1882
*Nov. 7.
1883
*Mar. 29.

CONFEDERATION LIFE ASSOCIATION OF CANADA..... } APPELLANT;

AND

EDMUND O'DONNELL.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life Assurance—Policy, delivery of—Policy not countersigned, effect of—Premium, proof of payment of—Delivery of policy insufficient—Escrow.

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from *Toronto* to the agent at *Halifax*, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by ——— agent at ———, countersigned this —— day of ———. Agent."

The agent, in his evidence, said he delivered the policy to *W. O'D.* (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among *W. O'D's* papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered up the year up to the 1st October, 1873. *W. O'D.* died the 10th July, 1873. The case was tried before *McDonald*, J., without a jury, and he gave judgment in favor of respondent for the $3,000, and this judgment was confirmed by the Supreme Court of *Nova Scotia*.

On appeal to the Supreme Court of *Canada*, it was

Held (*Fournier* and *Henry*, JJ. dissenting) that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore Company was not liable.

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

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Per *Gwynne*, J., that the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to *W. O'D.* until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

Mr. *Beatty*, Q.C., and Mr. *Lees*, Q.C., for appellants:

Before arguing the case, Mr. *Lees*, on behalf of the appellants, applied to have an affidavit added to the case.

[THE CHIEF JUSTICE.—The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence.]

Mr. *Beatty*, Q.C.:

The real point in this case is, was the premium ever paid? The fact of the respondent of having the policy in his possession is the chief point on which he relies But as the policy has, on its face, a fatal defect, it not being countersigned by the agent, it was for the plaintiff to prove why it was not countersigned. The printed memorandum is evidence for the appellants that they have not received the premium, and corroborates the evidence and books of the agent. Then, again, we have the fact that the premium was tendered after the death of the assured. The acknowledgment of the receipt of the premium which appears in the policy is only provisional, and is only valid after the agent has countersigned the policy. See *Bliss* on Life Insurance (1); *Wood* v. *Poughkeepsie* (2); *Bigelow* (3). If this instrument was a completed contract we would be liable unless we proved fraud. The memorandum is notice to the applicant that the agent has no

(1) 2 ed. pp. 252 & 637. (2) 32 N. Y. R. 619.
(3) 2 vol. 35.

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right to deliver the policy until the premium has been paid. This instrument we have proved was not delivered as a completed contract.

[The learned counsel then reviewed the evidence, contending there was no evidence of payment of the premium, and that, under the circumstances, the *onus* was on the plaintiff to prove payment.]

Mr. *Thompson*, Q.C., for respondent:

The evidence given by the company's agent is contradicted on material facts, and therefore it ought to have no weight. There is evidence that the policy was in the assured's possession several months prior to his death, and the fact of its not being countersigned does not invalidate the policy. This was not a condition of the policy. The statute incorporating the company declares in what way the policy should issue.

RITCHIE, C. J.:

I think this instrument was on its face an incomplete instrument for want of the signature of the agent, and therefore, though produced by the other side, does not authorize an inference of delivery. To give any force or effect to the receipt in the policy it must first be established that the policy was duly delivered, for, if not duly delivered, nothing is established. The policy on its face shows that, though signed by the president and manager, it was not, and was not intended to be, either a complete or a binding instrument; and thefact is unequivocally made apparent to all parties dealing with agents of the company to whom the policy may be transmitted, that the instrument is not to be delivered or received as a valid, binding policy, unless countersigned by the agent to whom it may have been transmitted to be dealt with, that is to say, to be delivered as a valid, binding policy only on payment of the

premium, and on being countersigned. Until these conditions were complied with, there was no contract binding on the company, and by the deed and other provisions of the policy before there had been a compliance with these precedent requirements of the company, the deceased only obtained possession of an incomplete instrument which the agent had no right to deliver, or the deceased to accept, as a binding contract. The words, "This policy is not valid unless countersigned by agent," are words, I think, that must be read as part of the policy.

