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 \*Feb. 24.  
 \*May 1.

THE MANUFACTURERS ACCIDENT INSURANCE COMPANY } APPELLANT;  
 (DEFENDANT) ..... }

AND

MINNIE PUDSEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA  
 SCOTIA.

*Accident insurance—Renewal of policy—Payment of premium—Promissory note—Instructions to agent—Agent's authority—Finding of jury.*

A policy issued by the Man. Acc. Ins. Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the city had requested P. to renew and had received from him a promissory note for \$15 (the premium being \$16) which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore.

The note was never paid but remained in possession of the agent the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in

\*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt P. might fairly expect that he was authorized to take a premium note having no knowledge of any limitation of his authority and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia.

*Held* further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise.

**APPEAL** from a decision of the Supreme Court of Nova Scotia affirming the judgment for the plaintiff at the trial.

The material facts are sufficiently set out in the above head-note and more fully in the judgment of the majority of the court delivered by Mr. Justice King.

*Wallace Nesbitt* for the appellant.

The policy had expired and no contract for insurance existed when the insured was killed. See *Accey v. Fernie* (1); *British Industry Life Assur. Co. v. Ward* (2); *Tiernan v. The People's Ins. Co.* (3).

(1) 7 M. & W. 151.

(2) 17 C. B. 644.

(3) 26 O. R. 596; 23 Ont. App. R. 342.

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The agent had no authority to take a note for the premium. *Western Assur. Co. v. Provincial Ins. Co.* (1).

*W. B. A. Ritchie* Q.C. for the respondent.

The judgment of the majority of the court was delivered by :

KING J.—This is an action on a policy claimed to have been effected by Obadiah Pudsey, deceased, and the question in controversy is whether the insurance was in fact effected.

Pudsey had been insured in the appellant company for the twelve months ending on 24th September, 1893. The policy provided that it might be renewed for like periods from year to year by payment of the annual premium of sixteen dollars.

One of the conditions indorsed on the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which the claim should be made.

Another was that no renewal receipt should be valid unless printed in office form and signed by the managing director and countersigned by the agent.

Nothing was stated in the policy or conditions respecting the payment of premiums, whether in cash or by premium notes, and of course, therefore, nothing as to the effect of non-payment of premium notes at maturity.

Prior to November, 1889, the company was in the habit of taking premium notes, but at that time they informed their agents by circular that they had resolved to discontinue the practice, and directed them to conduct the business thereafter on the cash system, and refused to accept notes for premiums for accident insurance.

One Paton was at the period in question agent and manager of the company for the Maritime Provinces. He was also agent for the Manufacturers Life Insurance Company, a company having, as it is stated, substantially the same management. In the business of this latter company premium notes were continued to be taken, and the circular referred to seems to point to a distinction intended to be made in the mode of conducting the accident and life business.

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The insurance effected as above expired on the 24th September, 1893. On the 26th Mr. Paton sought out Pudsey, who was a locomotive engineer on the Windsor and Annapolis Railway, to get him to renew his insurance.

What took place is differently stated by the different witnesses. It is proved, however, and not disputed, that Pudsey signed and delivered to Paton a promissory note for fifteen dollars payable on October 10th. This note was on one of the printed forms supplied by the Manufacturers Life Insurance Company to Paton, and in accordance with its form was made payable to that company, or order. It does not appear that the attention of Pudsey was drawn to the difference in the companies.

Paton, who was called as a witness on behalf of each party, says that the note was taken as a portion of the renewal premium, but that it was agreed between him and Pudsey that there was to be no insurance till the note was paid, and he says he gave no renewal receipt and received no payment of cash in addition to the note.

On the other hand the father of Pudsey, who was present at the time, although not, it appears, within hearing of all that took place, says that his son gave Mr. Paton a bank note, and that the latter said he would take his note for the balance. He also says

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that Paton gave to Obadiah Pudsey a paper purporting to be a receipt of some kind, which the jury have found to be the ordinary renewal receipt of the company.

