1879 JAMES McQUEEN.....APPELLANT;

*Nov. 18, 19.

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AND

*March 13. THE PHŒNIX MUTUAL FIRE INSURANCE COMPANY..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Trust Assignment—Conditions of Policy—Notice to Agent—Loss Payable to Creditors—Right of Action.

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of $2,000 for three months, "loss if any to be payable to his creditors of whom *G. McK.* is one and *McM. & Co.* are second." An interim receipt was issued by the company, dated 19th November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void.

On the 28th November the appellant transferred the insured property to the said *G. McK.*, in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to *G. McK.* and *McM. & Co.*, and others as creditors, as their interests may appear." After the fire the Inspector of the company wrote twice to *McK.* calling for proof of loss.

Held,—Reversing the judgment of the Court of Appeal for *Ontario*—that the notice of the trust assignment to the company's agent

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* PRESENT:—Ritchie, C. J.; and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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was sufficient, that the company must be considered as having assented to such assignment and to have executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition on the policy.

2. That the words "loss payable, if any, to *G. McK.*, &c.," operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant was made, the action for a breach of that covenant was properly brought by him alone.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing a judgment of the Court of Common Pleas (2).

The facts of the case are sufficiently stated in the head note and judgments hereinafter given.

Mr. *Mowat*, Q. C., for appellant.

It is important, in this case, to consider carefully the terms and the object of the assignment and the circumstances under which it was executed by the insured. Clearly the object of the assignment was not, and the effect of it is not, to divest the appellant of all interest in the goods, but as the evidence of both *McKenzie* and *McQueen* shows, to enable the appellant to dispose of the goods and to apply the proceeds towards paying the appellant's creditors, the very men to whom the policy is made payable, the appellant still retaining an interest in the goods.

Then also by the terms of the application the loss is made payable to "*George McKenzie* and *McMaster & Co.*" only. The policy is made payable to "*George McKenzie*, *McMaster & Co.*, and others, creditors" of the appellant. The trust assignment makes the proceeds of the goods payable to all the creditors of the appellant, exactly in the terms of the policy, thus largely extending the number of payees mentioned in the

(1) 4 Ont. App. R. 289. (2) 29 U. C. C. P. 511.

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application and in this respect differing materially from the application. From this circumstance alone the appellant contends that it is clear that, between the date of the trust assignment on the 28th November, 1877, and the date of the policy 12th December, 1877, the respondents must have had notice of the trust assignment, else how does it come that the payees in the trust assignment and the policy are identical, and both differ from the payees in the application.

Moreover, with full knowledge of this assignment, at latest in the month of January, 1878, the respondents call on the appellant for proof of loss. *Peck*, the Inspector of respondents, sent *McKenzie* a postal card; and again, on the 13th February, 1878, and by direction of the manager wrote a letter, both communications calling for proof of the loss—and all this long after the manager had full knowledge of the assignment, "knowledge" before the date of policy as appellant contends, or at all events "knowledge" before calling on appellant for proof of loss, as the manager in his evidence admits.

Another answer to the argument founded upon the execution of this trust deed is this, when the assignment was made the interim receipt was the only contract between the parties, the policy had not issued, the defendants were not bound to issue it at all. The appellant is not shown to have had any notice of the conditions. No evidence to show that condition 4 was one of the conditions on policies issued by respondents at the date of the interim receipt. The appellant should not be bound by conditions not made known to him, and not shown to be one of the conditions in respondent's policy when insurance effected. *Fourdrinier* v. *Hartford Fire Ins. Co.* (1). And the respondents, having held the policy until after the fire, dispensed with the

(1) 15 U. C. C. P. at p. 414.

necessity of endorsing the assignment on the policy. Appellant could not have this done, and it was not necessary that it should be done. Where an endorsement is required to be on a policy that assumes the issue of a policy. *Parsons* v. *Citizens Insurance Co.* (1). The want of this interest is one of the two grounds on which the Court of Appeal reversed the judgment of the Common Pleas.

If during the currency of the policy the insured transferred his interest in the goods, but *before* the loss he regains it, the policy will not be void. Here the appellant transferred the goods to pay his creditors, reserving to himself the residue after paying such creditors; before the loss these creditors were paid, and whatever goods remained revested in appellant. *Crozier* v. *Phœnix Ins. Co.* (2).

The words "*aliened* by sale" in condition 4 mean an *absolute* and *unconditional sale*, in which no interest is reserved to vendor. Here an interest is reserved in the trust deed to vendor, and he, therefore, had an interest in the property at the time of loss. *Sands* v. *Standard Ins. Co.* (3) and the cases there cited. See also *Hardcastle* on Statutes (4).

And I may add also that condition No. 4 only refers to alienations made after the policy was *issued*. Here the policy is dated on the 12th Dec., 1877, but not issued to appellant until after the fire, while the alleged alienation was on the 28th Nov., 1877. The condition says: "In case any property be alienated by sale, &c., the policy shall be void," clearly implying the existence of a policy prior to the act of alienation. The condition does not say that the insurance in existence at the time of change of owner-

(1) 43 U. C. Q. B. at p. 279.
(2) 2 Hannay 200.
(3) 26 Grant 113.
(4) P. 243.

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ship under an interim receipt shall be void, but only when policy issued.

We have also express decisions by American courts that an assignment for benefit of creditors does not avoid a policy unless the assignment is of such a character as to deprive the debtor of all interest in a loss. *Lazarus* v. *The Commonwealth Ins. Co.* (1).

We also contend the evidence shows that the agent of the company had notice of the assignment. And notice to the agent is sufficient. *Rowe* v. *The London & L. F. Ins. Co.* (2).

And in any event, if the respondent's agent led the appellant to believe that notice of the assignment to the company was unnecessary, the company cannot now take advantage of the want of notice to them or of non-compliance with condition 4. *Beebee* v. *The Hartford Insurance Co.* (3), referred to in *Herbert* v. *Mechanics F. Ins. Co.* (4).

Here the agent had express notice of the assignment, and when told to notify the respondent, said "Notice to company not necessary," and when the agent thus misleads the insured, and tells him not to do a thing called for by the condition, the company is bound by the act of the agent. *Hastings M. F. Ins. Co.* v. *Shannon* (5); *Gore D. M. F. Ins. Co.* v. *Samo.* (6).

Finally I submit that *R. S. of O.* ch. 161, sec. 43, leaves it optional with the company to pay claims which are void under, and to waive objections mentioned in, sec. 41, which covers condition 4. Here the company by calling for proof of loss waived the objection now relied on, and did not exercise their option by cancelling the policy when made aware of the assignment. *Smith* v. *Commercial Union Ins. Co.* (7).

(1) 3 Pick. 76.
(2) 12 Grant 311.
(3) 25 Conn. 51.
(4) 43 U. C. Q. B. at 392.
(5) 2 Can. S. C. R. 394 at 408, 409 and cases there cited.
(6) 2 Can. S. C. R. 411, 425, 426.
(7) 33 U. C. Q. B. 82.

The learned counsel also referred to *Richards* v. *Liv. & London Ins. Co.* (1); *Hutchinson* v. *Wright* (2).

Mr. Foster for respondents:

The appellant sues upon the policy issued by the respondents, with its conditions, as a perfect and complete contract. The thirty days insurance effected by the interim receipt had expired prior to the date of the policy and the occurrence of the loss.

If the statements in the application are correct, they form continuing representations upon which the policy issued, and form the basis of the respondents' liability. Now, at the time of the application, there was no idea of an assignment, such as was made on the 29th Nov., 1877. The policy is the only contract upon which the appellant can succeed, and this policy includes the conditions upon which we rely, and upon a breach of which the learned Chief Justice found a verdict for the respondents. See *Pim* v. *Reid* (3); *Sillem* v. *Thornton* (4).

We contend that the conditions avoid the policy, for at the time of the loss the appellant had ceased to be the owner of the property insured, and the insurance had been rendered null by the alienation. *Dadman Manufacturing Co.* v. *Worcester* (5); *Kanady* v. *Gore District Mut. Ins. Co.* (6). Nor can it be open to the appellant to rely upon the interim contract, as he has not declared upon it. But in any event the interim contract was by its terms subject "to all the conditions, rules and regulations contained in and endorsed upon the printed form of policy, in use by the company," and, if relied upon by the plaintiff, became void under the conditions mentioned. *Grant* v. *Reliance M. F. Ins. Co.* (7); *Hatton* v. *Beacon Ins. Co.* (8).

(1) 25 U. C. Q. B. 400.
(2) 25 Beav. 453.
(3) 6 Man. & Gr. 1.
(4) 3 El. & B. 881.
(5) 11 Met. Mass. 429.
(6) 44 U. C. Q. B. 261.
(7) 44 U. C. Q. B. 229.
(8) 16 U. C. Q. B. 316.

