THE NORTH AMERICAN LIFE ASSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

JANE ELSON (PLAINTIFF)..... RESPONDENT.

1903

*Mar. 26.

*April 22

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Life insurance—Delivery of policy—Escrow—Incontestability—Operation of conditions.

An application for life insurance dated 16th September, 1894, and made part of the contract to be effected, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof and that the place of contract for all purposes should be the head office of the company at Toronto. The policy insured the applicant's life to the fifth day of October, 1895, and provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the President and Managing Director signed and delivered this contract "at the City of Toronto this 27th day of September, A.D. 1894." The insured lived in British Columbia and the policy and receipt were mailed at Toronto on September 27th to the company's agent at Winnipeg, and forwarded by him on October 1st to the insured who would not receive it before October 7th. The insured died on 30th September, 1897.

Held, Taschereau C.J. dissenting, that the policy and receipt were delivered, and the contract of insurance was completed, at least as early as 27th September, 1894, when the papers were mailed at Toronto.

The policy provided that, after being in force for three years, only certain specified conditions therein should be binding on the holder and in all other respects the liability of the company thereunder should not be disputed. The insured violated a condition, but not one so specified, that would have avoided the policy but for this clause.

* PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour JJ.

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Held, that said provision covered breaches of conditions made during the three years the policy was in force, and was not confined to those committed subsequently thereto, and as the three years expired on 27th September, 1897, the insured dying three days later, the company was liable.

APPEAL from the decision of the Supreme Court of British Columbia reversing the judgment at the trial in favour of the defendants.

The only questions raised on the appeal were as to the date on which the policy came into force on which depended the operation or otherwise of the clause making it incontestable after the lapse of three years and as to whether or not such clause applied to breaches committed during the three years. The facts on which the decision of these questions depended are sufficiently stated in the above head-note.

J. K. Kerr K.C. and *Paterson K C.* for the appellants By the terms of the policy and the receipts for the premiums, the policy did not commence its operation until delivered in British Columbia some time later than 5th Oct. 1894. The application provided that the place of the contract for all purposes should be the place of the delivery of the policy. There was, therefore, no contract until the policy was delivered. By the terms of the application, the policy was not in force until the delivery to the insured of the initial premium receipt and this receipt was sent with the policy in letter of 27th September, 1894, by the appellant to Wm. McBride, and followed the same course as the policy, getting into Elson's hands in ordinary course between 7th and 10th Oct., 1894. By its terms the policy was not in force until the annual payment to and acceptance of the first premium due thereon by an authorized agent of the company and the delivery to the insured of the necessary receipt signed by the managing director, the life proposed for insurance being

at the time of such payment in the same condition of health as stated in the application.

The insured, in May, 1897, entered into a business of extra hazard, that of brakesman on a railroad and was killed in an explosion upon the railway on 30th September, 1897. The policy provided that if he, without a permit, engaged "in the employment on a railroad" then that the policy should forthwith become and be null and void without any act on the part of the company and all payments made upon it should be forfeited to the company. The insured was not, therefore, protected by the clause as to incontestability after three years and the appellant is consequently not liable and the judgment of the learned judge at the trial should not have been reversed.

Even on the assumption that the contract became operative at the time of the application on 18th September, 1894, the clause as to incontestability after three years will not avail the respondent. The deceased entered into the forbidden occupation on a railway in May, 1897, which was within the three years. It must follow by the terms of the policy that in May, 1897, without any act on the appellant's part it became *ipso facto* null and void. The contract thereupon came to an abrupt conclusion and there was nothing upon which the respondent could base any claim.

It is definitely provided that it requires four combining circumstances to put the policy in force in this case:—(1.) Actual payment to and acceptance of the first premium by an authorized agent of the company; (2.) The delivery to the insured of the initial receipt signed by the managing director; (3.) The life proposed for insurance being at the time of such payment in the same condition of health as stated in the application; (4.) The delivery of the policy. Respondent did not prove the delivery of the receipt or policy

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before 5th Oct., 1894. The case of *Xenos* v. *Wickham* (1) does not apply. See *per* Piggott B. at p. 309, of that report citing *Doe d. Garnons* v. *Knight* (2), and also *per* Cranworth L.J. at p. 322. Until the special time has arrived or the condition has been performed the instrument is not a deed but an escrow. See also *Tiernan* v. *Peoples Life Ins. Co.* (3), at p. 354; *Sun Life Assur. Co.* v. *Page* (4); *Confederation Life Association* v. *O'Donnell* (5).

