* (4)). The possession of the bailee gives him an insurable interest, and, after satisfying whatever loss he suffers, he becomes bound to apply the surplus of the insurance moneys in accordance with the interests in the goods

(1) (1856) 5 E. & B., at pp. 877, 878, 880; 119 E.R., at pp. 708, 709.
(2) (1924) 2 K.B. 282.
(3) (1884) 10 V.L.R. (L.) 154; 6 A.L.T. 50.
(4) (1883) 11 Q.B.D 380, at p. 398.

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he so intended to protect. Some not very satisfactory authorities appear to show that, if at the time of the insurance the bailee did not intend to protect the interest of the bailors or other ulterior interests in the goods, he is not accountable and as against those so interested may retain the full amount of the insurance moneys notwithstanding that he has recovered such moneys on the strength of the ulterior interests (*Gillett* v. *Mawman* (1); *Grant* v. *Hill* (2)).

In deciding what is the surplus for which a bailor must account to his bailee and what prior claims of his own he may satisfy, it is not unimportant to determine the legal basis of the bailor's liability. A court of equity might be expected to fasten a duty to account for the surplus upon an insured having only a limited interest who received the fund under a policy intended to protect all interests in the property. That it does so, seems to be the accepted view, although I have seen no actual decision of a court of equity to that effect (See per *Crompton* J. *in arguendo* in *London and North Western Railway Co.* v. *Glyn* (3); per *Blackburn* J. in *Martineau* v. *Kitching* (4); per *Brett* J. in *Ebsworth* v. *Alliance Marine Insurance Co.* (5)). But I think the liability of the bailor did not depend only on equity. It was not merely that of a constructive trustee. Although *Crompton* J. (3) expressed the contrary view, it seems to have been assumed that an action for money had and received lay at law. In *Sidaways* v. *Todd* (6) Lord *Tenterden* so decided, and in *Martineau* v. *Kitching* (4) *Blackburn* J. says that if the insurance moneys are actually obtained for the goods of the bailor, the insured must be taken to have got the moneys on his behalf, "and there would arise a trust from that enforceable in equity, and I suppose enforceable at law also." The explanation of the existence of such an action notwithstanding a seeming want of privity is probably to be found in the general relation between bailor and bailee and, in particular, in the close analogy which the insurance moneys bear to damages recovered by a bailee from a third party by whose wrongful act the goods have been destroyed. "No proposition can

(1) (1808) 1 Taunt. 137; 127 E.R. 784.
(2) (1812) 4 Taunt. 380; 128 E.R. 377.
(3) (1859) 1 E. & E., at p. 658; 120 E.R., at p. 1057.
(4) (1872) L.R. 7 Q.B. 436, at p. 458.
(5) (1873) L.R. 8 C.P., at p. 637.
(6) (1818) 2 Stark. 400; 171 E.R. 685.

be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property" (*Manders* v. *Williams* (1), per *Parke* B.). The bailee, whether liable or not to the bailor for the loss of the chattel, is entitled to recover from the wrongdoer its full value (*The Winkfield* (2)). But he is liable over to the bailor for the amount he recovers after satisfying his own lawful claims. "There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole of the loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of the bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor" (per Lord *Collins* M.R. (3)). Thus, in *Swire* v. *Leach* (4), where a pawnbroker maintained an action of trover against his landlord for wrongfully seizing pawned chattels under a distress, *Erle* C.J. said: "The bailee," (i.e., the pawnbroker) "therefore, is entitled to the full value of the goods. He may retain out of that the sums he has advanced upon them and the interest, and he will be liable to hand over the surplus to the respective owners of the goods." "The money recovered . . . represents and is substituted for the goods themselves" (*Eastern Construction Co. Ltd.* v. *National Trust Co. Ltd.* (5), per Lord *Atkinson*). (See, too, *The Joannis Vatis* (6).)

