CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1915).

W.L.D. PART IV.

BUSHBY v. GUARDIAN ASSURANCE CO.

1915. *August* 27, *September* 1, *October* 1. BRISTOWE, J.

Insurance.—Proposal.—Interim contract.—Warranty.—Variance.—Rectification.—Onus.—Justus error.—*Estoppel.—Declinature of risk.—Business not within company's scope.—Transfer from retiring to continuing partner.—Change of interest.*

Plaintiff and his partner, desiring to insure certain wood and iron premises with defendant company, filled up and signed a proposal form on the 4th January, 1913. On the same day the premium for one year was paid, and an "interim cover note" signed on behalf of plaintiff was handed to plaintiff as follows: "Messrs. Bushby & Bishop having this day effected an insurance against fire . . . . . on property as particularised in the proposal . . . . . a policy according to the terms and conditions of this office will be forthwith prepared and delivered. From 4th January, 1913, to 4th January, 1914." The question in the proposal "whether the books are deposited in a fireproof box or safe at night or when the premises are closed" was answered "No," and the question "if not so deposited, state precautions for safe custody" was answered "kept at night in proprietor's room" (this was in the same building). The question whether the insurance now proposed had been declined by any other office was answered in the negative, the fact being that prior to insuring with the defendant company, plaintiff approached C, who was a general agent, but also agent of the L company, and C replied that the L company did not insure wood and iron premises. This interview was not disclosed.

On the 8th February, 1913, the policy was delivered containing the following warranty: "warranted that the books are locked in a fireproof safe or re-

moved to another building at night and when the premises are not actually open for business." There was also a clause voiding the policy if the property insured passed from the insured otherwise than by will or operation of law, without the consent of the defendant company.

On the 28th August, 1913, the partnership was dissolved and the assets ceded to plaintiff, the remaining partner. On the 16th September, 1913, the premises were destroyed by fire. Defendant refused to pay on the ground that the warranty had not been complied with. The policy was never read, and no objection prior to the fire ever taken to the warranty clause. In an action for rectification, viz., to have the warranty struck out on the ground of inconsistency with the prior contract. *Held,* that to obtain rectification of a written instrument the *onus* was on plaintiff to prove a prior contract with which the instrument to be rectified failed to agree, that such failure was due to mutual mistake, and that such mistake was reasonable and not due to carelessness or negligence on plaintiff's part; *Held,* further, assuming (but doubting) that the interim note amounted to a definite agreement to insure for one year, that the warranty was a usual condition clearly within the company's power to insert, and not at variance with any antecedent contract, and that therefore there was no right to rectification; *Held,* further, that in any event plaintiff was estopped by his conduct from now questioning the validity of the warranty. *Held,* further, on the facts that there was no declinature of the risk by the L Company, and that the non-disclosure of the interview with C was not a non-disclosure material to the risk; *Held,* further that a refusal to insure based solely on the fact that the proposed business is outside the scope of a company's activities is not a declinature of the risk.

Held, lastly, that a transfer from a retiring to a continuing partner was not a "passing of interest" which would avoid the policy.

Action for rectification of a policy of fire insurance granted to plaintiff by defendant company. Plea, acceptance of policy. The facts appear from the judgment.

C. F. Stallard, K.C. (with him *J. G. van Soelen*), for plaintiff: On the question of rectification, see *Motteux* v. *London Assurance Co.* (26 Eng. Rep. 343). As to the effect of the interim note, see *Clarke* v. *African Guarantee, etc., Corp.* (1915, C.P.D. 68); *Citizens' Insurance Co. of Canada* v. *Parsons* (H.L. 7 A.C. 96), and on the point of variance between policy and proposal, see *Collett* v. *Morrison* (68 Eng. Rep. 458). On the question of change of interest, we submit there was no change within the meaning of the forfeiture clause; see Welford and Otter-Barry's *Fire Insurance*, p. 214; Porter, *Insurance*, p. 210; *German Mutual, etc., Co.* v. *Fox* (63 L.R.A. 334); *Hathaway* v. *State Insurance Co.* (52 Amer. Rep. 438) and the criticisms thereon and cases to the contrary, pp. 442 and 443 (*ib.*).

