RECENT ENGLISH DECISIONS.

Supreme Court of Judicature. Court of Appeal.

CASTELLAIN v. PRESTON.

After the date of a contract for the sale of a house which was insured against fire, and before completion of the purchase, the house was damaged by fire, and the insurance company, in ignorance of the contract, paid the vendors for the damage done. The purchase was subsequently completed, the vendors receiving the full amount of the purchase-money, and also retaining the moneys paid to them by the insurance company. In an action by the chairman of the insurance company against the vendors to recover the amount paid by the company to them: *Held* (reversing the judgment of CHITTY, J.), that the contract of insurance was a contract of indemnity only, and therefore the receipt of the purchase-money by the defendants must be taken into account in calculating the amount of the loss sustained by the defendant, and as it had the effect of extinguishing such loss, the plaintiff was entitled to recover.

THIS was an action brought by the chairman of the Liverpool and London and Globe Insurance Company against the defendants to recover the sum of 330*l.*, together with interest thereon from the 25th September 1878; or, in the alternative, for a declaration that the defendants were trustees for the plaintiff of the same sum and interest, under the following circumstances:

On the 31st July 1878, the defendants entered into a contract with Messrs. Rayner for the sale to them of a house and premises in Liverpool for the sum of 3100*l.*

At the date of the contract the house was insured against fire, by the defendants, with the Liverpool and London and Globe Insurance Company, but no mention of the insurance was made in the contract.

After the date of the contract, but before the completion of the purchase, the house was damaged by fire to the extent of 330*l.*, which sum was paid to the defendants by the insurance company, who at that time were not aware of the contract for the sale of the premises.

As the defendants refused to hand over the 330*l.* to the purchasers, or to allow that sum to be deducted from the purchase-money, or to expend it in reinstating the premises, the purchasers brought an action against the vendors for a declaration that they were entitled to the benefit of the moneys received by the defendants from the insurance company, and to have the same paid or

allowed to them accordingly, or otherwise to have the money laid out towards reinstating the premises; but that action was dismissed with costs by JESSEL, M. R., and his decision was affirmed on appeal: *Rayner* v. *Preston*, 14 Ch. Div. 297; S. C. on appeal, 18 Ch. Div. 1.

This action was then brought, and was entered for trial at the Liverpool Assizes in January 1882, but, upon being opened before CHITTY, J., the jury were discharged, and the action was adjourned for further consideration.

After hearing the argument, on further consideration, CHITTY, J., gave judgment for the defendants, and from this judgment, which is reported L. R., 8 Q. B. Div. 613, the plaintiff now appeals.

The appeal was argued by *C. Russell*, Q. C., and *Tobin*, for the plaintiff; and by *Gully*, Q. C., and *W. R. Kennedy*, for the defendants.

BRETT, L. J.—In this case an action was brought by the plaintiff as representative of the Liverpool and London and Globe Insurance Company, in respect of certain money which had been paid to the defendants on account of damage done to a building by fire. The defendants were the owners of the property so damaged, and they had made a contract for the sale of it to third persons, which contract, on the giving of certain notice as to time of payment, would oblige those third persons to pay the agreed price. The vendees would have to pay the price whether the house were burned or not. After the making of the contract and before the day of payment the house was burned. It was insured by the defendants with the insurance company which the plaintiff represents, and it could not be suggested that the defendants had no insurable interest; for, in the first place, they were the legal owners of the property; and, secondly, the vendees might never carry out the contract, and the vendors, the defendants, would then suffer the loss. The defendants made a claim upon the insurance company, and were paid the amount of the damage occasioned by the fire. After that the contract of sale was carried out, and the full price paid to the defendants, notwithstanding the fire. The plaintiff now sues the defendants, not, properly speaking, to recover back the money actually paid to the defendants, but in respect of the money so paid, claiming that the insurance company is entitled to have the benefit of that

money. The question to be decided is, can he recover? The case was tried before CHITTY, J., and he has come to the conclusion that the plaintiff cannot recover. It seems to me that the foundation of his judgment is this: He does not consider that the doctrine of subrogation can be applied to the present case. What we have to consider is, do we agree with this view or not? In order to give my opinion on this question I feel obliged to revert to what is the foundation of every rule with regard to insurance law, which is this: Every contract of marine or fire insurance is a contract of indemnity, and of indemnity only, the meaning of which is that the assured in case of a loss is to receive a full indemnity, but is never to receive more. Every rule of insurance law is adopted in order to carry out this fundamental rule, and if ever any proposition is brought forward the effect of which is opposed to this fundamental rule, it will be found to be wrong. There are many propositions bearing on the question, and many rules may be glanced at which are well-known in insurance law. The doctrine in marine insurance law of constructive total loss is adopted solely in order to carry out the fundamental rule. It is a doctrine which is in favor of the assured, because where the loss is not an actual total loss, but is what, as a matter of business, is treated as equivalent to a total loss, this rule is adopted to carry out the fundamental doctrine and give the assured a full indemnity. Grafted on that doctrine came the doctrine of abandonment, which is only applicable to cases of constructive total loss, and is introduced in favor of the underwriters, so that they may have to pay no more than an indemnity. So it appears that these two doctrines were introduced in order to carry out the two limits of the fundamental doctrine to which I have referred, namely, that the assured shall get a full indemnity, and that he shall get no more. As I stated in the course of the argument, the doctrine as to notice of abandonment seems more difficult to support in principle than the other rules of insurance law. It was introduced in favor of the underwriters, in order that they might not by means of any fraud be obliged to pay more than a full indemnity. It is a technical doctrine, because, if there was no notice of abandonment, although there was a constructive total loss, the assured did not recover for the loss. Probably the rule was originally adopted by merchants for the purpose of carrying on business, for otherwise it seems to me that the introduction of it by the courts would be an encroachment. The doctrine of subrogation

