JAMES G. BOYCE (PLAINTIFF).....APPELLANT; 1887

AND

THE PHŒNIX MUTUAL LIFE INSURANCE CO., (DEFENDANT.)..... } RESPONDENT.

*May 6.
*June 22.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA. (APPEAL SIDE).

Life insurance—Declarations and statements in application—Intemperate habits—Increase of risk—Promissory warranty—Locus standi—Art. 153 *C. C.*

An application for life insurance signed by the applicant contained in addition to the question and answer, viz.: Are your habits sober and temperate? A. Yes, an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void."

On an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk.

Held, on the merits per Ritchie C. J. and Strong J., (Fournier and Henry JJ. *contra,*) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract.

The appellant's interest in the policy was as assignee of Dame M. H. B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on 27th October, 1876.

Held, per Strong, Taschereau and Gwynne J.J. that the appellant, had no *locus standi,* there being no evidence that M. H. B. had been authorised by her husband to accept or transfer said policy.

APPEAL from a judgment of the Court of Queen's Bench, for Lower Canada, appeal side (1) affirming a

*PRESENT:—Sir W. J. Ritchie C. J., and Strong, Fournier, Henry, Taschereau and Gwynne J. J.

(1) M. L. R. 2 Q. B. 323.

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judgment of the Superior Court, which dismissed appellant's action.

The Company respondent, on the 27th September, 1876, issued a policy on the life of William A. Charlebois, of Montreal, for the sum of $3,000, payable to his executors, administrators or assigns ninety days after proof of his death.

On the 27th of October, 1876, Charlebois, for value, assigned the policy to one Mrs. Lefebvre, and she on the 9th of September, 1882, assigned it for value to plaintiff who was the holder of it on the 17th of September, 1882, when Charlebois died.

In an action on the policy, the appellant's declaration set up that Charlebois' interest in the said policy was on the 27th October, 1876, transferred " to Dame " Marie Eliza Helmina Belle, wife of Charles Hamilton " Lefebvre, of Montreal, aforesaid, who became thereby " the legal holder and owner thereof; that afterwards, " to wit, on the 9th day of September, 1882, said Dame " Marie Eliza Helmina Belle by the ministration of her " duly authorized agent and attorney, James Baxter, of " the city and district of Montreal aforesaid, broker, " duly assigned and transferred all her right, title and " interest in said policy for value received to said " plaintiff, who became thereby the legal holder and " owner thereof, the whole as appears from copies " of said transfers, duly fyled. That the said transfers " above mentioned were duly signified and notified to " the company, defendants, who duly accepted the " same previous to the 17th September, 1882, at the " city of Montreal."

The defendants answered this action by two pleas, the first in effect denying the plaintiff's title, averring that the assignment and transfer of Dame Belle's rights in said policy were null and void; that Baxter had no right nor authority whatsoever to make such assign-

ment and transfer; that the plaintiff had not become in consequence of the said alleged transfer and assignment the legal holder and owner of the policy; that the company were never notified of this transfer, and that any assignment of the policy was not binding on the company; that the plaintiff was a mere *prête-nom* of Baxter and had no interest in the policy and assignment; and concluding with a general denial.

The second plea was directed specially to the terms and conditions of the policy, and was to the effect that the policy was null on account of false representations as to his sober habits made by Charlebois in his application therefor, and further on account of his violation of the terms and conditions of the application and of the policy by increasing the risk on his life by the excessive use of spirituous intoxicating liquors.

The pleas were met by general answers.

With the exception of that part of the second plea, which sets up false representations in the application as to the insured's sober habits at the time of making the application, both these pleas were maintained by the judgment of the Hon. Mr. Justice Mathieu in the Superior Court, and the action of plaintiff was dismissed accordingly, which judgment was confirmed by the Court of Queen's Bench. The opinions delivered in the Court of Queen's Bench relate entirely to the defence made by the second plea. The evidence as to a change of his habits was that during the last year of his life the insured took to drink heavily, but medical opinion was divided as to the cause of death, two doctors holding that the insured died of dropsy, produced by heart disease, and that intemperate habits did not increase the risk to an appreciable degree, while a third doctor, his regular medical attendant, stated that he died of disease of the liver, and that his intemperate habits materially increased the risk.

