1902

*May 9.
*May 27.

MARY D. S. CORNWALL.....APPELLANT;

AND

THE HALIFAX BANKING COMPANY..... } RESPONDENTS.

IN RE, ESTATE OF IRA CORNWALL, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insurance—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.

Where through error and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy he is, nevertheless, entitled to the benefit of the insurance.

Judgment appealed from reversed, Davies and Mills JJ. dissenting.

Per Sedgewick J. The New Brunswick Act (58 Vict. ch. 25) for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the decree of the Probate Court which declared that the proceeds of a policy on the life of the late Ira Cornwall belonged to his estate and not to his widow.

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

The facts of the case are fully set out in the opinions of the judges on this appeal.

C. J. Coster for the appellant.

J. R. Armstrong, K.C., for the respondents.

TASCHEREAU J.—This is an appeal from a judgment of the Supreme Court of New Brunswick affirming a decree of the judge of probate of St. John by which, upon the hearing of passing accounts in the insolvent estate of the late Ira Cornwall, the appellant, his widow, on the application of the respondent, creditor of the estate, was ordered to account for a sum of one thousand dollars which she has received from an insurance company upon a policy for two thousand dollars on her deceased husband's life. She claims that she was the beneficiary under that policy. The creditors, on the other hand, claim that the amount of the insurance passed into the estate of her late husband.

The substantial facts of the case are not complicated.

On the twenty-sixth day of February, 1896, the late Ira Cornwall applied in writing for an accident insurance, the sum to be insured two thousand dollars, policy to be payable in case of death by accident under the provisions thereof to present appellant. The company, however, issued their policy payable on its face to the personal representatives of the said Ira Cornwall.

Hugh Scott, the chief agent for Canada of the insurance company, stated as follows in his evidence:—

Q. Why did you not endorse on the policy that it was payable to Mary D. S. Cornwall, wife of the deceased, as expressed in application?

Ans. It is not the practice of this association to do so, and it never has done so under our management in Canada.

Under such an application and our policy we would pay the beneficiary only named in the application.

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After receiving the policy from the company, the said Ira Cornwall, believing that it was payable to his wife as he had ordered it to be, handed it to her and told her that it was payable to her. She did not look at it, but kept it in her possession as her own until after his death, after which it was found that it was through error on its face payable to his personal representatives.

On the 26th July, 1897, while the said policy was in force, the said Ira Cornwall was found drowned, in the River St. John, under circumstances which induced the company to believe that there had been a breach of the condition in the policy against suicide.

The appellant then applied to the company for payment of the amount of the policy to her as beneficiary.

The company thereupon set up merely the defence of suicide and refused to pay the amount of the insurance. Under the New Brunswick law, an action could not be brought in the name of the beneficiary. Administration had, therefore, to be taken out on Ira Cornwall's estate to obtain a nominal plaintiff and, upon action by the appellant as such administratix for the two thousand dollars covered by the policy, the insurance company compromised her claim and paid her the one thousand dollars now in controversy.

The judge of probate determined that as, in law, the policy on its face was not payable to the appellant, he could not recognise the equitable or beneficiary right she claims and, therefore, ordered her to account for that sum to the estate. With deference, I think that this determination, though affirmed by the Supreme Court of the province, is erroneous.

As I view the case, it seems to me to be a very simple one. First, it cannot but be conceded that principles of equity govern the administration of estates in probate courts in New Brunswick in the same way, in effect, as

they would if the estate was being administered in equity. *Harrison* v. *Morehouse* (1). Now, it seems to me incontrovertible, upon the evidence on record, from the facts found and the fair inferences therefrom, that the deceased believed that the policy he received from the company was payable in the case of death to the appellant, as he had directed in his application, and agreed to receive the policy exclusively upon that belief. Then, the company themselves admit that by their real contract the appellant was, in case of death, to be the sole beneficiary of the insurance. That the policy is not in terms payable to her is, therefore, clearly a mutual mistake. And that, under these circumstances, a court of equity would not refuse a reformation of the policy so as to make it payable to appellant as both parties to it intended it to be, seems to me plain.

That, in my opinion, concludes the case. The learned counsel for the respondents invoked the acquired rights of the creditors, and argued that as, at the death of Ira Cornwall, these one thousand dollars had passed to his estate, the appellant was now precluded from asserting any equitable rights in the matter she might have had during his life. But that is a *petitio principii*. It is assumed that she was not *ab initio* the benificiary of this insurance. Now, that is the very question in issue. And by determining, as we do, that she was, at the date of the policy, the sole beneficiary thereunder, it follows that, at the death of her husband, the amount of the policy did not pass into his estate.

The respondents' attempt to imply a waiver or an estoppel against the appellant from certain allegations she made in her petition for letters of administration entirely fails. It would be most unfair to declare her

(1) 4 N. B. Rep. 584.

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precluded from now asserting her just rights merely because she made a mistake of law in such a document which, as to the respondents, was *res inter alios acta*. The appeal is allowed with costs; a decree to be entered that the $1,000 in question formed no part of Ira Cornwall's estate. Costs in all the courts will be against the respondents.

