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HUGH P. KEEFER AND THE QUEBEC BANK (PLAINTIFFS)..... } APPELLANTS;

AND

THE PHŒNIX INSURANCE COMPANY OF HARTFORD (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Insurable interest—Unpaid vendor.

An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited if when he effected the insurance he intended to protect the interest of the vendee as well as his own.

The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer.

Judgment of the Court of Appeal (26 Ont. App. R. 277) reversed, and that of the trial judge (29 O. R. 394) restored.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of the plaintiffs.

The plaintiff Keefer sold a piece of land to one Cloy for $2,000 payable by instalments, agreeing to keep it insured for the amount of the purchase money, which he did. A fire having occurred causing a loss of $1,740, when Keefer had been paid $800 by Cloy, the insurance company refused to pay more than the amount of Keefer's interest, and the latter brought an action to recover the full amount of the loss, the Quebec Bank, as assignee of Cloy's interest in the policy, joining him as plaintiff.

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

(1) 26 Ont. App. R. 277. (2) 29 O. R. 394.

At the trial before Mr. Justice Ferguson, the plaintiffs recovered the full sum claimed, but this judgment was reversed by the Court of Appeal. The plaintiffs then appealed to this court.

Collier for the appellants, relied on *Castellain* v. *Preston* (1), referring also to *Irving* v. *Richardson* (2), and *Howes* v. *Dominion Fire & Marine Ins. Co.* (3).

Aylesworth Q.C. for the respondent, cited *Guerin* v. *Manchester Fire Ins. Co.* (4); *Simeral* v. *Dubuque Mutual Ins. Co.* (5).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—I entirely concur in the judgment of the Court of Appeal for Ontario in this case. The policy of insurance sued upon is printed and is in the statutory form prescribed by ch. 167 R. S O. 1887, and is one only of indemnity, expressed, I think, in very plain terms, whereby the defendant agreed

> to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage (not exceeding in amount $2,000, nor the interests of the insured in the property herein described).

At the trial the interest of the assured at the time of the policy being made, although then represented by him to be his own property, was in fact that of a vendor with a lien thereon for unpaid purchase money, amounting then to the sum of $1,200. Now that this policy so entered into operated solely as an insurance against loss of the insured's direct beneficial interest as such unpaid vendor cannot, I think, admit of a doubt.

(1) 11 Q. B. D. 380.
(2) 2 B. & Ad. 193.
(3) 8 Ont. App. R. 644.
(4) 29 Can. S. C. R. 139.
(5) 18 Iowa 319.

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The suggestion that the words "heirs or assigns" and "interests" (in the plural) as used in the above contract, which is in a printed form, show that the assured intended to insure the interest of his vendee as well as his own, has been fully answered by the judgment of the Court of Appeal for Ontario, and nothing can in my opinion be usefully added thereto. As to the assured having had the intention suggested (assuming him to have entertained it). all that need be said is that such intention is not expressed in the contract and it cannot be argued that a secret intention of the assured can be appealed to for the purpose of changing the terms of the contract, contrary to the intention of both parties to the contract as expressed therein. But this point also is fully dealt with by the judgment appealed against. The appeal, therefore, must in my opinion be dismissed with costs.

SEDGEWICK J.—The appellant Keefer, on the 25th July, 1893, being the owner of certain lands and premises in the town of Thorold, upon which the buildings covered by the policy in question were erected, entered into an agreement with one George C. Cloy to sell the property to him for $2,000, payable as follows: $300 in cash; $500 in four months, and the balance, $1,200 in twelve months. At the same time Keefer verbally agreed with Cloy to keep the buildings insured to the extent of $2,000 until the purchase money should be fully paid. There was, at the date of the agreement, a policy in force covering the property for that amount, and this policy was allowed to remain until the 23rd February, 1894, when the policy sued on was substituted for it, and issued to the appellant Keefer. Cloy at this time had paid Keefer $800 on account of the purchase money, and subsequently paid him $500. The policy was

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renewed from time to time, and on the 11th December, 1896, the frame building mentioned in the policy was destroyed by fire, and another building damaged to the extent of $40, making a loss of $1,740, the amount claimed in this action. At this date the purchase money payable to Keefer had been reduced by payments made by Cloy to $700. The interest which Cloy had, or claimed to have, under the policy was assigned to the Quebec Bank, and this action was brought by Keefer and the Quebec Bank to recover the total amount of loss, the bank claiming the interest of Cloy under its assignment, as well as that of Keefer.

The case was tried before Mr. Justice Ferguson, and judgment given in favour of the appellant. This judgment was reversed by the Court of Appeal, Mr. Justice Maclennan dissenting.