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MacLaren for the appellant.—A policy is a negotiable commercial instrument under the law of Lower Canada, and its assignees are not bound by collateral contracts. See Art. 2482, C.C. Daniels on Negotiable Instruments sec. 1. Arts. 2490–1 C. C. contain the law as to what are warranties and what conditions. And see Crawley on Life Insurance (1).

Creighton for the respondents.—There was no authority in Dame Lefebvre to take an assignment of the policy or to assign it afterwards. Art. 183, C.C. See *Crevier* v. *Rocheleau* (2).

The demand of separation on the record is not certified. If she had a right to the policy she forfeited it and lost it by the terms of this judgment. *Cherrier* v. *Bender* (3) is relied on by the other side, but there is a case of *L'Heureux* v. *Boivin* (4) decided by Chief Justice Meredith overruling it.

The following cases were also cited. *Kenck* v. *Mutual Life Insurance Co.* (5); *Towle* v. *National Guardian Assurance Society* (6); *Kimball* v. *Ætna Insurance Co.* (7).

MacLaren in reply referred to Art. 144 C. C. May on Insurance p.p. 182–3.

Sir W. J. RITCHIE C.J.—The application for insurance headed "The questions to be answered by the "party whose life is proposed for insurance and which "formed the basis of the contract" contained *inter alia*; "Q. Are your habits sober and temperate?" "A. Yes." and at the end;

It is hereby agreed that this application shall form the basis of the contract of insurance herein applied for. and that the same shall form part of said contract as fully as if therein recited, and that all answers and declarations contained in this application are, and shall

(1) P. 136 and cases there cited.
(2) 16 L. C. R. 328.
(3) 3 L. C. R. 419.
(4) 7 Q. L. R. 221.
(5) 35 Am. Rep. 641.
(6) 30 L. J. Ch 900.
(7) 9 Allen (Mass.) 540.

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be taken to be strict warranties, and that should the applicant become as to habits, so far different from the condition in which he is now represented to be as to increase the risk on the life insured, or neglect to pay the premium on or before the day it becomes due, the policy shall become null and void, and all payments made thereon shall be forfeited. The contract of insurance here applied for, shall be completed only by the delivery of the policy and payment of the premium. It is also agreed and warranted that this application has been made, prepared and written by the applicant or by his own proper agent, and that the assurer is not to be taken to be responsible for the preparation, or for anything contained therein or omitted therefrom, and any untrue answers or representations or suppressions of any fact, shall void the contract.

And in the policy itself it is provided

This policy is issued, and accepted by the assured, upon the following express conditions and agreements.

First. If the said William A. Charlebois shall at any time during the continuance of this policy, without the consent of the said company previously obtained in writing, visit any part of the Western Hemisphere lying between the tropics, or of the Eastern Hemisphere between the 36th parallel north and the Tropic of Capricorn, or engage in the manufacture or transportation of gunpowder or fireworks, or in submarine operations, or in any military or naval service whatsoever, [the militia not in actual service excepted] or in case he shall die by the hands of justice; or in, or in consequence of a duel, or of the violation of the law of these States, or of the United States, or of any other country, which he may be permitted under this policy to visit, or reside in, or, if any of the declarations or statements made in the application of this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, or in case any note given for the cash part of premium on this policy shall not be paid at maturity, or in case the interest is not paid annually in advance, or any notes which may be given for any portion of the premiums on this policy, then, and in such case this policy shall be null and void.

The policy and declaration are one and must be read together and so as to make one consistent whole and so reading them it is impossible, in my opinion, to escape the conclusion that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk of the life insured or neglect to pay the premium on or before the day it became due, the

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policy therefore became null and void and all payments made thereon forfeited. Mr. Crawley on Life Insurance p. 35, thus states the law.

The first step towards effecting an insurance is for the person intending to effect it to fill in a form of proposal containing a searching number of questions as to his age, health, mode of life and habits, and to sign a declaration varying in form in the different companies, but generally to the effect that the answers are true, and that the declaration shall be the basis of the contract, and that any untrue statement, omission, or suppression shall avoid it; and frequently providing in addition that the premiums paid shall in such a case be forfeited to the company.

