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SAMUEL CALDWELL AND SARAH CALDWELL (Plaintiffs)..... } APPELLANTS.

AND

THE STADACONA FIRE AND LIFE INSURANCE COMPANY (Defendants)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Policy—Termination by Company—Surrender—Waiver—Estoppel—Husband and wife—Insurable Interest in wife's property—Tenant for life—Damages.

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put risk in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming, in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand.

Held—reversing the judgment of the court below, Fournier J. dissenting, that C. had an insurable interest in the property at the time of the loss, as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.

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*PRESENT—Sir William J. Ritchie C. J. and Strong, Fournier, Henry and Gwynne JJ.

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That the company, by wrongfully witholding the policy, were estopped from claiming that proofs of loss had not been given according to endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing if such condition applied to waiver of proofs of loss.

That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.

Per *Fournier* J. dissenting, that the sending of the circular by the company, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of said policy, and plaintiff therefore could not recover.

Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.

APPEAL from a decision of the Supreme Court of Nova Scotia, setting aside a verdict for the plaintiffs and ordering a non-suit. The facts of the case are fully stated in the judgments delivered by the court.

J. Gormully for the appellants:

The respondents are estopped from setting up the defence of want of proof of loss within time specified. First, by their wrongful act in witholding our policy. They cannot take advantage of a delay caused by their own delay. Secondly, having based their refusal to pay upon the ground of cancellation of the policy they cannot now resist on other grounds. *Dimock* v. *New Brunswick Mar. Ins. Co.* (1); *Bowes* v. *National Ins. Co.* (2).

If the defence is open to them, it was waived by agent asking appellants to delay putting in proof, and court below was wrong in deciding that waiver should have been in writing. *Post* v. *Etna Ins. Co* (3); *Bowes* v. *National Ins. Co.* (4); *Van Allen* v. *Farmer's Ins. Co.* (5); *Priest* v. *Citizen's Mut. Fire Ins. Co.* (6). The twelfth

(1) 3 Kerr 654.
(2) 4 P. & B. 437.
(3) 43 Barb. N. Y. 351.
(4) 4 P. & B. 437.
(5) 4 Hun. N. Y. 413.
(6) 3 Allen Mass. 602.

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condition does not affect proofs of loss. *Priest* v. *Citizen's Ins. Co.* (1); *Bowes* v. *National.*

The damages were not excessive. *Woodhouse* v. *Whitley* (2); *Alsager* v. *Parker* (3). If they were the court below should not have considered them, the ground not being in the rule *nisi.*

P. B. Casgrain Q.C. for respondents:

By the deed from Caldwell to Bayers his interest in the property insured ceased and never revived. The contract being one of indemnity, is strictly personal. *Wood* on Fire Ins. (4). The policy does not attach to the building, but merely secures the owner from damage by fire.

At the time of the loss Caldwell held only in right of his wife, and could neither have insured himself or continued the original insurance. *Wood* on Fire Ins. (5). It may be claimed that Caldwell had a life interest as tenant by the courtesy, which is insurable. Admitting that to be so, it was not the interest insured by the respondents. Caldwell having been divested of his interest in the property during the continuance of the policy, it could only revive in his own name and favor. *Res perit domino* is the maxim applicable to the case. *McCarty* v. *Commercial Ins. Co.* (6); *Wood* on Fire Ins. (7) and cases there cited.

But in any case the respondents are not liable. The act of Anderson in giving the policy to Greer with instructions to put it in the Western, was a release of any claim against the respondents and an acceptance of another company as insurers. The contract with the Western was complete. *Robertson* v. *Dudman* (8). We rely too on the failure to give proofs of loss within five

(1) 3 Allen, Mass. 602.
(2) 4 F. & F. 1086.
(3) 10 M. & W. 576.
(4) P. 535.
(5) P. 558, sec. 331.
(6) 2 Bennett 60.
(7) Sec. 247 p. 470.
(8) I. R. & C. 50.

days. The agent had no authority to waive a forfeiture. *Wood*, sec 393.

The appellants claim that having refused payment on a special ground, we must be held to waive other objections. I submit that is not so. *Wood*, p. 723, sec. 417; p. 705, sec. 414.

The action should have been brought by Anderson either in his own name or in the name of Caldwell for his benefit. The latter would be the best course. *Wood*, p. 818, sec. 88.

The damages are excessive. At the most the appellant only had a life interest in the policy, and evidence of value of that interest should have been given to the jury. The judgment of the court below should be sustained.

J. Gormully in reply.

Sir W. J. RITCHIE C. J.—This was an action upon a policy of insurance under seal against fire, dated 10th August 1875, whereby defendants' company, after reciting that Samuel Caldwell had paid them $25 for insuring against loss by fire $4,000.

On a one and-a-half storey wooden building, situate on the west of the Kempt road, at corner of the street leading to Willow park, in the city of Halifax, N.S., owned and occupied by the assured as a dwelling, in the sum of four thousand dollars.

The building is isolated, being over 100 feet to nearest building.

Loss, if any, under this policy payable, to George R. Anderson, Esq. Halifax N. S., for a year from the said tenth day of August 1875; and had agreed to pay to the company on the 10th day of August in every succeeding year during the continuance of said policy the like sum of twenty-five dollars; it was declared that subject to the conditions endorsed on said policy and which constituted the basis of said insurance, the said Samuel Caldwell, should be paid out of the capital stock and funds of said company, and the funds and property of the said company, except the funds for the time being of the life department thereof as defined by the Act of incorporation, should be subject and liable to pay and make good to the said Caldwell the amount of all such loss or damage by fire as should happen to the

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property in the said policy mentioned, not exceeding the amount insured thereon as aforesaid, during the said year from the said tenth day of August A.D. 1875, or at any time afterwards, so long as the plaintiffs should pay the said sum of twenty-five dollars yearly as aforesaid, and the directors of the said company for the time being should accept the same.

And the declaration alleged :—

That the only condition on said policy endorsed, material to the plaintiff's cause of action or essential to the said contract of insurance, is as follows:—"All persons insured by this company sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within five days after such loss occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation and by their books of account, or by such other proper evidence as the directors of this company or its agents may reasonably require, and until such declaration, account and evidence are produced the amount of such loss, or any part thereof, shall not be payable or recoverable;" and that the plaintiffs at the time of the making of the said policy, and thence and until and at the time of the damage and loss hereinafter mentioned were, or one of them was, interested in said premises so insured as aforesaid to the amount so insured thereon, and after the making of the said policy and whilst it was in force the said premises so insured as aforesaid were burnt, damaged and destroyed by fire, whereby the plaintiffs suffered damage and loss on the said dwelling-house to the amount insured on as aforesaid, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs to maintain this action, and nothing happened or was done to prevent the plaintiffs from maintaining the same.

The conditions of the policy as set out in the case, are as follows :—

No. 2. And if by reason of such alteration or addition, or from any other cause whatever, the company or its agents shall desire to terminate the insurance effected by this policy, it shall be lawful for the company or its agents so to do by notice to the insured or his representative, and to require this policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance.

No. 8. Damage to buildings not totally destroyed shall be ap-

praised by disinterested men mutually agreed upon by the assured and the company or its agents, and where merchandize or other personal property is partially damaged the assured shall forthwith cause it to be put in as good order as the nature of the case will let, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of such damage on each article by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the assured, who shall pay all fees and expenses incurred in the substantiation of the claim. A copy of the written portion of this policy to be given in the affidavit of the assured in all cases.

No. 9. All persons insured by the company sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within five days after such loss or damage has occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of accounts or such other proper evidence as the directors of this company or its agents may reasonably require; and until such declaration or affirmation, account and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; no profit or advantage of any kind is to be included in such claim; and if there appear fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under the policy.

No. 11. It is furthermore hereby expressly provided that no suit or action against the company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any suit or action shall be commenced against the company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by endorsement upon this policy signed by the manager of this company for Canada.

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Second count that defendants converted the policy to their own use.

To this declaration the defendants pleaded thirteen pleas :—

1st. *Non est factum*, to first count.

2nd. *Non assumpsit*, to first count.

3rd. That house was not burnt, to first count.

4th. That plaintiffs were not, nor was either of them interested in house as alleged, to first count.

5th. And for a fifth plea to said count, defendant company says that the said insurance was effected, and the said policy applied for by the said Samuel Caldwell, who was then owner of said dwelling house, and the loss, if any, under said policy, was by said policy made payable to one George R. Anderson, and that after the date of said policy and before such alleged loss the said Samuel Caldwell conveyed all his interest in said dwelling house to one Thomas Bayers, and the defendants had no interest therein and sustained no loss or damage from the burning of said dwelling house as alleged.

6th. That plaintiffs did not within five days deliver account of loss according to conditions.

7th That the plaintiffs delivered a false and fraudulent account.

8th. False representations on application for insurance.

10th. That before loss defendants by notice terminated insurance according to conditions.

11th. Same as last, and that plaintiffs delivered up policy to be cancelled, and it was cancelled before loss.

12th. Numbered 13 in case. Plea to second count that defendants did not convert policy.

13th. Numbered 14 in case. Plea to second count that policy was not property of plaintiff, but of defendants.

Replication :—

1st. To all pleas plaintiff joins issue.

2nd. To fifth plea.

2nd. And for a second replication to the fifth plea by like leave,

plaintiffs say that they or one of them was at the time of their making said insurance the owner of said house and premises, and although the said building and premises were afterwards formally conveyed to one Thomas Bayers, yet before the said loss the said Thomas Bayers reconveyed the same to the said Sarah Caldwell, then and still being the wife of the said plaintiff, Samuel Caldwell, and the said Sarah Caldwell from thenceforth and from the making of said policy, and until and at the time of the said fire and the said loss was the owner thereof and interested therein.

