

THE CITIZENS' INSURANCE COM-
 PANY OF CANADA, (DEFENDANTS). } APPELLANTS;

1894
 *Feb. 20.
 *May 1.

AND

JAMES W. SALTERIO (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Fire Insurance—Condition in policy—Change of title in property insured—
 Chattel mortgage.*

A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; and that the policy should not be assignable without the consent of the company indorsed thereon, and all incumbrances effected by the assured must be notified within fifteen days therefrom.

Held, reversing the decision of the Supreme Court of Nova Scotia, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. *Sovereign Ins. Co. v. Peters* (12 Can. S. C. R. 33) distinguished.

Held further, that it was an incumbrance even if the condition meant an incumbrance on the policy.

APPEAL from the 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 in trade, which policy contained, among others, the following condition:

"Condition no. 2.—Title. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the property insured stands on leased or borrowed ground, it must be so represented to the company, and so expressed in

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

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the written part of this policy, otherwise the policy shall be void. Property or goods of any kind held as collateral on commission in trust or on storage, or sold, delivered or not delivered, or any other interest than absolute, are not insured hereunder, as well as leaseholds, rents, improvements, unless so designated and so specifically insured."

"This policy or any interest in it, shall not be assignable without the consent of the company expressed by indorsement made hereon, and all encumbrances effected by the assured must be notified within fifteen days therefrom, otherwise this policy shall be void. In event of any sale, transfer or change of title in the property insured the liability of the company shall thenceforth cease."

The insured, during the currency of this policy, gave to Gault Bros. & Co., of Montreal, to whom he was indebted, a chattel mortgage on all the property so insured, and also "all policies of insurance on the said stock and all renewals thereof," without first obtaining the consent of the company to be indorsed on the policy. The defendants claimed that this chattel mortgage was a breach of the above condition and rendered the policy void.

As to the contention of the company that the assignment of the policy was a breach of the condition see *London Ins. Co. v. Salterio* at page 33 of this volume.

Newcombe Q.C. for the appellant was stopped by the court.

Chisholm for the respondent. A chattel mortgage is not a transfer of the property within the condition. *Sovereign Ins. Co. v. Peters* (1).

At all events it cannot affect the policy until default. *Hanover Ins. Co. v. Connor* (2).

(1) 12 Can. S. C. R. 33.

(2) 20 Ill. App. R. 297.

Newcombe Q.C. in reply referred to *Burlinson v. Hall* (1); *Tancred v. Delagoa Bay &c. Railway Co.* (2).

The judgment of the court was delivered by

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GWYNNE J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia, in favour of the plaintiff, in an action against the appellants, as defendants, upon two several policies of fire insurance executed by the appellants, the one for \$1,000, and the other for \$2,000 upon certain stock in trade of the plaintiff mentioned and described in the policies. The policies are indentical in every respect except in the amounts by them respectively insured. Each policy was subject to the following, among other conditions :—

Condition no. 2.—Title. If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or &c., &c., it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void. This policy or any interest in it shall not be assignable without the consent of the company expressed by indorsement made hereon and all incumbrances effected by the assured must be notified within fifteen days therefrom, otherwise this policy shall be void. In the event of any sale, transfer or change of title, in the property, the liability of the company shall thenceforth cease.

By an indenture bearing date the 18th October, 1890, and while these policies were in force, the plaintiff granted, bargained, sold, assigned, transferred and set over all the stock in trade whereon the said insurances were by the said policies effected, and also all policies of insurance on the said stock and all renewals thereof, to Gault Brothers and Company, of Montreal, by way of security for payment to them of the sum of nine thousand and seventy-two dollars, to have and to hold, to them and their assigns upon trust upon breach

(1) 12 Q. B. D. 347.

(2) 23 Q. B. D. 239.