J. Stratford, K.C. (with him *J. P. van Hoytema*), for defen-

dant: No contract was concluded on the proposal form. The interim note means that a policy will be effected on the *usual* terms of the office. It is a final contract of insurance only for the period between the issue of the note and the issue of the policy; see Halsbury's *Laws of England*, vol. 17, p. 517. The proposal form is not a contract, it is only evidence of what are the usual terms, see Welford (*supra*), p. 77. To obtain rectification there must be an antecedent concluded contract on which the party seeking rectification must rely. The mistake must be mutual, and *justus, i.e.*, justifiable, and must continue up to issue of the formal policy. It must be shown that at the time of issue defendant agreed to give something different; lastly, rectification being a matter of equitable relief, it is available only to the vigilant; see Halsbury (*supra*), vol. 20, secs. 37-39, for the general principle; Taylor on *Evidence*, sec. 1139; *Quinn* v. *Goldschmidt* (1910, E.D.C. 158), at p. 164, *per* KOTZÉ, J.P.; *Caithness* v. *Fowlds* (1910, E.D.C. 261); *Port Elizabeth Harbour Works* v. *Mackie, Dunn & Co.* (14 S.C. 469); *Duke of Beaufort* v. *Neeld* (8 Eng. Rep. 1399), at p. 1415, per CAMPBELL, L.J. It was plaintiff's duty to read the policy; see *Potgieter* v. *New York Mutual* (17 S.C. 67). Next, the refusal to do a particular class of business is a declinature of the risk, see *Fine* v. *General, etc., Assurance Co.* (1915, A.D. 213). On the point of materiality we rely on the same case.

As to whether there was a change of interest, this is *res nova*. The American decisions are conflicting. Their ratio is that there must be "an integrity" on which the company may rely. Determination of the risk depends largely on personality; see Phillips' *Insurance*, I. 479, and compare *Ehrig & Weyer* v. *Transatlantic, etc., Co.* (1905, T.S. 557), following *Davies* v. *National Insurance Co. of New Zealand* (1891, A.C. 485); and see also *Standard Bank* v. *Wentzel & Lombard* (1904, T.S. 828); *Webster, Steel & Co.* v. *Patterson's Executors* (1 S.C. 350). Biddle on *Insurance*, I., sec. 223, shows the weight of U.S.A. authority to favour the view that a sale is a change of interest within the meaning of such a forfeiture clause; and see, lastly, May's *Insurance*, I., sec. 280.

Stallard, in reply: The contract is not to be found in the interim note alone. As to rectification, see Welford (*supra*), p. 106. The risk accepted was the risk contained in the proposal; if that is contradicted by the company's "usual terms," that is no concern of plaintiff's, and there is no negligence in not having

read the policy. The "usual terms" must conform to the terms in the proposal, otherwise the *exceptio doli* would lie, see Goudsmit's *Roman Law*, p. 273. On the question of previous declinature, the questions put by the company must be construed against the company; see *Littlejohn* v. *Norwich Union* (1905, T.H.), at p. 383.

[BRISTOWE, J.: There is no proposal where the offer is practically rejected before it is made?] That is so.

On the question of change of interest, compare *McNair, Cordiner & Co.* v. *Faehse* (19 S.C. 563) at p. 569, *per* DE VILLIERS, C.J., and *Blumberg* v. *Boyes & Malcolm* (1908, T.S., 1175), *per* WESSELS, J., at p. 1179.

It is fantastic to regard the honest partner as the watchdog of the firm. The company assures each partner. No interest has ever passed from the plaintiff. From first to last he has been interested in the whole property.

Van Hoytema, with leave, in reply for defendant: "Insured" means the firm not the individual partners, see Biddle, sec. 224, and *London Assur. Corp.* v. *Brennan* (U.S. Rep. 15 Insurance L.J. 209). As to what the *onus* of proving *justus error* includes, see *Quinn* v *Goldschmidt* (*supra*), at pp. 164, 165.

Cur. adv. vult.

Postea (October 1).