At the time of the fire, the appellant was the owner in fee of the whole property, but having only a beneficial interest to the extent of $1,200, and Cloy having a beneficial interest to the extent of $800, and the question in dispute here is whether an unpaid vendor can recover not only his beneficial interest, but the beneficial interest of his vendee as well as under the circumstances of the present case.

I am clearly of opinion that he can. The learned Chief Justice of this court in *Caldwell* v. *Stadacona Fire & Life Ins. Co.* (1) thus clearly lays down what I understand to be the law:

> Whatever doubts may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy, and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely.

He cites, among other cases, *Simpson* v. *Scottish Union Ins. Co.* (2), where Vice Chancellor Wood says:

(1) 11 S. C. R. 242.

(2) 1 H. & M. 618.

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I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year.

And *Waters* v. *Monarch Assur. Co.* (1), where Lord Campbell says:

The last point that arises is: To what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

My brother Gwynne, at page 260, in the same case, expressed similar views.

Castellain v. *Preston* (2), (a case very largely relied on by the majority of the court below) strongly supports the view just stated Lord Bowen says:

It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. * * * Then to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a

(1) 5 E. & B. 870. (2) 11 Q. B. D. 380.

mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership, he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover.

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A case which I cite, not as authority, but as clearly stating what I conceive to be the law, is that of *Insurance Co.* v. *Updegraff* (1).

Although the vendor (the court says), is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure if he thinks proper, to the full value of the property. It is true that in the case of a mortgagee of a ship he can only recover to the extent of his mortgage debt, unless it appears that in effecting the insurance he intended to cover, not his own interest only, but that of the mortgagor also. If he intended to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under a trust, as to the surplus, to hold it for the mortgagor. The same rule applies to the case of an insurance by a vendor. There is this difference, however, that as the whole estate is at law in the vendor, and the vendee has only a title to go into equity, the insurance company cannot assert the rights of the latter, or go into equity in respect to them, except upon principles of equity and good conscience. An insurance upon a house, effected by the vendor, is *primâ facie* an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter, and not upon the former, rests upon the underwriters. There is no hardship in this. The premium paid, as compared with that usually charged where the insurance is upon houses, and not upon debts secured by them, is generally decisive of the question, and the rates of insurance are peculiarly within the knowledge of the insurance company. If the insurance was upon the whole estate the premium would be according to the usual rates for houses of that description and location ; if it was only upon the debt due to the vendor, there would be a large reduction on account of the responsibility of the vendee, and the value of the lot of ground included in the sale, because both of these would, in that case, stand as indemnities to the underwriters. They would be entitled to a cession of the vendor's claims, from which an ample indemnity might be recovered.

(1) 21 Penn. 520.

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There cannot, I think, be any question, but that in the present case the appellant intended to insure the whole property, and not merely his beneficial interest therein. The agreement between him and Cloy is clear evidence of this as well as the terms of the policy itself. Nor in my view is there any doubt but that the company thought that it was insuring the whole property. The premium is for an insurance not upon a partial but upon an absolute interest. The terms of the policy show that the building itself was insured The company agreed to make good all such direct loss or damage not exceeding in amount the interests of the assured in the property described, and that word "interests," I think clearly includes interests of all kinds, if insurable; legal interests equitable interests, and all other interests arising from any relationship between the assured and any one claiming under the assurance

Some of the learned judges below seem to have thought the fact that Cloy's interest was not disclosed at the time of the insurance vitated the policy. The authorities are conclusively the other way. Bowen L. J. in *Castellain* v *Preston* (1) says two conditions only are necessary in order to entitle the assured to recover, "first, the form of his policy must be such as to enable him to recover the total value; and secondly, he must intend to insure the whole value at the time."

It is nowhere a condition of his recovering the whole amount that he must disclose all the parties interested. The law, I think, is well laid down in Wood on Fire Insurance, sec. 151:

> Unless the policy requires that the interest of the insured shall be disclosed, a failure to disclose the nature of his interest or of the existence of a lien or encumbrance thereon, is not a fraudulent con-

(1) 11 Q. B. D. 380.

cealment, and the policy is operative if the assured in fact has an insurable interest therein.

Lord Tenterden in *Crowley* v. *Cohen* (1), says:

> Although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large.

And see Arnold on Marine Ins., 6th ed. p. 51.

In arriving at the conclusion which I have done, I have been much influenced by the statement of the law in *Castellain* v. *Preston* (2). There is nothing inconsistent with our present judgment in that case. There, it was practically admitted that the vendor insured only in his own interest, and the case proceeding upon that assumption merely held that the vendor having received the full amount of the purchase money the insurance company became subrogated to his rights against the vendee, and could recover from him, the vendor, any excess which he received beyond a proper indemnity. On the whole I think this appeal must be allowed, and the judgment of the trial judge restored.

