

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The London and Lancashire Life Assurance Company v. Jean Fleming, from the Court of Appeal for Ontario; delivered 3rd August 1897.

Present :

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

SIR HENRY STRONG.

[*Delivered by Sir Henry Strong.*]

This is an appeal from a judgment of the Court of Appeal of the Province of Ontario affirming a judgment of the learned Chief Justice of the Common Pleas Division. The action was brought by the Respondent as assignee of two policies of assurance for the sum of \$5,000 each, effected by one James Fleming upon his own life and by him assigned to the Respondent. The policies, which were identical in form, contained a proviso that they were subject to the conditions thereon endorsed. Among these conditions were two containing the following provisions:—“(1.) Policies shall not “be in force until the first premium be paid.” “(10.) If a note or other obligation be taken “for the first or renewal premium or any part “thereof and such note or obligation be not paid “when due the policy or assurance becomes null “and void at and from default.”

Various defences were set up by the Appellants but only those founded on the 1st and 10th conditions are now material the others having been abandoned in the Courts below.

97673. 100.—8/97.

The questions to be considered are therefore (1) were the policies ever in force (2) if so did they subsequently become void ?

The policies which bear date the 4th of December 1894 were effected through the agency of one W. H. White who acted as the general agent at Toronto of the Appellants an English Life Assurance Company carrying on business in Canada and having the head office of its Canadian Branch in Montreal.

The action was tried before the learned Chief Justice without a jury when the following facts appeared in evidence.

On or about the 19th of November 1894 James Fleming the assured delivered to White for transmission to the Appellants' head office at Montreal a written application for a policy on his own life for \$5,000 at a premium of \$105. 80. This application contained an agreement that no contract of insurance should take effect until the first premium should have been paid. At the same time Fleming handed to White his own promissory note of that date for \$105. 80 payable six months after date to White's order, at the office of Bush and Graham, White's own bankers. This note was not in accordance with a form furnished to White by the Appellants nor was it submitted to the Appellants for their approval.

For this note White handed to Fleming a receipt in the following words :—

"No. 4,400. (In duplicate). Note payable 6 months.

"London and Lancashire Life Assurance Company.

"Agent's Interim Receipt.

"Received from James Fleming, Esq., of Wyevale, his
 "promissory note for One hundred and five $\frac{80}{100}$ Dollars (on
 "which the sum of Dollars has been credited)
 "being for the first premium for an assurance of \$5,000 on
 "the life of himself, provided the application be accepted
 "by the Company, and if accepted I agree to deliver the
 "Official Acceptance Receipt from the head office of the
 "Company in Montreal ; or should the said application be
 "declined, I undertake to return to James Fleming, Esq., or

within 15 days. "W. H. W."
 "to his order, the said promissory note [^] ~~It is hereby~~
~~"understood and agreed that if the note be not paid at~~
~~"maturity the Policy or Official Receipt shall be null~~
~~"and void, but nevertheless the note shall be paid in~~
~~"full."~~

" (Sgd.) W. H. WHITE,
 " Dist. Mangr.

" Date, 19/11/94.

" Place—Toronto."

This receipt was in the form supplied by the Appellants except that the concluding sentence in the printed form was ruled out and the words " within 15 days " and the initials " W. H. W. " were interlined.

On the 27th November 1894 White forwarded the application to the head office and its receipt was acknowledged by the manager on the following day.

At some date which is not clear upon the evidence but which must have been between the 28th November and the 4th December 1894 James Fleming's application was altered from an application for a single policy for \$5,000 to one for two policies of \$5,000 each which application as altered was accepted by the Appellants. This is shewn by the two official "Interim Acceptance Receipts" which were forwarded by the Appellants to White for delivery to James Fleming in a letter of the 5th of December 1894 in which letter they gave White notice that they had debited his account with the amount of the two premiums. No evidence was given shewing when these receipts were handed to James Fleming but they were produced at the trial with the counter signature of White which was essential to their validity.

Up to this time nothing had been received in respect of the premium on the second proposed assurance for \$5,000.