3rd. As to sixth plea plaintiffs say that defendants waived and dispensed with further or more particular account of loss.

4th. As to sixth plea plaintiffs did furnish due proof of loss, which defendants accepted as sufficient.

5th. To sixth plea defendants, by their agent, for good consideration, waived necessity to furnish within five days from loss particular account of said loss, and defendants accepted as sufficient the account furnished within a reasonable time and notified plaintiffs that they would resist loss solely on the ground that the policy had been cancelled.

Rejoinder:

The defendant company, as to the replications of said plaintiffs, joins issue thereon.

And for a second rejoinder as to the second, third, fourth and fifth replications, defendants say that the alleged waivers were not clearly expressed in writing by endorsement on said policy, signed by the manager of said company for Canada, as required by the conditions endorsed on said policy.

This second rejoinder has no application to the second replication.

SURREJOINDER:

And the plaintiffs join issue upon the second rejoinder to the second, third, fourth and fifth replications, pleaded to the defendants fifth and sixth pleas.

And for a second surrejoinder to the defendant's said second rejoinder, plaintiffs say that the defendants at the time of the happening of the loss of the premises in the declaration mentioned, were in possession of the policy of insurance in this action declared

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on and kept and detained the said policy ever since, and refused to deliver up the same, although the plaintiff demanded the same within the time limited to make and give the proofs of loss herein, and for the purpose of enabling the plaintiffs to make and furnish the said proofs, and plaintiffs were not aware of the conditions on said policy endorsed requiring waivers of proof of loss to be in writing endorsed on said policy and signed by the manager of the defendant company for Canada, and they were prevented, by reason of the wrongful detention of said policy by the defendant company, from acquiring knowledge of the said conditions, and from complying therewith.

Nor has the surrejoinder any application, so that, in fact, the fifth plea remains unanswered, except by the second replication to that plea, which is clearly bad, and upon which no issue is joined.

The following entry appears at the end of Greer's evidence. "I offer to allow plaintiff to file surrejoinder. Accepted." But I can find in the case no surrejoinder filed, nor any intimation of the nature of the surrejoinder which the judge says he allowed to be filed.

At the end of the case I also find this: "I allow and minute amendment." But I cannot find in the case the amendment or any minute thereof.

Motion for non-suit on the following grounds:—

1. Anderson should have been plaintiff.
2. Policy cancelled under condition 2.
3. No interest in plaintiff, Caldwell had conveyed.
4. Ninth condition not complied with. Proof not put in in time.
5. None of these can be waived—waiver not in writing.
6. Under 11th condition, six months a bar, action not brought for a year or more.
7. Under 9th condition, affidavit of Caldwell not true as to ownership, also as to amount of loss.

The dates are as follows:—

Suit commenced 15th February 1878. Tried on May 1880. Judgment for plaintiffs. Policy dated 10th August 1875. Loss 4th July 1877.

Deed McKenzie to Caldwell 26th Nov. 1874. Registered 27th Aug. 1875.

Deed of confirmation, Letson to Caldwell, dated 26th Aug. 1875, and recorded 27th Aug. 1875.

Deed from Caldwell to Bayers 2nd Feb. 1876. Registered 14th Feb. 1876.

Deed from Bayer to Sarah Caldwell, wife of Samuel Caldwell, dated 3rd Feb. 1876. Registered 10th April 1877.

Renewal receipt on policy from 10th Aug. 1876, to 10th Aug. 1877.

From these dates it appears that the renewal of the policy for the year in which the premises were destroyed was after the deed to Caldwell's wife, though before the same was registered, and, therefore, while Caldwell was interested by reason and in virtue of his marital rights.

On the 28th June 1877, the following circular was sent to Anderson, the mortgagee, to whom the insurance money was payable in case of loss, and who had effected the policy for and at the instance of Caldwell.

Halifax June 28 1877.

Sir:

I have to inform you that the Stadacona Insurance Company has ordered me to notify policy holders to insure elsewhere, as the company has decided to wind up. You will, therefore, take notice that your policy of insurance is cancelled from this date. Unearned premiums will be returned hereafter.

Yours, &c.,

(Sgd.) G. M. GREER,
Agent.

It is abundantly clear that this did not terminate the insurance effected by the policy, being neither in accordance with the letter or spirit of the condition, which expressly provides that "in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance," which was by no means complied with by inserting in the notice to insured "unearned premiums will be returned hereafter," instead of paying or tendering them.

But it is contended that Anderson, after receipt of

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this notice, having left the policy with Greer, the agent of the defendants, and likewise the agent of the Western Insurance Co., that this was an acceptance of the special condition and amounted to a surrender of the policy.

With respect to this Greer, Anderson, and Caldwell thus speak.

Greer, agent of the defendant, says on this point:

Immediately after the fire all the papers in my possession were sent to head office at Quebec. After fire M. H. Richey called and asked for policy. Anderson came also and demanded it. Caldwell was with him. I asked local board after fire if I should give it to them, and they referred me to head office. I applied by writing to head office. They did not answer, but the manager came down. I submitted all the facts to him, and asked him if I should give up the policy, and he said "we must hold on to it and not give it up." His name was George J. Pyke. He took it away with him, and I never saw it until to-day. Letter from Pyke, 14th December 1877, put in and read, marked J. A. J.

I think the only ground urged was that it was transferred to the Western. Pyke said to me "we are not liable, it is transferred to the Western," or to that effect. The company did not object to the proofs of loss. I don't remember if the proof of loss came to me before Pyke left. He was off and on here a few weeks after the fire. The St. John fire was 28th June. I received the proofs of loss and did not object to them. I know of no other objection except the transfer. My agency continued a month or two months after proofs were received. I made no objection to them.

When he brought the policies there was no return premium paid, nor at any time to my knowledge. Return premiums were paid 12 or 18 months after. Can't say Anderson got any. The only reason for sending the notices, so far as I know, was that company were in financial difficulties.

GEORGE R. ANDERSON.—I received this circular 28th June, 1877. This was before, and on same day I took the policy there.

Cross-examined, Rigby—I insured premises under authority of Caldwell, and charged him premium. Never authorized me to surrender policy. Never agreed to surrender it. I left it with Greer to enable him to take description of property, not for purpose of surrendering it. Never informed Caldwell up to time of fire of the notice I had received. After fire, probably next month, called on Greer with Caldwell. I told him he held policy in trust for Caldwell and me. I demanded it first and he refused to give it up. No

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return of premium offered me before action. I received this paper from Greer 9th April 1878. Before that I received no offer of return premium.

Re-examined, Ritchie—I told Greer when I got notice he was acting unfairly by compelling us to change the policies on a half holiday. I said I must have them changed; he said the Western was the best office in Canada. I told him I would leave the policies for him to get the description. I did not get the other Stadacona policies back. Did not ask for them. I am positive I told Greer I left policies for him to get description.

Caldwell says:

Mr. George R. Anderson effected the insurance for me. I authorized him to do so. I never instructed any person to put an end to the insurance. I did not know the policy had been handed to the company until after the loss. Anderson had a mortgage on the property. I told him to insure in any office he wished; gave him no other instructions.

Re-examined.—I knew before fire that it was insured in Stadacona. Anderson had whole management of insurance. I did not interfere.

George M. Greer, agent of defendant company.—Remember fire. Was agent then and for about two months after. I was then and am still agent of Western Insurance Company. There was a board of local directors for defendant company. John S. McLean and H. H. Fuller were two of them. I issued this policy, I think. I sent it to Mr. G. Anderson. Just before fire on 30th June 1877, I obtained the policy from Mr. Anderson's own hands. I sent him a notice on 28th. He came to my office with this and two other policies, and said, "Put those in the Western." That was all he said. It was not put in Western before fire. Gave no receipt or policy and received no premium. Made no contract. This was the only conversation with him before fire. No conversation with Caldwell until after fire. Sent no notice to Caldwell same as I did to Anderson mentioned above. Did not know Caldwell in the transaction, but knew, of course, that his name was in policy and who he was.

M. H. Richey, sworn—Was retained to collect the insurance after fire. Immediately after. Waited at once on Greer to ascertain position, as policy was not in the hands of plaintiff, and found that Greer had already notice of loss. He said he supposed I had called on him in reference to that. I gave him notice. Asked him if he had policy. He said he had. I asked him to give it to me to make the necessary proofs. He declined, without communication with his directors, and requested me to wait as there was no necessity for my doing so. At his request I delayed making any proofs until he

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should communicate with his directors. I called very shortly again, and was informed by him that the directors here would not authorize delivery without communicating with the head office at Quebec. I called frequently to ascertain the decision of the head office, and received no satisfactory answer, until finally thinking sufficient time had been afforded, I put in such proof as I could without the policy. I did not put the proof in before because I was awaiting the decision of head office whether the defendant company would return the policy to us or not, or whether the transfer of the risk to the Western was effected. I did not receive payment of the claim; payment was refused on the ground that the company had ceased to be liable, not on any other ground. I conversed with others beside Mr. Greer. I conversed with H. H. Fuller and J. S. McLean. Had no direct communication with general manager, except by a letter. This is the letter I received from him. Date, 14th Dec. 1877. Letter read. No objection was ever offered except that contained in the letter.

* * * * Greer asked me to delay putting in proofs. He said I had better wait until he had corresponded with the company. The ground of delay was largely to hear whether the Western would recognize the claim so as to know what company to put it into.