The jury have also found that a sum of money was paid in cash, and that the note was given and taken as payment of the balance of the premium.

The note never was paid, nor was it delivered up to Pudsey, but remained in possession of Mr. Paton. The company knew nothing of it.

In January, 1894, Pudsey was killed in a railway accident.

Upon the findings as above, judgment was entered for the plaintiff by the learned Chief Justice of Nova Scotia, before whom the case was tried, and the judgment was afterwards sustained by the other judges with exception of Meagher J. who dissented.

The contention of the appellants is that Paton did not purport to bind the company (or in other words to renew the insurance), and that, if he did, he acted without authority; and further that if there was any proper evidence of such authority, it should have been passed upon by the jury.

The most material question for us is that as to Paton's authority to do what the jury found that he did, viz., to take the note in payment of the premium and deliver the company's renewal receipt to Pudsey.

The express instructions of November, 1889, to accept only cash for accident premiums were in force at the time in question, for Paton says that these instructions had never been varied. It is not alleged that Pudsey knew anything of them.

The question therefore is whether it was within the scope of Paton's employment to take a premium note as in payment.

His authority to receive premiums and to give renewal receipts, and so to complete the contract, is clear. He says that every renewal receipt comes to him from the head office at Toronto, and that he renews policies after they have lapsed by giving renewal receipts.

He further says :

I personally may take part of the money and a note for the rest. I charge myself with the full amount of the premium and the note becomes my personal property. When I take part cash I take a note for the balance of the premium.

This shews at least that he was accustomed to complete the transaction.

The possession of blank policies and renewal receipts signed by the president and other principal officers is some evidence of a general agency to complete the contract. *Carroll v. Charter Oak Ins. Co.* (1). May on Insurance 2 ed. p. 139.

The authority of a general agent is, however, restricted to the range of his employment and to the acts and representations which a prudent and ordinarily sagacious and experienced person (with no reason to suspect otherwise) might expect him to do or to be authorized to make in respect of the particular business entrusted to him.

It would not be expected that an insurance agent would be authorized to receive a chattel in payment of a premium, or to discharge his own indebtedness to the assured through it, for this would be travelling out of the usual course of business.

But there is nothing in the course of business (or in the nature of the contract) to make it unreasonable to take a premium note.

In marine insurance it is very common. In the case of the Manufacturers Life it is shown to be the practice; and the evidence further shows that it was the practice

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(1) 40 Barb, N.Y., 292.

1897 of the appellant company to take premium notes up to  
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 ACCIDENT In the United States it has been held that where the  
 INSURANCE agent is authorized to accept the payment of premiums  
 COMPANY he may, in his discretion, accept a note or cheque  
 v. instead of the money, where the policy is silent in the  
 PUDSEY. matter. *Taylor v. Merchants Fire Ins. Co.* (1).  
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The fair conclusion would therefore seem to be that as this agent had been employed to complete the contract and had been entrusted with the renewal receipts, a prudent and ordinarily sagacious and experienced person might fairly expect that he was authorized to take a premium note, there being nothing in the policy to the contrary, and the assured having no knowledge of any limitation of the agent's authority. If this is so, the result would be that Mr. Paton was a person held out by the company as having authority to take a note for the premium and complete the contract by delivering the renewal receipt.

Then as to the objection that, there being no general verdict, the specific question should have been passed upon by the jury, the observations of Mr. Justice Graham upon the practice acts of Nova Scotia seem to be conclusive.

The remaining questions are as to the findings of fact by the jury. Is there evidence upon which reasonable men might find as they did? First, as to whether the note was taken in payment of the premium. The agent's account, it will be remembered, is that it was taken upon condition that, if paid at maturity, a renewal receipt would then issue, but that in the meantime, there was to be no insurance. The jury have not adopted this account of the transaction and of course credibility is particularly a question for them. What remains? Payment of a sum of money, and the

giving of a negotiable note for the balance of the premium, and the retention of the note by the agent after its non-payment at maturity.