In the same way the insurance moneys replace the goods. The bailee receives into his hands an indemnity, but the indemnity is for the loss incurred by both bailor and bailee in the destruction of the goods. Both at law and in equity this consideration is enough

(1) (1849) 4 Ex. 339, at p. 344; 154 E.R. 1242, at p. 1245.
(2) (1902) P. 42.
(3) (1902) P., at pp. 60, 61.
(4) (1865) 18 C.B.N.S. 479, at p. 492; 144 E.R. 531, at p. 536.
(5) (1914) A.C. 197, at p. 210.
(6) (1922) P. 92.

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to found the liability of the bailee to account for so much of the moneys representing the value of the goods as is attributable to the loss sustained by the bailor.

In the absence of any contract between them controlling the matter, it is clear that the bailee is entitled to recoup himself for his entire loss in respect of the goods, so far as it is covered by the insurance, before he can be called upon to pay over any sum to the bailor (*Martineau* v. *Kitching* (1)). But the nature of the claims which he may deduct as representing his loss has not been defined or worked out. In *Ebsworth* v. *Alliance Marine Insurance Co.* (2) *Bovill* C.J. cites from *Parsons* on *Insurance* (1868), p. 201, the following statement with respect to consignees for sale: "A commission merchant may insure for the full value of the goods consigned to him, and may recover not only what will indemnify him for the loss of his commissions, but the full value; so much of that value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he intends to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their previous authority to insure or their subsequent ratification of his act." The difference of opinion in that case depended at bottom upon the circumstance that the insured were not in possession of the goods, a shipment of cotton which had not arrived, and the bills of lading had not been delivered to them or to anyone on their behalf. *Brett* J. and *Keating* J. were of opinion that the consignees could not recover from the insurers the full value of the goods. *Brett* J. said that, being only consignees to sell, under advance, and with a contract right to earn commission, but not being the legal owners of the cotton, they could only properly insure, so as to recover in their own name, the amount for which they were liable upon their acceptances against the goods and any commission they would have earned by selling (3). But he decided that, although the policy was on the goods and was intended to cover the consignors' interests as well as those of the insured, they could apply the insurance to their own use to the extent of their own insurable interest and recover to that extent (4). *Keating*

(1) (1872) L.R. 7 Q.B. 436.
(2) (1873) L.R. 8 C.P., at p. 629.
(3) (1873) L.R. 8 C.P., at p. 643.
(4) (1873) L.R. 8 C.P., at p. 644.

J. concurred in his judgment. *Bovill* C.J. and *Denman* J. considered that the full value of the goods was recoverable by the consignees.

In the present case the wool-broker had an insurable interest in the commission it would earn by the sale of the wool in its possession and in any other profitable charges. "Profits may be insured, but that is on the ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. There the profits are insured as an additional value upon the goods, in which the insurer has a present interest" (per *Parke* B., *Stockdale* v. *Dunlop* (1)).

In the ordinary course the charges made by the wool-broker were deductible from the proceeds obtained by a sale of the wool. In this they differ from prospective gains forming at the time of the loss no part of the present value of the goods the subject of the insurance. When profits not contained in the goods but expected as a consequence of trading are insured, they must be made the subject of a special provision or contract. For they do not form part of the loss sustained in the destruction of the property, and in a policy on goods it is the property that is the subject of the insurance. No doubt profits anticipated from the use of property or from trading may be intercepted or frustrated by the occurrence of the risk and the destruction of the property. But the failure to gain them flows from the loss insured against and is not a part of that loss. On the other hand, a profit may be contained in the value of the goods, and, if so, it is not excluded from the indemnity simply because it is a profit. If the sum forms part of the value of the goods at the time and place of their destruction, it must be paid to the insured as a necessary part of a full monetary equivalent of the goods. It is true that, as between the clients and the wool-broker, the right of the latter to commission and charges had not matured

(1) (1840) 6 M. & W. 224, at pp. 232, 233; 151 E.R. 391, at pp. 394, 395.

