EDMUND GUERIN (PLAINTIFF).....APPELLANT; 1898

AND *Mar. 17.
*Nov. 21.

THE MANCHESTER FIRE ASSURANCE COMPANY (DEFENDANT).. } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Fire insurance—Conditions of policy—Notice—Proofs of loss—Change in risk—Insurable interest—Mortgage clause—Arbitration—Condition precedent—Foreign statutory conditions—R. S. O. (1897) *c.* 203, *s.* 168 *—Transfer of mortgage—Assignment of rights under policy after loss—Signification of assignment—Arts.* 1571, 2475, 2478, 2483, 2574, 2576 *C. C.—Right of action.*

Where a condition in a policy of insurance against fire provided that any change material to the risk within the control or knowledge of the insured should avoid the policy, unless notice was given to the company ;

Held, that changing the occupation of the insured premises from a dwelling to a hotel was a change material to the risk within the meaning of this condition.

A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss.

In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code.

Where a condition in the policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim ;

Held, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy.

Quaere, per Taschereau J.—Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties ?

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

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) (1), reversing the judgment of the Superior Court, sitting in review, and restoring the judgment of the Superior Court, District of Montreal (1), which had dismissed the action with costs.

The circumstances under which the controversy arose and the questions at issue in the case are stated in the judgment reported.

Rielle and *Madore* for the appellant. The change in the risk from a dwelling-house to a hotel was the act of the owner who was insured, and the performance of the different acts mentioned in the conditions of the policy were likewise imposed upon the owner, so that the omission of these formalities is the fault of the owner or insured. The mortgage clause contained in the policy provides that the insurance, as to the mortagee, shall not be invalidated by *any act or neglect* of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy. The policy states that the mortgagee interested in the policy is, and that the loss, if any, should be payable to, Mr. James McCready, Jr. Consequently, the reasons given by Mr. Justice Hall, cannot be urged against McCready, the mortgagee, nor against appellant, his assignee, who is subrogated in all his rights.

The "Mortgage Clause" binds the company towards the mortgagee and is a part of the policy and equity favours such a clause for the protection of the mortgagee who may be an absentee. See *Stanton* v. *Home Fire Ins. Co.* (2); Griswold (rev. ed.), Fire Underwriters Text Book, Nos. 733 to 744*a*. Here although the mortgagee was not bound to give the

(1) Q. R. 5 Q. B. 434.

(2) 21 L. C. Jur. 211; 24 L. C. Jur. 38.

notice or furnish proof of the loss, he actually complied, as much as it was possible for him to do, with the conditions imposed upon the insured, by sending the company a statutory declaration of all the facts, mentioning in that notice and declaration that the insured had died.

Appellant submits, that at the date of the fire McCready had still some insurable interest in the mortgage transferred. For when he says that at the time of the fire he had no more interest in that mortgage, it is clear, that what he means is that at that time he had transferred his rights. That transfer was made to appellant under *all the usual legal warranties.* Art. 1574 C. C. says: "The sale of a debt or other right, includes its accessories, such as *securities*, *privileges* and *hypothecs*," and Art. 1508 C. C. adds "the seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold." So that, not only was McCready bound to warranty for the amount of the sum transferred, but also at the date of the fire bound to warranty for the accessories, amongst which was the policy in question. His interest in the mortgage transferred remained the same on account of his responsibility towards appellant. This interest was an insurable one and remained practically the same after the transfer as before, on account of that warranty. McCready in discharge of this warranty made the assignment of his rights against respondent in virtue of the policy which was served upon respondent previous to the action, and even if there were informalities in respect to this signification that cannot render the transfer irregular. Compare *The Montreal Ins. Co.* v. *McGillivray* (1). Art. 2576 C. C. does not apply to a mortgagee's claim but contemplates alienation of the thing insured.

(1) 8 L. C. R. 401; 2 L. C. Jur. 221.

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We also rely upon *Black* v. *National Ins. Co.* (1); *Vézina* v. *The New York Life Ins. Co.* (2); 2 May on Insurance (3), secs. 463, 464; *The National Ins. Co. of Ireland* v. *Harris* (4). As to notice within a reasonable time see *Donahue* v. *Windsor Co. Mut. Fire Ins. Co.* (5); *Wiggins* v. *Queen Ins. Co.* (6); *Lafarge* v. *The London, Liverpool and Globe Ins. Co.* (7).

Martin for the respondent. No notice of loss was given to the company as required by the policy nor were proofs of loss furnished in conformity with the policy and the requirements of Art. 2478 of the Civil Code. McCready could not make the proof of loss under the conditions of the policy, and even if the insured was dead it would be his heirs who should comply with these conditions. See *Whyte* v. *The Western Assurance Co.* (8). In any case no proof was made within the required or any reasonable time. The condition required notice and proofs "forthwith" after loss. Art. 2575 C. C. *Accident Insurance Company of North America* v. *Young* (9); *Trask* v. *State Fire and Marine Ins. Co.* (10); *Whitehurst* v. *North Carolina Mutual Ins. Co.* (11); *Edwards* v. *Lycoming Co. Mut. Ins. Co.*(12); *Laforce* v. *Williams City Fire Ins. Co.* (13); *Weed* v. *Hamburg-Bremen Fire Ins. Co.* (15). The company never was furnished with an *account of loss* or declaration verifying it, nor of value of premises at the time of fire; *Lindsay* v. *Lancashire Fire Ins. Co.* (8); *Banting* v. *Niagara District Mut. Fire Ass. Co.*

(1) 24 L. C. Jur. 65.
(2) 6 Can. S. C. R. 30.
(3) Ed. 1891.
(4) M. L. R. 5 Q. B. 345.
(5) 56 Vermont 374.
(6) 13 L. C. Jur. 141.
(7) 17 L. C. Jur. 237.
(8) 22 L. C. Jur. 215.
(9) 20 Can. S. C. R. 280.
(10) 29 Penn. 198.
(11) 7 Jones N. C. (Law) 433.
(12) 75 Penn. 378.
(13) 43 Mo. App. R. 518.
(14) 31 N. East. Rep. 231; 133 N. Y. 394.
(15) 34 U. C. Q. B. 440.