is another proposition which has been introduced in order to carry out the fundamental rule. It was introduced in favor of the underwriters in order to prevent their having to pay more than a full indemnity, not on the ground that the underwriters were sureties, for they are not so always, although their rights are sometimes similar to those of sureties, but in order to prevent the assured recovering more than a full indemnity. The question is whether the doctrine as applied in insurance law can be limited. Can it be limited to putting the underwriters in the place of the assured in order to enable them to enforce a contract or a right of action? Why should we limit it to this, if the effect of so doing would be to entitle the assured to more than a full indemnity? That is the fault of the judgment of CHITTY, J., in the court below; it is limited to the enforcement of a right of action. In order to apply the doctrine properly we must go into the full meaning of subrogation, which is the placing of the assurer in the position of the assured. In order fully to carry out the fundamental principle we must carry the doctrine of subrogation so far as to say that, as between the underwriter and the assured, the underwriter is entitled to every right, whether of contract fulfilled or unfulfilled, or in tort, enforced or capable of being enforced, or to any other right, legal or equitable, which has accrued to the assured, whereby the loss can be or has been diminished. That is the largest form in which I can put the rule. I use the words "every right" because I think the doctrine requires to be carried to that extent. I think the decision in *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, went on this foundation. In that case what was paid by the American government was not salvage, but a gift, and the persons who received the money so paid had no right to it until it had actually come into their hands. I am aware that the cases as to reprisals (*Randal* v. *Cockran*, 1 Ves. Sr. 98, and *Blaauwpot* v. *Da Costa*, 1 Eden 130) have been stated to be cases of a gift, but it seems to me that they came within the same rule of law, because, although there was no obligation to make the payment, the government always made it so that as a matter of business it came to be considered as a right. This shows that the doctrine goes much further than to extend only to what could have given a cause of action. Where the contract has been fulfilled the right of action is gone. Again, take the case of a tort feasor, who makes good the damage occasioned by his tort; there again the right of action is gone, and

there is no right of action into which the insurer can be subrogated; but the insurer could not be subrogated until he had paid the loss, and therefore to confine the doctrine as suggested would take out innumerable cases. If the right exists in the assured, although there may never be a right of action, it seems contrary to the fundamental doctrine to say that the loss is not to be diminished. For myself I cannot see why, if the defendants would have had a right against a third party to enforce the contract of sale, the insurers should not have been subrogated into that right; but COTTON, L. J., is not satisfied as to this, so I will pass by the question, which it is unnecessary to decide, because here there was a right to have the contract fulfilled by the third party, and the assured has received from the third party the money payable under that contract. I cannot conceive any right by which the assured has his loss diminished, which would be other than a right affecting the loss. In the present case the right affects the loss, enabling the assured to get the same money which he would have got notwithstanding the loss. The present case is the case of a contract relating to real property, and therefore is somewhat peculiar in its nature. We are asked to say that where the contract is that a person will pay *if* the property is lost, that is to be brought into the account, but where it is to pay *though* the property is lost, that is not to be brought in. I cannot see that it rests on so fine a distinction. In the course of his judgment, in the court below, CHITTY, J., says, (8 Q. B. Div., at p. 617): "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss." This passage is quoted from the judgment of Lord CAIRNS, in *Simpson* v. *Thompson*, 3 App. Cas. 284. Then CHITTY, J., goes on: "What is the principle of subrogation? On payment, the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." It seems to me that he is there confining the principle of subrogation to rights which the insured is entitled to enforce; that is to say, that he is confining it to the remedies of the insured. Then he goes on and gives instances: "Where the owner of a building insures, and the

building is destroyed by a riot, the insurers, on payment, are subrogated to their right against the hundred. Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment, in like manner succeeds to the right of the landlord against the tenant," &c. I would add that if the tenant repairs the insurer is entitled to receive from the insured a benefit equivalent to that derived by the insured from such repairs. Dealing with *Burnand* v. *Rodocanachi*, 6 Q. B. Div. 633, 7 App. Cas. 333, he says: "There the underwriters, under a valued policy on the ship, which was destroyed by the *Alabama*, a cruiser, paid as on a total loss. The American government, under a treaty with the British government, provided a fund out of which the insured received a sum in respect of the destruction of the ship, and the question was whether that sum was part of the salvage. That point was put very clearly by BRAMWELL, L. J., in his judgment, and it was held that it was not; that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I would add to that—because there was no right in the assured to receive the money from the American government, but their payment to him was a pure gift. The decision in *Darrell* v. *Tibbitts*, 5 Q. B. Div. 560, is in favor of the plaintiff in the present case. I shall not retract what I there said. In *Darrell* v. *Tibbitts*, the insurers were not subrogated into a right of action or a remedy, but into the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person bound to administer it. I said there: "The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured:" 5 Q. B. Div. 563. That is one sentence, and is complete in itself, and so I intended it to be; then the same judgment continues, "and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right which is not affected by the loss or the safety of the subject-matter insured. If it is necessary to bring this payment within those terms