The declaration is generally incorporated in the policy by reference, but whether this is so or not, when in this form it must be construed with the policy, and together they form the contract; *Fowkes* v. *Manchester, &c., Co.* (1).

And at p. 134 :—

As we have seen, the almost universal practice of insurance companies is to require intending insurers to sign a declaration containing detailed answers to an elaborate series of searching questions, and stating that the declaration shall form the basis of the contract and is true, and that any untrue statements, omissions or suppressions shall avoid the policy :and in such cases the declaration is expressly or impliedly incorporated with the policy, and they must be construed together and together form the contract; *Fowkes* v. *Manchester &c., Co.*, (1); and where this is the case truth becomes a condition precedent to liability, and any untrue representation whether material or not avoids the policy, for it is part of the contract that if a particular statement is untrue the contract is at an end; *Anderson* v. *Fitzgerald* (2).

And May on Insurance (3).

Warranties are distinguished into two kinds; affirmative, or those which allege the existence at the time of insurance of a particular fact, and avoid the contract if the allegation be untrue; and promissory, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the contract if the thing to be done or omitted be not done or omitted according to the terms of the warranty.

So that as regards this case it is resolved into a question of fact namely, the assured having represented that his habits were sober and temperate did he

(1) 3 B. & S. 917-927). (2) 4 H. L. Cas. 484, at p. 504.
(3) 2nd Edition, p. 157.

become as to habits so far different from the condition he then represented himself to be, as to increase the risk to his life? The court of first instance distinctly finds that such was the case; that habits of intemperance which he acquired in the immoderate use of intoxicating drinks was different from what he had represented to be his condition at the time of application and issuing of the policy and that such use considerably impaired his health and, that his addiction to intemperance and his habits of intemperance have augmented considerably the risk of insurance on his life; and Mr. Justice Cross who delivered the judgment of the majority of the Court of Queen's Bench confirming the judgment of the Superior Court after stating the terms of the application which I have read says:—

I have no hesitation in saying that a contract thus formed was valid and became binding upon Charlebois and his assignees. It then becomes purely matter of evidence whether the alleged violation of the condition as to change of habits is proved, The learned judge of the Superior Court who rendered the judgment appealed from found it proved, and the majority of this court concur in the conclusion he arrived at.

There was ample evidence to sustain these findings; in fact, on the evidence, I do not see how any other conclusion could have been arrived at than that a change in the habits of the insured took place which increased the risk on his life and thereby the policy by the terms of the contract became void.

I do not think the doctrine of representation as distinguished from warranty is applicable to this case because the representation is included and forms part of the contract. The appeal must therefore be dismissed.

STRONG J. was of opinion that the judgment should be affirmed for the reasons given by the court below and by Mr. Justice Taschereau.

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Fournier J.

FOURNIER J.—I am of opinion that this appeal should be allowed. The evidence, I think, is not sufficient to warrant us in holding that the risk has been increased by the habits of the insured so as to avoid the policy.

HENRY J.—I am of opinion in this case, reading the application and policy together, that the respondent is entitled to our judgment on the merits of the case.

I do not think that it has been proved that the assured imperilled or shortened his life. It is in evidence that he suffered from heart disease and it was only a question as to how long his life could be saved. It was then thought that taking spirits even to an excess might or might not benefit him and, after a careful perusal of the evidence, I think there is not evidence sufficient to say that the policy was avoided by his so indulging in spirits. One of the doctor's examined said he died from the effects of liver complaint, whilst two other doctors put it on the ground of heart disease. The issue that his life was endangered by the use of spirits has not, in my opinion, been satisfactorily proved.

On the other point, whether or not the respondent was entitled to bring the suit, I am not so clear. However this court has power to amend and join the parties entitled to recover and as the merits of the case have been tried I am of opinion an amendment might be ordered and that the respondent in the case would be entitled to our judgment if such amendment were made.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The respondent's plea that the appellant has no *locus standi* is sufficient to dismiss the plaintiff's action.

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Gwynne J.

GWYNNE J.—The plaintiff has, in my opinion, failed to establish his title to the policy sued upon which title was distinctly put in issue by the pleadings on the record, and for this reason, without considering the other point raised, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *John L. MacLaren.*

Solicitor for respondents: *J. G. A. Creighton.*