1934 *Present : Garvin S.P.J. and Maartensz J.*

HONG KONG AND SHANGHAI BANK *et al. v.* BRITISH EQUITABLE ASSURANCE COMPANY LIMITED

131 and 132—D. C. Colombo, 45,189.

Insurance against fire—Assignment of policy—Right to receive money payable under policy—Action by assignee against insurer—Defences available against assignee—Breach of conditions—Waiver.

The second plaintiff insured certain produce with the defendant company and the policy was thereafter assigned by him to the first plaintiff-bank to secure an overdraft given by the bank. The assignment was evidenced by an endorsement made by an agent of the defendant-company on the back of the policy in the following terms:—"All rights and interests in the within-mentioned policy are hereby assigned to the Hong Kong and Shanghai Banking Corporation."

Held, that the first plaintiff-bank was an assignee not of the policy itself but only of the right to receive the sum payable under the policy. As against such an assignee the insurers are entitled to make use of any defences which would be available against the assured.

Where an agent has authority to receive and give receipts for the premiums on behalf of the insurers, his acceptance of a premium with knowledge of a breach of a condition is a waiver of the breach binding upon the insurers.

THE plaintiffs sued the defendant company to recover a sum of Rs. 100,000 due under a policy of insurance dated May 23, 1919, issued by the defendant to the second plaintiff against loss by fire and assigned by the second plaintiff to the first plaintiff. The property insured was stock in trade consisting of copra stored in certain premises belonging to the second plaintiff. The plaintiffs alleged that whilst the policy was in force copra of the value of Rs. 114,430.55 were destroyed by fire and prayed that the defendants be ordered to pay the first plaintiff or in the alternative the second plaintiff the sum of Rs. 100,000 with legal interest and costs.

The defendant admitted that certain goods lying in the premises were destroyed but denied liability on several grounds set out in the issues, which are fully stated in the judgment.

Among the grounds of law taken by the defence were: first, that the assignment of the policy was not valid, second, the plaintiffs had forfeited all benefits under the policy by (*a*) failure of the second plaintiff to give notice of another insurance effected on the same goods, and (*b*) making false declarations with regard to the quantity and value of goods in stock.

The learned District Judge held that the value of copra destroyed was Rs. 35,250, and that the second plaintiff took out the policy for the benefit of the first plaintiff, that it was duly vested in the first plaintiff and that the assignment was valid in law. He further held that the declarations made by the second plaintiff with regard to the stock were false but that, despite such false declarations, the first plaintiff was

entitled to recover the value of the stock destroyed by fire. The defendant company was, however, held not liable, in view of clause 16 of the policy, for more than half the loss, viz., Rs. 17,675. Judgment was entered for the first plaintiff for that sum with costs.

Appeal No. 131—

Hayley, K.C. (with him *Nadarajah* and *Ferdinands*), for defendant, appellant.

Keuneman (with him *H. V. Perera* and *Gratiaen*), for plaintiffs, respondents.

Appeal No. 132—

Keuneman (with him *H. V. Perera* and *Gratiaen*), for plaintiffs, appellants.

Hayley, K.C. (with him *Nadarajah* and *Ferdinands*), for defendant, respondent.

June 13, 1934. MAARTENSZ J.—

This was an action to recover a sum of Rs. 100,000, which the plaintiffs claimed to be due and payable under a policy of insurance, M·111413—dated May 23, 1929 (P 5), issued by the British Equitable Assurance Company, the defendants, to Martin, Sons & Company, against loss or damage by fire.

The property insured was the stock in trade consisting of copra and gunny bags stored in premises No. 11, Bastian Fernando's stores in St. Joseph's street, Colombo. It was insured by Martin, Sons & Company for a sum not exceeding Rs. 100,000 for a period of one year "between the 23rd day of May, 1929, and four o'clock in the afternoon of the 22nd of May, 1930, or the afternoon of the last day of any subsequent period in respect of which the insured shall pay to the Company, and the Company shall accept, the sum required for the renewal of this policy". It is common ground that the policy was renewed for another year on May 19, 1930.

