ALISON BRUCE GRAY (sometimes known as Alison Bruce Kerslake) (*Defendant*) ..... APPELLANT;

1957

*June 11, 12
**Nov. 18

AND

MILDRED LOUISE KERSLAKE (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Annuities—Contract made in foreign country—Provision for payment to beneficiary if annuitant dies before commencement of payments—Whether contract one of life insurance governed by The Insurance Act, R.S.O. 1950, c. 183, Part V—Effect of ss. 1, 132, 134 of the Act.

Insurance—Life insurance—Change of beneficiary—Whether statutory provisions apply to contract made in foreign country and to be performed there—The Insurance Act, R.S.O. 1950, c. 183, ss. 1, 132, 134, 158(2), 164(1).

K, who lived in Toronto, made a contract with an association carrying on business in the State of New York (and not licensed to do business anywhere in Canada). The contract provided for monthly payments by the association to K after he became 60 years of age and for payments to the beneficiary named in the contract in the event that K died before payment of the annuity had begun. The contract expressly provided that it was to be performed in the State of New York and "governed as to its validity and effect by the laws there in force".

K designated his wife as beneficiary in the contract but reserved the right to change the beneficiary and, by a supplementary contract, this designation was changed and the appellant herein was substituted as beneficiary. K died before attaining the age of 60. It was contended that by the operation of *The Insurance Act* the change of beneficiary (being a change from a preferred to an ordinary beneficiary, without the consent of the former) was invalid, and that the association, on K's death, held the insurance moneys as trustee for his widow, as preferred beneficiary, under s. 164(1) of the Act.

Held: The appellant was entitled to be paid as beneficiary under the contract, notwithstanding that she was not a preferred beneficiary under s. 158(2) of *The Insurance Act*.

Per Kerwin C.J. and Locke and Cartwright JJ.: Even assuming that the policy was one of "life insurance" within the statutory definitions, Part V of the Act did not apply to it.

Per Kerwin C.J. and Cartwright J.: The word "deemed" in s. 134(1) of the Act (which provided, *inter alia,* that a contract was deemed to be made in Ontario if the insured was resident there) did not mean "conclusively deemed" but only "deemed until the contrary was proved". *Hickey v. Stalker* (1923), 53 O.L.R. 414 at 418-9, quoted with approval; statement to the contrary in *In re Duperreault,* [1940] 3 W.W.R. 385,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

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disapproved. In this case the contrary was proved, and indeed admitted, and s. 134 therefore had no effect. Without applying s. 134, the contract could not be brought within any of the provisions of s. 132, defining the operation of Part V. Not only was it made and to be performed wholly in New York but it expressly provided that it was to be governed by the laws of that State.

Per Locke J.: Sections 132 and 134 of the Act could not apply to this contract since it was not made in Ontario and none of the rights arising out of it were situated there. To hold otherwise would be to say that the Legislature of Ontario might affect civil rights of which the *situs* was outside the Province. *Royal Bank of Canada et al. v. The King et al.*, [1913] A.C. 283 at 298, applied. The moneys payable under the contract were therefore not impressed with any trust in favour of the widow, and she had no claim to them.

Per Taschereau, Rand, Locke and Abbott JJ.: The contract was not one of "life insurance", and the proceeds were not "insurance moneys", either within the ordinary meaning of those terms or within the definitions in s. 1 of *The Insurance Act*.

Conflict of laws—Proof of foreign law—Presumption of similarity.

Per Kerwin C.J. and Cartwright J.: The presumption (in the absence of proof to the contrary) that foreign law is the same as that of the jurisdiction in which the action is tried relates only to the general law, and does not extend to the special provisions of particular statutes altering the common law; as to such provisions there is no presumption. *Purdom et al. v. A. E. Pavey & Co.* (1896), 26 S.C.R. 412 at 417, followed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J.[2]. Appeal allowed.

Terence Sheard, Q.C., for the defendant, appellant.