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In *Reg.* v. *Aldborough* (1), Lord *Denman*, C. J., says:

It is almost superfluous to cite authorities to shew all that is written on the instrument, according to the intention of the parties, before execution, constitutes the deed, and that matters subscribed or endorsed may be incorporated; *Broke* v. *Smith* (2) is in point; and the doctrine has been uniformly acted on since.

For these reasons, I am in favor of allowing the appeal.

STRONG, J.:

After some fluctuation of opinion, I have come to the conclusion that we ought to allow this appeal. The question appears to me to be entirely one of fact, for I do not regard the memorandum in the margin to the effect that the policy was not to be valid until countersigned by some agent, as forming part of the policy, or as being a condition to which it was subject. The policy, in my opinion, was *primâ facia* a completed instrument in the hands of the plaintiff, a valid deed under the seal of the defendants, and signed as their act of incorporation required, and as such it estopped them from denying the payment of the premium for which a receipt and discharge was contained in the body of the policy. It was, however, competent for

(1) 13 Q. B. 196. (2) Moore 679.

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the defendants to shew that the policy had never been delivered, and that it had come into the possession of the assured in such a way that it never was the deed of the defendants, and, in fact, never was a completed instrument,

The question is, do they sufficiently shew this? The evidence relied on to establish the non-delivery is that of the defendants' late agent at *Halifax*, Mr. *Allison*. He swears that the premium never was paid. This, however, is not the vital question, for, although the premium never was paid, the defendants might be bound by the policy, and the question of payment or non-payment is only important as bearing on the fact of delivery. But then Mr. *Allison* adds, that for the reason that the premium never was paid he had not countersigned the policy, but had retained it in his hands until the month of May, 1873, when he had handed it to the assured that he might read the conditions; and he says he did not "deliver it as a binding contract, and did not on that account countersign it." Now, this is clear and positive evidence from a party who must have known all the facts, and who is not directly interested, and, moreover, evidence confirmed by the state of the instrument itself, which, however technically complete as a deed, as I think it was, still appears upon its face never to have received the additional sanction of the countersigning, which, it is apparent, was intended should be given to it, and which the witness tells us he withheld for the express purpose of not making it a binding instrument, a very natural reason for finding the policy in the state in which it is now produced. In short the witness swears that the policy never was delivered because it was never paid for; that it was lent to the assured to read the conditions, and he points to the unsigned memorandum,

which it was his duty to countersign, as proof confirmatory of his testimony.

Then I cannot agree with the learned judge below that this explicit statement is to be overthrown because the plaintiff and two witnesses, to whom the learned judge gives credit, impeached Mr. *Allison* on a collateral point by proving that they saw the policy in the hands of the deceased in the preceding November, 1872, whilst Mr. *Allison* says he retained it in his possession until May, 1873. There may be a mistake on one side or the other as to the dates, but, assuming that the mistake is Mr. *Allison's*, this does not show that he is in error when he says "the premium on this policy "was never paid. I never delivered it to take effect as "an executed instrument, and I know that this is so "because I did not countersign it as I should have done "if I had delivered it as a completed policy." I think the learned judge attributed too little weight to the fact that this policy had not been countersigned, not as a matter of law, but as a fact confirming the testimony of *Allison* and giving it a great preponderance over that of the plaintiff's witnesses.

I think this appeal should be allowed, but I am not inclined to give costs, and I think it should, therefore, be without costs, and a new trial should be granted without costs in the court below.

FOURNIER, J. :—

L'intimé, en sa qualité d'administrateur de la succession de *W. A. O'Donnell*, son fils, décédé *ab instestat*, réclame la somme de $3,000, montant d'une police d'assurance émise par l'appelante sur la vie du dit *W. A. O'Donnell*. Pour rendre cette police obligatoire du 1er octobre 1872 au 1er octobre 1873, la prime à payer était de $48.06. Cette police fut envoyée de *Toronto* à un M. *Allison*, agent de la compagnie à *Halifax*, qui

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devait, après avoir touché le paiement de la prime, contresigner la police et la délivrer à qui de droit. Le contreseing de l'agent n'y a jamais été apposé.

