**HALIFAX BUILDING SOCIETY AND ANOTHER**

**V.**

**KEIGHLEY AND ANOTHER**

KING'S BENCH DIVISION]

1931 MARCH 27, 30.

**LEX (1931) – 2 K.B. 248**

**CITATIONS**

3PLR/1931/2 (KBD)

[1931] 2 K.B. 248

[1931. H. 692.]

**BEFORE:** WRIGHT J.

**REPRESENTATION**

*A. J. BELSHAM* for the Plaintiffs.

*GILBERT BEYFUS* for the Defendants.

Solicitor for plaintiffs: *F. B. BROOK, FOR GAUNT, FOSTER & CO., BRADFORD*.

Solicitors for defendants: *SOMERVILLE, PHILPOT & CO., FOR F. G. & H. E. SMITH, BRADFORD*.

**ISSUES FROM THE CAUSE(S) OF ACTION**

DEBTOR AND CREDITOR:- Mortgage of property covered by Fire Insurance - Insurance by Mortgagor apart from Statute and Mortgage Deed - Fire - Payment of Insurance Money to Mortgagor - Right of Mortgagee to Money paid to Mortgagor - Subrogation - Statute - Repeal - Extent of - Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 23, sub-ss. 3, 4 - Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 108, sub-ss. 3, 4; s. 207.

INSURANCE AND REINSURANCE:- Fire insurance – Mortgaged property – Where taken out by mortgagor outside of deed terms - Party entitled to same

REAL ESTATE AND PROPERTY LAW - MORTGAGE:- Mortgage of property covered by Fire Insurance - Insurance by Mortgagor apart from Statute and Mortgage Deed – Fire incident and receipt of payment of Insurance Money by Mortgagor - Right of Mortgagee to Money paid to Mortgagor – Whether subrogation applicable thereto - Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 23, sub-ss. 3, 4 - Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 108, sub-ss. 3, 4; s. 207 in review

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

A mortgage deed made in 1919 provided that the mortgagees might insure the premises against fire, and that the mortgagors should pay the premiums to them. Before 1925 the mortgagees effected insurances of the premises under the deed. Before that year the mortgagors also effected with other insurers an insurance of the premises apart from statute or the deed in their own names. In 1930, while the deed and insurances were all in force, the premises were damaged by fire. The respective insurers paid to the mortgagors and mortgagees the proportions of the loss for which they were responsible. The mortgagees brought an action against the mortgagors for payment over of the money paid to the latter by their insurers:-

ISSUES FOR DETERMINATION OF APPEAL

1. Whether the plaintiffs are entitled to recover from the defendants the sum which they have received from their insurance company being the amount attributable to the property covered by the mortgage.

2. Whether the defendants are trustees or accounting parties to the plaintiffs in respect of this same amount. I must deal with each of those three alternatives.

DECISION OF KINGS BENCH DIVISISON

***Held*** *–*

1. that the plaintiffs were not entitled to succeed in the action, either (1.) under s. 23, sub-s. 4, of the Conveyancing Act, 1881, inasmuch as that sub-section had been repealed by s. 207 of the Law of Property Act, 1925, subject to a proviso that the repeal should not affect any right acquired before the latter Act, and no right to the money which the plaintiffs claimed had accrued to them before that Act; or (2.) under s. 108, sub-s. 4, of the Law of Property Act, 1925, inasmuch as the insurance effected by the defendants was not an insurance effected under that Act or any enactment replaced thereby, or an insurance for the maintenance of which the defendants were liable under the mortgage deed; or (3.) on the footing that the defendants were trustees of the money for the plaintiffs, or otherwise liable to them therefor.

*Lees v. Whiteley* (1866) L. R. 2 Eq. 143 and *Sinnott v. Bowden* [1912] 2 Ch. 414 followed.

2. Sect. 23, sub-s. 4, of the Conveyancing Act, 1881, in so far as it may remain unrepealed by the Law of Property Act, 1925, is not subject to the limitation which restricts sub-s. 3 of that section to money received on an insurance effected under the mortgage deed or under the Act; but is subject to the limitation that it applies only to money received on an insurance in which the mortgagor and the mortgagee are one or other or both interested.

