1905

*Dec. 4.
*Dec. 22.

JENNIE HUTCHINGS (PLAINTIFF) . . APPELLANT;

AND

THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANTS) . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Life insurance—Condition of policy—Premium note—Payment of premium.*

When the renewal premium on a policy of life assurance became due the assured gave the local agent of the insurance company a note for the amount of the premium, with interest added, which the agent discounted, placing the proceeds to his own credit in his bank account. The renewal receipt was not countersigned nor delivered to the assured and the agent did not remit the amount of the premium to the company. When the note fell due it was not paid in full and a renewal note was given for the balance which remained unpaid at the time of the death of the assured. The conditions of the policy declared that if any note given for a premium was not paid when due the policy should cease to be in force.

*Held,* affirming the judgment appealed from (38 N.S. Rep. 15) Davies and Maclennan JJ. dissenting, that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due. *The Manufacturers Accident Ins. Co.* v. *Pudsey* (27 Can. S.C.R. 374) distinguished; *London and Lancashire Life Assurance Co.* v. *Fleming* ([1897] A.C. 499) referred to.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) which set aside the judgment

PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 15.

entered upon the findings of the jury and dismissed the plaintiff's action with costs.

The action was brought by the beneficiary under a policy of life assurance and the only question raised upon the pleadings and to be tried was whether or not the renewal premium was paid in cash to the company's agent when it became due. The renewal premium was payable on the 15th of October, 1902, and on the expiration of the days of grace the assured gave the local agent of the company a note, for the amount of the premium with interest added, at sixty days, which the agent caused to be discounted and the proceeds were placed to the credit of his personal account in the bank. When the note fell due a partial payment was made on account and the assured gave the agent another note for the balance remaining due which he failed to pay, and he died on the 12th of March, 1903, without having paid the amount of the renewal note. The agent was in possession of a properly signed renewal receipt for the premium at the time these transactions took place, but he did not countersign it, as required by its conditions, nor did he remit the proceeds of the note discounted to the company. Later on, while the renewal note was current, he returned the renewal receipt to the company as unpaid, and the policy was noted as lapsed. At the trial the jury found that the premium had been paid in cash to the company at the time when the local agent discounted the first note and received the proceeds and, upon this finding, judgment was entered in favour of the plaintiff. The judgment now appealed from set aside the verdict as being against the evidence and dismissed the plaintiff's action with costs.

1905

HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.

*Mellish K.C.* for the appellant. We submit that the findings of the jury and the judgment thereon should be restored, or in the alternative a new trial ordered. Under the facts the jury could have come to no other conclusion than that the premium was paid in cash to the company's agent. It was received to be discounted, and the discount charge was added to the face of the note; the agent used the note for the purpose for which it was given, not to pay the premium with the note, but to get the money in payment of the premium by discounting the note. The agent got the money in that way and held it for his company, but subsequently changed his mind, as he found he had made a mistake in lending his own credit to the assured who was in financial difficulties. The note was not payable till sixty days after its date (15th Oct., 1902). The agent was not authorized to take a note in payment of the premium, and the policy would have been avoided thirty days after that date (the grace allowed), and the assured could not have revived it even by paying the note at maturity. See opinions by Sir Henry Strong in *London and Lancashire Life Assurance Co.* v. *Fleming*(1), in the Privy Council and by Burton and Osler and Maclennan JJ. in the same case in the Court of Appeal for Ontario(2), at pages 670-673; also by Meredith C.J. in the report of the judgment of the trial court(3); which clearly indicate that if such an agreement as that referred to had been proven, and the notes discounted, as they were by this agent, it would have amounted to a payment of the premium in cash. The condition and the stipulation in the application for insurance, made part of the contract, that if any note

(1) [1897] A.C. 499. (2) 23 Ont. App. R. 666.
(3) 27 O.R. 477.

given for a premium be not paid when due the policy will not be in force, refers only to such notes made directly to the company. See also *The Manufacturers' Accident Ins. Co.* v. *Pudsey*(1).