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Suppose there were no question of the agent's authority to take a premium note, might not an inference fairly be drawn from the above facts that the transaction amounted to payment? And, in the consideration of this part of the case, it is to be assumed, in accordance with what has been already said, that the act was within the scope of the agent's employment. The mere fact that the agent was going contrary to instructions does not prevent the inference, although it is a circumstance fairly to be considered in determining whether such inference ought in fact to be drawn.

If there had been no accident during the twelve months of the alleged continuance of the insurance, and the company as the real payees had acquired title by indorsement, and brought action to recover the amount of the note, it would seem as if there was nothing in the facts as proved (apart of course from the account by Paton discredited by the jury) which would prevent recovery.

The remaining point is a more doubtful one, viz., as to the receipt. All that is proved with regard to it is that it was a receipt for sixteen dollars, and that it was signed by the president and acting manager of the company, and countersigned by the agent in the same way that ordinary renewal receipts are so signed and countersigned. It is also proved that the agent had such renewal receipts in his possession, and it does not appear that there was anything else to which it might correspond.

There are not wanting circumstances which make against giving full weight (not to say credit), to the elder Pudsey's testimony, but this frequently happens



1897 in jury and all other trials, while upon the whole the  
 ~~~~~ evidence is accredited.  
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 FACTURERS upon, viz., that the note was taken as in payment of  
 ACCIDENT premium, perhaps no serious fault can be found  
 INSURANCE upon, viz., that the note was taken as in payment of  
 COMPANY with the further finding that the receipt was an  
 v. acknowledgment of such fact of payment. And the  
 PUDSEY. receipt being upon the company's form, and formally signed by the principal officers of the company, and it not appearing that there was any other kind of form in use by the agent, it was a not unreasonable conclusion that it was the ordinary renewal receipt.

All that has been said rests, of course, upon the assumption, which we are not bound to make, that the account given by the witnesses relied on by the plaintiff is substantially correct. It is sought to get a new trial in order, by the testimony of witnesses from the head office, to corroborate the testimony of Mr. Paton as to his having no renewal receipts for this policy in his possession except the one produced by him at the trial. This is put upon the ground of surprise, and it is said that it was not alleged formally by the plaintiff that a renewal receipt had been obtained. But it seems as though the defendant in the action might well have supposed that the plaintiff would seek to show that a renewal receipt had been obtained, because without such receipt the plaintiff could not very well get on with his action.

Upon the whole, therefore, there is no good reason for disturbing the judgment, and the appeal should be dismissed.

GWYNNE J.—The plaintiff in her statement of claim alleges that on the 24th September, 1892, her husband Obadiah Pudsey, since deceased, effected a policy of insurance with the defendant company whereby they

agreed with him that in case by reason of external violent and accidental means occurring during the continuance of the said policy, the said Obadiah should die within three months after the occurring of such accident the defendant company would pay to Minnie Pudsey, the present plaintiff, the sum of one thousand dollars; that the policy was by its terms in force for the period of twelve months ending at noon on the 24th September, 1893, subject to renewal for like periods from year to year by payment of the annual premium, and that at the expiration of the said twelve months the said policy was renewed for the further period of twelve months by the defendants accepting the promissory note of the said Obadiah Pudsey for fifteen dollars and one dollar in cash in payment of the renewal premium for the period of twelve months from the 24th September, 1893. That on the 14th May, 1894, and during the continuance of the said policy the said Obadiah Pudsey was killed by violent external and accidental means within the terms of the policy. To this statement of claim the defendants pleaded twenty-three pleas setting up in varying forms the one substantial defence, namely, that the defendants never did accept or receive the promissory note and cash referred to in the said statement of claim, or any note or cash in payment of premium on renewal of said policy, or at all, and that in point of fact the said policy was never renewed by the said defendant company, but became and was cancelled on the 24th September, 1893, before the happening of the accident. The plaintiff joined issue on the defendant's pleas, and thereupon proceeded to trial. At the trial the plaintiff produced the policy pleaded in the statement of claim: It contained in the body of it the following clause:

