Counsel for Pursuer — M'Laren — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Balfour—Keir. Agents —Dundas & Wilson, C.S.

Friday, July 13.

FIRST DIVISION

[Lord Young, Ordinary.

SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY *v.* BUIST AND OTHERS.

(*Ante*, vol. xiii., p. 659.)

Insurance—Acquiescence—Mora—*Bar—Fraud.*

Held that it was no bar to an insurance company pursuing assignees of a policy of insurance for reduction thereof on the ground of wilful fraud and misrepresentation by the insured as to his habits and state of health, that certain of the officers of the company, after acceptance of the proposal and before the death of the insured, had suspicion as to his habits, but made no inquiry and gave no intimation to the assignees till after his death.

This was the sequel of the case reported *ante*, of date July 14, 1876 (13 Scot. Law Rep. 659, and 3 R. 1078). The points now before the Court were —1st, On the facts—whether there was fraudulent concealment as to the health, habits, and previous proposals for insurance of the insured? 2d, On a plea of personal bar—whether the office, having been put on their guard by some suspicions entertained by their medical officer, and by him communicated to the manager of the Insurance Company, could now insist in this action?

The pursuers averred that the answers given by the insured George Moir to the usual questions put to him as to his health, his habits, and whether he had previously proposed his life for insurance to any other company, were false and fraudulent, and that the policy should therefore be reduced.

The defenders denied these statements, and pleaded further—"(6) The pursuers, after ascertaining the facts, or at least having the means of ascertaining them and being put on their inquiry, having admitted the claim made by the defenders, cannot now dispute the same." The nature of the evidence as to the fraudulent statements and misrepresentations of Moir appears sufficiently from the judgments. The evidence upon the above plea was as follows:—Mr Finlay, secretary of the Scottish Equitable Company, said—"The late Mr George Todd was manager of the Scottish Equitable in May 1872. I find that the papers in this proposal were lent to the Scottish National Insurance Company. I remember that those papers were returned to us, and that the Scottish National informed us that they did not intend to proceed with the proposal which had been made to them. I think they said they considered that the applicant was not satisfactory. I think they informed us that he was of dissipated habits. This was in the autumn of 1872. I cannot give the exact date, but I think it was about September. Dr Robertson did not inform me about that time that he had discovered that Moir was of dissipated habits. Mr Todd did not tell me that Dr Robertson had told him so." And Dr Robertson, who had acted as medical officer for the Company, said—"I recollect being informed that Moir was to call upon me for examination in connection with a proposal to the Scottish National Insurance Company. I was then acting for that office in the temporary absence of Dr Hunter, their medical officer. This was some months, at all events, after the application to the Scottish Equitable. I do not think the proposal to the Scottish National came the length of being considered by the directors. By that time I had heard something about Moir. I had heard that his mode of life was not exactly what it ought to be. I had heard he was in humble circumstances, and was not a man of substance that he should be proposing for large sums. (Q) Had you heard he was of dissipated habits?—(A) I had heard a hint of the kind, and enough to make it necessary that there should be further inquiry in the event of the proposal going on. I mentioned that to one of the officials of the Scottish National. The matter was the subject of conversation between Mr Todd, of the Scottish Equitable, and me more than once — partly at the time of the proposal to the Scottish National, and partly before that, but all subsequent to the proposal to the Equitable. It was Mr Todd who informed me about Moir. He said, 'I believe this case which we passed the other day has not turned out to be a good one, for I understand the policy has since been assigned.' He also said, 'I believe he is not in very flourishing circumstances'—or words to that effect; that, in short, he was not a man who should be proposing for £2000. I understood him to be referring to Moir's pecuniary means. I understood him to say that Moir was lodging with some people at Corstorphine, and was not a man of substance, which at first I had taken him to be."

The Lord Ordinary reduced, decerned, and declared in terms of the conclusions of the summons.

The following was the judgment pronounced by his Lordship:—"This is an action to set aside a policy of life insurance, and is laid on a breach of the conditions on which it was issued, viz., that the answers given by the assured to the queries submitted to him, and the declaration, forming with these answers part of his proposal for insurance, were true. The particulars in which these are alleged to be false are specified on record, and I need not here repeat or summarise them. The relevancy of the action is undoubted, and the only question is whether or not the evidence is sufficient to sustain it in fact. At the conclusion of the evidence, and after hearing counsel for the parties, my strong impression was that the pursuers had proved their case—so strong, indeed, that in an ordinary case I should not have hesitated to act upon it by giving judgment at once. But to reduce a policy of insurance upon a *post-mortem* inquiry regarding the habits of the assured, and the bodily ailments with which he may have been afflicted prior to the insurance, is not an ordinary or commonplace matter, and I accordingly delayed judgment until I had reconsidered my impression with such aid to my memory and notes as the shorthand writer's notes of the evidence might give me.

