THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK (DEFENDANTS)............... APPELLANTS;

1904
*May 3.
*May 23.

AND

HENRY COSGROVE BELLEW (PLAINTIFF)............................ RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH APPEAL SIDE, PROVINCE OF QUEBEC.

Life insurance—War risk—Service in South Africa—Extra premium—Special condition—Consideration for premium.

Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war." Each policy also provided that the assured "has hereby consent to engage in military service in South Africa in the army of Great Britain any restriction in the policy contract notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased and an action was brought against the company for return of the extra premium on the ground that the insured had never been soldiers of the army of Great Britain in time of war.

Held, Girouard and Davies JJ. dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid was a sufficient consideration for the extra premium and it could not be recovered back.

Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

APPEAL from a decision of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court at Montreal in favour of the plaintiff.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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The plaintiff, Bellew, is an insurance broker in Montreal and in May, 1902, by arrangement with the defendants, he went to Halifax to endeavour to receive applications for insurance from the members of the fourth contingent which was about to be sent to South Africa He effected insurance on the lives of 235 officers and men all the policies, aggregating $251,000, being issued by the defendant company. Each policy contained the following provisions:

"The renewal contract of assurance defined upon the third page hereof shall be indisputable after one year from the date of entry upon the same, for the amount due, provided the premiums are duly paid as set forth in the renewal agreement; *except that military or naval service in time of war without a permit are risks not assumed by the society at any time*, further than that the reserve on this assurance only, will be due and payable in case of death from such service.

"A. I hereby agree on behalf of myself and of any person who shall have any claim or any interest in any policy issued under this application as follows: First, that I will not within two years from the date of policy to be issued under this application, travel or reside in any part of the torrid zone or north of the parallel of sixty degrees north latitude.

"It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of a soldier in army of Great Britain in time of war.

"This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

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"It is understood and agreed, in connection with policy No. ——for $——, dated May 12th, 1902, of Form 507 A, and issued on the life of that, in consideration of written application therefor, and also of the payment of an annual 'extra premium' of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding."

The following facts were admitted:

1. The military corps in question in this case sailed for South Africa from Halifax in three detachments, on the 8th, 16th and 23rd May, 1902.

2. On May 29th, 1902, a cessation of hostilities took place between the British forces and the armies of the Transvaal Republic and Orange Free State, and on June 1st, 1902, a treaty of peace was signed, terminating the war.

3. The soldiers of the Fourth Contingent in question in this case reached South Africa after such declaration of peace and the cessation of hostilities.

4. The soldiers of the Fourth Contingent in question sailed from South Africa on their way home on or about July the 1st, 1902.

As the company refused to issue the policies until the premiums were paid the plaintiff advanced the money for the purpose taking assignments from the insured of their pay from the Department of Militia to the extent of the sums paid. As the contingent did not reach South Africa before the war ended the department refused to honour the assignments so far as the extra premium was concerned and the plaintiff brought action against the company for the amount of such premiums, $6,275.

The Superior Court held that the insured were never members of the army of Great Britain in time of

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war and gave judgment for the plaintiff, which was affirmed by the Court of King's Bench. The company then appealed to this court.

Greenshields K.C. and *Laflamme K.C.* for the appellants. The risk attached when the contingent left Halifax. See Marshall on Insurance, vol. 2, p. 673 Emérigon Traité des Assurances, vol. 1, pp. 62, 67.

There was a reasonable cause for payment of the extra premium and it cannot be recovered back.

Ryan and *Garneau* for the respondent. The company was subjected to neither liability nor risk so that the extra premium was paid without consideration. Am. & Eng. Ency of Law, (2 ed.) vol. 16, p. 954.

THE CHIEF JUSTICE and SEDGEWICK J. concurred in the judgment allowing the appeal.

GIROUARD J. concurred in the dissenting opinion of Mr. Justice Davies.

DAVIES J. (dissenting). I agree with the conclusions reached by the Court of King's Bench and substantially with the reasons therefor given by Mr. Justice Blanchet.

The appellant agreed to insure the lives of as many of the men comprising the Fourth Canadian Contingent of militia and volunteers then at Halifax *en route* to South Africa to join the army of Great Britain there as would make the necessary application and pass the proper examinations.

The respondent who was an insurance broker was authorized by the company to proceed to Halifax and effect the insurances, provided he secured 200 out of the 2000 members of the contingent, and an annual extra premium of $25 per $1,000 for the war risk.

The policies were issued in the company's ordinary form of twenty annual payments of $24.78 "whole life" and with a stipulation that "*military or naval service in time of war without* a permit were risks not assumed by the society at any time."

As the object and intention of the society and of the men insuring were clearly to cover the risks incident to the contemplated service of the latter in the army of Great Britain, in South Africa, against the forces of the then Transvaal Republic and Orange Free State with which Great Britain was at war, and as the condition of the ordinary policy prohibited such service, an extra premium of $25 on each $1,000 insured was exacted and the following two clauses either pasted or written on the policies:

It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the Assured shall be that of soldier in army of Great Britain in time of war.