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This policy is in force for twelve months ending at noon on the 24th day of September, 1893, and may be renewed for like periods from year to year by payment of the annual premium.

And upon the back of the policy, among certain conditions and stipulations indorsed thereon, and which are by the policy declared to be read and taken as part of the policy, and not alterable or waiveable by agents, is the following :

The directors shall not be bound to send any notice of the renewal premium becoming due, and shall be at liberty should they see fit at any time to decline to renew the policy, and also may at any time cancel the policy by repaying to the insured the premium less the *pro rata* share thereof due to the company for the time it has been in force.

No renewal receipt is valid unless it is printed in office form and signed by the managing director and countersigned by the agent.

The plaintiff thereupon called as witness on her behalf J. B. Paton, who testified that he was agent in Halifax of the defendant company, and also of another company called the Manufacturers Life Insurance Company, and the policy declared on in the plaintiff's statement of claim having been put in his hands, he stated that it had passed through his office at Halifax. He produced a promissory note which he stated he had gotten from Obadiah Pudsey, deceased. This note was dated Kentville, N.S., September 28th, 1893, and was in a printed form, not of the defendant company but of the Manufacturers Life Insurance Company, as follows :

On Oct'r 10th after date I promise to pay to the *Manufacturers Life Insurance Company* or order at the sum of fifteen dollars.  
 (Signed) O. B. PUDSEY.

He said that this note was signed by Pudsey in the waiting room of the station at Kentville, he said further that he did not receive any money from Pudsey at the time of his signing the note. He said that on the day of the date of the note, viz., the 28th Septem-

ber, 1893, he was at the station and made inquiry for Pudsey, and subsequently saw him and took the note. At this time he said the policy had lapsed and that he so informed Pudsey, who said that he would like to renew but had not the cash, but said that he could pay the cash in a short time, that thereupon Paton told him that if he would pay the note at the time stated he, Paton, would hold the renewal receipt until it was paid, and upon the strength of that he took the note and that Pudsey had told him that if the note were placed in the bank at Kentville that it would be paid on presentation. He produced the form of a renewal receipt which he said was in his possession at the time he took the note from Pudsey; it is in the company's printed form which was apparently transmitted from the head office of the company at Toronto to the agent for the purpose of being countersigned by the agent and handed to the insured in the event of his renewing the policy within the year while it was in force by payment of the premium on renewal and which, the policy not having been renewed, remained in the hands of Paton after the expiration of the policy on the 24th September, 1893. The receipt is filed as exhibit C and is as follows :

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## RENEWAL RECEIPT.

MANUFACTURERS ACCIDENT INSURANCE COMPANY.

Head Office, Toronto.

\$1,000. Full deposit with the Dominion Government.

Authorized Capital, \$1,000,000.

Received from O. Pudsey, Esq., of Kentville, the sum of sixteen dollars being the amount due for renewal of Policy No. 8653, up to noon of the 24th September, 1894.

Countersigned on	}	(Sgd.)	GEO. GOODERHAM, <i>President.</i>	
this day of 189				JNO. F. ELLIS,
Agent.				<i>Managing Director.</i>

N.B.—Premium receipts are not valid except they are signed by the President and Managing Director of the company and countersigned by an agent of the company.

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The witness said that neither this nor any other renewal receipt was ever delivered to Pudsey, he added that Pudsey never paid the note. Witness produced a letter of instructions to agents which he received from the head office on the 16th November, 1889, these instructions he said have never since been varied. This letter bore date the 1st November, 1889, and informed him that at a meeting of the executive committee of the company the following resolution was passed, viz.: "that thereafter no notes be taken for accident premiums." The letter was addressed to the agents of the company who were directed to conduct the business of the company on the cash system only, and to refuse to accept notes for accident premiums. He added that when he took the note from Pudsey he told him that the policy had expired and that there was no insurance then in force, and that there would be none until the renewal receipt should be delivered, that he made no entry of the note in the books of the company, and never informed them of its having been made, and that they knew nothing whatever about the note.

