1934
*Nov. 16
1935
*May 13.

JOHN R. TAYLOR (PLAINTIFF)..... APPELLANT;

AND

THE LONDON ASSURANCE CORPORATION AND OTHER ASSURANCE COMPANIES (FIVE APPEALS CONSOLIDATED) (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Fire insurance—Action to recover for loss—Question whether, in applying for insurance, there was misrepresentation or "fraudulent" omission to communicate material circumstance within statutory condition 1 of The Insurance Act, R.S.O. 1927, c. 222.

In statutory condition 1 under s. 98 of *The Insurance Act*, R.S.O., 1927, c. 222, voiding a policy if the applicant for insurance "misrepresents or fraudulently omits to communicate any circumstance which is material * * *," the word "fraudulently" connotes actual fraud.

On an appeal by the insured under certain fire insurance policies, from the judgment of the Court of Appeal for Ontario ([1934] O.R. 273) dismissing his appeal from the judgment of Kelly J. (*ibid*) dismissing his actions, it was *held* that said statutory condition did not afford a defence to the respondent insurance companies; the course of the litigation precluded them from relying upon any charge of actual fraud; and, while the plaintiff's (appellant's) agent's partial statement of the facts to the insurance agent (in stating that there were fires "all over the country"; without disclosing that there was a fire in McNish township, which, as known to plaintiff but not to plaintiff's agent, adjoined the township in which was the lumber camp proposed to be insured) might, if calculated to mislead the insurance agent, amount to a misrepresentation, yet this was an issue of fact not suggested by the insurance companies at the trial, and the evidence did not shew that the insurance agent was misled; further, a misrepresentation, to produce a legal effect, must be one influencing the other party to enter the contract, and it did not appear that anything said by the plaintiff's agent influenced the insurance agent in assenting to effect the insurance. (*Smith* v. *Chad-*

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

wick, 9 App. Cas. 187, at 195-197, cited). The appeal was allowed and judgment given for the insured.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the judgment of Kelly J. (1) dismissing his actions. The plaintiff brought five separate actions, each against an insurance company to recover its proportionate share of a loss sustained by plaintiff through the destruction by fire of his camp buildings and equipment, which, he claimed, had been validily insured by them. The actions were tried together. The appeals to this Court were, by order, consolidated and proceeded with as one appeal.

The facts are discussed at length in the judgments below (1). The plaintiff, a lumberman residing in North Bay, Ontario, owned certain camp buildings and equipment situate in the township of MacBeth in the District of Sudbury in the Province of Ontario. On May 24, 1932, the forests in MacBeth and in the adjoining townships were very dry and there were numerous forest fires in various parts of the district other than the township of MacBeth. On that day a forest fire started in the township of McNish, which adjoins the township of MacBeth. In the afternoon of that day the chief forester for the North Bay District by telephone informed the plaintiff's wife (the plaintiff being absent from home) of the fire in McNish. About six or six-thirty o'clock in the evening she got in touch by telephone with the plaintiff who was some 150 miles distant. He asked her to telephone Mr. Kennedy, a local insurance agent in North Bay, through whom insurance on this camp had in former years been placed, and to have the property in question insured. This she did that evening, and Kennedy (who was authorized by the defendant companies to issue policies) undertook, over the telephone, to hold the property in question covered or insured to the same extent as in previous years. The plaintiff's wife, in her evidence, stated that Mr. Kennedy had asked her " are there any fires?" to which she answered " Yes, all over the country "; but that she did not mention McNish; that at that time she did not know, though the plaintiff did, that McNish was next to MacBeth. The policies were

(1) [1934] O.R. 273; [1934] 2 D.L.R. 657.

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completed about ten or eleven o'clock the next day (May 25th). The property in question was burned about noon or one o'clock on the 25th, from the fire which had extended from its starting point in McNish. The policies were delivered on the morning of the 26th, at which time Kennedy knew that the fire in question had occurred, but felt bound by his above mentioned undertaking on May 24th. Subsequently on the same day plaintiff paid the premium, which was subsequently tendered back by the companies but was not accepted by the plaintiff.

Counsel for the defendant companies, at the opening of the trial, said:

> Mr. Taylor is a gentleman of good standing in the community, and we do not desire to suggest that either Mrs. Taylor or Mr. Taylor was guilty of fraud in the ordinary sense of the word, but we say in law what happened consisted of fraudulent omission to notify the agent who, of course, had no knowledge of the fact that the fire was raging or of the existence of the fire. It seems to me that that is a question more of law than fact. There is some fact in it, of course.

The actions were tried with a jury; but the trial judge submitted only one question to them, reserving all others to the Court. The question submitted to the jury was: "Did Mrs. Taylor tell Mr. Kennedy, when asking him to place the insurance, that there were fires all over the country?" (as to which matter there was dispute in the evidence, Mr. Kennedy stating that he did not make "any query as to any fires"), and the jury's answer was "yes." The trial judge reserved judgment, and subsequently delivered judgment dismissing the actions. An appeal by the plaintiff to the Court of Appeal was dismissed; and plaintiff appealed to this Court.