(1). These conditions precedent have not been complied with. We rely upon Art. 2478 C. C.; *Accident Ins. Co. of North America* v. *Young* (2); *Logan* v. *Commercial Union Ass. Co.* (3); *Western Assurance Co.* v. *Doull* (4); *Scott* v. *Phœnix Ins. Co.* (5); *Racine* v. *Equitable Ins. Co. of London* (6); *Simpson* v. *Caledonian Ins. Co.* (7).

By a condition of the policy it was stipulated that no suit or action against the company for the recovery of any claim by virtue of said policy should be sustainable until after an award should have been obtained fixing the amount of such claim in the manner therein provided. No proceedings by way of arbitration were had and no offer was ever made on the part of plaintiff to abide by such proceedings. This reference to arbitration is a condition precedent to suit; *Viney* v. *Norwich Union Fire Ins. Co.* (8); *Elliott* v. *Royal Exchange Assurance Co.* (9); *Braunstein* v. *Accidental Death Ins. Co.* (10); *Anchor Marine Ins. Co.* v. *Corbett* (11); *Viney* v. *Bignold* (12); *Corroll* v. *Girard Fire Ins. Co.* (13); *Gauche* v. *London & Lancashire Ins. Co.* (14); *Wolff* v. *Liverpool, London & Globe Ins. Co.* (15).

The plaintiff derives his title solely from McCready, under the transfer of 17th April, 1894, and consequently McCready did not have any insurable interest in the property in question at the time of the fire. The insurance is void for *transfer of interest* to a third person, unless made with the consent or privity of the insurer. Arts. 2472, 2474, 2475, 2476, 2480, 2482 C. C.;

(1) 25 U. C. Q. B. 431.
(2) 20 Can. S. C. R. 280.
(3) 13 Can. S. C. R. 270.
(4) 12 Can. S. C. R. 446.
(5) Stuart Rep. 152:354.
(6) 6 L. C. Jur. 89.
(7) Q. R. 2 Q. B. 209.
(8) 57 L. J. Q. B. 82.
(9) L. R. 2 Ex. 237.
(10) 31 L. J. Q. B. 17.
(11) 9 Can. S. C. R. 73.
(12) 20 Q. B. D. 172.
(13) 16 Ins. L. J. 764.
(14) 11 Ins. L. J. 361; 10 Fed. Rep. 347.
(15) 50 N. J. (Law) 453.

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Saddler' Company v. *Babcock* (1). Although the transferer may have retained an interest in the objects insured and have suffered a loss by their destruction, the assignee cannot recover if at the time of the loss he has parted with his own insurable interest, any more than if he had insured in his own name. The interest must exist both at the time the insurance is made or the policy is transferred, *and at the time of the loss.* If the plaintiff had relied upon the transfer of 24th Oct., 1893, and the indorsement on the policy dated 30th Oct., 1893, he would have considered himself the party insured at the time of the fire, but every proceeding adopted subsequent to the fire shows that he did not consider that he was entitled to the insurance, but that McCready was the person covered by the policy. The alleged proofs of loss were made out in McCready's name, and the subsequent transfer, in April, 1894, of McCready's rights to plaintiff all tend to show this.

As to the change in the occupation of the premises, the mortgage clause did not protect McCready after he became aware of the change of hazard in the risk, and particularly after the interview had with the company's manager. This mortgage clause provided that the mortgagee should pay the increased rate in case of increase of hazard. From all this it must be held admitted that the policy was cancelled with the consent and approval of all parties interested, and no one ever paid the extra premium required to cover the premises as a hotel, or obtained from the company any policy covering the premises as a hotel; and having failed to do this, (particularly after being warned by the manager that the company would be off the risk) the company cannot be held liable in any manner whatsoever under the policy sued upon.

(1) 2 Atk. 557.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Queen's Bench allowing an appeal from the Court of Review and dismissing the appellant's action.

The action is brought to recover the sum of two thousand five hundred dollars, the alleged amount of a loss by fire under a policy of insurance effected upon a building situate in the town of Longueuil, in the province of Quebec. The policy in question was issued by the respondents, an English company having its head office in Canada, at Toronto, but doing business through an agent at Montreal. This policy bears date 4th November, 1891, and thereby the respondents, in consideration of a premium of thirty-three dollars paid to them and the representations, covenants and warranties of the insured, did insure Bernard Maguire from the 13th October, 1891, to 13th October, 1894, against loss or damage by fire to the amount of $3,000, this amount being apportioned between a dwelling house which was insured for $2,500, and a barn, shed and stable in rear of the dwelling house which was insured for $500. The appellant does not seek to recover in respect of the latter building, but confines his claim to the loss in respect of the dwelling house. The policy has indorsed upon it a clause in the words following:

> At the request of the assured the loss, if any, under the policy is hereby made payable to James McCready, Jr., as his interest may appear subject to the conditions of the above mortgage clause.
>
> (Sgd.) JOHN WM. MOLSON,
> *Resident Agent.*
>
> Montreal, 13th November, 1891.

