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*Oct. 22, 23.
*Dec. 10.

AMEDÉE GUIMOND AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE FIDELITY-PHENIX FIRE INSURANCE COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Insurance on lumber—Conditions—Warranty—Railway on lot—Security to bank—Chattel mortgage.

A policy insuring against loss by fire a quantity of sawn lumber in a specified location contained a warranty by the assured "that no railway passes through the lot on which said lumber is piled, or within 200 feet."

Held, that a railway partly constructed and hauling freight through the said lot, though not authorized to run passenger cars and do general business, is a "railway" within the meaning of the warranty.

A condition of the policy was that "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage" it should be void.

Held, per Duff J.—A security receipt under the "Bank Act" given to a bank for advances is not a chattel mortgage within the meaning of this condition.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and dismissing the action.

In an action on a policy insuring sawn lumber on the northwest of the Tobique Road in Campbellton, N.B., several defences were raised, namely, fraud and misrepresentation as to quantity and value of lumber;

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

non-compliance with a condition requiring statement as to origin of fire and other matters; that the fire was wilfully set by plaintiffs; defective proofs of loss; non-compliance with arbitration condition; breach of condition against encumbrance on lumber; and breach of warranty that no railway passed near it. The plaintiffs recovered at the trial, the jury's findings being all in their favour, among them being findings that the breaches as to encumbrance and the railway were waived. On the trial the defendants abandoned the charge of arson and failed to prove fraud and misrepresentation. The verdict against them was set aside by the full court on grounds of defective proofs, failure to arbitrate before action, breach of warranty as to the railway and breach of condition against encumbrances on the lumber. The plaintiffs appealed to the Supreme Court of Canada.

Hazen K.C. and *F. R. Taylor* for the appellants. The court below was wrong in holding that there was a breach of the arbitration clause. As defendants denied all liability there was nothing to arbitrate. *Margeson* v. *Guardian Fire and Life Assurance Co.* (1); *Morrow* v. *Lancashire Ins. Co.* (2).

The defendants are estopped by their actions from objecting to the proofs of loss as informal. *Western Assur. Co.* v. *Doull* (3).

The International Railway, being only in course of construction, was not a railway within the meaning of the policy. See McGillivray on Insurance, 295; *Wing* v. *Harvey* (4), at page 270.

If it were the company, through their agents, had

(1) 31 N.S. Rep. 359.
(2) 26 Ont. App. R. 173.
(3) 12 Can. S.C.R. 446.
(4) 5 DeG. M. & G. 265.

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full knowledge of its existence and location when they issued the policy and the finding of the jury must stand. See *Crozier* v. *Phœnix Ins. Co.*(1).

The security given to the bank was not a chattel mortgage and, therefore, not within the condition as to encumbrances. See *Hazzard* v. *Canada Agricultural Ins. Co.*(2).

Teed K.C. and *J. H. A. L. Fairweather* for the respondents. The insurance brokers who examined the property were not our agents and the knowledge they obtained as to the railway cannot be imputed to the defendants. The finding of the jury as to waiver was based on such knowledge and cannot stand. *McLachlan* v. *Ætna Ins. Co.*(3).

The security to the bank avoided the policy. *Hunt* v. *Springfield Fire and Marine Ins. Co.*(4).

The policy calls for arbitration before action. See *Guerin* v. *Manchester Fire Assur. Co.* (5), at page 151; *Spurrier* v. *La Cloche*(6).

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J.—This is an appeal from the unanimous judgment of the Supreme Court of New Brunswick setting aside a verdict entered for the plaintiffs, appellants, and directing a verdict to be entered for the defendant company, respondent.

The action was one brought to recover the amount insured by the respondents upon a quantity of sawn lumber of the appellants piled in their lumber yard in or near the Town of Campbellton, N.B.

(1) 13 N.B. Rep. 200.
(2) 39 U.C.Q.B. 419.
(3) 9 N.B. Rep. 173.
(4) 196 U.S.R. 47.
(5) 29 Can. S.C.R. 139.
(6) [1902] A.C. 446.

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A great many questions were submitted by the trial judge to the jury and nearly all were answered by them in the plaintiffs' favour resulting in a verdict being entered by the trial judge for them for $3,875, the full amount claimed.