Peter White K.C. and *Grant Gordon* for the appellant.

D. L. McCarthy K.C. and *J. D. Watt* for the respondents.

The judgment of Duff C.J. and Cannon and Crocket JJ. was delivered by

DUFF C.J.—I think I can most conveniently explain my view of the questions in controversy on this appeal by first reproducing textually the first condition to be read into fire insurance policies in Ontario by force of 14 Geo. V., ch. 50, sec. 92; and also, textually, the condition which it replaced (R.S.O. 1914, ch. 183, sec. 194). The condition under the first mentioned statute is in these words:

If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.*

The condition under the earlier statute (R.S.O. 1914, ch. 183, sec. 194) is as follows:

1. If any person insures property, and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

The only material change in the condition, as prescribed by the later statute, is effected by introducing the adverb "fraudulently" before the verb "omits."

My view of these words is that the adverb "fraudulently" connotes actual fraud. I think the words of this condition must be read in their ordinary sense, and that such is the ordinary sense of them. True it is that the term "fraud" is, and has always been, employed by lawyers in different senses. Where a fiduciary relation exists, a violation of a fiduciary duty without fraudulent intention may amount to fraud in the contemplation of a court of equity. Again, in the case of contracts *uberrimae fidei,* the insurance contract for example, a failure to disclose a material fact, however innocent from the moral point of view, or a misstatement of fact, however innocent from the same point of view, is conduct to which lawyers commonly apply the term "fraud."

We are not concerned with frauds consisting in a breach of duty arising out of a fiduciary relation; and it is too plain for argument that if the term "fraudulently" is used in this statutory condition to describe an innocent breach of the duty to disclose material facts which rests upon the insured under a contract of insurance, then the amendment of the condition effected by the legislation of 14 Geo. V. was merely pleonastic.

I think the course of the litigation precludes the respondent from relying upon any charge of actual fraud. No such charge was pleaded. At the opening of the trial there was an application to strike out the jury notice on the ground that the questions involved were really questions of

*Reporter's Note: This became the first statutory condition under s. 98 of *The Insurance Act,* R.S.O. 1927, c. 222.

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law. Counsel for the respondent disclaimed any intention of charging "fraud in the ordinary sense." He announced his intention of contending that the failure to disclose material facts in breach of the duty to disclose constituted a fraudulent omission within the contemplation of the condition as amended—"fraud in law," as he described it. An amendment was allowed permitting the respondent to set up the condition, but no amendment was allowed or asked for alleging fraud in fact.

During the course of the trial, counsel for the respondents disclaimed, on more than one occasion, any imputation of intentional wrongdoing on behalf of the plaintiff or his wife. Then, at the conclusion of the trial, there was some discussion about the submission of questions to the jury. What occurred on that occasion is rather important, and I quote from the record:

Mr. WHITE: At the request of your Lordship made to my friend and myself to discuss the question as to what, if anything, is to be left to the jury—

His LORDSHIP: Questions of fact.

Mr. WHITE: I submit that there should be left to the jury the question as to whether there was on the part of the plaintiff or his agent an omission to communicate to the agent of the insurance company any circumstances material to be made known to the defendants in order to enable them to judge of the risk to be undertaken, and also this further question: If so, was such omission fraudulent?

His LORDSHIP: "Omitted fraudulently with intent to deceive," if you are following the language of the section.

Mr. HENDERSON: "Fraudulently" within the meaning of the first statutory condition.

Mr. WHITE: No; I think I will leave it.

His LORDSHIP: I will put this on record as if it were taking place in court in the absence of the jury. My present inclination is that, after having heard all the evidence, I must conclude that the questions of law and fact are generally so involved that the case can be better disposed of without the assistance of the jury, but I am willing that there should be submitted to the jury any questions purely as to fact; and later, in view of this ruling, counsel have agreed that I should submit this question:

Q. Did Mrs. Taylor tell Mr. Kennedy, when asking him to place the insurance, that there were fires all over the country?

That is the only thing upon which counsel need address the jury.

The learned trial judge dismissed the action. The material part of his judgment I set out verbatim:

The important question is whether plaintiff, through his wife as his agent or otherwise, made full and frank disclosure to the defendants or their representatives of all such matters as were material to be made known to them in order to enable them to judge of the risk to be undertaken. Kennedy, with several years' acquaintance with and knowledge of