There is on the back of the policy the following endorsement:—"All rights and interests in the within-mentioned policy are hereby assigned to the Hong Kong and Shanghai Banking Corporation, entered in office books this day 21st May, 1929". Signed, "C. D. Carolis, Agent". C. D. Carolis was the Insurance Agent. The Hong Kong and Shanghai Banking Corporation (hereafter referred to as the bank) is the first plaintiff.

Martin, Sons & Company was the trade name of a business carried on by the second plaintiff, K. Martin Perera, with one Mana Cona Muna Ibrahim Saibo. The latter died on February 10, 1931, leaving, it is alleged, an estate estimated to be less than Rs. 2,500 in value. It was also alleged that the plaintiffs were not aware who were the persons entitled to administer his estate. The bank alleged that it had at all times material to the action an insurable interest in the property insured, that the said policy was taken out by Martin, Sons & Company for the benefit and on behalf of the bank, and that from the commencement of the risk the policy was vested in and enured to the benefit of the

bank. In the alternative, it was alleged that the bank had at all dates material to this action the rights of an assignee of the policy as well as of a mortgagee of the said property.

The plaintiffs alleged that on July 5, 1930, whilst the policy was in force 11,329 cwt. 3 pr. 1 lb. of copra of the value of Rs. 114,430.55 and the bags described in schedule A to the plaint which were in store No. 11 were destroyed or damaged by fire.

The second plaintiff assessed the loss incurred at Rs. 115,718.55, less Rs. 6,391.57 being the proceeds of sale of salvage sold with the approval of the defendant. The bank averred that it had no reason to doubt the correctness of the assessment.

The plaintiffs prayed that the insurers be ordered to pay the first plaintiff, in the alternative the second plaintiff, or as a further alternative the plaintiffs, the sum of Rs. 100,000 with legal interest from the date of action and costs.

The defendant admitted that certain goods lying in the premises in question on July 5, 1930, were destroyed by fire, but denied liability on the grounds formulated in the issues, which are as follows :—

(1) What was the amount and value of the stock in trade stored and lying in premises No. 11, Bastian Fernando's stores, at the time of the fire, viz., the 5th of July, 1930 ?

(2) Were Martin, Sons & Company on the 5th of July, 1930, the owners of the goods set out in the schedule to the plaint ?

(3) Were Martin, Sons & Company holding all the said goods in trust for third parties ?

(4) If so, does the policy sued upon or the renewal thereof cover the said goods for the reasons given in paragraph 13 (6) of the answer ?

(5) Had the first plaintiff an insurable interest in the said goods on the 5th July, 1930 ? If so what is the extent and value of such interest ?

(6) Did Martin, Sons & Company take out the policy and the renewal thereof for the benefit and on behalf of the first plaintiff ?

(7) Was the said policy and the renewal thereof vested in the first plaintiff ?

(8) Was the said policy and the renewal thereof assigned to the first plaintiff ?

(9) Was such vesting and assignment good and valid in law ?

(10) What was the loss sustained by (*a*) the first plaintiff, (*b*) the second plaintiff, by the destruction of the said goods by fire ?

(11*a*) Did the plaintiffs give notice in writing to the defendant company of the insurance with the Royal Exchange Insurance Company, dated 20th July, 1929 ?

(11*b*) Did the second plaintiff hold the said goods in trust or on commission without having an express statement to that effect endorsed in the policy of insurance ?

(11c) Did the interest in the said property pass from Martin, Sons & Company to the first plaintiff otherwise than by will or operation of law, and was the sanction of the company signified by endorsement upon the policy for passing of property ?

(12*a*) If there were any breaches of conditions as mentioned in issues 11 *a*, *b*, and *c*, was the defendant company aware at all material times of such breaches ?

(12*b*) Did the defendant company waive all or any of such breaches ?

(13*a*) Was the declaration made by Martin, Sons & Company on the 23rd July, 1930, false with regard to the quantity and value of the goods alleged to have been in stock at the date of the fire ?