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before the goods were destroyed. It is also true that as yet the wool-broker had no possessory lien upon the goods in respect of the charges. But we are not considering either the accrual of a debt nor the acquisition of a special property in chattels. We are considering the loss of a pecuniary advantage growing out of the continued possession of the goods and forming part of their value. It is perhaps worth remarking that the wool in the store awaiting auction must have been higher in value than it would have been if it still lay in the hands of the client. The interest of the wool-broker arose from a contractual employment entitling it on sale of the goods delivered into its possession to the charges in dispute. By means of its possession, it would realize its "interest." No doubt it was not a special property in the goods. But "interest" for the purposes of insurance is not confined to rights *in rem*. As between the insured and the insurer even, it is only the subject of the insurance and not the interest that must be described (*Crowley* v. *Cohen* (1)).

The circumstances of the present case show that the wool-broker intended to insure the full value of the goods in order, in the event of loss, to realize, so far as possible, the same amount as a sale would produce and so protect all interests in the proceeds of the wool. Its commission and charges would form part of the proceeds and were in that sense contained in the value of the subject of the insurance, a value increased by delivery into its store. I can see no ground for saying that, as between itself and its clients, its loss in respect of commission and charges should not be protected by the insurance. It cannot be considered to have intended to insure that part of the value of the goods for its clients and not for itself. It is a part of the value of the goods to which in the case of sale its clients would never become entitled. No contract or condition can be implied from the charge for insurance entitling its clients to a greater indemnity than in respect of their actual loss, that is, the loss of the net return from the sale. Nor can the wool-broker be considered as having received from the insurers payment of the whole insurance moneys for and on behalf of its clients. The insurers doubtless knew full well that the gross value of the wool would not be received by the owner, but only the net price after the

(1) (1832) 3 B. & Ad. 478; 110 E.R. 172.

deduction of charges of the kind now in dispute. There is, I think, no ground on which more than the net proceeds after deducting the loss of the wool-broker in respect of commission, consolidated charge and insurance charge can be regarded as held for the use of the plaintiff.

But a subsidiary question arises. It is whether in the case of the consolidated charge, and perhaps of the commission, the full amount should be deducted. At the time of the fire some of the work had not yet been done ; that is to say, the wool had not been lotted, valued or auctioned by the wool-broker. Ought the wool-broker to be limited to the value of the work done before the fire and the loss of the net profit which it would have made if it had carried out these operations ? On the whole I think it should not be so limited ; on the ground that in substance the insurance moneys representing the value of the wool at auction are divisible into two parts, the amount of the charges to be made by the wool-broker and the net amount lost by the client who consigned the wool for sale. The insurance was effected to include both these parts in the selling value of the commodity, which was, accordingly, fully covered. It is only the net residue that the wool-broker took as trustee for the plaintiff and its other clients, or as money received to their use.

For these reasons I think the appeal should be allowed with costs ; the order of the Supreme Court should be discharged, and in lieu thereof it should be ordered that the questions in the special case be answered : 1. No ; 2. Yes ; 3. No. ; 4. Yes, and that the plaintiff pay the defendant's costs of and incidental to the case stated.

EVATT J. This is an important test case arising out of a fire which destroyed large quantities of wool in the store of the defendant, which carries on the business of selling wool at a commission.

The action does not arise as between insurer and insured. Although the defendant broker charged each wool grower 1s. 6d. per cent less ten per cent for the service of insuring the wool against fire, whilst in store, the defendant carried out the service by insuring the wool in its own name with certain insurance companies ; as a result of the method of floating cover adopted by the broker, it was not

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possible to ascertain with what insurance company the wool of any particular grower was insured. Nor did the broker distribute its insurance charge amongst its clients so as always to be recouped for the premium it pays to the insurance companies. Indeed, the special case says: "The flat rate of 1s. 6d. per cent charged by the defendant to the grower bears no relation to the premium paid by the defendant or the length of time the wool of a particular client is in store, and the total amount charged to growers seldom if ever recoups the defendant for the premiums paid by it. The defendant has borne as much as £1,200 in one year for insurance premiums paid to the insurance companies but not charged to the growers. In practically every year there is a deficiency in this respect of some hundreds of pounds."

