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*May 10, 11.
*June 24.

THE CAPITAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

LYDIA A. PARKER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Non-payment of premiums—Misrepresentation to insured—Estoppel.

P., in payment of premiums on a life policy, gave his note for one instalment and an overdue balance of another. Shortly before it matured an official of the company, specially authorized to deal with the matter, informed P. that his policy had lapsed owing to the inclusion in the note of the overdue balance which was against the company rules. In consequence of this representation P. did not pay the note nor tender the amount of another instalment falling due before his death. In an action on the policy by the beneficiary no rule of the company was proved avoiding the policy as stated.

Held, affirming the judgment appealed against (48 N.S. Rep. 404), Fitzpatrick C.J. and Davies J. dissenting, that the company was estopped, by conduct, from claiming that the policy lapsed on non-payment of the note and subsequent instalment.

Per Davies J., that the non-payment of the note could not be relied on as avoiding the policy, but the estoppel did not extend to the failure to pay the quarterly premium which afterwards became due.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming by an equal division the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 48 N.S. Rep. 404.

J. J. O'Meara for the appellants.

Mellish K.C. and *Findlay MacDonald K.C.* for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal.

DAVIES J. (dissenting).—I do not think there was error in the court of appeal in holding on the findings of the learned trial judge that the non-payment of the note which the deceased, insured, had given for the payment of one of the quarterly premiums of his policy and which note included a balance of a former quarterly premium, did not operate to avoid his policy or cause it to lapse.

When the note in question was about maturing, Mr. Sorey, the superintendent of agencies of the defendant company, in the course of his travelling in the company's business, met the deceased in Sydney in the presence of two of his brothers and, after seeing the condition of his health, informed him that his policy was no longer in force because "he had allowed one part of an overdue premium to be carried forward with a note covering the next premium, which is against the rules of the company."

This statement of the company's chief representative took place between the 27th February and the 2nd March as found by the trial judge and the note fell due either on the 4th or, allowing for three days' grace, on the 7th.

In consequence of the statement as above of the policy being no longer in force the deceased did not pay his note and I am not prepared to say that the

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company was not under the circumstances estopped from setting up its non-payment as a ground for avoiding the policy.

I am, however, utterly unable to understand how such a holding can apply to the non-payment of a subsequent quarterly premium which fell due some time after the conversation before alluded to and before the death of the deceased insured.

That such a quarterly premium did so fall due and was not paid is proved and admitted.

Can it be contended for a moment that the conversation alluded to released the defendant for the remainder of his life from paying the premiums falling due upon his policy and estopped the defendant in an action on the policy from setting up such non-payments ?

If the argument cannot be accepted as covering the whole period of the insured's life, then for how long did it release the defendant from payment of his premiums and estop the company from setting up such subsequent defaults ?

The conversation had reference to a particular note then about falling due and to the effect which the inclusion in that note of part of a former overdue premium had. It may well be held to have induced the deceased not to have promptly paid his note until he had had time to understand what his true position was, and to have estopped the company from taking advantage of such default in its prompt payment to avoid the policy. But it surely cannot be held to operate in the same way with respect to premiums subsequently falling due; or to release deceased from his obligation to pay such subsequent premiums or to

estop the insurance company from appealing to the contractual result of such non-payment which was the avoiding of the policy.

For this reason that there is no estoppel with respect to such subsequent accruing premiums, I would allow the appeal and dismiss the action with costs in all the courts.

IDINGTON J.—This is an action on a policy of life insurance for a thousand dollars. The defence set up is non-payment of premiums and consequent lapsing of the policy. The appellant received through the hands of its local agent at Sydney a promissory note for one premium and a small part of another. This note was on a printed form evidently supplied by appellant for such uses. Its heading in type is as follows:—

Renewal Premium Note.

Note $..... Due.....
T. R. (if any) $....., Ottawa ....., 1914.

Balance $.....
Interest $.....

The part on right hand is filled in by writing of date. That on left hand is filled in opposite word "note" by figures $39.20, and opposite the letters "T. R." in figures 20c., and opposite the word "balance" $39.40, but nothing opposite the word "interest." No explanation is given in evidence or argument of what "T. R." stands for. The figures opposite that "T. R" and the words due date and balance seem to me from the ink to have been done by a later filling in than the remainder of the filling in of the blank.

Without attaching undue importance thereto, I think the fair inference, from the fact that this note

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was received in due course and never returned, but retained till the trial by the company, is that this note was received and accepted as payment.

The pretence that the small part of the note as clearly indicated to those at the head office being for a part of a past due payment must suffice to justify treating the policy as lapsed, seems idle. It may have been competent for the company to have so treated it on receipt and forthwith accordingly to have returned it and said so.