A cette demande, la compagnie a opposé comme moyens de défense le défaut de paiement de la prime et l'omission du contreseing de l'agent.

Quant au paiement de la prime, il n'y en a pas d'autre preuve que la déclaration contenue dans la police elle-même, qui est signée, scellée et revêtue de toutes les formes exigées par l'acte d'incorporation de l'appelante (34 Vict., ch. 54) pour en former un contrat parfait. Quelques jours après le décès de l'assuré, cette police a été trouvée dans ses papiers. L'intimé s'étant adressé à l'agent pour obtenir le paiement de l'assurance, celui-ci lui répondit qu'il aurait à télégraphier à la compagnie et lui demanda de revenir dans une semaine—ce que fit l'Intimé ; mais l'agent n'ayant pas eu de réponse de la compagnie, lui demanda encore de revenir dans une autre semaine. Ce n'est qu'à la troisième visite à l'agent que l'intimé reçut pour la première fois avis que le paiement de la prime était mis en question. N'est-il pas étrange que cette prétention n'ait pas été émise à la première entrevue. Quelle nécessité y avait-il d'en référer au bureau principal pour constater ce fait. La seule explication que l'on puisse en donner, c'est que l'agent n'avait pas foi dans la régularité de ses livres ; que n'y trouvant pas l'entrée de la prime qu'il avait reçue, il a pensé alors qu'il l'avait transmise au bureau et qu'il en trouverait là la preuve. Cette preuve faisant défaut, il a cru devoir s'en rapporter à ses livres pour déclarer que la prime n'avait pas été payée et que la police n'avait été remise que pour examen. Mais que vaut cette preuve contre la déclaration contenue dans la police ? En admettant même quelle fut admissible et légale, il est clair que reposant uniquement sur la déclaration d'un témoin formellement contredit dans

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une des parties principales de sa déposition, cette preuve est insuffisante. Si l'agent *Allison* se trompe ou manque a la vérité lorsqu'il dit qu'il n'a remis la police que pour examen ; dit-il plus la vérité ou ne se trompe-t-il pas aussi lorsqu'il dit qu'il n'a pas touché la prime. Lorsqu'il dit qu'il était en possession de la police dans le mois de mai 1873, son erreur est incontestable. Il est contredit par le père de l'assuré qui a vu cette police entre les mains de son fils le 29 novembre 1872. Il l'est également par *John MacDonald* qui dit aussi l'avoir vue entre les mains du défunt dans l'automne de 1872 ; il l'est encore par *E. C. Mumford* qui se trouvait avec *MacDonald* lorsque le défunt leur montra sa police. On peut conclure avec certitude de ces témoignages que la police était entre les mains de l'assuré dans l'automne de 1872. Elle ne pouvait donc pas être entre les mains d'*Allison* dans le mois de mai 1873, à moins de lui avoir été rendue par *O'Donnell*, qui l'aurait ensuite, après l'accomplissement de toutes les conditions, reçue une seconde fois des mains d'*Allison*. Je ne vois d'autre conclusion à tirer de ces faits que celle que la police a été remise comme un contrat obligatoire de part et d'autre, et comme elle fait preuve du paiement de la prime, je crois que l'Intimé a établi son droit de réclamer le montant de l'assurance. On a voulu tirer argument contre lui du fait qu'il s'est déclaré prêt à payer la prime, mais cela ne peut tirer à conséquence. On conçoit qu'il ne pouvait guère avoir de doute sur le fait du paiement. C'est lui-même qui en avait compté le montant exact à son fils qui partît avec cette somme et revînt avec la police. Il devait naturellement croire que le paiement avait été fait. S'il offrait de payer une seconde fois, ce n'est donc pas parce qu'il voulait remédier au défaut de paiement, mais plus tôt pour éviter les conséquences de l'erreur de l'agent. Le sacrifice qu'il aurait fait était insignifiant comparé au bénéfice

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qu'il lui aurait assuré. Concluant de toutes les circonstances de cette cause au paiement réel de la prime, je crois inutile de m'occuper de la question de savoir si les autorités justifient la proposition que même dans le cas où la prime n'aurait pas été payée, la remise d'une police en règle contenant la déclaration de paiement, la compagnie n'aurait pu prendre avantage de ce défaut.