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

New York, N.Y., May 12th, 1902.

WM. E. STEVENS,
Secretary.

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346 BROADWAY, N.Y.

It is understood and agreed in connection with policy No. 127,805 for $1,000.00 dated May 12th, 1902, of Form 507 A. and issued on the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25.00, the Assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding.

WM. E. STEVENS,
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Now bearing in mind that military or naval service was not *per se* prohibited by the original policy but only "in time of war" it is clear that the extra risk the society was insuring against and receiving the extra premium for was a "war risk" and that such war risk was limited to service by the assured "in the army of Great Britain in South Africa" and was renewable while the war thus going on lasted. It was not necessary for the assured to pay any extra premium in order to serve in the army of Great Britain in South Africa or elsewhere in time of peace. The policy did not prevent an assured from doing that. The extra risk assured by the company and paid for by the assured obviously was the risk attached or incident to service in the army of Great Britain in South Africa in time of war.

An ingenious argument was advanced that the extra war premium was really paid on the ordinary life policy the risk on which had attached and in order to obtain a consent, waiver or permission from the company to the assured to engage in the South African war as a soldier of the British Army. But looking at all the circumstances it appears to me that this war risk was a new substantive risk for which a new agreement was entered into and a new premium paid. The fact of it being indorsed upon the life policy did not matter. To my mind it was just as if a new war risk policy was issued. The risk under the new agreement had not attached and did not attach till the conditions specially mentioned in it had come into existence, namely, until the assured had become a soldier in the army of Great Britain in South Africa in a time of war.

The whole case, in my judgment, turns upon the proper construction of the policy and the two memo-

randa indorsed upon it relating to the extra risk assumed.

No evidence of any kind was offered as to the members of this Canadian contingent being or forming in any way part of the "army of Great Britain" before they arrived in South Africa. Nor do I think it would have availed the appellant had he given such evidence because the attaching of the risk and its location were fixed and determined by the contract to commence in South Africa.

The war was at an end before and when the Contingent arrived in South Africa. Hostilities there had ceased. Peace had been proclaimed and the special conditions under which and under which alone the extra risk was to arise never existed. If the assured ever was a soldier of or in the army of Great Britain in South Africa it was during a time of peace and not of war, a time and condition which neither called for nor justified an extra premium. If the contingent had arrived in South Africa one day before the cessation of hostilities and the evidence had shown it had been received or drafted into Great Britain's army there the risk would have attached and the premium could not of course be recovered back. But never having attached and it not being possible that it could have attached during the year I am of opinion that it can be recovered back.

Mr. Greenshields submitted that it was reasonable to argue the premium had been paid in part for permission to cross the torrid zone, a prohibited area, by the terms of the policy. At first I felt inclined to yield to that argument, but I think on more reflection and examination of the policy that the language of the new agreement referring to and defining the extra risk controls that restriction in the original policy and shews just the extent of the war risk which the

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company was accepting and for which the assured was paying. The prohibition invoked was inconsistent with the new agreement and does not apply to it and must be read and construed as applicable only to the ordinary life policy under which the ordinary life risks were incurred, the ordinary premium paid and the customary prohibitions agreed to. On the other points I agree also with the judgment of Mr. Justice Blanchet.

NESBITT J.—I was of the opinion that this appeal should be dismissed, but reflection has convinced me that it should be allowed. It is clear law that where the risk does not attach, or where by reason of the parties not being *ad idem* there is no contract, the moneys paid for premiums are recoverable. See Porter on Insurance, 3rd edition, 90 to 92, and cases there collected. Also *Fowler* v. *Scottish Equitable Life Ins. Soc.* (1); and *Foster* v. *Mutual Reserve Fund Life Assoc.* (2).

It is equally clear, in the case of a life policy, that where the risk has attached, or the premium begun to be earned for any space of time, the annual premium paid in advance is not recoverable. In this case the policy, issued upon what is known as the flat rate, provided that the insurance should not go into effect until the first premium had been paid, and that all premiums were due and payable in advance, and it also provided that should the insurance cease or become void by the violation of any stipulation or agreement, all payments made or accepted should be retained by the society.

Another clause provided for indisputability of the renewal contract of assurance after one year from the date of entry upon the same, provided the premiums were paid, "except that military or naval service in

(1) 4 Jur. N S. 1169. (2) 19 Times L. R. 342.

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time of war without a permit are risks not assumed by the society at any time."

Another clause provided that the application should be made a part of the contract, and the application contained the following:

I hereby agree on behalf of myself and of any person who shall have any claim or any interest in any policy issued under this application as follows:—*First:* That I will not within two years from the date of policy to be issued under this application, travel or reside in any part of the torrid zone or north of the parallel of sixty degrees north latitude.