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Then as to what took place between the agent and the insured, it is immaterial, as notice to the local agent of the respondents cannot bind them, because when the local agent had transmitted the application to the head office of the respondents he was *functus officio*. To bind the respondents, notice to the chief agent, or the board of directors, was requisite. *Billington* v. *The Provincial Insurance Company* (1); *Stringham* v. *National Ins. Co.* (2).

As to waiver by respondents. The policy of insurance and the conditions of the policy date from the day on which the application was signed, and to make out a case of waiver it must be proved the agent had power to waive a statutory condition. The alienation was without the knowledge, assent, permission, or ratification of the defendants, their directors, secretary, or duly authorized agent. There was no written endorsement of, or valid, authorized assent to, the alienation, or to a waiver of the conditions of the insurance: *Hawke* v. *Niagara District*, (3); *Mason* v. *Hartford* (4); *Hendrickson* v. *The Queen* (5); *McCrae* v. *Waterloo County M. F. Ins. Co.* (6); *Shannon* v. *Gore District M. F. Ins. Co.* (7); *Xenos* v. *Wickman* (8). There was no transfer of the insurance to the alienee.

Mr. *Mowat*, Q.C., in reply:

Sillem v. *Thornton* was overruled by *Thompson* v. *Hopper* (9) on the point relied on by respondent Moreover the variation relied upon does not apply to a cash policy, for the very words used in the whole clause show they are only applicable to a mutual policy. This company had power to issue cash policies and this was a policy of that character.

(1) 2 Ont. App. R. 158.
(2) 42 N. Y. R. 280.
(3) 23 Grant 148.
(4) 37 U. C. Q. B. 437.
(5) 31 U. C. Q. B. 549.
(6) 1 Ont. App. Rep. 218.
(7) 2 Ont. App. R. 396.
(8) L. R. 2 H. L. 296.
(9) El. B. & El. 1038.

RITCHIE, C. J. :—

The plaintiff, being indebted to certain persons, and desiring to have his stock of goods insured, applied to defendants' agent for insurance to the amount of $2,000 for three months. "Loss, if any, to be paid to his creditors, of whom *George McKenzie*, of *Wingham*, is one, and *McMaster & Co.*, of *Toronto*, are second." Whereupon the said agent granted to plaintiff an interim receipt in these words :—

INTERIM RECEIPT.

PHŒNIX MUTUAL FIRE INSURANCE COMPANY—HEAD OFFICE, TORONTO.

Provisional Receipt No. 9. *Agent's Office*, 19*th November*, 1877.

Received from *James McQueen* (Post Office), *Wingham*, twenty-two dollars, being the premium for an insurance to the extent of $2,000 on the property described in his application of this date, numbered 9, subject, however, to the approval of the Board of Directors in *Toronto*, and it is hereby declared that the property so described shall be held insured for thirty days from this date, or until notice be given that the proposal is declined, but the insurance hereby made is subject to all the conditions, rules and regulations contained in, and endorsed upon the printed form of policy in use by the Company at the date hereof.

Cash received, $18.50.

THOMAS HOLMES.

N. B.—In the event of the above insurance not being completed, an equivalent portion of the premium now paid will be retained for the period during which the company has been upon the risk.

R. J. W. M.

On the 28th November the plaintiff, by deed, transferred, *inter alia*, the property so insured, to the said *McKenzie*, in trust to sell the said property, and out of the proceeds thereof, in the first place, to pay all costs, &c., connected with the trust, and in the second place, to pay the creditors of the plaintiff named in the schedule annexed, including the claims of *McKenzie* (they being all creditors of plaintiff) in proportion to their respective claims, and in the third place to pay the balance of such proceeds (if any) to the plaintiff.

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McKenzie and *Holmes*, defendants' agent, and plaintiff, give this account of the transaction:

McKenzie's examination resumed—We went to *Holmes'* office and made application to have an insurance effected on the goods of *McQueen*; that was on the 13th November. It was to the amount of $4,000.00. *Holmes* said on that occasion he would put it in the *Western Assurance Company*; he asked how long we wished to insure, and then wanted to know the reason why we only wanted it for three months; we told him *McQueen* intended to run the goods off, and at the end of three months he would insure for a less amount. Then the application was made; and, shortly after, *Holmes* called me in, and told me the *Western* had accepted $2,000.00, and he was going to put the other $2,000.00 in the *Phœnix*; he stated he had filled up a policy. Mr. *Holmes* filled in the application. That is *Holmes'* writing; the loss is made payable to *McMaster* and me. *Holmes* filled it up, knowing that *McQueen* had called a meeting of creditors on the 12th November, and that the creditors insisted the goods should be insured; the agent of *McMaster* insisted upon the goods being insured, and if *McQueen* had not done it he would have done it himself. We were the largest creditors, and it was made payable to us. Nothing was said about the assignment at that time. That is, I think, about the sum and substance of it; that the creditors insisted upon having the insurance put on for their security. The application was drawn out first on the *Western*, on the 18th November, and this application on the 10th. Up to the making of this application nothing was said about an assignment; from the time of the application to the *Western* to the date of the application to the *Phœnix*, nothing was said. When we made the application to the *Western*, it was said the creditors were to get the loss; and it was still understood in putting it in the *Phœnix* that the payment was to be the same. I cannot say whether the interim receipt was given that day or not. From the time of the application until the time the trust deed was given Mr. *McQueen* went on carrying on the business—up to the 28th November. I went to Mr. *Holmes'* office two or three times—cannot say when, to a day—before the deed was made, and I told Mr. *Holmes* that Mr. *McQueen* wanted to make the assignment for the benefit of his creditors; wanted this, as the creditors, some of them, were crowding him. It was intended to make the assignment to myself, in order to not go into the regular system of assignment, to save expense. I asked *Holmes* if he could fill a document of that kind, and he advised me to go to you—Mr. *Cameron*. I asked *Holmes* on that occasion if it was necessary to notify the Insurance Company of this proposed assignment, and as I understood

him, he said no, as the policy was payable to us, it was not necessary to notify them. I went to him twice on that business. One time I wished him to notify the Company, and afterwards I told him of the agreement; on which occasion I told him, I cannot say. I came to you. It was in pursuance of that arrangement I got the document prepared. When I got the document prepared, I went to *Holmes* and told him I had got the thing arranged; that there was an agreement drawn up between *McQueen* and myself, with the consent of some of the creditors. I told *Holmes* about it, and spoke to him about the insurance again. Either on one occasion or the other I wished him to write to the Company and tell them what had been done; he told me on one occasion there was no necessity, as the policy was payable to the creditors—and I, being one, it was not necessary. *McQueen* was not insolvent; if he had been, this arrangement would never have been made. After the deed was signed, I went into the shop and sold goods. *McQueen* continued there all the while; he continued business the same as before, until the fire. I managed, and my son was the principal one. He was a clerk there and was employed by *McQueen*. *McQueen* was carrying on business all the time. There was no change whatever in the mode of carrying on the business—only I took charge of the cash; they counted the cash to me, and I took charge of it. We pushed the business a little harder and tried to dispose of the goods. I got the policy from *Holmes*. I got it on the morning after the fire. I did not get the policy until after the fire. The policy was not handed over to either *McQueen* or myself until after the fire—the morning after the fire. I knew nothing of the terms of the policy whatever. Neither the application or the policy were read by me or to me by any one. If the amount of the policy is paid there will be over $900.00 coming to *McQueen*; that is, if he succeeds in this suit, there will be over $900.00 coming to him. This is after payment of all his debts.

Cross-Examined—I am the person who gave instructions for this suit. I managed this throughout under the power of Attorney annexed to the deed, and another power of Attorney was given at the time of the fire for the purpose of collecting this loss. We did not intend at the time we made application to keep up the stock. Both *McQueen* and I intended to reduce the stock. This was in order to satisfy the creditors. It was not arranged what was to be done afterwards. There was no amount fixed to reduce it; we intended to reduce it as much as we could in order to satisfy the pushing creditors. Mr. *McQueen's* lease continued for three years. We had no idea of the assignment at the time we made the application; we intended to reduce the stock. The agent ought to have known what

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was necessary. The amount of stock, if it had been properly taken at that time, would be $7,000.00. At the time the insurance was effected, Mr. *Holmes* was told to insure it for three months, and that the reason of the short date policy being asked for was that we intended to reduce the stock; that they did not wish to pay insurance on a larger stock than they were carrying. That they intended to reduce the stock, and then insure on the smaller stock. I have now got the claims of most of the other creditors—nine-tenths of them. I purchased some of them at a shave. I have got about the same amount of interest as Mr. *McQueen*. There was some cash on hand at the time of the fire. I have got a larger interest than Mr. *McQueen*; it is close on a thousand dollars. There is not much difference between us. I did not see the policy in the hands of *Holmes* before the fire. I did not ask for it. I did not know he had that one. I knew he had the *Western*. I thought it necessary to notify the Company of the transfer. I thought the agent was the proper party to notify. I was not often in Toronto at that time.

