

an issue should be tried between the bank as plaintiff and the town corporation as defendant, to determine the ownership of the moneys.

J. W. Bain, K.C., for the bank.

W. E. Raney, K.C., for the town corporation.

E. G. Long, for the garnishee.

Rose, J., in a written judgment, said that the town corporation held a mortgage from the lumber company, and a policy of fire insurance was issued by the insurance company to the lumber company, loss if any payable to the town corporation as its interest might appear. The town corporation sued upon the mortgage, and on the 19th March, 1917, obtained final judgment. When the policy expired on the 14th August, 1917, a new one was written for the same amount, but the loss was not expressed to be payable to the mortgagee. This last mentioned policy was in force when a fire occurred on the 15th May, 1918, and the insurers admit liability for \$1,813.37.

On the day after the fire, the lumber company assigned to the bank the moneys payable or to become payable under the policy; and it is sworn that notice of the assignment was forthwith given by the bank to the insurance company.

The town corporation said: (1) that, although not so expressed on the face of the policy, the real agreement between the town corporation, the lumber company, and the insurers, was that the loss, if any, under the policy, should be payable to the town corporation as mortgagee, as its interest might appear; and, therefore, that the lumber company had nothing to assign to the bank; and (2) that, even if the money payable under the policy was payable to and assignable by the assured, the insurance company was, nevertheless, liable to the town corporation for a similar amount, in virtue of an agreement made between the town corporation and the insurance company, or because of representations made by the insurance company to the town corporation.

The bank said: (1) that the agreement between the town corporation and the assured was as it appeared to be upon the face of the policy; and, therefore, that the assignment was good; and (2) that, if the insurance company was not bound to pay the insurance moneys to the bank, it was, nevertheless, liable to the bank for a similar amount, because of a representation made by the issue of the policy, in the form in which it was issued, and acted upon by the bank.

The right to the original order depended upon the ability of the town to shew by affidavit that, at the time of the application, January, 1919, the insurance company was indebted to the lumber