

1902
 *Feb. 26, 27.
 *May 15.

THE MUTUAL LIFE ASSURANCE
 COMPANY OF CANADA (DEFEND- } APPELLANTS;
 ANTS)

AND

MARIE ALMA GIGUÈRE (PLAINTIFF)..RESPONDENT.

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

*Life insurance—Condition of policy—Payment of premium—Delivery of
 policy—Evidence—Art. 1233 C. C.*

The production from the custody of representatives of the insured, of a policy of life insurance, raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.

The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of article 1233 of the Civil Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the plaintiff's action with costs!

The action was to recover the amount of a policy of life insurance which declared that it was made in consideration, among other things, of the payment of the first premium upon the delivery of the policy. The policy was produced by the beneficiary from the cus-

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

today of the representative of the deceased person named therein as the insured.

The trial judge admitted parol testimony to shew that, as a matter of fact, the first premium had not been paid but that the policy had been left with the deceased for a few days for the purpose of examination on an understanding to that effect between him and the company's agent.

In the meantime the death occurred and the policy was found among deceased's papers.

In the Superior Court the action was dismissed and the present appeal is by the company against the King's Bench judgment reversing that decision.

Garrow K.C. and *Lane* for the appellants. There never was any consideration for the contract. The presumption arising from the possession of the policy is rebutted by proof that the delivery was merely provisional and conditional. The insured never accepted it, and the policy was a mere escrow.

This evidence as to conditional delivery of the policy was properly admitted by the trial judge, as life insurance, even by a mutual insurance company, for fixed premiums (art. 2470 C. C.) is a commercial matter, and art. 1233 C. C. applies. Proof by oral testimony could not be refused in regard to facts in relation to the delivery of the policy and the payment of the premium in consideration of which it was proposed that the contract should be made. The fact of an understanding between the assured and the company's agent that the policy would be left with him for a few days, for examination, is a fact altogether independently of the terms of the policy and subsequent thereto, and the proof of this fact is not in contradiction nor at variance with the terms of the policy. The policy does not acknowledge that the premium had been received by the company but on the contrary, fixes the future date for payment.

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Until the deceased had accepted the policy which the company proposed to issue to him and complied with the condition precedent to the contract by paying the first premium, there was no existing contract. There never was an effectual delivery of the policy.

We refer to *Savage v. Howard Ins. Co.* (1); *Confederation Life Association of Canada v. O'Donnell* (2); *British Empire Mutual Life Assurance Co. v. Bergevin* (3); *London and Lancashire Life Assurance Co. v. Fleming* (4); *McGeachie v. North American Life Ass. Co.* (5); *Tiernan v. People's Life Ins. Co.* (6); *Reese v. Fidelity Mutual Life Association* (7); *Wood v. Plough-keepsie Mutual Ins. Co.* (8); *Home Ins. Co. v. Field* (9); *Frank v. Sun Life Assurance Co.* (10).

T. Chase Casgrain K.C. and *Alexandre Taschereau* for the respondent. Parol evidence cannot be received to vary a written contract, *Art. 1234 C. C.* *Bury v. Murray* (11). The possession of the policy is proof of the receipt of the premium by the insurer. *Anderson v. Thornton* (12); *Compagnie d'Assurance des Cultivateurs v. Grammon* (13); *Massé v. Hochelaga Mutual Ins. Co.* (14); *Agricultural Ins. Co. of Watertown v. Ansley* (15); *Herald Co. v. Northern Assurance Co.* (16); *Ouimet v. Glasgow and London Ins. Co.* (17); *Liverpool and London and Globe Ins. Co. v. Valentine* (18).

The delivery of the policy completed the contract and was a waiver of any condition as to its coming into

(1) 44 How. N. Y. 40.

(9) 42 Ill. App. 392.

(2) 10 Can. S. C. R. 92; 13 Can. S. C. R. 218.

(10) 20 Ont. App. R. 564; Cout. Dig. 127.

(3) Q. R. 5 Q. B. 55.

(11) 24 Can. S. C. R. 77.

(4) [1897] A. C. 499.

(12) 8 Ex. 425.

(5) 22 O. R. 151; 20 Ont. App. R. 187; 23 Can. S. C. R. 148.

(13) 3 Legal News 19.

