

EDWARD C. TORROP (PLAINTIFF).....APPELLANT ;
AND

1896

*Nov. 5.

THE IMPERIAL FIRE INSURANCE }
COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

*Fire insurance—Conditions in policy—Breach—Waiver—Recognition of
existing risk after breach—Authority of agent.*

A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed.

Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition.

Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach.

APPEAL from a decision of the Supreme Court of New Brunswick, setting aside a verdict for the plaintiff and ordering a nonsuit.

The action in this case was on a fire insurance policy on a spool and bobbin factory in New Brunswick and the machinery, engine and boilers therein. The amount of the insurance was \$2,750 and was made payable to "Hon. George Irvine and John G. Walsh, Executors of the estate of the late Edward Burstall of Quebec," who held a mortgage on the insured property on which \$4,000 was due at the time of the loss.

The company defended the action on several grounds. First, that under a condition indorsed on the policy making it void "if the said property should be sold or

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

1896
 TORROP
 v.
 THE
 IMPERIAL
 FIRE
 INSURANCE
 COMPANY.

conveyed, or the interest of the parties thereon changed, or if the policy should be assigned without the consent of the company obtained in writing therein" the policy had been forfeited by the insured giving a bill of sale of the property to McAllister & Mott, the local agents of the company at Campbellton, N.B., and afterwards making an assignment for benefit of his creditors of all his property, mentioning expressly all policies of insurance. Secondly, that the policy had been cancelled before loss by notice to the insured as authorized by a condition therein. Thirdly, that proofs of loss had not been given to the company within the time limited therefor by the policy.

At the trial the plaintiff contended that the bill of sale and trust deed not being absolute transfers of the property were not sufficient to avoid the policy; that if they were the company had subsequently, by attempting to cancel the policy, treated the risk as existing with knowledge of the transfers, the knowledge of McAllister & Mott being imputed to the company; that the policy was not cancelled as notice had not been given to the insured but only to his trustees, and moreover, that notice to the payees of the policy in Quebec was essential; and that the proofs had been put in after the limited time and not objected to which constituted a waiver of the condition.

The Supreme Court of New Brunswick decided the case in favour of the company on the two grounds that the transfers avoided the policy, and if not that it was cancelled.

McLean for the appellant. The policy was headed, "Maritime Provinces Branch, Campbellton Agency," and indorsed "McAllister & Mott, agents." So far as the public were concerned McAllister & Mott were

general agents with full powers. *Millville Ins. Co. v. Building Assoc.* (1); *Ins. Co. v. Wilkinson* (2).

Notice to the agents was notice to the company. *Bawden v. London, &c., Assurance Co.* (3); *Markey v. Mutual Benefit Ins. Co.* (4).

After breach the company may elect to keep the policy in force. *Wing v. Harvey* (5); *McQueen v. Phoenix Ins. Co.* (6).

The policy was not assigned. *Lazarus v. Commonwealth Ins. Co.* (7).

The attempt to cancel the policy was ineffectual as notice was not given to the assured. *Caldwell v. Stadacona Ins. Co.* (8).

Pugsley Q.C. and *Hanington Q.C.* for the respondent, were not called upon.

THE CHIEF JUSTICE.—(Oral.) We are all of opinion that the judgment pronounced by the Supreme Court of New Brunswick in this case was quite correct, with one exception. There is no doubt that the bill of sale to McAllister & Mott was “a change of interest,” which avoided the policy under the first condition. The insured claimed that this forfeiture was waived, but McAllister & Mott, being agents only for the purpose of receiving applications and forwarding them to the head office, had no authority to waive it, and Whittaker, the resident secretary and the only person whose acts could bind the company, knew nothing of the bill of sale having been given, and could not be said to have elected to treat the policy as in force after a forfeiture of which he was ignorant. Therefore, without discussing any of the other questions that have been argued on behalf of the appellant, and

(1) 43 N. J. L. R. 652.

(2) 13 Wall. 222.

(3) [1892] 2 Q. B. 534.

(4) 103 Mass. 78.

(5) 5 DeG. M & G. 265.

(6) 4 Can. S. C. R. 660.

(7) 5 Pick. (Mass.) 76.

(8) 11 Can. S. C. R. 212.

1896
 TORROP
 v.
 THE
 IMPERIAL
 FIRE
 INSURANCE
 COMPANY.
 The Chief
 Justice.

which are all fully and ably dealt with by Mr. Justice Barker, in his judgment in the court below, we are of opinion that the appeal fails on the ground mentioned and must be dismissed.

Further, we think the court below should have ordered the entry of a verdict for the defendants instead of directing a nonsuit, and their judgment should be varied in this respect

Subject to this variation the appeal is dismissed with costs.

*Judgment varied as above stated
 and subject thereto appeal dis-
 missed with costs.*

Solicitors for the appellant: *Weldon & McLean.*

Solicitor for the respondent: *A. H. Hanington.*
