CALEDONIAN INSURANCE COMPANY AND ALLIANCE ASSURANCE COMPANY (DEFENDANTS)... APPELLANTS;

AND

THE MONTREAL TRUST COMPANY, LIQUIDATOR OF THE EDMONTON TERMINAL GRAIN COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

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*May 2, 3.
*June 15.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Fire insurance—Insurance obtained by liquidator on company's property —Sale of the property by liquidator—Payment to liquidator of purchase price and of unexpired portions of insurance premiums—No conveyance of property nor assignment of insurance policies—Destruction of property by fire—Right of liquidator to recover on policies on behalf of purchasers—Alberta Insurance Act, 1926, c. 31, statutory conditions (schedule B) 4 (a), 5 (c).

Respondent company was liquidator of E. Co. and obtained from the appellant insurance companies policies of fire insurance on E. Co.'s grain elevator, the loss, if any, being made payable to a bank to which E. Co. was indebted. In the course of the liquidation respondent sold the elevator to directors of E. Co. (who were guarantors on

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) [1924] Can. S.C.R. 654.

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E. Co.'s indebtedness to the bank). It was part of the arrangement that the purchasers should pay the unexpired portions of insurance premiums from date of sale. The purchasers paid the purchase price and the unexpired portions of insurance premiums. The bank was paid off and it handed to respondent E. Co.'s certificate of title and the insurance policies (which the bank had held as security). It was arranged between respondent and the purchasers that the conveyance to the latter should remain in abeyance, and no conveyance of the property, nor any assignment of the insurance policies, was made. Subsequently the elevator was burned, and respondent, at the request and for the benefit of the purchasers, sued appellants on the policies.

Held: Respondent was entitled to recover.

Per Rinfret, Lamont, Smith and Cannon JJ.: The stipulation in the contract of sale that the purchasers were to pay the unearned portions of the insurance premiums constituted an implied undertaking on respondent's part to hold the policies for the benefit of the purchasers until such times as they were validly assigned to them. Such an undertaking was enforceable in a court of equity by respondent as trustee of the purchasers. Respondent as liquidator had an insurable interest in E. Co.'s assets when it obtained the policies. Also it had an insurable interest at the time of the fire, by virtue (1) of its legal ownership, and (2) of its implied undertaking. Statutory conditions 4 and 5, schedule B, of the *Alberta Insurance Act,* (1926, c. 31) did not afford a defence to the claim. Appellants insured respondent as liquidator of E. Co.; by so doing they must be held to have insured all the interest in the elevator which, in the liquidation, would pass to or be under the control of respondent; the insured's interest was, therefore, stated in the policy within the meaning of statutory condition 4 (*a*). The insured's interest in the subject matter of the insurance had not been assigned within the meaning of statutory condition 5 (*e*).

The law in such cases discussed and authorities reviewed.

Judgment of the Appellate Division, Alta. (26 Alta. L.R. 21), affirmed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which (Mitchell and McGillivray, J.J.A., dissenting) dismissed their appeal from the judgment of Ives J. (2) holding the plaintiff entitled to recover against the defendants on certain policies of fire insurance.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

G. F. Henderson K.C. and *S. Bruce Smith* for the appellants.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

(1) 26 Alta. L.R. 21; [1931] 3 W.W.R. 432; [1932] 1 D.L.R. 116.

(2) [1931] 2 W.W.R. 571; [1931] 3 D.L.R. 809.

ANGLIN C.J.C.—I agree in the result of the judgment in this case, but, for want of opportunity to consider and analyze it in detail, cannot commit myself on the various propositions of law which it incidentally enounces.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

LAMONT J.—In this case the respondent brought action on two policies of insurance, one issued by each of the appellants who respectively agreed to indemnify the respondent for loss sustained by fire in respect of an elevator the property of the Edmonton Terminal Grain Company, Limited, in liquidation (hereinafter called the Grain Company). The relevant facts are as follows:—

On October 15, 1928, a winding up order was made against the Grain Company, and the respondent, the Montreal Trust Company, was appointed liquidator. On October 16 the respondent applied for and obtained a policy of insurance on the Grain Company's elevator from the appellant, the Caledonian Insurance Company, for $2,500, and, on November 5, 1928, a similar policy was obtained from the appellant, the Alliance Assurance Company. In both policies the loss, if any, was made payable to the Royal Bank of Canada.

At that time the Grain Company was indebted to the said bank in the sum of $26,400, and the bank held as security therefor an equitable mortgage on the elevator property, the fire insurance policies on the elevator, and the personal guarantees of the following directors of the Grain Company: Messrs. Morris, Chamberlain, Scramstad, Topper and Krause.