The agent in British Columbia had no power to waive forfeiture or to modify the contract. Elson had notice that the agent had no such authority, and stated his preference to deal directly with the head office at Torouto. For these reasons, *Campbell* v. *National Life Ins. Co.* (6), and *Moffatt* v. *Reliance Mut. Life Assur. Soc.* (7), do not help the respondent. Elson knew of this limited authority, and therefore *Wing* v. *Harvey* (8) does not apply in favour of respondent, nor does *Acey* v. *Fernie* (9).

The appellant knew nothing of Elson having worked as a brakesman until after his death, and therefore the acceptance of payment of the last premium, on the 29th September, 1897, was no waiver of the forfeiture; *Jacobs* v. *Equitable Ins. Co.* (10), at p. 46. The appellant was justified in retaining this premium, as it is part of the contract that "if any material information has been withheld by the insured all sums which shall have been paid to the company upon account of the insurance made in consequence shall be forfeited and the insurance shall be absolutely null and void." The retention was no waiver of the forfeiture. Furthermore the insurance was absolutely null and void in

(1) L. R. 2 H. L. 296
(2) 5 B. & C. 671.
(3) 23 Ont. App. R. 342.
(4) 15 Ont. App. R. 704.
(5) 10 Can. S. C. R. 92; 13 Can. S. C. R. 218; 16 Can. S. C. R. 717.
(6) 24 U. C. C. P. 133.
(7) 45 U. C. Q. B. 561.
(8) 5 DeG. M. & G. 265.
(9) 7 M. & W. 151.
(10) 17 U. C. Q. B. 35.

May, 1897, and there was therefore nothing left upon which any waiver could operate.

We also rely upon *The Mutual Life Insurance Co. of Canada* v. *Giguère* (1); *Provident Savings* v *Mowat* (2); *Kohen* v. *Mutual Reserve* (3); *Misselhorn* v *Mutual Reserve Fund Life Assn.* (4); *McCully's Administrator* v. *Phœnix Mutual Life Ins. Co.* (5); *Steinle* v. *New York Life Ins. Co.* (6).

The respondent cannot recover in this action, as no contract was ever made with her by the appellant. The contract was with the deceased, and with nobody else, and the right to sue passed to his legal representatives, and they are not parties to this action. *Cleaver* v. *Mutual Reserve Fund Life Assn.* (7); *Wright* v. *The Mutual Benefit Life Assn.* (8); at page 243,

Duff K.C. for the respondent. The change of occupation is not disputed, but the plaintiff's case is on the grounds that either a permit was granted, or that breach was waived, and that, even in the absence of waiver, the defendants are not entitled to set up the breach, because of the clause in the policy making it indisputable after three years. The case as to waiver is that in June, 1897, after the change of employment, the insured informed the defendants' manager in British Columbia of the change, who, subsequently, informed his father that the company did not object to the change because it involved no increase of risk. The clause providing that no provisions in the policy shall be waived except in writing under the hand of the President or Managing Director does not help defendants, because, (*a*) it refers only to waiver of terms of the policy, not to waiver of a breach of such terms, a distinction recognized in the policy; and (*b*) if necessary the jury might

(1) 32 Can. S. C. R. 348.
(2) 32 Can. S. C. R. 147.
(3) 28 Fed. Rep. 705.
(4) 30 Fed. Rep. 545.
(5) 18 W. Va. 782.
(6) 81 Fed. Rep. 489.
(7) [1892] 1 Q. B. 147.
(8) 118 N. Y. 237.