The mortgage clause referred to contained several provisions, only one of which is material to the questions raised by the present appeal. That provision is as follows:

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It is hereby provided and agreed that this insurance as to the interest of the mortgagees only therein, shall not be invalidated by any neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

The policy is also subject to certain conditions, twenty-three in number. These conditions are headed "statutory conditions" and are literally taken from the statutory conditions imposed upon Fire Insurance Companies by an Act of the Legislature of Ontario. They are followed by certain variations headed "Variations in Conditions." The only conditions which are material to the questions before us are the 3rd, 4th, 13th and 17th.

The third condition provides that any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent, and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuance of the policy, forthwith pay to the company, and if he neglects to make such payment forthwith after receiving such demand the policy shall no longer be in force.

The fourth condition is as follows:

If the property insured is assigned without a written permission indorsed thereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.

The 13th condition relates to proofs of loss and provides that:

Any person entitled to make a claim under this policy is to observe the following directions.

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(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish therewith a statutory declaration, declaring:

(1) That the said account is true;

(2) When and how the fire originated so far as the declarant knows or believes;

(3) That the fire was not caused through his wilful act or neglect, procurement, means or contrivance; and

(4) The amount of other insurances;

(5) All liens and incumbrances on the subject of insurance;

(6) The place where the property insured, if moveable, was deposited at the time of the fire.

(*d*) He is in support of his claims, if required and if practicable, to produce books of accounts, warehouse receipts and stock lists and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all the remains of the property which was covered by the policy;

(*e*) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice, sustained loss and damage on the subject assured, to the amount certified.

14. The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

Condition 17 contains a stipulation that the loss shall not be payable until thirty days after completion of the proofs of loss.

The variations do not alter the terms of the conditions in any respect which requires to be now considered, save that an arbitration clause in the words following is added to condition 16:

It is furthermore hereby expressed, provided and mutually agreed, that no suit or action against this company, for the recovery of any

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claim by virtue of this policy, shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

At the date of the policy the assured, Bernard Maguire, was the proprietor of the property insured, subject to two mortgages in favour of Hugh McCready, the tutor of the minor children of Robert McCready, dated respectively the 13th October, 1888, and the 13th of May, 1889. The amount of the hypothecary debt thus secured was $4,000.

This debt and the mortgages were on the 1st September, 1891, transferred to Robert McCready, who, by a notarial deed dated the 24th of October, 1893, transferred the same debts and mortgages to the appellant. The policy was never transferred to the appellant, but after the loss and on the 17th of April, 1894, the appellant procured Robert McCready to execute in the appellant's favour a transfer of all his right, title and interest in the policy and whereby he subrogated the appellant in all his rights against the company under the terms of the policy and authorized the appellant to collect the amount due thereunder by reason of the loss.

At the date of the insurance the building insured was occupied by Bernard Maguire as a dwelling house, in which he lived with his family. Subsequently it was used as a hotel or tavern, first by Maguire himself, who shortly before his death leased it to one Riendeau who occupied it as a tavern at the date of the loss.

The third condition does not appear to have been ever complied with. No proof of loss was ever made as required by this condition. On the 20th of December, 1893, the appellant made a statutory declaration stating the loss and other facts relating to the claim, no doubt with the intention of complying

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with the conditions requiring proof of loss, but it is not proved that this declaration ever reached the hands of the respondents' officers or agents, nor is it easy to see how it could have served any useful purpose if there had been such proof, in view of the fact that at the date at which it was made, McCready had ceased to have any interest in the mortages which, as before stated, he had absolutely transferred to the appellant on the 24th of October preceding the loss.

It is not very clear whether, according to the true interpretation of the policy read in conjunction with the so called mortgage clause, it ought to be considered as an insurance of the proprietary interest of Maguire, McCready being a mere *adjectus causâ solutionis* to whom the proceeds of any loss under the contract of insurance between Maguire and the company were to be paid, or whether the insurance was of McCready's mortagee's interest, and the contract one directly between him and the company. In the former case McCready, if he had not assigned his interest before the loss, might have been entitled to sue. According to the rule of law established in England, a person not himself a party to a contract, but to whom money is made payable under a contract entered into by other persons, cannot maintain an action to recover the money so made payable to him, and this rule prevails generally in the United States with the exception of the State of New York where the decisions have established a contrary rule. According to the modern law of France, however, the *adjectus gratiâ solutionis* can maintain an action in his own name where the payment is intended for his benefit (1). Therefore, had McCready retained an interest in the mortages up to the time of the loss he might have maintained an action for the insurance money though it was payable to him under a contract of

(1) 12 Duranton (4 ed.) no. 53, p. 80.

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insurance between Maguire and the company to which contract he was himself no party, and this right of action he might have transferred to the appellant. The right to maintain an action in the character of a mere party to receive payment would, however, depend on a due performance of the condition of the policy by the assured who, in the hypothesis now being considered, would be Bernard Maguire. On the other hand if the proper construction of the policy and what is called the mortgage clause, is, that there was a direct agreement between McCready as a mortagee and the company, McCready could of course recover upon his own contract so long as he retained an insurable interest.

I do not consider it necessary to determine this question of construction for the reason that it is plainly manifest that in neither alternative can the present action be maintained.

First, there could be no recovery in an action by the appellant or by McCready under a contract of insurance between Maguire and the respondent treating McCready as a party adjected merely for the purpose of receiving payment, for the reason that in that case the policy must have been avoided by an unauthorized change in the use of the insured premises by converting the dwelling house into a tavern; (see Art. 2574 C.C.); and for the further reason that there was no proof of loss such as the stipulations of the policy called for.