From all this it is, I think, abundantly clear that the policy never was surrendered. In the first place, while Anderson had authority to effect the insurance, he had no authority to destroy it, and in the second place, it is, I think, quite clear that the policy was only left with Greer, the agent of both companies, to get the description so as to put the risk in the Western, and when so placed, it was, no doubt, the intention that the risk in the Stadacona should cease; but I fail to see the slightest evidence of any intention that the liability of the Stadacona should be at an end until the risk was assumed by the Western; in other words, that it was ever contemplated by any party that the property should, for a moment, be without insurance.

Then, the policy never having been cancelled or surrendered, as to the objection that the proofs of loss required by the conditions of the policy were not put in within the time limited, it is abundantly clear that

this was not by or through the act or default of the plaintiffs or their agents, but their not being put in, was at the instance of the defendants and their agents, and the plaintiffs were hindered and prevented from putting them in by the defendants and their agents withholding the policy from the plaintiffs, when they had no right to do so, claiming that the same was cancelled and surrendered, and resting their sole objection to pay the claim on this ground; for which reasons, in my opinion, the defendants were estopped by their own acts and conduct and those of their agents in preventing and hindering the plaintiffs from making and putting in the proofs in accordance with the conditions, and cannot set up the failure to comply with the conditions, caused by their wrongful acts, as a non-compliance with such conditions. But defendants contend that none of the conditions can be waived by reason of the waiver not being in writing, and they invoke the twelfth condition, which says:—

No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by endorsement upon this policy, signed by the manager of this company for Canada.

And the Supreme Court of Nova Scotia rest their judgment on this, that though they think there was evidence of a waiver, a conclusion fully justified by the conduct of the company through their agents, yet they thought a parol dispensation would not answer to act as a waiver against a written condition of the policy.

But if condition No. 12 applied to the conditions, as to proofs of loss, I think the court erred in treating this as a waiver, but should have held the defendants estopped by matter in *pais* from setting up the non-compliance with the condition.

There can be no doubt that a husband has an insur-

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able interest in his wife's property. The husband has a freehold estate in the land and the exclusive right of occupation; an indefeasible title to the land which no one can defeat or disturb, which gives him a full and perfect title to the rents and profits of his wife's real estate during the coverture, and, in the event of the birth of a child, after the death of his wife during his life, and he is the proper party to insure the property, for the wife can make no contract in her own name to her own use, and if she could insure the property, in case of loss the insurance money, so soon as paid, would belong to the husband, inasmuch as the wife can acquire no personal property in her own right, as any she may obtain becomes immediately the property of the husband.

All that is required is that the insured should have an interest at the time of the insurance and at the time of the loss; and as to that interest, while there can be no doubt the party insured must have an insurable interest in the subject insured, or he can sustain no loss, and therefor if the insured parts with his interest before loss happens so that he has no interest left at the time of the loss, he cannot recover, yet if, pending the continuance of the policy and before loss, he acquires an interest, the policy suspended while he had no interest revives.

And as to the nature and extent of the plaintiff's interest, it need not be stated when the risk is taken.

In *Crowley* v. *Cohen* (1) Lord Tenterden C.J. said:

> That in a policy of insurance, although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large.

Littledale J. makes the same observation.

Parke J. says:

(1) 3 B. & Ad. 478.

The particular nature of the interest is a matter which only bears on the amount of damage; it is never specially set out in a policy.

And Patteson J. says:

It is only necessary to state accurately the subject-matter insured, not the particular interest which the assured has in it.

In *Simpson* v. *The Scottish Union Fire and Life Insurance Company* (1), Sir W. P. Wood V.C. says:

It appears to me that a tenant from year to year, having insured his premises for 500, has, if his house is burnt down, a right to have the £500 applied in rebuilding, for the purpose of reinstating him in premises which have a value to him, as distinguished from their value to his landlord. He may have a good trade, and there may be a number of other things which concern him, and which render the premises worth to him the amount for which he has insured them. It does not appear to me that I ought to contract his rights to the narrow interest that he may be supposed to have merely as tenant of so many buildings from year to year, but that I ought to consider him as having a substantial right to stand upon the policy, and insist upon having the house rebuilt. Beyond this, the landlord has a right, in respect of the tenant's interest, to have the property, which the latter insured, rebuilt, in order to avoid the possible consequence of fraudulent insurance contemplated by the statute.

And in *Collingridgee* v. *Royal Exchange Ass. Co.* (2), (when the terme of the policy were, that the corporation should be liable to pay to the assure any loss or damage by fire to the buildings which should or might happen before 25th March then next ensuing £1,600.)

Lush L. J. says:—

The contract is not to make good any loss to the plaintiff, but any damage to his building.

But whatever may be said as to the insurable interest of a yearly tenant, there is a great distinction between a tenant from year to year, or for years, and a tenant for life in this that in the case of the former he is in no sense the owner of the property, while, in the latter case, the tenant for life during the continuance of

(1) 9 Jur. N. S. 711.

(2) 3 Q. B. D. 173.

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the tenancy, is the absolute owner entitled for the time being to the whole interest in the property, and the rents and profits thereof, and if so, the observations in *Laurent* v. *Chatham Fire Ins. Co.* (1), which states the effect of the contract, when the owner insures, would apply; in other words, the whole interest and possession for the time being is in the tenant for life.

There certainly is nothing unjust or inequitable in holding the insurers liable for the value of the building to the extent of the sum insured; the insured has paid the premium on the whole sum, and he insures for the entire risk of the property to that amount during the whole term of the policy.

This is in no way analogous to the case of a mortgagee, who merely insures his own interest in the property, that is, his debt. In this case there was no specified interest. Here the party insured was, for the time being, interested in the property not only as tenant for life, but as mortgagor to Anderson, and the contract was neither confined to his interest as owner or mortgagor liable for the payment of the debt secured by the mortgage, but the insurers for the consideration of the premium on $4,000 have covenanted if the property is destroyed to pay the amount insured, whereby the assured may indemnify himself by restoring the building, and thereby replacing himself in the exact position he stood in relation to the property, and the full enjoyment of his rights therein that he had before and at the time the fire occurred.

It cannot be denied that a tenant for life receives a substantial benefit from the continued existence of the property, and I know of no law prohibiting him from protecting by insurance his interest in the preservation of the buildings erected on the property in which he has an actual interest, or securing their re-erection by the

(1) 1 Hall (N. Y.) 4.

proceeds of such insurance, the interest being "a real interest in, and issuing out of, the thing insured, and so connected with it as to depend on the subject matter of the thing insured and the risk insured against," and which it would require the amount insured to restore to the condition it was at the time of the fire, whereby he would be placed in a position to receive the rents and profits of the property as he was doing before the fire.

As to the question of damages, as Mr. Mayne remarks, there is a great dearth of authority in theEnglish reports, but not so in the American reports. In the latter, cases can be found deciding that a lessee of a house from year to year, or for years, cannot recover its entire value on its destruction by fire upon a policy insuring it for its value. In England the same view does not seem to prevail to the same extent, for the contract of insurance being in no way limited either as to nature or amount of interest, when the assured establishes an insurable interest in the property, he is entitled to recover the amount assured, and he is entitled to receive what would restore the property and make it what it was when he insured it, or at any rate what it was at the time of the loss, or as near as the amount insured will do it.

I am of opinion the appeal should be allowed.

STRONG J.—This was an action in the Supreme Court of Nova Scotia brought by Samuel Caldwell and his wife against the Stadacona Assurance Company. The policy of insurance sued upon as originally issued was for one year, namely, from the 10th August, 1875, to 10th August, 1876, but, as is proved by the renewal receipt in evidence, it was subsequently renewed and continued until 10th August, 1877. It was under the seal of the respondent company, and purported to be effected in favor of the appellant, Samuel Caldwell. It con-

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tained, however, a provision in the following words: "Loss, if any, under this policy, payable to George R. Anderson, Esq., Halifax N.S." The policy was subject to conditions, of which those material to the questions which have arisen in this action are the following. The second condition provides that the company might require the policy "to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the assurance."

The 9th condition requires particulars and proofs of loss to be delivered "within five days after such loss or damage has occurred;" and it also provides that "if there appear fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under the policy."

By the 11th condition "any action to be brought on the policy is required to be commenced within the term of six months next after any loss or damage shall occur."

The 12th condition is in these words:

> None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on this policy, signed by the manager of this company for Canada.

The declaration, in addition to a count framed in the usual manner in covenant for the recovery of the amount of the loss, contained a count in trover for the policy. The defences pleaded were, substantially, that the amount of loss was payable to Anderson; that there had been a breach of condition requiring proofs of loss to be delivered within five days; that the proofs of loss were false and fraudulent, within the meaning of the 9th condition; that the plaintiff had, on his application for the policy, been guilty of misrepresentation as to

the value of the house; that the policy had been delivered up and cancelled, and the risk terminated. And to the count in trover the defendants pleaded not guilty and not possessed.

To the plea of non-delivery of proof according to condition the plaintiff replied a waiver of the condition in that respect, to which the defendants rejoined that the waiver was not in writing, as required by the conditions. Upon the other defences issue was taken.

