THE SOVEREIGN FIRE INSURANCE COMPANY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES H. PETERS (PLAINTIFF)... } RESPONDENT.

1885
*Oct. 28.
1886
*Mar. 8.

ON APPEAL FROM THE JUDGE IN EQUITY OF THE PROVINCE OF NEW BRUNSWICK.

Insurance against loss by fire—Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.

Where a policy of insurance against loss or damage by fire contained the following provision:—

"If the property insured is assigned without the written consent of the company at the Head Office endorsed hereon, signed by the Secretary or Assistant Secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease:"

Held, affirming the judgment of the court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition.

APPEAL, by consent, from the decree of Mr. Justice Palmer, Judge in Equity for the Province of New Brunswick, in favor of the respondent (plaintiff below).

The firm of Peters & Sutherland, of the city of St. John, N. B., effected an insurance for the sum of $2,000 with the Sovereign Fire Insurance Company on their stock of boots and shoes in the premises in which they did business; not long after, the said Peters & Sutherland executed a chattel mortgage on their stock of boots and shoes, being the property covered by the said insurance, in favor of Charles H. Peters, the respondent, who allowed them to remain in possession of, and sell,

* PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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the said stock; while the said mortgage was outstanding the said stock was destroyed by fire, and the company refused to pay the insurance thereon on the ground that the chattel mortgage was a breach of a condition in the policy that the property insured should not be assigned without the written consent of the company indorsed on the policy; the mortgagee brought a suit in equity against the company to recover the insurance, and a decree was made in his favour; the company then appealed, by consent between the parties, to the Supreme Court of Canada.

Lash Q.C. for the appellant, referred to Cons. Stats. U. C. cap. 52 sec. 30; *Smith* v. *Niagara District Mutual Ins. Co.* (1).

Hanington, for the respondent, contended that it would require an absolute transfer of all the interest of the insured to make a breach of this condition. If not, a sale of the goods insured in the ordinary course of business might constitute a breach. He referred to *Taylor* v. *Liverpool & Great Western Steam Co.* (2); *Crusoe* v. *Bugby* (3); *Goodbehere* v. *Bevan* (4); *Croft* v. *Lumley* (5); *Hitchcock* v. *North Western Ins. Co.* (6).

Johns v. *James* (7); *Marks* v. *Hamilton* (8); May on Insurance (9); Phillips on Insurance (10); *Sands* v. *Standard Ins. Co.* (11).

Sir W. J. RITCHIE C.J.—The case set forth that it is admitted:—

That a chattel mortgage was given by said defendants, John Peters and Thomas F. Sutherland, to said plaintiff, upon the property and effects mentioned in said policy of insurance, duly executed by said John Peters and Thomas F. Sutherland, on or about

(1) 38 U. C. Q. B. 570.
(2) L. R. 9 Q. B. 546.
(3) 2 Wm. Black. 766.
(4) 3 M. & S. 353.
(5) 6 H. L. Cas. 672.
(6) 26 N. Y. 68.
(7) 8 Ch. D. 744.
(8) 7 Ex. 323.
(9) Sec. 281.
(10) 5th Ed. p. 151 par. 286.
(11) 26 Gr. 113; 27 Gr. 167.

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the 17th day of August, A.D. 1883, and duly filed in the office of the Registrar of Deeds in and for the City and County of Saint John on the 29th day of said month of August, a copy of which said chattel mortgage, it is agreed, may be filed and read as part of this case.

It is admitted that the chattel mortgage aforesaid was made and executed by the said defendants, John Peters and Thomas F. Sutherland, to the said plaintiff without procuring the written consent of the said defendants, the Sovereign Fire Insurance Company of Canada, thereto, and that no consent in writing to the said chattel mortgage was ever indorsed by the said defendant, the Sovereign Fire Insurance Company of Canada, on the policy; that, in fact, the said Abraham D. G. Vanwart (the company's agent) had not, nor had the said Sovereign Fire Insurance Company of Canada heard of said chattel mortgage having been made before said fire, nor had any notice been given to them, or either of them, or to their agent.

