Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Whyte v. *The Western Assurance Company, from the Court of Queen's Bench for Lower Canada, in the Province of Quebec; delivered Tuesday, 9th March* 1875.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.
SIR MONTAGUE E. SMITH.

THIS is an Appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court. The action was on a policy of insurance against fire, brought in the name of Whyte, who was an official assignee of the effects of Davies, who was an insolvent, and who claimed as the assignee of the policy from one Clarke. There were pleas raising several defences, and according to the practice of the Court in Canada, the Court settled a number of questions on points of fact which were put to the jury at the trial, and their answers are before their Lordships.

After the trial a motion was made both by the Plaintiff and by the Defendants to have judgment entered for them respectively upon the findings. There was also an application made on the part of the Plaintiff for a new trial on the ground of mis-direction of the judge on certain points which arose during the trial. The Court ordered judgment to be entered for the Defendants on several grounds, and refused a new trial,

and that judgment was affirmed by the Court of Queen's Bench, though there was a difference of opinion among the judges.

Now the question that we have heard argued has been the question whether there ought to be a new trial on the ground of the mis-direction of the judge during the trial, because it is admitted on the part of the Plaintiff that there is one defence which on the findings is properly found for the Defendants; and that depended upon a condition in the policy as to the proofs which were to be made after the fire, before the action could be brought, and that was the ninth condition in the policy, which was in these words,—"All persons assured by this Company, "and sustaining loss or damage by fire, are to "give immediate notice thereof to the secretary "or manager of the Company, or to the agent of "the Company, should there be one acting for "it in the neighbourhood of the place where "such fire took place, and shall within 30 "days after such loss or damage deliver to the "secretary or manager, or to the agent of the "Company as aforesaid, a full and detailed "account of such loss or damage, signed with "their own hands, and verified by their oath or "affirmation; they shall also declare on oath or "affirmation whether any or what other as-"surance has been made on the same property, "what was the whole actual cash value of the "subject assured, and what their interest there-"in; in what general manner (as to trade, "manufactory, merchandise, or otherwise,) the "building assured, or the building containing "the subject assured, and the several parts "thereof, were occupied at the time of the loss, "and who were the occupants of such building; "and when and how the fire originated, so far as "they know or believe; and in case of buildings, "machinery, or other fixed property, they shall

" further accompany the said statement by the " affidavit of two builders, machinists, or other " competent persons acquainted with the pre- " mises preceding their destruction or damage, " as to the cash value of the same at the time " of the fire, to the best of their knowledge and " belief; and also shall produce such other " evidence as to any loss or damage by fire as " this Company or its agents may reasonably " require. They shall also produce a certificate " within the said 30 days, under the hand " and seal of a magistrate or notary public most " contiguous to the place of the fire, and not " concerned in the loss, stating that he has " examined the circumstances attending the fire, " loss or damage alleged, and that he is well " acquainted with the character and circum- " stances of the claimant, and verily believes " that he, she, or they have, by misfortune, and " without fraud or evil practice, sustained loss " and damage on the subject assured to the " amount which the magistrate or notary public " shall certify; and, whenever required in " writing, the assured or person claiming shall " produce and exhibit his books of account, " invoices, or certified duplicates thereof where " the originals are lost, and other vouchers to " the assurers or their agents, in support of his " claim, and permit extracts and copies thereof " to be made; and until such proofs, declara- " tions, and certificates are produced, the loss " shall not be payable; and if there appears any " fraud or false swearing in the proofs, declara- " tions, or certificates, the assured shall forfeit " all claim under this policy." Then further on it says:—"And in case this policy should be " assigned in trust or as collateral security, when " loss or damage arises it shall be the duty of " the assignor to make and furnish the necessary

" proofs in support of the claim before the same " shall be recognized and payable."