If on the other hand the insurance is to be deemed one of McCready's interest as mortgagee, then the undeniable fact that McCready had ceased to have any insurable interest after the 24th of October, 1893, when he transferred all his interest in the mortgages to the appellant, would by itself be a conclusive answer to the action; (see arts. 2475, 2483 and 2576 C. C., Quebec.) There is no pretence that the policy was ever transferred to the appellant; his only title to

sue is therefore through the assignment from McCready to him of the 17th of April, 1894; but even if McCready had been entitled to recover for the loss this assignment would have been insufficient to confer on the appellant a title to maintain the action, since in order to perfect the legal cession of a debt the law requires that it be duly signified to the debtor, and here there is no proof whatever of any such signification. (Art. 1571, C. C., Quebec.)

A further fatal objection to the appellant's action is that there is no proof of the value of the property destroyed by the fire. The amount insured does not constitute any proof of this (art. 2575 C. C., Quebec), and the record contains no evidence whatever upon the point. A memorandum dated in October, 1894, and signed by one "George Robert" purporting to state the value of the destroyed property, but a memorandum which has never been proved, has been irregularly introduced into the record before this court.

Further the arbitration clause, added to the conditions by the variation to condition sixteen, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions fixing the amount of the claim. The Court of Review considered this provision void as tending to oust the jurisdiction of the courts of law and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established courts of justice is null, but nevertheless in the case of *Scott* v. *Avery* (1), the House of Lords determined that a clause of this nature and almost in the same words as that before us making an award a condition precedent, was perfectly valid and

(1) 5 H. L. Cas. 811.

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that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though of course not a binding authority on the courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration. *Trainor* v. *Phœnix Fire Ins. Co.* (1); *Kenworthy* v. *Queen Ins. Co.* (2); *Lantalum* v. *The Anchor Marine Ins. Co.* (3); *Dawson* v. *Fitzgerald* (4).

The appeal must be dismissed with costs.

TASCHEREAU J.—On 4th November, 1891, the company respondent issued a three years policy for $3,000 on certain buildings near Montreal in favour of one Maguire, the owner.

On November 13th following the company, with Maguire's assent, attached thereto the usual mortgage clause (Holt, Insurance, No. 192), in favour of one James McCready, who had a mortgage for $4,000 on the said buidings "loss payable to James McCready as his interest may appear."

On the 24th of October, 1893, McCready assigned, with Maguire's assent, all his rights in that mortgage to appellant, who thereby became the mortgagee and Maguire's creditor.

On 1st December, 1893, Maguire's buildings were destroyed by fire.

In April, 1894, McCready assigned to appellant all claims he might have against the respondent, and

(1) 8 Times L. R. 37.
(2) 8 Times L. R. 211.
(3) 22 N. B Rep. 14.
(4) 1 Ex. D. 257.

signification of this assignment was duly made upon the respondent.

The appellant now claims from the respondent the amount of the said assurance, less $500 value of outbuildings not destroyed.

The respondent meets this demand by :—

First. The general issue.

Secondly. Non-compliance with the conditions of the policy as to notice of loss and proofs of loss, it being stipulated in the policy that in case of loss notice in writing should be forthwith given to the company by the assured, and "that proofs of loss must be made by the assured although the loss was payable to a third party," and that no such notice in writing of the loss was given, and that no proofs of loss were furnished by the assured or any one acting for him.

Thirdly. By a third plea the company averred that the parties had agreed by a clause in the policy (16th) to submit their differences to arbitration with the express condition that no suit or action against the company for the recovery of any claim under the policy should be sustainable until after an award should have been obtained fixing the amount of such claim.

Fourthly. By a fourth plea the company averred that by a condition indorsed upon the back of said policy, loss if any, under the policy was made payable to James McCready, of Montreal, mortgagee, as his interest would appear at the time of the loss as such mortgagee ; that on the 1st of December, 1893, date of the fire, said James McCready had no insurable interest as mortgagee or otherwise in the property covered by the policy, having on the 24th of October, 1893, assigned to appellant all his rights and interest as mortgagee of the property in question ; that as said James McCready had no insurable interest in the

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property at the time of the fire, he had no claim to assign to appellant after the fire, and neither appellant nor James McCready have now any rights under the policy in question.

Fifthly. By a fifth plea the company averred that the premises were insured as a dwelling only and that subsequently to the issue of the policy the property was occupied as a hotel, and was so used at the time of the fire, and that this was a change material to the risk within the the control and knowledge of the assured and voided the policy.

The Superior Court maintained respondent's second plea, and dismissed appellant's action, on the ground that under article 2478 of the Civil Code, notice of the loss must be given by the assured in conformity with the special conditions of the policy, and that no such notice had been given by Maguire, nor by any person on his behalf.

Appellant inscribed his case in review, where the judgment of the Superior Court was reversed and the company respondent condemned to pay to appellant the sum of $1,980 with interest from the 24th of April, 1894.

Respondent then brought the case before the Court of Queen's Bench, where the judgment of the Court of Review was reversed and appellant's action dismissed, on the two grounds as given in the formal judgment, that appellant failed to prove, first, that he had a legal right of action under the policy, upon which his action was based; and secondly, that the party assured under said policy had not given the notice of loss in the manner, within the delay, and under the conditions stipulated in the said policy.

