

is inherent in the subject-matter, their Lordships cannot see. Lessees, landowners, and inspector, all put together, cannot tell what works or occupations will be necessary or required; but the award is to the effect that, whatever are found to be so, the damage done by them is estimated beforehand at fifty dollars (five for each share).

Their Lordships are of opinion that the judgment of the Supreme Court should be discharged, and the motion to quash the award dismissed with costs, and that the respondent should pay the costs of this appeal. They will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellants: *Paine, Son, & Pollock.*

Solicitor for respondent: *Bompas, Bischoff & Co.*

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[PRIVY COUNCIL.]

CONNECTICUT FIRE INSURANCE COM- } PLAINTIFFS;
PANY }

AND

KAVANAGH DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER
CANADA, PROVINCE OF QUEBEC, APPEAL SIDE.

J. C.*
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July 6, 8, 30.

*Fraud—Failure of Proof—New Issue as to Negligence cannot be raised
in Appeal.*

Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—

Held, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing

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all that he would have brought forward to rebut a charge of negligence; nor had the points connected with that issue been submitted to the Courts below.

APPEAL from a decree of the Court of Queen's Bench, dated Sept. 26, 1891, affirming a decree of the Superior Court (Nov. 14, 1889).

The action was to recover \$2872 32c., which the appellants alleged they had been induced to pay in their own wrong to one Warden King, by the fraud of the respondent, such alleged fraud consisting partly of false and fraudulent misrepresentations, and partly of wilful and fraudulent concealments made with a view to deceive the appellants into making the said payments.

The facts are stated in the judgment of their Lordships.

Bompas, Q.C., and *Gore*, for the appellants, first contended that the evidence shewed that at the date of the fire Warden King was in truth insured with the Scottish Company, and not with the appellants. They submitted that King had himself no contract with the appellants, nor was there one subsisting between them and the respondent on his behalf which King could and did ratify. Even if there had been, the respondent was bound to put an end to it, and not to allow King to ratify it. It was his duty as their agent so to do. There was neither contract nor ratification, but the respondent falsely represented to the appellants that King was, at the date of the fire, insured in their company and had a valid claim against them, and that such insurance was effected on the 14th of July, 1888, and that King was not insured in any other company. He fraudulently concealed from the appellants facts within his knowledge as their agent, and material for them to know in reference to King's claim. Even if the case of fraud failed, the respondent was guilty of negligence and breach of duty as the appellants' agent in not informing the appellants of facts within his knowledge as their agent, material for them to know in judging of their liability and of the validity of his claim. Such negligence under the circumstances was of itself sufficient to support the action and entitle the appellants to the decree claimed. Reference was made to *Lancashire Insurance Company*

v. *Nill* (1), a case decided by the Supreme Court of Pennsylvania in which the facts were exactly similar; *Gifford v. Queen's Insurance Company* (2); *Williams v. North China Insurance Company* (3); Arnold on Marine Insurance (last ed.) p. 167; *Hagedorn v. Oliverson* (4); *Routh v. Thompson* (5); *Ogden v. Montreal Insurance Company* (6); see also *Swinfen v. Lord Chelmsford* (7); and *Thom v. Bigland* (8).

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Fullarton, Q.C., and *Kavanagh* (of the Canadian bar), for the respondent, contended that upon the evidence the allegations of fraud entirely failed; and that it was not open to them to claim judgment on any other ground. The ordinary rule that fraud must be proved as alleged applies especially in a case where no other ground of claim had been tried and investigated in the Court below. No issue was raised as to negligence in the Court below and evidence directed to an issue as to fraud cannot be accepted, particularly in appeal, as complete or conclusive in reference to another issue so distinct in its character as that on which the appellants now claim a decision in their favour. Moreover, a cause of action founded upon negligence is not within the declaration, and the appellants cannot be allowed to change the whole character of their claim. Upon the merits of the new claim it was contended that the respondent had proved that he was authorized by King to transfer his insurance to the appellants, that he did so by substituted entries in his books in the usual way. He believed that the transference had been effected and so represented to the appellants, and all the circumstances bearing on the appellants' liability were disclosed at the time that the amount payable thereunder was adjusted. See *Routh v. Thompson* (5), cited on the other side. The judges below had not been asked to weigh the evidence as to the authority to transfer, or as to the respondent's belief in the validity of the transfer, nor had they discussed those points

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| (1) Pennsylvania Rep. vol. 114,
p. 248. | (5) 13 East, 274. |
| (2) 1 Hannay, New Brunswick Re-
ports, p. 432. | (6) 3 Upper Canada C. P. Reports,
497. |
| (3) 1 C. P. D. 757. | (7) 5 H. & N. 890. |
| (4) 2 M. & S. 485. | (8) 8 Ex. 725. |

J. C. in reference to the usual practice of business so as to throw any
 1892 light on the imputation of negligence. Reference was made to
 CONNECTICUT Code of Civil Procedure, s. 320; Porter's Laws of Insurance,
 FIRE p. 425; *Overend & Gurney v. Gibb* (1).
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Bompas, Q.C., replied.