F. A. Brewin, Q.C., and *J. F. McCallum*, for the plaintiff, respondent.

D. H. W. Henry, Q.C., for the Attorney General of Canada, intervenant.

The judgment of Kerwin C.J. and Cartwright J. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment of Wilson J.[2] and directing that judgment be entered for the respondent against the appellant for $6,147.85.

The facts are undisputed. On August 1, 1934, the late Everett George Kerslake, to whom I shall refer as "Dr. Kerslake", entered into a written contract, in which he was

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.
[2] [1956] O.W.N. 594.

called "the annuitant", with Teachers Insurance and Annuity Association of America, hereinafter referred to as "the Association", whereby, in consideration of the payment of "regular monthly premiums" until he should attain the age of 60 years, the Association agreed to pay him a stated sum monthly, commencing on the first day of the calendar month next following the 60th anniversary of his birth and continuing thereafter throughout his life. At the date of this contract Dr. Kerslake was resident in Toronto. The contract was numbered A13169 and contained the following provisions:

9. Place of Contract. All premiums on this contract and all benefits herein provided, are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made. No person whosoever is authorized to represent or act for the Association in any manner outside of the State of New York.

* * *

12. Manner of Payment in Event of Death. In the event of the death of the Annuitant before payment of the annuity has begun as provided on the first page hereof, the Association will pay 120 equal monthly instalments of $9.83 per $1,000 of Accumulated Premiums to

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of the Annuitant, if living, as Beneficiary.

The right to change the Beneficiary is reserved by the Annuitant.

If the right to change the Beneficiary is reserved the Annuitant may from time to time change the Beneficiary by making written request to the Association, but such change shall take effect only upon the endorsement of the same hereon by the Association.

No oral testimony was given at the trial. The facts were stated by counsel and contract no. A13169 and contract no. S-1876, to which reference will be made later, were filed as exhibits by consent. The learned trial judge asked counsel whether he was correct in assuming "that the contract [A13169] was accepted in New York and issued from New York" and counsel replied in the affirmative. The Association was not at any time licensed to transact business in the Province of Ontario.

The respondent is the Mildred Louise Kerslake named in the paragraph quoted above from contract A13169. She was then the lawful wife and is now the lawful widow of Dr. Kerslake.

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On February 17, 1949, Dr. Kerslake executed an endorsement revoking the designation of the respondent and naming as beneficiary the appellant whom he described as "Alison B. Gray Friend".

On September 27, 1949, Dr. Kerslake obtained a decree of divorce from the respondent in the State of Idaho and on July 25, 1950, he went through a form of marriage with the appellant in the State of Connecticut. The domicile of Dr. Kerslake was at all relevant times in Ontario and it is conceded for the purposes of this action that, according to the law of Ontario, he was not validly married to the appellant.

On December 1, 1950, Dr. Kerslake executed a further endorsement naming the appellant as beneficiary and describing her as "Alison B. Kerslake (formerly Alison B. Gray) Wife".

Both of the above-mentioned endorsements were signed by Dr. Kerslake at Toronto. They were duly accepted and recorded by the Association and attached to the contract.

Dr. Kerslake died on July 22, 1953, before attaining the age of 60 years. He left a will in which he named the appellant as executrix and left all his estate to her. Probate was granted to the appellant on February 5, 1954 by the Surrogate Court of the County of York.

On August 1, 1953, the Association issued to the appellant a contract numbered S-1876 whereby it agreed to pay her an annuity certain consisting of 36 monthly payments of $179.46. This contract contained the following provisions:

> This supplementary contract is granted in consideration of the surrender to the Association of its original policy contract number A-13169, application of the proceeds thereof in the amount of $6,147.85 being in full satisfaction therefor and in accordance with the mode of settlement elected thereunder.
>
> * * *
>
> The consideration for this contract and all benefits herein provided are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made.

