In the Privy Council.

No. 77 of 1896.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY . . *(Defendants) Appellants,*

AND

JEAN FLEMING . . . . *(Plaintiff) Respondent.*

CASE OF THE RESPONDENT.

1. This is an appeal from the Judgment of the Court of Appeal for Ontario affirming a Judgment of Chief Justice Meredith.

2. The action was brought in the High Court of Justice for Ontario by Jean Fleming (the Respondent) to recover $10,000 the amount of two policies (Exhibits 1 and 2) issued by the appellants. The policies are numbered 34063 and 34064 and dated the 4th of December 1894 for the sum of $5,000 each in favour of and upon the life of James Fleming. R., p. 25, l. 8 R., p. 28, l. 16

3. The policies were assigned by James Fleming to the respondent on the 13th of June 1895 (Exhibit 4). James Fleming died on the 15th of June 1895. (Exhibit 5). Proofs of death (Exhibit 3) were made on the 4th of July 1895 and the action was commenced on the 23rd day of July 1895. R., p. 28, l. 24 R., p. 28, l. 27 R., p. 28, l. 20

4. The appellants put in as a defence.

(1.) Untrue statements in the application for the insurance. This defence was abandoned at the trial of the action.

(2.) Improper delivery of policies and no contract of insurance, see paragraph 6 of Defence. R., p. 3, l. 38

(3.) In the alternative, if policies were delivered that by reason of non-payment of two notes claimed to be due on the 22nd and 25th days of May 1895 the policies became null and void. R., p. 3, l. 46

(4.) No proof of claim. This defence was also abandoned at the trial. R., p. 4, l. 14

R., p. 4, l. 4 Condition Number 10 of the policy set out in paragraph 7 of the Statement of Defence is as follows :—" 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 but such voidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation and the premium shall be considered as earned and shall be recoverable by the Company."

5. The action was tried on the the 27th of January 1896 before Chief Justice Meredith at Toronto.

6. The facts proved at the trial were,—The application for insurance was
R.,p.30,l.35 made the 19th of November 1894 (Exhibit 7). The premium for cash $5,000 of insurance was $105.80 being $811.60 for the total insurance. The Agent at Toronto who effected the insurance was one W. H. White. The terms of his
R., pp. 28-30 engagement are set out in the contract of the 2nd of August 1892 (Exhibit 6). The latter part of the second clause being that the agent "shall not under any
R.,p.29,l.12 circumstances collect or receive payment for any premium without giving head office receipt or policy therefore," the third clause being, " All premiums shall be
R.,p.29,l.14 paid in cash or notes printed by the Company. Any agent shall not receive payment for premiums or any renewals thereof in any other manner."

R., p. 29, l. 46, *et seq.* Under clause 10 Mr. White's commission was 55 per cent. of the premium for the first year and in consideration thereof he agreed "to remit in cash every month for net assurances for which official receipts shall have been sent to him up to the 20th day of such month.

R., p. 35 7. Mr. White's employment was also secured by a bond (Exhibit 16) dated the 3rd of March 1891 made by Mr. White and two sureties in the sum of $2,000,
R.,p.35,l.38 a term of the bond being as follows :—" It is also understood and agreed that this bond will cover payment of any and all notes made by W. H. White that the Company may accept from the said W. H. White for premiums under policies effected by him as well and as effectually as if no such note or notes were taken."

8. On the 19th of November 1894 the assured gave to W. H. White a
R.,p.34,l.20 promissory note (Exhibit 15) for $105.80 being an amount equal to the premium for one year upon $5,000 of the insurance. This note was not upon the printed form of the Company nor were the appellants parties to it. It was drawn payable to W. H. White at the office of his private bankers. White gave to the assured a receipt for such note altering and using one of the forms of the appellants, as follows:—

R.,p.36,l.27 (Exhibit 18).

" No. 4400. (In duplicate) Note payable 6 mos.

London & Lancashire Life Assurance Co.