Thomas Holmes—I am the agent of the *Phœnix* at *Wingham*. I knew *McQueen* and *Mackenzie*. I think Mr. *Mackenzie* spoke to me first about the insurance. The application was made to the *Western* first. I think both *McQueen* and *Mackenzie* were present then. Subsequently an insurance was effected in the *Phœnix* for $2,000.00. Mr. *Mackenzie* said to me, when the *Western* would not take the whole, to fill up the application for the *Phœnix* and he would send Mr. *McQueen* up for it. I think it was Mr. *Mackenzie* who said they were going to run off the goods. I think Mr. *McQueen* was present then. I asked them why they did not take it for a longer period, and they told me they were going to run off the goods to pay the creditors; then they would insure for a longer period for a smaller amount. I do not know that any reason was given why they were making it payable to the creditors. Both these men told me to make it so. I do not remember that they gave any particular reason. Some time after Mr. *Mackenzie* had been away, and he came back and told me he had been appointed manager or assignee of *McQueen's* or something like that, and he asked me if that would make any difference. I think this was before I got the policy from the head office. I am not sure what answer I gave to him, but my impression is I said to him that it would not make any difference, as the loss was made payable to the creditors. I really cannot say whether Mr. *Mackenzie* asked me to notify the Company; I do not remember whether he did or not. I do not think he said anything further about manager or assignee. I think he was there after he told me this. I think that was the only time this matter was spoken of. I do not know

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that I recollect anything being said about drawing up an assignment. I have a kind of a recollection of his being at *Goderich*, but I am not sure. I do not recollect his asking me to draw up an assignment. After he had been away in some place, he came and told me he had been made assignee or manager. I do not recollect where he had been. I do not recollect recommending him to go to your (Mr. *Cameron's*) office to get the papers prepared, but it is very likely I would. In the application I took from *Mackenzie* the loss is payable to *Mackenzie* and *McMaster*. The loss in the policy is made payable to *McQueen*, *McMaster* and others. I do not know why that went in there; the policy is generally made the same as the application. I cannot say that I ever knew it to differ. I do not know whether in this case it differs or not. I never read the policy. I may have written them for *Mackenzie* as assignee or manager, but I have no recollection of it. I have no recollection of writing the company after getting the notice from the company, and before the fire. I do not remember writing any between the application for the insurance and the fire itself. I wrote them once after the fire. I do not remember what was in the letter exactly, but I remember saying I was sorry they were not settling up the claim. I do not remember saying anything in that letter about notice being given to me of the assignment. I sent one letter with the application, and, after the fire, this other letter that I have just told you of. I do not recollect of any but these two letters. There may have been a third letter written some time after, advising them to pay the loss. That is the letter I am referring to now. I am not sure whether I wrote that the day after the fire. I wrote, some considerable time after the fire, this letter I am telling you of. It is quite likely I would write to them, telling them the fire occurred. I cannot tell you the date. I do not know if I said anything in that letter about the assignment. I told them it was an honest claim and that they ought to pay it. That is all I remember.

Cross-examined—My powers were to take applications and to forward them to *Toronto*, and to give interim receipts. I was agent, and had whatever powers that gave me.

Re-examined—There might be other agents there for anything I knew. I do not remember of giving any notice of any change in the risk. The Company has not been in operation very long, I think, over a year. I do not recollect of any change being made in the risk I took. I never took many risks for this Company.

Examination of plaintiff under order :—

By virtue of an order of this Honourable Court, made herein

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under "The Administration of Justice Act," bearing date the 26th day of September, A.D., 1878, and hereunto annexed, directing the examination, on oath, of said plaintiff before me under said Act, at such time and place as should be appointed by me in writing endorsed on said order, I did in pursuance of said order appoint Tuesday, the eighth day of October, A. D., 1878, at ten o'clock in the forenoon at my chambers in the court house, in the town of *Goderich*, for such examination, at which time and place the said plaintiff did attend, and having been duly sworn said as follows: I am the plaintiff. I had been in business before. I effected this insurance a little over a year. I came to *Wingham* 4th October, 1876. I bought out *McKenzie's* stock and rented his store. The stock was taken by me, *McKenzie* and his son before I bought. It was valued at something over $6,000. I paid $5,560 for the stock. We took stock again about 1st November, 1877. Mr. *McKenzie* assisted me in this. I entered it in the stock book then. It was burnt I suppose. There was a safe there at the time of the fire. At the time of the fire there was nothing but the lost stock book and the cash book in the safe. I had finished stock-taking at time I made this insurance. At the time I made the insurance, 19th November, 1877, I was considerably in debt. *McKenzie* and I had not at that time any condition as to going out of business. Mr. *Holmes* took my application. It was some time before I received any policy. He gave me a receipt for the money I paid at the time of the application. I had it up to the time of the fire. I read it through. It wasn't a printed form. I believe it is destroyed by fire now. I paid *Holmes* the cash he asked. At that time we were doing a nice business. I think *Holmes* went over the premises when he took the application. He asked me some questions, but I can't say what. I knew the kind of business carried on next door. After I made the application, I made an agreement with Mr. *McKenzie*, now produced marked "A." I remember all about the agreement. There had been no condition between us as to such an agreement before I made the application. It was at the time of the agreement the condition occurred. He went on selling off. He was taken in to take care of the cash. The business went on in that way up to 15th January. The stock was then reduced. I intended leaving the place as soon as I got everything sold off, and my creditors paid off. The arrangement was made to secure *McKenzie* and the other creditors. Most of our sales were cash sales, but there were not many credit sales. The books shewing the credit sales were destroyed by fire. We bought no stock after this arrangement was made. I don't know how the fire took place. It occurred between one and two o'clock. The first

notice I had of it was when I got up to attend to my little girl and I saw some smoke in the room, and I then went to the room where we kept a stove and saw the fire was out there, and then I got hold of my wife and child and carried them out. There was then no fire in my place. I went out by the back of my house and saw the fire coming out of the hardware store next door. They kept some coal oil next door. I couldn't tell how much. There was a place back in the yard where they kept coal oil. I couldn't say in what part of the hardware store they kept coal oil. Mr. *McKenzie* carried on the business with me at the time of the fire. His son had been with me all along, and was with me when the fire occurred. Mr. *Holmes* handed me my policy. I had no connection with *Holmes* from the time I made the application till I got the policy. From the time I got the policy and the fire *Holmes* and I had no conversation about it. At the time he gave me the policy nothing was said. He just handed it to me. I didn't write to *Holmes* at any time. I never sent any letter to the company before the fire. The signature to the proof of loss, now produced marked B, is mine. The signature to the paper produced marked "C," is Mr. *McKenzie's*. I can't say, I am sure, why I didn't tell the company of the arrangement with Mr. *McKenzie* when I made the application. I thought there was plenty there to pay every man. After I made the arrangement with *McKenzie* I began to reduce the stock, and had no intention of increasing it. I intended to sell off. I gave no notice to *Holmes* of my arrangement with *McKenzie*, nor did I authorize any one to do so, nor have I any reason to believe any other person gave such notice. At the time of the fire I suppose my liabilities were somewhere between $2,000 and $3,000. We arrived at the credit sales, after the loss, from what we knew of them in round figures. The cash sales were something over $700. The stock book we last used was not the same one that we used when I purchased. It's a new stock book. The old one was destroyed by the fire. At the last stock-taking we put down the goods at less than invoice price. Some of the stock destroyed had been in hand since the purchase. I was also insured in the *Western*. I valued stock at the time of fire, at $4,354.91. It was because he was there to look after things, that I stated in my application that I was the *bona fide* owner.

Cross-examined—The valuation of stock at time of fire was based on the last stock-taking. Because the stock was taken at a reduced figure the amount at the time of the fire would be much larger. We add usually more than 20 per cent. to actual cost price to cover profits, carriage, &c. When I made this valuation I honest-

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ly believe it was correct. Our sales were mostly cash, and very little credit from the beginning. I believe the amount of debt due me from beginning to time of fire was $288. There might have been a few dollars of this incurred after the last stock-taking. I think in the cash book no distinction was made between cash received on sales and cash received on debts due from the beginning. The cash received for sales made before last stock-taking would be about the same as the amount of credit sales after last stock-taking. We arrived at amount of stock at the time of fire by deducting from the amount at last stock-taking the cash sales, less 10 per cent., and the value of goods saved. I never saw the policy before the fire. When I made the application I told *Holmes* that *McKenzie* and *McMaster & Co.* had a claim against me. I told him the insurance was for the benefit of my creditors. The agreement marked "A" was subsequently made to carry out the intention I expressed to *Holmes*. *Thomas Holmes* filled out this application for me; I did nothing but sign it. He read it over to me. I applied to *Holmes* first for an insurance on the whole, and he put the half in the *Phœnix* of his own notion. It was read over to see if it was right for the benefit of my creditors. [Mr. *Cameron* proposed to ask, "when you stated in application the average value of your stock at $6,000 did you mean before the application?" and I refuse to admit it.] The reason why I did not afterwards mention the agreement marked "A" was because I thought it was sufficiently mentioned in the application. I don't know whether I ever saw the inspector before now. The papers for proof of loss were first sent to Mr. *McKenzie*. I remember getting papers from the inspector to have proof made in my name at the time of the application and after I was really owner of the goods, subject to the claims of *McKenzie* and others. I never ceased carrying on the business up to the time of the fire. I had the general management of the business all the time. *McKenzie* was helping me to sell. There was no change in the books, or accounts. I took home the goods that were saved. At the time of the agreement I was indebted, but I had enough to pay everybody in full, but I wanted *Mackenzie* in to help me. *Holmes* lives near me.