The respondent's claim was put as follows: (i) under the interpretation sections of *The Insurance Act,* R.S.O. 1950, c. 183, hereinafter referred to as "the Act", contract A13169 was a contract of life insurance; (ii) it must, by virtue of

s. 134 of the Act, be treated as having been made in Ontario; (iii) it was therefore subject to Part V of the Act; (iv) under s. 158(2) the respondent was a preferred beneficiary; (v) under s. 164(1), upon Dr. Kerslake designating her as beneficiary a trust was created in her favour; (vi) the designation of the appellant as beneficiary in her place was invalid and without effect; (vii) the appellant, having surrendered contract A13169 to obtain contract S-1876, holds the last-mentioned contract in trust for the respondent and is liable to account to her for the proceeds thereof.

To this it was answered: (i) that the respondent had no personal claim against the appellant and that if the respondent had any claim under contract A13169 (which was denied) it must be made against the Association and not against the appellant, and, alternatively, that if the respondent could have any right of action against the appellant this would arise only after she had exhausted her remedies against the Association; (ii) that the Ontario *Insurance Act* could not affect the rights of the parties under either contract A13169 or contract S-1876, both of which were made and to be wholly performed in the State of New York, and that to the extent that the provisions of the Act purport to affect those rights they are *ultra vires* of the provincial Legislature; (iii) that in any event the provisions of the Act were not applicable to contract A13169 as it was not a contract of life insurance.

The learned trial judge gave effect to the last-mentioned submission and dismissed the action.

The Court of Appeal[1] were of opinion that contract A13169 was a contract of life insurance as defined in the Act, that a trust was created in favour of the respondent when she was designated as beneficiary, that Dr. Kerslake could not deprive her of the benefits of the contract by transferring them to the appellant who was not a member of the class of preferred beneficiaries, that it was unnecessary to decide whether s. 134 of the Act was *ultra vires* of the Legislature as, in determining the rights of the parties, it should be assumed that the laws of the State of New York do not differ from those of Ontario, that the appellant had received from the Association money "which in law belonged

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.

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to" the respondent, and that as the appellant resided within the jurisdiction of the Courts of Ontario the respondent was entitled to maintain an action against her to enforce payment of the sum of money "belonging to" the respondent which the appellant "wrongfully received and used for her own benefit". The argument that the respondent must first pursue her rights against the Association was rejected, but without discussion of the cases on which it was founded.

It is obvious, from what has been said above, that the respondent's claim depends upon her being able to maintain that the rights of the parties were governed by Part V of the Act, particularly s. 164(1).

The cases cited by Mr. Sheard indicate that, apart from the definitions contained in the Act, contract A13169 could not properly be described as one of life insurance, while the learned justices of appeal have concluded that it falls within the statutory definition of a contract of life insurance. I do not find it necessary to decide these points because, even on the assumption that the contract is one of life insurance, it is my opinion that Part V of the Act does not apply to it.

Not only was the contract made and to be performed wholly in the State of New York but its terms provided that it was made with reference to and was to be governed as to its validity and effect by the laws of that State. It was in fact fully performed according to its terms in the State of New York by the issue to the appellant of contract S-1876.

Section 132 of the Act reads in part as follows:

132.—(1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the 1st day of January, 1925, and any term in any such contract inconsistent with this Part shall be null and void.

(2) This Part shall apply to every contract of life insurance made in the Province before the 1st day of January, 1925, where the maturity of the contract had not occurred before that date.

(3) This Part shall apply to every other contract of life insurance made after the 1st day of January, 1925, where the contract provides that this Part shall apply or that the contract shall be construed or governed by the law of the Province.

It is obvious that contract A13169 does not fall within the wording of any of these subsections read by themselves, but the respondent relies on s. 134(1) of the Act which provides:

134.—(1) A contract is deemed to be made in the Province,

(*a*) if the place of residence of the insured is stated in the application or the policy to be in the Province; or

(*b*) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract.

The question of the meaning to be given to the word "deemed" when used in a statute has been considered in many decisions, a number of which are collected and discussed in the judgments delivered in the Appellate Division in *Hickey v. Stalker*[1], a case dealing with an Ontario statute different from the one with which we are concerned. As is pointed out by Meredith C.J.C.P., at p. 416, the word may mean "deemed conclusively" or "deemed until the contrary is proved".