BRISTOWE, J.: In this action the plaintiff, who was formerly a member of the firm of Bushby and Bishop, outfitters and general dealers at Bloemhof, claims to have a policy of fire insurance on the business premises and stock-in-trade of such firm, granted by the defendant company on the 23rd January, 1913, rectified by striking out the following clause (which I shall call "the clause of warranty"): "Warranted . . . that same (*i.e.*, the books of the business) are locked in a fireproof safe or removed to another building at night and at all times when the premises are not actually opened for business." And he also claims payment of the policy moneys amounting to £1,800, together with certain alternative relief with which I am not concerned.

The pleadings in the action have been closed, and among the issues arising for decision are the following, which I have been asked by the parties to determine before the trial of the action is proceeded with, namely:—

(1) Whether the plaintiff is entitled to such rectification as I have mentioned.

(2) Whether, having regard to a certain interview which had occurred between the plaintiff and one Campbell (representing the London and Lancashire Fire Insurance Company), the policy was avoided by the plaintiff having (*a*) answered negatively Question 18 in the proposal form, "has the insurance now proposed been declined by any other office?" (*b*) failed to disclose such interview.

(3) Whether, having regard to the fact that on the dissolution of the partnership (which, for the purposes of this case, it is admitted took place on the 28th August, 1913) the entire interest in the business premises and in the stock-in-trade and other business assets was made over to and vested in the plaintiff without the sanction of the company having been obtained, the plaintiff's right of action is precluded by clause 8 of the policy which provides that if (*inter alia*) "the interest in the property insured pass from the insured otherwise than by will or operation of law," the insurance shall "cease to attach as regards the property affected, unless the insured, before the occurrence of any loss or damage, obtains the sanction of the company, signified by endorsement upon the policy by or on behalf of the company."

The proposal from was filled up and signed by the plaintiff on the 4th January, 1913. It proposed an insurance against fire of the firm's premises, fixtures and stock from the 4th January, 1913, to the 4th January, 1914, for the sum of £1,800 at a premium of £31 10s.; and in addition to Question 18, which I have already referred to, and a variety of questions as to the nature, construction and mode of occupation of the premises and the adjoining premises, the form contained one (Question 14) which was as follows: "Are accounts, books of purchases and sales (cash and credit) kept? If so state (1) if deposited in a fireproof box or safe at night or when the premises are closed. (2) If not so deposited state precautions taken for their safe custody." To the first of these queries the plaintiff answered, "Yes," to the second, "No," and to the third, "Kept at night in the proprietor's room."

On the same day the premium for a year was paid, and an interim cover note was signed on behalf of the company and handed to the plaintiff. The cover note was headed;—"Interim note," and the material part of it ran as follows:—"Messrs. Bushby Bishop having this day effected an insurance against fire to

the amount of £1,800 on property as particularised in the proposal, and having paid the premium as understated, a policy according to the terms and conditions of this office will be forthwith prepared and delivered." Then followed the words, "From 4th January, 1913, to 4th January, 1914," and the premium was expressed to be £31 10s.

The policy when executed was delivered to the plaintiff; and on the 8th February, with the sanction of the defendants, it was ceded and delivered to the National Bank of South Africa, as security for an overdraft. It was retained by them until the day on which this action was commenced, when it was re-ceded to the plaintiff. In the meantime the partnership was dissolved, as I have stated, on the 28th August, 1913, when all the assets were vested in the plaintiff subject to a first charge in favour of Bishop of certain moneys which the plaintiff agreed to pay to him. On the 16th September in the same year, a fire occurred in which the insured premises were totally destroyed. And when the plaintiff called upon the defendants to make good the loss, they refused on the ground (among others) that the clause of warranty had not been complied with.

At the hearing before me evidence was taken on certain points material to the questions which I am called upon to decide.

The plaintiff does not suggest that the clause of warranty was ever complied with, or that prior to the fire, any objection was ever taken to the insertion of that clause in the policy. His case is that his partner was away and knew nothing of what was occurring; and that he himself assumed that the policy would contain nothing inconsistent with the information given in the proposal form; that he never read it and never knew that the warranty clause was contained in it; and that the books have always (as stated in the proposal), been taken at night-time into the proprietor's room behind the shop. The defendants in their plea allege acceptance of the policy by the plaintiff.

