DEMILL BUCK AND FRANK M. BUCK (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM G. KNOWLTON (DEFENDANT) ..... } RESPONDENT.

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*May 31.
*Oct. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract—Application for insurance—Agreement to forward—Evidence—Escrow.

B. wishing to insure his vessel the C. U. Chandler went to a firm of insurance brokers who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at $2,500 and the rate of premium was fixed at 11 p.c. K. refused to forward the application unless the valuation was raised to $3,000 or 12 p.c. premium was paid. This was not acceded to by the brokers but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost and four days after K. received a telegram from the attorney of the company at the head office as follows: "Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and returned at once; he did not show it to the brokers nor to B. nor inform them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy:

Held, affirming the judgment of the court below, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at $3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence.

Held, further, that as the property in the policy prepared at the head office and sent to K. never passed out of the company and was at

* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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the most no more than an escrow in the hands of K., the agent, trover would not lie against K. for its conversion.

APPEAL from a decision of the Supreme Court of New Brunswick ordering, on motion of the defendant pursuant to leave reserved, a new trial on terms, or in default of the terms being agreed to a non-suit.

The facts of the case will sufficiently appear from the above head-note and the following judgments.

Palmer Q.C. for appellants.

McLeod Q.C. for respondent.

STRONG J.—The question is simply one of fact: Did the plaintiffs ever authorize Whittaker Bros. to accept such a policy as that they now seek to get the benefit of in this action?

Upon the evidence it is plain that they never did. The only policy which the plaintiffs authorized Whittakers to procure for them upon the C. U. Chandler was one for $800 on a valuation of $2,500 at a premium of 11 p.c., whilst that which they now claim to be entitled to is one insuring $800 on a valuation of $3,000 at 11 p.c., and consequently at a premium which the plaintiffs never authorized. If the insurance company had sued for the premium it is manifest that they could not possibly have recovered.

The plaintiffs had never, before the policy was recalled by the company, assented to the terms of such a policy and they cannot, therefore, now sue for a conversion of it treating it as their policy. The instrument was, at the most, never anything more than an escrow in the hands of the company's own agents.

As regards negligence on the part of the defendant, which is charged in the first count of the declaration, there never was any privity between the plaintiffs and the defendant. The Whittakers never had authority

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to constitute Knowlton a sub-agent, and they dealt with him as the agent of the insurance company and in that character only. Knowlton, consequently, never owed any duty to the plaintiffs and the charge of negligence, therefore, wholly fails on the evidence.

In my opinion the rule absolute for a non-suit in default of the plaintiffs complying with the terms on which a new trial was granted to him was a proper disposition of the case. This appeal must, therefore, be dismissed with costs.

TASCHEREAU J.—Upon the question of amendment, as upon the whole of the controversy, I adopt Mr Justice Tuck's reasoning in the court below. The appellants have not proved the averments of their declaration. The rule for a non-suit or for a new trial upon terms must stand. I would dismiss the appeal.

GWYNNE J.—The plaintiffs have wholly failed to maintain the allegations in their statement of claim which are made the foundation of this action. The first count is framed upon the allegation that the plaintiffs, at the request of the defendant, retained and employed the defendant to cause to be made an insurance upon a ship of the plaintiffs called the C. U. Chandler for reward to be paid to the defendant in that behalf, and that the defendant accepted and entered upon such retainer and employment but neglected to effect the insurance and that the ship was lost, to the plaintiffs' damage, etc. Now, the evidence shows that no such contract as that alleged was ever entered into by the defendant, that, in point of fact, the plaintiffs never did retain or employ the defendant to effect any insurance upon the ship in question nor did the defendant ever undertake so to do. On the contrary what the evidence shows is that the plaintiffs retained and

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employed certain insurance brokers, practising as such under the name of Whittaker Brothers, to effect an insurance for $800.00 on the vessel valued at $2500.00, at the rate of 11 per cent premium, and that Messrs. Whittaker sent their clerk to the defendant, who was the agent at St. John, New Brunswick, of the Portland Marine Insurance Company, whose head office and place of business was at the City of Portland, in the State of Maine, for the purpose of procuring the defendant as such agent of the said insurance company to forward the said application to the said company, and that the defendant refused to forward such application or any application unless the plaintiffs should accept a policy wherein the vessel should be valued at $3,000.00 at such premium of 11 per cent or would pay 12 per cent on a valuation of $2500.00. The clerk of Messrs. Whittaker being unable to concur in such an arrangement was instructed by the defendant to communicate with his principals, and the defendant never did forward the application as proposed by the Messrs. Whittaker on the plaintiffs' behalf nor did he ever undertake so to do. But what he did do appears to have been that in the expectation that the Messrs. Whittaker would arrange with the plaintiffs that they should concur in the defendant's suggestion, which, however, they never did, he made application to the Portland Marine Insurance Company for a policy for $800 on the plaintiffs' vessel, valued at $3,000 at 11 p.c. premium. The letter enclosing this application would seem not to have been mailed at St. John until Sunday the 7th October, 1888. Upon the 11th of October the defendant received from his company a telegram from Portland as follows :—

Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy. Please decline risk and return policy.