At pp. 418-9 Middleton J., as he then was, after referring to the treatment of the word in the dictionaries, continued:

> Far more important are two decisions of the Supreme Court of Nova Scotia. In *Regina v. Freeman* (1890), 22 N.S.R. 506, Townshend, J., speaking for the full Court, says (p. 513): "The word 'deemed' has acquired no technical or peculiar signification when used in legislation, but, like other words, must be interpreted with reference to the whole Act of which it forms a part."
>
> In the second case, *Rex v. Fraser* (1911), 45 N.S.R. 218, the statute provided that an act which in itself might be lawful or might be unlawful "shall be deemed" to have been unlawful; it was argued that this meant "held conclusively" or "adjudged and determined." The same learned Judge, then Sir Charles Townshend, C.J., says (p. 220): "I should be sorry to believe that our Legislature was capable of enacting such an unreasonable law, and I am quite confident the Legislature never contemplated anything so contrary to natural justice:" and so he concludes that the true meaning to be given to the word "deemed", as here used, is that it shall be treated as "*prima facie* evidence," "held until the contrary is proved." Graham, J., prefers this result to thinking that the Legislature had declared "white to be black;" Drysdale and Lawrence, JJ., also concurred; but Russell, J., did not agree.
>
> I think this modified meaning should be given to the word as found in our statute, for it will not only save the legislation from being unjust but also from being absurd. That it is the duty of the Court, in seeking the true legislative intention of an Act, which undoubtedly is the sole duty of the Court, to regard the possible consequences of alternative constructions of ambiguous expressions, has been determined in many cases.

In the case at bar, and in many cases which can easily be imagined, to construe the word "deemed" in s. 134(1) as "held conclusively" would be to impute to the Legislature the intention (i) of requiring the Court to hold to be the fact something directly contrary to the true fact, and (ii) of

[1] 53 O.L.R. 414, [1924] 1 D.L.R. 440.

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asserting the power to alter the terms of a contract made and to be wholly performed and in fact wholly performed in a foreign state. This result can, and in my opinion should, be avoided by construing the word to mean "deemed until the contrary is proved". In the case at bar the contrary has been proved and indeed admitted.

I have not overlooked the fact that in *In re Duperreault*[1], Bigelow J. held that the words "is deemed" in s. 156 of *The Saskatchewan Insurance Act*, R.S.S. 1930, c. 101, the wording of which was identical with that of s. 134 of the Ontario Act, meant not "is *prima facie* considered" but "must be considered and held"; but, with the greatest respect for the opinion of that learned judge, the practical and constitutional objections to that construction appear to me to be insurmountable.

It is contended that the Court of Appeal were right in presuming that the law of the State of New York was the same as that of Ontario, but the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law. It will be sufficient to refer to one of the several authorities on this point relied upon by Mr. Sheard. In *Purdom et al. v. A. E. Pavey & Co.*[2], an appeal from the Court of Appeal for Ontario, Strong C.J.C., delivering the unanimous judgment of the Court, said, at p. 417: "Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law."

For the above reasons I am of opinion that Part V of the Act does not apply to contract A13169 and that the appeal succeeds; it therefore becomes unnecessary for me to consider the submissions of counsel for the appellant other than those with which I have dealt above.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout. No costs should be awarded to or against the intervenant.

TASCHEREAU J.:—With the exception that I do not find it necessary to express any opinion as to the validity of s. 134 of *The Insurance Act*, R.S.O. 1950, c. 183, I agree with my brother Locke that for the reasons stated by him this

[1] [1940] 3 W.W.R. 385, 7 I.L.R. 347, [1941] 1 D.L.R. 38.
[2] (1896), 26 S.C.R. 412.

appeal should be allowed with costs throughout, and that there should be no order as to costs to or against the intervenant.

The judgment of Rand and Abbott JJ. was delivered by Taschereau J.