Re-Cross-Examined—According to the way it was done the *Western* would only take $2,000 on the stock. Mr. *Holmes* didn't tell me why application was made in the *Phœnix*. I gave Mr. *Holmes* the information contained in the application. I mean the answers to the questions. I mentioned to *Holmes* that loss was to be payable to my creditors. Up to that time I had not spoken to *McKenzie* about it. At the time of the application my creditors had been pressing me. Mr. *McKenzie* was pressing me. I myself suggested

the agreement with *McKenzie*, and the agreement was drawn up by a lawyer. I didn't explain any of my business difficulties to *Holmes*. I only told *Holmes*, *McKenzie* and others were creditors.

JAMES McQUEEN.

Taken and signed before me this 8th October, 1878.

W. R. SQUIER, EXR.

A fire occurred which destroyed the property insured on the 15th January, 1878; the policy, which was dated the 12th December, 1877, was not delivered until the morning after the fire. After the loss on the 30th of January, 1878, the inspector of the defendants wrote *McKenzie* as follows:—

POST CARD.

Geo. McKenzie, Esq., *Wingham, Ont.*

Toronto, Jan. 30th, 1878.

DEAR SIR,—Yours of the 24th inst. to hand, and in reply would say Mr. *McQueen* has been sent claim papers to be filled in, and as the policy has not been assigned to any one, he is the only one that can make out such papers; of course when the amount of damage is settled, the parties named in the application have a right to receive the same.

I am, yours, &c.,

OGLE R. PECK,
Inspector.

And on the 13th January, 1878, he agrees with *McKenzie* as follows:—

LETTER.

Geo. McKenzie, Esq.

Toronto, 13th February, 1878.

DEAR SIR,—I would like to have all the information possible to lay before the Board at its next meeting in reference to the *McQueen* claim. Will you kindly let me know who were *McQueen's* creditors at the time the fire occurred, and what was the amount of their respective claims. As vouchers for correctness of prices at stock-taking, the Board will probably require duplicate invoices of stock, which you had better have ready.

Respectfully yours,

OGLE R. PECK,
Inspector.

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The manager says: "I presume that was written by my authority."

It is now claimed that the loss cannot be recovered on account of the transfer to *McKenzie*, and because it is alleged no notice was given of it to the company; and if entitled to recover, the plaintiff is only entitled to recover to the extent of his own interest.

As to the first, the interim receipt was granted with full knowledge by the agent of defendants that the insurance was for the security of plaintiff's creditors as well as himself. He was informed and consulted as to the transfer and the notification thereof to the company, and *McKenzie* says: "When he wished the agent to write to the company and tell them what had been done, he told him (*McKenzie*) there was no necessity, as the policy was payable to the creditors and I being one it was not necessary," and after the fire, from the letters of the inspector, the liability, if not in express terms admitted, certainly was inferentially recognized.

It is not at all to be wondered at that the agent treated the information as immaterial to be communicated, for in substance and reality there was no change in the position of matters, as between the plaintiff and defendants, and no new parties were introduced into the transaction. Had the plaintiff made an assignment whereby he had parted with his interest in the property, the case would have been very different. Though he transferred the legal title in the goods to *McKenzie*, the real pecuniary interest of neither him nor *McKenzie* was altered. As insured by the interim receipt, if the goods were destroyed by fire the creditors would receive their payment, and plaintiff so be relieved from his indebtedness, and plaintiff would receive the surplus; if the goods had not been insured the whole loss would fall on plaintiff, as he would lose his goods and still have to discharge his indebtedness to his creditors; so, though

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the assignment was made to *McKenzie*, if the goods were destroyed without insurance, plaintiff would be in the same position, and if destroyed, as they were, the result is just the same as if destroyed after interim receipt given and before assignment, for *McKenzie* and creditors will be entitled to receive only what is due them, and plaintiff will get the surplus. So that, as plaintiff was at the time of the making of the interim receipt interested to the whole value of the property and to the full amount assured in case of loss, so was he interested after the assignment and at the time of the loss. And so the creditors were in like manner interested in the insurance under the interim receipt in case of loss, and under the assignment and policy, but not to any other or greater or less extent, the only change in the position of the parties being that the legal title of the property was, after the assignment, in *McKenzie* in trust for the creditors and plaintiff, instead of the legal title being in plaintiff for the benefit of the creditors and himself, the equitable and beneficial interests of both plaintiff and creditors being at time of interim receipt and continuing till time of loss the same. I think it is not open to defendants, after what took place between plaintiff, *McKenzie* and the defendants, by and through their agent, and after having, after the loss, handed over the policy, and subsequently, through their inspector, after knowledge of the assignment, recognized the claim as valid and apparently only desired to be satisfied as to the amount, now to dispute it; and as to plaintiff only recovering what may after payment of the creditors be coming to him, what I have already said shows he had an insurable interest in the whole value of the goods. All matters connected with the transaction, both before the interim receipt and after, and before the date and issuing of the policy and its delivery as a valid and binding instrument, were fully and truthfully com-

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municated to the agent authorized by the company to effect the insurance. In fact, all was done under his advice and subject to his directions. He was the party, as agent for defendants, in immediate communication with the assured, and the assured through him with the defendants. I think he must be assumed to have been furnished by his principals with all necessary information to enable him to deal in a proper manner with the parties who the company, through him, sought to get to insure with them.

To him the assured most naturally would and did apply, and on the information furnished by him the assured acted, and he well knowing that in fact the interest of the parties remained the same, and that there was no substantial change in the position of the property or the parties in reference thereto, the change being, in truth, merely to keep the property in the position it was, so that it might not be seized by any one creditor, but be held for the benefit of all, and they get the benefit of the insurance money in case of loss, as was contemplated when the original application was made. in other words, simply to secure the continuance of the arrangement as to the insurance for the benefit alike of the creditors and the assured, and without in any way increasing the liability of the insurers. The company, through him, their agent, did not treat the transfer in this case as an "alienation by sale, insolvency or otherwise," and, therefore, not such a transfer as was contemplated by the conditions of the statute, and so not in this case a transfer of a character to affect their position as insurers, or in anyway to change the risk or increase their liability, and, therefore, not necessary to be communicated in writing to the company or endorsed on the policy, which, in fact, could not be done. Therefore in view of what took place between the assured and the company thro' their agent,

and the delivery of the policy after the loss without objection, and the conduct of the company, thro' their officers, in inferentially recognizing and admitting their liability after the loss and after knowledge of the assignment, desiring only to be satisfied as to the amount, was a full ratification of all that had been done by the agent, I think, now to permit the company to ignore the knowledge and conduct of their agent and officers (all which I think we must assume was within the scope of their authority) and to repudiate all they wrote and said and did, and so to deny successfully their liability under such circumstances, would be, in my opinion, to allow them, with the sanction of a court of justice, to evade payment of what their agent, cognizant of all the circumstances and who acted for them throughout, says is an honest claim, and would be thereby to assist them in perpetrating a gross fraud on an innocent party, who dealt with them through their agent and officers in a frank, truthful and straightforward manner.

The appeal must be allowed with costs in this court and in the Court of Appeal, and the judgment of the Court of Common Pleas affirmed, except so much requiring the plaintiff to produce and file the releases by said judgment required to be produced by the plaintiff.

STRONG, J.:—

I concur with Mr. Justice *Gwynne*.

FOURNIER, J., concurred.

HENRY, J.:—

The discussion of the points in this case took a wider range than, in my opinion, was necessary to determine the rights of the parties to be affected by our judgment.

The action was brought to recover two thousand

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dollars, insured upon goods of the appellant by a policy issued by the respondent's company, dated the twelfth of December, 1877, but not delivered to the appellant till after the loss, which occurred by fire on the fifteenth of January, 1878. The declaration sets out the policy with the statutory conditions applicable to the points in issue, and "variations in conditions applicable to mutual insurances" and "additional conditions." In it the appellant avers that after making application for this insurance, and some time before the fire, he made an assignment in trust to one *George McKenzie* of the goods insured (he having then a contract of insurance upon them in the shape of what is called an interim receipt) to sell the goods to pay:—1st, the costs of the execution of the trust; 2nd, to pay himself and the other creditors of the appellant the amounts due to them, or if insufficient for that purpose, to divide the trust fund amongst them in proportion to their respective claims; and, in the third place, to pay the balance of the trust fund, if any, to the appellant; that at the time of the loss the property assigned was more than sufficient to pay his creditors, and a surplus was afterwards coming to him out of the property so insured; that at the time of the making of the policy the respondents were aware of the assignment in trust; and that the creditors were interested in the insured property, of which, at the time, the respondents had due notice; that the plaintiff and the creditors were so interested when the loss occurred; and assigned a breach for non-payment of the amount insured either to the appellant or the creditors referred to in the policy, and to whom the loss, if any, was made payable.

