

In the present case Mr. Vertannes on behalf of his client says that he only wants to appeal in order to save his client's good name. He should have thought of that before. When he filed the application for leave to appeal as a pauper he was thinking mainly of the Rs. 15,000 damages. It is only when he has failed to get this money that his good name becomes of great importance to him; and I agree that when a man has had his chance and lost it there is no reason why the Court should go out of its way to give him a second chance.

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 v.
 LAWSON.
 BAGULEY, J.

PRIVY COUNCIL.

DAWSONS BANK, LIMITED, AND OTHERS

v.

VULCAN INSURANCE COMPANY, LIMITED.

* J.C.
 1934

Oct. 29.

[On Appeal from the High Court at Rangoon.]

Insurance (Fire)—Policy—Misdescription of insured premises—Material misdescription—Avoidance of Policy.

A misdescription of the premises insured under a policy against fire is a material misdescription which avoids the policy if it would affect the mind of a reasonable insurer, either as to accepting the risk, or as to the premium which he would place upon the risk. Whether a misdescription is material or is not, is partly a question of evidence and partly a question of law.

A policy described the premises thereby insured against fire as constructed of brick walls in the ground storey, whereas only the back wall was wholly of brick, the front wall being of timber and the side walls of timber for two-thirds of their length. The evidence of witnesses experienced in the business of insurance in Burma showed that a higher premium would have been charged in the case of premises of the latter description.

Held, that the misdescription was material to the policy, and prevented the insured from succeeding in a suit to recover under it.

Decree of the High Court, I.L.R. 11 Ran. 266, affirmed.

Appeal (No. 16 of 1934) from a decree of the High Court in its Appellate Jurisdiction (March 8, 1933) reversing a decree of that Court in its Original Jurisdiction (May 17, 1932).

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The appellants instituted a suit against the respondents in the High Court claiming under a policy of insurance against fire on the ground that the insured premises had been burnt down. The written statement raised the defence that the defendants were not liable, because there was a material misdescription of the premises insured.

The facts appear from the judgment of the Judicial Committee.

The trial Judge (Das J.) held that there had been a misdescription, but that it was not a material misdescription. He made a decree for the insured sum.

An appeal was allowed and the suit dismissed. Page C.J., with whose judgment Mya Bu J. agreed, held that the misdescription was a material misdescription and avoided the policy. The learned Chief Justice rejected a contention, not urged upon the present appeal, that knowledge of the true facts was to be imputed to the defendants, because the plaintiffs acted as their local agents. Reference was made to English authorities upon that point. The appeal is reported at I.L.R. 11 Ran. 266.

Oct. 29. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the High Court at Rangoon sitting in appeal, which reversed the decision of the trial Judge in a claim brought by the appellants upon a policy of insurance against fire.

The premises were situated at Moulmeingyun in Burma. The appellants were the mortgagees of the premises, who, in accordance with the terms of the mortgage, had taken out a policy of insurance upon the mortgaged property. The particular policy was

taken out with the respondents, the Vulcan Insurance Company, Limited. The premises had apparently at one time been insured in the Northern Assurance Company, but they had ceased to carry the risk. It was said that they had withdrawn from fire business in Rangoon; whether that is so or not their Lordships do not know. At any rate, in 1929, the policy was taken out with the Vulcan Insurance Company, having originally been written by the Northern Assurance Company. The risk and description of the property was, it is said, taken from the original policy with the Northern Assurance Company. It is described as being "Three buildings, the property of the insured, situated at the corner of Strand Road and Ferry, Moulmeingyun, Myaungmya District. Said buildings are constructed of brick walls and cement flooring in the ground storey, timber walls and flooring in the upper storey with shingled roof. Used as retail shop for hazardous and non-hazardous goods in the ground floor and above as dwellings."

There was a fire by which the premises were totally destroyed in March, 1931, and on a claim being made, after some delay in making up their minds, the insurance company finally resisted the claim on the footing that there had been a material misdescription of the property. It is admitted that there was, in fact, a misdescription of the property, and the only question is whether the misdescription was a material misdescription, by which one would ordinarily mean a misdescription such as would affect the mind of a reasonable insurer either as to accepting the risk or as to the premium which he would place upon the risk. Whether a misdescription is material or is not, is partly a question of evidence, and also partly a question of law.

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In this case the learned trial Judge said he was not satisfied that the misdescription was material, and the learned Chief Justice and his colleague thought the misdescription was material.

It is not very easy to ascertain what was the exact condition of these premises, because at one time apparently they consisted of only one building, and at another stage in the proceedings when a policy was taken out, they had been divided laterally into three buildings, and their Lordships were told that at the time the fire took place they had been divided into five buildings, so that there were five shops and buildings overhead. But the question as to the number of buildings is not very material in this case. The question is whether the building was properly described as "constructed of brick walls and cement flooring in the ground storey." It is admitted that it was not so correctly described, and the question, therefore, is whether that misdescription was material.