Mr. Hands, the local manager of the defendant company, stated in evidence, and I have no doubt that the warranty clause is one always insisted on in risks of this nature, not only by the defendants, but by all, or almost all other fire insurance companies in Johannesburg.

As regards the interview with Campbell, the plaintiff admits that before he approached the defendants, he asked Campbell, who was a general agent in Bloemhof and also agent for several insurance

companies (of which one—the London and Lancashire—undertook fire insurance) if he could insure the plaintiff's premises. And it is clear that Campbell, thinking that the plaintiff had come to him as agent for the London and Lancashire, replied that his company did not undertake that class of work. The plaintiff says that he did not know that Campbell was agent for the London and Lancashire, and that he simply went to him as a general agent who he thought might be able to arrange an insurance for him. I do not think that I should be justified in doubting the plaintiff's evidence on this point, and I, therefore, hold that the plaintiff approached Campbell in his capacity of general agent and not as agent for the London and Lancashire.

I now proceed to consider the specific questions with which I have been asked to deal.

In order to obtain the rectification of a written instrument, the plaintiff must show in the clearest and most satisfactory manner (see *Fowler* v. *Fowler* (4 de G. and J. at p. 265) that there was a prior contract entered into between the parties, with which the instrument to be rectified fails to agree; that such failure was due, not only to the plaintiff's mistake, but also to mistake on the part of the other party to the contract; and further that the mistake was reasonable and was not the result of carelessness or negligence on the part of the plaintiff (*Quinn* v. *Goldschmidt* (1910, E.D.C., at p. 165); and see *Van der Byl* v. *Van der Byl* (16 S.C. 338)). Mr. *Stratford* contended that the plaintiff must also prove that the prior contract continued up to the date of the instrument sought to be rectified. As a rule this, no doubt, is so, but where the prior contract is itself in writing it seems to me that its continuance must be presumed until the contrary is shown.

Turning now to the present case, it is probably true to say that a cover note does not, as a rule, amount to a final acceptance of the insurance proposal. It is an acceptance for the purpose of an interim insurance, but it usually leaves the company free to grant or refuse the policy as it thinks fit; and the insurance created by it is only intended to enure until the company has made up its mind (see Halsbury's *Laws of England*, Vol. 17, Sec. 1,020; *Citizens' Insurance Co. of Canada* v. *Parsons*, 7 A.C. at p. 124). But, as was pointed out in *Clark* v. *African Guarantee, etc., Co.* (1915 C.P.D. at p. 81.), the meaning and effect of a cover note is always a question of construction for the determination of which we must look to the document itself. Now the cover note in this

case is by no means a perspicuous document. Instead of stating clearly, as it might easily have done, whether the company was intended to have a *locus penitentiae* or not, it seems to go out of its way to use language calculated to mystify the accurate thinker. The words, "Having this day effected an insurance against fire to the amount of £1,800 on property as particularised in the proposal and having paid the premium," especially when read in connection with the term given at the foot of the note which corresponds precisely with the year mentioned in the proposal, would naturally import that an insurance for a year had been definitely agreed upon. This, in fact, was Mr. *Stallard's* argument, and he went on to contend (as would follow on this hypothesis), that the policy was merely intended to embody in formal language the terms already agreed upon between the parties. There are, however, objections to this interpretation. In the first place the policy was not to be a merely formal document; it was to contain "the terms and conditions of the office," meaning (as I understand) the terms usually inserted in risks of this description. These (even if confined, as Mr. *Stallard* urged that they must be, to conditions not inconsistent with the proposal), would, or might include onerous provisions unknown to the insured, and which he ought to have an opportunity of repudiating. Moreover, the very description of the cover note as an "interim note" would seem to indicate that it was intended to have only a temporary or provisional application, limited to the period anterior to the delivery of the policy. On the whole, however, I incline to the view that two contracts of insurance were intended, (1) an interim insurance and (2) the policy. If this is so then the insurance "this day effected" must refer only to the interim insurance, and the cover note would have to be read as containing two distinct contracts, (1) an interim contract of insurance and (2) a contract to deliver a policy "according to the terms and conditions of the office"; each insurance being on the "property as particularised in the proposal."