This is the whole substance of the evidence given on the examination in chief, the cross-examination and re-examination of this witness who produced the note and knew all the circumstances attending the making of it, and was the most competent person to testify in respect thereof, and who was produced by the plaintiff as a credible and reliable witness upon the matters in issue. Upon this evidence having been given accepting it as credible and reliable, and it was not disputed by the defendants in any particular, it must, I think, be admitted that it was not only utterly insufficient to support, but that it absolutely disproved, the material allegation in the plaintiff's statement of claim, and which was denied by the de-

fendants, namely, that the policy sued upon had ever been renewed by the defendant company by the payment to them by Pudsey of the renewal premium necessary to be paid to them for that purpose. The plaintiff herself went into the box and testified that the policy when it was effected was given to her by her husband, and that it had thenceforth remained in her possession until it was handed by her to her solicitor for the purposes of this action. She said further that her husband generally carried his receipts in his vest pocket; that she had made search for a renewal receipt the night before the day on which she was giving her evidence, in all his clothes, in all his pockets, and also in a trunk where he kept papers, and in fact in every other place where she thought it likely such a paper would be, but that she had found none.

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Now here it may be observed that the fact of her not having found any such renewal receipt was in perfect accord with the evidence which had been given by the previous witness who had sworn that none such had ever been given to the deceased.

The next witness called was John Pudsey, the father of the deceased. Before referring to the matter deposed to by him, it is to be observed that he was called for the sole purpose of contradicting the evidence given by the plaintiff's first witness Paton upon a matter peculiarly within that witness's knowledge, and of thus establishing, contrary to the evidence of Paton, that a renewal receipt had been given by Paton to the deceased, which the deceased's father had himself read, and the precise terms of which he professed perfectly to recollect, although, strange to say, it had not been alleged in the statement of claim that any renewal receipt had ever been given to the deceased, nor had it been suggested that any ever had until this

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witness who was called after Paton had produced as an exhibit in court the form of the receipt which had been forwarded to him to be countersigned by him and when so countersigned delivered to the deceased in the event of his renewing the policy by payment of the renewal premium within the terms of the policy in that behalf, but which receipt never had been countersigned by Paton and delivered to the deceased, for the reasons which Paton had already explained in his evidence. In the notes which we have of the evidence taken at the trial, it is true that when this witness Pudsey commenced to give his evidence the defendant's counsel objected to the evidence being taken but the ground and nature of the objection taken does not appear, which certainly seems singular when we read the evidence taken down from the lips of the witness, and see how manifestly objectionable the admission of such evidence was under the circumstances. All that we see on the case before us is that on the motion made on behalf of the defendants in the Supreme Court of Nova Scotia to set aside the findings of the jury upon the questions submitted to them and to enter judgment for the defendants the following grounds of objection are stated.

1. Because there is no evidence to support said finding.
2. Because on the evidence the findings ought to have been in the negative.
3. Because said findings and each of them are against the weight of the evidence.
4. Because of improper admission of evidence.
5. Because there was no evidence for the jury and the case ought to have been withdrawn from the jury.
6. Because the judge who tried the cause improperly admitted evidence of conversations with an agent of the company who had no authority to bind the company.
7. Because the judge who tried the cause admitted secondary evidence of contents of a receipt without any proof that the original was lost.