White however subsequently on the 10th of December 1894 received in respect of it a note

of Robert Fleming for the sum of \$105⁸⁰/₁₀₀, the exact amount of the premium. This note was made payable to W. H. White or order three months after date at the Bank of Bush and Graham. This note like the former was not in the form furnished by the Appellants nor was it submitted to the Appellants for their approval. It does not appear that any receipt was given expressly for this note probably for the reason that the interim receipts from the head office then in White's hands were upon signing of this note handed over to James Fleming.

These notes were not forwarded by White to the head office but were retained by him and dealt with as follows. Robert Fleming's note as it appears from a memorandum endorsed upon it was discounted by White with Bush and Graham on the 22nd December 1894 and the proceeds were applied to his own use. It was not paid at its maturity but was taken up by a renewal note at two months on the 21st March 1895. When this renewal note became due it was also dishonoured.

James Fleming's note which did not mature until 22nd May 1895 was discounted by White with the same bankers on the 27th March and the proceeds in like manner applied to his own use. This note was also dishonoured at maturity. On the 5th of June Robert Fleming brought to White a renewal with which he wished to retire James Fleming's overdue note but this the bankers refused to accept. White endorsed all the notes and appended at the foot of each his personal guarantee and waiving protest. No evidence whatever was given of what took place at the time the notes were handed to White. The receipt for the first note specifically attributes it to the premium, and in the case of Robert Fleming's note there was no proof to warrant the assumption that it was given for any other purpose than to White as the

Appellants' agent in payment of the premium with the amount of which it exactly coincides. According to the ordinary course of business between White and the Appellants cash premiums were remitted and notes taken for premiums were forwarded by the agent to the Appellants at their periodical settlements at the close of each month. Under his agreement with the Appellants the agent was entitled to retain 55 per cent. of first year's premiums paid in cash.

On the 31st December 1894 White wrote the Appellants' Manager as follows:—

“ I omitted to enclose settlement of new premiums. Hence I wired you to day as follows:—‘ Mailed my note \$135. 16 for ‘ premiums Fleming, McGlade, Thompson ‘ which I enclose herein,’ ” and on the 3rd January 1895 the Appellants' Manager acknowledged the receipt of the letter and note as follows:—“ I am in receipt of your letter of the “ 31st ult. enclosing note at three months “ for \$135. 16 which we will hold as requested.”

James Fleming died of consumption on the 15th June and the Appellants first heard of his death on the 17th or 18th of June 1895.

On the 31st of May 1895 the Appellants who had no notice that at that time James Fleming was ill cancelled the policies in their books and about this time difficulties having arisen between them and White they sent their Inspector to Toronto to endeavour to effect a settlement with him. On the same date (31st May) the Appellants credited White with the amount of the premiums on the two policies which had previously been charged to him. They subsequently on the assignments to the present Respondent being sent to their office for registration refused to register them assigning for a reason that the policies were not in force.

The notes which had remained overdue in the hands of Bush and Graham the bankers were paid and taken up by the Appellants and upon a settlement with White they handed back to him his own note of the 31st of December 1894.

It was established in evidence that at the date of the receipt of White's note at the end of December the Appellants had no knowledge whatever of the transactions which had taken place between White and the Flemings. White in his evidence states positively that his note of the 31st December was not given in payment or discharge of the premiums, but rather to serve as evidence that they were due. His words are:—"Where I had given time on "premiums and the cash had not been paid to "me and I had not the cash to pay myself I "gave a note myself as evidence there was "something due them—not as payment of "the premium."

The learned Chief Justice upon the evidence of these facts held that the Appellants had accepted White's note in satisfaction and discharge of the premiums payable by the assured under the terms of the policies and conditions and that the defence therefore failed and he gave judgment accordingly for the Respondent. The Chief Justice also adopted the further point, taken by the Respondent, in answer to the defence based on the 10th condition, that the character of the transaction between the Flemings and White was not that the notes were given directly for the premiums, but that they were given to White not as agent for the Appellants but in order that he might raise money for the accommodation of James Fleming which money he was to apply in payment of the premiums, and that the proceeds of the discounts thus became funds belonging to James Fleming in

White's hands which he must be assumed to have applied in discharge of Fleming's liability for the premiums.

In the Court of Appeal the Chief Justice and Mr. Justice Burton were of opinion that the Respondent was not entitled to recover and that the action ought to be dismissed but Mr. Justice MacLennan with whom Mr. Justice Osler agreed being of a contrary opinion the Court were equally divided and the judgment was upheld.