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 July 30.
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The judgment of their Lordships was delivered by

LORD WATSON :—

In this case the argument addressed to their Lordships was not confined to the points which were submitted for the decision of the Courts below. Before dealing with these controverted questions, whether old or new, it will be convenient to notice the facts which are not now in dispute.

The respondent, Walter Kavanagh, in the year 1888, acted as agent in Montreal for three different companies carrying on the business of fire insurance. A gentleman, named Warden King, had insured with him certain premises in Montreal, occupied as a paper-box factory, under a policy from one of these concerns, the British America Assurance Company, which expired on the 8th of July, 1888. Before that date the company intimated to the respondent that they declined to renew the policy on any terms; whereupon he, being desirous to keep the insurance in his office, communicated with the son of the assured, who acted for his father in these matters, and, with his assent, opened an insurance with the Scottish Union and National Insurance Company. On behalf of that company he issued to Mr. King a document termed an interim receipt, and received in exchange for it a year's premium of \$68 75c. The receipt, which the respondent had admittedly power to issue, constituted an insurance for thirty days from the 8th of July, subject to cancelment at any time within that period upon written notice to the assured. On the 12th of July he received a letter from the manager of the Scottish Company, instructing him to cancel, in reply to which he wrote a letter of remonstrance, urging that the risk was one which the company ought to have no hesitation in accepting. On the 13th of July an answer from the manager, confirming previous instruc-

tions, reached his office, was there opened by Mr. Stanger, his chief clerk, and was then forwarded to and received by the respondent on the evening of the same day.

The respondent went to his office early on the morning of Saturday, the 14th of July, when he directed Mr. Stanger to transfer the insurance from the Scottish to the appellant company, and was informed that, in accordance with usual practice, the transfer had already been made in his books. The respondent left early in the forenoon; and, after his departure, Mr. Stanger posted, about 2 P.M., a report to the appellants, informing them, *inter alia*, that an insurance of Mr. King's premises had been effected on their behalf. The office was then closed for the day, and immediately afterwards Mr. Stanger learned that there was a fire on the premises, but could not ascertain the amount of damage which had been done.

The respondent heard of the fire for the first time on the Sunday forenoon, from Mr. King, junior, whom he then informed that the insurance had been transferred from the Scottish to the appellant company. Mr. King, whose father still held the interim receipt of the Scottish Company, without notice of cancellation, states that he said in reply, "Well, I will expect you to see me out of the matter." According to the respondent's account, the answer he received was, "All right; do whatever you like with it." On the Monday, a written claim for the amount of his loss was preferred by Mr. King against the appellants, and the claim and an estimate of the loss was, on that day, sent to them by the respondent. On the same day the premium which had been received by the respondent was transferred, in his cash book, from the credit of the Scottish Company to that of the appellants. Charles D. Hanson, an insurance adjuster, was, with their assent, appointed to act on behalf of the appellants; and, after receiving his report, they, on the 1st of August, 1888, paid the sum of \$2872 32c. to Mr. King.

The appellants filed a writ and declaration against the respondent in January, 1889, in which they alleged that he had been guilty of wilful deceit, and had fraudulently effected, or purported to effect, a transference of the insurance in his books after the fire had occurred, in the knowledge that the Scottish office,

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and not the appellants, were the only insurers at the time, with the fraudulent purpose of relieving himself of a possible claim at the instance of the Scottish Company in consequence of his neglect to give a written notice of cancellation, pursuant to their instructions. Upon that issue, the case went to trial before Wurtele, J., who acquitted the respondent of all imputations of fraud, and dismissed the action with costs. The appellants then carried the case to the appeal side of the Court of Queen's Bench, where, admitting that the transfer had been made in the respondent's books before the fire occurred, they nevertheless insisted that the charge of fraud had been proved. The Court of Queen's Bench, consisting of five judges, unanimously affirmed the decision of Wurtele, J., and dismissed the appeal with costs.

Upon the argument of this appeal, the appellants maintained that the charges of fraud which they prefer are borne out by the evidence. It certainly appears to their Lordships that the conduct of the respondent, when subsequently called upon to explain the particulars of the transaction, was neither candid nor creditable, and was well calculated to excite suspicion; but, upon the facts proved, their Lordships are unable to differ from the conclusion at which all the learned judges below have arrived.

