1893
*Nov. 28.
1894
*Feb. 20.

JAMES W. SALTERIO (PLAINTIFF).....APPELLANT;

AND

THE CITY OF LONDON FIRE INSURANCE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Condition against assigning policy—Breach of condition.

A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with or in any way encumbered the insurance should be absolutely void unless the consent of the company thereto was obtained and indorsed on the policy. S. the insured under said policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S. without such consent made it void and he could not recover the amount insured in case of loss.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment for defendants at the trial.

The action in this case was on a policy of insurance against fire on plaintiff's stock, dated April 1st, 1890. One of the conditions of the policy was as follows :—

"Condition no. 5.—If, during this assurance, any change takes place in the title to or possession of the property described in the policy, or in the event of any change affecting the interest of the assured therein, whether by sale, legal process, judicial decree, voluntary transfer or conveyance of any kind, or if the assured

* PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

is not the sole and unconditional owner of the property insured, or of the premises in or upon which the same may be situate, or has not such more limited interest in the property insured or in the premises in or upon which the same may be situate, as may be described in the application for the policy and approved by the company, or if the policy or any interest therein be assigned, parted with, or in any way encumbered, or if possession of the premises becomes vacant by removal of the owner or occupants, then and in every such case this insurance shall be absolutely void, unless the consent thereto of the company in writing shall have been obtained and indorsed hereon."

On September 6, 1890, the plaintiff executed a chattel mortgage of all his said stock so insured "and all policies of insurance on the said stock and premises and all renewals thereof" to Gault, Bros. & Co., of Montreal. At the time the said mortgage was given plaintiff held policies of insurance on said stock in other companies which contained no such condition as the one set out above.

Plaintiff's stock having been destroyed by fire the solicitors of Gault, Bros. & Co. notified the local agent of the defendant company that their clients held the policies and were the persons entitled to the insurance. The company having refused payment an action was brought on the policy which resulted in favour of the company. The decision of the trial judgment having been affirmed by the Supreme Court of Nova Scotia, sitting in banc the plaintiff appealed to this court.

Harrington Q.C. for the appellant. The mortgage of policies must be held to apply to those which Salterio could assign and not to this as to which an assignment is prohibited. *Lazarus* v. *Commonwealth Insurance Co.* (1)

(1) 19 Pick. 81.

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Newcombe Q.C. for the respondents referred to *Credland* v. *Potter*. (1)

The judgment of the court was delivered by:

KING J.—The condition relied upon by defendant as a defence to the action declares (*inter alia*) that if the assured shall assign, part with, or in any way encumber the policy or any interest therein, without the consent of the company indorsed on the policy, the policy shall be void. Prior to the loss the assured made a chattel mortgage to Messrs. Gault Bros. assigning and transferring all his stock in trade (the property covered by the insurance in question) and "also all policies of insurance on the said stock and premises." He held at the time several policies of insurance in one or more of which there was no condition against assigning or encumbering such policy or policies.

Mr. Harrington argued, upon the authority of *Lazarus* v. *Commonwealth Ins. Co.* (2), that the assignment should be limited to such of the policies as contained no restraint upon assignment, upon the ground that it would be insensible for the mortgagor to destroy his security under the policy, as neither he nor the mortgagee could derive any advantage from it. He also contended that the assured could not be said to have assigned or encumbered the policy when the policy did not admit of such assignment or encumbrance being made effectual except upon a condition that was not performed. But I conceive that what is meant by the condition is that the policy shall be voidable by the insurance company upon breach of the condition, and the Messrs. Gault had, by the assignment and encumbrance, the legal possibility of advantage through the chance of the company's consent being given. The encumbrance was effectual so far as Salterio was con-

(1) 10 Ch. App. 8. (2) 19 Pick 81.

cerned, and might be entirely an effectual security by the company electing not to avoid the policy. Unless the clause of the policy operates to render voidable what but for it would be a valid assignment or encumbrance it is difficult to see what it can mean. Here there was the transfer of the insured property by way of mortgage, and the transfer by way of mortgage of the assured's interest in the policy and the policy itself, and this seems to me to be an encumbrance of the policy or of an interest therein within the meaning of the condition.

The assigning or encumbering clause "also all policies of insurance on the said stock and premises," in its natural meaning embraces this policy, and there is nothing to show that the intent was otherwise; on the contrary the attorneys of Messrs. Gault, the virtual plaintiffs, a few days after the loss wrote the following letter to the agent of the company, clearly implying that, in Messrs. Gault's view at least, this policy had been transferred under the chattel mortgage and requesting that consent be then given.

January 2nd, 1891.

DEAR SIR,—We beg to inform you that all policies of insurance which James W. Salterio holds on the stock-in-trade owned by him and consumed by fire in the Globe Hotel building on Wednesday night, were assigned by him to Gault Bros. & Company of Montreal, by chattel mortgage dated 18th day of October, 1890. The mortgage contained a covenant to insure the goods for our client's benefit. It is true that we did not get the policies assigned by indorsement thereon made with your assent, but if that is necessary it can be done now after the loss. At present we simply wish to notify you of our client's rights and that they are the persons entitled to the insurance, their interest being upwards of nine thousand dollars.

Yours truly,

(Sgd. HARRINGTON & CHISHOLM,
Attorneys of Gault Bros. & Co.

To ALFRED SHORTT, Esq.,
Agent of City of London Insurance Company.

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In May on Insurance (1), it is said that:—

> An assignment of a policy as collateral security avoids a policy which stipulates against an assignment in whole or of any interest in it under penalty of forfeiture.

In such case the words "or of any interest in it" have been held in the courts of the United States to extend to the transfer of the policy by way of security. The words of this policy go further and extend in terms to encumbrances. There are the following general observations of the experienced writer just quoted with reference to the reason for the insertion of such clause:—

> Incumbrances are objectionable, and are usually inquired after; for, as they increase, the interest of the owner of the property in its preservation diminishes * * * If the privilege of transferring the policy as collateral security for goods purchased or money borrowed tends to the increase of incumbrances the Company has a motive to prohibit it. That it does so tend is a matter of common experience.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Harrington & Chisholm.*

Solicitors for the respondents: *Drysdale & McInnes.*

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(1) 2 ed. sec. 380.