I do not think, however, that it matters very much which of these views of the construction of the interim note is correct, because I have come to the conclusion that in either case the warranty clause cannot be objected to. This clause, as I have said, is a usual condition. It was clearly, therefore, within the power of the company to insert it, unless it is excluded by the words "on property as particularised in the proposal." It may be

admitted that if the two are inconsistent the latter must prevail, because the property to be insured is the basis and substratum of the whole proposal. But are they inconsistent? It is contended that they are because the proposal was only in respect of a business the books of which were not kept in a safe but in the proprietor's room, whereas the warranty required them to be locked in a safe or removed to another building. But I cannot think that this is any part of the "property particularised." The "property particularised" is the property to be insured, that is, the premises stock and fixtures the destruction of which by fire would support a claim on the policy. So far as the books fall within this, they may be covered by the insurance, but the information whether books are kept and how they are disposed at night is only material from an evidential point of view. And it seems to me that by no stretch of language can that be said to be any part of the property particularised in the proposal.

Mr. *Stallard*, in the course of his argument, said that he did not rely so much on the cover note as on an antecedent parol contract arising from the acceptance of the proposal implied by the receipt of the first year's premium; and the declaration itself leaves it doubtful upon which of the two the plaintiff intended to base his case. There is, however, no evidence of any contract except that embodied in the cover note. The reference to an insurance "this day effected" does not mean that there was some other insurance than the cover note records. It merely imports that the cover note instead of being itself the contract is the evidence of the contract—a distinction without much difference.

I, therefore, come to the conclusion that the plaintiff has failed to prove an antecedent contract with which the warranty is at variance. And as this is essential to a right of rectification I am of opinion that such right does not exist.

But there is another point on which I am against the plaintiff. He knew when he received the policy that it would or might contain clauses of which he was not aware. It was, therefore, his duty to make himself acquainted with the terms of the policy in order to ascertain whether there was anything in it of which he disapproved, so that the company might be informed at the earliest possible moment of any objection he might entertain. The company were entitled to assume that he had discharged this duty, and when a reasonable time elapsed without objection on his part, they were entitled to assume that he was satisfied and had accepted

the policy as a sufficient compliance with the contract into which they had entered. Mr. *Van Hoytema* argued that the *onus* of proving *justus error*, which unquestionably is on the plaintiff, included negativing subsequent negligence of such a nature that if it had not occurred the plaintiff would have ascertained the true facts in time to have had the matter set right. I do not think this is the true way of putting the matter. It seems to me that the *justus error* necessary to found a right of rectification stops short of common mistake prior to the completion of the document complained of and for which the plaintiff is not blameable. If that is proved then the right to the relief *primâ facie* exists; and anything that subsequently occurs whether indicating acquiescence, acceptance, estoppel or any other answer to the plaintiff's claim is matter of defence which the defendant must plead if he wishes to set it up. Here, however, acceptance is pleaded, so that that question is open for the decision of the Court. Now the case seems to me to be very analogous to a sale of unascertained goods. There, it is for the vendor to deliver such goods as he considers to be a fulfilment of the contract and it is for the purchaser when he receives them to say whether he accepts them as such. He is allowed a proper time for inspection, but if he does nothing he is taken to have accepted them. So here. The defendants had undertaken to deliver a policy in accordance with the terms agreed upon. They delivered one which in their view was in accordance with those terms. It was then for the plaintiff to say whether he concurred in that. He could have read and if necessary taken advice upon the policy within a few days or at all events a week or two after he received it. But he did nothing. He put it aside assuming that it was unobjectionable; and not until a fire had actually occurred some eight months later did he raise any question as to the validity of the warranty clause.