The appellants did not confine their argument to the issue which alone was raised before Wurtele, J., and the Court of Appeal. They argued at great length that their pleadings, taken in connection with the evidence adduced at the trial, disclose such negligence, or breach of duty, committed by the respondent, acting in the capacity of their agent, as is in law sufficient to infer his liability to them for the sum claimed in this action. On the other hand, the respondent maintained that the new cause of action, brought forward here for the first time, was not within the appellants' declaration, that the evidence led at the trial was not directed to it, and that it ought not to be entertained by this Board.

Upon the merits of the new question, the argument of the respondent, shortly stated, was this: That he had authority from Mr. King, junior, to transfer the risk from the Scottish Company to the appellants, and that notice to cancel the receipt of the Scottish Company was therefore unnecessary; that, according to

the practice of insurance agents, a valid substitution was made by the entries of Saturday, 14th of July, of the appellants for the Scottish Company as insurers of the premises; and that the practice was in conformity with the principles recognized in *Routh v. Thompson* (1) and similar decisions. In any view, he maintained that his representations to the appellants, to the effect that they were the insurers at the time of the fire, were made by him in good faith, and in the reasonable belief that such was the fact, derived from the general understanding and course of dealing in that part of the world. He also maintained that Mr. Hanson, according to the custom of insurance offices there, was charged with the duty of inquiring into the legal liability of the appellants; and that the whole circumstances bearing upon that liability, as they appeared in the respondent's books, were fully disclosed to him.

Their Lordships are of opinion that, in the circumstances of this appeal, the appellants are not entitled to raise any issue except that of fraud. They do not question the accuracy of the general rule laid down by the Court of Exchequer in *Swinfen v. Lord Chelmsford* (2), to the effect that, when a declaration discloses a certain state of facts, the plaintiff may recover upon the liability which the facts disclose. One material difference between that case and the present consists in the fact that the point there raised had been put forward at the trial, so that the defendant had notice of it. *Thom v. Bigland* (3), the other authority upon which the appellants relied, in which the plaintiff was held to be precluded from raising any other issue than fraud in the Appeal Court, comes much nearer to the present case. Baron Parke observed (4), "If the words 'falsely and fraudulently' can be struck out of a declaration so as to leave a good cause of action, that may be done." In this case it is of the essence of the appellants' declaration that the respondent was guilty of fraud, and that is not proved. If the allegations of fraud and wilful misrepresentation were expunged, it is exceedingly doubtful whether there would remain an intelligible charge of negligence.

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(1) 13 East, 274.

(2) 5 H. & N. 890.

(3) 8 Ex. 725.

(4) 8 Ex. 730.

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Their Lordships do not find it necessary to rest their decision upon that ground. When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.

In this case there are various points upon which the evidence does not appear to their Lordships to be so full and satisfactory as it might and probably would have been, had the question of negligence been raised at the trial. The points touching the authority of the respondent to make a transfer of the risk on behalf of the assured, and the honesty of his belief in the validity of the transaction of which the appellants complain, depend, as was shown by their argument, upon the degree of credibility to be attached to different witnesses, a matter which ought to have been submitted to the judge before whom they were examined. There are two other points upon which light might have been thrown, had the plea of negligence been taken before him, these being (1.) the ordinary course of insurance business, and (2.) the position and duties of an insurance adjuster. Were their Lordships to decide upon the evidence as it stands, and the arguments addressed to them, they could only be guided by their own knowledge of the course of insurance business in this country, which the evidence shews to be so far different from that followed in the city of Montreal as to make it unsafe to assume that con-

duct which might tend to show negligence in the one case would do so in the other.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal, the costs of which must be borne by the appellants.

Solicitors for appellant: *Bompas, Bischoff & Co.*

Solicitors for respondent: *Simpson, Rawson & Co.*

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[PRIVY COUNCIL.]

ROBINSON PLAINTIFF;

•AND

CANADIAN PACIFIC RAILWAY COMPANY DEFENDANT.

J. C.*
1892
June 28;
July 23.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Law of Canada—Interpretation of Code—Civil Code, ss. 1056, 2262 (2)—
Prescription—Widow's Right of Action distinct from that of Deceased.*

An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory Code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein.

Held, that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by sect. 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under sect. 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased.

APPEAL by special leave from a decree of the Supreme Court (June 22, 1891), reversing by a majority (Fournier, J., dissenting) a decree from the Court of Queen's Bench for Lower Canada, Appeal Side, District of Montreal (June 19, 1890), which had affirmed a decree of the Superior Court in review (Jan. 31, 1889).

The proceedings in the action are stated in the judgment of

* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.