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infer a formal waiver by the company. *Wing* v. *Harvey* (1); *Phœnix Life Co.* v. *Raddin*, (2). Further, by the claim papers, the company had notice in October, 1897, of the change of employment, and with that knowledge they kept a premium paid in September, 1897, five months after the alleged breach. The retention of this premium was a waiver of the alleged breach, because the company cannot, while holding moneys paid on the faith of the policy subsisting, resist an action upon it on the ground that at the time those moneys were received the policy had ceased to be binding on them. *New York Life Ins. Co.* v. *Baker*, (3); *Canada Landed Credit Co.* v. *The Canada Ag. Ins. Co.* (4). The incontestability clause forbids the defence upon which defendants rely. The obligation of defendants commenced not later than 17th Sept., 1894. The first premium receipt was delivered to Elson on 18th Sept., 1894. This receipt is said by the Managing Director of the defendants to have "put the policy in force." The risk was finally accepted and the policy issued on 27th Sept., 1894. The company "delivered this contract at the City of Toronto this 27th day of September, A.D. 1894." The last sentence of the incontestability clause governs the clause, and at the end of the period, the only defences open to the company are those specified in its earlier sentences. Every other clause in the policy must be read subject to this provision of the incontestability clause. See *Davenport* v. *The Queen* (5) at p. 128; *Doe d. Bryan* v. *Bancks* (6); *Roberts* v. *Davey* (7); and other cases in the notes to *Dumpor's Case* (8); *Turquand* v. *Armstrong* (9); *Massachusetts Benefit Life Assn.* v. *Robinson* (10); *Goodwin* v. *Provident*

(1) 5 DeG. M. & G. 265:
(2) 120 U. S., R. 183.
(3) 83 Fed. Rep. 647.
(4) 17 Gr. 418.
(5) 3 App. Cas. 115.
(6) 4 B. & Ald. 401.
(7) 4 B. & Ad. 664.
(8) 1 Sm. L.C. (11 ed.) 32.
(9) 9 Ir. L.R. (N.S.) 32.
(10) 30, S.E. Rep. 918, 927.

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Savings Life Assur. Society (1); *Manufacturers' Life Ins. Co.* v. *Anctil* (2) per Sedgewick J. at p. 126.

In the construction of policies the *strictum jus* or *apex juris* is not to be laid hold of, but they are to be construed largely, for the benefit of trade and the insured. *Per* Mansfield L. J. in *Pelly* v. *Royal Exchange* (3); *Notman* v. *Anchor Ass. Co.* (4); *Fitton* v. *Accidental Death Ins. Co.*, (5); *Thompson* v. *Phœnix Insurance Co.* (6); Porter on Insurance (3 ed.) p 32.

THE CHIEF JUSTICE (dissenting).—I would allow this appeal upon the ground that, as held by Mr. Justice Martin at the trial, the policy in question did not come into force before the 5th October 1894, and consequently had not been in force for three years at the time of the death of the insured on the 30th September 1897; so that the incontestability clause cannot be invoked by the respondent. And without the benefit of that clause she clearly cannot succeed.

The application for insurance dated 18th September, 1894, the terms of which application are expressly made part of the contract in question, contains the following declarations and agreements.

That a policy if issued in the company's usual form and delivered shall be the only acceptance of this application.

That such policy will be accepted *when presented* subject to the terms n and upon the said policy and as herein set forth.

The policy itself dated 27th September, 1894, contains the following declarations and agreements.

After being in force three years the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided, and that the provisions as to military and naval services, proofs of age and death and limitation of time for action or suit shall be observed. In all other respects after

(1) 66 N.W. Rep. 157.
(2) 28 Can. S. C. R., 103.
(3) 1 Burr 341, 348.
(4) 4 C.B.N.S. 476 at 481.
(4) 17 C.B.N.S., 122 at 135.
(5) 136 U.S.R., 287 297.

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the expiration of the said three years the liability of the company under this policy shall not be disputed.

The following is indorsed on the policy:

This policy is issued and also accepted by the insured upon the following additional provisoes and agreements therein made a part thereof and, (*inter alia*) if without a permit the insured engaged*** in the employment on a railroad, steamboat or other vessel*** this policy shall thereupon become and be null and void without any act on the part of the company and all payments made upon it shall be forfeited to the company.

