THE HOME INSURANCE COMPANY OF NEW YORK (DEFENDANT)..... } APPELLANT;

AND

HARRY GAVEL (PLAINTIFF).....RESPONDENT.

1927
*May 11, 12.
*June 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Fire insurance—Statutory condition against effecting subsequent insurance with another insurer—Insured subsequently obtaining policy from another insurer which never attaches by reason of statutory condition therein against prior insurance—Insured's right to recover under first policy.

A statutory condition in a fire insurance policy that the insurer is not liable for loss "if any subsequent insurance is effected with any other insurer, unless and until the insurer assents thereto" contemplates a subsequent insurance which is effective, and is not applicable so as to defeat the insured's claim for loss merely because the insured, without the insurer's assent, subsequently obtains from another company a policy which never attaches by reason of the application of the statutory condition therein that "the insurer is not liable for loss if there is any prior insurance with any other insurer."

Manitoba Assurance Co. v. *Whitla*, 34 Can. S.C.R. 191, at p. 206, not followed, in view of *Equitable Fire & Accident Office, Ltd.* v. *The Ching Wo Hong*, [1907] A.C. 96.

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 70) affirmed.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

1927

HOME INSURANCE CO. OF NEW YORK. v. GAVEL.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing an appeal by the present appellant from the judgment of Harris C.J. (1) in favour of the respondent in an action brought by the respondent on a fire insurance policy issued by the appellant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

The statutory condition contained in the policy and quoted and dealt with in the judgment is the 9th statutory condition in the first schedule to *The Fire Insurance Policies' Act,* R.S.N.S., 1923, c. 211.

C. J. Burchell K.C. and *J. A. Hanway K.C.* for the appellant.

W. A. Livingstone for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from the unanimous decision of the Supreme Court of Nova Scotia *en banc* (1), dismissing an appeal brought by this appellant from the judgment of Harris C.J. (1), who awarded the respondent $8,000 on a fire insurance policy issued by the appellant.

In December, 1923, the respondent effected an insurance against fire with the appellant on a building owned by him at Digby, N.S., and occupied as a garage and dwelling. The policy ran from December 10, 1923, to December 10, 1924, and was for $8,000. On December 3, 1924, the building was greatly damaged by fire, and it is not contended that the loss did not equal the amount insured. The policy contained the following statutory condition:

> The insurer is not liable for loss if there is any prior insurance with any other insurer, unless the insurer's assent to such prior insurance appears in the policy or is endorsed thereon, nor if any subsequent insurance is effected with any other insurer, unless and until the insurer assents thereto, or unless the insurer does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

In November, 1924, the appellant obtained a fire insurance policy from the Northern Assurance Company, Limited, London, England, which I will call the Northern Com-

(1) (1926) 59 N.S. Rep. 70.

pany, for $4,000, being $3,000 on his building and $1,000 on his furniture. This policy was made subject to the same statutory condition.

After the fire, the respondent brought actions against both companies, the action against the Northern Company being apparently the first in time. The plea of the Northern Company is not in the record, but I understood from counsel that, in addition to other defences, the Northern Company disputed liability on two grounds: 1, that the plaintiff had prior insurance with the present appellant, to which the assent of the Northern Company had not been secured; 2, that the plaintiff had failed to disclose to the defendant that, when he obtained insurance from the appellant, he had applied for $12,000 insurance, but was informed that $8,000 only could be placed on the property.

On the second ground Mr. Justice Mellish dismissed the action against the Northern Company, although he did not find the plaintiff's conduct fraudulent. He decided that the policy of the Northern Company had never attached, and that the plaintiff's premium should be returned to him.

In answer to this action of the respondent against the present appellant, the latter set up the same statutory condition and claimed that its policy had become void by reason of the subsequent insurance with the Northern Company.

The only question to be decided on this appeal is whether any such subsequent insurance was effected within the meaning of the condition.

The respondent's answer is that the policy with the latter company never attached and therefore that no subsequent insurance was effected. He relies, and the judgments in his favour were based, on the decision of the Judicial Committee in *Equitable Fire and Accident Office, Limited* v. *The Ching Wo Hong* (1).

In that case the company disputed liability because, it alleged, an additional insurance had been effected in violation of a condition of the policy which stated that no additional insurance was allowed except by consent of the company. The insured had obtained from another insurer a

(1) [1907] A.C. 96.

1927

HOME INSURANCE CO. OF NEW YORK. v. GAVEL.

Mignault J.

policy of insurance containing a condition that the insurance would not be in force, nor would the company be liable in respect of any loss or damage, before the premium, or a deposit on account thereof, was actually paid. No premium had been paid and the insured did not attempt to collect the insurance. Their Lordships, speaking by Lord Davey, were of opinion that the second insurance had never become effective, and that therefore the condition of the policy sued on had not been infringed.

The appellant relies on several Canadian cases in support of its contention that the mere fact that the respondent obtained subsequently a policy of insurance, however void, annuls its contract of insurance under the statutory condition of its policy. It cites the following language of Mr. Justice Sedgwick, speaking for this Court, in *Manitoba Assurance Co.* v. *Whitla* (1):

> So far as the Manitoba Assurance Co. is concerned it seems to me that there can be but little question as to its non-liability. The effecting of the new insurance in the Royal Co. without its assent gave it the right at its option to void it, and, as has been established by a long series of cases in Canadian courts, whether the new insurance was in the first event valid or invalid, if there was a new contract of insurance in fact, that *de facto* second insurance made void the first.

I think this language can no longer be considered as binding in view of the decision of the Privy Council in *Equitable Fire and Accident Office, Limited* v. *The Ching Wo Hong (ubi supra)* (2). The question to my mind is whether, within the meaning of the statutory condition, "any subsequent insurance was effected with any other insurer." The policy of the Northern Company never attached. Its statutory condition expressly provided that "the insurer is not liable for loss if there is any prior insurance with any other insurer," etc., so that, if there was such prior insurance, the condition applied, and no insurance under the policy was effected. The condition of the appellant's policy does not contemplate a subsequent contract of insurance in fact, but a subsequent insurance which is effective. That is precisely what the Northern Company's contract never was. The attempt now to vivify this con-

(1) (1903) 34 Can. S.C.R. 191 at p. 206.

(2) [1907] A.C. 96.

tract so as to relieve the appellant from liability, in my opinion, must fail.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James A. Hanway.*

Solicitor for the respondent: *W A. Livingstone.*