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In fact upon the 8th October, and before ever the policy could have been prepared, the vessel had become a total loss occasioned by a fire which had arisen from lime with which she was loaded. Upon the following day, the 12th October, the defendant received by mail the policy wherein the vessel was valued at $3,000, and which in obedience to the telegram received the day before he returned to his company. It is plain that upon this state of facts the plaintiffs cannot recover upon the first count in their statement of claim because no such contract as therein alleged, nor any contract, was entered into between the plaintiffs and the defendant whereby the latter undertook for reward or otherwise to procure a policy of insurance upon their ship for the plaintiffs; neither can the plaintiffs recover upon the 2nd count, which is for conversion by the defendant of a policy upon their ship the property of the plaintiffs, for the policy which was received by the defendant on the 12th of October, and was returned by him to his company, never had been applied for by the plaintiffs—nor had they ever agreed to accept such a policy. It is obvious, therefore, that it never had become the property of the plaintiffs, but still continued to be the property of the company in the hands of the defendant as their agent, and subject to their order and control. The appeal, therefore, must be dismissed with costs.

PATTERSON J.—The gist of the first count of the declaration, which is somewhat long, is that the plaintiffs, who are the present appellants, at the request of the defendant, the respondent, retained the defendant to effect for them a policy of marine insurance upon their ship; that the defendant neglected to effect the insurance; and that the vessel was lost by perils that were to have been insured against.

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The defendant lives at St. John and is the provincial correspondent of an association of marine underwriters doing business at Portland in Maine.

The plaintiffs desiring to effect an insurance of $800 on a ship, the C. U. Chandler, went to an insurance broker at St. John named Whittaker, and in his office signed an application for insurance, filling up the blank for the whole value of the vessel with the sum of $2,500.

Mr. Whittaker prepared another application, signing it with his own name, for insurance on the vessel in the name and on account of the plaintiffs, giving the same valuation of $2,500. He sent that application by a clerk to the defendant, and the defendant declined to forward it to the Portland association unless the valuation was put at $3,000, or, as he says, unless in the alternative the rate was made 12 per cent in place of 11 per cent. There is a conflict of evidence between the defendant on the one side and Whittaker and his clerk on the other as to whether the defendant went with the clerk, or went at all, immediately after receiving the application to Whittaker's office, but it is shown by Whittaker as well as by his clerk that the clerk informed Whittaker that the defendant required the valuation changed.

This all happened on Friday, the 5th of October, 1888. The vessel was then loading or loaded with lime at St. John. One of the plaintiffs had charge of her as master, and he gave charge of her to another master on Saturday evening, the vessel being then at anchor in the harbour of St. John. She was injured by a gale on Sunday, and early on Monday the 8th of October she was on fire from the sea water having got at the lime.

If nothing further had occurred than what I have mentioned how did the defendant incur any liability to the plaintiffs?

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The plaintiffs' case under the first count is based on the proposition that a contract existed between the plaintiffs and the defendant, a promise by the defendant to effect the insurance, or at all events to forward the application, being supported by a consideration arising from the compliance by the plaintiffs with the standing request made by the defendant to all insurers to send their applications through his hands. I do not for the moment touch the dispute concerning the form of the count.

This proposition may, in point of law, be sound or may be open to dispute, and it may or may not appear, on close examination, to apply to transactions of the class of that before us. We need not at this moment pronounce upon those questions. If the defendant declined to forward the application in the shape in which it was given to him it is impossible to infer a contract to forward it, or to effect a policy in the terms of it, from his being engaged in that line of business. That he did so decline is proved by the evidence given on the part of the plaintiffs by Whittaker's clerk and by Whittaker also who speaks of what the clerk told him. The defendant is distinct on the same point. There is the curious discrepancy as to whether the defendant was or was not at Whittaker's office and in communication at the particular time with Whittaker. But even if Whittaker and his clerk are correct in saying he was there then, nothing that they say took place displaces the evidence of the fact that he insisted on the change of valuation. The only thing that can be said to look in that direction is Whittaker's statement that he asked the defendant if he had received the application all right and that the defendant said he had. That is indefinite enough, and there is not a word of the defendant receding from his position about the valuation, or being spoken to on the subject by

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Whittaker to whom the clerk had reported what had been said, or of the subject being mentioned, although according to the clerk it was to speak of it the defendant went to Whittaker's office. On the contrary the evidence is that it was not spoken of.

I do not understand it to be contended that, apart from such a contract as might be inferred from the delivery to and acceptance by the defendant of an application for insurance, the defendant owed any duty to the plaintiffs. They could not insist on his acting on an application which he chose to say he would not act on.

The defendants sent an application to the underwriters association but it was not the one he received from Whittaker. It was a fresh one prepared by himself, putting the value of the vessel at $3,000. In place of sending it by Friday evening's mail, which would be delivered in Portland on Saturday afternoon, he seems to have omitted mailing his letter till Sunday evening. A policy was sent to him, but before he delivered it to the plaintiffs or to Whittaker it was recalled by telegraph, and was returned by him to Portland. That was no doubt because of the loss of the vessel which had taken place before the application had reached the Portland office.

The second count, which was added at the trial, is in trover for that policy.

I see no ground for differing from the majority of the court below with regard to that policy. It did not become the property of the plaintiffs. The application for it was unauthorized by them. They were not bound to accept it, and might have refused to do so if it had been offered to them.

For these reasons, and without entering into some other questions that have been discussed, I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitors for respondent: *E. & R. McLeod.*