"As my judgment on the whole matter is in favour of the insurance office, it is, I think, all the more proper that I should say distinctly that in my opinion a policy ought not to be easily set aside upon a comparison of the result of what I have characterised as a *post-mortem* inquiry into a man's habits and bodily ailments, and the answers which he has given to the queries answered in his proposal for insurance. With respect to sober and temperate habits in particular, I should certainly not be induced to hold an answer false and a breach of condition by evidence of habitual generous living or even of occasional excess. Nor with respect to disease, or ailments short of what are generally called diseases, should I consider it material that the assured had in his answers and declaration altogether omitted to notice several trifling illnesses, and even several temporary bodily troubles, arising from folly or indiscretion. A man is not, for anything I now decide, and I think really is not, obliged as a condition of insuring his life on the terms usually exacted by insurance offices, to make a minute confession of his sins and misfortunes, and their effects on his health, provided these effects, though they occasioned temporary inconvenience with more or less anxiety, have passed away without results from which permanent or lasting injury to health is reasonably to be apprehended. I express this opinion only to guard more distinctly against the supposition that anything to the contrary is involved in the decision which I now pronounce, for the facts as proved really present no such case for consideration. I mean, however, to express my opinion distinctly to this effect—that an insurance office challenging a policy after the death of the assured on the ground of untrue answers to queries, and untrue declaration made by him regarding his health and habits of life, undertakes a heavy *onus*, to the discharge of which it must be strictly held. I do not go the length of saying that gross and wilful faleshood must be proved. But, first, the falsehood must be clear, and on a subject which is, or reasonably may be, material to the risk; and, second, if not wilful, it must be inexcusable in this sense—that it consists in a blameably reckless or careless assertion or omission of which an honest man giving ordinary attention to the matter in hand would not have been guilty, and which in fairness to the office which was deceived cannot be treated and passed over as immaterial or trifling. There may be, and no doubt are, cases in which these propositions would require qualification or modification, and I only submit them as sufficient for the case immediately before me.

"My judgment on the evidence is, that the answers and declaration of the assured were wilfully false in the several respects specified by the pursuers on record. Short of this, and as a milder view of the assured's conduct in the matter, I am of opinion that his answers and declaration were false in fact, and inexcusably so in the sense which I have explained. I have arrived at this conclusion on a careful consideration of the evidence with reference to the heavy *onus* that lay on the pursuers according to the opinion which I have already expressed. I made a precis of the evidence for my own use, but do not feel that it would be useful to enter upon any examination of the evidence here.

"I therefore repel the defences, sustain the reasons of reduction, and give decree as concluded for, with expenses. The pursuers do not seek to avail themselves of the clause forfeiting to them the premiums which they have received, notwithstanding the now declared invalidity of the policy, and stated their readiness to return them. This is not only becoming and what was to be expected, but is probably only consistent with the form of action which the pursuers adopted, and the decree of total reduction which they have asked and obtained. However this may be, it will be quite understood that the pursuers agree to complete restoration and make return of the premiums accordingly."

The defender reclaimed, and argued on the second point—*Mora*, acquiescence, and such conduct as compromises third parties, will bar a pursuer from challenging a deed on grounds which are otherwise available, and was fraud. Good faith demanded that the Insurance Company should make the assignees aware of their suspicions. They did not do so, but in full knowledge of the flaw in the policy they waited till Moir's death before bringing forward any challenge, whereby the position of the assignees was seriously impaired.

The pursuers argued—The suspicions were vague and not sufficient to put the office on its inquiry, much less to require of them that they should go to the assignees. They had not fully ascertained that the policy was reducible. Far from it. And anything short of that was insufficient to justify them in taking such a step.

The nature of the argument on the facts has sufficiently appeared from the above judgment of the Lord Ordinary.

At advising—

On the facts of the case the Court was clear that the Lord Ordinary's judgment was right, and that it had been abundantly proved that Moir's statements as to his habits and his health were false, and that he knew them to be false; and further, that his statement that his life had not been proposed for insurance with any other company was false and fraudulent.

On the question as to personal bar—

Lord Mure—Another point has been argued to us which does not appear to have been before the Lord Ordinary, viz., that in consequence of some communications passing between this office and the officers of some other companies, to the effect that this insurance was not a good one, the Insurance Company were put on their inquiry, and therefore it is said the pursuers were barred from insisting in this action, or, at all events, were bound to refund the premiums that they had received. Now, I find that what is referred to was nothing more than a suspicion, and, besides, I have great doubt of the relevancy of such allegations, and then I find that the pursuers meet these parties half-way by offering to return their premiums.

Lord Deas—With reference to what Lord Mure has said as to the plea that the Insurance Company is barred from objecting to this policy because they came to know of the fraud and did not forthwith take steps to reduce it, that may be an important question when the facts raise it, but I am clearly of opinion that here there are no

facts to raise it. These vague suspicions cannot be called knowledge.