The insertion of this fact in the special case is intended, I suppose, to suggest that the broker treats the grower somewhat generously. It might have increased its flat-rate charge, but it seems to have refrained from doing so. There is competition in the business of wool-broking, and that may explain the fixing of the unprofitable charge. The motive of generosity should not be without its appeal to the grower. Only if the broker succeeds in the present action will it become entitled to employ the insurance moneys so as to retain for itself nearly three per cent of the total value of the grower's wool.

The defendant broker has actually received from the insurance companies moneys representing the value of the growers' wool as at the time of the fire, which in the case of the particular plaintiff amounts to £1,980 0s. 7d. This figure has been worked out upon the basis of a supposed sale by auction as at the time of the fire. The document sent to the grower by the broker describes itself as an "account sales of realization by insurance."

This form tends to conceal the fact that the action is for money had and received to the plaintiff's use. This is a proper form of action (*Sidaways* v. *Todd* (1)). The defendant having received £1,980 0s. 7d. in respect of the insurances effected on the plaintiff's property, the question is: What title has the defendant to retain to its own use any portion of that amount? Nowhere in the special case is it suggested that it was any portion of the bargain between

(1) (1818) 2 Stark. 400; 171 E.R. 685.

grower and broker that, from the insurance moneys which would be collected by the broker in respect of the grower's wool, the former would ever become entitled to deduct commission moneys on sales never effected or charges for work never performed. Moreover, although the point is now academic, how was the grower ever informed that the broker could look to the insurance moneys to recoup itself even for work actually done ? Obviously, for whatever work had been done up to the time of the fire, the broker could recover from the grower. But where did the broker obtain from the grower the right to treat the insurance moneys as the security for payment for such services ? So far as its present claim, viz., to appropriate *unearned* commission moneys and charges for services *not rendered*, is concerned, there is not the slightest ground for supposing that the grower could ever have had it in contemplation, even if the broker himself did.

I think that it is important to note that the broker's claim to deduct commission moneys and charges for work not done is not limited to the amount of the profits which it would have earned but for the occurrence of the fire. It is in reality a claim to retain the gross receipts from activities which, if they had been performed, would necessarily have exposed the broker to some expenses. Thus, the broker claims so to use the insurance moneys as to be placed in a better financial position in relation to its commission and charges than if the fire had never occurred. The broker naturally retorts that, possibly as a result of the insurers' method of valuing the goods destroyed by fire, the grower also claims to be placed in a better position than if the fire had not occurred. Even if that point were conceded, the actual result is in no way attributable to the action of the grower, and there seems no justification for the broker, who never became liable primarily to the grower as insurer, to use the insurers' argument, " You are asking us to give you something more than an indemnity."

It is contended that the claim of the broker is prior or superior to that of the grower. Upon what basis does this theory rest ? It is said to derive from the leading common-law cases commencing with *Waters* v. *Monarch Fire and Life Assurance Co.* (1). In that case a

(1) (1856) 5 E. & B. 870 ; 119 E.R. 705.

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fire policy had been taken out by the plaintiffs, who were wharfingers and warehousemen, and, under the terms of the policy, the value of the whole of the goods destroyed had to be paid to the plaintiffs by the defendant insurer. Lord *Campbell* C.J. said that the plaintiffs "will be entitled to apply so much to cover their own interest, and will be trustees for the owners *as to the rest*" (1).

It has to be remembered that in the *Waters Case* (2) the plaintiffs had a lien on the goods for cartage and warehouse rent, but no further interest therein, and no charge whatever had been made for insuring the merchandise of the customers, who indeed were not aware of the existence of the fire policy. Lord *Campbell's* observations were intended to explain how in practice the very extensive insurable interest of the wharfinger in the goods was to be reconciled with the extreme smallness of his personal interest therein. As *Keating* J. said of *Waters' Case* (2) in the subsequent case of *North British and Mercantile Insurance Co.* v. *Moffatt* (3),

> "the offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover to the amount of such liens. But the court held in each case that the plaintiffs were entitled to recover to the full amount insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected."