RAND J.:—This appeal deals with an annuity contract entered into between the husband of the respondent and the Teachers Insurance and Annuity Association of America. Payment of the annuity was to begin when the annuitant reached the age of 60 years; should he die before that time the Association was to pay 120 monthly instalments of such an amount as at the rate of 3½ per cent. would return the premiums paid. The contract was made in the State of New York and according to its terms was to be subject to the law of that State. The annuitant was then residing in Ontario. The original beneficiary was the annuitant's wife. By an express provision the annuitant could change the beneficiary and in 1946 he substituted the appellant for his wife. In 1953 he died. The Association entered into a new arangement with the appellant providing for 36 monthly instalments of $179.46. The widow brought this action against the beneficiary. At trial it was dismissed but on appeal judgment was directed for the total amount of the premiums, $6,147.85, from which the beneficiary brings the case here.

The cause of action is argued to be supported by several sections of *The Insurance Act*, R.S.O. 1950, c. 183. By s. 132 it is declared that every contract of life insurance made in Ontario after January 1, 1925, shall be subject to Part V of that Act, within which the sections hereafter mentioned are included. By s. 134 a contract is deemed to be made in the Province if, at the time, the insured is resident in Ontario. Section 158(2) provides for preferred beneficiaries, of whom the wife is one, and s. 164 prohibits any change to an ordinary beneficiary in such circumstances as are present here. As these provisions are confined to life insurance the initial question is whether the policy is one of that class.

The expression "Life Insurance" is defined by s. 1(36):

"life insurance" means insurance whereby the insurer undertakes to pay insurance money on death, or on the happening of any contingency dependent on human life, or whereby the insurer undertakes to pay insurance money subject to the payment of premiums for a term depending on human life, but, except to the extent of double indemnity insurance, does not include insurance payable in the event of death by accident only.

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"Insurance" is also defined, s. 1(31):

> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;

It is seen from these definitions that the latter is considerably broader than the former, but both are used in the Court of Appeal in reaching the conclusion that the contract was one of life insurance. It seems to me to be clear, however, that the specific definition of "life insurance" is exclusive and it would be misleading to extend it by an interpretation given in the light of that wider definition.

Life insurance in its characteristic forms involves, as its essence, a risk in a specified payment of money absolute from the moment the contract takes effect. That constitutes the security sought by the insured, the premiums for which in turn furnish the consideration to the insurer. There is nothing of that in this case. The repayment when death is before the age of 60 years is simply the return of the premiums to that moment paid. The only risk assumed by the Association in relation to death lies in the preservation or investment of the premiums. But that is not a life insurance risk; there is in fact no risk in the true sense whatever and the Association will retain the benefit derived over the years from the use of the premiums received.

Laidlaw J.A.[1] quotes from the general definition the following: "to pay a sum of money . . . upon the happening of a certain event"; but in the specific definition it is not the payment of "money", it is the payment of "insurance money", on "death or on the happening of any contingency dependent on human life"; that means the payment on the risk assumed by the insurer to be liable for the amount of insurance from the beginning.

On the reasoning of the Court of Appeal every pension scheme with provision for repayment of the whole or part of the premiums in the event of death, would satisfy the definition of "insurance" and thereupon to be treated as a life policy. I can find nothing in the Act dealing with life insurance to give support to that intention or applicability. Pension schemes are as familiar now as insurance and are approaching an almost universal item in industrial business and other economic activities. Pensions may be looked upon

[1] [1956] O.R. at pp. 904-5.

as the payment of postponed wages, and their amount depends, certainly in most schemes, on the length of service, the contributions made and the wages from time to time received; they are not, in the general understanding and in a true sense, looked upon as insurance. If the Legislature had any intention that the definition should extend to such contracts it would, I think, have declared so in clear terms, and I am unable to read the specific definition as embracing them. Legislation for such schemes would call for consideration of matters not relevant to insurance. The provision for the return of premiums paid is a resulting contingent incident and does not change the essential character of the contract. Nothing in the Act gives any indication of attention having been given to these different features and aspects; there is nothing referring to annuities except those which are modes of paying insurance moneys upon death.