The first premium receipt, dated 18th September 1894, is stated to be

subject to all the provisions of the said policy and those on the back hereof hereby incorporated herein.

By the terms of the policy and of the receipts the contract ended upon the 5th October in any year. And as the premiums were annual premiums the policy must have commenced its operation upon the 5th October, 1894. That seems to me unquestionable.

By the terms of the application the contract commenced from the delivery of the policy and the policy was sent by the appellant's letter dated 27th September, 1894, to William McBride at Winnipeg, agent of the appellant, for delivery to Elson in British Columbia. McBride forwarded it from Winnipeg to Elson on the 1st October, 1894. According to the evidence it would then have reached Elson in ordinary course between the 7th and 10th October, 1894.

By the terms of the application moreover, the policy *was not in force* until the delivery to the insured of the initial premium receipt and this receipt was sent with the policy in letter of 27th September 1894, by the appellant to Wm. McBride, and this receipt followed the same course as the policy, getting into Elson's hands in ordinary course between the 7th and 10th

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October, 1894. Until that receipt reached Elson, his life was not insured.

The onus was upon the respondent to prove when the contract commenced, and for that purpose she examined Wm. McCabe the appellant's managing director. From his evidence it appears clearly that the contract could not have commenced before the 5th of October 1894. The receipt itself for the premium of 1897 leaves no room for doubt upon that fact. It is a continuance of the policy from the 5th of October, 1897, for one year. That necessarily implies that the first year began on the 5th of October of the year 1894 in which the policy was issued. It reads as follows :

HEAD OFFICE, TORONTO, ONT.

Due October 5th, 1897—$9.$\frac{50}{100}$. Sum insured $1,000.

Received this 29th day of September, 1897, Nine $\frac{50}{100}$ Dollars from the owner of Commercial Policy No. 02647, on the life of Geo. Wm. Elson, Esq., for the regular premium *due as above stated*, hereby continuing the insurance thereunder for twelve *months from above due date* only, subject to all the provisions of the said policy and those on the back hereof, hereby incorporated herein.

WM. McCABE,
Managing Director.

Elson had taken employment on a railroad contrary to the express stipulation of the policy, so that he had forfeited all his rights under it, and he having died before the expiration of three years from the date that the policy was in force the company is not precluded, by the incontestability clause, from pleading such forfeiture in answer to the respondent's action.

The judgment of the majority of the Court was delivered by

DAVIES J.—By their policy of insurance dated at the Head office of the Company, Toronto, on the 27th September 1894, the North American Life Ass. Co. insured the life of George Elson for the term ending at

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noon on the 5th October 1895 and promised to pay to the plaintiff his mother the sum of $1,000 within a certain time after proofs of his death. The policy was mailed by the company on the day of its date to one of its western agents to be handed the insured, and the subsequent premiums were paid annually up to and including that due on the 27th September 1897. About five months before his death the insured engaged in employment upon the Canadian Pacific Railway which is one of the hazardous employments prohibited by the policy. The substantial question raised upon this appeal was as to the meaning and effect of the clause known as the "incontestable clause" of the policy sued on. A question was raised and argued by Mr. Kerr as to the date when the policy came into force and we were of the opinion on the hearing (and in fact the respondent's counsel was stopped on the point) that the policy went into operation and took effect from, at any rate, the date when it was posted by the company in Toronto, 27th September 1894, for transmission to the insured. If, therefore, the "incontestable clause" covers breaches of the conditions committed during the three years the policy was in force, the company would be liable, the insured not having been killed until the 30th September, 1897, two or three days after the expiration of the three years.

The policy contained on its face the following clause :

> After being in force three years, the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided, and that the provisions as to military and naval service, proofs of age and death, and limitation of time for action or suit shall be observed. In all other respects after the expiration of the said three years the liability of the company under this policy shall not be disputed.