To this declaration seven pleas were put in.

The first one requiring notice is the third. It alleges that the appellant "was not, at the time of the alleged

loss, interested in the said dry goods, groceries, boots and shoes, as alleged."

That plea is put in as an answer to the whole claim of the appellant. It must be sufficient to defeat the whole claim, or it is not an answer at all. If, therefore, the appellant at the time of the loss had any insurable interest in the goods covered by the policy, our judgment must be for him. The evidence shows that the appellant was the owner of the goods in question, which formed the stock of a business then being carried on by him. Being in solvent circumstances, but behind hand in meeting promptly the bills of some of his creditors, and to secure them, he made, on the 28th of November (some days after his application for the insurance), the assignment in trust referred to and in part recited in the declaration. It would be, I think, an unnecessary waste of language to prove, that by such an assignment the appellant did not part with his whole interest; but afterwards had, as *cestui-que-trust*, a valid insurable interest. I will have occasion hereafter to refer more particularly to this subject when dealing with the defence under other pleas, and feel it quite enough to say at present that the third plea is not an answer to the appellant's claim or the declaration setting it out.

There is not the slighest pretence that there is any evidence to sustain the fourth plea, that the appellant made a false and fraudulent account of the loss.

The 5th plea alleges the making of the application, and that the appellant therein represented, amongst other things, that the goods were not encumbered by mortgage or otherwise; that the value of his average stock was six thousand dollars; that the appellant therein declared the statements in the application were a just and true exposition of all the facts, &c., in regard to the condition, situation, value and risk of the property to be insured,

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so far as the same was known to him; and agreed that the same should be held to form the basis of the liabilities of the respondents; that the policy was effected upon those representations; that after the application, and before the making of the policy, to wit, on the 28th of November, the appellant assigned the insured property to one *George McKenzie*, in trust to sell the same and apply the moneys to arise from such sale in the manner set forth in the declaration, and put *McKenzie* in possession of the goods; that the plaintiff then ceased to carry on business or keep his stock in trade up to an average value of six thousand dollars; that it was material to be made known to them (the insurers) that the appellant had so assigned and transferred the property and had ceased to cary on business or keep his average stock up to the value of six thousand dollars, in order to enable them to estimate the risk, but (and here is the gravamen of the charge and upon which the defence is rested.)

That the plaintiff, *fraudulently* and *deceitfully*, and with intent to induce the defendants to effect the said policy, concealed from the defendants the fact that he had so assigned, transferred and set over the said property to the said *George McKenzie*, and delivered possession thereof, and had ceased to carry on business, or to keep up the general average value of his stock, and did not give the defendants, *or their local agent*, any notice thereof, by reason of which concealment the defendants aver the said policy was and is void.

I have had no little difficulty in determining whether the alleged concealment is by the plea made applicable to the time of the application, or to a concealment of the transfer between the time of the application and the making of the policy, and I cannot even now congratulate myself upon having arrived at a proper conclusion as to what was intended. Some parts of the plea could only apply to a concealment at the time of the application, but that again is wholly inconsistent with other parts of it, and

with the acknowledged facts, and is in its nature impossible, for there could be no concealment at time of the application of what had not then taken place. If applicable at all, it can only be an alleged concealment of the subsequent assignment between the time of its execution and the making of the policy. How the failure to give notice of the assignment (if such were the case) can be called a fraudulent or deceitful concealment, I am wholly at a loss to discover. The plea shows that there is no ground for imputing any concealment when the application was made. The application being then correct and unassailable, the policy might be avoided for other reasons, but certainly not for those set out in the plea. But the plea rests the defence under it on the further ground that the appellant "did not give to the defendants or *their local agent*" any notice of the assignment and other things therein mentioned, but the evidence shows the local agent knew all about it. He was consulted before it was made, and agreed to it, and knew of it several days before the policy was issued.

I will conclude my remarks as to that plea briefly thus: In the first place, it raises no material issue, nor does it contain a sufficient answer. 2nd. It is untrue, when charging the appellant with any fraudulent or deceitful concealment, and it is equally untrue in the statement that he did not give the respondents *or their local agent* notice of the assignment when made. The evidence shows the very opposite. 3rd. I think the plea is bad for the reason that the assignment was not of that nature, that in this case rendered any notice of it necessary. The appellant, it is true, by the assigment changed the nature of his interest, but he still retained such an interest as would be considered an insurable one for the whole value of the property; and if his application had

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been made after the assignment, his right to insure and recover on a policy would have been in law the same as it had been previous to it. If, indeed, the appellant stated in his application that he was the *sole owner, so as to negative the fact of a trust assignment*, the case might be different, and the assignment *and a change of posession*, if shown, might be reasonably considered as circumstances necessary to be communicated in the application, and if made after the issue of the policy to the applicant, it might require the written assent of the Company. I have, however, looked carefully at the application and, strange to say, although apparently stated, in reality it is not, that the appellant was the owner of the goods. The first question to be answered by the applicant relates to landed property, and is so answered. The 2nd, "Is applicant owner of property insured? If not, give owner's name." The answer is: "The owner, *Geo. McKenzie*,—applicant is tenant." The 3rd question, "Name of tenant or occupant?" Answer "*James McQueen*." These are the only questions and answers in any way relating to the *ownership* of the goods, if even they do, which I think is not the case. The three questions read seriatim are calculated to impress the idea that the second did not refer to landed property. It is seldom, if ever, such a question would be asked as to goods; but owing to mortgages, &c., it is more necessary to ask such about landed property. The question is followed by the direction "If not, give owner's name," and that immediately followed by requiring the "name of tenant or occupant," shows clearly that question number two was originally, at all events, intended to enquire as to landed property. The application was filled in by *Holmes*, the local agent of the respondents, and he, as their agent, and acting for them, wrote an answer to question number two as applicable to landed property. The result is, that if the question

was intended to ascertain the owner of the goods, it failed in its object; and under the circumstances the appellant cannot be said to have represented himself as the owner of goods wholly unencumbered. If a mistake in this respect was really made in the filling up of the application by the respondents through their agent, the appellant is not answerable. The agent, in his evidence, says: "My powers were to take applications and to forward them to *Toronto*, and give interim receipts. I was agent, and had whatever powers that gave me." Some fire insurance companies provide against their liability through the mistake or wrongful act of any of their local agents, and the policies provide that if an application be filled up by such agent it will be deemed the act of the applicant. There is no such provision in this policy, and in such a case I must look at the act of the agent here as that of his principal. He had authority over the whole subject-matter up to the receipt of the premium and the granting of the interim receipt, and, as I hold, he was the proper recipient of a requisite notice of any change up to the making of the policy. Under the circumstances, I think no notice of the change was necessary, but if it were, I think that given to the agent was sufficient. If the manager of the company looked carefully, as it was his duty to do, at the answers given tc the printed questions, he could not have failed to discover the mistake (if it was one) of the agent in filling up that to question number two. By not doing so, and by not seeking for further information as to the ownership of the goods before issuing the policy, the company is now estopped from saying that the appellant made any false representation whatever as to such ownership.

The sixth plea alleges the application and payment of the premium and the issue of the interim receipt which it recites: that the receipt constituted an insur-

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ance for thirty days unless sooner cancelled, "subject to all the conditions, rules and regulations in and endorsed upon the printed form of policy in use by the defendants at the date thereof;" that the receipt was not cancelled, but the same was in force, to wit, on the 12th of December, 1877, "when the defendants executed and delivered the policy in the declaration mentioned"; that the conditions, rules and regulations set out in the declaration are the same as those referred to in the interim receipt; that the appellant, at the time of the application, was the legal and equitable owner of the insured property; but that, while the same was covered by the interim receipt, he made the assignment referred to in the declaration,

Without the written permission endorsed on the policy by an agent of the defendants duly authorized for that purpose, as required by the condition endorsed on the said policy, and without the knowledge and consent of the defendants.

Had the appellant's right of action been founded on an insurance contract, which at one time existed, under the interim receipt and no policy issued, I could understand a contention that a transfer of the property which would have left no interest in the insured at the time of the loss would prevent the recovery of the amount covered by it; and the same principle is equally applicable when the insurance was by a policy. We are, however, not called upon to say anything as to the effect of the conditions as applicable to an interim receipt. By the terms of it and by the tacit and understood agreement of the parties, that was only to be in force till a policy should be issued, and that when issued the parties were to be governed by it alone. The interim receipt was only for an insurance in the meantime. The policy by express words related back to the time of the application, and was in all respects a substitution for the interim receipt.