That the delivery of the shoes mentioned in the attestation clause of said chattel mortgage to the plaintiff was so made as a matter of form, as the parties to said chattel mortgage believed it to be a necessary form in order to make said chattel mortgage legal as a chattel mortgage, and, in fact, the said plaintiff did not, previous to the time of the fire above mentioned, enter into possession of any of the property or effects mentioned in said chattel mortgage, or take any proceedings to foreclose said chattel mortgage, or realize the amount secured thereby.

That the said Peters & Sutherland, after the execution of said chattel mortgage, continued in possession of said property and effects, and paid over to the plaintiff, from time to time, amounts on account of the amount secured by said chattel mortgage, as they had likewise done on account of the amounts due him before its execution, but there is still due to said plaintiff, on account of the amounts secured by said chattel mortgage, a large amount in excess of the amount of $2,000 insured under said policy as aforesaid.

That the said plaintiff and the said John Peters and Thomas F. Sutherland, or William Peters, junior, at the time of making said chattel mortgage or said trust deed, had not, nor had any of them, read over the conditions of said policy, and none of said parties intended to commit a breach of any of the conditions of said policy, and neither of them knew or believed that such chattel mortgage or trust deed would affect said policy in any way.

It is admitted that if the said policy was in force and valid at the time of said fire, the said plaintiff is entitled to maintain this action and to recover against the defendants, the Sovereign Fire Insurance Company of Canada, the sum of $2,000 and interest

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thereon from the 26th day of December, A.D. 1883.

I differ entirely from Mr. Justice Palmer as to the meaning of the words "property insured" in the third condition. That learned judge says they may fairly mean the insurable interest in the subject insured. That, certainly, is what is insured, and such interest is property. With all due deference to that learned judge, I think the property insured was the following property:

> Their stock of boots and shoes, findings, and machinery contained in the premises occupied by them, on the second flat of the four-storey brick building with gravel roof, situate on the south-west angle of Carmarthen and Union streets, City of St. John N.B., occupied by insured and other tenants as a steam power boot and shoe factory, furniture and brush and soap factories, and grocery—

as specified in so many words in the policy. Then we have the third condition, in reference to which the policy is made and accepted, and declared to be part of the contract, "that if the property insured is assigned without the written consent of the company." What property? In my opinion, clearly the stock of boots and shoes, &c. But, if anything is wanting to make this more clear, we have the last words of the condition, "but this condition does not apply to change of title by succession, by operation of law, or by reason of death." Change of title? To what, if not to the stock of boots and shoes, does this apply? Then again, if it could possibly be required to be made plainer, we have condition four: "When property insured is only partially damaged no abandonment, &c." What is this property insured but the stock of boots and shoes? So at the end of this condition: "No abandonment of property insured will be allowed," &c. Does this apply to the insurable interest?

So again, in condition twelve, as to the directions to be observed by persons entitled to make a claim under the policy, we have, *inter alia:*

5. He shall also declare what was the whole actual cash value of the property insured, and what interest the assured had therein at the time of the loss.

6. Whether there was any incumbrance thereon, and, if any, giving full particulars thereof.

7. In what general manner the premises insured, or the premises containing the subjects insured, or the several parts thereof, were occupied, &c.

Also by condition 15 :

If any difference arise as to the value of the property insured, of the property saved, or amount of the loss, &c.

But it is, in my opinion, idle to pursue the matter further; the case is too clear for argument. There is not a doubt, in my mind, that the assignment of the property insured referred to the insured subject, the thing insured. I have looked at the cases relied on by the learned judge, and cannot discover that they have the slightest bearing on this case; nor can I agree with the learned judge, that "it follows that the only question is what is the meaning of the words "property insured." The question is simply: Was the execution of a chattel mortgage, without the written consent of the company, such an assignment of the property insured as would render the policy void under the third condition ?

