THE WESTERN ASSURANCE COMPANY (DEFENDANT)..... } APPELLANT.

AND

THOMAS A. TEMPLE (PLAINTIFF).....RESPONDENT.

1901

*May 17.
*June 5.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insurance against fire—Condition in policy—Interest of insured—Mortgagor as owner—Further insurance—Estoppel—Pleading.

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property * * or if the interest of the assured in the property whether as owner, trustee * * mortgagee, lessee or otherwise is not truly stated."

Held, that a mortgagor was sole and unconditional owner within the terms o f said condition.

By another condition the policy would be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance but before being notified of the acceptance of his application the premises were destroyed by fire.

Held, that there was no breach of said condition. *Commercial Union Asssurance Co.* v. *Temple*, (29 Can. S. C. R. 206) followed.

In one count of his declaration plaintiff admitted a breach of said condition but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts showed, as held by the decision in the previous case, that there was no breach.

Held, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition.

APPEAL from a decision of the Supreme Court of New Brunswick sustaining the verdict at the trial in favour of the plaintiff.

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

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The questions to be decided on the appeal are sufficiently stated in the above head note.

Leighton McCarthy for the appellant. The condition as to other insurance is not the same as that in the Commercial Union case. In this policy other insurance even if invalid will avoid the policy.

Plaintiff having admitted in his declaration and at the trial that he had effected other insurance without consent is estopped from denying a breach of the condition. Ewart on Estoppel p. 187.

There was a mortgage on the property when the policy issued and plaintiff thereby ceased to be owner and his interest not being disclosed the policy was void. See *Citizens Insurance Co. of Canada* v. *Salterio* (1); *Torrop* v. *Imperial Fire Insurance Co.* (2); *Westchester Fire Insurance Co.* v. *Weaver* (3).

(Respondent's counsel were only required to argue the last point.)

Pugsley K.C., Atty. Gen. of New Brunswick, for the respondent. A mortgagor is always regarded as the owner of the mortgaged property. In *North British and Mercantile Ins. Co.* v. *McLellan* (4) the Chief Justice said " a mortgagor is deemed the owner of the property mortgaged both in a popular and a technical sense."

The insurers who must state the nature of the interest insured are named in the policy and the mortgagor is not one.

Every decision of the courts in the United States and Canada dealing with this condition has held the mortgagor to be the owner. See *Dolliver* v. *St. Joseph Fire & Marine Ins. Co.* (5); *Friezen* v. *Allemania Fire Insurance Co.* (6); *Insurance Co.* v. *Haven* (7).

(1) 23 Can. S. C. R. 155.
(2) 26 Can. S. C. R. 585.
(3) 70 Md. 536.
(4) 21 Can. S. C. R. 288.
(5) 128 Mass. 315.
(6) 30 Fed. Rep. 352.
(7) 95 U. S. R. 242.

Masters K.C. follows for respondent. The wording of the condition shows that the term owner was intended to include a mortgagor, and in some policies the mortgagor is referred to as owner. *Hopkins* v. *Provincial Insurance Co.* (1).

In *Sinclair* v. *Canadian Mutual Fire Insurance Co.* (2) a mortgagor was held to be "absolute owner" of the mortgaged property.

A mortgagee has a conditional interest, but not a mortgagor.

The judgment of the court was delivered by:

THE CHIEF JUSTICE —We are all of opinion that the respondent was the sole and unconditional owner of the property within the meaning of the conditions of the policy, and that the interest of the assured was not untruly stated by him. *The North British and Mercantile Ins. Co.* v. *McLellan* (3), and *Dolliver* v *St. Joseph Fire & Marine Insurance Co.* (4), are authorities in point.

The other objections relied on in the appellants' factum, viz., that the assurance in the Quebec Assurance Co invalidated the policy, was, we think, rightly considered by the Supreme Court of New Brunswick to have been decided adversely to the contention of the appellant in the former case of *Temple* v. *The Commercial Union Assurance Co.* (5) by which we are bound.

The question of estoppel not referred to in the factum, but raised for the first time at the argument here, is not open to the appellant under the agreement come to at the trial that the facts proved in *Temple* v. *The Commercial Union Assurance Co.* (5) should be taken as proved in this case, and that upon this evidence with any additional facts which either party might prove, the case should be decided. This agreement entirely

(1) 18 U. C. C. P. 74.
(2) 40 U. C. Q. B. 206.
(3) 21 Can. S. C. R. 288.
(4) 128 Mass. 315.
(5) 29 Can. S. C. R. 206.

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precludes the highly technical objection of an estoppel on the pleadings.

Concurring as we do in the reasons given in the judgment of the court appealed from, it is unnecessary to write more fully.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Belyea.*

Solicitor for the respondent: *Wm. Pugsley.*