Mr. Justice MacLennan based his judgment on the point last noticed viz. that the premiums must be taken to have been paid in cash by the application of the proceeds of the discounted notes, though he also stated his concurrence in the other ground that the premiums were satisfied by the acceptance of White's note.

It was urged with much force by Mr. Robinson in his argument at their Lordships' bar that the Appellants were entitled to succeed upon the defence founded upon the first condition in that there had never been any payment of premiums either in cash or by notes for the reason that White had not conformed to the authority conferred upon him by the Appellants and that his acceptance of the notes was consequently *ultra vires*. Their Lordships do not think it necessary to express any opinion on this point for conceding that the notes were accepted by White in payment of the premiums as their Lordships are clearly of opinion they were, the 10th condition applied upon their non-payment when due and the policies thereupon became void. That the notes were placed in the hands of White as an agent for James Fleming in order that he might raise money by negotiating them and out of such money pay the premiums is an assumption which in the entire absence of evidence of any agreement to that effect their Lordships

cannot make. If that was the arrangement it was a matter to be proved by the Respondent.

As regards the first note that given by James Fleming on the 19th of November there is not only no such proof but the receipt is in express terms a receipt for the note as given on account of the premium; it is written on the Company's forms and is signed by White as District Manager. In the case of the later note that of Robert Fleming given on the 10th of December there is it is true no receipt, but we are not to presume that the transaction was in any way different from the first; if there was any arrangement such as the judgment below proceeds upon, it must have been made by or at least known to Robert Fleming, but he is not called as a witness. Then as regards both notes White repudiates such an agreement as that suggested, and the circumstance that the notes were for the exact amount of the premiums thus leaving no margin for the amount to be deducted for interest or discount is an indication that the fact was that the notes were given for the premiums in accordance with the terms of the receipt produced. It was not however for the Appellants to show that there was no arrangement, no presumption which they were called upon to displace was warranted by the facts proved, the onus of proof was upon the Respondent to show that the premiums were paid in cash and their Lordships are of opinion that in this she has entirely failed. Upon this part of the case Mr. Justice Burton's view as expressed in the following passage in his judgment commends itself to their Lordships' consideration as a correct conclusion from the evidence. The learned Judge says :—

“It is said that the fact of the notes being made payable personally to the agent and made payable at a bank is some evidence of an agreement between the applicant and the

“ agent to discount them for him and apply the money on his
 “ premium. To my mind it affords no such evidence even if it
 “ stood alone but White gives no such version. Robert
 “ Fleming is not called and it is directly in variance with the
 “ receipt produced which shews it was not given for the
 “ purpose of being discounted and paying the premium from
 “ the proceeds but that it was given and accepted as the first
 “ premium. It affords I think very cogent evidence that the
 “ agent contemplated from the first making an improper use
 “ of the notes and negotiating them for his own purposes but
 “ not the most remote evidence of an agreement between the
 “ applicant and the agent to raise money for him to pay the
 “ premium.”

Upon the other propositions relied on in support of the judgment under appeal their Lordships have even less hesitation than on the first branch of the case in expressing an opinion in favour of the Appellants. There are many answers to what has been urged on this head. It will suffice however to refer to two. In the first place how, without an entire disregard of legal principle, could it possibly be held that the Appellants must be deemed to have intended to enter into entirely new contracts of assurance of the life of James Fleming and to have accepted their own agent's note in payment of the premium when they were in entire ignorance of all that had passed between White and Fleming and were entirely unaware of the relations in which they stood to the assured? This like the other point relied upon was clearly a matter to be proved by the Respondent and it is a sufficient answer to say that there is not only not a shadow of proof in its support but strong evidence the other way. Further the principle upon which the decision on the case of *Accey v. Fernie* (7 M. & W. 151) proceeded applies. The dealings between the Appellants and their Agent were as regards the assured *res inter alios* and afford no presumption of an intention to treat the agent as acting not for his true principals but as the representative of the assured.

Their Lordships are of opinion that the judgment cannot be supported and they will humbly advise Her Majesty to allow the appeal, of which the Respondent must pay the costs.