(13*b*) Were fictitious, forged, and fabricated documents used by both plaintiffs or either of them in support of their claim in order to obtain a benefit under the policy ?

(14) If so, do all benefits under the policy fail ?

(15) If issues 2, 3, 5, 7, 8, 11, 12*a*, 12*b* or any of them be answered in favour of the defendant company, can the plaintiffs or either of them maintain this action ?

(16) If it be held that the defendant company is liable upon the policy sued upon, what sum is payable to the defendant company with regard to the insurable interest and average and contribution clauses, to wit, clauses 17 and 18 of the policy with the Royal Exchange ?

(17) Can both plaintiffs or either of them maintain this action without impleading the legal representative of the deceased partner of the second plaintiff ?

On the 1st issue the District Judge held that 175 tons of copra of the value of Rs. 35,350 were destroyed on July 5. The 2nd, 3rd, and 4th issues were answered in the affirmative. On the 5th, 6th, 7th, 8th, and 9th issues the District Judge held that the first plaintiff had an insurable interest on July 1, 1930, to the extent of the lien created in their favour in respect of the money advanced to Martin, Sons & Company ; that Martin, Sons & Company took out the policy and the renewal thereof for the benefit of the first plaintiff and that it was duly vested in the first plaintiff, having been endorsed by the defendant company ; that the policy and the renewal thereof was assigned to the first plaintiff and that the vesting or assignment was good in law. The learned Judge has not given any reasons for the findings on these issues.

On the 10th issue the Judge held that the loss sustained by the second plaintiff as partner of the firm was Rs. 35,350. He further held that the declaration made by Martin, Sons & Company on July 23, 1930, was false with regard to the quantity and value of the goods alleged to have been in stock at the date of the fire (issue 13*a*) ; that fictitious, forged, and fabricated documents were used by the second plaintiff in support of his claim in order to obtain a benefit under the policy (issue 13*b*) and that the second plaintiff forfeited all benefits under the policy (issue 14).

As regards the first plaintiff, the District Judge came to the conclusion that two employees of the bank, Messrs. Greig and Frughtneit, should have known that the claim for 2,265 candies of copra (a candy is equivalent to one-fourth of a ton) was false, but did not think that the evidence was sufficient to justify his holding that the bank was aware that the claim made by Martin, Sons & Company was excessive and fraudulent. The District Judge held that the first plaintiff was in spite

of the over-valuation and false claim made by the second plaintiff entitled to recover the value of the stock that actually was in the store at the time of the fire.

On the 11th issue he said that he saw no reason to hold that the first plaintiff did not perform all the conditions under the policy.

On the 17th issue the District Judge held that there was no evidence that Ibrahim, Martin Perera's partner, had left property in the Island which required administration or left heirs entitled to inherit his share and saw no objection to the action being brought by Martin Perera alone.

On the 10th issue he held that the defendant company was, in view of clause 16 of the policy, not liable for more than half the loss, namely, Rs. 17,675.

Judgment was entered for the first plaintiff for this sum with costs in that class. The second plaintiff's action was dismissed with costs.

The plaintiffs' and the defendant have appealed from this judgment. The plaintiffs' appeal is numbered 132 and the defendant's 131.

Before dealing with the questions raised and argued in appeal it is, I think, necessary to set out the facts which are as follows:—

Martin Perera and Ibrahim Saibo carried on business separately as dealers in copra and other produce until the year 1927. On August 10, 1927, they entered into partnership and carried on business under the name of Martin, Sons & Company (hereafter referred to as the firm) on an oral agreement till October 23, 1928, when a deed of partnership was executed. At that date the place of business was No. 53, Silversmith street. About March, 1929, they moved to premises No. 12, Bastian Fernando's stores. At the end of March, 1929, they took No. 11 as well and used both stores for one month, then No. 12 was given up. The numbers of the premises in Bastian Fernando's stores are of importance as the policy issued by the Royal Exchange Insurance Corporation, referred to in issue 11*a*, was in respect of the stock of coconuts, copra, and desiccated coconut in premises No. 12, Bastian Fernando's stores.