I think this must be read as an absolute assignment of the property insured, of all the assured's interest therein, and that the condition, as against the assured, should not be read as forbidding a mortgage of or incumbrance on the property, where the assured retains an insurable interest. That condition must be strictly construed, and, as said by Chief Justice Cockburn in *Fowkes* v. *Manchester and London Assurance Ass.* (1) :

In construing an instrument prepared by the company and submitted by them to the party, affecting insurance, it ought to be read most strongly *contra preferentes.*

(1) 3 B. & S. 925.

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Forfeitures are certainly not favored by the law. It has been well said that in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture when it will bear another reasonable construction which will not produce such a result.

In the last edition of the Imperial Dictionary assign is, in law, to transfer or make over to another the right one has in any object, as in an estate, chose in action or reversion, and in this sense we may fairly assume that the words were used. A mortgage is one thing, an assignment of the property is quite another; the one being conditional, the other absolute. In order to operate as a forfeiture, I think the assignment must divest the assured of all interest in the property, as he would be by change of title, by succession, by operation of law, or by reason of death, which changes are excepted from the operation of the condition, but so long as an insurable interest remains in the assured the policy is valid to the extent of that interest. Condition number twelve, in its fifth and sixth paragraphs, which provide directions for parties making claims under the policy, seems to indicate that the property may be encumbered without the knowledge or consent of the insurers.

Par. 5.—In such statutory declaration he (the insurer) shall declare what was the whole actual cash value of the property insured, and what interest the assured has therein at the time of the loss.

Par. 6.—Whether there was any incumbrance thereon, and if any, giving full particulars thereof.

But nowhere is it said that where an insurable interest is shown, the policy is avoided by any incumbrance thereon. If it was intended that the policy should be forfeited, notwithstanding the assured retained an insurable interest in it, I think such an intention should be clearly apparent from the language

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of the policy or condition. I think the assignment should amount to an absolute transfer of the assured's whole interest; in other words, a transfer of the title and determination of his interest.

The case from Ontario *Sands* v. *Standard Ins. Co.* (1), holds that in a condition "if a property is assigned without the written consent, &c.," the word "assign" did not cover a dealing with the property by way of mortgage, with which decisions the American authorities seem to be entirely in accord.

I think therefore the appeal should be dismissed with costs.

FOURNIER J.—Sutherland et Peters, après avoir effectué une assurance pour un an, le 29 mars 1883, sur leur fonds de commerce, composé de chaussures et d'articles concernant la manufacture de chaussures, consentirent un *chattel mortgage* (hypothèque sur les meubles) en faveur de l'intimé, comme sûreté collatérale d'une dette. Celui-ci ne prit pas possession des articles en question et ne fit aucun procédé pour réaliser sur le *chattel mortgage*. Le 8 d'octobre suivant, les effets couverts par la police d'assurance et par le *chattel mortgage* furent consumés par un incendie. La question résultant de ces faits est de savoir si la création d'un *chattel mortgage* sur les meubles assurés, constitue une violation de la troisième condition de la police d'assurance, conçue en ces termes :

If the property insured is assigned without the written consent of the company at the head office indorsed hereon, signed by the Secretary or Assistant Secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease; but this condition does not apply to change of title by succession, or by operation of law, or by reason of death.

La création du *mortgage* est-elle en réalité une violation de la condition que les meubles assurés ne peuvent

(1) 26 Gr. 113 and 27 Gr. 167.

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être transportés sans le consentement de la compagnie ? et comme le *chattel mortgage* ne laisse plus aux assurés que le droit de racheter leurs propriétés en remboursant le montant de ce *mortgage*, leur reste-il encore, dans ce cas, un intérêt assurable ?