L'autre moyen opposé à l'intimé est l'omission du contreseing de l'agent, qui devait être mis au bas de la note suivante qui se trouve au dos de la police :

This policy is not valid unless countersigned by agent at countersigned this day of

Agent.

La condition de nullité comprise dans cette note n'est ni signée par le président et le gérant général de la compagnie, ni revêtue du sceau de la compagnie, qui, en vertu de la 16e sec. de l'acte d'incorporation, sont les conditions requises pour la validité d'une police d'assurance. Une condition de cette importance ne peut être rendue obligatoire sans l'accomplissement de ces formalités, à moins d'être insérée avec les autres conditions dans le corps de la police. Dans ce cas, comme la police est revêtue de toutes les formalités voulues par la 16e sec., cette condition serait devenue obligatoire comme les autres. Les pouvoirs donnés au bureau de direction par la ss. 7 de la sec. 13 de l'acte d'incorporation sont assez étendus et généraux pour conférer à la compagnie le droit de faire de cette formalité du contreseing une condition de la validité de la police, bien que cette condition ne puisse avoir d'autre effet que d'assurer à la compagnie un contrôle plus complet sur ses agents. Mais il n'est pas établi en preuve que cette formalité ait été exigée par aucun règlement du bureau de direction, ni qu'elle ait été mise au dos de la police par son ordre comme une condition de sa validité. Pour ces motifs, je suis d'avis que l'appel doit être rejeté avec dépens.

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HENRY, J.:—

The main question raised by the counsel of the appellants was upon the point of evidence given on the trial on their part that the premium had not been paid. That evidence, supplied only by the local agent of the company, was substantially contradicted by three witnesses, and the learned judge who tried the case decided in favor of the respondent. The policy acknowledges the receipt of the premium and to negative such receipt clear and satisfactory evidence is required; such, in my opinion, has not been given, and I could not under such circumstances feel justified in reversing the finding of the learned judge. It is, however, also denied that the policy was delivered and the contradictory evidence on that point was resolved by the learned judge also in favor of the respondent, and I think properly so for the reasons given by my learned brother *Fournier* in his judgment read to-day. I agree with my learned brother *Strong* that the failure of the agent to countersign the policy cannot be raised to invalidate it. The point as an objection was only incidentally referred to in support of the contention that the premium had not been paid and that the policy had not been delivered.

I think the appeal should be dismissed and the judgment below affirmed with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

I think a new trial should be granted in this case. The defendants plead among other pleas: 1st. That the policy declared upon is not their deed; and 2nd. That the premium payable on the policy was never paid by *Wm. A. O'Donnell*, deceased, in his life time nor any one on his behalf.

The defendants have, therefore, put the plaintiff to

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legal proof of the execution and delivery of the policy, and the question is was the policy which was declared upon executed in the manner required by law to be binding upon the company, defendants, and so executed was it ever delivered to *Wm. A. O'Donnell*, in his life time, or to any one on his behalf with the intention of its being finally binding upon the company as a policy completely executed? If not issued by the company with the intention of being finally binding upon them, there is not, as is said by Mr. Justice *Blackburn* in *Xenos* v. *Wickham* (1), any magic in the law to make it binding contrary to their intention.

The defendants are a company incorporated by the Dominion Statute 34 *Vic.*, ch. 54, by which Act it is provided that the head office of the association shall be in the city of *Toronto*, and that the company should have a common seal. They were empowered also through a board of directors to make by-laws, rules and regulations for (among other things) the issuing of policies and in what form and with what conditions, restrictions and limitations; and it was enacted that all policies of insurance should be sealed with the common seal of the association, and should be signed by the president or a vice-president and the general manager or such officer as the general board may appoint for that purpose. The policy which was declared upon when produced purported to have the signature of a person signing it in the character of president, and of another purporting to be signed in the character of general manager. It also had a seal attached to it, but the plaintiff offered no evidence of the fact of the execution of the policy either under the common seal of the company or by the persons competent to sign policies on behalf of the company.