Agent's Interim Receipt.

Received from James Fleming, Esq., of his promissory note for one hundred and five 80/ 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 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.~~ within 15 days. W. H. W.

(Sgd) W. H. WHITE,
Disct. Manager."

Date 19-11-94.

Place—Toronto.

It will be seen that the words from and after "It is hereby understood and agreed" are struck out and the words "within 15 days" inserted instead.

9. The application for insurance was forwarded to the Head Office at Montreal on the 27th of November 1894 (Exhibit 7) and on the 5th of December 1894 the appellants sent their official certificates that the application had been accepted and that policies would be issued (Exhibit 10) the letter with same being as follows (Exhibit 9): R., p. 30, l. 23 R., p. 32, l. 16 R., p. 32, l. 1

"Montreal, 5th Dec., 1894.

W. H. White, Esq.,
Toronto,
Ont.

Dear Sir;—

I send you herewith undernoted acceptance receipts and debit your account with $232.01.

Yours truly,
(Sgd) B. HAL. BROWN,
Manager for Canada.

11709	J. Fleming	$5000	$105.80
11710	do.	5000	105.80
11711	J. McGlade	2000	20.41
			$232.01 "

10. On the 10th of December 1894 White received from the assured a note for $105.80 of one Robert Fleming (Exhibit 20) made payable to White, not on the form used by the appellants but on an ordinary printed form payable at the office of the private bankers of White, the appellants not being parties to the note. This note was discounted by white with his private bankers on the 22nd day of December 1894, see endorsement on the back of the note. The proceeds placed in White's hands a sum of money exceeding that payable to the appellants under the terms of White's agreement with them, the proportion payable to the appellants for the whole insurance being $95.22, and White delivered the acceptance certificates of the appellants (Exhibit 10) to James Fleming. R., p. 37, l. 8 R., p. 37, l. 16 R., p. 32, l. 16

11. White's evidence is that he discounted and dealt with those notes as a personal matter and not a Company transaction (see opening of cross-examination.) R., pp. 17-22 R., p. 19, l. 3

12. On the 31st of December White telegraphed to the appellants as follows: (Exhibit 11) "Mailed my note one thirty-five 16 for premiums R., p. 32, l. 36

Fleming, McGlade, Thomson," and on the same day wrote them as follows
R., p. 33, l. 1 (Exhibit 11): "I omitted to enclose settlement of new premiums, hence I wired you to-day. 'Mailed my note for $135.16 for premiums Fleming, McGlade, Thompson,' which I enclose herewith." The receipt of this note
R., p. 33, l. 10 was acknowledged by the appellants on the 3rd of January, 1895 (Exhibit 12) as follows:—"I am in receipt of your letter of the 31st ult., enclosing note for three months for $135.16, which we will hold as requested."

R., p. 33, ll. 27-40 13. On the 23rd of January the policies were forwarded to White with a letter (Exhibit 13) stating, "I herewith send you undernoted policies with which your account has been debited.

Policy No. 34063, J. Fleming $5,000 $105.80
Policy No. 34064, J. Fleming $5,000 $105.80."

and the policies were delivered to the insured.

At this time the appellants believed that White had received in cash the amount of the premiums upon these policies.

14. The note made by Robert Fleming fell due in March 1895 being re-
R., p. 34, l. 30 newed by White (Exhibit 15) on the 21st of March 1895, and such renewal was on the same day discounted with Burke and Graham and on the 27th of March
R., p. 34, l. 20 the note of James Fleming (Exhibit 15) was also discounted with Burke and Graham. The dates of discount appear from the waivers of protest dated and endorsed on the back of the notes.

15. In the beginning of April the note made by White to the Company fell due and White did not pay the same. This note was endorsed as appears by the
R., pp. 5-17 evidence given at the trial, see evidence of B. Hal. Brown for defence and was
R., p. 35 also secured by the terms of the bond above mentioned (Exhibit 16). In default of payment by White of this note a clerk in the office of the defendant Company marked the policies as "not taken" and the Company until the trial of this action relied upon the non-payment of this note of White's as a good reason for cancellation of the policies under the terms of condition No. 10 above mentioned.

