

E. M. BACHRACH, PLAINTIFF AND APPELLEE, VS. BRITISH AMERICAN ASSURANCE COMPANY, A CORPORATION, DEFENDANT AND APPELLANT.

G.R. No. 5715. December 20, 1910

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 13th of July, 1908, the plaintiff commenced an action against the defendant to recover the sum of P9,841.50, the amount due, deducting the salvage, upon the following fire insurance policy issued by the defendant to the plaintiff:

"[Fire policy No. 3007499.]

"This policy of insurance witnesseth, that E. M. Bachrach, esq., Manila (hereinafter called the insured), having paid to the undersigned, as authorized agent of the British American Assurance Company (hereinafter called the company), the sum of two thousand pesos Philippine currency, for insuring against loss or damage by fire, as hereinafter mentioned, the property hereinafter described, in the sum of several sums following, viz:

"Ten thousand pesos Philippine currency, on goods, belonging to a general furniture store, such as iron and brass bedsteads, toilet tables, chairs, ice boxes, bureaus, washstands, mirrors, and sea-grass furniture (in accordance with warranty 'D' of the tariff attached hereto) the property of the assured, in trust, on commission or for which he is responsible, whilst stored in the ground floor and first story of house and dwelling No. 16 Calle Martinez, district 3, block 70, Manila, built, ground floor of stone and or brick, first story of hard wood and roofed with galvanized iron - bounded in the front by the said calle, on one side by Calle David and on the other two sides by buildings of similar construction and occupation.

"Co-insurances allowed, particulars of which to be declared in the event of loss or claim.

"The company hereby agrees with the insured (but subject to the conditions on the back hereof, which are to be taken as a part of this policy) that if the property above described, or any part thereof, shall be destroyed or damaged by fire, at any time between the 21st day of February, 1908, and 4 o'clock in the afternoon of the 21st day of February, 1909, or (in case of the renewal of this policy) at any time afterwards, so long as, and during the period in respect of which the insured shall have paid to the company, and they shall have accepted, the sum required for the renewal of this policy, the company will, out of their capital stock, and funds, pay or make good to the insured the value of the property so destroyed, or the amount of such damage thereto, to any amount not exceeding, in respect of each or any of the several matters above specified, the sum set opposite thereto, respectively, and not exceeding" in the whole the sum of ten thousand pesos, and also not exceeding, in any case, the amount of the insurable interest therein of the insured at the time of the happening of such fire.

"In witness whereof, the British American Assurance Company has caused these presents to be signed this 21st day of February, in the year of our Lord 1908.

"For the company.

"W. F. STEVENSON & CO., LTD.,

"By.....

"Manager Agents."

And indorsed on the back the following:

"The within policy covers and includes a 'Calalac' automobile to the extent of (P1,250) twelve hundred and fifty pesos Philippine currency.

"Memo: Permission is hereby granted for the use of gasoline not to exceed 10 gallons for the above automobile, but only whilst contained in the reservoir of the car. It is further warranted that the car be neither filled nor emptied in the within-described building or this policy be null and void.

"Manila, 27th February, 1908.

"W. F. STEVENSON & CO., LTD.,

"By.....,

"Manager Agents."

The defendant answered the complaint, admitting some of the facts alleged by the plaintiff and denying others. The defendant also alleged certain facts under which it claimed that it was released from all obligations whatever under said policy. These special facts are as follows:

First. That the plaintiff maintained a paint and varnish shop in the said building where the goods which were insured were stored.

Second. That the plaintiff transferred his interest in and to the property covered by the policy to H. W. Peabody & Co. to secure certain indebtedness due and owing to said company, and also that the plaintiff had transferred his interest in certain of the goods covered by the said policy to one Macke, to secure certain obligations assumed by the said Macke for and on behalf of the insured. That the sanction of the said defendant had not been obtained by the plaintiff, as required by the said policy.

Third. That the plaintiff, on the 18th of April, 1908, and immediately preceding the outbreak of the alleged fire, willfully placed a gasoline can containing 10 gallons of gasoline in the upper story of said building in close proximity to a portion of said goods, wares, and merchandise, which can was so placed by the plaintiff as to permit the gasoline to run on the floor of said second story, and after so placing said gasoline, he, the plaintiff, placed in close proximity to said escaping gasoline a lighted lamp containing alcohol, thereby greatly increasing the risk of fire.

Fourth. That the plaintiff made no proof of the loss within the time required by condition five of said policy, nor did the insured file a statement with the municipal or any other judge or court of the goods alleged to have been in said building at the time of the alleged fire, nor of the goods saved, nor the loss suffered.

The plaintiff, after denying nearly all of the facts set out in the special answer of the defendant, alleged:

First. That he had been acquitted in a criminal action against him, after a trial duly and regularly had, upon a charge of arson, based upon the same alleged facts set out in the answer of the defendant.

Second. That he had made no proof of the loss set up in his complaint for the reason that immediately after he had, on the 20th of April, 1908, given the defendant due notice in writing of said loss, the defendant, on the 21st of April, 1908 and thereafter on other occasions, had waived all right to require proof of said loss by denying all liability under the policy and by declaring said policy to be null and void.