Lord Shand—As to the proposition argued in bar against this office, viz., that they went on taking premiums after they had knowledge of the falsity of the representations of the insured; if the case had come up to this, that they had full knowledge of the truth, and had notwithstanding gone on for years to take premiums, that would be a serious question; but the case does not approach that. The only allegation is as to their knowledge of his habits; there is not said to have been any knowledge of his proposals to other offices or of the state of his health. That falls far short, therefore, of what would be necessary for barring an office from such an action. I am clearly of opinion that there is nothing to bar the Insurance Company from insisting in this action.

The Lord President was of opinion that the policy had been obtained by gross and deliberate fraud. His Lordship went on to say—There has been a plea in bar of this action raised which it is necessary to notice; all that is said in support of that plea is, that some suspicious circumstances as to the habits of the insured became known to some of the Company's officers. That imposed no duty on the Company at all; their suspicions were vague and ill-supported, and I can conceive nothing more rash and ill-advised than to intimate a challenge of the policy on such grounds as these. What do the defenders mean to say was the duty of the Company? To refuse premiums? That would have been a very strong measure, and one not justified by the state of their knowledge. If it is said that they should have communicated their vague suspicions to the assignees, I say again that that would have been most rash and ill-advised. If after an assignation an insurance company becomes aware of objections so clear and conclusive that a statement of them is sufficient, I do not say that it is not the duty of the insurance company to make the assignee aware of them. In such a case it would not be consistent with good faith to go on taking premiums. We have no such circumstances here, and I only make these remarks in case it might be supposed that there could not be circumstances in which this plea might be maintained.

The Court adhered to the Lord Ordinary's interlocutor.

The judgment in this case was held to apply to two other actions of reduction raised by different offices against assignees of policies entered into by Moir on similar fraudulent representations.

Counsel for the Scottish Widows Fund—Asher—Pearson. Agents—Gibson-Craig, Dalziels, & Brodies, W.S.

Counsel for the Scottish Equitable—Balfour—Pearson. Agents—Campbell & Lamond, C.S.

Counsel for the General Life and Fire Assurance Company—Dean of Faculty (Watson)—Strachan. Agent—James S. Mack, S.S.C.

Counsel for the Defenders and Reclaimers—Fraser—Scott—J. P. B. Robertson. Agent—James M'Call, S.S.C.

Friday, July 13.

SECOND DIVISION.

SPECIAL CASE—JOHN BOYD AND OTHERS (BOYD'S TRUSTEES).

Husband and Wife—Marriage-Contract—Trust—Acquirenda.

By antenuptial contract of marriage the wife conveyed to trustees "all and sundry estate and effects which she may conquest and acquire during the subsistence of this said marriage by purchase, succession, bequest, or otherwise." *Held*, upon a consideration of the whole terms of the marriage-contract, that this did not include (1) a liferent, and (2) an annuity.

This was a Special Case for (1) John Brack Boyd of Cherrytrees, and others, trustees under the antenuptial marriage-contract of Mr and Mrs William Brack Boyd; and (2) Mrs William Brack Boyd, and her husband for his interest.

By the said marriage-contract Mrs Boyd had conveyed to the trustees a capital sum, and "also all and sundry other estate and effects which she, the said Elizabeth Bell Wilson, may conquest and acquire during the subsistence of the said marriage by purchase, succession, bequest, or otherwise, provided the same shall amount to £300 sterling or upwards; and for the more effectual completion hereof the said Elizabeth Bell Wilson hereby binds and obliges herself to execute all deeds requisite and necessary."

The purposes of the trust were—(1) Payment of expenses thereof; (2) payment to Mrs Boyd of the annual proceeds of the "said principal sum and other estate hereby assigned," exclusive of the *jus mariti* of her husband; (3) in event of the predecease of Mr Boyd, for payment to Mrs Boyd "of the one-half of the said principal sum, and of the whole other estate hereby assigned, and her heirs, executors, and assignees," and of the other half of the said principal sum to her in liferent only, and to the children of the marriage in fee; (4) in event of Mrs Boyd predeceasing, for payment of the interest or annual proceeds of the "principal sum and other estate" to Mr Boyd, and the fee to the children; (5) in event of there being no children, for Mr and Mrs Boyd in liferent, and on the death of Mr Boyd for payment of the whole to Mrs Boyd, her heirs, executors, or assignees.

It was also provided that the trustees might (in their discretion) pay over to Mr Boyd "the said principal sum," or "any other principal sums, conquest as aforesaid, or any portion thereof," if he desired to purchase an estate.

Mrs Boyd's father, James Wilson, died prior to the date of the marriage-contract, leaving a disposition and settlement whereby he conveyed his estate of Otterburn and his whole moveable estate to his son John, under certain burdens and provisions, the second of which was in the following terms:—"*In the second place* (but always with and under the declarations after written), with the burden of payment of the interest of the sum of £3000 to the said Elizabeth Bell Wilson, my only daughter, during all the days of her life, for her liferent use only, and that at two terms in the year, Whitsunday and Martinmas, by equal por-