This conclusion dispenses with the examination of the other questions raised, the validity of s. 134 and the right of suit against the appellant in the absence of pursuing a claim against the Association, and no view is intended to be expressed for or against either of them.

I would allow the appeal and restore the judgment at trial with costs in the Court of Appeal and in this Court.

LOCKE J.:—The agreement made by the Teachers Insurance and Annuity Association of America with the late E. G. Kerslake, dated August 1, 1934, obligated it to pay an annuity of such amount as the accumulated premiums at the date of the first annuity payment would purchase, in accordance with the interest rates and mortality tables designated, on the 60th anniversary of the birth of the annuitant. It further provided that, in the event of Kerslake's death before completion of the annuity payments provided for, the Association would pay 120 equal monthly instalments "of such amounts as to be equivalent in value on a $3\frac{1}{2}\%$ interest basis to the accumulated premiums at the date of death", to the named beneficiary. A term of the agreement declared that its purpose was to furnish an old age annuity benefit and that it had no cash surrender value.

Clause 9 of the general provisions forming part of the Agreement read:

Place of Contract. All premiums on this contract and all benefits herein provided, are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the

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State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made. No person whosoever is authorized to represent or act for the Association in any manner outside of the State of New York.

Clause 12 read:

Manner of Payment in Event of Death. In the event of the death of the Annuitant before payment of the annuity has begun as provided on the first page hereof, the Association will pay 120 equal monthly instalments of $9.83 per $1,000 of accumulated premiums to

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of the Annuitant, if living, as Beneficiary.

The right to change the Beneficiary is reserved by the Annuitant.

Thereafter Kerslake assumed to change the named beneficiary to the appellant Alison Bruce Gray, describing her as a friend, and at a later date directed that the beneficiary be described as Alison B. Kerslake, describing her as his wife. This description was inaccurate as the contract of marriage with the respondent had not been dissolved.

By the statement of claim it was alleged that the Teachers Insurance and Annuity Association had paid or agreed to pay "the proceeds of the said policy of insurance" to the appellant.

The defence, as amended, denied that the Association had paid the amount alleged to the defendant but said that it had issued to her a new contract in settlement of her claim against the company under the laws of the State of New York.

By way of reply the respondent alleged that if this had been done

the new contract with the Insurance Company, numbered S. 1876 having been secured with the proceeds of a policy of insurance held in trust for the Plaintiff, is subject to the said trust and the defendant is liable to account therefor as claimed in the Statement of Claim.

At the trial, an agreement was put in evidence dated August 1, 1953, whereby the Teachers Insurance and Annuity Association of America agreed, in consideration of the surrender of her rights under the contract of August 1, 1934, to pay to the appellant an annuity consisting of 36 monthly payments of $179.46 each, the first to be paid on the 1st day of each month thereafter and, in the event of her death, to be commuted and paid in one sum to persons designated by the annuitant as beneficiaries. This agreement was made at the city of New York.

Subsection 31 of s. 1 of *The Insurance Act,* R.S.O. 1950, c. 183, declares the meaning to be assigned to the word "insurance" in the Act. The expression "insurance money" is also defined and subs. 36 defines the words "life insurance" as meaning

> insurance whereby the insurer undertakes to pay insurance money on death, or on the happening of any contingency dependent on human life, or whereby the insurer undertakes to pay insurance money subject to the payment of premiums for a term depending on human life, but, except to the extent of double indemnity insurance, does not include insurance payable in the event of death by accident only.

Part V of the Act includes ss. 131 to 191, both inclusive. Of these the following require consideration: s. 132 which declares that, notwithstanding any agreement to the contrary, Part V applies to every contract of life insurance made in the Province after January 1, 1925, and to every contract of life insurance made in the Province before that date where the maturity of the contract has not occurred before that date, and to every other contract of insurance made after January 1, 1925, where the contract provides that it shall apply or that the contract shall be construed or governed by the law of the Province.

Section 134(1) reads:

> A contract is deemed to be made in the Province,
> (*a*) if the place of residence of the insured is stated in the application or the policy to be in the Province; or
> (*b*) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract.