The objection could certainly have been put in more plain terms, for what was in fact done was that after it had been testified upon the evidence of a witness called by the plaintiff and examined upon matters peculiarly within his knowledge that no renewal receipt had ever been given to the deceased, the plaintiff was permitted to examine another witness for the purpose of proving by him that the evidence of the previous witness was false for that the witness contradicting him had seen a renewal receipt in the deceased's hands and had read it and could precisely state its contents, which evidence he was permitted to give, and the result was that the evidence of these two conflicting witnesses of the plaintiff was submitted to the jury as if the case was one of conflicting evidence between witnesses, the one of the plaintiff and the other of the defendant, between whom it was the province of the jury to determine which was telling the truth and which what was false. The evidence so given by this witness is in substance as follows :

On the last day of September or first of October, 1893, he, his son the deceased, and the witness Paton were at the station in Kentville ; while witness was standing in the doorway, his son came in, and he and Paton shook hands. He then said that Paton asked his son if he was going to renew his insurance ; that his son replied that he would but that he had not money enough to pay all the renewal ; that he and Paton spoke together for a moment, and his son took a bank note out of his pocket which he gave to Paton saying it was all the money he had ; that Paton said he would take his note for the balance, that his son replied all right, and that he and Paton then went into the railway office and witness passed on to the wicket where he could see into the railway office ; that Paton

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was writing at a little desk, and when he got through writing he stepped aside and signed some paper; that witness's son then passed out of the office into the waiting room and handed witness a paper partly written and partly printed which he read and then handed back to his son; that this paper was headed "Manufacturers Accident Insurance Company," on the left hand there was "an arm with a hammer in it" enclosed in a circle, and in the body was a receipt from Obadiah Pudsey for \$16 (sixteen dollars); that it was signed by three names, two on the right hand corner, and one on the left; that the name on the left hand corner was "J. B. Paton, agent, Halifax;" that at the bottom was "John F. Ellis" and "G. W. Gooderham," one of whom was designated manager, and the other, he thought, superintendent. He said that he did not hear what passed between his son and Paton in the railway office; then he said on cross-examination that on the day upon which he was giving his evidence the plaintiff's counsel had shown him a paper which looked like the paper his son had shown him; that it was like both in shape and appearance, that he did not read this paper, for that almost as soon as he looked at it when handed it by the plaintiff's attorney a gentleman came into the room and took it into court; then he said that he thought he had made a mistake in what he had said as to the description attached to the names on the right hand; that he thought the first name on the right hand was described "President," and the second, "General Manager and Superintendent." This latter description accords with the paper which had been produced by Paton and filed as exhibit C, which plainly was the document handed by the plaintiff's solicitor to the witness before he went into the witness box to give his evidence. The witness finally said that on the paper shown to

him by his son at the railway station there was a date which as near as he could recollect was October 10th or 11th, 1893. Now it is to be borne in mind that up to the time of this evidence having been given in court it does not appear that it had ever been suggested that any renewal receipt had been given to the deceased, or that the witness or any other person had ever said that one had been seen in the possession of the deceased, and it is further to be borne in mind, as already observed, that the statement made by the witness, the father of the deceased, in his evidence, was not made until both the promissory note dated the 28th September, 1893, and the paper produced by Paton and filed as exhibit C, had been filed in court; and it is further worthy of observation that while the witness swears that the paper which his son had shown him in the railway office, and which he then read, had on the left hand enclosed in a circle, "an arm with a hammer in it," and that in the body of it was a "receipt from Obadiah Pudsey for \$16 (sixteen dollars)" with the names, "John F. Ellis," and "G. W. Gooderham," subscribed in the right corner, the one as "General Manager," and the other as "Superintendent," or the one as "President," and the other as "General Manager," or "Superintendent," and that the paper shown to him on the morning of his giving his evidence by the plaintiff's attorney, which could have been no other than the exhibit "C" produced by Paton, and filed in the cause, resembled both in shape and appearance the paper which he said he had seen in his son's hands and had read, yet "the arm with a hammer in it" is not upon this exhibit "C" at all, but is upon the paper filed as exhibit "B" which obviously the witness never saw in the hands of his son for it is the note of the date of the 28th September, 1893, which is on a printed form of note