KING J.—I agree with Osler J. that the case mainly turns upon the question:

> What is the proper construction of the policy of insurance? Is it limited by its terms to the plaintiff's interest which, though not disclosed to the company, was that of an unpaid vendor, or is it an insurance not only for himself but for others interested, as for example, the vendee, to the extent of the value insured?

And again:

> The question is whether the policy is apt for the purpose?

The learned judge came to the conclusion that the words are not apt for such latter purpose, and that therefore the plaintiff's interest as unpaid vendor to the extent of the $700 remaining due at the time of the loss was alone at risk at that time.

(1) 3 B. & Ad. 478. (2) 11 Q. B. D. 380.

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The policy declares in the first place that the company in consideration of the stipulations herein named and of $40 premium does insure H. F. Keefer for the term of one year from the 23rd day of February, 1894, at noon, to the 23rd day of February, 1895, at noon, against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding $2,000, to the following described property, while located and contained as described herein and not elsewhere, to wit: $1,700 on the frame building (describing it) and $300 on his frame storehouse (describing it).

It subsequently goes on as follows:

And the said Phœnix Insurance Company hereby agrees to indemnify and make good unto the assured, his heirs and assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property with proper deduction for depreciation however caused.

I must admit to having been for some time of the opinion that by the terms of the indemnity clause the insurer's liability was limited to an amount (within the sum assured) not exceeding the assured's own interest at risk and liable to be prejudiced by a loss. Such seemed to me the fair meaning and scope of the indemnity clause; and it appeared to be quite unnecessary to guard therein against non-insurable claims or interests, as these would be excluded by the implied terms of an insurance contract. On fuller consideration, however, I think that the policy has a different meaning. By its opening clause, already recited, the plaintiff is insured generally in respect of the property mentioned to the amount specified, that is to say, he is insured generally in respect of his insurable interests in the property, whatsoever they may be. Then in the indemnifying clause, the company undertakes in terms to indemnify and make good unto the assured all such direct loss or damage; but that this may not appear to be a covenant to pay $2,000 in any event in case of loss, the words are added: "not exceeding in amount

the sum or sums insured as above specified;" and further, that it may not appear to be a covenant to pay the amount irrespective of the existence or continuance of the insurable interest of the assured, the further words are added: "nor the interests (*i. e.* the insurable interests) of the assured in the property herein described," and then the clause goes on to provide for the mode in which the amount of loss or damage shall be estimated. Strictly, the saving clauses, both as to the sums specified as insured and as to the insured's interests in the property, were not necessary; nor were they more necessary in the one case than in the other, and in both cases appear to have been inserted by way of greater caution. The object of the clause of indemnity, so called, was not to limit or define the subject of insurance in any way. That had been sufficiently designated or described in the opening clause of the policy. As to the use of apt words to cover beneficial interests intended to be insured, it seems to me that these need not be specially descriptive of such other interests in the subject of the insurance. All that is meant is that the words shall be large enough to cover all that was in fact intended. If they are so, the insurer's concurrence in what the assured intended to be embraced in them is implied, and so the difficulty involved in his supposed non-concurrence is removed.

The next question is whether it is competent for an unpaid vendor retaining the legal title and having the right so to retain it, to insure and recover for the whole value of the property which he has bargained to sell, there being no question of his intention so to insure and no question of the use of apt words therefor in the policy.

It is not easy to see how such a case can be put lower than that of a mortgagee as instanced by Bowen L.J. at p. 398 of *Castellain* v. *Preston* (1) where he says:

(1) 11 Q. B. D. 380.

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If he has the legal ownership he is entitled to insure for the whole value. * * If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest.

I cannot concur with Mr. Justice Maclennan in regarding what was said by Bowen L.J. as "an authoritative statement of the law by the Court of Appeal in England." The other members of that court had preceded him in the delivery of separate opinions in which the several matters arising in the case were fully considered, and we are not to suppose that they adopted all the views and statements of law expressed by Bowen L.J. in his somewhat wide incursion into the field of insurance law. To me it appears that, in respect of what is said by him as bearing on this appeal, his views mark a departure to some extent from prior authority; still we have in them the considered opinion of a very high authority which so far as I am able to discover appears also to have been adopted and established as part of the law and practice of insurance, and which, as limited by him, appears to be consistent with good sense.

The remaining and alternative part of the case relates to the effect of the alleged agreement with the vendee for the keeping alive of insurance on the premises. If that agreement were a valid one, I think that there could be no doubt that under this policy the plaintiff could recover in respect of the whole value of the property to the extent of the insurance, for in such case the plaintiff, in addition to the amount of his interest as unpaid vendor, would in case of loss be

prejudiced to the further amount to which he had bound himself to keep up the insurance.

The result is that I concur in allowing the appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Collier & Yale.*

Solicitors for the respondent: *Smith, Rae & Greer.*

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