*W. B. A. Ritchie K.C.* for the respondents. There was no evidence whatever of payment of the premium, and the learned trial judge should have withdrawn the case from the jury, as requested by counsel at the trial on the conclusion of the plaintiff's case. It was for the judge, alone, to decide whether or not any facts had been established by evidence, from which payment of the premium might be reasonably inferred, and if such facts had not been established by evidence then it was his duty to have withdrawn the case from the jury. *Metropolitan Railway Co.* v. *Jackson*(2), *per* Cairns L.J. at page 197; *Ryder* v. *Wombwell*(3), *per* Willis J. at page 38; *Bridges* v. *North London Railway Co.*(4), *per* Pollock B. at page 221. We also rely on *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery*(5), and particularly the observations of Lord Penzance at page 1175, Lord O'Hagan at pages 1181, 1182, and of Lord Coleridge, pages 1195-1197.

The fact that the renewal receipt had not been countersigned, as required by its conditions, is a fact strongly demonstrating that the premium had not been considered as having been paid. Moreover, it never reached the possession of assured. *Confederation Life Association* v. *O'Donnell*(6); *Busteed* v. *West England Fire and Life Ins. Co.*(7); Bunyon on Life Assurance (3 ed.) p. 83; *London and Lancashire*

(1) 27 Can. S.C.R. 374.
(2) 3 App. Cas. 193.
(3) L.R. 4 Ex. 32.
(4) L.R. 7 H.L. 213.
(5) 3 App. Cas. 1155.
(6) 10 Can. S.C.R. 92.
(7) 5 Ir. Ch. 553.

1905

HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.

*Life Assurance Co.* v. *Fleming*(1); *Torrop* v. *Imperial Fire Ins. Co.*(2).

The proceeds of the note were held by the agent merely as agent for assured. If he had agreed to apply these funds to the payment of the premium he never so applied them. The money was paid into his bank account as the agent of Hutchings to pay the premium and he never did pay the premium. He never paid out the money as instructed by his principal, but kept it in his personal account and used it for his own purposes. If assured gave the note to him as agent of the company his act, in taking the note, was not binding on the company, because it was beyond his authority as defined by the policy to take such a note.

It is submitted that the agent held the money as agent for Hutchings until the maturity of the note, when, if Hutchings paid it, he got the renewal receipt and the agent was to pay the company. This is shewn by the renewal receipt being attached to the note. Later on when it became evident that Hutchings could not pay the renewal note and re-pay the sum advanced by the agent on renewing it, it was agreed that the agent should treat the paper as for his own accommodation, to which Hutchings agreed.

The respondent relies on the following authorities: *Acey* v. *Fernie*(3), approved by the Privy Council in *London and Lancashire Life Assurance Co.* v. *Fleming*(1); *Bartlett* v. *Pentland* (4); *Baines* v. *Ewing* (5); Brice on Ultra Vires (3 ed.) p. 658; *Giblin* v. *McMullen*(6); *Hiddle* v. *National Fire and Marine*

(1) (1897) A.C. 499.
(2) 26 Can. S.C.R. 585.
(3) 7 M. & W. 151.
(4) 10 B. & C. 760.
(5) L.R. 1 Ex. 320.
(6) L.R. 2 P.C. 317.

*Ins. Co. of New Zealand* (1); *Hine Bros.* v. *Steamship Insurance Syndicate* (2); *Phillips* v. *Mayer* (3).

The fact of there being an express condition in the policy, limiting the authority of the agent, was notice to the assured that the agent was not possessed of power to take a renewal note. It was not, therefore, within his apparent authority, as it appeared otherwise from the policy. *Frank* v. *Sun Life Assur. Co.* (4); *McGeachie* v. *North American Life Ins. Co.* (5).

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J. (dissenting).—My mind fluctuated a good deal during the course of the argument before us, but a careful reading of the evidence and judgments appealed from, and further consideration of the arguments of counsel have convinced me that there was sufficient evidence before the jury to enable them to find a payment in cash of the premium by the assured to the agent of the company. The agent held in his hands at the time the renewal receipt duly signed by the company's proper officers.

There is no term of the policy requiring this receipt to be countersigned or delivered by the agent. It merely requires, to enable the agent to receive payment, that he should have in his possession the receipt signed by the president, managing director and secretary of the company, or any two of them. On this evidence there was a finding in favour of the plaintiff and on that finding the trial judge directed judgment to be entered for her.

(1) [1896] A.C. 372.
(2) 72 L.T. 79.
(3) 7 Cal. 81.
(4) 23 Can. S.C.R. 152*n*; 20 Ont. App. R. 564.
(5) 23 S.C.R. 148.

1905

HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.

Davies J.