A case more like the present was *Cochran & Son* v. *Leckie's Trustee* (4). There a miller had customers who in the regular course of business forwarded hay to be chopped at the mill. The miller was held to have promised such customers as follows: "All goods held in trust covered by insurance against fire." The miller took out an insurance policy which covered merchandise at the mill, the property of the insured or held by him in trust or on commission for which he was responsible. After a loss the insurance company paid to the miller's trustee in bankruptcy the full value of the hay. Lord *Low* said:—

> "Looking to the circumstances in which that document was issued, the words must mean that customers need not trouble themselves to insure against fire, because their goods were insured under policies taken out by the grain-crusher. I do not see why that should not be an insurable risk. What was

(1) (1856) 5 E. & B., at p. 881; 119 E.R., at p. 709.
(2) (1856) 5 E. & B. 870; 119 E.R. 705.
(3) (1871) L.R. 7 C.P. 25, at p. 31.
(4) (1906) 8 S.C. 975.

> meant was either that the grain-crusher undertook to be responsible to his customers for loss caused by accidental fire or to insure the customers' goods as agent for them. The insurance companies have accepted the view that the risk was insurable, and that the policies issued by them covered it, and they have paid the money. That being so, the trustee cannot retain the money so obtained and distribute it among the general creditors. It may be that it should never have been included in the bankrupt estate at all, but the same result will be arrived at if the customers are found entitled to it preferably to the other creditors " (1).

Waters' Case (2) was decided in 1856, and in 1859 it was followed in *London and North Western Railway Co.* v. *Glyn* (3), where special emphasis was laid by the judges upon the fact that the liability of the insurer to the bailee was not necessarily commensurate with the liability actually enforceable as against the bailee in respect of the bailor's goods. Two of the judges suggested that, if they chose, the insurers might " limit their insurance to the carriers' liability and responsibility only." Insurers gradually adopted the suggestion, and in *North British and Mercantile Insurance Co.* v. *Moffatt* (4) a policy in its altered form came before the court.

In the present case the modern form of policy was adopted, and the broker took out policies in its own name, the subject matter of insurance being defined by the schedule as being " merchandise the assured's own property or held by them in trust or on commission *for which they may be liable in the event of loss or damage by fire*, whilst contained " &c.

Does the broker's claim to retain further insurance moneys as against the growers find any support in the terms of the insurance policy itself ? The subject matter of the insurance is not the broker's liability to the grower as such, nor is it expressed as the broker's interest in or lien over the merchandise. The subject matter is the merchandise itself, which is divided into two categories, first, the property of the broker, second, goods held by it on trust or on commission—subject to the provision that the broker is under an existing liability in respect of damage by fire to such goods. In the present transaction the broker was under an existing liability in respect of the wool consigned to him for sale, and such contractual

(1) (1906) 8 S.C., at p. 981.
(2) (1856) 5 E. & B. 870; 119 E.R. 705.
(3) (1859) 1 E. & E. 652; 120 E.R. 1054; 28 L.J.Q.B. 188.
(4) (1871) L.R. 7 C.P. 25.

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liability was itself sufficient to give the broker an insurable interest to the full value of the goods (*Cochran & Son* v. *Leckie's Trustee* (1)).

So far as the present transaction is concerned I find it difficult to appreciate how by insuring the grower's goods, held by it on trust or commission, the broker should be regarded as having done any more or any less than it was bound to do by virtue of its contract with the grower. It is true that the broker might happen to have acquired a lien on some or all of the wool in store, but why should not the relevant transaction be regarded as one in which (1) the broker promises that there will be full responsibility for the loss by fire of the grower's wool while it remains in the store, and (2) does so by contracting to that effect with the insurance companies. In their turn, the insurance companies expressly limit their liability to cases where the broker has assumed a legal responsibility to the growers.

