

“ second and third issues, and that the sum  
 “ due to the pursuer, Scott, on the policy, is  
 “ L. 500.”

SIR W. FORBES  
 & Co.  
 v.  
 EDIN. LIFE  
 ASSUR. Co.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

SIR WILLIAM FORBES & COMPANY v. EDIN-  
 BURGH LIFE ASSURANCE COMPANY.

1830.  
 March 23.

AN action, by assignees to a policy, for pay-  
 ment of the sum insured on a life.

Finding that in-  
 surers were in-  
 debted in the  
 sum insured on  
 a life.

DEFENCE.—Misrepresentation and non-  
 statement of material facts.

ISSUE.

“ It being admitted, that, on the 26th day  
 “ of September 1826, the defenders granted  
 “ the policy of insurance, No. 6 of process,  
 “ whereby, in consideration of a certain pre-  
 “ mium, the defenders agreed to pay to Wil-  
 “ liam Inglis, W. S. the sum of L. 3000 Ster-  
 “ ling, on the death of John Thomas Earl of  
 “ Mar, and that the right to the said policy is  
 “ now in the pursuers :

“ It being also admitted, that on the 20th  
 “ day of September 1828, the said Earl died :

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“ Whether the defenders are indebted and  
“ resting owing to the pursuers in the said  
“ sum of L. 3000, contained in the said po-  
“ licy?”

*Anderson* opened for the pursuers, and stated the facts, and that the pursuers were not parties to the original transaction ; that the sum was refused on the ground that there had not been a full disclosure of the state of Lord Mar’s health, and a concealment of his habit of taking opium. We deny his taking opium to the extent stated, and maintain that he was in good health, and had no illness tending to shorten life. The defenders put no question to Lord Mar as to his habits ; and having taken the return of their own medical officer, who did not answer the question as to habits, they are not now entitled to object. The state of Lord Mar’s affairs was the cause of the depression of his spirits previous to his death.

In a question on one policy of insurance a party allowed to produce another policy by the same office on the same life.

An objection was taken to the production of a policy executed on the life of Lord Mar in 1823.

LORD CHIEF COMMISSIONER.—This is not worth debating about ; it is merely *prima faciæ* evidence of what the office thought at the time ;

and the only question is, whether they are called on to answer it? I shall allow the pursuers to produce it at present; but their reading it must depend on the evidence to be produced.

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An objection was also taken to Mr Gibson-Craig, stating a transaction as to a loan of L. 50,000.

*Hope, Sol.-Gen.*—You may ask his opinion, or whether he advised the office for which he acted to take the risk.

*Cockburn.*—We are entitled to prove that he acted on that opinion, and that he was personally concerned in the transaction.

LORD CHIEF COMMISSIONER.—I think you may by his evidence lay the foundation for proving the transaction by legal evidence.

*Hope, Sol.-Gen.* opened for the defenders.—The case is most material in reference to the principles which it involves. Taking two ounces of laudanum a-day was a material fact which *Lord Mar* was bound to disclose, and not having done so, the office is free. The insurance was for the security of the pursuers, and they are liable for the acts of *Lord Mar* and *Mr Inglis*, his agent. The office is not

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bound to do any thing, unless, on the face of the declaration, the risk appears different from the common one. The disease of which he died, jaundice, is a natural result of this habit ; but we rest on this, that it was a fact material for the office to know. If the fact had been known, no office would have taken this risk without a special report.

I submit to the Court, as the result of the cases on this subject,

1. That the party for whose benefit an insurance is made must suffer, if the representation is not correct. 2. If he suppresses any circumstance which it is material for the office to know. 3. The jury, and not the party, are the judges of whether the fact is material. 4. The failure to state what medical men think material was sustained in a recent case. 5. The party whose life is insured is, to the extent of the statement made, the agent of the party making the insurance.


Maynard v.  
Rhodes, 5 D. and  
Ry. 266.

Morrison v.  
Muspratt,  
4. Bing, 60.

Everett v. Des-  
borough,  
5 Bing. 503.

*Cockburn*, in reply for the pursuers.—The question in the issue depends on whether this is a good policy. As the defenders put their names to it, and took the premium, I have a legal and moral right to recover the sum insured, unless they prove an objection to the policy. Their objection is not fraud, or that

this was not an insurable life ; but that a fact ought to have been disclosed, to enable them to calculate the risk. I admit that the concealment of a material fact vacates the policy ; and you, the jury, are the absolute judges whether it is material, but must look with a nice eye to it.


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It is said the office are not bound to do any thing ; they ought to have been vigilant, and not to have granted the policy without an answer to the question as to habits. The question turns on the habits of Lord Mar,—the presumption is in our favour, and they have not proved that he took opium to excess, and that it produced on him an effect which it was material for the office to know.

The question is the effect produced on the individual and his chance of life. It is impossible that his mind and memory could have been in the state which has been proved, if he took opium to excess ; and it is proved not only by opinion but facts, that he had no appearance of taking opium.