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The question then is not, whether the appellant forfeited his insurance under the interim receipt, for that is not the issue, but did he forfeit it under the subsequent policy? To plead to the action on the policy what is stated to be a defence under the interim receipt would be a departure, would raise an immaterial issue and be therefore no defence. How then does the condition (No. 4) operate in regard to the interim receipt, is a question that may be asked; and my answer is that in consequence of the pecular wording of it it may, as I think it is, be wholy inapplicable. The condition is that license to assign must be "endorsed hereon." Until a policy exists it is impossible to endorse anything upon it. The condition is therefore only inapplicable to an interim receipt; and if no policy issued, and an action were brought on an interim receipt, I should have great difficulty in deciding that the condition formed a part of the contract. The undertaking of the insured amounts to this, "should a policy be hereafter issued on my application, I hereby agree to make no assignment of the property without a written permission endorsed thereon." The defence therefore, as I think, could not be set up to an action on the interim receipt. It may be considered inequitable to rule so, but it must be remembered this is but a technical objection to a large extent, and where such are raised they should be clearly provided for, and companies should either make contracts of their own drawing plain, or take the consequences of all ambiguities or defects. I think that condition No. 4 refers to an assignment subsequent to the policy, and not to one subsequent to the application and before the making of the policy which is the case here.

The seventh and only remaining plea alleges, that at the time of the sealing and delivery of the policy and loss, the property was owned by one *George McKenzie*,

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As set out in the plaintiff's declaration, and the interest of the plaintiff in the said property was not stated in or upon the said policy as required by the said statutory condition in that behalf endorsed on the said policy as required.

The answer to the defence set up by the latter plea is, first, that the property was not owned by *McKenzie*, as evidenced by the declaration and the assignment therein recited, at any time up to the loss, so as denude the assured of his insurable interest; and secondly, that by the wording of the condition it does not apply to an assignment previous to the policy.

The 4th statutory condition, respecting which we have heard so much, is after all to a great extent the same as the law otherwise prescribes. By the latter no one can recover on a fire insurance policy unless he has an interest at the time of the loss. If a party insured property and subsequently assigned it, but got it back before the loss, he could recover. The conditions generally annexed to policies and the statutory conditions provide otherwise. They, however, provide that, if the company in a particular manner manifest their assent, the insurance still remains notwithstanding the assignment, and, in case of loss, the interested party will be indemnified up to the amount insured. In some cases this is secured by an assignment of the policy with the assent of the company. Such an arrangement dispenses with the necessity of a new policy and enables the purchaser to appropriate for his own benefit, what he otherwise would not have, the policy of the seller. Where the whole interest in insured property is assigned, a case arises wherein it is necessary, for the object just mentioned, to obtain the assent of the company, the object being, as the seller's interest in the policy will be terminable by a sale and transfer, to enable the purchaser to get the benefit of the unexpired term, and in case of loss to recover the insurance. Such then I take to be the object and intention of the condition in question

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annexed to policies. The assignment contemplated I take to be one by which the assignor divests himself of all title and interest. The words are: "If the property is assigned,"—which means wholly transferred. It is not prohibitory of the assignment of an interest as security by way of a chattel mortgage or otherwise, where the resulting beneficial interest remains; or to a conveyance made to enable a party to sell and convey property for the use and benefit of the party making it. It is admittedly good law that an equitable interest is sufficient, and this court unanimously lately so held in the case of *Clark* v. *The Scottish Imperial Insurance Company* (1). In that case the plaintiff had but an equitable lien without any possession of the subject-matter, but the authorities justified our judgment. In this case the appellant always retained an insurable interest to the extent of the whole value of the property, and also the possession in the same building. He, it is true, made an assignment to *McKenzie*, but it was for special objects—first to sell the property, then to apply proceeds to pay the creditors of the appellant and to pay any remaining balance to him, the appellant. That assignment was not irrevocable. The assignor, by paying otherwise his creditors, or, in certain events, without doing so, might call for a re-assignment. None of the creditors, except *McKenzie*, had any vested interest, for there is nothing to shew their acceptance of the assignment or agreement to be bound by it, and the latter was under no obligation to them to execute the trust. They were not bound in any way to agree to the assignment or to the terms contained in it. If *McKenzie* executed the trust they might of course adopt the assignment so far as to claim from him payment according to their several interests, but up to the loss the assignment was one to a great extent between the appellant and *McKenzie* only (2). The

(1) 4 Can. S. C. R. 192.

(2) Dart on Vendors and Pur., 902.

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appellant was interested throughout. He was not insolvent, and is shown to be entitled to $900 after providing for the payment of all his creditors' demands, if he recovers in this suit. Nothing could more pointedly show his continuing interest in the insured property.

I regret to have been obliged to go so much into detail in this matter, but as differences of opinion have been expressed by several of the learned judges of the courts in *Ontario* in regard to some of the points in issue in this and other cases, I have thought it but right to give my views at length in regard to those involved in our decision. According to my best judgment the appellant is legally entitled to succeed, and I think the appeal should be allowed, the judgment of the Court of Appeal of *Ontario* reversed, and that of the Court of Common Pleas affirmed with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

In the view which I take of this case, it raises no question, whether the *Ontario* Statute, known as "The Fire Insurance Policy Act of 1876," is or not *ultra vires* of the Provincial Legislature; nor whether the provisions of that statute, assuming it not to be *ult a vires*, apply to an insurance effected through the medium of what is known as an "interim receipt;" nor can the fact, that the plaintiff had been temporarily insured through the medium of such an "interim receipt," before the execution by the defendants of the policy which is declared upon, be at all invoked to the prejudice of the plaintiff's right to recover upon the policy declared upon, which is duly executed under the common seal of the defendants.

The case went down for trial before a judge without a jury, under the provisions on that behalf contained in ch. 50 of the Revised Statutes of *Ontario*. The learned

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judge who tried the cause, after hearing all the evidence on both sides, entered a formal verdict for the defendants, reserving to the plaintiff leave to move the court in which the action was pending to enter a verdict for him for the sum of $2050, if the court should be of opinion that, *upon the whole evidence*, the plaintiff ought to recover; and it was agreed that to give effect to this reservation all amendments that might be necessary should be made. This reservation was plainly made in view of the provisions contained in sections 7 and 8 of ch. 49 of the Revised Statutes of *Ontario*, which enacted that no proceeding at law or equity should be defeated by any formal objection, but that *at any time* during the progress of any action, suit, or other proceeding at law or in equity, the court or a judge may, upon the application of any of the parties, or *without any such application*, make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective *parties and of the real question in controversy between them*, and best calculated to secure the giving of judgment according to the very right and justice of the case.

Now, the effect of this reservation accompanying the verdict was to impose upon the Court in which the action was pending the duty of determining the rights of the parties upon the real question in controversy between them, *upon a view of the evidence alone*, and to say whether or not, upon such view of the evidence, the plaintiff was entitled to recover, with this provision added, that his right should not be defeated by any formal objection, but that if the issues joined were not such, having regard to the evidence, as sufficiently to raise the very point in controversy, the Court should amend the pleadings, *nunc pro tunc*, so as to make them conform to the evidence, or might render such judgment

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as the evidence warranted, irrespective of the issues as joined, in case there should prove to be any defect or informality in those issues, or that these were not appropriately framed, having regard to the evidence.

The short material substance of the plaintiff's declaration is, that before effecting the insurance of the goods mentioned in the policy declared upon, which is dated the 12th day of Dec., 1877, to wit on the 28th Nov., 1877, he assigned the goods to one *George McKenzie* in trust to sell, and out of the proceeds thereof in the first place to pay all expenses, &c., attending the trust, and in the second place to pay the creditors of the plaintiff, and among others the said *George McKenzie, McMaster & Co.*, and others, who were then creditors of the plaintiff, the amounts due to them, and in case the said trust fund should not be enough to pay the said creditors in full, then to pay them such trust fund in proportion to their respective claims; and, in the third place, to pay the balance of such trust fund to the plaintiff; and the plaintiff averred that at the time of the making by the said defendants of the said policy the defendants were aware of the said trust assignment as aforesaid, and that the said *George McKenzie*, the said *McMaster & Company* and others, the creditors of the plaintiff, were interested in the said property so insured as aforesaid, and the said defendants at the time aforesaid had due notice thereof. And further, that the plaintiff and the said *George McKenzie*, the said *McMaster & Company* and others, the creditors of the plaintiff, continued interested in the property so insured by the defendants until the loss by fire stated in the declaration. Yet the defendants did not make good the said loss or damage so sustained or any part thereof, and did not pay to the plaintiff, nor to the said *George McKenzie, McMaster and Company* and others, or either of them, the said loss or any part thereof, to the plaintiff's damage of $3,000.

The real point in controversy between the parties appears to have been, was it or not true, as alleged in the declaration, that at the time of the making of the policy declared upon the defendants were aware of the trust assignment stated in the declaration? The defendants, however, pleaded several pleas in bar of the plaintiff's action.