1894 of any of the covenants, provisoes and agreements in
 THE said indenture contained to sell the same either by
 CITIZENS' private sale or public auction, and out of the proceeds
 INSURANCE arising from such sale to pay all the expenses con-
 COMPANY nected with the said indenture and the said sale, and
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 Gwynne J. of nine thousand and seventy-two dollars with interest
 thereon at and after the rate of five per centum per
 annum, or any balance that may then be due to them,
 rendering the balance, if any there be, to the said
 plaintiff, his executors, administrators, or assigns, pro-
 vided always that if the plaintiff should well and truly
 pay or cause to be paid unto the said Gault Brothers
 and Company or their assigns the said sum of \$9,072
 with interest thereon at the rate aforesaid, the whole
 to be paid within eighteen months from the first day
 of November, 1890, in instalments made payable at
 certain days and hours in the said indenture men-
 tioned, then that the said indenture should become
 void, but otherwise should remain in full force and
 effect; and it was by the said indenture agreed, that
 until default in payment or other default, it should be
 lawful for the plaintiff to retain possession and use of
 the said goods, chattels and premises thereby conveyed
 or intended so to be, and to sell and dispose of the
 same in the ordinary and usual course of trade. Pro-
 vided always and it was thereby agreed, by and
 between the parties thereto, that if any legal proceed-
 ings should be taken or any judgment entered against
 the said plaintiff by any person or persons, or execu-
 tion issued against him or attempted to be levied on
 said property thereby conveyed or intended so to be,
 or any part thereof be seized, attached or distrained
 upon, or in case of any other default in the provisions
 of the said indenture, then that it should be lawful for
 the said Gault Brothers and Company, &c., &c., to

take immediate possession of and sell the said property as thereinbefore provided, before the expiration of the said period of eighteen months.

Some time in the month of December, 1890, prior to the 18th, certain creditors of the plaintiff entered suit against him and thereby, in the terms of the said indenture, the goods, stock in trade, &c., assured by the said policies became absolutely vested in Gault Bros., upon trust to sell for the purpose in the said indenture of the 11th October, 1890, mentioned. Gault Bros. never gave notice to the appellants of the execution of that indenture, nor of the assignment therein contained of the said stock and policies, until some time after the destruction of the said goods, &c., by fire on the 31st December, 1890. Upon the 2nd January, 1891, they, by their solicitors, Messrs. Harrington & Chisholm, gave such notice in a letter of that date addressed to Wm. Duffus Esq., agent of the appellants, which is as follows:—

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HALIFAX, 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. & Co., of Montreal, by chattel mortgage dated the 18th day of October, 1890. The mortgage contained a covenant to insure the goods for our client's benefit. It is true 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 wish simply to notify you of our client's rights and that they are the persons entitled to the insurance, their interests being upwards of nine thousand dollars.

Yours truly,

Sgd. HARRINGTON & CHISHOLM.

Attorneys of Gault Bros. & Co.

The actions were resisted upon the contention that the policies were avoided by the execution of the deed of October 18th, 1890, and the assignment therein contained of the policies without the assent of the appel-

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lants, but the learned trial judge held that as the condition indorsed on the policies declared that these policies could not be assigned without the consent of the appellants indorsed thereon, and as no such assent had been obtained, they were not in fact assigned and that no breach of the condition which had the effect of avoiding the policies had taken place and he therefore rendered judgment for the plaintiff.

The Supreme Court of Nova Scotia maintained this judgment upon the authority of the judgment of the Supreme Court of Massachusetts, in the case of *Lazarus v. Commonwealth Insurance Co.* (1.) But that case, even if it were a binding authority, was very different from the present. The policy of insurance under consideration there was effected upon the 21st October, 1824, upon a ship of the plaintiff by Smith & Stewardson, creditors of the plaintiff, for their own security, they paying the premium, and to them the money, in case of loss, was made payable, although the policy was effected in the name of the plaintiff. The policy contained a clause whereby it was agreed that the policy should be void in case of its being assigned, transferred or pledged without the previous consent in writing of the assurers, and on the 23rd December, 1824, the plaintiff executed an indenture whereby he assigned to one Street all his interest in certain vessels, &c., &c., all goods and stock in trade and bonds, &c., &c., policies of insurance, debentures, &c., &c., belonging to the said Michael Lazarus, or in which he has any right, title or interest, property, lien or claim whatever, in trust for sale, and to apply the proceeds in payment of the plaintiff's creditors and to pay and apply any surplus balance to the plaintiff. At the time this instrument was executed Smith & Stewardson were in possession of the policy and held it as

(1) 19 Pick. 81.

