1946
*May 16, 17.
*Oct. 1.

SPRINGFIELD FIRE AND MARINE INSURANCE CO. (DEFENDANT) ..... APPELLANT;

AND

MILLIE MAXIM (PLAINTIFF) ..... RESPONDENT.

EAGLE FIRE COMPANY OF NEW YORK (DEFENDANT) ..... APPELLANT;

AND

MILLIE MAXIM (PLAINTIFF) ..... RESPONDENT.

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

Insurance (Fire)—False representation by applicant for policy—Non-disclosure or denial of previous fires—Transfer of property—Request by transferor to place insurance in name of transferee—Insurance company endorsing policy to cover transferee—Whether assignment or new contract—Right of transferee to recover on policy—Whether misrepresentation by transferor a defence to action.

The appellant companies issued two insurance policies to the respondent's husband on property owned by him consisting of a flour mill and equipment. During their currency, the property was conveyed to the respondent, and it is admitted that she is a *bona fide* purchaser for value. The policies were then taken to the local agent of the appellant companies by the husband, with the request that, as the property had been transferred, the insurance be placed in the name of his wife. An endorsement was then affixed to the policies by the two companies in nearly the same terms, reading "* * * this policy is held to cover in her name only * * *. All other terms and conditions remaining unchanged." A material misrepresentation was made by the husband in his application for insurance, when he stated that he never had a fire previously. The trial judge found that the statement was knowingly false and such finding was not disturbed by the appellate court. The property insured was totally destroyed by fire, and the respondent brought two actions against the appellant companies for the amount of the policies. The trial judge held that the misrepresentation by the husband could be set up as a defence against the respondent's claim and no waiver of statutory condition No. 1 of *The Alberta Insurance Act* could be inferred from the language of the assent by the companies; and the actions were dismissed. The Appellate Division, reversing that judgment, found that the effect of the request made by the husband on behalf of his wife and the endorsements on the policies by the companies was to create new contracts of insurance running direct to the wife as then owner of the property, and that the misrepresentation had no application to them; the respondent's actions were maintained.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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Held, affirming the judgment appealed from ([1945] 3 W.W.R. 705), The Chief Justice and Hudson J. dissenting, that, upon the facts and circumstances of the case, non-disclosure or denial of previous fires by the husband in his application for fire insurance cannot be set as a defence to the actions on the policies brought by the respondent against the appellant companies.

Per The Chief Justice and Hudson J. (dissenting):—The insurance policies, as between the original insured and the appellant companies, were void and unenforcible; but the effect of the assignment remains to be decided.—Though the misrepresentation was made by the husband and not by his wife, the husband was representing her in getting the approval of the companies to the transfer. The respondent must be held responsible for his acts as her agent, the respondent herself in her evidence proving such agency. "Concealment or misrepresentation (by the agent) is to be imputed to his principal and any policy effected through him will be void." Moreover, there was no change in the moral risk as the husband remained in control of the insured property after the transfer to his wife. Under the circumstances, the respondent acquired no rights under the policies.

Per Kerwin and Estey JJ.:—The respondent was not a mere assignee, who thus would take nothing from policies avoided for misrepresentation. —In view of the manner in which the companies' local agent was apprised of the respondent's wish to have the insurance in her name, and of the evidence of representatives of the companies that they had no objection to the respondent as an insured, it follows that new contracts were entered into between the companies and the respondent. The respondent was a purchaser for value; and, in the ordinary course of business, it should be possible for a purchaser of insured property to enter into a new contract of insurance without being bound by all representations that had been made to the insurer by his predecessor in title.—The wording "all other terms and conditions remaining unchanged" must be taken to refer to such terms as are applicable to the new contracts and the answers to the questions as to previous fires, by the husband, do not constitute an applicable term.