Now after the fire had taken place, and within a short time afterwards, namely, on the 30th of June 1870, Mr. Whyte sent in a claim,—therefore, he so far complied with the conditions; and afterwards he sent in a certificate of a notary public, and no defence is raised on account of any defect in that. But nothing more was sent in within the 30 days. After the 30 days were over,—somewhere between the 1st and the 5th of August,—he sent in a valuation, which was signed by two builders and two blacksmiths, and a manager, but it was not on oath or affirmation. He probably sent in some additional voucher, though what precisely it was does not appear on the evidence; and then he wrote this letter, addressed to the agents of the Defendants, —"Dear Sirs, I have not received from you any " request for additional vouchers in support " of my claim made upon the 'Western' In- " surance Company, in the matter of the loss " by fire at the Dominion Glass Works on " the night of the 9th and 10th June last, " but as I am furnishing the other companies " with an additional voucher, I do also in this " case. I hope the proofs and vouchers will " be considered satisfactory, and will be glad " to hear from you to that effect." That was signed "John Whyte, Assignee." To that letter the Company sent no answer at all.

Then on the 24th of August 1870, Whyte writes them another letter,—"Would you allow me " to remind you that 60 days have elapsed since " my proof was furnished you of loss, under " Policy No. 65,971, transferred to me by " H. J. Clarke, Esq., and to request a settlement. " You can understand that as assignee I am " expected to be diligent, and that creditors " will look for an early distribution. I would,

" therefore, feel obliged by a speedy liquidation " of the claim.—Yours very respectfully, John " Whyte, Assignee." To that an answer was sent on the 31st of August,—" Dear Sir, In " answer to your note of 24th inst., requesting " a settlement of your claim as assignee of the " estate [of] Davies, under Policy No. 65,971, " transferred to you by H. J. Clarke, Esq., we " have to inform you that the Company consider " that they are not liable for any loss referred " to in the claim you have made under said " policy, and decline paying it."

There are two misdirections which, it is alleged, the judge made at the trial; first, that he told the jury that Clarke was the person who ought to have sent in an affidavit as to his interest under the policy, and how the loss occurred; and, secondly, that though he left it to the jury to say whether there had been any waiver of strict compliance with the conditions, yet that he told the jury that the court could not see any evidence of such waiver; and it is said that there was misdirection in those respects.

To the first it was answered that the direction is quite right; that Clarke was the proper person to make the affidavit, and even if that were wrong, still it was wholly immaterial, because it was plain that even if Whyte were the person to make the claim and send in the affidavit, he had not sent in the proper proofs within the proper time.

Now with reference to the question whether Clarke was the proper person to make the claim and make the affidavit, it is necessary to consider what the position of Clarke was with reference to Davies. Davies was a man apparently of no means, but he had entered into a contract for the purchase of this property, for the purpose of establishing some glass works. A few days after he had purchased it, he executed a deed which

unquestionably on the face of it was an absolute conveyance, in which in consideration of the sum of $10,000, he purported to convey the property absolutely to Clarke. On the same day, there was what on the face of it was a mortgage from Davies to Clarke's wife, which appears to have been executed with Clarke's consent. Then afterwards, in the month of October, there was an absolute assignment of the plant and machinery on the premises by Davies to Clarke in consideration of another sum, with an agreement that it would be resold on paying the sum of $10,000. After Davies's failure, Clarke appears to have executed an assignment, with the consent of the Company, of the policy to Whyte, by which he purported to assign it to Whyte; and previous to that assignment, or cotemporaneous with it (for it does not very clearly appear which), he wrote a letter of the 19th April 1870 to Whyte, in which he says,—"Sir, As you are aware, I hold "policies of insurance on the building, plant, "tools, &c. of the Dominion Glass Works, "covering, to a certain extent, my mortgage on "the buildings, &c. and also on the plant, tools, "&c., mine by bill of sale. Now that the "concern has broken down, I think it right that "the policies in question should be transferred "to you, as assignee to the estate; for this "reason I desire that in case of accident, all the "unsecured creditors should share alike, and "indeed it is my intention, no matter what may "be the result of Davies's efforts to obtain a "settlement with his creditors, to cast aside all "advantages in my favour as far as securities "are concerned, and to take my chance as an "ordinary creditor, as I am well aware that "many of the creditors were encouraged to trust "Davies because of their being told that I had a "large amount invested in it. I want them and "you to understand that I can better afford to