It seems to me doubtful, I may premise by saying, if the Ontario statutory conditions that are printed on the back of this policy, form part of the contract

between the parties thereto. The policy does not in any way refer to them, the application is not in evidence, and by the Ontario statute, R. S. O., 1897, c. 203, sec. 168, these conditions, in express terms are made applicable exclusively to insurances in Ontario. *Cameron* v. *Canada Fire and Marine Ins. Co.* (1). How could a Quebec Court have the power to declare any of the variations unreasonable as the Ontario Courts have under their statute?

However, in my view of the case this is immaterial.

There is nothing in the respondent's plea as to arbitration, which I will dispose of first, assuming the other printed conditions to form part of the contract.

Condition sixteen, as varied, relied upon by respondent clearly can have no application, as there is, in the Province of Quebec, no County Judge to appoint a third arbitrator in certain cases as provided thereby for Ontario policies. Under these circumstances, it is unnecessary to determine here whether or not an arbitration under a clause of this nature, *clause compromissoire*, is, in the Province of Quebec, a condition precedent to the right of action, a question upon which there has been much controversy. De Lalande, "Assurance," Nos. 488, 439; Sirey, Table Gén. vo. "Arbitrage," Nos. 47 *et seq.*; Bioche, "Procedure," vo. "Arbitrage," No. 147. In England, *Scott* v. *Avery* (2); *Viney* v. *Bignold* (3); and cases cited in *Anchor Marine Ins. Co.* v. *Corbett* (4). Upon this point I would be against respondent's contention.

Then, as to the reason given by the Superior Court and by the Court of Queen's Bench that Maguire, the assured, failed to give notice of the fire as required by the policy, by art. 2478 of the Civil Code, it is evident that such a reason in this case must be due to

(1) 6 O. R. 392.
(2) 5 H. L. Cas. 811.
(3) 20 Q. B. D. 172.
(4) 9 Can. S. C. R. 73.

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an oversight. Whilst undoubtedly such a want of notice would be fatal to the assured Maguire, yet it could not be held to defeat appellant's claim, were it otherwise well founded, without reading out of the mortgage clause which forms the contract between the mortgagee and the company, the express provision that the insurance, as to the interest of the mortgagee, was not to be invalidated by any act or neglect of Maguire. And that cannot be done. *Anderson* v. *Saugeen Mutual Fire Ins. Co.* (1). Joyce on Insurance, secs. 3304, 3308. Under that provision, the mortgagee has no action where the assured would have none. In *Kanady* v. *The Gore District Mutual Fire Ins. Co.* (2), for instance, and *Willey* v. *The Mutual Fire Ins. Co. of Stanstead and Sherbrooke* (3); the companies would have been condemned if there had been in the policies a mortgage clause such as this one.

A payment by the company to the mortgagee, under these circumstances, when the assured himself has forfeited all his rights under the policy, does not operate as a discharge of the mortgage. It simply substitutes the company to the mortgagee in the latter's rights. That is the remedy which the company gets in such a case. But, towards the mortgagee, they are liable. That part of the respondent's pleas seems to me unfounded.

The same as to the increase of the risk by turning the house into a hotel. By the mortgage clause it is expressly stipulated that this, as to the mortgagee, was not to invalidate the policy. Such increase of risk, in express terms, puts upon the mortgagee the obligation to pay the additional rate on reasonable demand, but that is all; it leaves the policy intact as to the mortgagee. Though the company here was notified by

(1) 18 O. R. 355.
(2) 44 U. C. Q. B. 261.
(3) 2 Dor. Q. B. 29.

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the mortgagee of this change in the premises as soon as he knew of it, it never made a regular demand for the additional rate, so as to put him *en demeure*, and never cancelled the policy, or took any action to that effect.

I cannot see anything in the fact that, on the 9th November, 1891, the company's agent wrote to McCready that if the premises were to be occupied as a hotel the present policy would have to be cancelled. For it is after that letter, on the 13th November, that the mortgage clause was attached to the policy; and by its very terms, the policy was not to be cancelled or voided by an increase of hazard, the additional rate only being then payable by the mortgagee. That implied that the policy was to continue in full force. So that when the agent later on, upon being informed of the change in the occupation of the premises, told appellant that he would have to return the policy so that a new one could be issued, appellant had the right not to pay any attention to that requisition as he did.

So far, I would be with the appellant.

He cannot succeed, however. The loss, as I have said, was made payable to McCready, "as his interest may appear" McCready, therefore, was to have no claim against the company if, at the time of the loss, it appeared that he had no more interest in the mortgage. He could not have recovered judgment upon his contract with the company without alleging in his declaration, and proving at the trial, that he was still a mortgagee, and what was the amount due to him on the mortgage. His interest as mortgagee and his rights under the mortgage clause were correlative. The vitality of the latter depended on the existence of the former.

Now at the time of the fire he had no interest whatever in the mortgage. He had previously sold it to

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appellant, without a clause of *fournir garantir et faire valoir*, and had become entirely disconnected from it. He then had no action against the company and if he had none the appellant cannot now have one.