Per Rand J.:—Assignment of a contract of fire insurance is essentially different from an ordinary assignment. The latter is a matter between assignor and assignee solely; but admittedly, and here by express terms, in such insurance it is a condition that there be assent by the company. The insured cannot by his own act substitute a new party to the contract and thereby change the moral risk and the interest in the subject matter insured. The effect of the company's assent is to substitute the assignee as the person insured, the transaction involves also a reapplication of terms, the entire group of relations undergoes a readjustment and what emerges is a completely new contract. In this case, therefore, a new contract based on the existing policies was entered into with the respondent. But its terms and conditions must be determined; and, in particular, was it made on the basis of the original application so as to constitute the misrepresentation a fundamental defect? The simple procedure of assignment furnishes the answer to that question. The request for approval of an assignment is in effect an application for a new

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contract of insurance; the company may require any information before giving consent and could insist upon an application *de novo*. But, if it does not see fit to do so, the company must be deemed to have been content to deal with the assignee on the footing of his own representations alone and should not be able to raise against the assignee any misrepresentation made by the assignor.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ewing J. A. (2) and maintaining two actions by the respondent to enforce a claim for loss occasioned by fire in respect of property insured under policies issued by each of the appellant companies.

G. H. Steer K.C. and *R. Martland K.C.* for the appellants.

J. N. McDonald K.C. for the respondent.

The judgment of the Chief Justice and of Hudson J. (dissenting) was delivered by

HUDSON J.:—These actions were brought to enforce claims under insurance policies which the defendant companies had issued to the plaintiff's husband, and which policies were subsequently assigned to the plaintiff to whom, meanwhile, the property had been transferred.

The facts are fully set forth in the judgment of Mr. Justice Ewing at the trial (2). He found (*a*) that the plaintiff's husband, in each application to the defendant companies for the insurance, had represented that he never had a fire previous to the date of the applications; (*b*) that such representation was false to the knowledge of the applicant; (*c*) that such misrepresentation was of facts material to be made known to the defendants, to enable them to judge of the risks they were undertaking.

On these findings the learned judge held that the policies were void. He referred to section 1 of the Statutory Conditions in Schedule B of the *Insurance Act*, R.S.A. 1942, chapter 201, as follows:

1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known

(1) [1945] 3 W.W.R. 705. (2) [1945] 3 W.W.R. 209.

to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

He also held that this defence was valid as against the plaintiff as assignee and dismissed the action.

In the Appellate Division (1) this decision was reversed and judgment given for the plaintiff for the amounts claimed. Chief Justice Harvey arrived at his decision on two grounds: first, that it is only a misrepresentation or omission in respect of the insured property that comes within the terms of the condition, and in the present case it was other properties of the insured where the previous fires had occurred; secondly, that the assignment to the plaintiff when approved of resulted in a new contract between her and the company to which the condition in question here did not apply.

Mr. Justice Ford and Mr. Justice Macdonald agreed with the Chief Justice on the second ground but did not express any opinion on the first.

In respect of the first ground relied on by the Chief Justice, counsel for the appellant contended that the question simply is whether the occurrence of previous fires with respect to other properties is a material circumstance to be considered by an insurer, to enable him to judge of the risk he undertakes. This view is supported by a decision of the Judicial Committee in *Condogianis* v. *Guardian Assurance Company Ltd.* (2). In regard to what was a misleading answer to a similar question, Lord Shaw said at p. 131:

> It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insurer who had been formerly a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place.

The question goes to the "moral" risk which, after all, is much the most important in a case of fire insurance. The danger is not merely that of incendiarism but of carelessness. The careless man in control of property is no doubt responsible for a very large percentage of destructive fires.

(1) [1945] 3 W.W.R. 705. (2) [1921] 2 A.C. 125.

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At the expiration of the term provided for in the original insurance policies, new policies were issued by each of the companies. These were in the nature of renewal policies and upon the same terms and conditions as the earlier policies and on the faith of the original applications. For that reason this condition continued to apply.

I, therefore, agree with the learned trial judge that as between the original insured and the defendant companies the policies were void and unenforcible.

There remains the question of the effect of the assignment to the plaintiff. It appears that in July, 1943, Efrim Maxim, the husband, transferred the title of the flour mill insured to his wife, the plaintiff, and a certificate of title was issued in her name. Several weeks later he told the local agent of each of the insurance companies about this transfer and, at his request, this agent wrote a letter to each of them as follows:

August 12, 1943.

I am informed by the assured that *he has transferred the property in the name of his wife,* Mrs. Millie Maxim. Please issue the endorsement and send same over to me for attachment to the above policy.

As requested, the companies issued and forwarded to their agent, to be delivered to the plaintiff, endorsements to be attached to the policies in the following language:

The Springfield endorsement:

Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only. All other terms and conditions remaining unchanged.

The Eagle endorsement:

Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim, and this policy shall, in future, read and cover in the name of Mrs. Millie Maxim, with loss, if any, payable to the Assured and not as heretofore written. All other terms and conditions remaining unchanged.