security for their claims. That claim was paid off subsequently to the execution of the indenture to Street. The jury found that after payment of all the plaintiff's debts and a release executed to him by his creditors there was a surplus of the assigned property, reverting to the plaintiff, including the policy in question. The vessel upon which it had been effected was lost by peril insured against. Upon this state of facts the court said:

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At the time when the indenture to Street was made the policy was in the hands of Smith & Stewardson who were then in advance to the plaintiff. They procured it to be made and the defendants agreed to pay the money to them in case of loss. They might have maintained an action upon this policy in their own names against the defendants. Now it would seem that the plaintiff could not have deprived them of the benefits secured to them by this contract without their consent. It is true that the plaintiff afterwards paid his debt to them, but that circumstance does not show that the defendants might not have been liable to them for any loss upon this policy which might have happened after the assignment and before they received their payment from the plaintiff. If the policy was made void it was avoided by the act of assignment; and if it were so avoided, it would follow that Smith & Stewardson's rights, which were secured by the policy, would have been destroyed, without their consent.

In this state of facts, and upon this reasoning, the court came to the conclusion that the parties to the indenture to Street had no intention whatever to assign thereby the policy in question, of which Smith and Stewardson were so in possession as beneficial owners, and that as there was no intention that the policy should pass by that indenture it did not pass, and was not affected thereby.

Now in the present case there was the clearest intention that the policies in question here should pass to Gault Bros. & Co., under the indenture of the 18th October, 1890. There is clear evidence of the express intention of the parties that they should pass, and by the above letter of the solicitors of Gault Bros. & Co.,

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to the appellants, notifying them of the assignment, it is apparent that they relied upon obtaining afterwards the assent of the appellants to such assignment, and the intention of the plaintiff is further placed beyond question by the power of attorney bearing date the 19th day of January 1891, executed by him to Mr. Chisholm as the agent and attorney of Gault Bros., wherein he recites the execution of the indenture of the 18th October, 1890, and that his claim against the appellants, which claim only existed under the said policies, had been equitably assigned by him to Gault Bros. as further collateral security for the payment of the debt secured by the said indenture of October, 1890. There is no suggestion that this equitable assignment took place otherwise than by the indenture of 18th October, 1890.

It, then, being the clear intention of the parties to the indenture of the 18th October, 1890, that the policies under consideration should pass, this case is quite distinguishable from *Lazarus v. The Commonwealth Insurance Company* (1); and the language of the indenture being sufficient to include these policies we must hold the policies to have been avoided.

Then, again, it appears by the same condition no. 2 that the policies were effected upon the assurance and faith that the assured had the entire, unconditional and sole ownership of the property insured for the use and benefit of the insured, and it was provided by the last clause of that condition that "in the event of any sale, transfer or change of title in the property insured, the liability of the company should thenceforth cease." Now although the case of *Sovereign Insurance Co. v. Peters* (2), which has also been relied upon in the courts below, may well be an authority for holding that the words "sale" and "transfer" in

(1) 19 Pick. 81.

(2) 12 Can. S. C. R. 33.

this sentence must, as the word "assign" in *The Sovereign Ins. Co. v. Peters* (1), be construed as meaning an absolute assignment, sale or transfer, and so that such words would not include a mortgage, still, to the words "change of title," a more extended meaning must be attached. They must be construed to comprehend any "change" from the entire, unconditional and sole ownership of the insured in the property insured; and that a chattel mortgage is such a change of title cannot, I think, be doubted. So likewise does it, as appears to me, come within the words of the condition which provides that all "encumbrances effected by the assured must be notified within fifteen days therefrom, otherwise the policy shall be void." This word "encumbrances" here used refers more naturally to the property insured than to the policy, but if it is to be understood as meaning an "encumbrance" or charge upon the policy itself, the assignment in the indenture of the policies contained in the indenture of 18th October, 1890, intending to operate as collateral security to Gault Bros. & Co. for the debt secured by the indenture, is, I think, such an "encumbrance," which, by the means of the transfer not being assented to by the appellants as required by the condition in the policies, avoids the policies.

The appeal, therefore, must be allowed with costs and judgment be ordered to be entered in the court below for the defendants, with costs.

Appeal allowed with costs.

Solicitor for appellants : *Hector McInnes.*

Solicitor for respondent : *John M. Chisholm.*

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(1) 12 Can. S.C.R. 33.