(14) 22 L. C. Jur. 124.

(6) 26 O. R. 596; 23 Ont. App. R. 342.

(15) 17 R. L. 108.

(16) M. L. R. 4 S. C. 254.

(7) 111 Ga. 482.

(17) 19 R. L. 27.

(8) 32 N. Y. 619.

(18) Q. R. 7 Q. B. 400.

force. There was also waiver by the company accepting proofs of the claim under the policy, thus recognizing it as an existing contract.

In any case rules as to proof in commercial cases do not apply to insurances by mutual companies; see Arts. 2471, 2478 and 2585 C. C.

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The judgment of the court was delivered by :

GIROUARD J.—Il s'agit de savoir si, lorsque la police déclare que la prime sera payée lors de sa livraison et que la police est produite par le bénéficiaire de l'assuré, la preuve testimoniale est admissible pour établir que la prime n'a pas été payée, et que la livraison de la police n'a été que provisoire ou conditionnelle. La cour de première instance (Routhier J.) a décidé dans l'affirmative, et ce sentiment fut partagé par M. le juge Bossé en Cour d'Appel. La majorité de cette cour (Lacoste J. C., Hall, Würtele et Ouimet JJ.) a été d'un avis contraire et a infirmé le jugement de la Cour Supérieure. La question se résume à ceci : La preuve du paiement de la prime, résultant de la livraison de la police et de ce qui y est exprimé, est-elle si complète et parfaite que la preuve testimoniale contredirait le document écrit, car, on le sait, on ne peut contredire un document écrit par la preuve orale, non seulement dans les causes civiles mais aussi dans les affaires commerciales, sans un commencement de preuve par écrit, qui n'existe pas ici (1). Il faut bien remarquer que la police ne contient pas une déclaration de paiement de la prime fait par l'assuré au moment où elle est signée, ou avant, mais elle énonce purement et simplement que ce paiement sera fait dans un avenir indiqué,

in consideration of the application for this policy, which is made a part of this contract, and of the payment of one hundred and eight dollars on the delivery of this policy, etc.

(1) Arts. 1206, 1233, 1234 C. C.

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La police réfère donc à un événement futur qui arrivera ou n'arrivera peut-être pas. La demanderesse, veuve de l'assuré, et bénéficiaire, produit la police comme preuve de cet événement futur. On ne peut nier que *primâ facie* cette production constitue une présomption que la police a été dûment livrée et que le paiement de la prime a été bien effectué (1), mais comme toutes les autres présomptions de faits, elle peut être détruite par la preuve positive du contraire. Ce n'est donc pas contredire le document écrit que de permettre la preuve orale du contraire de cette présomption, savoir, que cette livraison ne fut faite que provisoirement quelques jours seulement avant l'accident dans un ascenseur qui lui coûta la vie, et sous la condition que la prime serait payée et que de fait elle ne le fut jamais. Où est là la contradiction de l'écrit ? La police ne dit pas que la prime a été payée, mais qu'elle le sera lorsque la police sera livrée à l'assuré, qui, sur paiement de la prime, en devient propriétaire. A-t-il payé, oui ou non ?

Il s'agit donc d'établir purement et simplement un fait relatif à une affaire commerciale, et il est impossible, à mon avis, de refuser la preuve testimoniale en face de l'article 1233 du Code Civil, étant admis que cette affaire est d'une nature commerciale (2).

Enfin, comme l'observe M. le juge Bossé, l'application de l'assuré, qui fait partie du contrat, prévoit spécialement le cas où le montant de cette première prime n'aurait pas été payé :

And I further agree to accept the policy when presented and pay the stipulated premium therefor, and that the said assurance shall not take effect or be binding until the first premium shall have been paid to the said company or a duly authorized agent thereof during my lifetime and good health.

Nous sommes donc d'avis d'accorder l'appel et de rétablir le jugement de la Cour Supérieure. L'action

(1) Art. 1242 C. C.

(2) Arts. 2469, 2470 C. C.

de l'intimée est renvoyée avec dépens devant toutes
les cours.

Appeal allowed with costs.

Solicitors for the appellants: *Lane & Galipeault.*

Solicitors for the respondent: *Fitzpatrick, Parent,*
Taschereau, Roy & Cannon.

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