Some months later the insured property was totally destroyed and the plaintiff claimed the full amount insured for from each company.

The general rule as to the position of an assignee of a fire insurance policy is stated in Welford and Otter Barry's Fire Insurance, 3rd ed. at p. 223:

On the other hand, as the assignee merely takes the place of the original assured, he necessarily succeeds to the consequences of any act

or omission by which the validity of the policy may have been affected before the assignment, and he may, therefore, through no fault of his own fail to recover in the event of a loss.

See also Couch's Cyclopedia of Insurance, vol. 6.

The contention on behalf of the respondent here is that the misrepresentation of the husband in the original applications became irrelevant when the property passed to a new owner, that in such case the rights of the purchasers of properties who were entirely innocent of the misrepresentations and who were not parties to same would be put in a most unfair and improper position.

It is true that the misrepresentation was made by Efrim Maxim, not by his wife, but Efrim Maxim represented his wife in getting the approval of the company to the transfer. She was responsible for his acts as her agent. Welford and Otter Barry's Fire Insurance, p. 152:

> Where the policy is effected through the medium of an agent of the assured, such as, for example, an insurance broker, the duty as to disclosure applies as fully as in the case where the assured effects the policy himself. If, therefore, the agent fails to perform this duty, and is guilty of concealing or misrepresenting a material fact, his concealment or misrepresentation is to be imputed to his principal, and any policy effected through him will be void.

Moreover, the moral risk involved remained. The husband always carried on the business of operating the mill in question, not only before but after the transfer to the wife. It was a flour mill and not the sort of business which a woman would be likely to operate. The position was stated by her as follows:

Q. Have you ever carried on business as a flourmiller yourself?

A. Myself?

Q. Yes, have you ever done that business? Did you ever learn to mill flour?

A. I didn't learn. How could a woman learn to mill flour?

Q. Since you went to Smoky Lake in 1936 Mr. Maxim has always looked after the flour milling business?

A. Yes.

Q. But he was the man who really ran the business?

A. Yes.

Q. And he still ran the business after he transferred the property to you?

A. Yes.

And again:

Q. After you got the transfer of the flour mill, did you keep the books or did Mr. Maxim?

A. Well, the books, it was his work.

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Q. That was his work?
A. Yes.
Q. And he would receive the money from the farmers when they paid it?
A. Yes.
Q. He would be the one who really ran the business there?
A. Yes.

Again:

Q. The truth is you were worried about this money that Mr. Maxim had in the Prairie Rose Company, isn't that right?
A. I guess so; I think so.
Q. And you wanted to have the flour mill in your name so that it would be safe, in case anybody made claims against Mr. Maxim, isn't that right?
A. Yes it was part of it.
Q. Did you ever go and see Mr. Romaniuk yourself?
A. No.
Q. You did not have any talk with him about insurance?
A. No.

Chief Justice Harvey expressed his views in the following language:

The important words of these endorsements are in the last clause: "All other terms and conditions remaining the same." Condition 1 is one of the conditions which still applies but it must be adapted to the new contract which is one between Mrs. Millie Maxim and the company instead of one between Efrim Maxim and the company and condition 1 is concerned only with representation made by the "person applying for insurance." Certainly Efrim Maxim did not apply for this insurance which is for the benefit and protection of his wife, other than as agent for her. She was the principal making the application. She acquires her rights under this policy not by assignment but as the terms of a new contract as disclosed in the words of the endorsement. All she received from Efrim Maxim is the benefit of the consideration already paid to the company for which presumably, as in the usual case, she has given him consideration, it then becomes a consideration from her to the company.

Mr. Justice Ford stated his reason as follows:

There has been no formal assignment of the policy, and the plaintiff is not relying upon a legal or equitable assignment thereof. She is the insured, and in my opinion her rights are to be determined as those of any applicant who has obtained insurance without a formal application therefor. Whatever duty she had to disclose or not to conceal such a circumstance material to the risk as is relied upon by the respondents, such disclosure is relative only to a new contract made with her.

There was no consideration for the change in the name of the insured. It was made at the request of her agent who was the person guilty of the original misrepresentation by which the insurance was secured. This agent was then and remained in control of the insured property. There was no change in the moral risk.