In the winding up proceedings the elevator in question was offered for sale by order of the Master in Chambers but no bids were received therefor. When no bids were obtained at the sale the above named directors got together and, through their solicitors, Messrs. Abbott & McLaughlin, submitted to the respondent an offer of $25,000 for the elevator property. This offer was accepted, as testified to by Mr. Banner, the manager of the respondent's Edmonton branch, on condition that as part of the arrangement the purchasers were to pay the unexpired portions of the insurance premiums from the date of the sale.

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This arrangement was approved by the Master in Chambers, as appears from a letter to Abbott & McLaughlin by the respondent's solicitors, on February 19, 1929, which reads as follows:—

> As advised we attended before the Master this afternoon and explained the situation to him asking for his further directions. He directed that the purchasers, for whom you act, be required to pay, not later than 3 p.m. on Thursday the 21st inst., the amount equal to 10 per cent. of the purchase price of $25,000 and that the balance of the purchase price be paid not later than Thursday the 28th inst., together with the amount of the unearned premiums on the existing Fire Insurance Policies from the date when the sale was made. In default a further Application is to be made when directions will be given for the enforcement of the Agreement.

The purchasers complied with the terms set out in the letter. On February 22 they paid the $25,000 and, on February 28, the sum of $1,125, which represented the premiums on the policies (some 13 in all) from the date of the sale until the expiration of the policies. As the purchasers had not made up their minds just what they were going to do with the property, they arranged with the respondent that the conveyance to them should, in the meantime, remain in abeyance. The respondent paid the purchase money over to the Royal Bank and the guarantors furnished the additional amounts necessary to pay the bank in full. The bank then handed over to the respondent the Grain Company's certificate of title and the insurance policies. No conveyance of the property nor any assignment of the insurance policies was made. On April 28, 1929, the elevator was burned to the ground, constituting a total loss. The appellants repudiated any liability under the policies as a result of the burning of the elevator, and the respondent brought this action at the request and on behalf of the purchasers.

As a defence to the respondent's claim the appellants set up:—

(1) That after the making of the policies of insurance, but prior to the fire, the respondent had sold and assigned the insured property and had received the full purchase price and consideration therefor, and that, at the time of the fire, the respondent had no interest whatever in the property so insured and, therefore, did not suffer any loss or damage.

(2) That the statutory conditions set forth in Schedule B of the *Alberta Insurance Act*, 1926, were, by the Act,

embodied in and made part of the policies in question, and the said conditions, in part, provided:—

4. Unless otherwise specifically stated in the policy the insurer is not liable for the losses following, that is to say:

(a) For loss of or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the policy;

5. Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring:

(c) After the interest of the insured in the subject matter of the insurance is assigned.

In its reply the respondent set up, as an answer to the appellants' defence, that if, prior to the fire, the insured property had been sold, it was sold under a contract which contained a provision that the respondent must keep alive the existing policies of insurance for the benefit of the purchasers and retain title to and possession of the insured property, and otherwise care for the building, until the purchasers saw fit to have the same transferred to themselves, and that a sale of the property under these circumstances did not deprive the respondent of its interest therein or disentitle it to recover on the policies.

It is established law that a contract of fire insurance is a contract of indemnity. To establish a right to indemnity the insured must shew that he has in fact sustained loss by reason of the destruction (wholly or partly) by fire of his interest in the subject matter of insurance. The extent of his indemnity must, subject to the terms of the contract, be measured by the loss which he has actually sustained. A contract of insurance is a mere personal contract between the insurers and the insured for the payment of money and, as such, cannot, in the case of a building insured against fire, run with the land so as to pass the benefit of it to an assignee of the original owner. The mere transfer of the property insured is not of itself sufficient to pass the benefit of the insurance to the transferee.

On the other hand, it is equally well established law that a vendor owning a building upon which he holds a policy of insurance may validly transfer the building and, at the same time, validly assign to the transferee the policy of insurance. Welford and Otter-Barry on Fire Insurance, 3rd ed., at pp. 215 et seq.

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In *Powles* v. *Innes* (1), the head-note is:

A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit.

In his judgment Parke B. said:

Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser: but we cannot infer that, no facts being stated in the case to warrant such an inference.

And in *Rayner* v. *Preston* (2), Brett, L.J., stated the law as follows:—

It is true that under certain circumstances a policy of insurance may, in Equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the Defendants to the Plaintiffs. It would have been assigned by the Defendants to the Plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the Plaintiffs to the Defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the Plaintiffs.

See also *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.* (3); *Keefer* v. *Phoenix Insurance Co.* (4); *Castellain* v. *Preston* (5); *Collingridge* v. *Royal Exchange Ass. Corporation* (6), and *Phoenix Assurance Co.* v. *Spooner* (7).