La propriété des assurés ne consistant plus après le *chattel mortgage* que dans un droit de rédemption (*equity of redemption*), ce droit peut-il être considéré comme compris sous les termes *property insured* ? Le terme *property*, en matière d'assurance, a été interprété, comme ayant une signification assez étendue pour comprendre un intérêt assurable. Voir *Holdbrook* v. *Brown* (1) ; *Wiggins* v. *Mercantile Ins. Co.* (2) ; *Locke* v. *North American Ins. Co.* (3). Si les mots *property insured* comprennent un intérêt assurable, il ne reste donc qu'à savoir si après l'exécution du *chattel mortgage*, les assurés possédaient encore un intérêt assurable. Par l'article 15 du cas spécial, il est admis que la livraison mentionnée dans la clause d'attestation n'a été ainsi faite que comme matière de forme et sous l'impression qu'elle était nécessaire à la validité du *chattel mortgage*, mais qu'en réalité cette livraison n'a pas eu lieu, et que de fait, avant l'incendie, l'intimé n'avait pris possession d'aucun des effets mentionnés dans le *chattel mortgage* et n'avait adopté aucun procédé pour réaliser la somme dont le remboursement était garanti de cette manière. Peters et Sutherland étaient donc encore en possession des articles affectés au *chattel mortgage*, et pouvaient, en payant le montant ainsi garanti, rentrer dans leur droit de propriété et alors, dans le cas d'incendie, la perte des effets assurés retombait sur eux. Il résulte de cette position qu'ils avaient conservé dans les effets en question un intérêt assurable suffisant pour leur permettre de recouvrer le montant couvert par la police d'assu-

(1) 2 Mass. 280. (2) 7 Pick. 270.
(3) 13 Mass. 61.

rance. Cette cour ayant déjà exprimé son opinion sur ce qu'elle considère comme un intérêt assurable dans la cause de *Clark* v. *Scotish Imperial Insurance Co.* (1), et dans celle de *Anchor Marine Ins. Co.* v. *Keith* (2), je crois qu'il serait inutile de citer à ce sujet d'autres autorités que celles de ces deux causes et des nombreuses décisions sur lesquelles la cour s'est alors appuyée pour en venir à la conclusion qu'elle a adoptée. Je considère donc ce point comme réglé et, en conséquence, que l'intimé a droit de recouvrer sur la police.

Mais l'appelant ayant aussi invoqué comme défense le fait qu'il y avait eu violation de la troisième condition par la création du *chattel mortgage*, qui dans ses termes contenant un transport de la propriété assurée, il est nécessaire de voir quelle interprétation il faut donner au mot *assigned* dans cette condition. L'intimé a fait à ce sujet une savante dissertation en se basant sur les règles d'interprétation pour en venir à la conclusion que le mot *assigned* n'a rapport dans cette condition qu'à une aliénation complète des articles assurés qui n'aurait laissé aucun intérêt assurable à Peters et Sutherland. Une clause semblable a déjà fait l'objet de discussions importantes dans les cours de la province d'Ontario, dans la cause de *Sands* v. *Standard Ins. Co.* (3). Dans la même cause, entendue de nouveau *in banco*, et rapportée au 27 vol. Grant, p. 167, le jugement de l'honorable juge Proudfoot décidant que la condition dont il s'agit ne s'appliquait pas à une aliénation par hypothèque (*mortgage*), mais à un transport absolu, fut confirmé par tous les juges. La condition dont il s'agit en cette cause est semblable, dans ses parties essentielles, à celle qui faisait le sujet de la discussion dans la cause de *Sands* v. *The Standard Ins. Co*; il n'y a qu'une différence sans importance dans les

(1) 4 Can. S. C. R. 192. (2) 9 Can. S. C. R. 483.
(3) 26 Grant, p. 113.

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termes qui ne sont pas de nature à modifier la question d'interprétation du mot *assigned* dans la troisième condition dont il s'agit ici. L'interprétation admise est évidemment applicable en cette cause. En conséquence, l'appel doit être renvoyé avec dépens.

HENRY J.—This is an action by the respondent as mortgagee of Peters & Sutherland on certain goods and assignee of a policy of fire insurance issued by the appellant company to the said Peters & Sutherland on the same goods previous to the execution of the chattel mortgage. The question as to the validity of the assignment was submitted under a special case in which everything necessary to the recovery of the respondent is admitted except as to the validity of the policy when the loss occurred, which was a few months after the execution of the chattel mortgage and the assignment of the policy. The third condition of the policy is as follows:—

If the property insured is assigned without the written consent of the company, at the head office, indorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall, thereby, become void, and all liability of the company shall thenceforth cease; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.