At the end of 1927 Saibo got into touch with Mr. Thiagarajah, who was the shroff of the bank, and obtained an overdraft at the bank guaranteed by the shroff. Martin Perera described such an overdraft as a "clean overdraft". The firm from time to time gave promissory notes in respect of the overdrafts and also letters of lien in respect of the stock. Thiagarajah subsequently raised the question of insurance and in 1927 the stock was insured by the Royal Exchange Company up to Rs. 50,000. The stock increased and in 1929 another policy was taken up from the Western Assurance Company for Rs. 50,000. These policies have not been produced.

In 1929 Thiagarajah wanted the insurance raised to two lacs and the insurance in question was effected with the defendant company by the policy marked P 5. The Western Insurance policy was about to expire, the policy issued by the Royal Exchange Assurance Company for Rs. 50,000 was still in force. It appears to have expired on July 20, 1929, and a fresh policy was issued—No. 990,446, dated July 20, 1929, marked P 6—by which the stock of coconuts, copra, and desiccated coconut in No. 12, Bastian Fernando's stores, was insured up to Rs. 100,000 for one year renewable by payment of further premiums.

Martin Perera's evidence is that he informed C. D. Carolis, the defendant's agent, of the insurance effected with the Royal Exchange Assurance Corporation, and that he (Carolis) had no objection.

Thiagarajah as the guarantor was liable to make good the overdraft if the firm failed to pay the amount overdrawn, and he no doubt had the stock insured so that there would be the insurance money in case the stock was destroyed. Up to the time the policy sued on was effected, the bank does not appear to have come into direct contact with the firm and there is no evidence that the bank was aware of the step taken by Thiagarajah to have the stock, against which the overdrafts were granted, insured.

In June, 1929, Thiagarajah borrowed Rs. 10,000 from the firm and in July Rs. 15,000, and he failed to meet a cheque for Rs. 25,000 given by him to settle the debt. Martin Perera gave the cheque to Mr. Boyd, the manager of the bank, in or about October, 1929. At the same time Thiagarajah had committed other irregularities which resulted in the bank losing about 20 lacs of rupees. Thiagarajah was dismissed and subsequently prosecuted. The prosecution resulted in his being sentenced to a term of imprisonment.

In October, 1929, Martin, Sons & Company had overdrawn their account to the extent of Rs. 75,909.55. The bank stopped further credit and ascertained that the value of the stock in the firm's stores amounted to only Rs. 15,000. The firm's explanation of this shortage of stock was that sums amounting to Rs. 42,000 had been advanced to copra dealers who had not at the time delivered copra against the advances made to them and that a sum of Rs. 25,000 had been lent to the bank's shroff, Thiagarajah, which he had failed to repay.

On November 26, 1929, an agreement—No. 784, p. 7—was entered into between the firm and the bank. By this agreement (1) the amount overdrawn, Rs. 75,909.55, was to be liquidated by the bank receiving and appropriating all sums of money due to the firm on account of rebates in freight, estimated to amount to Rs. 40,000, and by the firm paying the bank Rs. 750 a month commencing from December 25, 1929. To further secure repayment, the firm agreed to execute in favour of the bank a primary mortgage of premises Nos. 51 and 52, Grandpass Stores. This overdraft has been referred to as the No. 1 account. (2) The Bank agreed to open for the firm a current account, to be called the No. 2 account, and to allow the firm to overdraw the amount to the extent of Rs. 50,000 until the sum of Rs. 75,909.55 was paid in full. As security for the overdraft the firm transferred and assigned to the bank "All and singular the goods, produce, chattels, effects now lying in their store at No. 12, Bastian Stores, Grandpass, in Colombo, and all those which may hereafter from time to time be brought to the said store or any other store in lieu or in addition to the same". I would here note that the firm's store at that time was No. 11, Bastian Stores.