*In re Doherty (J. E.)* [1925] 2 I. R. 246 approved.

**JUDGMENT OF COURT**

FACT STATEMENT

The plaintiffs are the successors in title of the Halifax Permanent Benefit Building Society, and that society on April 30, 1919, granted a mortgage to the defendants Gilbert and Frank Keighley, in respect of certain premises, the property of the defendants. The sum covered by the mortgage was 3360l., and was increased by a further charge with which I may not deal. It was a term of the deed that "it shall be lawful for the society from time to time to effect in the name of the society such insurances against fire in respect of any buildings for the time being on the said hereditaments as the directors may from time to time deem necessary." There was a further provision that the mortgagors "will at all times during the continuance of this security duly and punctually pay to the society all premiums and moneys necessary for keeping up any insurance against fire in respect of the buildings for the time being on the said hereditaments which shall have been effected by the society in exercise of the power in that behalf hereinbefore contained when the same shall become due or within one week thereafter." There were also certain rules of the society, rules from 93 to 96 inclusive, made binding by the covenants in the agreement, but in my judgment nothing turns on those rules. There were two insurances with the Alliance Assurance Company, Ld., effected on the property by the society, the plaintiffs, but entered in the joint names of the society as mortgagee and the mortgagors. One was dated May 14, 1920, and the other was dated November 20, 1924. Each of these policies contained, though not in identical terms, a familiar clause. I take, as representative of the clause, condition 8 in one of them, which reads: "If at the time of any destruction of or damage to any property hereby insured there be any other insurance effected by or on behalf of the insured covering any of the property destroyed or damaged, the liability of the company hereunder shall be limited to its rateable proportion of such destruction or damage." That clause is now almost, if not quite, universal in fire policies. The mortgagors, however, the defendants, also effected a separate policy in their own name with the Car and General Insurance Corporation, Ld. That policy covered other property as well as the property which was the subject of the mortgage. In November, 1930, while the mortgage deed and these three policies were all current, a fire took place on the defendants' premises and very considerable damage was done, though the whole property was not destroyed. In consequence, a claim was put forward by the plaintiffs, though no doubt the defendants must have joined with them, as the policies were joint policies, for the loss and damage. The claim on that basis was for 2965l. But for the fact of there being the third policy taken out by the mortgagors with the Car and General Insurance Corporation, Ld., the Alliance Assurance Company, Ld., would have duly paid that sum of 2965l., and that would have been received by the plaintiffs and would have been appropriated by them to the reduction of the debt. By reason, however, of the fact of the third policy taken out by the mortgagors and the presence in the Alliance policies of the clause such as I have read, the Alliance Assurance Company, Ld., were entitled to reduce the amount which they paid to the building society by a sum of 525l. 14s. 7d., and they did so reduce it. It is common ground that that reduction was properly made and that the amount recoverable on the Alliance policies was limited to 2439l. 5s. 5d.

The plaintiffs brought the present action against the defendants in the King's Bench Division of the High Court on a specially indorsed writ to recover the above mentioned sum of 525l. 14s. 7d., which the Car and General Insurance Corporation, Ld., had paid to the defendants. In the statement of claim indorsed upon the writ the only claim originally made was under s. 108, sub-s. 4, of the Law of Property Act, 1925 (1); but, on the application of counsel for the plaintiffs, Wright J. allowed the statement of claim to be amended so as to include an alternative claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881 (1), and a further alternative claim against the defendants as trustees for the plaintiffs of the sum claimed.

*(1) The material statutory provisions are set out below in the judgment of the learned judge.*

March 30.

WRIGHT J.

This case is tried as a short cause on a specially indorsed writ. [His Lordship stated the facts as above set out and continued as follows:] The claim in the action is by the plaintiffs to recover from the defendants the sum of 525l. 14s. 7d., which they have received from their insurance company in those circumstances, that being the amount attributable to the property covered by the mortgage. The claim as indorsed on the writ was originally limited to a claim pursuant to s. 108, sub-s. 4, of the Law of Property Act, 1925, but on the application of Mr. Belsham I have allowed the claim to be amended by putting in an alternative claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881, and also a further alternative claim on the ground that the defendants are trustees or accounting parties to the plaintiffs in respect of this same amount. I must deal with each of those three alternatives.