The document produced had no attestation clause

(1) L. R. 2 H. L. 314.

purporting that it was "signed, sealed and delivered," in the presence of any one, but in lieu thereof there was printed near the place where such clause is usually inserted, and opposite the names of the persons signing as president and general manager; and on one side also of the seal attached to the instrument the following clause: "This policy is not valid unless countersigned "by ———, agent at———;" and underneath, the place for countersigning, is indicated thus: "Countersigned "this———day of———

"———, agent."

Now, this printed matter appears to me to be as much authenticated by the seal and signatures attached to the instrument as is any other matter in the instrument, and although the blanks are not filled up so as to define precisely the person and place by whom and where the countersigning was to be done, it amounts to a declaration made by the parties, whose names are to the instrument, that before the policy could become a valid instrument, binding upon the defendants, it should be countersigned by some person filling the character of agent of the defendants at some place; and as the head office of the company was situate at *Toronto*, where the seal of the company is kept, and as the application of *O'Donnell* for the insurance was made to an agent of the company at *Halifax*, whose business would be to receive the premium, *O'Donnell* could have had no difficulty in understanding that the person to countersign the instrument, in order to give it validity, was that agent through whom he had applied for the insurance.

The only evidence which the plaintiff offered to disprove the defendant's plea, that it was not their deed, was the mere production of the policy with the above declaration printed alongside the signatures and seal which appeared attached, and evidence that the instrument in this condition was found among the

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papers of the deceased, *M. A. O'Donnell*, in whose possession it had been seen during his life.

The defendants, however, produced as a witness a Mr. *Allison*, their agent at *Halifax*, who had applied for the policy for *O'Donnell*, and he proved that the policy had been sent to him from the head office at *Toronto*, and that he held it in his hands as an *escrow*, not to be issued or delivered to *O'Donnell* until the premium should be paid, and he, *Allison*, should countersign the policy; and he swore that the premium never was paid, and that for this reason he never did countersign the policy; that he never issued it as a policy binding upon the defendants, but had let the deceased have it to read the conditions, and that as a fact the policy was never delivered to him as a contract. The only evidence relied upon to defeat this positive evidence, is the inference relied upon as proper to be drawn from the fact of *O'Donnell* having had the policy in his possession in his lifetime and until his death. This evidence is, in my opinion, quite insufficient for the purpose. I think it is sufficiently clear, upon the evidence, that the instrument was delivered as an *escrow* to *Allison* not to be delivered as a binding policy to *O'Donnell* until the premium should be paid, and until *Allison* should, in testimony thereof, countersign the policy; and that as these conditions have not been proved to have been fulfilled, there is no sufficient evidence to divest the instrument of its original character as an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

I think, therefore, the appeal should be allowed, and a new trial ordered, with costs. The exigencies of the defendant's business as a company, whose head office is at *Toronto*, make it not only reasonable, but necessary, that they should protect themselves

in this manner when they send policies to be issued at a remote agency; and the necessity for pursuing this course, and the object of the notice printed, as this is, alongside the signature, must be well understood by all persons effecting policies through agents.

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Appeal allowed with costs. Gwynne, J.

Solicitor for appellants: *C. H. Tupper.*

Solicitor for respondent: *John L. D. Thompson.*

SARAH MARIA GRASETT (PLAINTIFF)..APPELLANT;

AND

JOHN CARTER (DEFENDANT).....RESPONDENT.

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*Mar. 13.

1884

*June 16.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.

T. was the owner of lot 9, and *C.* was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. *F.* being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked *C.* where he claimed his northern boundary was. *C.* pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, *C.* not objecting. A few days afterwards, *T.*, with his architect and builder, went on the ground, and, in the presence of *C*, the builder again marked out the boundary by means of a line connecting the surveyor's marks, *C.* not objecting. Excavating was commenced according to that line immediately, and *T's* house was built according to the line

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