The law as laid down by these authorities and others has been summarized in Welford and Otter-Barry's work above referred to, and, as applied to this case, may briefly be said to be:—

Where the insured property has been sold under an agreement of sale and the sale completed by the receipt of the purchase money and an absolute conveyance of the property, before its destruction by fire, the insured, having divested himself of all his interest in the property, could not suffer loss by its destruction and, therefore, has no right of recovery on the policy.

(1) (1843) 11 M. & W. 10; 152 E.R. 695.
(2) (1881) 18 Ch. D. 1, at 10.
(3) (1875) L.R. 10 Q.B. 249.
(4) (1901) 31 Can. S.C.R. 144.
(5) (1883) 11 Q.B.D. 380.
(6) (1877) 3 Q.B.D. 173.
(7) [1905] 2 K.B. 753, at 756.

In the event of a fire taking place before the sale is completed by the conveyance of the property and the receipt of the price, the insured is entitled to recover to the full extent of his loss within the limits of the policy.

Referring to a state of facts similar to those existing in the case before us, the learned authors, at pages 217 and 218, say:—

> If the price has been paid, but the conveyance of the subject-matter has not been completed, the assured retains an insurable interest by virtue of his legal ownership. The policy therefore remains in force, notwithstanding such payment; but in the event of a loss before completion, the assured, not being damnified by the loss, will not be entitled to enforce it against the insurers for his own benefit * * * Where, however, the assured has contracted with the purchaser to be responsible for the safety of the subject-matter, the position will be different; and, unless the language of the policy is prohibitive, the value of the subject-matter will be recoverable by the assured.
>
> The contract under which the assignment of the subject-matter takes place may contain a provision that the assured is to keep alive an existing policy for the benefit of the purchaser. Where, as is usually the case, the consent of the insurers is obtained to what is to all intents and purposes an assignment of the policy no difficulty can arise. The effect of the provision, in the absence of such consent, does not appear to have been discussed, but the following considerations seem to apply, namely:—
>
> (i) There must be no condition in the policy precluding the assured from contracting with a purchaser in the terms of the provision.
>
> (ii) So long as the assured retains some interest in the subject-matter, such a provision may be valid, not only as between the assured and the purchaser, but also against the insurers. Although the contract may effect a change in the nature of his interest, it does not put an end to it. Nor is its value necessarily diminished, since the contract may amount to an undertaking by the assured to be responsible in the event of any loss.

An attempt was made by the purchasers to establish that, as a result of certain conversations between Mr. Banner, the respondent's then manager at Edmonton, and themselves, an agreement had been arrived at by which the respondent was to be responsible for the safety of the elevator. This attempt, in my opinion, wholly failed. No agreement of that nature can be spelled out of the conversations.

The respondent, however, is entitled to rely on the terms of the contract of sale made with the purchasers and approved by the Master. By that contract the purchasers were to pay the unearned portion of the insurance premiums. These had been paid by the respondent to the

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insurance companies. What object could there have been in embodying this stipulation in the contract if it was not to give the purchasers the benefit of the insurance policies? The respondent could have surrendered the policies to the companies and have obtained from them a return of the unearned premiums if all that was desired was to reimburse the respondent for money paid out in the liquidation on behalf of the Grain Company. The $1,125 was paid in respect of the policies of insurance and, in my opinion, the stipulation constituted an implied undertaking on the part of the respondent to hold the policies for the benefit of the purchasers until such times as they were validly assigned to them. Such an undertaking is enforceable in a court of equity by the respondent as trustee of the purchasers. *Burton* v. *Gore District Mutual Ins. Co.* (1).

That the respondent as liquidator had an insurable interest in the assets of the Grain Company when it obtained the policy is not disputed. That it had an insurable interest at the date of the fire is, in my opinion, established. It had that interest by virtue (1) of its legal ownership, and (2) of its implied undertaking.

The statutory conditions do not afford any defence to the respondent's claim. The appellants insured the respondent as liquidator of the Grain Company. By so doing they must be held to have insured all the interest in the elevator building which, in the liquidation, would pass to or be under the control of the respondent. The insured's interest was, therefore, stated in the policy within the meaning of statutory condition 4 (*a*). And, for the reasons above given, the insured's interest in the subject-matter of the insurance had not been assigned within the meaning of statutory condition 5 (*c*).

As the respondent had an insurable interest in the elevator not only when it obtained the policies in question but also at the date of the fire, and, as it was a term of the contract of sale that the insurance policies should be held for the benefit of the purchasers, the respondent, in my

(1) (1857) 14 U.C.R. 342, at 351.

opinion, is entitled to recover on the policies. I, therefore, agree with the majority of the court below and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Parlee, Freeman, Smith & Massie.*

Solicitors for the respondent: *Abbott & McLaughlin.*