It is true that serious interference with the broker's business profit might result from the fire, and this might be regarded by the broker as a risk. But the well-recognized way of covering all such risks is by consequential-loss policies. The policies executed were ill adapted to cover losses of profit, and whether they have been covered by other means the court is not informed. The policies taken out all provided in clause 11 (*a*) that the claim under the policy is to be assessed upon the value, at the time of the loss, of all items destroyed by fire, such value "not including profit of any kind." There is nothing on the face of the policy or the schedule which trenches upon this overriding principle of valuation. In my opinion, the broker did not, in the present policies, cover itself against the risk of being deprived by fire of the probability of earning business profit. Assuming in the broker's favour that the words of the present policies were sufficient to cover some "interest" in or lien over the goods attributable to the value or price of the services performed by the broker in reference to the grower's wool, I am of opinion that such interest or lien cannot extend one iota further than the charges for those services which at the time of the fire had already been rendered to the grower in respect of his wool. Even in relation to

(1) (1906) 8 S.C. 975.

cases of the *Waters* (1) type, where the bailee has assumed no obligation to insure, the right of the bailee as against the bailor is no greater. *Crompton* J. dealt with the precise point, stating :—

> "The parties meant to insure those goods with which the plaintiffs were entrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to their bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods" (2).

The passage quoted makes it clear that, even in such cases, the bailee's claim as lienee was to be limited to the value of services actually rendered up to the time of the loss.

Certainly the claim of the present wool grower as against the present broker, who has received from the insurers the full value of the grower's wool as at the time of the fire, is at least as potent as that of the unwitting volunteer owner of merchandise whose right to the "surplus" of the insurance moneys was being defined by *Crompton* J. Here the broker has done no more than he was bound to do, and it is probably erroneous to assume that the grower should be remitted to the secondary and subordinate position occupied by the owners in cases like those of *Waters* (1). In my opinion the appellant, having received the full money equivalent of the wool from the insurers, must account for all of it to the growers. It cannot extend any claim of its own beyond the price or value of services already rendered, and its claim to deduct from such moneys the gross receipts it would have obtained if the fire had not taken place cannot be defended by reference to the terms of the policy, the bargain between the broker and grower or any other part of the transaction.

The appeal should be dismissed.

McTIERNAN J. The appellant held a quantity of the respondent's wool, which was burned while in its store. The wool was received by the appellant upon the conditions that it was to weigh, lot and value it, sell it for commission, deduct its charge for these services, its commission, and any moneys which it laid out on the wool, from the proceeds of sale, and pay the balance to the respondent

(1) (1856) 5 E. & B. 870; 119 E.R. 705.

(2) (1856) 5 E. & B., at p. 882; 119 E.R., at p. 709.

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or as he should direct. The course of business between the parties is described in detail in the special case. The appellant, in its own name, entered into a policy of fire insurance which was expressed to be effected " on interest as more particularly described in " the schedule. The more particular description was : " On merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire." The respondent's wool, which the appellant held for weighing, lotting, valuing and selling, was included in the merchandise described in the schedule. The moneys paid by the insurer to the appellant included the sum of £1,980 0s. 7d., which was equal to the gross selling price, as estimated by appraisers, that the respondent's wool, which was burned, would have realized if it had been weighed, lotted and valued for sale in the appellant's store, and sold by it at auction immediately before the fire. It was lawful for the appellant, although its interest in the subject matter of the policy was a special interest only, to effect the policy in its own name for the full insurable value of the subject matter of the insurance and to indemnify itself out of the moneys received by it from the insurer for the loss of any insurable interest of its own to which the policy attached. The appellant was liable to pay the balance to the respondent. The appellant claimed the right to indemnify itself out of the sum of £1,980 0s. 7d. for the loss of its charge for weighing, lotting and valuing the wool, and of its commission for selling it. The respondent disputes the appellant's right to an indemnity under the policy for these losses. The appellant's right to this indemnity out of the moneys received under the policy turns upon the question whether it was the intention of the policy to insure the interest which the appellant had in the lost remuneration. As the appellant's charges for weighing, lotting and valuing and its commission were to be paid out of the moneys realized by the sale of the wool, it had a direct pecuniary interest in the wool. In my opinion this was an insurable interest (*Lucena* v. *Craufurd* (1); *Wilson* v. *Jones* (2), per Lord *Blackburn*). The description of the subject matter of the policy does not specifically refer to this insurable interest, but that omission is not material if this insurable