So far as the claim on s. 23, sub-s. 4, of the Conveyancing Act, 1881, is concerned, I think that, if that section now applies, the plaintiffs are right in their claim. The section is in these terms: "without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." Mr. Beyfus has contended that those words, which are general in their terms and must be subject to some limitation, have to be read as subject to the same limitation by way of implication, as is expressed in the preceding sub-s. 3. The limitation is there expressed as "All money received on an insurance effected under the mortgage deed or under this Act." He points out quite truly that the defendants' insurance with the Car and General Insurance Corporation, Ld., is neither effected under the mortgage deed nor under the Act. But I do not think any such limitation can be read into sub-s. 4. That section may be limited, and I think ought to be limited, to insurances in which the parties are one or the other or both interested, and therefore will cover an insurance effected by the mortgagor, and if these words apply will cover the defendants' insurance in this case.

*(1) (1877) 5 Ch. D. 569, 583.*

I have been referred to an authority to the same effect, an authority which does not bind me, but which I should treat with respect, which in fact agrees with the view I have independently formed. That is the Irish case of *In re J. E. Doherty.* (1)But before giving effect to any such view in the present case it is necessary to consider the further submission made by Mr. Beyfus, that this sub-section no longer applies, because it has been repealed by the repealing section, s. 207 of the Law of Property Act, 1925. That section repeals the Acts mentioned in the Seventh Schedule to the Act, which includes the Conveyancing Act, 1881, and therefore the sub-section to which I have been referred is prima facie repealed unless it falls within the qualifying sub-section of s. 207. Sect. 207 (*a*) is in these terms: "Nothing in this repeal shall affect the validity or legality of any dealing in property or other transaction completed before the commencement of this Act, or any title or right acquired or appointment made before such commencement, but, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of instruments whether made or coming into operation before or after such commencement." The instruments in question here are the mortgage deed, the further charge and the insurance policies, and they are all anterior in date to the commencement of the Law of Property Act, 1925, and the operative words apply to instruments made and coming into operation before such commencement and therefore apply to these instruments. It is, however, contended that what is in question here comes within the words, "title or right acquired or appointment made before such commencement." What is in question here is the plaintiffs' right to require payment to them of certain moneys which have accrued due under an insurance policy, and in my judgment it is the date at which that right accrues which must be the governing factor in this case. Assuming there was a right under the sub-section of the Act of 1881 it can only arise when the necessary conditions have been fulfilled; first of all, that there should be money received on the insurance, and secondly, that requirements should be made by the mortgagees that that money should be paid over to them. These conditions in the present case were clearly not fulfilled before the commencement of the Law of Property Act, 1925. I further think that the words in question, "title or right acquired or appointment made," are not precisely apt to the facts of this case. More apt words are to be found in another enactment referred to in s. 207 - namely, the Interpretation Act, 1889, s. 38, sub-s. 2 (*c*), which refers to "any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed," and that is saved by the proviso to s. 207, which provides that its terms are without prejudice to the provisions of this section of the Interpretation Act, 1889. In my judgment the claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881, fails, because that sub-section was not applicable in this case at any material time.

The statutory rights of the parties, if any, must therefore depend upon s. 108, sub-s. 4, of the Law of Property Act, 1925. That sub-section is in these terms: "Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied in or towards the discharge of the mortgage money." That sub-section follows sub-s. 3, which is in substance identical with the language of sub-s. 3 of s. 23 of the Conveyancing Act, 1881. Whereas sub-s. 3 gives the mortgagee a right to have moneys applied to reinstatement, sub-s. 4 entitles the mortgagee to have insurance moneys received by the mortgagor under an insurance as defined applied to a discharge of the mortgage money. It is clear that that sub-section is deliberately worded in order to limit the scope of its application. It applies according to its express terms to an insurance effected under the Act or any enactment replaced by the Act, that is in effect an insurance effected under s. 101 subject to the qualifying conditions of s. 108, sub-ss. 1 and 2. It is clear that the insurance here in question, that is the insurance effected by the defendants as mortgagors with the Car and General Insurance Corporation, Ld., cannot come within those terms, and it is I think equally clear that this insurance cannot come within the other term in the sub-section - namely, "an insurance for the maintenance of which the mortgagor is liable under the mortgage deed." This is an insurance which is in no way dealt with by and which in no way comes within the scope of the mortgage deed, but is outside it altogether. In my judgment accordingly the claim of the plaintiffs under s. 108, sub-s. 4, of the Law of Property Act, 1925, must fail.