In Welford on Fire Insurance, 3rd ed. at p. 223, it is stated:

> On the other hand, as the assignee merely takes the place of the original assured, he necessarily succeeds to the consequences of any act or omission by which the validity of the policy may have been affected before the assignment, and he may, therefore, through no fault of his own, fail to recover in the event of a loss.
>
> The insurers do not, by the mere fact of giving their consent to the assignment, preclude themselves from afterwards asserting that the policy had already been avoided at the date of the assignment. The form of their consent and the circumstances in which it was given may, however, amount to a new contract, and therefore place the assignee in a better position than the original assured.

This statement in Welford is amply borne out by the authorities.

The contract of fire insurance required throughout its existence the utmost good faith on the part of both the insurer and the insured.

The defendants in their several defences set up that the plaintiff acquired no rights under the policy because it was null and void *ab initio,* by reason of the misrepresentations and non disclosures of the husband. It was the plaintiff in her evidence who proved the agency of her husband in securing the consent to the transfer to her name. The consequence of such agency, in my opinion, follows as a matter of law. Under these circumstances the plaintiff acquired no rights under the policy.

I would, therefore, allow the appeal and restore the judgment at the trial with costs.

The judgment of Kerwin and Estey J.J. was delivered by

KERWIN J.:—The respondent, Millie Maxim, brought an action against Springfield Fire and Marine Insurance Company on a policy of fire insurance for loss suffered by the destruction by fire of a flour mill and equipment in the village of Smoky Lake, in the province of Alberta. She also brought an action against the Eagle Fire Company of New York on a policy of fire insurance for the same loss. An order was made consolidating the trials of the two actions, which came on before Mr. Justice Ewing who dismissed the actions (1). Upon appeal, the Appellate

(1) [1945] 3 W.W.R. 209.

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Division of the Supreme Court of Alberta (1) gave judgment for the respondent, and the two insurance companies now appeal.

The flour mill and equipment were at one time owned by Efrim Maxim, the husband of the respondent, and on May 18, 1942, he applied in writing for $2,500 insurance. The application was directed to a different company but nothing turns on this as it was accepted, and policy no. 12872 issued, by the appellant, Springfield Fire and Marine Insurance Company. On June 11, 1942, Maxim applied in writing for $2,000 insurance on the same property and again, while the application was directed to a different company, it was accepted, and policy no. 15741 issued, by the Eagle Fire Company of New York. In each application was a question: "Have you ever had a fire?", to which the applicant answered "No". Each policy was for the term of one year and in 1943, on May 18 and June 11 respectively, each of the companies issued to Efrim Maxim a new policy for the corresponding amount covering the mill and equipment.

In July, 1943, Efrim Maxim transferred and conveyed all his estate and interest in the property to his wife, the present respondent, and a certificate of title was issued to her on July 21. In August of the same year, Efrim Maxim notified the local agent of the appellants of the transfer and that his wife wanted the insurance in her name, and on the 16th of that month, each appellant issued and delivered to the respondent an endorsement to the policy issued by it. The Springfield endorsement reads as follows:—

> Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only.
>
> All other terms and conditions remaining unchanged.

The Eagle endorsement is in the following words:—

> Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim, and this, policy, shall, in future, read and cover in the name of Mrs. Millie Maxim, with loss, if any, payable to the assured and not as heretofore written.
>
> All other terms and conditions remaining unchanged.

On February 24, 1944, the property insured was totally destroyed by fire.

(1) [1945] 3 W.W.R. 705.

Mr. Justice Ewing found that the answers to the questions in the original applications quoted above were false to Efrim Maxim's knowledge because, while carrying on business at Bellis, Alberta, he had sustained two fire losses prior to the applications, one in 1931 and the other in 1936, and that these were material circumstances to be made known to the insurers in order to enable them to judge the risk to be undertaken within the meaning of Alberta Statutory Condition No. 1:—

> Misrepresentation. 1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstances which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

It was only after the fire in February, 1944, that the companies learned of the previous fire losses.

The trial judge treated the policies issued in 1943 as mere renewals of the 1942 originals and held that it was settled law that a renewal is made on the faith of the truth of the original representations. As to the endorsements, he held they constituted new contracts entered into between the respondent and the insurers but that they were based upon the terms of the then existing policies.