(1) (1808) 1 Taunt. 325; 127 E.R. 858. (2) (1867) L.R. 2 Ex. 150.

interest is in the subject matter which is insured. In *Crowley* v. *Cohen* (1) Lord *Tenterden* C.J. said: "But I agree . . . that although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large." And in *Mackenzie* v. *Whitworth* (2) *Bramwell* B. said: "The rule, indeed, is that you must specify the subject matter of insurance, not your interest in it." The policy now in question was expressed to be "on interest as more particularly described in" the schedule. The interest which was intended to be insured by the policy was specified by reference to the merchandise described in the schedule. It is plain from the language of the policy that the appellant intended to insure, first, its own merchandise, secondly, its own interest in the respondent's wool which was held in store to be weighed, lotted and valued and sold by the appellant for a charge and commission to be paid out of the wool, and thirdly, the respondent's interest as the owner of the wool held on these conditions. The clear description of the subject matter of the policy would be unduly restricted by reading it as not covering the direct pecuniary interest which the appellant got in the respondent's wool under the conditions upon which it agreed to receive the wool into its store. That was an interest of an insurable nature in the subject matter of the policy, and it came within the scope and operation of the policy. It follows that the appellant is entitled to indemnify itself for the loss of the charges for weighing, lotting and valuing the wool and for the loss of its commission out of the proceeds of the policy.

If any of these services had been done before the fire and a lien for the value of what was done had attached to the wool, the appellant would have had an insurable interest in the wool equivalent to the value of the lien, and the policy would have attached to that interest. The Supreme Court decided that the appellant's indemnity was confined to the value of any lien which it had on the wool. A lienee has an insurable interest in the subject matter of the lien, but, if the view be right that the advantage which the appellant had of being entitled to be paid out of the wool for the services which the wool was consigned to it to perform gave it an interest

(1) (1832) 3 B. & Ad., at p. 485; 110 E.R., at p. 175.
(2) (1875) L.R. 10 Ex. 142, at p. 148.

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of an insurable nature in the subject matter of the policy, it is not material that its interest had not matured into a lien at the time of the fire. The appellant is, nevertheless, entitled to an indemnity under the policy for the loss of that insurable interest. The Supreme Court came to the conclusion that, as no lien for the charges for services or for the commission had matured, the appellant was not entitled to be indemnified for the loss of its remuneration, because it was not specifically described as a subject matter of the insurance. A policy on goods *simpliciter* cannot be read as covering a loss of profits which is collateral to the loss of the goods insured. But there is no departure from this principle in reading the present policy as covering the loss of the appellant's charges for services and its commission, because the appellant's interest in the charges and commission to be deducted from the proceeds of the wool gave it a direct pecuniary interest of an insurable nature in the subject matter of the insurance. Indeed, upon the hypothesis adopted by the appraisers an amount equal to the appellant's remuneration formed part of the insurable value of the wool on the day of the fire.

In my opinion the appeal should be allowed.

Appeal allowed with costs. Order of Supreme Court set aside. Questions in special case answered as follows: 1. *No*; 2. *Yes*; 3. *No*; 4. *Yes*. *Plaintiff to pay defendant's costs of and incidental to special case.*

Solicitors for the appellant, *Ferguson & Vine-Hall.*

Solicitors for the respondent, *A. J. McLachlan & Co.*

J. B.