Section 158(2) defines "preferred beneficiaries" and s. 161 provides that the insured may designate the beneficiary by the contract or by a declaration, subject, *inter alia,* to the provisions of the Act relating to preferred beneficiaries. Section 165 provides that, notwithstanding the designation of a preferred beneficiary, the insured may subsequently exercise the powers conferred by s. 161 so as to transfer the benefits of the contract to any one or more of the class of preferred beneficiaries, to the exclusion of any or all others of the class.

Section 164(1) reads:

> Where the insured, in pursuance of the provisions of section 161, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof

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as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.

It is on the footing that the annuity contract was subject to these provisions of *The Insurance Act* of Ontario that the respondent advances the claim against the appellant.

The claim of the respondent must be sustained, if at all, on the basis that the moneys payable by the Association under the annuity contract of August 1, 1934, were, at the time of the death of Kerslake, held in trust by the Association for the respondent as a preferred beneficiary and that the moneys received by the appellant under the annuity contract of August 1, 1953, were impressed with a trust in the respondent's favour. It is stating the obvious to say that any claim that the respondent may assert against the appellant cannot be placed upon any higher ground than such claim as she might advance against the Association. If the quoted sections of *The Insurance Act* applied, Kerslake's attempt to change the beneficiary from the preferred beneficiary, his wife, to one who did not fall within that class, would be ineffective and, accordingly, the respondent's right against the Association might be asserted either in contract under the terms of the agreement of August 1, 1934, or in damages for breach of trust in paying to the appellant moneys held in trust for the respondent. It is only on the basis that the latter claim might be sustained that the respondent's claim can be upheld. The limit of the claim would be that portion of the accumulated moneys which had not been exhausted by the annuity payments made to Kerslake between the time when he became 60 years of age and the date of his death.

The appellant contends that the annuity contract dated August 1, 1934, was not a contract of life insurance and that, accordingly, Part V of *The Insurance Act* does not apply to it or alter or affect the obligations of the Association. A further contention is that ss. 132 and 134 of the Act do not apply in respect of the said contract, since it was not made in Ontario and none of the rights arising out of it are situated in Ontario.

It appears from the reasons for judgment delivered in the Court of Appeal[1] that the second of these points was raised in that Court as a contention that s. 134 was *ultra vires* of

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.

the Province. The Attorney General of Canada did not appear in that Court but obtained leave to intervene in this Court and we have heard counsel on his behalf. The position now taken both by counsel for the appellant and for the Attorney General is as it is stated in the next preceding paragraph.

The judgment of the Court of Appeal found against the appellant on the first point and rejected the contention that the sections were, as the respondent asserted, *ultra vires*.

While if the first point is decided against the respondent it is decisive of the action, I think the second point should be decided in this Court.

The finding of the Court of Appeal is made upon the basis that the annuity contract was a contract of life insurance to which Part V of *The Insurance Act* applies. The home office of the Association is in the city of New York and, while it was not proven, it may properly be presumed that it was incorporated in the United States. The contract itself was made in the State of New York and, by its terms, the obligations of the Association were to be performed there and were to be such as were imposed upon it under the laws of that State. The Association was not licensed to carry on business in Ontario at any time. The effect of the judgment is to declare that the Legislature of Ontario may, despite the existence of such facts, alter the terms of a contract of life insurance made by such an association by declaring that the person insured may not, contrary to its terms, change the beneficiary to any one other than a preferred beneficiary as defined by the Legislature, say that the liability of the Association for the insurance moneys payable on the death of the policyholder is that of a trustee for the person to whom the Act of the Legislature permits the money to be paid, and prohibit the insuring company from carrying out the obligations imposed upon it by the laws of the state where the contract was made and to be performed, in this case the State of New York.

The situs of the cause of action which would arise on the death of the policyholder or annuitant was clearly in the State of New York. The validity of the finding of the Court of Appeal may perhaps be tested in this manner: Should the respondent bring an action against the Association in the State of New York, where the moneys were payable,

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would it be an answer to the claim for the Association to say that, in accordance with the terms of the contract, it had paid the moneys to the person entitled under the laws of the State of New York, or could the respondent in such case say that these terms had been changed by an Act of the Legislature of Ontario and that the Association's liability was to be determined under the laws of that Province? It seems to me that to ask the question is to answer it.