The firm agreed to the bank having a representative at their store, to pay his salary, and to allow him to keep the key of the store. The firm also agreed during the continuance of the overdraft always to keep "in their said store or in any other store in lieu of or in addition to the same goods, produce, chattels, effects, and things of the value of not less than the amount of the overdraft for the time being".

It was lastly agreed "that if the said Martin, Sons & Company shall and will pay or cause to be paid to the bank the said sum of Rs. 75,909.55 and interest thereon and all sums of money overdrawn by them in accordance with the covenants and agreements in that behalf and also fulfil and carry out all the other covenants, agreements, and stipulations on their part herein contained, the bank at the request and cost of the said Martin, Sons & Company will reconvey and reassign all such goods, produce, chattels, effects, and things which may be then in the possession of the bank to the said Martin, Sons & Company or as they shall direct".

Both before and after the agreement P 7 was signed the firm sent to the bank from time to time certificates that the firm held certain quantities of copra "to the order and for account of the Hong Kong and Shanghai Banking Corporation as security for the overdrawn account". The certificates furnished after the agreement was signed are marked P 8 to P 14 and D 13. The earlier certificates are marked D 15, D 16, and D 17.

The firm was not allowed to operate on the No. 2 account indiscriminately. When cheques were drawn on that account the firm had to inform the bank by letter that such cheques had been issued and the purpose for which they were issued.

These are the facts necessary for a consideration of the questions of law which were argued first.

The defendant company contended—(1) that the finding that the claim made by the firm was fraudulent both as to the quantity and the value of the goods destroyed by the fire and that fictitious, forged, and fabricated documents had been used to support the claim operated against the bank and that the claim made by the bank should have been dismissed, (2) that the failure of the plaintiffs to give the defendant company notice in writing of the insurance subsequently effected with the Royal Exchange Assurance Company should have resulted in a dismissal of the action of both plaintiffs.

The soundness of these contentions depends on the nature of the interest, if any, which the bank had in the policy No. 111,413 which is the subject of the action.

A policy of fire insurance itself may be assigned; the assignment is then an assignment of the contract contained in the policy, including all the rights and liabilities of the assured. On the completion of the assignment, the rights and duties of the original assured devolve upon the assignee who becomes, to all intents and purposes, the assured under the policy and succeeds to the consequences of any act or omission by which the validity of the policy may have been affected before the assignment, but any act done by the original assured after the assignment will not affect the validity of the policy (*Welford and Otter-Barry on the Law relating to Fire Insurance, p. 223, 3rd edition*). For a valid assignment of a policy the consent of the assurer must be obtained to the assignment and the assignee must have an interest in the subject-matter of the policy at the time of the assignment, *ibid.* p. 223. "No particular form of assignment appears to be necessary to complete the rights of the assignee as against the insurers since the validity of the assignment depends not upon the form in which it is made but upon the consent of the insurers.

By giving their consent they render themselves liable to the assignee whether the policy has been duly assigned to him by formal consignment or whether it has been merely transferred to them by manual delivery in pursuance of an understanding between the original assured and himself", *ibid.* p. 223.

According to the law laid down by *Welford and Otter-Barry*, the bank, if it was an assignee of the policy, could not be affected by any subsequent insurance effected by the firm, notice of which was not given to the defendant.

Where the policy itself is not assigned but only the right to receive the sum payable under the policy in the event of loss, it is not necessary that the assignee should possess or acquire any beneficial interest in the subject-matter itself nor is the consent of the insurers necessary, *ibid.* p. 224. But the assignment is at any time before loss liable to be rendered worthless by reason of the policy being invalidated by the act or omission of the assured.

If the bank was an assignee of the beneficial interest in the policy, it would be affected by the findings of the District Judge that notice of the second insurance with the Royal Exchange Assurance Company was not given to the defendant and that a false claim was made and supported by fictitious evidence.

The first question to be decided is whether the bank was an assignee of the contract contained in the policy or an assignee of the right to receive the sum payable under the policy.