It was not competent for the head office to have held on to the note and later on attempt to repudiate it. Neither in law, justice nor common sense can such a position be maintained.

Another payment of premium fell due on the 20th March, which remained unpaid at the death of the insured.

By the learned trial judge it is found as fact that on a date between the 27th February and the 2nd March before the note fell due, the appellant's superintendent of agencies called on the insured and finding him in such a physical condition that an early death must be expected, told him, in language sworn to by two brothers of the insured, and not denied, that the policy was not in force because one part of the premiums had been carried forth into a note covering the next premium.

One of the brothers swears the premiums, but for this assertion, would have been paid, and doubtless that is true. They and deceased were thus dissuaded from tendering the amount of the note and of the March premium. It is not pretended that if tendered such payments would have been accepted. The re-

pudiation of the policy in such distinct and absolute terms dispensed with such tenders.

There was no justification under the circumstances for appellant's repudiation after accepting and retaining the note given in payment and receipted for as such by the local agent.

The superintendent alleges he wanted information or instructions from the head office of appellant before stating as alleged, so there can be no doubt of his conduct being duly authorized or confirmed.

Even his dispute of the date of this repudiation which was a leading question in contest at the trial, did not induce him to produce and file in evidence the telegram or other written communication to the head office or replies thereto.

The appeal should be dismissed with costs.

DUFF J.—The controversy on this appeal reduced to its lowest terms presents two questions of fact both of which are, as I think, conclusively determined against the appellants by reference to two pieces of evidence; the letter of August 29th addressed by the secretary to Mr. MacDonald, the respondent's solicitor, and the evidence relating to the interview between the assured and Mr. Jorey, referred to in the judgment of Mr. Justice Ritchie, which the learned judge finds took place between the 22nd of February and the 2nd of March.

The letter is as follows:—

E.L. Ottawa, Canada, August 29th, 1914.

Finley MacDonald, Esq.,
Barrister, Solicitor, etc.,
Dillon Block, Sydney, Nova Scotia.

Re William J. Parker.

Dear Sir,—Your favour of the 24th instant received. Policy No. 624 called for a premium of $27.65 payable four times yearly in

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advance, commencing Dec. 20th, 1912. At Dec. 20th, 1913, there remained a balance of $10.70 unpaid on account of the four instalments of premium due for the first policy year. This balance of $10.70 with interest of 85 cents for delay up to that time was merged by our agents with the next quarterly instalment due December 20th, 1913, and a note for the combined amounts, in all $39.20, was taken by them. This note fell due by its terms March 4th, with no payment whatever made thereon, and the policy consequently lapsed automatically. It might have been reinstated upon payment of the amount due, and submission of satisfactory evidence of health, but no application was ever made. So far as official receipts of premiums are concerned, these are handed to the insured upon his setting by cash or note. If a note is given, the policy, by the terms of the note, lapses unless payment is made on or before the due date thereof.

Yours truly,
M. D. GRANT, *Secretary.*

In itself this letter, a guarded letter, written by the secretary of the company after the death of the insured and no doubt framed in view of the probability of a claim being made under the policy, is sufficient evidence that the note of the second of February was accepted in payment, conditional payment, of course, of the moneys then due in respect of renewal premiums and that the company had treated the policy as a policy in force down to the maturity of the note. "No payment having been made" upon the note, "the policy," to quote the last letter, "consequently lapsed automatically." The letter, of course, is not conclusive evidence. It was open to the company to shew at the trial that the secretary had made a mistake, or to supplement the facts stated in the letter by other evidence shewing as was contended by the appellant that the policy had lapsed in consequence of non-payment of the premium due on the 20th September, or of that due on the 20th December; that the agent at Sidney had acted in excess of his authority in taking the note of the 2nd February, and that his action had not been

ratified by the company. But no attempt was made to do this, no testimony was offered to shew how the note was treated at the head office of the company or what communications were made with respect to it by the agent to the head office. The statement made by Mr. Jorey in the conversation above referred to, to the effect that the note had been "put through," confirms the conclusion suggested by the perusal of the letter itself.

I concur with the two courts below in thinking that the proper conclusion of fact is that the note was accepted in payment and — assuming (a point on which I am by no means satisfied) that on the 2nd February when the note was received, the insured was in default and that the company was entitled by reason of his default to treat the policy as a lapsed policy — the company by accepting the note as payment manifested its election to treat the policy as a policy in force and not to take advantage of the default of the insured. The company being bound by its election the policy was, of course, at the time of the interview between the insured and Mr. Jorey (some time before the 2nd March, as the trial judge found) a policy in force, and the company was bound on payment of the note at maturity and renewal premiums as they should fall due to observe and carry out its contract of insurance according to the terms of it. That was the state of affairs when the interview referred to took place.