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belonging not to the defendant company at all who do not take notes for renewal premiums, but belonging to the Manufacturers Life Assurance Company in whose name as payees the note is made and of which company also Paton was agent, and upon this document there is no such heading as the witness swore was upon the paper shown to him by his son or any heading, but there is the date of October the 10th, the day upon which the sum of fifteen dollars mentioned in the note is made payable, which date or that of the 11th of October the witness swore was on the paper which his son showed him in the railway office.

It is apparent from this evidence that whatever paper, if any, his son had shown the witness in the railway office it was not the promissory note signed by his son and filed as exhibit B, and yet this document alone and not the exhibit "C" had on it two marks viz: "the arm with the hammer in it," and the date October 10th, 1893, both of which the witness swore were on the paper which his son had shown him and which he read. Then again the exhibit "C" which the witness swore resembled in shape and appearance the paper shown to him by his son, while it had on it neither of these two distinctive marks, and though it has on it the names "John F. Ellis" and "Geo. Gooderham" subscribed, the former as "Managing Director" and the latter as "President," has not on it the name of Paton as agent, without which (as is expressly declared by the policy) a receipt, although having the other names upon it, is absolutely valueless. It is plain therefore that if ever the witness saw a receipt in the form of exhibit "C" having subscribed thereto the name "J. B. Paton, agent, Halifax," the company must have sent from their head office, Toronto, to Paton, at Halifax, two receipts both signed by "Geo. Gooderham" and "John F. Ellis" for Pudsey's

renewal premium. For what purpose two such receipts should be sent no suggestion is offered. It can well be conceived that the defendants, in the absence of any previous allegation that the deceased had ever had in his possession any renewal except signed by the officers of the defendant company, should have been taken by surprise by such evidence and that they should not have been prepared to show at Halifax, so far from their head office, that the only receipt sent from the head office to Paton of the nature spoken of was the exhibit "C" produced by Paton and filed in evidence.

Under all the above circumstances it appears to me to be difficult to conceive how any intelligent jurors who duly appreciated the duties of their office could have overlooked these facts and have answered the questions submitted to them as they have, even if there were no objection to the reception of the evidence of the witness Pudsey. It appears to me a heavy draft upon credulity to conceive that the evidence of that witness stands upon any other foundation than that it was conceived and devised by reason of the witness having seen the exhibits "B" and "C" which Paton had produced and filed in court, without having distinguished, with sufficient care, between them and what appeared upon them respectively so as to give to his evidence the similitude of truth when subjected to careful scrutiny. The tendering of such evidence if indeed the plaintiff had ever heard anything of it until it was delivered by the witness in court could have been only for the purpose of appealing upon it to the jury to discredit as unworthy of belief the evidence of Paton whom the plaintiff had put into the witness box as a credible witness, and who was the only person through whom the policy if renewed by the defendants had been

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renewed, which question constituted the sole material issue in the cause. The defendants only now ask that the findings of the jury shall be set aside and a new trial ordered; that relief, to prevent a miscarriage of justice must, in my opinion, be granted. When the real facts of the case relied upon by the plaintiff for the purpose of establishing that the policy was renewed by the defendants shall be established upon unimpeachable evidence it will be time enough to determine whether those facts constitute a renewal binding in law upon the defendants. If the plaintiff can succeed in establishing her cause of action as alleged without the evidence of Paton he ought not to be put into the box as a witness for the plaintiff, and if she cannot succeed without calling him her action must fail upon his evidence as given. As there has, I think, been a miscarriage in the case as tried the appeal must, in my opinion, be allowed with costs and a rule be ordered to be issued in the court below for a new trial and without costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *H. A. Lovitt.*

Solicitors for the respondent: *Wade & Paton.*

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