After hearing the evidence adduced during the trial of the cause, the lower court found that the defendant was liable to the plaintiff and rendered a judgment against the defendant for the sum of P9,841.50, with interest for a period of one year at 6 per cent, making a total of P10,431.99, with costs.

From that decision the defendant appealed and made the following assignments of error:

- The court erred in failing to hold that the use of the building, No. 16 Calle Martinez, as a paint and varnish shop annulled the policy of insurance.
- The court erred in failing to hold that the execution of the chattel mortgages without the knowledge and consent of the insurance company and without receiving the sanction of said company annulled the policy of insurance.
- The court erred in holding that the keeping of gasoline and alcohol not in bottles in the building No. 16 Calle Martinez was not such a violation of the conditions of the policy as to render the same null and void.
- The court erred in failing to find as a fact that E. M. Bachrach, the insured, willfully placed a gasoline can containing about 10 gallons of gasoline in the upper story of said building, No. 16 Calle Martinez, in close proximity to a portion of the goods, wares, and merchandise stored therein, and that said can was so placed by said Bachrach as to permit the gasoline to run on the floor of said second story.
- The court erred in failing to find as a fact that E. M. Bachrach, after placing said gasoline can in close proximity to the goods, wares, and merchandise covered by the policy of insurance, that he (Bachrach) placed in close proximity to said escaping gasoline a lighted lamp containing alcohol, thereby greatly increasing the risk of fire.
- The court erred in holding that the policy of insurance was in force at the time of said fire, and that the acts or omissions on the part of the insured which caused, or tended to cause, the forfeiture of the policy, were waived by the defendant.
- The court erred in holding the defendant liable for the loss under the policy.
- The court erred in refusing to deduct from the loss sustained by Bachrach the value of the automobile, which was saved without damage.
- The court erred in refusing to grant the motion for a new trial.
- The court erred in refusing to enter judgment in favor of the defendant and against the plaintiff.

With reference to the first above assignment of error, the lower court in its decision said:

"It is claimed that either gasoline or alcohol was kept in violation of the policy in the bodega containing the insured property. The testimony on this point is somewhat conflicting, but conceding all of the defendant's claims, the construction given to this claim by American courts would not justify the forfeiture of the policy on that ground. The property insured consisted mainly of household furniture kept for the purpose of sale. The preservation of the furniture in a salable condition by retouching or otherwise was incidental to the business. The evidence offered by the plaintiff is to the effect that alcohol was used in preparing varnish for the purpose of retouching, though he also says that the alcohol was kept in the store and not in the bodega where the furniture was. It is well settled that the keeping of inflammable oils on the premises, though prohibited by the policy, does not void it if such keeping is incidental to the business. Thus, where a furniture factory keeps benzine for the purposes of operation (Davis vs. Pioneer Furniture Company, 78 N. W. Rep., 596; Faust vs. American Fire Insurance Company, 91 Wis., 158), or where it is used for cleaning¹ machinery (Mears vs. Humboldt Insurance Company, 92 Pa. St., 15; 37 Am. Rep., 647), the insurer can not on that ground avoid payment of a loss, though the keeping of the benzine on the premises is expressly prohibited. These authorities also appear sufficient to answer the objection that the insured automobile contained gasoline and that the

plaintiff on one occasion was seen in the bodega with a lighted lamp. The first was incidental to the use of the insured article and the second being a single instance falls within the doctrine of the case last cited."

It may be added that there was no provision in the policy prohibiting the keeping of paints and varnishes upon the premises where the insured property was stored. If the company intended to rely upon a condition of that character, it ought to have been plainly expressed in the policy.

With reference to the second above assignment of error, the defendant and appellant contends that the lower court erred in failing to hold that the execution of the said chattel mortgage, without the knowledge and consent of the insurance company and without receiving the sanction of said company, annulled the said policy of insurance.

With reference to this assignment of error, upon reading the policy of insurance issued by the defendant to the plaintiff, it will be noted that there is no provision in said policy prohibiting the plaintiff from placing a mortgage upon the property insured, but, admitting that such a provision was intended, we think the lower court has completely answered this contention of the defendant. He said, in passing upon this question as it was presented:

"It is claimed that the execution of a chattel mortgage on the insured property violated what is known as the 'alienation clause,' which is now found in most policies, and which is expressed in the policies involved in cases 6496 and 6497 by a phrase imposing forfeiture if the interest in the property pass from the insured. (Cases 6496 and 6497, in which are involved other actions against other insurance companies for the same loss as in the present action.)

"This clause has been the subject of a vast number of judicial decisions (13 Am. & Eng. Encyc. of Law, 2d ed., pp. 239 et seq.), and it is held by the great weight of authority that the interest in property insured does not pass by the mere execution of a chattel mortgage and that while a chattel mortgage is a conditional sale, there is no alienation within the meaning of the insurance law until the mortgagee acquires a right to take possession by default under the terms of the mortgage. No such right is claimed to have accrued in the case at bar, and the alienation clause is therefore inapplicable."