I agree with the contention of the appellant and the Attorney General that, even if it be assumed that the contract was one of life insurance, s. 134 and s. 132 of *The Insurance Act,* to the extent that it would make s. 134 applicable, do not apply. To hold otherwise would be to say that the Legislature of the Province might affect civil rights the situs of which was outside the Province. This is the argument which failed in *Royal Bank of Canada et al. v. The King et al.*[1], where Lord Haldane, delivering the judgment of the Judicial Committee, referring to the rights of the non-resident bondholders outside the Province of Alberta which were enforceable, said at p. 298:

> Their right was a civil right outside the province, and the Legislature of the province could not legislate validly in derogation of that right.

It accordingly follows that, as the moneys payable under the annuity contract were not impressed with a trust in favour of the respondent, the contention that the appellant has received moneys impressed with a trust in her favour should fail.

Counsel for the Attorney General did not contend that the sections were *ultra vires* since, clearly, they do apply to contracts made within the Province and to civil rights the situs of which is within the Province. In my opinion, this aspect of the matter should be decided on that basis.

I am further of the opinion that the annuity contract was not a contract of life insurance within the meaning of *The Insurance Act* and that Part V does not apply to it.

"Insurance money" is defined in s. 1(33) as meaning the amount payable by an insurer under a contract and includes all benefits, surplus, profits, dividends, bonuses and annuities payable under the contract. This expression appears as part of the definition of "life insurance" in subs. 36 of s. 1,

[1] [1913] A.C. 283, 9 D.L.R. 337, 3 W.W.R. 994.

and the contract there referred to is a contract of life insurance. It is true that under the annuity contract in question, as in the case of the annuities which may be purchased under the *Government Annuities Act*, R.S.C. 1952, c. 132, where the annuity provides for payments for a defined number of years, if the annuitant dies before the annuity commences or before the full amount has been paid, the part of the accumulated moneys which have thus been unexpended are paid to the personal representatives of the annuitant or to his nominees. There is express provision for this in s. 12 of the *Government Annuities Act*, as there is in the contract in question, and like annuity contracts are issued by great numbers of life insurance companies and annuity companies in this country. The fact, however, that part of the money may thus be repayable on death cannot transform what is simply an arrangement for the payment of annuities into a life insurance contract or the annuities into insurance money.

Annuities of the kind provided by the contract in question and by the *Government Annuities Act* have, in my opinion, nothing in common with contracts of life insurance. Their usual purpose is simply to provide, by the deposit either of a lump sum or of payments over a period of years, a sum of money sufficient, with accumulated interest, to provide an annuity to commence in one's later years, either for the life of the annuitant or for a fixed term of years. The sum repayable on death if the annuitant dies before he has reached the age when the annuity has commenced or before the stipulated number of annual payments have been made is nothing more than a refunding of moneys deposited for a defined purpose, when that purpose has wholly or partially failed owing to the death of the annuitant. It is common practice for testators to direct that moneys forming part of their estates shall be used to purchase annuities for their dependants, either for their life or for a specified term of years, and I am quite unable to understand how annuity contracts purchased for such a purpose could be classified as contracts of life insurance.

It may be noted in passing that by s. 26 of the Act insurers licensed for the transaction of life insurance in the Province may issue annuities but nothing in Part V refers to such contracts or the moneys payable thereunder.

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I would allow this appeal with costs throughout and restore the judgment at the trial. I would not award costs to or against the intervenant.

Appeal allowed with costs throughout.

Solicitor for the defendant, appellant: V. Maclean Howard, Toronto.

Solicitors for the plaintiff, respondent: Cameron, Weldon, Brewin & McCallum, Toronto.

Solicitor for the Attorney General of Canada, intervenant: W. R. Jackett, Ottawa.

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*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.