The 18th and 19th clauses of the special case are as follows:—

It is submitted that the said plaintiff is the lawful assignee for value of said policy of which the said defendants, the Sovereign Fire Insurance Company, had notice immediately after the said fire, but the Sovereign Fire Insurance Company of Canada had not notice of any assignment of the policy to the plaintiff until after the said fire, nor has the Sovereign Fire Insurance Company of Canada done any act showing they accepted the plaintiff as their assured.

It is admitted that if the said policy was in force and valid at the time of said fire, the said plaintiff is entitled to maintain this action and to recover against the defendants, the Sovereign Fire Insurance Company of Canada, the sum of $2,000 and interest thereon from the 26th day of December, A. D. 1883.

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The case concludes as follows:—

It is contended on the part of the defendants, the Sovereign Fire Insurance Company of Canada, that the third condition indorsed on the said policy was a proper and reasonable condition, and the execution and delivery of the said chattel mortgage was a breach of the said third condition indorsed on said policy of insurance, and that the said policy therefrom became void and of no effect whatever, and that the plaintiff cannot recover thereunder. It is admitted, however, that if the execution and delivery of said chattel mortgage was not a breach of said third condition, then the said policy of insurance was valid and in force at the time of said fire.

The question for the court is whether the said policy of insurance was valid and in force at the time of said fire. If so, then the plaintiff to have judgment for the amount aforesaid, said sum of $2,000 and interest and costs of this suit, and, if not, the said defendants, the Sovereign Fire Insurance Company of Canada, to have judgment with costs.

Reference is made in the special case to an assignment alleged to have been made subsequent to the mortgage, and before the loss by Peters and Sutherland to Wm. Peters, junior, of all their property for the benefit of their creditors, but it appears that nothing was done under it, and the creditors did not execute it, but at all events, no question was raised on it so as to affect the policy. We have therefore only to decide as regards the mortgage. I have no doubt that Peters and Sutherland, after the mortgage given as security, had an insurable interest in the property covered by the policy. That after the mortgage they might have insured the property covered by it, and that the creation of the security by the mortgage was not such a transfer or assignment of the property as is prohibited by the third condition of the policy. The assignment therein referred to, is one by which the property is absolutely and wholly assigned, so that no interest in it remains in the assignor. Such is not the case where security by mortgage is given on the insured property.

I have no doubt of the correctness and validity of the decision appealed from to this court, and am therefor of

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opinion the appeal should be dismissed with costs.

TASCHEREAU J. concurred in dismissing the appeal.

GWYNNE J.—The case of *Burton* v. *The Gore District Mutual Insurance Company* (1), and cases of that class being cases depending upon the peculiar provisions of the statutes relating to mutual insurance companies, have no bearing upon the present case, but although an absolute assignment of an insurer's whole interest in chattel property avoids the policy, and divests the insured of all right to recover thereunder upon the property being subsequently destroyed by fire without any condition indorsed on the policy to that effect, still, I think that it is an absolute disposition by assignment of all title in the insured property which is pointed at by the condition in question; the context in which the word "assigned" is used in the condition, leads, I think, to this conclusion. The object of the condition is, I think, to provide that although a change of the whole title by assignment without consent of the insurers shall avoid the policy, as indeed it would without any such provision, still that change of title by succession, or by operation of law, or by death, shall not. So that in these latter cases the parties becoming entitled to the property shall have the benefit of the insurance, while the assignee of the title, that is of the whole title, in the case of assignment, as in the other cases, shall not, unless such assignment be consented to by the insurers in the manner provided for in the condition. I agree therefor that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *Silas Alward.*

Solicitors for respondents: *Hanington, Milledge & Wilson.*

(1) 14 U. C. Q. B. 342.