In the meantime the company's position had altered for the worse. They had a right under clause 10 of the policy to cancel the contract. It is not suggested that that is not a usual term. It is one of the printed clauses of the policy. If the plaintiff had refused to accept the warranty clause the company would, in all probability, have cancelled the insurance. But the conduct of the plaintiff rendered it impossible for them to exercise that right. It seems to me, therefore, that it was too late after the fire for the plaintiff to raise this objection. The company did nothing to mislead him. It was a case of pure and simple carelessness. He

knew there might be features in the policy to which he might object, but he assumed that there were none. Surely then he voluntarily took the risk and he must abide by the result.

A case not unlike the present one arose in *Potgieter* v. *New York Mutual, etc., Co.* (17 S.C. 67), where an action for rectification or cancellation of a life policy failed because the plaintiff had neglected to read the policy, and had had the benefit of it.

The second question in the case must, I think, be answered in favour of the plaintiff. He did not, as I have already said, approach Campbell in his capacity of agent for the London and Lancashire Co., but in his capacity as general agent. He cannot, therefore, be said to have made any application to the London and Lancashire Company, and the insurance was not, therefore, declined by them. The answer to Question 18 of the proposal form was, therefore, in my judgment correct. But there is another reason which also leads me to this conclusion. Campbell refused to entertain the application on the ground that the company did not undertake that class of business, namely, the insurance of wood and iron stores. Now it seems to me that for an insurance to be declined within the meaning of the question, the application must be entertained, considered on its merits and refused. A rejection like that in the present case, based on the fact that the proposed business is outside the scope of the company's activities does not seem to be a rejection of the risk in any true sense, any more than it could be said to be rejected if it had been offered to and rejected by a body which did not do fire insurance work at all.

The second question then goes on to ask whether the policy was avoided by the non-disclosure of the interview with Campbell, on the ground that contracts of insurance are contracts "*uberrimae fidei*," and that there is an obligation on every person who seeks to be insured to disclose everything within his knowledge which is material to the risk. This also I must answer in the negative. It is no doubt important to know what another company has thought of the risk. But here the London and Lancashire Company never looked into the matter. They rejected it because it was outside their business. If it were possible to suggest that Campbell acted because of some adverse information with regard to these particular premises, or with regard to the plaintiff or his partner individually, the case might be different. But the evidence does not countenance such a suggestion. The only

ground for the refusal according to Mr. Campbell as well as according to the plaintiff, was that the premises were wood and iron and the London and Lancashire Co. did not insure wood and iron premises. A disclosure of this interview would, therefore, merely have informed the defendants that Campbell had refused to entertain the application because his company did not insure wood and iron buildings. But the defendants do insure wood and iron buildings. They know the risk as much as the London and Lancashire do, but still they do this class of work. That being so, how can it be material to this particular wood and iron risk to be told that the London and Lancashire do not accept risks of that kind. It seems to me that it has no bearing on the matter at all.

I come now to the third point. Although there has been considerable conflict of judicial opinion, the preponderance of American authority is in favour of the view that a transfer by a retiring to a continuing partner is not within any clause which makes the sale, assignment or transfer of the insured property, or any part thereof, or even a change in its ownership, without the consent of the insurers, an avoidance of the policy. There is much to be said against this view, not only where the construction may plausibly be said to be adverse to it, as where the clause is expressed to include a "change" in title (see *Hathaway* v. *State Insurance Co.* (52 *Amer. Rep.* 438) or any interest in the insured property (*Hartford Fire Ins. Co.* v. *Ross* (23 Ind. 179), but in other cases also; and the argument in its favour, based on a consideration of the mischief supposed to be aimed at by provisions of this kind, has been stated as follows: "The same reasons which would induce a company to protect itself against a sale to strangers, may exist in a sale from one partner to another. "In making contracts of insurance the company has regard to the habits and character of the other contracting parties. If a firm is composed in part of prudent careful men, a company may be willing to insure the property of the firm, though the others were of an entirely different character. But if after this was done those who were prudent and careful, could by selling out to the others, leave the company exposed to the unguarded negligence of the latter, it might suffer the same evil as from a sale to strangers." (*Keeler* v. *Niagara, etc., Co.* (16 Wis. 523).)