1st. *Non est factum*—this plea was disproved.

2nd. That the goods insured were not destroyed by fire as alleged, this was also disproved.

3rd. That the plaintiff was not at the time of the loss interested in the said goods, as alleged in his declaration. This plea was also disproved, for it appeared that the plaintiff's interest at the time of the loss was just the same as it was at the date of the policy.

4th. That after the loss the plaintiff delivered to the defendants a *false and fraudulent account of the alleged loss and damage*, in which (among other things) he stated that he was the *bonâ fide* owner of the property stated to be destroyed, holding the same as stated in the policy, and that no other person or person had any interest legal or equitable in the said property, excepting as mentioned in the said policy, whereas the plaintiff before the happening of the said loss without the knowledge or permission of the defendants had assigned, transferred and set over to one *George McKenzie* the said property in the said policy mentioned, in trust to sell the same and to apply the monies arising from such sale in the manner mentioned in the plaintiff's declaration.

The defendants could scarcely have expected to have succeeded in establishing a statement to be false and fraudulent, which, assuming it to have been made, was made in the belief, which the evidence warrants the conclusion that the plaintiff entertained, that the words in the policy whereby the defendants covenanted with

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the plaintiff: "*That the loss, if any, should be payable "to George McKenzie, of Wingham, and McMaster & "Co., and others as creditors, as their interest may ap-"pear,*" were inserted therein for the purpose of expressing the true nature of the plaintiff's interest in the property, especially if, as is alleged by the plaintiff in his declaration, the precise nature of the plaintiff's interest, and the fact of the execution of the trust assignment, by which alone *McKenzie, McMaster & Co.*, and others, the creditors of plaintiff, acquired any interest, was communicated to the defendants before they granted the policy sued upon, in which case, if the policy did not sufficiently express plaintiff's interest according to the fact, it was the defendants own fault: however, a verdict upon this issue had necessarily to be rendered in favour of the plaintiff, for the defendants do not appear to have offered any evidence in support of this plea, or to have relied upon any such false or fraudulent account of loss as is alleged in the plea.

The 5th plea, after averring that on the 19th Nov., 1877, the plaintiff made a written application for insurance, which he agreed should form the basis of the defendants' liability, in which he represented the goods to be unincumbered and that the value of his average stock was $6,000, and that the defendants executed the policy sued upon on the faith of the representations contained in the said application, alleges, by way of defence to the action, that on the 28th Nov., 1877, the plaintiff executed the trust assignment in the declaration mentioned and ceased to carry on business and to keep his stock up to an average value of $6,000, *and the defendants say that the plaintiff fraudulently and deceitfully, and with intent to induce the defendants to effect the policy, concealed* from the defendants the fact that he had so assigned the said property to *McKenzie* and had delivered possession thereof, and had ceased to

carry on business, or to keep up the general average value of his stock as aforesaid, and did not give the defendants, or their local agent, any notice thereof, by reason of which concealment the defendants aver that the policy is void.

As to this plea, it is to be observed, in the first place, that the policy does not import into it anything contained in the written application referred to in this plea. If the insurers desire to make the contents of the application, or any part thereof, part of the policy, such part should be introduced into the policy; they may elect to make such part of the application as they please part of the policy by introducing it into the policy; or they may exclude the whole from the policy by omitting to introduce any part into it (1).

There was nothing then in this policy which required the plaintiff to keep up the average value of his stock to $6,000. The gist of this plea, however, is that the plaintiff *fraudulently and deceitfully, and with intent to induce the* defendants to grant the policy, concealed from the defendants, and did not communicate to their local agent, the fact of the execution of the trust assignment of the 28th November, or give him any notice thereof. In this it joins issue directly with the allegation in the plaintiff's declaration upon what is the real substantial point in controversy between the parties. Now the evidence upon this point establishes beyond all doubt that the local agent of the defendants, at the time of receiving the application set out in the plea of the date of the 19th November, was informed that the plaintiff had called a meeting of his creditors, and that it was they who insisted that the goods should be insured, and that in reply to a question put by him enquiring why the application was not for a longer period than three

(1) *Scanlan* v. *Seals*, 5 I. L. Rep. 154, which appears to have been followed by the Court of C. P., *Ont.*, in *Brogan* v. *Manufacturers Insurance Co.*, 29 U. C. C. P., 414.

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months, he was informed both by the plaintiff and *Mackenzie*, to whom the trust assignment was subquently made, that they were going to run off the goods to pay the creditors; that subsequently, and just before the 28th Nov., the local agent was also informed that the plantiff was about to execute an assignment for the benefit of his creditors to *Mackenzie*, and the defendants local agent was asked to prepare the document, but that he advised Mr. *Mackenzie* to go to a lawyer, a Mr. *Cameron*, for that purpose; that Mr. *Mackenzie* asked him to notify the company, the defendants, of the proposed assignment; that upon the trust assignment being executed the said local agent of the defendants was informed thereof, and was requested to write to the defendants and to tell them what had been done, and that he said there was no necessity, as by the application then already sent forward the policy was asked to be made payable to the creditors, and as *McKenzie* was one of the creditors it was not necessary.

Now at this time the policy had not been granted, nor was it executed for a fortnight afterwards; there can be no doubt that upon the 28th of Nov. Mr. *Holmes*, the respondents' local agent, to whom the application was originally made, was as much the agent of the defendants to receive information and notice of any matter which might influence the defendants in determining to grant the policy, or to decline assuming the risk, as he was their local agent to receive the application in the first instance, and notice to him of the intention to execute the trust assignment and of the fact of its having been executed when executed was notice to the respondents. There is nothing that I know of that requires that notice to him of these matters should of necessity be in writing. The plaintiff seems to have done every thing necessary for him to do, to enable the

defendants deliberately to determine whether they would incur the risk or not, when he communicated these facts to the local agent through whom the application had been made. These facts were so communicated before the defendants granted the policy which is sued upon, and although it may be true that the local agent of the defendants neglected to convey to the defendants the information communicated to him for the purpose, still the defendants, when they executed the policy upon the 12th of December, must be held to have had knowledge of the facts so communicated to their agent, and to have executed the policy with the knowledge of those facts. There is, however, a piece of internal evidence in the policy which is not explained, and from which the reasonable and rational inference can be drawn, that in fact these officers of the company who prepared and executed the policy were aware of the execution of the trust assignment; for the policy provides that loss, if any, should be paid to plaintiff's creditors, precisely as is provided in the trust assignment, "*as their interest may appear.*" The issue therefore upon this plea, which raises the real point in controversy between the parties, could only have been found for the plaintiff.

The sixth plea, after averring the application made upon the 19th Nov., 1877, to defendants' agent for a policy for $2,000.00 for 3 months, and the granting by such agent of an interim receipt, which the plea avers to have operated as an insurance for 30 days, unless cancelled within that period, subject to all the conditions, rules and regulations contained in and endorsed upon the printed form of policy in use by the defendants at the date thereof, proceeds to say, that while such interim receipt insurance was in full force, the defendants executed and delivered the policy in the declaration mentioned, and the defendants further say that at the

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time of the making of the said application, and while the said property was so insured as aforesaid under the said receipt, subject to the conditions, rules and regulations contained in and endorsed upon the printed form of policy in use by the defendants, which are those set out in the declaration as endorsed upon the policy declared upon, the plaintiff on 28th Nov., without the written permission endorsed on the said policy by an agent of the defendants' duly authorized for such purpose, as required by the condition in that behalf, endorsed on the said policy, and *without the knowledge and consent of the defendants*, executed and delivered to *George McKenzie*, the deed of assignment mentioned in the declaration, by reason of which the said policy and the insurance so effected with defendants became void.

The issue offered by this plea is substantially the same as that offered by the 5th plea, although the form of the plea has created some confusion.

The declaration had already alleged the execution of the trust assignment of the 27th Nov. and the subsequent execution by the defendants of the policy of the 12th Dec., with full knowledge and notice given to them of the execution of the trust assignment in favor of plaintiff's creditors.

The gist of the plea is in its closing paragraph: It alleges the application for insurance on the 19th Nov., the granting then of an interim receipt, the execution of the trust assignment of the 28th Nov., the subsequent execution of the policy of the 12th Dec., which the plea insists is avoided for the reason that, as the plea alleges, it was granted without any knowledge of the execution of the trust deed, and without the consent of the defendants.

Now, if it be true, as alleged in the declaration, and as established by the evidence, as I have already point-

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ed out when considering the 5th plea, that at the time of the trust assignment being contemplated the intention to execute it was communicated to the defendants' agent who had received the application, and that immediately upon its execution the fact of such execution and its purport were in like manner communicated, and that the defendants did not execute the policy for a fortnight afterwards, and that under the circumstances the defendants must be held to have consented to the assignment and to have executed the policy with full knowledge of it, it can make no possible difference that at the time of the execution of the trust assignment, and of the communication to the defendants, through their agent, of the fact of its execution, there was an insurance existing upon an interim receipt.