" be looked upon as a fool in business matters,
" than to be viewed by my fellow sufferers as a
" selfish speculator, who, secured himself, induced
" or encouraged them to risk their money or
" goods without security. I will, therefore, as
" soon as you are ready to accept the same,
" transfer to you all the insurance which I hold,
" for the benefit of the unsecured creditors of the
" estate, not including claims for Davies's debts
" outside of his glass business. *It must be per-*
" *fectly understood that the insurance in question*
" *is transferred for the benefit of the unsecured*
" *creditors, and more especially for the benefit*
" *of the Messrs. Shaw, W. P. Bartley and Co.,*
" *Mathieu De Beaufort, McMann, McCready,*
" *Abjon, Devany and Co., Johnston, Robinson,*
" *Brogan, Harvey, Hill, Hynes, Hall, Watkins,*
" *Guy and Co., Jordan and Benard, Smith and*
" *McLynn, and myself.* I wish it to be distinctly
" understood that I do not intend, nor will I
" consent, that any part or portion of the insur-
" ance thus to be transferred shall be taken as
" covering or in any way whatever securing
" *Molson's claim*, or certain pretended mort-
" gages and other *claims of Mulholland and*
" *Baker*, nor those of certain workmen claiming
" wages, because Mulholland and Baker received
" all the glass that was ever manufactured by
" Davies up to the Saturday when they refused
" to pay the workmen's wages, which they were
" bound to do, and to my own knowledge, with
" the exception of the amount due [to] them by
" that last pay list, the whole of the men were
" far overpaid for all the time they worked for
" Davies. *The above express conditions and*
" *stipulations understood and agreed to, I*
" *will transfer the insurance in question to*
" *you, as official assignee in the matter of*
" *Richard Davies (Clarke and Co.) for the*
" *benefit of the creditors above mentioned*, when-

" ever you are ready to accept such transfer, and " *I shall consider your acceptance of the transfer* " *as being an acceptance of the conditions and* " *stipulations above set forth, without exception.*" It is quite plain that if that letter is the letter which states the terms on which Clarke assigned the policy to Whyte, it was not assigned to him for the equal benefit of all the creditors of Davies, but was assigned to him for the benefit of Clarke himself and certain particular creditors.

It is true that a question was asked the jury—" Was the assignment of the said policy from " Henry J. Clarke to the Plaintiff executed as " alleged in Plaintiff's declaration, and acceded " to and approved by the Defendants as therein " also averred, or was the said transfer made " to the Plaintiff for the benefit only of the " parties mentioned in Defendants first plea, " and in a letter bearing date the 19th day of " April 1870, and was said letter written by " the said Henry J. Clarke to the Plaintiff and " received by the latter?" The answer is,—" Policy was assigned as alleged, and approved " by the Defendants, and was for the benefit " of the creditors generally, Clarke's letter " as to distribution having no binding effect " on assignee." It is to be observed the jury do not find that the letter was not written and sent, but all they find is that Clarke's letter as to distribution had no binding effect on the assignee.

It appears to their Lordships that this is merely an answer as to what is really a question of law. Whatever answer the jury gave on questions of fact which are put to them, the Court would be bound by, subject, of course, to this: that if the answer was not satisfactory the Court might order a new trial. But it appears to their Lordships that if the jury in answering a question really only give an answer which

is an answer to a question of law, and not an answer to a question of fact at all, the Court in giving their judgment, and entering the verdict according to the findings of the jury, are to decide the question according to the correct decision in point of law, and not according to any erroneous statement or findings of the jury in that respect.

Therefore, it appears to their Lordships, notwithstanding that finding, this really was an assignment by Clarke to Whyte, on trust for the benefit of Clarke himself and the other particular creditors mentioned in that letter.

There is a considerable question, whether Clarke is to be treated as mortgagee or as the actual owner under the bill of sale which he took. It appears to their Lordships unnecessary to decide that question, because, whether he was owner or whether he was mortgagee, he was unquestionably the absolute owner of the policy of insurance. It is not contended that the policy of insurance was made on account of Davies, or that Davies had any interest in it. Neither was there any consideration given by Whyte for the assignment of the policy by Clarke to Whyte, and it therefore follows that this being in the nature merely of a gift, Clarke was perfectly entitled to say for what purposes and on trust for whom Whyte should hold the policy. Therefore their Lordships are of opinion that Whyte held the policy on trust for the persons mentioned in the letter by Clarke.