I am of opinion that here the contract is affected because the money is paid in consequence of the contract. In his judgment in the court below, CHITTY, J., observes, "that the only principle applicable is that of subrogation, as understood in the full sense of that term, and that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance which entitled the insurers to have the damages made good:" 8 Q. B. Div. 625. I think it would be better to say, "which entitled the insured to be put by such third parties in as good a position as if the damage had not happened." The contract in the present case does enable the insured to be put in such a position, and this arises from the contract alone. For these reasons it seems to me that, according to the true principle of insurance law, and carrying out the fundamental doctrine that a policy is a contract of indemnity and no more, the plaintiff must succeed. I am of opinion that the plaintiff in the present case is entitled to recover, and the jugment appealed from must be reversed.

A previous action arising out of the same state of facts had, prior to the principal case, been brought by the purchaser of the house against the vendor to recover the insurance money received by the latter, and had been decided against the purchaser. See a report of the case with a note, 21 Am. Law Reg., N. S. 89 (*Rayner* v. *Preston*).

It will be seen that the two decisions, though relating to the same transaction, are based on different grounds. In the first (*Rayner* v. *Preston*), as stated by BRETT, L. J., in his opinion: "There was no sort of relation of any kind between the plaintiff and the defendant with regard to the policy, and therefore none with regard to any money received under the policy." JAMES, L. J., however, dissented, preferring to rest his judgment on the fact that "the relation between the vendor and the purchaser, became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of and as the actual amount of the damage done to the trust property, * * * and that the money reached the vendor's hands according to the then rights of the parties as between them and the insurance office; that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in."

The principal case, in deciding which the court was unanimous, rested upon the ground of insurance law, as between the insured and the insurer, viz., that a policy is a contract of indemnity and no more, and the receipt of the purchase-money by the defendants must be taken into account in calculating the amount of the loss sustained by them, and as BOWEN, L. J., observes, "a policy of insurance is a contract of indemnity, and no more can be recovered than the amount of the loss sustained," and here the receipt of the purchase-money had the effect of extinguishing such loss. Mr. Justice CHITTY did not appear to think that the doctrine of

subrogation was applicable to the case. The fundamental law, as stated by BRETT, L. J., is that "every contract of insurance, marine or fire, is a contract of indemnity, and of indemnity only, the meaning of which is that the insured, in case of a loss, is to receive a full indemnity, but is never to receive more."

BOWEN, L. J., in giving his judgment in the principal case, commented on the words used by JAMES, L. J., in *Rayner* v. *Preston*, *supra*, where he said: "The Act of Parliament as to fire insurance (14 Geo. 3, c. 75), seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consciences of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest within the meaning of the act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life, having insured his house, has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age, or suffering from a mortal disease." "I wish," said BOWEN, L. J., "to speak with the highest respect and reverence in commenting on anything said by so great a judge, but I confess I cannot follow those observations. It is true that in practice insurance offices do not take the trouble to inquire as to interest of persons proposing to insure; but the reason is that generally the policy is intended to cover all interest, and also there are usually covenants to repair, so that there no question can arise. Suppose a weekly tenant insures, only meaning to cover his own interest, could he recover the full value of the house? It is true that the insurer cannot satisfy the claim upon him by handing over to the injured tenant marketable value of his term; but the reason for that is that the insured loses more. That is all that is meant by WOOD, V. C., in *Simpson* v. *The Scottish Union Ins. Co.*, 1 H. & M. 618." His lordship then as to the case of a life tenant, upon the hypothesis that he is a very old man, and assuming that he meant to insure only his own interests, says: "If he insures intending to insure his own interest only, and he dies a week after the fire, I doubt whether the court would give the full value of the house to his representatives. In such case we must go back to the broad principle. Here the case is one of vendor and vendee, and *Rayner* v. *Preston* was decided on the ground that the vendors were not trustees for the purchasers of the money secured by the policy. What then is the insurable interest of the vendor which entitles him in the first instance to receive the money? It is the beneficial interest of an unpaid vendor who has agreed to sell the property, but still retains the legal estate, and has not received the price. In the first instance he can obviously recover on the policy, as was decided in *Collingridge* v. *The Royal Exchange Assurance Corporation*, 3 Q. B. Div. 173. Then can he keep the whole of the insurance money, having only lost a part, say a half, of what he has insured? In *Simpson* v. *Thomson*, 3 App. Cases 284, Lord CAIRNS said: "I know of no foundation for the right of underwriters, except the well known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. Now is there any distinction here on the ground that the present case is one of fire, while that was one of