At the trial before Mr. Justice James without a jury the following facts appeared in evidence: On the 2nd February, 1876, the appellants conveyed the property on which the insured building was erected to Thomas Bayers in fee, who, on the next day, conveyed the same to the appellant, Sarah Caldwell, in fee. On the 30th June, 1877, the respondents' agent at Halifax, George M. Greer, sent to Anderson, who held the policy for his security as mortgagee, a circular to the effect that the company had cancelled the policy, adding that "unearned premiums will be returned hereafter." Upon receiving this notice, Anderson, without any communication with Caldwell, handed the policy to Greer, and the respondents from that date held it, until it was produced by them on the trial, having, although it was frequently demanded by Caldwell's attorney, positively refused to deliver it, insisting that it was cancelled. The unearned premium was never returned or offered to be paid to either Anderson or Caldwell. Anderson positively swears that his object in leaving the policy with Greer was to enable him to get the description of the premises, so as to enable him to effect a new policy in the Western Insurance Company, for which Greer was also the agent. Greer does not prove that the policy was delivered up by Anderson for the purpose of cancellation, or that anything was agreed to, either as surrender or cancellation. The proof was also clear

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and distinct that the delivery of the policy by Anderson to Greer was wholly unauthorized by Caldwell, and without the knowledge of the latter. There was no evidence of any misrepresentation of value by Caldwell in his application for the policy. Greer himself says that Anderson told him that the house cost Mr. Fishwick, a former owner, $6,000, and there is nothing to show that this statement was untrue. The house insured was destroyed by fire on the 4th July, 1877. Notice of a total loss was promptly given to the agent of the company at Halifax, and application was made to him to deliver up the policy which was in his possession, and for instructions as to the proof of loss required. At his suggestion the putting in of proofs was deferred, to allow him time to communicate with his head office regarding the policy, and ultimately, on the 25th of July, the proofs of loss were furnished by the appellant's solicitor to the agent, who received them without objection, and retained them. Accompanying the proof of loss was a letter from the appellants' attorney, Mr. Ritchie, to Mr. Greer, the respondent's agent, in which he wrote as follows:

> Herewith I hand you proof of loss in the case of Samuel Caldwell, prepared with as close conformity to the requirements of your office as we can attain without the policy, which is now, I understand, in your custody, and I have thus far been unable to obtain it. It is, however, not convenient for my client to longer delay making his claim in this formal manner, and I shall be obliged by your acquainting me, on receipt of this, whether any objection exists to either the claim or the form in which it is prescribed.

No objection was ever made, in any particular, to the proofs of loss furnished, and the only contention ever raised by respondents prior to their pleadings to the action was, that they were not liable, because the policy had been cancelled. A letter, dated the 11th December, 1877, from Mr. W. J. Pyke, the general manager of the respondent's company, to Mr. Richey, the plaintiff's

attorney, which was put in evidence, leaves no doubt of the fact that this was the only ground on which the company based their denial of liability.

The refusal of the respondents to give up the policy for the purpose of preparing the proofs, upon an application being made to their agents for that purpose, was proved by Mr. Richey, the plaintiff's attorney, and also by Mr. Anderson, and the fact was admitted by the respondents' agent, Mr. Greer. Evidence of the value of the house was given by the appellant, Samuel Caldwell, and also by Anderson, who stated that he had advanced $4,500 on mortgage on the property on a valuation of the land at $2,000 and the house at $4,500. There was no testimony to contradict this evidence, and consequently, nothing to establish the alleged fraudulent over-valuation in the proofs of loss.

A non-suit having been moved for on several grounds included in the numerous list of objections hereafter to be considered, it was refused by the learned judge, who thereupon found a verdict for the plaintiff for $4,000 and interest. A rule *nisi*, which was granted to set aside this verdict, on the general ground that it was against law and evidence, and on the specific points which were urged at the trial on the motion for non-suit, was, after argument before the court in *banc*, made absolute.

The judgment of the court below, in granting this new trial, appears to have been founded exclusively upon the single ground that, although a waiver of the requirements of the 9th condition as to delivering proofs or particulars of loss within five days, had been sufficiently made out, if parol evidence had been admissible, yet, that the 12th condition, requiring waiver to be expressed in writing, by endorsement on the policy, applied to and excluded all proof to that effect other than such as was required by the terms of the

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condition referred to. Upon this appeal no less than nine distinct objections to the appellant's rights to recover have been set up. These may be stated as follows:—1st. It is said the action should have been brought by Anderson. 2nd. That the misjoinder of the appellant's wife is fatal to the action. 3rd. That the appellant had been guilty of fraudulent misrepresentation as to the value of the assured house in his application for the policy, 4th. That the action not having been brought within six months after the loss, the stipulations of the 11th condition constituted a bar to the appellant's right to recover. 5th. That there was fraudulent over-valuation in the appellant's affidavit delivered to the respondents' agent as proof of loss. 6th. That the appellant Caldwell had not at the time of loss any insurable interest in the property, or had, by reason of his change of interest arising from the alienation in favor of his wife, by means of the conveyance to Bayers, and the re-conveyance of the latter, become disentitled to the benefit of the policy. 7th. That the policy had been duly cancelled and rescinded, pursuant to the terms of the 2nd condition. 8th. That the proof had not been furnished within the five days, as required by the 9th condition, and that all evidence of waiver, otherwise than in writing, was excluded by the 12th condition. Lastly, it was said that, failing all other defences, the measure of the damages which the appellant Samuel Caldwell was entitled to recover, was not the intrinsic value of the house, but only the actual value of his estate or interest during the continuance of the marriage, and subsequently, in the event of his surviving his wife, as tenant by the courtesy; and that as no proof had been given of the value of such interest, there must, in any event, be a new trial, for the purpose of ascertaining what amount the appellant was entitled to recover in respect of it. Some

of these objections were urged as grounds for the non-suit at the trial, but others appear to have been raised for the first time, either in the respondents' factum or on the argument of this appeal; and as the judgment under appeal was on an application for a new trial, it may therefore be doubted if any objection not taken at the trial is now admissible. As it appears, however, that the appellants will not be prejudiced by a consideration of the several points taken on their merits, I proceed to consider them.

The first six objections are so ill-founded—some in point of fact, others in point of law—that it is not too harsh a criticism upon the line of defence adopted by the respondents to say that they are frivolous.

The policy contains, it is true, the provision already mentioned, that the loss shall be payable to Anderson, but the contract of insurance is in terms embodied in a covenant under seal with the appellant; and the old and well known rule is, therefore, exactly applicable, that if a person covenants with another to pay money to a third person not a party to the covenant, the covenantee alone can sue; and the person to whom the money is payable, being a stranger to the covenant, can maintain no action. It is true that there are some American authorities which, in cases where the policy is not under seal, have recognized a right of action in the person to whom the loss is payable, but these have proceeded upon the principle, inapplicable here, that the person to whom payment is appointed to be made is to be considered a party to the contract. The joinder of Mrs. Caldwell as a co-plaintiff, could only be taken advantage of by a plea in abatement, and constituted no ground of non-suit. The action is to be regarded as that of the husband alone, and the judgment to be entered must be for or against him, disregarding the wife, whose name must be struck out of the record.

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The defence set up by the eighth plea, that the appellant misrepresented the value of the insured premises in his application for insurance, as I have already pointed out, fails for want of proof. The only evidence in this respect is that of Greer, the agent, who swears that the appellant told him that the house had cost Fishwick $6,000, and there is nothing to show that this statement was not perfectly true. It appears, therefore, that the charge of fraud contained in this 8th plea, was too lightly made by the respondents. The failure to bring the action within six months, as required by the 11th condition, has not been pleaded, which is alone conclusive against such a defence. Moreover, it is apparent that the respondents have, by their conduct in withholding the policy, and insisting on the surrender, estopped themselves from insisting on the benefit of any defence founded on this condition. At all events, it is sufficient to say that the defence is one which should have been pleaded, that the respondents have not asked to be allowed to amend the record by adding the plea, and even if they had, no court, in view of the course of conduct they pursued in the interval, between the loss and the commencement of the action, could, with justice to the appellants, grant them such an indulgence. The allegation of fraudulent over-valuation in the appellant's affidavit delivered in proof of loss, is not only unsubstantiated by any proof on the part of the respondents, but is conclusively disposed of by the evidence of Anderson, who swears that he lent the appellant $4,500, on a valuation of the land and house apportioned as already mentioned. The contract of fire insurance being one of indemnity, requires that the insured should have an interest at the date of the insurance, and also at the time of the loss. In the absence of any express stipulation or condition against alienation, there is,

however, nothing to invalidate the contract in the fact that, during the currency of the risk, the insured has alienated his interest, provided he has acquired it again before the loss. There is nothing in such a temporary alienation which can, in any way, injuriously affect the rights of the insurers—their liability is, as it has been observed, made less burdensome, as for a portion of the time for which they have been paid the premium, they are without any risk (1). In no way has any greater liability been imposed upon the respondents by reason of the change of interests in the present case; and as to the argument founded on the *detectus personæ*, there is no room for its application. The appellant, under the conveyance from Mr. Bayers to Mrs. Caldwell, which was to the latter in fee, without any limitation to her separate use, became also seized of an estate in fee simple in right of his wife, which estate he became entitled to during the continuance of the coverture, and was actually in the enjoyment of it, and in possession by his tenant, when the loss occurred; so that in all respects material to the interests of the respondents, the appellant stood in the same relation to the property at the time of the loss, as he did at the date of the insurance. I am not prepared, however, to accede to the proposition, that insurance is so far a personal contract that any change in the possession and control of the property will vitiate the policy. No authority can be produced to show that a policy effected by the owner of the freehold in possession would, in the absence of any condition providing against a change of possession, become void, merely because during the pendency of the policy, the property has been demised to a tenant, in whose occupation it remained at the time of the loss.

(1) May on Insurance, 2nd ed. sec. 101; *Worthington* v. *Bearse*, 12 Allen (Mass) 382.