The learned trial judge has accepted the account of that interview (which he has set out in his judgment) given in the evidence of George Richard Parker and Thomas Parker. I see no reason for the slightest doubt as to the correctness of his finding, and I think the proper interpretation of that interview

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is the interpretation contended for in the respondent's factum and on the oral argument before us. The insured was in fact told by Mr. Jorey (and it was upon this view of what he was told that he acted) that his policy had lapsed; and that the company would accept no payment from him except upon the condition that he furnished satisfactory evidence of health. This condition Mr. Jorey admits was obviously an impossible condition and the insured rightly interpreted the intention of the company's representative when he construed it as a refusal on the part of the company to continue the insurance. The declaration of the company of its intention not to carry out its contract was on well known principles an actionable breach of contract. *Frost* v. *Knight*(1); *Hochster* v. *De La Tour*(2); *Honour* v. *Equitable Life Assurance Society* (3). The insured, as he was entitled to do, treated it as a refusal to carry out the contract and a right of action immediately arose.

It is no answer to say that he might have tendered the amount of the promissory note and the renewal premiums. There is no suggestion and it could not have been suggested that any such tender would have been accepted and there is nothing in the law making it incumbent upon the insured to go through any such idle formality. Indeed, considering the evidence before us as to the state of health of the insured if the action had been brought in March immediately after the repudiation of the policy by the company the damages could have been but little less than the amount of the policy less the amount of the note and such pre-

(1) 26 L.T. 77. (2) 2 E. & B. 678.
(3) [1900] 1 Ch. 852.

miums as the insured might be expected to be obliged to pay.

I think the judgment below is right and should be affirmed.

ANGLIN J.—I entertain serious doubts whether upon the evidence before us the assured was so in default when the local agent of the respondent company took his note covering the premium due in December and a small balance of the September premium that the company was then entitled to terminate his policy. But if it was, I am satisfied that by what occurred in connection with that note (it was promptly sent to the head office of the company, it was there "put through," we are told by the defendants' superintendent of agencies, presumably as a payment of the premium, it was held for nearly a month before the insured was notified that there was any question as to its being accepted or as to his policy being in force, he being left in the meantime under the belief that the note had been accepted and that his policy was in good standing) the company is estopped from alleging that it elected to terminate the policy for any default prior to the taking of the note, and that if the amount of that note and of the March premium had been paid at maturity or had been duly tendered to the company there would have been no ground upon which they could have successfully resisted payment. Very shortly before the maturity of the note, however, the company, through a leading official (their superintendent of agencies), specially sent from the head office to deal with this matter, notified the assured that his policy was void because the local agent had exceeded his authority in including in the note taken for the

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December premium the balance of the premium due in September. The evidence, I think, supports the conclusion of the learned trial judge that the statement of the company's representative that the policy was void led the insured to believe that payment of the note and of subsequent premiums would not be accepted, and caused him not to tender them. This was a reasonable inference which the company's representative should have contemplated would be drawn by the insured. Although this misrepresentation might not justify the insured refraining indefinitely from tendering premiums or entitle his beneficiary after the lapse of a long period (how long it may be difficult to say) to prefer a claim for payment of the policy, I think, the conduct of the company's representative precludes their setting up the failure of the assured to pay his note and the March premium, which fell due only a few days afterwards, as a defence to this action. *National Mutual Ins. Co.* v. *Home Benefit Society*(1); *Hayner* v. *The American Popular Life Ins. Co.*(2); *Heinlein* v. *Imperial Life Ins. Co.*(3), and other cases cited in May on Insurance, vol. 2, sec. 358, and 19 Am. & Eng. Encyc., page 57, N. 4; and *Webb* v. *New York Life Ins. Co.*(4). Of course, the defendants are entitled to deduct the amount of the note and of the March premium and also of the July premium (which had accrued due before the death of the insured, although the thirty days of grace had not expired) from the sum to be recovered on the policy.

In another aspect of the matter, the assured might have treated the declaration of the company's repre-

(1) 181 Pa. 443.
(2) 69 N.Y. 435, at p. 439.
(3) 101 Mich. 250.
(4) 22 Can. L.T. 179.

sentative as a repudiation of the contract entitling him to maintain an action of damages for breach. *Honour* v. *Equitable Life Assurance Society* (1). Having regard to his precarious state of health, the amount of his damages — the value of his policy at the date of the repudiation — would be little less than the sum insured. *Re Albert Life Ins. Co.* (2).

I am, for these reasons, of the opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Colin Mackenzie.*

Solicitor for the respondent: *Finlay MacDonald.*

(1) [1900] 1 Ch. 852.

(2) 22 L.T. 92.