There remains the third alternative claim as put forward by Mr. Belsham for the plaintiffs. There again it seems to me that the plaintiffs must fail. The claim cannot be put and is not put as damages for breach of any covenant in the mortgage deed. There is no covenant at all in the mortgage deed which refers to any outside insurance effected by the mortgagor at his own expense, and there is no covenant in the mortgage deed or in the rules which makes it a breach of covenant on his part to effect any such insurance, even if it affects recovery on the other policies. But even if there was it would be beyond the scope of this action, which does not deal with damages, but only with liquidated claims. In so far as it is sought to say that the defendants are in some way constructively constituted trustees of this money for the plaintiffs it seems to me that any such contention is contrary both to principle and authority. It was held in the case of *Lees v. Whiteley* (1) that the plaintiff, an assignee under a bill of sale of certain chattels, had no claim to the benefit of a policy against fire effected by the mortgagor. The deed contained a covenant to insure, but no provision for the application of the policy moneys in case of fire. The plaintiff was claiming there that he was entitled to have the money received by the mortgagor applied to the reduction or liquidation of the mortgage debt. Kindersley V.-C. said it was an assignment by bill of sale of machinery containing a covenant to insure, and that there were no terms as to the benefit of the policy passing by the assignment, and the learned Vice-Chancellor proceeds in this way: "If the plaintiff's contention can be sustained, it must stand on the footing that by reason of the covenant to insure there is an implied contract with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt. The question then comes to this: Can I imply such a covenant from the language of the bill of sale? and on examination of the terms of that instrument I am of opinion that I cannot. Were I to do so I should be making a new contract between the parties. It was perfectly competent to the plaintiff to have stipulated that the policy moneys should be applied in liquidation of the mortgage debt or in the restoration of the premises, but he has not done so; and how can I say that the parties intended something which is not stipulated for in this instrument, or make for the plaintiff a better agreement than he thought it necessary to make for himself? It might be that if he had insisted on such a contract, Messrs. Whiteley would have refused it. In point of fact, the existence of the insurance is obviously to some extent for the benefit of the mortgagee, although there was no obligation on the mortgagor to apply the insurance moneys in any particular way; because it is for the interest of the mortgagee that his mortgagors should be in a solvent condition." (1) That decision was expressly approved by Parker J. (as he then was) in *Sinnott v. Bowden.* (2) He there says: "It is, I think, clear that, apart from special contract or the provisions of some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises" (3), and then the learned judge refers to *Lees v. Whiteley* (4); *Poole v. Adams* (5); and *Rayner v. Preston.* (6) That being the law, it seems to me that the plaintiffs' third ground of claim must fail equally with the others. The decision of *Lees v. Whiteley* (4) was in 1866, at which time I apprehend there was no statutory provision analogous to that which was afterwards found in s. 23, sub-s. 4, of the Conveyancing Act, 1881. The mortgage in question here was no doubt prepared by a draftsman, who had in mind the provisions of that subsection of the Act of 1881, and no doubt since the Act of 1925 those who prepare similar documents adapt them to the provisions of the Act of 1925, but in the present case there is no special covenant and no statutory provision which applies.

*(1) L. R. 2 Eq. 149.; (2) [1912] 2 Ch. 414.; (3) Ibid. 419.; (4) L. R. 2 Eq. 143.; (5) (1864) 12 W. R. 683.; (6) (1881) 18 Ch. D. 1.*

In the result in my judgment the plaintiffs have not the right for which they are here contending, and their claim must be dismissed with costs.

*Judgment for defendants.*

J. R.