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Such cases must be, and are, of frequent occurrence, yet no one ever heard of a mere change of possession being admitted as a good defence to an action on the policy, There is, therefore, no pretence for saying, in the present case, that the appellant had not at the time of the loss, an interest in the insured property covered by the policy. Next, it is insisted that there was a good surrender or cancellation of the policy under the 2nd condition. The material words of that condition have been before stated. There can be no question as to the proper construction of this provision. The condition is a most unreasonable and one-sided stipulation, as it enables one party to a contract to rescind or put an end to it at his pleasure, whilst the other party is not entitled to a like privilege. Moreover, it is grossly unfair, in not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance. These considerations alone ought to induce a court to construe so unjust and harsh a condition with more than ordinary strictness. It is, however, doing no violence to the language of the condition itself, to hold that the repayment of the unearned proportion of the premium is to be a condition precedent to the exercise of the right of rescission, which the company, at its own arbitrary election, is entitled to subject the assured to. The words are in the form of a proviso, which ordinarily imports a condition precedent. And the language thus permitting it, no one could hesitate to adopt a construction which has at least the merit of attributing to the cancellation the character of a rescission, by requiring that the insured shall,as nearly as possible, be put in *statu quo*, rather than that of a forfeiture, which it would be, in fact if not in form, if the condition justified a cancellation such as that pro-

posed by the circular sent by the respondents' agent to Anderson, namely, a cancellation taking place at the arbitrary will of the company, without any return of premium, the insured being bound to rest content with the assurance that "unearned premiums will be returned hereafter." That the effect just attributed to this second condition is its true meaning, is so clear, that authorities need scarcely be referred to to justify that interpretation. It may be as well, however, to refer shortly to a standard treatise on the law of insurance, and a few decided cases, to show that I have not placed an unduly strict construction on the terms of the condition. Mr. May, treating of this question of cancellation in the last edition of his work (1) says :—

> And the right can only be exercised by a strict compliance with the terms and conditions upon which it is admissible. If refunding the premium, or a portion of it, be one of the terms, there must be a payment or tender. An agreement with the insured, that he shall return his policy to be cancelled and receive his premium, is no cancellation.

It is, therefore, abundantly clear that there never was a cancellation in the present case, for the reason that the terms of the condition were never complied with, for it is not pretended that there was any payment or tender of the premium, the intention being as stated by Mr. Pyke, the general manager of the respondents' company, in his letter of the 14th December, 1877, to Mr. Richey, that the premium should be returned "hereafter." Further, it cannot be said that Mr. Anderson had any power to dispense with the preliminary of repaying the premium, thus accepting what Mr. Pyke is pleased to call a "special condition," whatever that may mean, for it is distinctly sworn to by Anderson that the appellant never authorized him to surrender

(1) May on Insurance, ed. 2 sec.574; Citing *Runkle* v. *Citizens' Ins. Co.*,(C. Ct. Ohio) 11 Rep. 599; *Chase* v. *Phœnix Ins. Co.*, 67 Me. 85; *Hathorn* v. *Germania Ins. Co.*, 55 Barb. (N. Y.) 28.

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the policy. Again, Mr. Anderson also states that he never did surrender the policy under the condition in question, but merely handed it to Greer to get the description from it, in order to effect a new policy in the Western Company, and the evidence of Greer in no way contradicts these statements. The result is, that the ground upon which the respondents, up to the date of the action, placed the denial of liability, was without foundation, and that there never has been any surrender, cancellation or rescission of the policy, which is therefore, still a valid and subsisting instrument.

There is as little color for the next pretension of the company as there was for the last. The 9th condition requires proofs of loss to be put in within five days, another very rigorous and unreasonable stipulation. It is, however, only upon a strict enforcement of this very illiberal provision as to time, that the appellants have been able to succeed in the court below.

It was contended by Mr. Gormully, on behalf of the appellant, that the condition requiring waiver to be in writing did not apply to the provision limiting the time for the delivery of preliminary proofs, but only to such conditions as were essentials of the contract.

Some American cases may, at first sight, seem to countenance this objection, but it will be found, on careful examination, that they turned on the construction of words referring to the conditions generally as the "conditions of the policy," and not to specific conditions endorsed, but in the present case, in the body of the policy, the liability of the company is expressly made subject "to the conditions herein endorsed;" and endorsed upon the policy, under the heading "conditions on which this policy is granted," appears this 9th condition, requiring the delivery of proofs within five days. It is therefore plain that the right to recover is as much subject to a compliance with this condition, as if it had been incorporated

in the policy itself, instead of being endorsed as a condition of liability. Again, I think no legal importance is to be attached to the fact that the proofs were not objected to as being after time, or to the objection to pay being confined to the surrender. It is no doubt the law, as decided by several American authorities, that if imperfect proofs are filed before the expiration of the time allowed, and no objection is made to them until the prescribed time is elapsed, but the refusal to pay is put on other grounds, that constitutes an estoppel, as the imperfections might have been remedied in due time if the objection had been promptly made; but here the proofs were not presented until long after the lapse of the time fixed by the conditions.

It was further argued that the respondents were estopped from insisting on the 9th condition, and this appears to be the true ground on which to rest the defendant's right to be relieved from any obligation to comply strictly with its terms. The evidence of Mr. Richey, the appellants' attorney, shows that the policy was demanded by him from Greer immediately after the fire, he thinks the next morning, that Greer refused to deliver it, that he demanded it for the express purpose of preparing the proofs, and that Greer was told at the time that it was required for this purpose. The witness says: "I asked him to give it to me to make the necessary proof;" and he adds that Greer asked him to delay putting in the proofs. Mr. Richey also says that he was under the impression that a much longer time than five days was allowed for the purpose.

These statements, so far from being contradicted, are corroborated by Greer's evidence. Upon these facts it is plain that the illegal retention of the policy by the respondents, and the conduct of their agent in reference to it, were the true and only reasons why the proofs were not furnished in due time. Had Mr. Richey

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known the terms of the condition, as he would have done if the policy of which his client was entitled to the possession had not been wrongfully withheld, it must be presumed against the respondents that the proofs would have been furnished within the prescribed time. Again, had Greer, instead of misleading Mr. Richey, by asking that the proofs should be delayed, stated to him that the condition required their presentation within five days, it must be presumed that a similar result would have followed. This conduct, therefore, constitutes an estoppel, and disentitles the respondents to the benefit of the 9th condition, which must, for the purposes of this action, be considered as struck out of the policy. This is, of course, an entirely distinct ground from that of waiver under the 12th condition. Had the appellant had the policy in his possession, or had the facts regarding the limitation of time been truly stated to his attorney by Greer, the mere request of the latter that the proofs should be delayed would have been nothing more than a dispensation with the terms of the condition, by agreement, which would have required endorsement on the policy in the terms of the condition excluding proof of waiver unless so evidenced. As it is however, it is apparent that the respondents, by their unjustifiable conduct, caused the non-compliance with the terms of the policy, which they now insist on as constituting a defence to the action. To allow them thus to avail themselves of their own wrong, would be to assist them to commit a fraud, and whenever such is the case an estoppel arises.

There remains only the question of damages. Whatever doubts may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy,

and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely.

In the case of *Franklin Insurance Company* v. *Drake* (1), the facts were similar to those in the present case. A husband had insured houses of which his wife was sised in fee, and in which his own interest was like that of the present appellant's, a right to the permanency of the profits during the coverture, and an estate in the courtesy, if he should survive the marriage. The court says :—

It the assured had an insurable interest at the time of the assurance, and also at the time of the loss, he has a right to recover the whole amount of damage to the property, not exceeding the sum insured, without regard to the value of the assured's interest in the property. The amount of the recovery will depend on the interest intended to be insured, provided it is covered by the policy. A mortgagor who has mortgaged to the full value of the property, and whose equity of redemption has been sold under execution, provided he has, at the time of the loss, a right to redeem ; or a lessee for years, whose lease is upon the eve of expiring at the time of the loss, is entitled to recover the full value of the property destroyed, not exceeding the sum insured.

In *Simpson* v. *Scottish Union Insurance Company* (2), Vice-Chancellor Page Wood says :—

I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year.

And in *Waters* v. *Monarch Insurance Company* (3), in an action upon a fire policy on goods in the plaintiff's warehouse described as "goods in trust or on commission therein," it was objected that the plaintiff could only recover in respect of goods of

(1) 2 B. Mon. 47.
(2) 1 H. & M. 618; 9 Jur. N. S. 711.
(3) 5 E. & B. 870.

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which they were thus bailees to the extent of their lien and liability over to their bailors. The court refused so to restrict the right to recover.

Lord Campbell says:—

The last point that arises is, to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

Wightman J. also says:—

Then comes the question, can the plaintiffs recover their value? It seems to me that they may, unless there be something making it illegal to insure more than the plaintiffs own interest.

Mr. Lush does not contend that any statute applies:

It has been decided that, if no statute applies, a person insured may recover the amount contracted for, and that being so, I think the plaintiffs entitled to recover the whole value.

The policy in the present case covers "all such loss or damage by fire as shall happen to the property above mentioned," and upon the authorities quoted the appellant is, therefore, entitled to recover the full amount of loss caused by the destruction of the property, and is not limited to the value of his life interest. A contrary conclusion would cause great inconvenience to insurers of property, the title to which is, as in the present case, in the wife in fee simple, the husband having merely his marital interest, with the contingency of being tenant by the courtesy if he should survive his wife. If the law were not as we find it to have been settled to be by the above cited authorities, it would be requisite, in all such cases, to effect two separate

contracts of insurance, and pay two premiums, although nothing in the policy or the law would have called for such a distinction, and although, upon a loss happening, the money recoverable under the wife's assurance would belong to the husband. I am of opinion that the appeal must be allowed, and the rule for a new trial in the court below discharged, with costs to the appellant in both courts.

FOURNIER J.—I think that the sending of the circular by the company, and the compliance with the terms of such circular by the assured in giving up the policy to the company's agent, was a surrender of the policy, and the appeal should therefore be dismissed.