SEDGEWICK J.—I concur in the judgment of my brother Taschereau, but I think it desirable to make a few observations relating to a point upon which he is silent.

As he has shewn, the policy in question is one which a court of equity would, under the circumstances, rectify upon the ground of mutual mistake, the assured thinking that he was to receive a policy payable to his wife and the company thinking that they were giving him a policy payable to his wife.

Assume then that the policy in question is a policy in which the widow is named as the beneficiary; what rights does the widow possess under it? It is clear that, at law and apart from the statute, she could not sue upon it because there is no privity between her and the company. But the company has contracted with the assured that it, upon his death, will pay the widow. The contract is clearly fulfilled and the company's liability has ceased if it specifically performs its contract, namely, pays the insurance money to the widow. Upon such payment, in the absence of special circumstances or arrangements to the contrary, the transaction is forever closed.

I have been unable to find a single case in England or elsewhere where, under such circumstances, moneys so paid were ever declared to be estate funds payable to the executors or administrators of the assured. It is only by virtue of the technical rule as to privity of

contract that the insurance moneys could never come into their hands and, coming into their hands, it comes there ear-marked, and then, subject to the rights of the beneficiary named in the policy and forming no part of the general estate.

Against this proposition has been cited the celebrated case of *Cleaver* v. *Mutual Reserve Fund Life Association* (1), where one Maybrick insured his life for the benefit of his wife, Mrs. Maybrick, who afterwards murdered him. In that case the insurance company endeavoured to escape liability upon the ground that inasmuch as the beneficiary, Mrs. Maybrick, had murdered her husband, it was not liable. The court, however, held that while, on grounds of public policy, Mrs. Maybrick could not recover the money, yet the insurance company was, nevertheless, liable to the estate of which the insurance moneys in that event would form part.

It is evident in that case that, had Mrs. Maybrick been an innocent woman, she would have been both at law and in equity entitled to the money. The insurance company had contracted to pay her, and they would have paid her except for her conduct. It is true that Lord Esher in his judgment states that at common law in a case like the present the money would, in the event of non-payment by the insurance company to the beneficiary, become the estate property, but that statement was not necessary to determine the case, and appears to have been inadvertently made, because Fry L. J. states that the effect of the transaction was, in his opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the £2,000 insured. *It would be broken by non-payment* to her, and he never suggests that in the event of payment to her the estate could recover it back.

(1) [1892] 1 Q. B. 147.

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But if there were any doubt about this, I think the question is settled by ch. 25 of 58 Vict., "An Act to secure to wives and children the benefit of life insurance." It is the enactment here of the same law which prevails in England and in most of the provinces of Canada. It expressly gives the beneficiary, if a wife or child of the deceased, a beneficial interest in the insurance moneys. The only difficulty suggested is that the policy here is not a life insurance policy, but an accident insurance policy, and section 3 of the Act, providing that its provisions shall apply

> to every lawful contract of insurance in writing now in force or hereafter effected, which is based on the expectation of human life,

does not apply.

I cannot see why the contract here is not based upon the expectation of human life. The contract, so far as this question is concerned, is that, should the assured die by accident within a year from its execution, the company will pay the amount insured. It expects him to live. It takes the chance and runs the risk of an accident bringing him to an untimely end, so that, in my view, the statute clearly applies.

GIROUARD J.—I concur in the opinion of Mr. Justice Taschereau.

DAVIES J. (dissenting).—For the reasons given by Mr. Justice Barker in the Supreme Court of New Brunswick, speaking for the majority of that court, and to which I feel I can add little, if anything, useful, I am of opinion that this appeal should be dismissed with costs.

To my mind the reasoning of Mr. Justice Barker is conclusive. There was admittedly no mutual mistake in the issue of the policy by the company in the form it did and making the amount insured payable in case of death by accident to the executors of the assured.

And I thoroughly concur with Mr. Justice Barker that, the company having paid the sum of $1,000 as a compromise to the administratrix of the estate in an action brought by her to recover the money on the policy, the evidence of Mr. Scott as to the general practice of the insurance company in paying the beneficiary only, in cases where an application for insurance named a beneficiary and the policy issues payable instead to the insured's executors, is of no importance in the present case,—even if it should have been admitted at all.

There having been no mutual mistake there can of course be no reformation. Even if the policy was reformed as now contended for, unless the New Brunswick Statute "Securing to wives and children the benefit of life insurance" was held applicable to an "accident" policy, the reformation of the policy would not avail the appellant.

I quite agree with Mr. Justice Barker that, outside of the statute and in the absence of any independent act of the assured declaring a trust respecting the moneys payable under the policy for the benefit of his wife or assigning them to or for her benefit, the proceeds of the policy would go to the estate. But as the proper construction of this statute, and its application to such a policy as the one in question, was not argued before us and, in the view I take of this appeal, it is not necessary to decide this question, I express no opinion upon it.

MILLS J. (dissenting).—I am of the same opinion as my brother Davies.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

Solicitor for the respondents: *J. R. Armstrong.*