The reasons given by the Supreme Court for setting side the verdict and directing judgment to be entered for the defendants are set forth by Chief Justice Barker with great clearness and fullness, and were rested upon four distinct grounds.

1. That there was a breach of warranty as to railway track.

2. Non-compliance with the arbitration or appraisement clause.

3. Non-compliance with several conditions precedent in the proofs of loss.

4. That the policy was voided by the security given to the bank on August 15th.

Mr. Justice White, who concurred in the judgment appealed from, expressly refrained from giving any opinion as to the sufficiency of the proofs of loss or as to the questions of waiver and estoppel in respect to the same.

As I have reached the conclusion that the appeal must be dismissed upon the ground that there was a breach of warranty as to the railway track, it will not be necessary for me to touch upon or express any opinion upon any of the other points relied upon by the court below for its judgment.

They were argued before us at great length and the respective contentions of the contesting parties as to non-compliance with the conditions of the policy and the waiver by the insurance company of compliance with such conditions and as to estoppel and al-

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leged over-insurance and as to the effect of the statutory security given to the bank on the lumber, were presented to us very fully.

The property insured, the amount, and certain special conditions of the risk are described in the following passage, which was typewritten, taken from the face of the policy:—

FOUR THOUSAND DOLLARS.

On sawn lumber, piled and lying on northwest of Tobique Road, in the Town of Campbellton, N.B.

Other concurrent insurance permitted without notice until requested.

Loss, if any, payable to La Banque Nationale.

Subject to conditions of average hereto annexed.

It is warranted by the assured in accepting this policy that a clear space of 300 feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or water-power saw-mill, planing mill or other special hazard, and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

It was admitted at the argument that the track of the International Railway was within the prohibited distance when the policy was issued and when the loss occurred, in fact that the jury so found in one of their answers. The jury also found that the insurance company

had either by itself or its duly authorized agent waived performance of the conditions of the policy (*e*) in regard to there being a railway running through the yard where the lumber was piled; that an agent of the company had inspected the plaintiff's lumber yard immediately before and as a preliminary to the placing of the insurance upon the lumber piled therein; that the company or its agents were aware at the time of insuring the lumber that it was within one hundred feet of the railway,

and that the railway was not open for "general business" before the lumber was destroyed by the fire.

The contention put forward by the plaintiffs in their pleadings and at the trial was that the word "railway" in the warranty necessarily means only a

completed railway authorized to be operated for general public traffic, and does not include such a railway as the International Railway here in question which was at the time of the issuance of the policy and also when the fire occurred a railway in course of construction only, and not open for general public traffic. I cannot accept this contention. Although the International Railway Company only began to operate with respect to general *public traffic* a short time after the fire, it had been in operation for all construction purposes and *for freight traffic* for some length of time before the policy issued.

The evidence is clear and was not questioned that this International Railway was so far completed and operated past this lumber yard as to carry freight and that as a fact all the lumber in the plaintiffs' lumber yard covered by the policy sued on had been hauled over this railway from plaintiffs' mills to the yard, a distance of some 12 or 15 miles. It also appeared that large quantities of lumber sold by the plaintiffs to their customers were carried by this railway from the plaintiffs' mill past the lumber yard to Campbellton and to the wharf for shipment and elsewhere, and that this had been going on, if not after the policy issued, at any rate up to within a very short time before it issued. The issues submitted for trial and actually tried did not render necessary any proof of the actual running of trains along the railway past the lumber yard during the time the policy was in existence and neither party offered any evidence on that point.

The only inference to be drawn from the evidence is that the operation of the railway for the purposes of freight traffic was under legal authority. It was

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not suggested by any one that the railway had been illegally operated as regards freight traffic, and we cannot assume that to have been the case.

Mr. Hazen's further submission, however, on this branch of the case was first, that there was sufficient evidence to justify the findings by the jury above referred to as to the waiver by the defendants of the condition or warranty in the policy that "no railway passed through the lot on which the lumber was piled, or within 200 feet," and as to their knowledge when issuing the policy of the existence of this railway; and secondly, that no specific evidence of the actual running of trains along this railway from the time of the issuance of the policy had been given.

On the question of the alleged knowledge of the company of the existence of this railway and of their waiver of the warranty in the policy, I am of the opinion that there was no evidence whatever to justify the findings of the jury.