HENRY J.—The court below, apparently in very few words, gave judgment against the plaintiff in the action on the ground that there was not a legal waiver of the fifth condition, and that the damages were excessive. Now, if we look at the issues to be tried, I think it will be seen that the interest of the plaintiff Caldwell is admitted by the pleadings at the time of the policy. There is no plea denying his right at the time he obtained the policy, and I think the fifth plea, when criticized, raises the only issue :—

And, for a fifth plea to the said count, the defendant company says that the said insurance was effected, and the said policy applied for, by the said Samuel Caldwell, who was then the owner of the said dwelling-house, and the loss, if any, under said policy was made payable to one George Anderson, and after the date of said policy, and before such alleged loss, the said Samuel Caldwell conveyed all his interest in said dwelling-house to one Thomas Bayers.

That is merely pleading evidence so far, but the whole substance of the plea, and the issue raised under it, are as follows :—

And the plaintiffs had no interest therein and sustained no loss or damage from the burning of the said dwelling-house as aforesaid.

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We are to consider whether the plaintiffs or either of them—for under the law of Nova Scotia either of the plaintiffs can recover—had any interest at the time of the loss, and I think that Samuel Caldwell had an insurable interest, as the husband of Mrs. Caldwell; that he held the fee, and he held an insurable interest; and, if no policy had issued, he would have been entitled to ask for a policy from an insurance company for the full value of the property, and according to the English authorities, that title would have been good for him to obtain a policy for the full value of the house that was insured, and entitled him to have recovered for the loss of that house. He had, then, under the evidence in this case, at the time of the issuing of the policy, a title; we need not enquire what it was, if it amounted to an insurable interest. The parties granted a policy upon it, and it was for them to allege and prove that he had not an insurable interest at the time he effected the policy. This they have not done. On the contrary, they admit he was the owner. But, they say, afterwards he transferred the property, and at the time of the loss had no interest therein. That is the sole question, and it is not necessary for us to enquire and trace out was done with the property through half a dozen different transfers, and this policy might have stood there for years and the party might not have had a right to recover because he had not an insurable interest at the time of the loss. If it were burned at the time when the title was out of him, of course he could not recover, but the only issue for the jury to try was: Had he any interest at the time of the loss? I think he had a good interest. Then one of the conditions required that proof should be put in within five days. What is the evidence? That it was not put in till from fifteen to sixteen, or eighteen days after the time. But, when we look at

the circumstances of the case, we find the real defence and objection to pay was not for want of preliminary proofs. It was in the very first start the plaintiff was told, "Your policy is cancelled." That is the defence; and if you look at the letter of Mr. Pyke, the general agent of the company, he puts it altogether on that. He says: "Whether you are insured with the Western or not, I am certain you are not with us, because your policy is cancelled." I do not think it was the intention of Anderson, when he went there, to cancel that policy. There is no evidence of the payment of the premium by the company, or when it was to be paid back, or that it was offered to be paid back, and Mr. Pyke says it was to be paid some time thereafter. No time was settled or arranged for. We can then fairly conclude that the parties were bound to return the premium when they attempted to cancel the policy on a certain day. It might have been only a few dollars or several hundred dollars, according to the value of the property insured, but law and justice require them to pay back the unearned premium, just as much as it did the other parties to respect their right to cancel the policy. I dispose of that by saying that the policy was not cancelled. Further, that policy was delivered to Greer, as the agent of the Western Insurance Company. Anderson knew the position of the Stadacona Insurance Company, and it was not as the agent of that company that he placed the policy in Greer's hand, but as the agent of the Western. Then there is not the slightest ground for saying the policy was cancelled. If it was not done, then, by the act of Caldwell, it could not be done by anybody. Now, although Anderson was the agent of Caldwell to effect the insurance, there is no evidence whatever that he authorized him to cancel that policy. Caldwell would not be bound. True, Anderson was his creditor, and there was an arrangement that the

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money should be paid to him in the case of loss, but the action must be brought in the name of Caldwell, who is entitled to the whole amount, and then his liability to Anderson arises. There are some cases to support the opposite view, but I think it is confined to the case when it is stated in the body of the instrument that the party mortgaged all the property to the extent of his interest in the policy and the value of the property. Under the circumstances then, I am of opinion that Anderson had no authority whatever to cancel the policy.

Then we come to the story of the waiver. I do not consider the matter as a matter of waiver at all. I think from the evidence of what took place, that the particular special objection that was made to the settling of this policy was that it was cancelled. They would give no satisfaction, and put it upon that ground, and I think they had no other ground in view, or they might take it to lead the party off the track, as has been done since I have had the honor of a seat on this bench; plead one thing, and then come in and prove another. Whether it was in time or not, it would operate fraudulently against the interests of Caldwell. I think the parties, after placing their defence solely on the ground of the cancellation of the policy, should not be allowed to come in now and say, you did not produce the proofs in proper time. Moreover they had the policy in their possession, and Mr. Richey had not the means of making out the claim. I think the parties are estopped from setting this up. There are other issues raised—fraudulent loss, the insurance company to have an account, and so on. There is no evidence, to my mind, that creates any difficulty against the plaintiff's right to recover. We have a replication here, the second replication to the plea I have just been referring to—the fifth plea. The plaintiffs say:

That they or one of them was, at the time of their making said

insurance, the owner of said house and premises, and although the said building and premises were afterwards formally conveyed to one Thomas Bayers, yet before the said loss the said Thomas Bayers re-conveyed the same to the said Sarah Caldwell, then and still being the wife of the said plaintiff Samuel Caldwell, and the said Sarah Caldwell from thenceforth and from the making of said policy, and until and at time of the said fire, and the said loss, was the owner thereof and interested therein.

That brings back the title in answer to this plea, and sufficiently specifies the legal requirements to entitle the parties to recover. I think, therefore, the judgment ought to be in favour of the appellant Of course the wife's name, if necessary, may be struck out of the record.

GWYNNE J.—This is an action wherein Samuel Caldwell and Sarah his wife declare as plaintiffs upon a policy of insurance against loss or damage by fire, executed under the common seal of the defendant company, whereby the defendants insured the plaintiff Samuel Caldwell against loss or damage by fire to a certain dwelling-house described in the policy. The policy contained the following clause: "Loss, if any, under this policy, payable to George R. Anderson Esq., Halifax N.S." The declaration contained also a count that the defendants wrongfully deprived the plaintiffs of the use and possession of the policy, and the plaintiffs claimed $5,000, the amount insured by the policy being $4,000.

To this declaration the defendants pleaded several pleas, and the parties having eventually joined issue, the record came down for trial before Mr. Justice James without a jury. The material points, relied upon by the defendants against the plaintiffs recovery at the trial were :—

1st. That Anderson, to whom the loss, if any, was declared by the policy to be payable, was the person insured, and that he should have been the plaintiff.

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2nd. That the policy had been cancelled before loss under the provisions of a condition in that behalf endorsed on the policy.

3rd. That Samuel Caldwell named in the policy had no interest in the property insured at the time of the loss, having sold the property, whereby, as was contended, the policy became void.

4th. That proof of loss was not put in within the time prescribed by a condition in that behalf endorsed on the policy. The plaintiffs contended that this condition was waived, but in answer to this contention the defendants insisted that the waiver was not in writing endorsed on the policy and signed by the company's manager, as alleged to be required by a condition endorsed on the policy. The plaintiffs also insisted that they were entitled to recover the full amount of the loss under the second count, upon the ground that the defendants had wrongfully deprived plaintiffs of the policy,and prevented their making proof as required by the conditions endorsed thereon.

The learned judge before whom the case was tried without a jury, rendered a verdict in favor of the plaintiffs for the whole amount of the policy and interest thereon.

A rule *nisi* having been obtained to set aside this verdict as against law and evidence, and upon the points taken at the trial upon motion for a non-suit, the Supreme Court of the Province of Nova Scotia made the rule absolute upon the ground, that although the court was of opinion that a waiver by the defendants of the obligation upon the plaintiffs to make proof of their loss within five days, as required by a condition on the policy, had taken place, still that such waiver was ineffectual as not being in writing endorsed on the policy as required by the twelfth condition in that behalf, and that for this reason the plaintiffs could not recover.

Against this rule absolute the present appeal is brought, and the whole matter has been opened before us, and a point has been made, which does not appear to have been suggested in the courts below, namely, that Sarah, wife of Samuel Caldwell, is improperly joined as plaintiff, she not having been named in the policy, and having, in fact, acquired any interest she has in the property insured subsequently to the execution of the policy. This objection, however, is disposed of by the ninety-fourth section of the revised statutes of Nova Scotia, 4th series, ch. 94, which provides that the joinder of too many plaintiffs shall not be fatal to any action, but the plaintiff or plaintiffs entitled may recover. We may treat the action, therefore, as having been brought in the name of Samuel Caldwell alone.

Now, that Samuel Caldwell, and not Anderson, was the person insured by this policy, and that he, therefore, was the proper person to sue upon the policy, cannot, in my opinion, admit of a doubt, and in fact this court has so decided in *McQueen* v. *The Phœnix Insurance Co.* (1) A case was cited from the Supreme Court of Nova Scotia in support of the contrary contention, *Brush* v. *Ætna Insurance Co.* (2). Whether or not we should concur in that decision if the precise point before the court should arise, it is not necessary to express any opinion, because the material facts upon which, in that case, the judgment of the court was rested, do not exist in the case before us. That was an action of assumpsit, and not, as this is, an action of covenant upon a policy under seal, and the expression in the policy upon which the right of the plaintiff there to sue turned was—"loss if any payable to the order of Peter Brush (the plaintiff), his interest therein being as mortgagee," and it appeared that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush,

(1) 4 Can. S. C. R. 660. (2) 10 Old. 459.