The Appellate Division did not disturb the finding that the answers of Efrim Maxim were false and that the prior fire losses were material circumstances to be made known to the companies. No attack was, or very well could be, made upon it. The Appellate Division did not deal with the contention that the new policies of May and June, 1943, must be taken to be issued on the strength of the original representations but, while counsel for the respondent raised the point before us, there is no doubt that the trial judge was correct; *Sun Insurance Office* v. *Roy* (1). The Appellate Division, however, held that the respondent was not an assignee but that, in the circumstances, she had entered into a new contract with each company. Under *The Alberta Insurance Act,* an application for such policies as are before us need not be in writing.

The Chief Justice of Alberta held that, even assuming Statutory Condition I avoided the contracts with Efrim Maxim, there was a new and valid contract effected with

(1) [1927] S.C.R. 8.

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his wife, under which she has a valid claim. Ford J. stated that there had been no formal assignment of the policy and that the respondent's rights were to be determined as those of any other applicant who had obtained insurance without a formal application therefor. The new contracts, he continued, were based upon the terms of the existing policies in accordance with the terms of the companies' consents, "All other terms and conditions remaining unchanged," but with the limitation that only those terms thereof were continued as were applicable to the new contracts. "I think", he says,

> it entirely repugnant to the concept of the new contract which arises to say that it is to be avoided by reason of a misrepresentation the materiality of which can have relation only to the moral risk relative to someone other than the person who has been accepted by the insurer as the person assured. The question of whether an applicant for fire insurance has had other fires is so personal to the individual applicant that its materiality is relevant only to him.

Mr. Justice Macdonald agreed with the Chief Justice and Ford J.

Mr. Steer argued that the respondent was a mere assignee who took nothing because by Statutory Condition I the policies were avoided. If I could agree with his premise, the result predicated would, I think, follow but, bearing in mind the manner in which the companies' local agent was apprised of the respondent's wish, and that the evidence of representatives of the companies makes it abundantly clear that they had no objection to the respondent as an insured, I agree with the view of the members of the Appellate Division that new contracts were entered into between the companies and the respondent. It is admitted she is a purchaser for value, and the results in the commercial world would be serious indeed if, in the ordinary course of business, it were not possible for a purchaser of insured property to enter into a new contract without being bound by all representations that had been made to the insurer by his predecessor in title.

In *North British and Mercantile Insurance Company* v. *Tourville* (1), relied upon by the appellants, it appears from the printed case filed on the appeal that no question of a new contract could arise as the assignment to Tourville was made after the fire which would give rise to a claim

(1) (1896) 25 Can. S.C.R. 177.

had occurred. Even as to assignments of policies as distinguished from assignments of the proceeds, the latter part of the discussion in Welford and Otter-Barry on the Law Relating to Fire Insurance, 3rd edition, also relied upon by the appellants and quoted by the trial judge, shows (pp. 223-4) that while an assignee merely takes the place of the original assured,—

> The form of their (the insurers') consent and the circumstances in which it was given may, however, amount to a new contract and therefore place the assignee in a better position than the original assured.

An example of a new contract between the original assured and his insurer may be found in the decision of the Ontario Court of Appeal in *Mechanic* v. *General Accident Assurance Co. Ltd.* (1).

It is argued that in the present case there was no consideration moving from the respondent to the appellants but, as stated by Ford J., that may be found in the retention by the appellants of the unexpired portion of the premiums paid by Elfrim Maxim and the obligations imposed upon the respondent by virtue of the applicable statutory conditions,—such, for instance, as under Statutory Condition No. 11:—

> Salvage
>
> 11. After any loss or damage to insured property, it shall be the duty of the insured, when and as soon as practicable, to secure the insured property from further damage, and to separate as far as reasonably may be the damaged from the undamaged property, and to notify the insurer of the separation.

It was then contended that even if there were new contracts, one of the terms on which the companies entered into them was, as expressed in each endorsement of August 16, 1943, "all other terms and conditions remaining unchanged." I agree with Ford J. that that must be taken to refer to such terms as are applicable to the new contracts and that, for the reasons given by him in the extract from his judgment previously quoted, the answers to the questions as to previous fires, by her husband, do not constitute an applicable term.

An additional reason for allowing the appeal was given by Chief Justice Harvey, namely, that Statutory Condition I did not avoid the policy even if Efrim Maxim had

(1) (1924) 26 O.W.N. 185.