16. At the trial the appellants fell back upon the non-payment of the notes given by James Fleming and Robert Fleming to W. H. White. The note made by James Fleming had fallen due about the 22nd of May 1895 and was renewed
R., p. 37, l. 1 on the 5th of June 1895, White on that date giving a receipt (Exhibit 19) as follows:—

"Toronto, June 5th, 1895.

Received from Robert Fleming James Fleming's note for $100.80 and cash $5.00 to retire James Fleming's note for $105.80 due May 22nd, 1895.

(Sgd) W. H. White."

17. The appellants claimed to take advantage of the notes given to White as if they were in the same position as notes given directly to the appellants and to resist payment of the policies upon the ground of these notes not being paid. The respondent contended that the notes were not given to the appellants but were given to White in pursuance of an arrangement that White should discount such notes and out of the proceeds pay the appellants the portion of the premium coming to them.

R., pp. 38-43 18. On these facts Chief Justice Meredith gave judgment on the 11th of March 1896 in favour of the respondent.

He held that the condition No. 10 on the policies above mentioned (Exhibits 1 and 2) only applied to notes made by the insured and given to the appellants. That the appellants believing that White had received payment of the premiums took his note in settlement of the portion of premiums coming to them. That a Company would have power to take in payment of premiums notes of a third party and that default in payment of such notes would not be a default within the terms of Condition No. 10. R., pp. 25-28

19. The appellants appealed to the Court of Appeal for Ontario who on the 30th of June 1896 gave judgment dismissing the Appeal with costs the Court being equally divided.

20. Hagarty C. J. and Burton J. A. based their judgments in favour of allowing the appeal upon the assumption that the notes taken by White were notes made by the insured and they treated these notes as being in the same position as if they had been made direct to the Company upon the Company's forms and that on non-payment of these notes the assured was wholly in default. R., pp. 45-51

21. Maclennan J. A. agreed substantially with the reasons of Chief Justice Meredith and held also that the dealings with the notes in question were personal transactions between White and the assured.

Osler J. A. did not write a judgment but having read that of Maclennan J. A. agreed with him.

22. The respondent submits that the Judgment in the Court of Appeal dismissing the appeal was correct and should be affirmed for the following amongst other

REASONS:—

1. Because the dealings between the assured and White were personal matters whereby White was to discount the notes given to him and pay the premium to the appellants.

2. Because assuming that the notes were in the same position as if they had been made direct to the appellants one of them was a note of a third party and according to the judgment of Chief Justice Meredith which is not controverted by the Court of Appeal condition 10 of the policy would not apply to such a note and the other note had been renewed prior to the death of the assured and such renewal was current at the date of the death of the assured.

3. Because the transaction between the assured and White amounted to a payment to the said White the agent of the appellants of the premiums of insurance.

4. Because the transaction between the said Flemings and White having placed the said White in possession of funds the appellants having accepted from the said White his promissory note and accepted him as their debtor in the place of the assured cannot now claim to cancel the policies in question by reason of default in payment by said White of the promissory note made by said White to the appellants.

5. Because the appellants having abandoned at the trial all defences which had reference to the state of the health of the assured cannot now urge any such defences.

6. Because the question in issue is one of fact and, an appeal from the findings of the trial judge having been dismissed by the Court of Appeal, those findings ought not to be further reviewed.

7. Because the facts proved at the trial entitle the respondent to succeed in the action.

8. Because the judgment and reasons of Chief Justice Meredith and of Maclennan J. A. and Osler J. A. are correct and the reasons of Hagarty C. J. and Burton J. A. are not correct. 10

JAS. R. ROAF.

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S. V. BLAKE,
17, Victoria Street,
S.W.