Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Anthony Hordern and Samuel Hordern (trading as Anthony Hordern & Sons) v. *The Commercial Union Assurance Company, from the Supreme Court of New South Wales; delivered February 18th*, 1887.

Present:
LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THEIR Lordships do not think it necessary to call upon counsel for the Respondent in this case. They desire to express their appreciation of the clear and able manner in which the case has been argued by Mr. Byrne, and in their opinion the Appellant has not suffered by the unavoidable absence of Sir Horace Davey.

In the Supreme Court of New South Wales the Chief Justice and the other Judges were of opinion, though not all for the same reasons, that the trial of this cause had not been satisfactory, and that there ought to be a new trial; and two of them, the Chief Justice and Mr. Justice Windeyer, were of opinion that the new trial should go on the main question in the case, namely, whether the goods which were stored in the premises, formerly No. 758, and were there injured by the fire, were covered by the policy. In such a case where there is a judgement of three Judges, who appear to have dealt with this case with great care and attention, granting a new trial on the merits, their Lordships would be very slow indeed to recommend any interference with that decision.

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Their Lordships, after careful consideration, have arrived at the conclusion to which attention has been directed in the course of the argument that the real question, going to the very merits of the case between the parties, was a question for the jury, and that question does not appear to have been submitted to them. If the question had been one of the construction of the policy alone, it would be for the Court; but when once the evidence disclosed that on that policy there was a latent ambiguity, and that it was necessary to go into the consideration of other documents, and to resort to parol evidence to solve that ambiguity, their Lordships consider that there it ceased to be a question merely of construction of the instrument, and raised a question of fact to be determined by the jury, that question being, as already pointed out, whether the policy covered the goods, that is to say, whether it covered that portion of the premises in which these goods actually were stored at the time of the fire. Mr. Cohen, for the Insurance Company, has saved us some trouble by his undertaking that if the order for a new trial should be affirmed, and a new trial should be had, the Company would raise but the one question, viz., whether the policy covered the goods, but retaining their right on that question to point out and rely on the fact that the proposal does not describe the premises as distinct and separate, or standing apart from each other.

Inasmuch as their Lordships are about to recommend Her Majesty to affirm the decision of the Court below, and as there must be a new trial, solely on that one question, going to the very merits, they refrain from expressing any further opinion upon the case; and will therefore humbly recommend Her Majesty to affirm the Judgement of the Court below granting a new trial, and that this appeal be dismissed with costs.