It appears to be true, as contended for by the appellant, that to make a loss payable to the mortgagee, is not an assignment of the policy; May, on Insurance, (3 ed.) sec. 379; Joyce, on Insurance, secs. 2305, 2314; *Anderson* v. *Saugeen Mutual Fire Ins. Co.* (1); *Fogg* v. *Middlesex Mutual Fire Ins. Co.* (2); and that the assignee of the sum payable in case of loss need not have an insurable interest. I do not see anything to the contrary in arts. 2474, 2475, 2482, 2483 and 2576 of the code, cited at bar. *McPhillips* v. *London Mutual Fire Ins. Co.* (3); Pouget, dict. des Assur. vol. 1er v. "Indemnité," par. 2, p. 368; v. "Paiement," pages 570, 571, vol. 2; v. "Transport," page 949; Huc. Transp. de cr. vol. 1er, nos. 172, 174, 297. Pand, Fr. vol. 10, v. "Assur. contre l'incendie," nos. 1294, 1520. If McCready, for instance, had remained the mortgagee, but had assigned his right of action to appellant, appellant might have recovered judgment against the company, if the assignment had been duly served upon them in accordance with Art. 1571 of the code. Or if McCready had been a mere chirographary creditor of Maguire, an assignment to him, accepted by the insurer in the terms of the one in question, "as his interest may appear," might have given him a right of action, though he would have had no insurable interest, upon his proving, and only upon his proving, that he was still Maguire's creditor at the time of the loss. But here there is no question of insurable or no insurable interest as pleaded that can affect the case. McCready was not the assured. *Omnium Securities Co.* v. *Canada*

(1) 18 O. R. 355.
(2) 10 Cush. (Mass.) 337.
(3) 23 Ont. App. R. 524.

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Fire and Mutual Ins. Co. (1). It is a simple question of contract. The company has covenanted to pay McCready in case of loss, but only if at the time of the loss he was still a mortgagee of the property insured by Maguire, up to the amount of his interest at the time, as such mortgagee. Now, he had ceased to be such. He had absolutely assigned all his interest therein. Therefore, he had no action, and I repeat it, he could not afterwards assign to appellant a right that he did not himself have.

The maxim "*Nemo plus juris transferre potest quam ipse habet*" has here full application.

I would dismiss the appeal.

GWYNNE J.—This is an action brought by the plaintiff upon a policy of insurance against loss by fire issued by the above defendant to and in favour of one Bernard Maguire upon a dwelling house of his situate in the Province of Quebec. The policy was issued on the 4th November, 1891, and was declared to be in operation until the 13th October, 1894. The policy was in the form prescribed by a statute of the Province of Ontario as the form in which all policies against loss by fire should be framed as regards property situate within the Province of Ontario. But the company having issued outside of the Province of Ontario a policy the form and terms of which are made compulsory by statute as regards property situate in the Province of Ontario contains no less, and must be construed as containing, the terms by which the parties to the policy have agreed to be bound.

Among the conditions subject to which the policy in the present case was issued, are the following:

(1) 1 O. R. 494.

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3. Any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby unless the change is promptly notified to the company or to its local agent in writing, and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand the policy shall be no longer in force.

12. Proof of loss must be made by the assured although the loss be payable to a third party.

13. Any person entitled to make claim under this policy is to observe the following directions:

(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver as soon afterwards as practicable as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish a statutory declaration declaring;

1. That the said account is just and true;

2. When and how the fire originated as far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance, and

4. The amount of other insurances.

15. Any false statement in the statutory declaration in relation to any of the above particulars shall vitiate the claim.

16. If any difference arises as to the value of the property insured, of the property saved, or amount of the loss, such value and amount and the proportion thereof, if any, to be paid by the company shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree upon one person, then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen, or on their failing to agree by the county judge of the county wherein the loss has happened, and such reference shall be subject to the provisions of the laws applicable to references in actions, and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company. Where the full amount of the claim is awarded the costs shall follow the event and in other cases all questions of costs shall be in the discretion of the arbitrators. It is furthermore hereby expressed, provided and mutually agreed that no suit or action against

the company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

17. The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided for by the contract of insurance.

18. The company instead of making payment may repair, replace or rebuild within a reasonable time the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proofs herein required.

The policy was also made subject to a special clause called a "mortgage clause" which was attached to the policy and made part thereof, and is as follows:

Mortgage clause.—It is hereby provided and agreed that this insurance as to the interest of mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagees on reasonable demand from the date such hazard existed according to the established scale of rates for the use of such increased hazard during the continuance of this insurance. It is also provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees in all the securities held as collateral to the mortgage debt to the extent of such payment, or at its option the company may pay to the mortgagees the whole principal due or to become due on the mortgage with interest and shall thereupon receive a full assignment and transfer of the mortgage and all other securities *held as collateral* to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim. It is also further provided and agreed that in the event of the said property being further insured with this or any other office on behalf of the owner or mortgagee the company, except such other insurance when made by the mortgagee or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained.

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At the request of the assured the loss, if any, under this policy is hereby made payable to James McCready, Jr., *as his interest may appear* subject to the conditions of the above "mortgage clause."

This clause thus described as "mortgage clause" appears by Mr. Griswold's underwriters' text book to have been introduced into policies of insurance in the United States of America by the Mutual Insurance Company of New York, in the year 1860. In sections 733 *et seq.* he thus treats of the introduction of the clause in use in policies in the State of New York from which the clause in the policy now under consideration appears to have been framed:

This clause is a special stipulation operating only between the insurance company and savings banks and other money loaning institutions or individuals to which it may be conceded, usually accompanying a mortgagor's policy whose loss thereunder is made payable to such parties as mortgagees, and intended as a protection against any acts or omissions on the part of the insured, the mortgagor, by which the insurance might become invalidated as to such mortgagor, in which event the policy would continue to cover the interest of such mortgagees, though the insured may have set fire to the premises or otherwise wilfully caused the loss. Thus as the mortgagor has no interest in the clause—it not becoming operative until his legal interest in the insurance shall have entirely ceased—it is difficult to conceive why it should as in present practice form one of the stipulations attached to *his* policy.