With reference to the third assignment of error above noted, upon a reading of the decision of the lower court it will be found that there is nothing in the decision of the lower court relating to the facts stated in this assignment of error, neither is there any provision in the policy relating to the facts alleged in said assignment of error.

Assignments of error numbers 4 and 5 above noted may be considered together.

The record discloses that some time prior to the commencement of this present action, a criminal action was commenced against the plaintiff herein in the Court of First Instance of the city of Manila, in which he was charged with willfully and maliciously burning the property covered by the policy in the present case. At the conclusion of the criminal action and after hearing the evidence adduced during the trial, the lower court, with the assistance of two assessors, found that the evidence was insufficient to show beyond peradventure of doubt that the defendant was guilty of the crime. The evidence adduced during the trial of the criminal cause was introduced as evidence in the present cause. While the evidence shows some very peculiar and suspicious circumstances concerning the burning of the goods covered by the said policy, yet, nevertheless, in view of the findings of the lower court and in view of the apparent conflict in the testimony, we can not find that there is a preponderance of evidence showing that the plaintiff did actually set fire or cause fire to be set to the goods in question. The lower court, in discussing this question, said:

"As to the claim that the loss occurred through the voluntary act of the insured, we consider it unnecessary to review the evidence in detail. That was done by another branch of this court in disposing of the criminal prosecution brought against the insured, on the same ground, based mainly on the same evidence. And regardless of whether or not the judgment in that proceeding is res adjudicata as to anything here, we are at

least of the opinion that the evidence to establish this defense should not be materially less convincing than that required in order to convict the insured of the crime of arson. (*Turtell vs. Beamont*, 25 Rev. Rep., 644.) In order to find that the defense of incendiarism was established here, we would be obliged, therefore, in effect to set aside the findings of the judge and assessors in the criminal cause, and this we would be loath to do even though the evidence now produced were much stronger than it is."

With reference to the sixth assignment of error above noted, to wit: That the court erred in holding that the policy of insurance was in force at the time of said fire and that the acts or omissions on the part of the insured which caused or tended to cause a forfeiture of the policy were waived by the defendant, the lower court, in discussing this question, said:

"Regardless of the question whether the plaintiff's letter of April 20 (Exhibit B) was a sufficient compliance with the requirement that he furnish notice of loss, the fact remains that on the following day the insurers replied by a letter (Exhibit C) declaring that the 'policies were null and void,' and in effect denying liability. It is well settled by a preponderance of authorities that such a denial is a waiver of notice of loss, because if the 'policies are null and void,' the furnishing of such notice would be vain and useless. (13 Am. & Eng. Encyc. of Law, 347, 348, 349.) Besides, 'immediate notice' is construed to mean only within a reasonable time.

"Much the same may be said as to the objection that the insured failed to furnish to the insurers his books and papers or to present a detailed statement to the 'juez municipal,' in accordance with article 404 of the Code of Commerce. The last-named provision is similar to one appearing in many American policies requiring a certificate from a magistrate nearest the loss regarding the circumstances thereof. A denial of liability on other grounds waives this requirement (*O'Neil vs. Buffalo Fire Insurance Company*, 3 N. Y., 122; *Peoria Marine Ins. Co. vs. Whitehill*, 25 Ill., 382), as well as that relating to the production of books and papers (*Ga. Home Ins. Co. vs. Goode & Co.*, 95 Va., 751; 66 Jur. Civ., 16). Besides, the insured might have had difficulty in attempting to comply with this clause, for there is no longer an official here with the title of 'juez municipal.' "

Besides the foregoing reasons, it may be added that there was no requirement in the policy in question that such notice be given.

With reference to the assignments of error numbers 7, 9, and 10, they are too general in their character to merit consideration.

With reference to the eighth assignment of error above noted, the defendant and appellant contends that he was entitled to have the amount of his responsibility reduced by the full value (P1,250) of the said automobile.

It does not positively appear of record that the automobile in question was not included in the other policies. It does appear that the automobile was saved and was considered as a part of the salvage. It is alleged that the salvage amounted to P4,000, including the automobile. This amount (P4,000) was distributed among the different insurers and the amount of their responsibility was proportionately reduced. The defendant and appellant in the present case made no objection at any time in the lower court to that distribution of the salvage. The claim is now made for the first time. No reason is given why the objection was not made at the time of the distribution of the salvage, including the automobile, among all of the insurers. The lower court had no opportunity to pass upon the question now presented for the first time. The defendant stood by and allowed the other insurers to share in the salvage, which he claims now wholly belonged to him. We think it is now too late to raise the question.

For all of the foregoing reasons, we are of the opinion that the judgment of the lower court should be affirmed, and it is hereby ordered that judgment be entered against the defendant and in favor of the plaintiff for the sum of P9,841.50, with interest at the rate of 6 per cent from the 13th of July, 1908, with costs. So ordered.

Arellano, C. J., and Torres, J., concur.

Trent, J., concurs in the result.

Moreland, J., dissents.

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