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that he, the mortgagor, should insure the premises in the name of and for the benefit of Brush. These circumstances were rested upon as distinguishing that case from *Nevins* v. *Rockingham Fire Insurance Co.* (1), cited by the court as deciding that where a policy provides that the insurance, in case of loss, shall be paid to a third person, that is, not describing him as mortgagee, the action should be in the name of the party to the policy. The case of *Brush* v. *Ætna Insurance Co.* is therefore quite distinguishable from the present case. It is clear to me, also, that the defendants must fail upon their contention that the policy was cancelled before the loss occurred. By the second condition endorsed on the policy, it was provided, that if from any cause whatever the company or its agents should desire to terminate the insurance effected by the policy, it should be lawful for the company or its agents so to do by notice to the insured or his representative, and to require the policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion, for the unexpired term, of the premium received for the insurance. On the 28th June, 1877, while the policy was in full force, the company's agents sent to Mr. G. Anderson, the person named in the policy, as the person to whom the loss, if any, was to be payable, a circular in the words following:—

Halifax, June 28th, 1877.

Mr. I have to inform you that the Stadacona Insurance Company has ordered me to notify policy holders to insure elsewhere, as the company has decided to wind-up. You will, therefore, take notice that their policy of insurance is cancelled from this date; unearned premiums will be returned hereafter.

Yours &c.

(Sgd.) G. M. GREER,
Agent.

(1) 5 Foster (N. H.) 22.

No circular was sent to Caldwell. Anderson, to whom the above circular was sent, and who had no instructions from Caldwell authorizing him to surrender the policy, although he had authority to effect insurance upon the property, upon receipt of the above circular took the policy, which, from the time of its being effected, was in Anderson's custody, and left it with Greer, who was also agent of the Western Insurance Company, for the purpose, as I think may be inferred from the evidence, of enabling Greer to take a description of the property, so that he should transfer the policy from the defendants to the Western, upon which being done, the cancellation contemplated by the defendants' circular might be consummated, but no proportion of the premium for the unexpired term having been paid or tendered, and no substitutional policy in the Western having been effected and accepted, it is plain that no cancellation of the policy executed by the defendants ever was consummated, even assuming Anderson to have been competent to bind Caldwell by accepting a policy in the Western in lieu of that in the defendant company (1).

As regards the point of waiver, the ninth condition endorsed on the policy provides that :—

All persons insured by the company sustaining any loss or damage by fire, are immediately to give notice to the company, or its agents, and within five days after such loss or damage has occurred, are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or its agents may reasonably require, and until such declaration or affirmation, account, and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable.

And the twelfth condition provides that—

None of the foregoing conditions or stipulations, either in whole or

(1) *Hollingsworth* v. *Germania Insurance Co.* 12 Am. Rep. 579.

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in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on the policy signed by the manager of this company for Canada.

It was contended upon the authority of *Blake* v. *Exchange Mutual Insurance Co.*, decided by the Supreme Court of the State of Massachusetts (1), that the twelfth condition endorsed on the policy, related to a waiver of provisions of the contract, and not to a waiver of the performance of provisions, which a waiver of proofs of loss is, and so that in this case a verbal waiver, which was abundantly proved, was sufficient. I do not think it necessary to express any opinion upon this point. It would be unreasonable and unjust in the extreme that the defendants, who by their agent refused, immediately after the occurrence of the loss, to return to the insured his policy for the purpose of enabling him to see, and comply with, its provisions as to proof of loss, and who have ever since insisted upon their right to retain the policy as cancelled before the loss occurred, should be heard to insist that the policy was not cancelled, but made void by default of the assured in making proof of his loss within five days, a default which but for the defendants wrongful detention of the policy might never have occurred; a stronger case could not, I think, be well conceived for a good answer by way of estoppel in *pais* to a pleading setting up such a defence, and this is what is in substance done by the surrejoinder, to which the defendants do not demur, but merely join issue in fact, an issue, which, upon the evidence, must be found against them. I am, moreover, of opinion that the defendants' wrongful detention of the policy entitles the plaintiff to recover to the full amount of his loss within the amount insured by the policy, under the count for wrongfully depriving the plaintiff of his

(1) 12 Gray 266.

policy. If, upon the demand made by Mr. Richey upon behalf of the plaintiff, immediately after the occurrence of the loss, the defendants had given up the policy to the plaintiff, the latter could, by giving proof of his loss within the time prescribed by the condition in that behalf upon the policy, have entitled himself to recover, and could have recovered under the policy, the amount of his loss within the amount insured by the policy, and such amount as it appears to me upon the authority of *Woodhouse* v. *Whitely* (1), (which, although a *nisi prius* decision, seems a sound one,) is the proper measure of damages recoverable under the second count, if, which is really the sole material point in this case, the plaintiffs interest in the policy did not absolutely cease and determine upon the sale by him of the insured premises to Bayers by the deed dated 2nd February, 1876. By deed of that date Samuel Caldwell, the plaintiff, conveyed the insured premises in fee simple to one Bayers, who, by deed dated the 3rd of February, 1876, conveyed the same premises in fee simple to Sarah, the wife of the assured, who then had and still has living, a child born of her marriage with the plaintiff. These conveyances have the appearance of having been adopted merely as means of transferring the property from Samuel Caldwell to his wife Sarah in fee, but whether that was their object, or that the deed to Bayers was intended to operate as conveying, as it purports, the beneficial interest as well as the legal to him absolutely, and that the conveyance by him to the plaintiff's wife was a wholly independent sale, subsequently contracted for, the evidence fails to give any indication; nor is it necessary that it should for the purposes of the defendants' contention, which is that immediately upon the execution of the deed of the 2nd February, 1876, to Bayers, all the plaintiff's interest in the policy ceased, and that

(1) 4 F. & F. 1086.

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he cannot recover thereunder for the loss subsequently occurring to the insured property.

The usual mode of averring the interest of the insured in a declaration upon a policy of insurance against loss by fire is:—

> That the plaintiff, at the time of making the policy, and thence until and at the time of the damage and loss hereinafter mentioned, was interested in the said premises so insured as aforesaid to the amount so insured thereon.

But in no decided case is it held that the interest which the assured had at the time of the insurance being effected continued thence continuously until the loss, should appear in evidence to entitle the assured to recover. In *Sadlers Co.* v. *Badcock* (1), Lord Hardwick held merely that the insured should have an interest in the property at the time of insuring, and at the time the loss happens, and the usual form of plea to the above averments of interest in the declaration traversing such interest is, as is the fourth plea to the declaration in this case, that the plaintiff was not at the time of the alleged damage and loss interested in the said dwelling-house as alleged.

The question as to the revival of a policy in favor of the assured upon a reconveyance to him after a sale by him of the insured property does not appear, so far as my research has enabled me to find, ever to have come up for decision in the English courts. The case of *Reed* v. *Cole* (2), cited in the argument before us, is not the case of a revival of a policy upon a reconveyance after a sale by the assured, but of an interest reserved by the assured at the time of the sale, which the court held to be sufficient in that case to enable him to recover under the policy, notwithstanding the sale. The action was one upon the case upon articles of agreement constituting a society for the mutual assurance of each other's

(1) 2 Atk. 554. (2) 3 Burr. 1512.

ships, and which was executed by the plaintiff and the defendant, whereby the parties thereto engaged that when and so often as any of the ships wherein any of the members of the society had property should be lost, the rest should contribute to such loss. Every member was obliged to prove a property of £500 in the ship, and if he would cease to be a member, he was obliged to give six months' notice. The defendant pleaded that the plaintiff had parted with his interest in the ship before the loss happened. To this plea the plaintiff replied that by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay £500, if a loss happened within three months, and therefore that he was interested during the voyage in which the loss occurred; to this the defendant demurred, and it was held, that in virtue of this agreement, the plaintiff still had an interest in the safety of the ship, and that he had not parted with all his interest in it, but continued to be interested quoad his loss; and that, as he continued contributory to the losses of others at the time when his loss happened, it was but just and equitable, and within the words and meaning of the agreement, that they should contribute to his.

The American courts do, however, furnish cases bearing upon the question.

Now, the policy declared upon in this case upon its face, is stated to be upon a building "owned and occupied by the assured as a dwelling," but there is nothing in the terms of the policy, or in the conditions endorsed thereon, to the effect that in the event of any alienation, sale or transfer of the property insured, or any change in the title thereto, the policy shall become void; the case stands, therefore, upon the general law affecting a contract of insurance against loss by fire, without any such stipulation expressed therein, and the obligation of the contract is to make good to the assured

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any loss or damage to the property by fire occurring within the time for which the policy protects it, within the amount named in the policy, and such loss or damage, as is laid down in *Laurent* v. *The Chatham Insurance*, by the Superior Court of the state of New York (1), is to be estimated according to the actual value of the property at the time the loss occurs, and not upon the probable value to the plaintiff of his enjoyment of his interest in the property.

In Phillips on insurance, paragraph 93, it is said that mortgaging the insured premises is not an "alienation" within the provision of the charter of an Insurance Co. making void an alienation by sale or otherwise, citing as authority *Conover* v. *Mutual Insurance Co., of Albany* (2), in which one ground stated for the decision is that the assured still retained his insurable interest to the amount of the full value; and in paragraph 187, Phillips says that a change of an absolute ownership to an interest as mortgagee or other interest, not required to be specially described in the policy, does not defeat a policy on the subject which does not specify the kind of interest which is insured, and he gives the case in Burrowes above noted and *Stetson* v. *Massachusetts Mutual Fire Insurance Co.* (3), as authority for this proposition. The latter case was one where, to an action upon a fire insurance policy, the defendants pleaded that the plaintiff, being the owner of a dwelling-house, insured it in the defendant company (of which by insuring he became a member), and that after effecting the policy, and before the fire, he conveyed one-half in value of the dwelling-house to one T. H. to hold in fee simple, saving a term of seven years which the plaintiff reserved therein, which term he immediately assigned to the said T. H.