These could only be upheld on the ground that Frink and Shannon were the agents of the company when the policy issued and that the knowledge they may have obtained from such an inspection of the premises as they made must be imputed to the defendants, their principals, or if only one of them should be held to be such agent, that his knowledge should be so imputed.

I agree with Chief Justice Barker in his conclusion after reviewing the evidence on this point, that there was nothing to sustain the contention that "Frink acted or was in fact the defendants' agent." As he says, "the evidence was all the other way. Neither he nor Shannon had any connection direct or indirect that I can see with the defendants. To attempt under

such circumstances to fix the defendants with knowledge of facts which they had as in any way affecting this insurance seems to me altogether useless." Moreover, there is no evidence that either of them had any knowledge that the railway had been operated for any purpose.

But even if the findings of the jury could be sustained of the company's agents having knowledge of the existence of this railway within the lumber yard, I cannot see how such knowledge on their part could avail to overcome, either on the ground of estoppel or waiver, the express warranty which the company chose to require from plaintiffs as a condition of their insurance contract attaching. There is nothing whatever to indicate that either Frink or Shannon had communicated any information respecting the existence of this railway or its relation to the lumber yard to the defendant company.

I see no essential element of estoppel present in the facts as proved, and I cannot see how the doctrine of waiver can be applied to an express warranty written in the body of the policy and forming part of the contract.

The plaintiffs must be assumed to have read their policy and if they did not read it cannot plead their ignorance of the existence of the warranties on which it is expresssly issued as an answer to evidence of their breach. I understand waiver to mean something said or done, some agreement made or assumed to have been made, subsequent to the condition or warranty, whereby the performance or observance of the condition or warranty need not be carried out, made nor proved.

But that is not the case here. Nothing of the kind

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is alleged respecting this warranty and if there was any question of its waiver there is nothing to shew that the waiver was in writing and attached to the policy as required by its conditions.

As to the suggestion or argument not presented in the pleading nor in the appellants' factum, but advanced here by Mr. Hazen, that because evidence was not given of the actual running of trains over the railway past the lumber yard during the period covered by the policy, therefore there was no breach of the warranty proved, I am unable to accept it.

The warranty was that no railway passed through the lot on which the lumber was piled. The company pleaded this warranty and alleged that the International Railway ran through the lot. The plaintiffs rejoined that when the policy was written and the loss occurred, the said railway was not completed and was not a railway within the meaning of the policy. That was the issue and the evidence admittedly shewed that such a railway did *de facto* exist, and had carried all the lumber insured from the plaintiffs' mills to the lumber yard, and other lumber of the plaintiffs from the mills and the lumber yard to Campbellton, and to the wharf and other places. If the plaintiffs had shewn that neither construction nor freight trains had been run past the lumber yard during the currency of the policy, they might have been in a position at least to argue that the railway had ceased to continue as such within the meaning of the policy.

The warranty was not that no train would pass along the railway during the continuance of the policy, but that no railway passed through the lumber yard. When it was proved that a railway did *de facto* so pass, and that construction and freight trains were in

the habit of passing over it and that the very lumber insured had been then recently carried by such trains to the lumber yard, and other lumber of plaintiffs to their purchasers past the yard, it seems to me the fact of a railway being there was sufficiently shewn.

It could hardly be said to be arguable that a railway in process of construction, over which construction trains were passing, and which had authority to carry freight and had exercised for a long time that authority, was not a railway within the meaning of such a warranty as that contained in this policy. If the plaintiffs in this case under the issues of fact joined desired to shew that although it had been a railway it had ceased to be one, either because it had been abandoned, or because the company had stopped running trains over this part of the tracks either for construction purposes or for carrying freight or for any other purpose, it was their duty to have given some evidence of the facts. A railway running trains for construction purposes or for carrying freight was as much a railway within the meaning of the term used in the warranty as one having statutory authority to operate for all purposes. The risks against which the warranty was obviously inserted to guard existed as much in the one case as the other.

IDINGTON J.—The appellants sued on a fire insurance policy wherein appeared in the typewritten particulars thereof, amongst other things, the following:

> It is warranted by the assured in accepting this policy that a clear space of three hundred feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or waterpower saw-mill, planing mill or other special hazard; and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

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The verdict obtained was set aside on appeal to the Supreme Court of New Brunswick on the ground, amongst others, that there was a breach of this warranty (which was not observed by the assured, and indeed was broken as soon as made), and thus the right of recovery defeated.