LORD CHIEF COMMISSIONER.—The issue contains the question to be tried, and giving an affirmation or negative, by finding for the pursuer or defender, will be sufficient. But whether the defenders are or are not indebted,

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depends on the concealment charged against Lord Mar, and those making the insurance. The question is not whether his death was caused by the use of opium, but whether there was a concealment of a material fact ?

Insurance is a contract of indemnity, and is of a most sacred nature, in which the material facts must be disclosed, whether the subject is a ship, a house, or a man. In all of them there is a sum paid to get indemnification for the loss of the article ; and, as the premium is in proportion to the risk, concealment voids the policy ; but the party objecting must make out that the fact was material. In the present instance you had documentary evidence laid before you, and also proof of the acts of the party ; and you have to consider whether the fact ought to have been disclosed.

The pursuers come with perfect fairness, and the case does not depend on their knowledge of the fact ; but the defenders are not bound to pay, unless law would have bound them to pay to the original party.

My general observations in this case are more matters of common sense than law, as it is purely a question of fact ; and you will have to consider the documents, and contrast them with the other part of the case. The questions put

in the schedule of the office are, What are his habits? Temperate? Or free? These are united, and a general answer given by Mr Weir. Dr Wood only answers the two last, and his answer is favourable; but he does not answer the general question. I do not rest on the circumstance of Dr Wood being the officer of the defenders; but it is a very material circumstance that they refer to a medical man, and then make the insurance, without an answer to a question which is material in making the insurance and fixing the premium. By this conduct must they, or must they not, be held to have abandoned this, as they made the insurance without an answer? If they took the risk without this answer, must they not be held to have passed from this as to habits?

Lord Mar seems to have kept this habit as secret as possible; and if his ordinary medical attendant had been called, he could not have given farther information. This raises the question whether Lord Mar was under a moral obligation to disclose his habit, or are the office to be held as abandoning it. It is undoubted that there may be facts which in honour and honesty an individual is bound to disclose, otherwise the policy will be void; but the question returns, whether he is under this obligation, if the in-

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urers act so as to show that they do not consider it material.

The evidence in this case had a twofold object,—1st, To show that the habit existed ; 2d, That it was to such an extent as to be important, and that he was bound to disclose it.

In the simple case there would have been merely the evidence of the habit, but the conduct of the defenders rendered farther evidence necessary. During his residence in England, and after his return here, you have it proved that he got opium in a mysterious way ; and, though his housekeeper speaks of his using it, yet Lord Mar is the only person who knew the extent to which he took it. You must consider the nature of the habit, and the effect of it ; and, though his servants spoke of his taking opium and brandy, yet the spirits were a mere adjunct to the other. The second point is, whether he, *Lord Mar*, was bound to disclose it to the office, to enable them to reject the insurance or raise the premium ? Some of the witnesses described the appearances produced by the use of opium, and that it might produce disease ; but others speak of Lord Mar as neither debilitated in body or mind, and that his habits at the time this insurance was made were those of other gentlemen. At



one time he lived secluded ; and when he became acquainted with the disordered state of his affairs, he was knocked down by the information, and never rallied. You are to consider whether the use of the drug had not a considerable effect, so as to require to be disclosed—whether the state of his affairs was the cause of the depression—or whether it was both combined.

Two witnesses stated that he had no habit which apparently produced any effect, either on his body or mind, which bears on the question, whether it was so material that it was right to disclose it if the office did not abandon the inquiry.

The evidence of the medical gentlemen who heard the other evidence went to prove the use of the drug dangerous, and that, if they had known the habit, they would have mentioned it to the office ; but the one who had most practice in the use of the drug, mentioned instances proving, that persons taking opium in large quantities may live to a great age, and yet it may be a material fact.

This policy must be taken in the hands of the assignees with all its defects on its head ; but all they have to do is to lay the policy before you, leaving the defenders to make out its defects by

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proving clearly the taking the drug to a pernicious extent—that the office called for the information—and that it was so important, that Lord Mar, by concealing it, voided the policy.

If, on the whole circumstances, the habit is proved, and that he concealed a material fact, then you will find for the defenders ; but if you are not satisfied that the habit is made out to so great an extent, and that there was another cause for the depression,—or that explanation was not called for when it ought to have been demanded,—or that the fact was not of that materiality which would have raised the premium, or made the office reject the insurance, then you will find for the pursuer.

Verdict—“ For the pursuers, and that the  
“ defenders are indebted and resting owing to  
“ the pursuers in the sum of L.3000.”

*Cockburn, Skene, A. Anderson, and Forbes, for the Pursuers.  
Hope, Sol.-Gen., Jeffrey, D. F., and D. M'Neill, for Defenders.  
(Agents, Cranstoun and Anderson, w. s. and J. T. Murray, w. s.)*