When the information was so communicated the defendants might, if they had pleased, have avoided the insurance upon the interim receipt and have refused to grant a policy under seal; not having done so, but on the contrary having issued the policy under their seal, whereby they consented with the plaintiff that in case of loss the amount should be payable to *George McKenzie* and *McMaster* and Company, and others *as creditors* of the plaintiff as *their interest* might appear, the defendants must be held to have consented to the trust assignment, so that the only point in controversy in reality was, as was raised on the 5th plea: had the defendants, directly or through their agent, knowledge of the execution of the trust assignment before the policy declared upon was granted?

The condition relied upon in the plea is a condition which, in terms of the endorsement on the policy, is restricted in its application to "Mutual Insurances." The condition is verbatim taken from the Act relating to Mutual Insurances, and its provisions relate to a

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policy granted upon the Mutual Insurance principle, whereas the policy declared upon appears to have been granted for a cash premium paid once for all, and not at all upon the mutual insurance principle; but assuming for the sake of argument, a temporary insurance, effected by payment of premium and an interim receipt pending the determination of the company upon an application for a policy under seal for a definite term extending beyond the period covered by the interim receipt, to be subject to the 4th condition endorsed on the policy, unaffected by the variation which is declared to be applicable to mutual insurances; and, indeed, assuming the interim receipt insurance to be subject to the condition as varied (points which are not necessary to be determined in this case), still it is apparent that the assignment there contemplated is an assignment made subsequently to the granting of the policy under which the property assigned, is, at the time of assignment, insured. The condition is that if the *property insured* is assigned, &c., &c., without written permission endorsed *hereon*—that is on the policy whereby it is insured—the policy in existence shall *become* void *thereby*—that is by such assignment. Now, granting for the sake of argument it to be necessary in the case of an interim receipt insurance, that an assignment made pending the existence of the insurance upon the interim receipt should be endorsed upon the interim receipt at the peril, in default, of forfeiture of the insurance existing under the interim receipt, it is plain that *the condition* does not require such an assignment to be endorsed upon a policy subsequently granted under the seal of the company, containing the covenant of the company and extending the period of insurance beyond that covered by the interim receipt. The assignment when made could not be endorsed on a policy not in existence, nor could a policy not in existence *become* void. The

insurance existing under the interim receipt might *become* void by reason of such an assignment not being endorsed upon the interim receipt; but if the company with full knowledge of the assignment should recognize it by issuing their policy under seal for a term extending beyond the period to which the interim receipt applied, such an assignment so recognized cannot, it is plain, be within the scope of the condition against assignment endorsed upon the subsequently issued policy. There is no sense or reason in the contention that it should be, for if the assignment was made known to the Company before they granted the policy under seal, it is but reasonable that they should be bound by the covenant contained in the policy, which was made with full knowledge of the assignment; and if the assignment made an alteration in the condition of the property different from that in which it was when they insured, and upon the faith of which they did insure, and which it was material should have been made known to them, and was not made known to them, in that case the policy so granted might be avoided, not for a breach of the condition endorsed on the policy, but upon plea averring, as has been here averred by the defendants expressly in their 5th plea, and substantially also as it appears to me in the 6th plea, that the plaintiff fraudulently withheld from the defendants all knowledge and notice of a fact material to be made known to them, and so by fraud and deceit procured the policy. This, as I have already said, is the real point in controversy between the parties here, and upon the evidence could not properly have been decided otherwise than against the defendants.

The Court of Common Pleas, on the argument of the case reserved, and in pursuance of the terms of the agreement entered into at the trial, allowed a replication to be filed to this 6th plea, but, as it appears to me,

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the issue which had already been joined between the parties, and which put in issue the material part of the 6th plea, which, in my opinion, consisted in the allegation that the assignment of the 28th November had been made "without the knowledge and consent of the defendants," that is at the time of their executing the policy on the 12th December, was quite sufficient. However, the material part of the replication as allowed was, upon the evidence, properly found in favor of the plaintiff; it would have been better and more conformable to the evidence if the replication, instead of alleging that notice of the assignment had been given as therein stated "before the loss," had alleged, as the evidence established that it had been given before the defendants granted and executed the policy declared upon. The case, when analysed and its facts are thoroughly understood, seems to me to be free from all difficulty, the whole point being, whether or not an agent of an insurance company authorized to receive applications for insurance, and who had received such an application, is the proper person, (while the application is still under the consideration of the company who have not yet agreed to grant the policy) to whom any alteration in the subject of the insurance, affecting such application, and material to be communicated to enable the company to determine whether they will or not grant the policy, may be communicated so as to affect the company with notice thereof.

I cannot entertain a doubt that he is, and that he is was never doubted or disputed, but on the contrary was assumed as clear law upon all sides, and by this court in *Liverpool, London & Globe Insurance Co.* v. *Wyld* (1).

Nothing was said in argument upon the 7th plea, nor do I think could be, because the evidence, I think, shows that the interest of *McKenzie* in the property was known

(1) 1 Can. S. C. R. 604.

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to the defendants when they granted the policy, and also the interest of the plaintiff, and the reference to *McKenzie* in the policy as a creditor of the plaintiff does, I think, sufficiently comply with the condition referred to in the 7th plea, but assuming it not to do so, still, as the defendants are held to be affected with knowledge of all the facts of the case when they executed the policy, it is wholly their fault if the interest of the plaintiff is not sufficiently stated in the policy, and as by the reservation at the trial, the rights of the parties are to be determined by the evidence, the defendants could not be allowed to prevail upon this plea if there were anything in it.

The Court of Common Pleas, in the rule which is the subject of this appeal, has ordered that a verdict be entered for the plaintiff for $2,050.00, upon the plaintiff producing to and filing with the master a release from all necessary parties of their claim to the insurance monies, proof of necessary parties to be given by affidavit to the satisfaction of the master, such release to be handed over by the master to the defendants by their attorney. I confess I cannot see the necessity or propriety of this condition so attached to the entry of a verdict in favor of the plaintiff. The policy, although having in it the words "loss if any payable," &c., &c., is granted to the plaintiff. He is the person named therein as the insured, he is the person with whom the defendants contract, with whom the defendants covenant to make good all loss or damage to be sustained by the peril insured against, and the words "loss if any payable," &c., &c., operate to enable the defendants, in fulfilment of that covenant, to pay the parties named, and to set up such payment to an action by the plaintiff against them for breach of this covenant, but if they do not pay them or any one, then, if loss has been incurred within the terms of the policy, a breach of their covenant is committed, and

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the plaintiff is the person in whom the right of action for such breach is vested—he is the proper person to sue.

In *McCallum* v. *The Ætna Insurance Co.* (1), the Court of Common Pleas held, and I think rightly, that, even in a marine policy which had not in it the words "for "or in the name of all parties interested," nor "for "whom it may concern," but stated that the policy entered into "on account of *A. C.*"—"loss if any pay-"able to *L. McC.*," the contract was with *A. C.*, who only could sue for a breach of the contract. *A fortiori* in this case, which is not a marine policy, and where the policy expressly states the plaintiff to be the person with whom the contract is made and with whom the defendants' covenant is made, he should sue alone for a breach of that covenant.

I cannot see upon what principle the Court should have interposed its authority to impose a condition affecting the plaintiff's verdict, in the interest of the defendants who have committed a breach of their covenant sued upon, and which condition was of a nature that the defendants, not only had not set up any claim to be entitled to the benefit of, but could not have put the claim upon the record in the shape of a plea in excuse of the breach of covenant for which the action is brought, or in bar of the action.

Although the plaintiff is not a party objecting under rule 61 of this Court to the rule against which the defendants have appealed, still, lest this case should be regarded as a precedent approving of the restriction imposed by the Court upon the entry of a verdict in plaintiff's favor, and lest these conditions should be found embarrassing in the particular case, I think that under the rule we may with propriety order the rule of the Court of Common Pleas to be amended by *omit-*

(1) 20 U. C. C. P. 289.

ting the condition imposed as to filing releases, and leave the assignee *McKenzie* to protect the interest of the creditors, which he can easily do if there be any necessity for his interfering for that purpose.

The defendants have no right that I can see to claim the interference of the Court to protect them against the legal consequences of the breach of their covenant with the plaintiff, and to suspend the recovery of a verdict against them until all plaintiff's creditors shall release the defendants from all claim they may have to the money recoverable by the plaintiff from the defendants for such breach. If the defendants had paid *McKenzie*, the assignee in trust, they could have pleaded that payment as a fulfilment of their covenant, and by this conditional verdict they are given a benefit, not only not asserted on the record, but which could not be, and which in fact operates as a premium to them for committing the breach of covenant for which they are sued.

Appeal allowed with costs.

Solicitor for appellant: *Malcolm C. Cameron.*

Solicitors for respondents: *Foster & Clarke.*