The question is one purely of fact. Both parties rely upon the case of *London and Lancashire Life Assur. Co.* v. *Fleming*(1). Applying the principles of law determined in that case to the facts proved in this the question is reduced entirely to one of fact: Did or did not Harrington receive the premium in cash? And the proper tribunal to determine it, once there was evidence to submit to them, was the jury.

On the 15th day of October, 1902, the agent of the company, Mr. Arthur E. Harrington, went to the insured and arranged with him to raise the money by a note which Harrington was to discount. The premium was $49.27, and the note was for $50.27—the difference being to pay the charge of discounting. Harrington discounted the note with the bank and got the proceeds, $49.27, to remit to the company, but failed to remit, as he heard very shortly after taking the note that the assured was in financial difficulties. The note was payable sixty days after date.

It was argued that because Harrington had the proceeds of the note put to his credit in his account in the bank where he discounted the note that, in some way or another, he could not be said to have received it in cash.

I am unable to appreciate or accept that argument or to discern the substantial difference between Hutchings taking the note, having it discounted and handing over the proceeds to Harrington or the latter discounting it and putting the cash to his own credit. In either case he would have received the cash.

It matters not what Harrington did with the cash after he received it or how long afterwards he heard assured was in financial difficulties and determined

(1) (1897) A.C. 499.

upon protecting himself by retaining the money he had received as the proceeds of the note.

All the subsequent acts and conversations of the agent and the assured may have been good evidence to thrown light upon what was the real transaction at the time of the discount of the note.

But it was all admitted, and went to the jury and the finding of the jury, which in my opinion was justified, should not be disturbed.

I would allow the appeal with costs.

IDINGTON J.—This case is clearly distinguishable from that of the *Manufacturers' Accident Ins. Co.* v. *Pudsey*(1), upon which appellant relies. There the renewal receipt which was a badge of authority in the hands of the agent was found by the jury to have been delivered over to the assured upon his payment of part of the premium and giving his note for the balance, and the court held correctly that there was evidence to go to the jury on that and other points in dispute.

The failure of the assured here to get the receipt for the premium or perhaps even to have seen it and the peculiar circumstances connected with the retention of it by the agent tell against the assured having relied upon the agent having authority, or the company by any act of theirs inducing him to rely on the authority of the agent for doing as he did.

The principles upon which the decision in the case of *London & Lancashire Life Assurance Co.* v. *Fleming*(2) rests are decisively against the case of the appellant here.

I think, therefore, that the appeal ought to be dismissed with costs.

(1) 27 Can. S.C.R. 374.
(2) [1897] A.C. 499.

1905

HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.

Maclennan J

MACLENNAN J. (dissenting).—I am of opinion that this appeal should be allowed and that the judgment at the trial should be restored.

The life policy sued on provides that the premiums, after the first, shall be paid at the head office of the company. But by a privilege or proviso indorsed upon the policy and made part thereof it is declared that premiums may be paid to any officer or agent who has in his possession a printed receipt therefor issued by the company and signed by the president, managing director and secretary or any two of them. Such a receipt duly signed in accordance with that privilege or proviso was in the hands of the agent of the company, Mr. A. E. Harrington, at the time of the transactions between him and the deceased which are in question.

I think, in the first place, it is clear that if the assured had paid the premium to Harrington that was all he was required to do. It was not necessary that Harrington should deliver the receipt to him or that he should request or demand that to be done. The payment of the money was the essential and only thing required to be done and the sole question is whether or not the assured did in fact pay his premium to Harrington.

What took place was this: The premium, $49.27, was due on the fifteenth of October, 1902, and the assured had not the money, so the company's agent, Mr. Harrington, took a note at sixty days for the sum of $50.27, the excess over the amount of the premium being for the discount charged by the bank. Mr. Harrington says that he discounted the note and the proceeds, $49.27, were placed to his credit, and that he had, at that time, in his possession the company's re-

1905

HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.

Maclennan J

ceipt duly signed according to the privilege or proviso.

I think the effect of that transaction was a payment by the assured to the company's agent of the premium on his policy, that is, a payment in money according to the terms of the policy.

It appears that Harrington did not send the money to the company, nor did he deliver the receipt to the assured, but attached it to the note. I think that makes no difference and that the premium was paid according to the terms of the policy.

I think the appeal should be allowed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondents: *A. Cluney.*