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remained the insured because of the words "as to the property in respect of which the misrepresentation or omission is made" and the representations had been made with reference to other property. Like Mr. Justice Ford and Mr. Justice Macdonald I am not prepared to agree with that interpretation but what has been said is sufficient to dispose of the appeal which should be dismissed with costs.

RAND J.:—This appeal raised a question of importance in the law of fire insurance. The respondent claims under two policies which were originally issued to her husband. During their currency, the property consisting of a mill, was conveyed to her, and the case is before us on the basis that she is the bona fide owner of it. There was no formal assignment executed, but the policies were taken to the local agent with the request that, as the property had been transferred, the insurance be placed in the name of the wife. Thereafter an endorsement was affixed to the policies, in the one case in this form:

> Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim and this policy shall in future read and cover in the name of Mrs. Millie Maxim with loss, if any, payable to the assured and not as heretofore written.
>
> All other terms and conditions remaining unchanged.

And in the other:

> Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only.
>
> All other terms and conditions remaining unchanged.

The policies had been issued following the expiration of preceding policies to which they referred, and in the application for which there had been a material misrepresentation. In the reply to the question

> Have you ever had a fire? If so, give particulars and name of company which insured the property destroyed at the time

the husband had in each case answered "No". The applications were made in May, 1942, but in 1931 and in 1936 he had had two fires on both of which he had recovered insurance. The trial judge, on conflicting evidence, found that the answer was knowingly false.

The first statutory condition of the *Insurance Act* of Alberta deals with misrepresentation in these words:

1. If any person applying for insurance falsely describes the property to the prejudice of the insurer or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

The answers made come clearly within this condition, and as against the husband there can be no question that they furnish a complete defence to an action.

The Appellate Division, reversing the judgment at trial, has found, however, that the effect of the request made by the wife and the endorsements on the policies was to create two new contracts of insurance running direct to the wife as then owner of the property, and that the misrepresentation had no applicatoin to them.

Mr. Steer, in his admirable argument, contended that the transaction was an assignment within the terms of statutory condition 5 (*c*) which reads as follows:

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

Change of Interest

(*c*) after the interest of the insured in the subject matter of the insurance is assigned, but this condition is not to apply to an authorized assignment under *The Bankruptcy Act* or to change of title by succession, by operation of law or by death.

Because of the misrepresentation, the policy was in fact void and as an assignee whether his interest is equitable or legal simply steps into the shoes of his assignor, there was effected no contract of indemnity with the wife.

I think it necessary to have clearly in mind just what is entailed in the so-called "assignment" of such a contract. An assignment from the earliest times has related to the transfer of an interest in property, corporeal or incorporeal. In the latter case, it has been used with reference to debts in which there existed in substance only an absolute obligation to pay money: the personality of the creditor was not a material element. Admittedly in such cases there was a transfer of beneficial interest but the only legal creation was an irrevocable power of attorney to the assignee to bring action in the name of the assignor: the legal structure of the chose was not changed. In equity the

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assignee was looked upon as the owner of it and was entitled to enforce his right there by bringing both the debtor and the assignor before the court. Later the *Judicature Act,* in the case of an assignment in writing followed by notice in writing to the debtor, substituted the assignee for the assignor as the legal party to the chose and so enabled the assignee to bring action at law in his own name, but subject to all the defences that might then have been raised against the assignor.

In the contract of fire insurance we have an entirely different relation. It is now beyond controversy that it is a personal contract of indemnity against loss or damage to the interest of the insured in specified property. It is insurance against certain risks, and among them, what is called the moral risk of the insured. It is limited also to the interest of the insured in the subject matter. To say of such a reciprocal relationship, that the insured could by his own act substitute a new party to the contract, and thereby change the moral risk and the interest in the subject matter insured is to misconceive the nature of the contract. It is perhaps unnecessary to remark that this form of transfer is wholly different from that of a mere right to receive moneys that may become payable: there the contract in its insurance aspects remains untouched.

The essential difference between the two is indicated by the fact that ordinary assignment is a matter between assignor and assignee solely; but admittedly, and here by express terms, in such insurance it is a condition that there be assent by the company. And the reason is obvious; after a transfer of interest in the subject matter, the insured cannot recover because he suffers no loss, and the assignee, because he is not insured. The effect of that assent is, in some form, to substitute the assignee as the person insured in relation to his newly created interest in the subject matter. The transaction involves also a reapplication of terms. For instance, the provisions relating to the "insured" necessarily apply to the substituted party. In this case, assuming the policies to have been valid, the husband, as the insured, although barred by his own act of incendiarism, could have recovered on a fire set by his wife; but after assignment could it be seriously questioned that the wife,

although barred by her own act, would not be barred by that of her husband? The entire group of relations undergoes a readjustment, and what emerges is a completely new contract.