The only definite evidence as to what was assigned is contained in the endorsement made by C. D. Carolis on the back of the policy. It would be convenient to restate it. It runs as follows:—"All rights and interests in the within-mentioned policy are hereby assigned to the Hong Kong and Shanghai Banking Corporation". This endorsement is, in my opinion, an assignment not of the policy but only of the right to receive the sum payable on the policy. And there is no evidence to supplement the terms of the endorsement from which it could be gathered that the policy itself was assigned. It was not seriously contended that there was not an assignment to the bank of the amount payable under the policy either before or after the loss was sustained. An assignment of the sum payable under the policy may be made by the assured before payment even after a loss has taken place (*Welford and Otter-Barry*, p. 224). It is clear from the documents produced in this case that such an assignment had been made by the firm even if there had not been an assignment earlier. No formal assignment is necessary; a chose in action under the Roman-Dutch law may be verbally assigned (*Mohamed v. Warind*[1]).

The next question for decision is whether the assignment is invalidated (*a*) by the second insurance with the Royal Exchange Assurance Company on July 20, 1929, of which notice in writing was admittedly not given to the defendant, (*b*) by reason of a false claim having been made by the firm which was supported by fictitious and fabricated documents.

As regards the first part of the question notice in writing of the second insurance was, as I have said, admittedly not given to the defendant. Plaintiff's counsel contended that the breach of this condition was waived

[1] (*1919*) *21 N. L. R. 225.*

by the defendant agreeing to extend the policy for another year and accepting the premium after Carolis was informed that a second insurance with the Royal Exchange Assurance Company had been affected.

The evidence of Martin Perera that he informed Carolis by telephone that a policy had been taken out with the Royal Exchange for Rs. 100,000 and that he had no objection is not rebutted, and must be accepted. The defendant, therefore, know of the second insurance and accepted a premium and extended the term of the policy sued on although written notice had not been given to him of the second insurance. And where an agent has authority to receive and give receipts for the premiums on behalf of the insurers his acceptance of a premium with knowledge of a breach of a condition is a waiver of the breach binding upon the insurers (*Welford and Otter-Barry*, p. 124. Where the insurers issue a policy to the assured or renew an existing policy, the acceptance of the premium or the renewal premium, as the case may be, estops the firm from repudiating liability upon the ground that the policy has already been avoided by a breach of the conditions. The defendant, however, contended that clause 3 contemplated notice being given at any time before the occurrence of loss or damage, and that there was no breach of the conditions until the fire and that therefore the acceptance of the renewal premium did not amount to a waiver.

I am unable to accede to this contention. Carolis was informed, but not in writing, that a second insurance had been effected; he did not take exception to the form of the notice, and by accepting the renewal premium he, in my opinion, waived the condition that notice must be in writing. I accordingly hold that there was a waiver of the breach of the condition, if there was a breach, that notice of the second insurance should be given in writing or by a printed notice.

Counsel for the plaintiffs contended that clause 3 did not make a written or printed notice a condition precedent to the attaching of liability on the policy in case of loss or damage. His argument was that the condition that the notice must be written or printed was contained in clause 20 and that that clause did not provide that failure to give a printed or written notice avoided the policy. I am inclined to agree with this argument, but in view of the conclusion I have come to that there was a waiver of the conditions contained in clause 3 it is not necessary for me to discuss it or decide it.

It was also contended by plaintiffs' counsel that there was in fact no second insurance of the goods in premises No. 11, St. Sebastian stores. This contention is correct if the policy with the Royal Exchange Assurance Company is read exactly. The policy, P 5, dated July 20, 1929, assures the insured against loss or damage by fire or lightning (lightning is not mentioned in the policy sued on) of the following property, namely, (*a*) "stock of coconuts, copra, and desiccated coconut including packing materials, the property of the insured or held by them in trust or on commission and for which they are responsible in case of fire, whilst stored in the building situated and known as No. 12, St. Joseph's street, Grandpass, Colombo, and known as Bastian Fernando's Stores . . . ., (*b*) furniture and effects therein".