plaintiff, says he is not the sort of person who would fraudulently misrepresent. From what I observed, I would expect the same to be said of plaintiff's wife. She says she was not then aware of the location of McNish township with reference to the township of MacBeth. While it must be taken that she told Kennedy there were fires all over the country, she did not tell him what Greenwood said about the fire in the township of McNish nor did plaintiff by any other means convey to the defendants' representatives the information which he had that there was a fire in McNish. While defendants' representatives must have been aware of the existence of bush fires in some localities, they could not reasonably be presumed to have known that there was a fire in McNish township. A definite and express mention of a fire in that township would have localized their knowledge and might have so affected their judgment and decision in the matter as to result in a refusal on their part to undertake the risk. This is a reasonable inference independent of the evidence at the trial of Kennedy and witnesses Hamilton and McBride on that point. It appears to me that Greenwood's information on the 24th that there was a fire in the township of McNish indicated to plaintiff that danger to his camp was imminent. He has admitted that until May 24th he did nothing in regard to placing insurance on this property. On that day he seems to have been stirred into action by learning that there was a fire in McNish. That information was manifestly material and important to him; in any event he so regarded it; and being material and important to him who then, and no doubt in consequence thereof, desired and gave instructions to have insurance placed on the property, why not equally material and important to defendants and their representatives who were asked to assume and did assume the risk? In my opinion, the existence of a fire in the township of McNish was a material fact within the knowledge of plaintiff at the time the insurance was effected which he did not disclose, but omitted to communicate to the insurers. It has been contended that he did not fraudulently omit to communicate that fact. The omission may not have been fraudulent in the sense that he deliberately withheld the information with intent to deceive the insurers; but I do think that it was fraudulent in the sense that he did not observe that good faith towards the insurers which his duty to them called upon him to observe, in that he did not make a full disclosure of this material fact. The duty which rests upon an owner in effecting insurance is dealt with in Welford and Otter-Barry's Law relating to Fire Insurance, 3rd Edition, at p. 126 and following pages, where many reported cases are cited which I need only refer to. I draw attention, however, to the case of *Carter* v. *Boehm* (1), because of these statements therein of Lord Mansfield (at page 1909) in regard to non-disclosure of a material fact, even without fraudulent intentions:—

"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risque run is

(1) (1766) 3 Burr. 1905.

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really different from the risque understood and intended to be run, at the time of the agreement."

The issue with which the learned judge is dealing in this passage is stated in his first sentence:

> The important question is whether plaintiff, through his wife as his agent or otherwise, made full and frank disclosure to the defendants or their representatives of all such matters as were material to be made known to them in order to enable them to judge of the risk to be undertaken.

He finds that there was a fraudulent omission within the meaning of the condition, but his construction of the condition is made clear by this sentence:

> The omission may not have been fraudulent in the sense that he deliberately withheld the information with intent to deceive the insurers; but I do think that it was fraudulent in the sense that he did not observe that good faith towards the insurers which his duty to them called upon him to observe, in that he did not make a full disclosure of this material fact.

and by his reproduction of the passage from Lord Mansfield's judgment in *Carter* v. *Boehm* (1).

No issue of fraud in fact, that is to say, of fraudulent intention, was pronounced upon by the learned trial judge or was tried. No charge of fraud in that sense was made. Indeed, as we have seen, the intention to make any such charge was explicitly disclaimed.

In the Court of Appeal, the learned Chief Justice of Ontario accepted the judgment of the trial judge and based his own judgment on the grounds therein explained. Mr. Justice Masten negatives fraud. Mr. Justice Macdonnell negatives actual or "moral" fraud.

The substantial question upon which we have to pass is that which is raised in the very clear and forcible judgment of Mr. Justice Davis. Put concisely, his view is this: the appellant knew that there were fires not far from his camp; that his camp was in danger, and, although Mrs. Taylor herself was not aware of this, her statement is Taylor's statement, and her statement that there were fires all over the country, without disclosing that they were fires in the vicinity of the camps, amounted to misrepresentation. Now, whether or not that is so, is a question of fact. If Mrs. Taylor's partial statement of the facts was calculated to mislead the person to whom it was addressed, then it might amount to a misrepresentation. But no such issue of fact

(1) (1766) 3 Burr. 1905.

was suggested by the respondents at the trial. The agent Kennedy, who was called as a witness, does not intimate that he was in any way misled by anything that Mrs. Taylor said. I should not be prepared myself to find as a fact, in view of what occcurred at the trial, that such was the case.

But there is a more serious difficulty. A misrepresentation in the air is of no legal consequence. It must, to produce such effects, as the phrase is, be *dans locum contractui;* that is to say, it must be a misrepresentation influencing the other party to enter the contract. As I have said, the witness with whom Mrs. Taylor had the conversation in the course of which this misrepresentation, if it was such, occurred, does not suggest that anything Mrs. Taylor said to him had any effect on his mind of any description whatever; much less that it influenced him in assenting to effect the insurance. My conclusion, from the evidence as a whole, is that it had no such effect.

I think Lord Blackburn's language in *Smith* v. *Chadwick* (1) is in point. At pp. 195-197, he says:

> In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman* (2) was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave* v. *Hurd* (3), the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation

(1) (1884) 9 App. Cas. 187. (2) 2 Sm. L.C. 66, 73, 86 (8th ed.)
(3) (1881) 20 Ch. D. 1, at 21.

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they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness, on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive.

I think the appeal should be allowed and the appellant should have judgment for the amount claimed with costs throughout.

RINFRET J.: I agree with the Chief Justice that this appeal should be allowed and the appellant should have judgment for the amount claimed, with costs throughout.

HUGHES J.: I agree with the Chief Justice. The appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *White, Ruel & Bristol.*

Solicitors for the respondents: *Henderson, Herridge & Gowling.*