Apparently the Burma fire companies have adopted for themselves a tariff, which has been put in evidence, consisting of the classification of buildings into four classes. Class I is: "Built of brick or stone, with hard roof." Then there are classifications for that. Class II is: "Built of brick or stone with shingled roof." Then it proceeds: "Built of brick-nogging or partly of brick, brick-nogging or stone and partly of timber, with hard or shingled roof." Class III is: "Built of timber throughout, with hard or shingled roof"; and Class IV is: "Built of brick, stone, iron, timber, or timber with mat walls, and having a roof of thatch." That classification is no doubt a classification for the guidance of the insurers against fire in Burma, and the parties who conform to it, namely, the insurance companies or underwriters against fire, are entitled,

as far as their Lordships can see, to put their own construction upon it, for the purpose of business, because it obviously is a classification which admits of some ambiguity.

Now the first question is what exactly was the nature of these buildings? There was the evidence of a surveyor, which seems to have been of a very unsatisfactory nature, because he went to the premises after the fire. He did not know them very well before, and if he did, he seems to have forgotten about them. He prepared a plan of the buildings, relying upon descriptions given to him, which appear to be inaccurate, and as both the Courts put on one side that plan, certainly their Lordships do so in considering this matter. But there was evidence of one man, who was the last witness called for the plaintiffs, who was the Manager of Messrs. Dawsons Bank, the mortgagee, who described this building, and his evidence has been accepted as correct in all the Courts. From that it would appear that the back wall of the premises was undoubtedly built of brick, and the front wall of the premises, so far as it can be said to have been a wall at all, was undoubtedly built of timber; it consisted of folding doors which were open during business hours, but which when closed formed a wooden wall. The side walls, it is now quite clearly established, were partly of brick and partly of timber. They were partly of brick up to one-third of their length from the rear to the front, or of that part of the premises which consist of the back wall, and one-third of the side wall. There is no doubt that the kitchens of the different shops and the latrines were built for the most part, as far as the latrines were concerned, wholly of brick, and the kitchens being protected in this way by having brick side walls and a brick

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back wall. But the rest of the side walls were of timber.

In those circumstances the question arises whether or not this is a material misdescription.

Two witnesses were called on behalf of the defendants, gentlemen of experience; one of them of very large experience, and the other being a gentleman who had some experience in insurance business, and not being connected with this particular company, who said that in their opinion this misdescription was a material misdescription, because in their view if the premises consisted of one wall being brick at the back and the other three walls being timber, it was a building which they would have classed under Class III of the tariff, and they would, therefore, have charged a higher premium on it than if it had been put in Class II.

It appears to their Lordships, as it appeared to the appellate Court, that that evidence must apply in common sense to a case where as to the remaining three walls, one was of timber and both the lateral walls were as to two-thirds of their length timber. In such a case it would appear that the danger would be substantially greater if the building caught fire, because the two-thirds of the timber falling down would bring down the superstructure above it, and there would be a most material question as to the danger of fire in the first place, and the amount of damage caused by the fire in the second place.

It appears to their Lordships, on the footing that those two outside lateral walls were as to one-third of their length brick and as to two-thirds timber, quite impossible to resist the inference that that would be a material departure from the actual description, which was that all the ground floor walls were brick. There seems to be some contro-

versy as to what the lateral divisions were which divided up the building. Whether they were of brick, as this witness stated, right through from back to front, in two cases, and made of corrugated iron in respect of the other two, it still leaves the description of the building inaccurate, and it is, as appears to their Lordships, inaccurately described in a matter which was material for insurance purposes.

In those circumstances, it appears to their Lordships that the decision come to by the appellate Court was correct, and their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondents must have the costs of the appeal.

Solicitor for appellants : *J. E. Lambert.*

Solicitors for respondents : *T. L. Wilson & Co.*

PRIVY COUNCIL.

MAUNG SEIN SHWE

v.

MAUNG SEIN GYI AND OTHERS.

* J.C.
1934

Nov. 20.

[On Appeal from the High Court at Rangoon.]

Burmese Buddhist Law—Inheritance—Kittima sons—Adoption after death of wife—Out-of-time grandchild—Manukye X, 15, 66.

A Burmese Buddhist was survived by two *kittima* sons whom he had adopted after the death of his wife, also by a grandson, the son of a daughter who died before her parents. No other child or grandchild of the marriage survived. It was contended for the grandson (1) that he was entitled to his grandmother's half share in the common property of the marriage; (2) that in the half share of the deceased he was entitled under *Manukye X, 66*, to double the share taken by each *kittima* son, and that the same applied to his grandmother's half share if his first contention failed; (3) that although he was an

* Present : LORD THANKERTON, SIR LANCELOT SANDERSON, and SIR SHADI LAL