It will be seen that the two policies differ as to the nature of the property, the right under which the property is held, and the stores in which the property is stocked. The policy sued on does not cover goods held in trust or on commission. The most important difference is the stores in which the property insured is stocked. In the policy sued on the property insured is the stock in trade consisting of copra, &c., stored in premises No. 11, Bastian Fernando's stores. Martin Perera's evidence is that he had only one store, No. 11, when he entered into the policy P 5 and that the insurance with the Royal Exchange Assurance Company was in respect of the "identical stock", and that he insured the same stock with two different companies because he thought it best to do that.

It is no doubt possible that in an action between the firm and the Royal Exchange Assurance Company the firm might be able to establish that what was in fact insured by the Royal Exchange Assurance Company were the goods in premises No. 11, but that has not been proved in this case. Mr. Bundy, the agent of the Royal Exchange Assurance Company and the attorney of the defendant, has nowhere said in his evidence that the Royal Exchange Company had in fact insured the property which was stored in premises No. 11.

I am therefore unable to hold that the defendant has established that there was a second insurance of the property in premises No. 11, Bastian Fernando's stores.

As regards the second part of the contention, the District Judge, although he found that the firm had made a fraudulent claim and for that reason must forfeit all benefits under the policy, held that the evidence was not sufficient to justify his holding that the bank was aware that the firm had made an execessive and fraudulent claim, and on the authority of *Samuel v. Dumas*[1] and *Small v. United Marine Insurance Association*[2], decided that the bank was entitled to sue and claim on the insurance policy as long as the bank itself had nothing to do with the fraudulent and wrongful act of the firm.

I am of opinion that the authorities referred to by the learned Judge do not support his ruling that the bank is not affected by the fraudulent claim made by the firm.

It is clear law, as I have already stated, that as against the assignee of the sum payable on the policy the insurers can make use of any defences which would, at the time when the assignment was completed, have been available against the assured. Further, all conditions precedent to their liability must be performed by the assured. Therefore, if the firm in fact make a fraudulent and fictitious claim neither the bank nor the firm will be entitled to recover on the policy.

The plaintiffs have, however, appealed from the learned Judge's findings that there were only 175 tons of copra in the store when it was burnt and that the plaintiffs had made a false and fraudulent claim and supported it by fabricated and fictitious evidence. If they succeed, the question whether the bank is affected by the claim made by the firm will not arise. Their contention was that the learned Judge's findings could not be supported as they were based on mistakes of fact and arrived at without due regard to the oral and documentary evidence in the case.

[1] (1924) *A. C. 431.*

[2] (1897) *L. R. 2 Q. B. 311.*

This contention involved a close examination of the evidence led in the District Court and it will be necessary to refer to the evidence in the judgment in appeal.

[His Lordship after discussing the evidence proceeds as follows :—]

I am of opinion for the reasons given by me that the plaintiffs have established that there were 500 odd tons of copra, more exactly 518 tons, in the store on July 5, 1930, and I find accordingly. It necessarily follows that issues 13A and 13B must be answered in the negative. At the ruling rate of Rs. 50.50 per candy, the value of 518 tons of copra was Rs. 104,636 to which must be added Rs. 1,954 the value of the other articles, totalling Rs. 106,590, from which must be deducted Rs. 7,599 the value of the salvaged copra, leaving a balance of Rs. 98,991.

I have held the defendant has not established a second insurance, and clause 16 of the policy that if "at the time of any loss or damage happening there be any other subsisting insurance, or insurance . . . . . the company shall not be liable to pay or contribute more than its rateable of such loss or damage" will not apply to the claim.

The objection that the plaintiffs should not maintain the action without adding the legal representatives of Ibrahim Saibo's estate was not pressed in appeal.

I accordingly allow the appeal of the plaintiffs and in terms of the motion filed by the plaintiffs enter judgment for the first plaintiff, the bank, for Rs. 98,991, with legal interest from the date of action and costs here and in the District Court.

The appeal of the defendant is dismissed with costs.

GARVIN S.P.J.—I agree.

Plaintiffs' appeal allowed.
Defendant's appeal dismissed.