Again at sec. 744 he says:

These mortgage clauses are distinct waivers of the conservative stipulations of the policy; the property may be sold and resold or burned by the mortgagor during its currency but the liability of the underwriter still remains; and just why such special concessions should be made to money lending institutions to protect their interests when they are the very last to make concessions to others is one of the mysteries of the business especially when the effect of such concession is to bar the underwriter from the benefit of the saving conditions of his policy in cases of fraud or other voidable circumstances on the part of the mortgagor without any corresponding benefit in the way of extra premium or otherwise for such concession.

And in another place, sec. 734, he says that the clause when first introduced

was a source of such vexation and annoyance to the companies and to the courts as well until some of the more prominent offices refused to underwrite them.

To my mind it still remains an inexplicable mystery why the defendant should have attached this mortgage clause to the policy issued in the present case; its insertion appears to present a very difficult problem to be solved if it should be necessary to reconcile these apparently inconsistent conditions; however, in the present case it will not be necessary to attempt this task in view of the only right asserted by the plaintiff upon the record upon which alone his claim is based. That claim as presented in his statement of claim briefly is that one Bernard Maguire, being the owner of a lot of land situate in the town of Longueuil, in the province, with a dwelling house thereon, upon the 13th of October, 1888, executed a mortgage upon the said property in favour of the estate of one Robert McCready, then deceased, for securing payment to the said estate of the sum of three thousand dollars; that subsequently upon the 13th of October, 1889, the said Bernard Maguire executed another mortgage upon the same property in favour of the estate of the said deceased Robert McCready for securing payment to the said estate of the further sum of one thousand dollars.

That upon the 1st of September, 1891, the said estate of the said deceased Robert McCready did by deed of transfer duly executed before a notary public transfer to one James McCready all their (the said estate of said Robert McCready) right, title and interest in the said mortgages amounting to the sum of four thousand dollars.

That on the 4th November, 1891, the said Robert McCready insured the said dwelling house against loss by fire to the amount of two thousand five hun-

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dred dollars, with the defendant, who thereupon issued the policy under consideration (the material parts of which are above set forth.)

That on the 13th November, 1891, the defendant did at the request of the said Bernard Maguire make the loss under the said policy payable to the aforesaid James McCready, and he was fully vested with all the rights which might accrue in case a fire should happen to the property so insured.

That on the 1st of December, 1893, the premises so insured were destroyed by fire which resulted in a total loss, and that the ruins which remained are useless for any purpose whatsoever, and the said fire made the said policy exigible in full; and

That the said James McCready did immediately notify the said company and did make a statutory declaration through his attorney and representative, and did request from the company the payment of the amount so due to him. That on the 17th of April, 1894, at the City of New York, in the United States of America, the said James McCready for a good and valid consideration did assign, transfer and make over to the present plaintiff all his right, title and interest in the said policy of insurance sued on in this case, and did subrogate the present plaintiff in all his rights under said policy.

That on the 21st April, 1894, signification of the transfer was made to the defendants, and

That by reason of the foregoing facts the plaintiff has a right to demand payment of the said sum (*i.e.* $2,500, amount of insurance on dwelling house) with interest.

The claim presented by this statement of claim is asserted to be vested in the plaintiff wholly by the assignment of the date of 17th of April, 1894, executed by James McCready whereby as is alleged he transferred to the plaintiff a right alleged to have been

then vested in him the said James McCready, to recover the indemnity, if any, payable to the said insured Bernard Maguire under the terms of the policy. There is no claim whatever asserted in right of James McCready to recover in his own interest as mortgagee under the provisions of the mortgage clause. The statement of claim is framed as upon a policy whereby the indemnity, if any, payable to the insured Bernard Maguire was directed to be paid to James McCready without there being any clause such as that termed the mortgage clause inserted in or made applicable to the policy.

To the statement of claim so framed the defendant pleaded several pleas and thereby respectively pleaded the above 3rd, 12th, 13th, 16th and 17th conditions. As to the third condition they pleaded that the property insured was insured as a dwelling house and that subsequently to the issue of the said policy the said insured property was occupied as a hotel and was so used and occupied at the time of said fire, that such occupation of said premises as a hotel was more hazardous than that permitted by the said policy and no notice of such change of occupation or change of risk was ever given in writing to the said company defendant or its agents; that by means of such change of occupation of said premises the said policy became and was at the time of the said fire cancelled and not in force, and the said defendant was by reason of such change of occupation relieved from all obligations under the said policy, and that the said James McCready was well aware of the said change in the occupation of said premises and failed to notify said company of such change, although the same came to his knowledge and was well known to him.

As to the twelfth condition and in breach thereof, the company pleaded, that the insured under the policy was

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Bernard Maguire, and that no proof of loss under said policy was ever made or given by said Bernard Maguire or his agents or representatives, and that the pretended proofs of loss (in the statement of claim alleged) to have been made by the plaintiff acting as agent of said James McCready, did not conform to the conditions of said policy and was and is irregular, illegal and insufficient.

As to the thirteenth condition and in breach thereof, it was pleaded, that no notice in writing was given said company defendant forthwith after said loss by the said assured or their agents or representatives, or by any person whomsoever, and that said condition was never complied with.

As to the sixteenth and seventeeth condition, and in breach thereof, it was pleaded that neither the plaintiff nor the said James McCready, nor the said Bernard Maguire ever complied with the said conditions in any manner. And it was further pleaded, that previously to the said fire on or about the 30th of October, 1893, the said James McCready sold and transferred to the plaintiff all his, the said James McCready's, right, title and interest in and to the mortgages then held by him upon said property and set forth at length in plaintiff's declaration, and that the said James McCready had not on the said 17th day of April, 1894, any rights or interest under the said policy to transfer to the plaintiff, and that the plaintiff did not thereby acquire any right or title to the amount of loss claimed under the said policy. To these pleas the plaintiff did not plead any matter whatever in reply, and so the case went down for trial solely as to the truth of the pleas, and their efficacy if proved to be true.