In order to construe this clause properly it is necessary to read it in connection with the following condi-

tion or provision indorsed upon the policy and which was made expressly a part of the contract:

1. If any statement made in the application and therein declared to be material to the contract, be untrue; or if any premium, note, cheque or other obligation given for the first or any subsequent premium or any part thereof, or any renewal of any such note or other obligation or any part thereof, be not paid when due; or if, without a permit the insured engages as an occupation: (1) in blasting, mining, submarine labour, the production of any explosive material, or in any naval or military service (except in time of war); or (2) engage in aerial or arctic voyages or in employment on a railroad, a steamboat or other vessel; or (3) reside elsewhere than in Canada, Newfoundland, Europe or the United States; or (4) between the 15th days of June and November in any year reside in any part of the United States south of the 26th degree of North Latitude, or in Europe south of the 42nd degree; this policy shall thereupon become and be null and void, and all payments made upon it shall be forfeited to the company.

I am of the opinion that the Supreme Court of British Columbia was right in holding that the object of the above incontestable clause "was to provide an automatic cutting off at the end of the triennium of all defences arising after the coming into force of the policy except such as are reserved in the clause itself." And, I would add further, of all defences arising out of any untrue or incorrect material statement made in the application for the policy.

The contention of the appellants was that the clause in question did not operate to relieve the insured from any breach of condition invalidating the policy happening within the three years, but only those happening afterwards. But I think a careful examination of the clause in connection with the first condition of the policy will show that such a contention is both narrow and untenable. In fact it whittles down the meaning of the clause so much as to make it practically illusory and valueless. If given effect to it still leaves the policy liable to be avoided by the company five, ten or even twenty years after it was issued, if some state-

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ment made by the insured in his original application and therein declared to be material turned out afterwards to be untrue, or if the company discovered that within the first three years the policy was in force, the insured had, wittingly or otherwise, broken one of the many conditions to which the policy was subject. It seeks to give an effect to the opening words of the clause "after being in force three years" which I do not think they fairly bear and which I feel confident neither party to the contract could have intended, and I think it reaches that conclusion by ignoring or unduly limiting the meaning of the closing sentence of the clause. I construe the first part of the clause as dispensing after three years with further compliance by the insured with any condition excepting the ones expressly reserved, viz. those relating to payments, military and naval service, proofs of age and death, and limitations of time for bringing actions. In that view, with which Mr. Kerr concurred, the last sentence was unnecessary. That last sentence, however, does not confine itself to stipulations about conditions but broadly and unreservedly says

> in all other respects after the expiration of the said three years the *liability of the company under this policy shall not be disputed.*

One part of the clause dispenses with future compliance with the general conditions and the other renders the policy indisputable after the three years, except for breaches of some of the special conditions which are retained and continued. The words of the latter clause are not that the liability of the company shall not be disputed because of breaches committed after three years, as is now contended for, but that absolutely and in all other respects than the ones specifically set out, it shall be indisputable. If the clause is to operate as containing the limitation sought to be put

upon it now by the company then they must alter its phraseology and clearly insert the limitation.

The counsel for the respondents were on the argument pressed with the question whether the clause covered untrue statements made in the application and Mr Patterson felt himself compelled to admit that apart from fraud he thought it did. If it does it is indisputable that the clause relates as well to breaches within the three years and covers them as to breaches occuring after three years. Once it is admitted that the phase "In all other respects" with which the last sentence begins applies to untrue statements made in the original application, then, in my opinion, it must follow that it covers other breaches although made within the three years. In fact the last sentence was unnecessary if limited alone to breaches arising after three years. There could be no breach because there was no condition then existing. The first part of the clause annulled all conditions after three years excepting those expressly retained, and there would therefore be no necessity for the last sentence at all. But it was, in my opinion, inserted to cover the obvious intent and meaning of the parties to the contract and to give assurance to the party insuring that, after the lapse of the three years, he need not worry about his policy because it was indisputable except for the breach of the two or three conditions or things specifically mentioned and which therefore he would have to be careful about.

Appeal dismissed with costs.

Solicitors for the appellants: *Drake, Jackson & Helmcken.*

Solicitors for the respondents: *Cowan, Kappele & McEvoy,*