The most widely accepted view, however, is that clauses of this kind are intended to interdict transfers of interest by persons

insured to persons uninsured, and not changes of *personnel* among the insured themselves. And the argument put forward in the extract which I have quoted has been answered thus, "It is suggested that the proviso may have been designed to insure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all, and the theory is rather fanciful than sound that they may have intended to conclude a bargain with rogues on the faith of a promise that an honest man should be kept in the firm to watch them" (*Hoffman* v. *Aetna, etc., Co.*, 32, N.Y., at p. 410). This is the view which has been taken by the majority of the cases (see *Burnett* v. *Erfaula, etc., Ins. Co.*, 7 Amer. Rep. 531; *Pierce* v. *Nashua Ins. Co.*, 9 *ib.* 235; *Cowan* v. *Iowa, etc., Ins. Co.*, 20 *ib.* 583; *West* v. *Citizens Ins. Co.*, 22 *ib.* 294; *Keeney* v. *Home Ins. Co.*, 29 *ib.* 60; *Phoenix Ins. Co.* v. *Holcombe*, 73 Amer. State. Rep. 532), and it is the view which the text writers on the whole support (Porter on *Insurance*, 210; Welford and Otter Barry, 214; 1 Biddle, sec. 224; and both Angell and May express opinions to the same effect).

It is not, however, satisfactory to rely entirely on general grounds. The clauses employed by various insurance offices differ widely from each other, and the question in every case must be ultimately one of construction. Now the clause in the present case is, "If the interest in the property insured pass from the insured otherwise than by will or operation of law." The insured were the plaintiff and Bishop. Can it be truly said that when Bishop ceded his interest to the plaintiff "the interest in the property passed from the insured"? It seems to me that it cannot. A share in the property has passed from one of the insured to the other of the insured, but nothing has passed out of the hands of the insured. The only way in which property can pass from the insured is if it passes to persons who are not insured. If it does not do this it still remains in the hands of someone covered by the insurance. It was for the company to make its meaning clear; and it could easily have done so if it had intended to cover a case of this kind by adding the words "or any of them." In *Forbes* v. *Border Counties Fire Office* (11 Sess, Cas. (Series 3) 278) a clause in almost identical terms with this was held not to be broken by a transfer from one partner to another. And it is a clause in precisely this form which is referred to in Porter on

Insurance in the passage to which I have referred. And my attention has not been called to, and I have not found any case in which, on a clause worded as this one is, a contrary decision has been arrived at. The third question must, therefore, in my opinion, he answered negatively.

Plaintiff's Attorneys: *Marks, Saltman & Gluckmann;* Defendant's Attorneys: *Gedye & Hands.*

[G. H.]

EX PARTE GARRUN'S TRUSTEE.

1915. *October* 7. MASON, J.

Insolvency. — Foreign Trustee.—Recognition. — Jurisdiction of Witwatersrand Local Division.—Act 7 of 1907, *sec.* 3.

The Witwatersrand Local Division has no jurisdiction to order the recognition of a foreign trustee in terms of sec. 3 of Act 7 of 1907, but where there is great urgency such an order may be made by the presiding Judge in his capacity as a Judge of the Supreme Court, Transvaal Provincial Division.

Application for an order recognising the appointment of the applicant as the sole trustee in the insolvent estate of one Garrun. The estate had been sequestrated in the Orange Free State, where the applicant had been duly appointed. The application was made in order that the applicant might make a further application of an urgent nature for an interdict, pending action, to restrain the transfer of certain property alleged to be an asset of the estate.

G. A. Mulligan, for the applicant, moved.

[MASON, J.: This Court has no jurisdiction to entertain such an application.]

In view of the great urgency of the application which follows this, I ask your Lordship to make an order, sitting as a Judge of the Supreme Court, Transvaal Provincial Division, in Chambers, as was done in *Ex parte Lange and Veltman* (1911, W.L.D. 150).

MASON, J.: It is quite clear that the Witwatersrand Local Division has no jurisdiction to make an order in terms of section 3 of Act 7 of 1907, and the case which has been quoted to me is a deci-