Had this policy been issued in that form, I think that, upon the insured embarking at Halifax, as a member of the fourth contingent, intending to take part in the war then pending in South Africa, if he had died after entering the torrid zone on the voyage, or if he had been killed by the ship being attacked by any Boers who might have escaped, or if the assured had died of disease contracted on the transport, which is one of the chief causes of risk in war time, the policy would have been voided.

It has been held, however, by the courts below and was argued here, that the further contract of insurance, known as the war risk, removed these obstacles to the right to recover under such circumstances. Such further contract is shown by the two following indorsements:

1. It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of *an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war.*

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the premium receipt.

2. It is understood and agreed, in connection with Policy No. 127,-805 for $1,000 dated May 12th, 1902, of Form 507A, and issued on

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the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding.

It has been held that the indorsement No. 2, by its very terms, involved the idea that the parties had waived the "travel limit" clause as it must be assumed that the parties contemplated the journey to South Africa in order that the limited war risk should attach. The parties were, in my view, contracting on the basis of the fourth contingent being, once they embarked from Halifax, no longer militia but soldiers of Great Britain intended for hostile operations in South Africa, and I think that the $25 extra money was paid to cover the risk attaching to them as members of such fourth contingent in war time renewable each year no matter how long the war lasted, provided that as such soldiers they participated in hostilities in South Africa. One of the chief risks of war, as I have said, is the risk of disease in transportation to the seat of war or to the actual place of hostilities. The company also agreed on receipt of the $25 to insure the applicant as a war risk for the then current year, and to continue such insurance from year to year as long as the war might last and this was the consideration for the $25 paid. The applicant, the moment he paid his extra $25 and received his policy with this indorsation, clearly had a right, if the war continued for any number of years, to pay from year to year his extra $25, being engaged as a combatant in South Africa during the time, a right which had not previously existed. I think, bearing in mind what the flat rate covered and the added risks occurring after the embarkation from Halifax when in point of time a state of war existed, and the further right of com-

pelling a renewal war risk, that some consideration was given by the company for the additional premium and that but for this further bargain the applicant would not have been protected during the voyage and, therefore, he cannot recover the $25 so paid.

KILLAM J.—In my opinion this appeal should be allowed.

The claim is for the return of money as having been paid upon a consideration which has failed. The position taken in the courts below was that the extra premiums were paid only for the risk of military service in South Africa, in the army of Great Britain, in time of war, and that as, upon the arrival of the assured soldiers in South Africa and during their stay there, the contemplated state of war did not exist, the risk never attached and the consideration for the extra premium had failed.

While, undoubtedly, the only war which was contemplated as the one in which the assured were to be engaged was the existing war between Great Britain and the Republics of the Transvaal and the Orange Free State in South Africa, the provisions respecting the extra premiums were not so limited. The judgments have not proceeded upon any claim that the policies differed from the terms of the agreements upon which the premiums were paid. No such contention has been raised before us. The argument proceeded solely upon the interpretation of the policies.

The company insisted upon payment of the premiums before issuing the policies. In order to determine whether the considerations for the two classes of premiums were severable, and what they were, we must examine each policy as a whole. We should read with the ordinary form of policy, containing the provision that "military or naval service in time of

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war without a permit are risks not assured by the society at any time," the clauses indorsed or annexed as follows:

It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war.

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

It is understood and agreed, in connection with Policy No. 127805 for $1,000, dated May 12th, 1902, of Form 507 A, and issued on the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding.

When the policies issued it was uncertain what would be the duration of the then existing war. It might continue for years; it might end, as it did, without the insured incurring any real risk incident to actual participation in it.

Further, the stipulations for the extra risk were not limited to the war then in progress. The consent was

to engage in military service in South Africa in the army of Great Britain

and this was expressed to be given in consideration of an "*annual* extra premium of $25." The provision for an "extra annual premium" was that it was to be paid

whenever and as long as the occupation of the assured shall be that of a soldier in army of Great Britain in time of war.

The policy was one under which the assured was to be covered so long as his occupation should be that of a soldier in the army of Great Britain in time of war, provided he should keep up the payment of the extra premiums.

The company incurred the risk of a continuance of the existing war for years, and it incurred the risk of Great Britain becoming engaged in other wars and of the assured participating in them as a soldier in the British army. Whether this risk was to be limited to South Africa only is not now important.

It cannot, I think, be properly said that the consideration upon which the extra premiums were paid wholly failed. As the company incurred the risks and bound itself to their continuance so long as the extra premiums should be paid, it was entitled to the benefit of the cessation of the existing war.

It appears to me that the judgment in favour of the plaintiff should be set aside and the action dismissed, with costs here and in all courts.

Appeal allowed with costs. *

Solicitors for the appellants: *Greenshields, Greenshields, Heniker & Mitchell.*

Solicitors for the respondent: *Jacobs & Garneau.*

*Leave to appeal to the Privy Council was refused (xliii, Can. Gaz. 376).