Now it is possible that A should agree to indemnify B as trustee for C in respect of the interest of C in the subject matter. As in marine insurance C might be a series of transferees of property and of the right to indemnify: but B remains always the party to the contract, and it is contemplated both that the property may be so transferred and the insurance pass without reference to the insurer. In such case obviously the terms made with B not only should but are intended to be the basis of the indemnity to the successive *cestuis que* trust. But here there is no such form or contemplation; such a transfer would render the policies inoperative; and by the terms of the consent to the transfer and on the evidence, it is unquestionable that there was a complete substitution of insured party, interest and risk under the policies, which terminated the relation of the husband to them.

It was argued that there was in fact no assignment but a wholly original contract with the respondent; but that view appears untenable. The existing contract, including the consideration, the premium, was the basis for the substituted arrangement; and from that as well as the mode in which the transfer was made, I think it impossible to treat the transaction as being other than the ordinary "assignment" which follows a change in ownership of the subject matter.

Mr. Steer contended that there was no consideration for such a contract, and that all that was changed was in effect the party to whom the loss might become payable. But apart from the necessary modifications in person and risk mentioned, this view overlooks the fact that, in the circumstances, the wife became the equitable owner of whatever rights or powers under the policies might be available in a renegotiation of insurance. When she presented the policies to the agent, it was on the terms that the obligation to her husband be released and a

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novation made to herself. This release given by her was sufficient to satisfy any requirement that consideration move from the promisee.

The termination of insurance and the refunding of unearned premium are covered by condition 10 (1) which is as follows:

> 10. (1) The insurance may be terminated,—
>
> (*a*) subject to the provisions of condition 9, by the insurer giving to the insured at any time fifteen days' notice of cancellation by registered mail, or five days' notice of cancellation personally delivered, and, if the insurance is on the cash plan, refunding the excess of premium actually paid by the insured beyond the pro rata premium for the expired time;
>
> (*b*) if on the cash plan, by the insured giving notice of termination to the insurer, in which case the insurer shall, upon surrender of this policy, refund the excess of premium actually paid by the insured beyond the customary short rate for the expired time.

Notwithstanding the misrepresentation, at the time of the assignment the assignee and the company in fact assumed the policies to be in force, and that a notice under this condition (b) could be given. The discharge of that apparent right to a refund by the superseding agreement would likewise furnish a sufficient consideration from the wife for the new promise.

But although a new contract based on the assumption in fact that the existing policies were in force was entered into with the assignee, the question still remains: what were its terms and conditions? In particular, was it made on the basis of the original application and did the first statutory condition apply so as to constitute the misrepresentation a fundamental defect? The argument is that that application is the foundation for not only the assignment, but any and every policy of insurance issued thereafter by way of renewal. The consequence of that view would be, as Mr. Steer frankly conceded, that an innocent purchaser could continue the payment of insurance premiums for any number of years, and in the event of fire find himself at the mercy of a misrepresentation by his predecessor in title about which he knew nothing and which might be irrelevant to the actual risk of the new contract. I think the simple procedure of assignment furnishes the answer to that contention. The request for approval of an

assignment is in effect an application for a new contract of insurance. The company may require any information considered necessary or desirable before giving consent. It could insist upon an application *de novo*. But if it does not see fit to do that, apart from the question of estoppel on the fact that, in reliance on the approval, the assignee ordinarily can be said to have abstained from taking out new insurance, the company must be deemed to have been content to deal with the assignee on the footing of his own representations alone.

The interpretation of the precise language of the condition leads really to the same result. "If any person applying for insurance" must refer to the assignee, because it is insurance of the assignee that is constituted by the new contract. The assignee becomes the insured, and the terms and conditions become applicable to him accordingly. The only real difference between the taking of a new policy and that of following the procedure of assignment is that the contract with the unearned premium runs for the balance of the old term rather than with a new premium for a new term. With such an alternative at hand, it would be intolerable that the company should be able to raise such a misrepresentation against the assignee.

On the basis of the foregoing grounds, the appeal must be dismissed with costs.

Appeal dismissed with costs.

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