Now it appeared in evidence that when the company agreed to attach the mortgage clause to Bernard Maguire's policy, James McCready, the mortgagee,

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was informed in writing by the agent of the defendant that if ever the insured building should be used as a hotel the company must be notified, and that a wholly new policy must needs be obtained at an increased rate, for that the company cannot underwrite a policy on a hotel at the same rate as a dwelling house, nor for three years, as that issued upon Bernard Maguire's building used as a dwelling house was; and indeed the mortgage itself points out to the mortgagee, James McCready, the duty imposed upon him in the event of its coming to his knowledge that the insured building was used for a purpose more hazardous than was permitted by the policy; that occupation of the building as a hotel was a much more hazardous risk than occupation as a dwelling house, and that a much higher premium was required by the company to be paid also appears in evidence. It further appeared in undisputed evidence. in fact by the evidence of a son of Bernard Maguire, that Bernard Maguire himself in the year 1892 converted the insured building into a hotel and for the greater part of that year occupied it as such, and that by a notarial deed executed on the 27th of February, 1893, he demised the said insured building to be used as a hotel to one Alexander Riendeau, who in virtue of such demise occupied and used the building as a hotel until it was destroyed by fire. It also appeared that no notice in writing of such change of occupation of the insured building was ever given to the defendant or its agent by the said Bernard Maguire, nor by any agent or representative of his, as required by the third condition, nor by any person at any time until the latter end of the month of October, or beginning of the month of November, 1893, when the plaintiff, professing to act in the interest of the mortgagee, James McCready, having ascertained that the building

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which had been insured as a dwelling house was being used as a hotel, informed the said McCready that it was necessary that the defendant should be notified thereof, and thereupon the plaintiff and James McCready went together to the defendant's agent, (Mr. Molson), and informed him of the change so made in the occupatien of the insured building. Until the plaintiff and James McCready so gave this information to the defendant's agent, it does not appear that the defendant had any information as to the change in the occupation of the insured building from a dwelling house into a hotel. The policy therefore, as regarded the interest of Bernard Maguire therein, had been avoided by force of the terms of the third condition long previously to the time when the notice above mentioned was given by the plaintiff and James McCready to the defendant's agent, and in fact in the lifetime of the said Bernard Maguire who, as appears in evidence, departed this life on the 17th of April, 1893.

Again, when the fire took place on the 30th November, 1893, the legal representatives of Bernard Maguire gave no notice thereof to the defendant and made no proof of loss as required by the conditions in that behalf in the policy. It is therefore conclusively established that no recovery in respect of the right or interest of Bernard Maguire or of his legal representatives could ever be maintained upon the policy set out in the plaintiff's statement of claim. There can be no recovery under the policy unless in the right and interest of James McCready as mortgagee, and under the provisions of the above mortgage clause.

Now the fair conclusion upon the evidence as to what took place when the plaintiff, professing to act as the agent of James McCready, gave notice to the defendant's agent in October or November, 1893, that

the building insured as a dwelling house was being used as a hotel is I think this, that thereupon the defendants informed the plaintiff and McCready as he had informed McCready in writing when the mortgage clause was attached to the policy, that it would be necessary that the old policy should be returned and an increased premium paid, and a new policy taken out, and the agent promised that upon a return of the old policy and the payment of the increased premium, the amount of which was then named, he would issue a new policy but for no more than $2,000, and for one year only as the company could not underwrite a policy upon a hotel for any longer period; but that the old policy never was returned, and the increased premium never was paid or tendered and so no new policy had been issued.

Then when the fire took place it appears that the plaintiff, still professing to be acting as agent of the said mortgagee, James McCready, upon the 20th December, 1893, but not until then, gave notice to the defendant of the loss occasioned by fire on the 30th November, 1893, and made a declaration which plainly appears to have been intended to be by way of proof of loss on behalf of James McCready as still mortgagee and entitled to the benefit of the mortgage clause; but whether James McCready if he was the now plaintiff and was still claiming as mortgagee could recover under the circumstances as above appearing in evidence under the provisions of the mortgage clause, it is not necessary for us to determine, for it is pleaded by the defendant and proved that upon the 24th day of October, 1893, James McCready by notarial deed assigned and transferred to the plaintiff all his right, title and interest in the mortgages in the statement of claim mentioned and neither at the time of the occurrence of the said fire, nor at the time of the notice

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given by the plaintiff and James McCready of the change in the occupation of the insured building from a dwelling house to a hotel, had he, the said James McCready, any estate, right, title or interest in the said mortgaged premises or any part thereof, and consequently, that nothing passed by the execution of the document in the statement of claim mentioned to bear date the 17th April, 1894, upon which alone the cause of action in the statement of claim asserted is based. By the express provisions of the mortgage clause the said James McCready was only entitled to demand and receive any monies secured by the policy in his character of mortgagee, and to the extent only that his interest as such should appear. If therefore the monies secured by the mortgages had been paid with the exception of say $500, James McCready, had he continued to be mortgagee, could have recovered no more than that amount, but having sold the mortgages and all interest in the mortgaged premises and so in the insured building two months before the happening of the fire, he could recover nothing.

The appeal must therefore be dismissed with costs.

SEDGEWICK and KING JJ. were of opinion that the appeal should be dismissed for the reasons stated in the judgment of His Lordship the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. C. Madore.*

Solicitors for the respondent: *Foster, Martin & Girouard.*