Right of creditor to exercise rights of his debtor under Art. 1031, C.C.—Failure of debtor to proceed—Mise en demeure—Parties to suit.

Held:—1. A creditor who, on the distribution of the price of sale of his debtor's property under process of execution, has not been collocated because the proceeds were insufficient and were awarded in the report to a privileged creditor for a claim due by the debtor jointly with another, his warrantor to the extent of one half of the claim, has under Art. 1031, C.C., the right to bring the action the debtor could have brought against such warrantor to recover from him the amount for which he is liable.

2. The failure of the debtor to proceed in warranty against his co-debtor and warrantor, at the time of the distribution of the proceeds of his property, amounts to a refusal and neglect on his part to act, sufficient to entitle the creditor to avail himself of Art. 1031.

3. The debtor was *en demeure* to so proceed, and no further *mise en demeure* of him by the plaintiff was required before bringing suit.

4. It is not necessary, in such a case, that the creditor should join his debtor as co-defendant in the suit brought against the warrantor.—*Gosselin* v. *Bruneau*, in Review, Casault, Caron, Andrews, JJ., (Casault, J., *diss.*), April 30, 1889.

FIRE INSURANCE.

(*By the late Mr. Justice Mackay.*)

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CHAPTER II.

OF THE ESSENCE OF THE CONTRACT, ITS TERM, AND THE PREMIUM.

[Continued from p. 175.]

§ 46. *Effect in France and in England, of acknowledgment of premium paid.*

As to the effect of such agreements, Pardessus, Droit Commercial, Vol. 2, says that in France if a policy have been delivered and it state that the premium has been paid, but in reality it has not been, and a loss happens, the insurers must pay; they may only deduct the unpaid premium. If before a loss happens they wish to be freed because the insured will not pay according to promise, they must (says Pardessus) put him *en demeure*, and tell him clearly that they cancel the policy. Alauzet is to the effect that if, among the conditions of such a policy delivered, there be one stating that the premium must be actually paid or there shall be no insurance, there can be none before actual payment of the premium.

In England, in the case of *Newcastle Fire Ins. Co.* v. *McMorran*,[1] where the policy contained the condition that there should be no insurance until the premium was actually paid, the insured raised the pretension that there was no effectual policy till the premium was really paid, and as alterations had been made after the policy was issued but before the premium was paid, the insured claimed that after the insurance became effectual he had not altered. McMorran, the insured, lost his case.

§ 47. *Waiver of the condition requiring actual payment of premium to complete the contract.*

The condition, that no insurance shall be regarded as binding until actual payment of the premium, may be waived by the insurer, and the waiver may be proved by parol.

If a policy has been delivered with receipt of premium admitted in it, I would say the condition, against insurance till actual payment, could not avoid such a policy. Even if the policy has not been actually delivered, if delivery was only delayed from pressure of business in the office, the insurance is valid and the contract complete, without payment of the premium.

The case of *Government* v. *National Protn. Ins. Co.*[2] was an illustration of waiver, for the company was informed of the loss, yet took the premium afterwards.

In *Sanford* v. *The Trust Fire Ins. Co.*,[3] the charter ordered that the policies must be signed by the President and Secretary, and that every policy and every contract must be in writing, to be binding. But it was held that a court of chancery would interfere where a perfect contract has been made, except the mere omission of the signature of the president and secretary.

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[1] 3 Dow, 255.

[2] 25 Barbour.

[3] 1 N. Y. Legal Observer (1842).