The lumber in fact was piled on a lot within the prohibited two hundred feet from a railway.

This railway had been constructed for twenty miles or more and ran past the place where the lumber in question was piled, but the railway company had not been given the authority of the Railway Commission to run passenger cars and do general business.

It was contended we must, therefore, hold that it was not a railway within the meaning of the words in said warranty.

It had been in use not only for construction purposes, but also for carrying freight, and amongst other freight had carried for appellants this very lumber now in question, and a great deal more.

Having regard to the manifest purpose of such a condition as this warranty in an insurance policy, it seems impossible to read it in the restricted sense asked by the appellants.

The contention that the respondent knew all this has no evidence to support it. The brokers who induced appellants to apply to the respondent for insurance were neither in fact its agents nor held out in any way by it to give them the appearance of agents for it and thus to lead people to believe them such.

The objection thus raised, therefore, seems fatal to recovery herein.

No good purpose can be served so far as I can see by deciding here the validity or invalidity of the several other objections taken.

I may, however, be permitted to observe that some, if not all, of them might by according due weight to some cases cited by appellants, have been overcome had there been in force in New Brunswick legislation dealing with conditions in or upon insurance policies similar to what has existed in Ontario for a great many years and also for some time past in some if not all of the Western provinces.

The appeal should be dismissed with costs.

DUFF J.—On the ground stated in the judgment of my brother Idington I think this appeal should be dismissed. It is strictly unnecessary to discuss any of the other grounds upon which the respondent company supported the judgment of the court below, but one point is relied upon to which, I think, it is right to refer. The policy contained the following clause:—

> This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured * * * or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage * * * or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance.

On the 15th August, 1910, after the risk attached, the appellants gave La Banque Nationale security for loans amounting to $29,133.15 upon part of the personal property which was the subject of the risk under section 88 of the "Bank Act." It is argued that in consequence of giving this security "the subject of insurance" became "encumbered by a chattel mortgage." The proposition upon which the contention rests is, of course, that a security taken by a bank under section 88 of the "Bank Act" is a chattel mortgage within the clause above quoted. I cannot agree with this contention. It is not necessary to say whether or not a secur-

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ity taken under section 88 of the "Bank Act" has such legal effect and such legal incidents as would technically justify one in describing it as a mortgage. The term "chattel mortgage" is a term of common use in those provinces in which the legal system is based upon the law of England. In most, if not all, of those provinces the class of instruments understood to be designated by that term is *eo nomine* the subject of legislation; and that legislation has, of course, nothing whatever to do with securities of the description in question. In the "Bank Act" itself such securities are nowhere alluded to as "chattel mortgages," and in common speech, whether of lawyers or laymen, that term would not be taken to comprehend such securities and I do not think any legal draftsman would regard "chattel mortgage" as an apt term for the purpose of designating them. As the phrase does not necessarily include such a security it seems to follow in accordance with the general rule governing the construction of insurance policies that the insurance company must submit to that construction which accords with the common understanding of the words employed and which is most favourable to the insured. There is here, of course, no suggestion of a controlling context.

ANGLIN J.—I concur in the judgment of Mr. Justice Davies in so far as it is based on the ground that the proximity of the International Railway to the plaintiffs' lumber yard constituted a breach of warranty and on the absence of any evidence that either Mr. Frink or Mr. Shannon was an agent of the defendant company. Beyond this I wish not to express an opinion, which is unnecessary to the decision of this

appeal, on the questions of waiver and estoppel discussed in my learned brother's notes.

BRODEUR J.—This appeal should be dismissed.

It was the duty of the appellants when they received their policy to examine it and see whether the contract as expressed therein was acceptable or not.

There was in the main body of the policy a typewritten clause to the effect that the insured warranted that no railway was passing within 200 feet of the lumber insured.

As it has been decided by this court in the case of *The Provident Savings Life Assurance Society of New York* v. *Mowat*(1), the insured or his agent had opportunity to examine the policy and he cannot now be heard to say that it did not contain the terms of the contract agreed upon and that the warranty stipulated was of no effect.

Appeal dismissed with costs.

Solicitor for the appellants: *F. R. Taylor.*
Solicitor for the respondents: *J. H. A. L. Fairweather.*

(1) 32 Can. S.C.R. 147.