That being so, it necessarily follows that the case comes within the condition of the policy,—"In "case this policy should be assigned in trust or as "collateral security, when loss or damage arises "it shall be the duty of the assignor to make "and furnish the necessary proofs in support of "the claim before the same shall be recognized "and payable." Therefore the judge, in their

Lordships' opinion, was perfectly correct in saying that Clarke was the person to send in the proof.

The only other question is, assuming that the condition was not at all complied with, was there a waiver of the condition? The alleged waiver must arise either from the Company having sent no answer to the letter of the 5th of August 1870, or else from the letter written by the Company of the 31st of August 1870. With respect to not answering the letter of the 5th of August 1870, that letter was not sent, nor were the proofs even by Whyte sent in until after the 30 days had elapsed; and their Lordships are clearly of opinion that the 30 days are a material part of the condition; so that unless there is a waiver, the assured cannot recover unless he sends in the proper proofs within 30 days. It was said, that although it was a condition precedent that the proofs should be sent in, yet the period of 30 days was not material; but if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three, or four years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition. And indeed the cases which have been referred to which have been decided in England,—the case of *Meeson* v. *Hardy*, and another case in 1 Ellis and Ellis,—are decisions by the Courts here that the time mentioned is an essential part of a condition of this kind, and that is affirmed by the clause which has been cited from the Code of Canada, by which, if by some impossibility the assured is prevented from sending in his proofs within the proper time, further time may be given to him. Therefore their Lordships think that it was essential that the proofs should be sent in within 30 days, unless that was waived.

That being so, their Lordships are also of opinion that the not answering a letter sending in proofs after the 30 days—the mere fact of not answering that letter—cannot possibly be a waiver of the not sending the proper proofs in, and not sending them in within proper time. Whether, if the proofs, or what appear to be and professed to be proofs, had been sent in within the 30 days, asking, as this letter does, whether those proofs were satisfactory,—whether in that case the not answering it, when if they had answered it possibly the assured might have sent in proper proofs in time, would be a waiver, it is not necessary to consider, but it appears to their Lordships that after the 30 days are over, and when the assured had a defence to the action, their not answering a letter cannot be sufficient to amount to a waiver. Their Lordships do not mean to say that there may not be a waiver after the 30 days are over. It is possible that if they did anything which misled the assured, or put him to expense, there might be a waiver after the time was over; but they are clearly of opinion that not answering this letter sent after the 30 days cannot of itself be sufficient.

Then with respect to the letter of the 31st of August, that was in answer to a letter of the 24th of August, in which Mr. Whyte says not only the 30 days have elapsed, but "would you "allow me to remind you that 60 days have "elapsed since proof was furnished." Therefore that was when more than 90 days had elapsed, and when the assured was alleging that he had performed all the conditions, and was entitled to recover, and when the time had long gone by. Then in answer to that the assurers say:—"We "have to inform you that the Company consider "that they are not liable for any loss referred "to in the claim you have made under said "policy, and decline paying it." If that letter

also had been sent within the 30 days before the time had elapsed, or had been sent after the 30 days had been waived, and had been sent at a time when it was still possible for the assured to have sent in proper proofs, then it might well be said that the Company, by saying they are not liable for the loss, are not relying on the non-compliance with the sending in the proper proofs, but are relying on some defence on the merits respecting the fire itself. But when the time for the sending in the proofs has elapsed, merely writing to say they are not liable for the loss cannot in their Lordships' opinion amount to any waiver, because it is perfectly consistent with that that the Company are going to say that they are not liable for the loss referred to because the proper time for sending in the proofs has elapsed and the proofs have not been sent in.

Therefore their Lordships are of opinion that the direction of the judge was perfectly right on that part of the case, and that the verdict of the jury was right, and that the decision of the Court was correct; and therefore they will humbly advise Her Majesty that the Appeal be dismissed with costs.