(1) 1 Hall N. Y. 44. (2) 3 Denio 254.
(3) 4 Mass. 330.

and one L. G., so that at the time the house was consumed, he, the plaintiff, was not the owner of the house according to the form and effect of the policy and the rules of the company. To this plea the plaintiff replied that at the time of making the deed to T. H., he, the said T. H., conveyed back the same premises to the plaintiff by way of mortgage conditioned for the payment of a sum of money which the plaintiff averred was not paid pursuant to the condition, nor at any time. The plaintiff then set forth a lease from him to T. H. and L. G. of the premises comprised in the mortgage for the term of seven years, reserving a rent to be paid quarterly, with a right of re-entry reserved in case of non-payment; to this replication the defendants demurred, and it was held that taking all the writings together, the sale of the moiety was substantially to be considered as a conditional sale after the expiration of seven years, and it was held that the replication was a good answer in law to the plea, and that the plaintiff was entitled to recover the full value of the building destroyed, within the amount for which it was by the policy insured. In *Bell* v. *Firemens Insurance Co.* (1), the Supreme Court of Louisiana in 1843 seems to have entertained a contrary opinion, but in the same case, upon its coming up again on a bill of exceptions after a second trial, and in *Bell* v. *Western Marine and Fire Insuraace Co. of New Orleans* (2), which was an action upon a policy covering the same property, the court cites and follows the cases above cited (3) and expressly held that it is not necessary that the interest of the insured at the time of the insurance, and at the time of the loss, should be identical, when the policy contains no clause forbidding sale or change of interest without the assent of the insurers. In the same court in 1841, in the case of

(1) 3 Rob. La. 423. (2) 5 Rob. La. 443.
(3) Mass. 330 and 3 Burr. 1512.

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Macarty v. *The Commercial Insurance Company* (1), where the owner of property insured had made a donation *inter vivos* of the insured property by authentic act in full property to the donee without any restriction or qualification whatever, except against alienation otherwise than by last will and testament, it was upon a very clear principle decided that evidence could not be received to show that it was agreed orally between the donee and the donor that the latter was to receive and enjoy the rents and profits of the premises during his lifetime, pay the taxes, and make all necessary repairs, with a view to establishing that he had a qualified interest or right of property amounting to an insurable interest sufficient to enable him to recover, under a policy effected before the donation, for a loss by fire occurring after it. The court, however, proceeded to say, that even if the evidence could have been received, the right to receive the rents which it was said the donee had agreed to let the plaintiff enjoy was an interest of a character and value so different from that which the assured had at the time of the insurance being effected, that he could not recover under the policy, at least, not to the full amount of the damage done to the insured property: whatever weight we should feel disposed to give to this expression of opinion is materially diminished by the consideration that it was quite unnecessary to the determination of the case before the court, which proceeded upon the inadmissibility of the evidence which was offered to contradict the authentic instrument, and which evidence had been, and rightly-as the court held, rejected. The opinion seems at variance with the rule as laid down by Mr. Phillips in his 187th paragraph above quoted, and with the cases cited by him in support of that rule, and with other cases, for a reservation of a right to receive and enjoy the rents,

(1) 2 Bennet's Ins. Cas. 60.

issues and profits of an estate for the life of the grantor of the fee simple to a stranger, subject to such reservation effected by a legal instrument, seems to entitle the owner of the estate so reserved for life, to insure to the full value of the property; and to recover upon a policy which had been effected by himself, when seized in fee simple, equally as in the case of a change from absolute ownership to an interest as mortgagee, or to any other interest not required to be specifically described in the policy.

In *Franklin Insurance Co.* v. *Drake* (1), the Court of Appeal for the state of Kentucky, in 1841, held that a husband, having by his wife a living child, had a right to insure in his own name a building of which his wife was seized in fee, and upon loss by fire occurring, to recover the full value of the building destroyed not exceeding the amount insured by the policy. The court said:

> Drake (the husband) had unquestionably an insurable interest and a right to effect the policy; he had a right to the use and enjoyment of the premises or their rents during the joint lives of himself and wife, and he would be tenant by the courtesy after the death of his wife. If the assured had an insurable interest at the time of the insurance, and also at the time of the loss, he has a right to recover the whole amount of the damage to the property not exceeding the amount insured, without regard to the value of the assured's interest in the property.

Worthington v. *Bearse* (2), decided by the Supreme Court of the state of Massachusetts in 1866, is an express authority that in the case of an absolute sale of property insured, and the subsequent reconveyance of the property to the assured, a policy effected before the sale becomes revived upon the reconveyance so as to entitle the person insured by the policy to recover for a loss occurring after the reconveyance. The property insured in that case was a ship, and Bigelow C.J.,

(1) 2 B. Mon. 48. (2) 12 Allen 382.

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delivering the judgment of the court, declares the law to be that, although for a time, namely, while the property in the vessel should be in another, the assured had parted with his insurable interest, still his rights to recover on the policy was not gone for ever, that it was only suspended during the time that the title of the vessel was vested in the vendee, and was revived again on the reconveyance to the assured during the term specified in the policy. Although that was the case of a reconveyance of the same estate as had been previously sold by the assured, and it is contended here that the estate of the assured at the time of the loss was quite different from that which he had at the time the insurance was effected, still, the reasoning upon which the judgment in that case was rested, appears to be equally applicable to the present case. The Chief Justice there says :

> The insurance was for one year. There was no stipulation or condition in the policy that the assured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute to insure the interest of a person named in a particular subject for a specific time—for this entire risk an adequate premium was paid and the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So too at the time of the loss all the facts necessary to establish a valid claim under the policy existed. No fact is shown from which any inference can be made that by the alienation of the title to the vessel, the risk of the insurers upon the subsequent re-transfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third pers n.

And again :—

> The sole effect would be to suspend the risk for the time during which, by reason of the transfer, the assured had no interest in the subject insured and to revive it as soon as the original interest was re-vested in him. The transfer of the vessel rendered the policy inoperative not void. It could have no effect while the assured had no interest in the subject insured; but when this interest was revived

or restored during the term designated in the policy without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct—inasmuch as neither the person nor the subject insured is changed and the risk remains the same, the intermediate transfer is an immaterial fact which can in no way affect the claim under the policy.

In the case before us it is however contended that, although neither the person nor the subject insured is changed, still the interest of the person in the subject was wholly changed, and became of quite a different character from what the interest of the assured was when the policy was effected; but the interest of Samuel Caldwell, after the re-conveyance by Bayers to Samuel's wife, Sarah, was of such a nature as entitled him to insure to the full value of the property, and he retained such interest at the time of the loss. There is nothing in the evidence from which any inference can be drawn that, nor is there any suggestion even that, the risk was increased after the transfer to the wife, nor that the insurers had not the same security arising from the nature of the interest of Samuel Caldwell after the execution of the deed to his wife by Bayers that he would use all the precautions to avoid the calamity insured against equally as if his interest had remained identically as it was when the policy was effected. The insurable interest, then, of Samuel Caldwell in the property insured after the conveyance to his wife by Bayers, being such as to entitle him to ensure to the full value of the property equally as the interest which he had when the policy was effected, and such interest existing at the time of the loss, and there being nothing in the policy prohibiting any change of title during the time designated in the policy for its continuance, the condition of the policy was, as it appears to me, satisfied, and there being no suggestion of any increase of risk or prejudice to the insurers by reason of the change which

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has occurred in the interest of the assured, as well upon principle as upon the express authority of *Worthington* v. *Bearse*, which appears to me to be founded on sound reason, and upon the authority of the text of Phillips, supported as it is by authority, I am of opinion that the plaintiff, Samuel Caldwell, is entitled to recover, under the policy to the full value of the house destroyed within the amount insured. He was entitled to the uncontrolled possession and enjoyment of the property, or of its rents and profits, during the joint lives of himself and his wife, and he was tenant by the curtesy initiate, and entitled to payment of the full amount of damage done to the property insured by the risk ensured against within the amount stated in the policy, unless the defendants should avail themselves of the benefit of the condition endorsed on the policy, enabling them to re-instate the house so that the insured should have the full benefit of his right of possession and enjoyment.

As to the contention of the defendants, that the policy is avoided by fraudulent representation of the value of the house and of the amount of loss, I can see nothing in the evidence in support of this contention. What the plaintiff paid for the house, where it stood upon the lot from which he removed it, can afford no criterion of its value as it stood upon the lot where it was rebuilt. The learned judge before whom the case was tried, without a jury, does not appear to have thought the amount stated in the policy to be in excess of the value of the house destroyed, nor does such a contention appear to have been brought under his notice at the trial, and in the rule taken out in the Supreme Court of Nova Scotia to set aside the verdict, the ground that the verdict is for excessive damages, is not taken. I see no sufficient reason, therefore, to justify the setting aside of the verdict and send-

ing the case down for a new trial. I think, therefore, that this appeal should be allowed with costs, and that the rule *nisi* for a new trial in the court below should be discharged with costs, and that the name of Sarah Caldwell as a plaintiff should be erased from the record, and judgment entered for Samuel Caldwell as sole plaintiff.

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Appeal allowed with costs.

Solicitor for appellants: *M. H. Richey.*

Solicitor for respondents: *P. B. Casgrain.*