1910

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC AND THE MARITIME PROVINCES (DEFENDANT) ..... APPELLANT;

*Nov. 28, 29.
*Dec. 23.

AND

ELIZABETH A. TURNER (PLAINTIFF) ..... RESPONDENT.

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

Benefit association—Life insurance—By-laws and regulations—Transfers between lodges—Member in good standing—Regularity of affiliation—Payment of dues and assessments—Evidence—Presumption—Waiver.

Where the constitution of a benefit association provides that members shall not be transferred from one lodge to another unless all dues and assessments have been paid, up to and including those for the month in which the application for affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against the association that the transfer was regularly made when the member was in good standing and in accordance with the regulations.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Review, which reversed the judgment of the Superior Court, District of Montreal, at the trial, and maintained the plaintiff's action with costs.

The late J. A. Farlinger was a member of Valleyfield Lodge and, in January, 1894, entered into a con-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff and Anglin JJ.

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

tract of life assurance with the Order, for the benefit of his wife, for $2,000, on the assessment plan. In December, 1905, he applied, in accordance with the rules of the Order, for a "clearance card" or certificate which would entitle him to have his membership transferred to another lodge, known as the Longueuil Lodge. By the Constitution of the Order no such certificate could issue nor could such a transfer be effected unless the member requesting it was in good standing and had paid all dues and assessments up to and including those for the month in which his application was made. He received the necessary certificate from the defendant and, on the 2nd of June, 1906, applied for affiliation and was transferred to the Longueuil Lodge. He paid his dues and assessments to that lodge, from month to month, up to the time of his death on the 19th of November, 1906. The claim by his widow, the plaintiff, was resisted by the Order on the ground that at the time of the transfer, on 2nd June, 1906, Farlinger had not in fact been a member in good standing as he was then in arrears for dues and assessments which should have been paid to or through the lodge to which he had previously belonged; that he was under suspension at the time of his death, and, consequently, that, by the conditions of the policy, the Order was relieved of obligation to pay the amount of the insurance. The plaintiff's action was dismissed at the trial in the Superior Court, District of Montreal, but that judgment was reversed on an appeal to the Superior Court sitting in review. The judgment now appealed from affirmed the judgment of the Court of Review.

The issues on the present appeal are stated in the judgments now reported.

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

T. P. Butler K.C. and *Aimé Geoffrion K.C.* for the appellant.

Atwater K.C. and *J. Wilson Cook* for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I am disposed to agree with the trial judge that the October assessment was not paid and the deceased was not a member in good standing at the time of his death. I am confirmed in this impression by the failure of the respondent to produce the receipts for July, August, September and October, and the attempt to make a payment after her husband's death. The month for which each of these payments was made must have appeared on the face of these receipts. The presumption is that they were in the possession of the respondent with the policy, and, if not, their loss has not been accounted for nor explained satisfactorily. The highly technical nature of some of the features of the defence, such as the denial of liability on the contract because made in the first instance with the Ontario lodge, and the fact that the deceased is alleged secretly to have joined a lodge in that province, is calculated to prejudice one against the meritorious part of it. The evidence as to suspension in November, 1906, is not as satisfactory as it should be. On the whole I think the appeal should be allowed but do not dissent as the two intermediate courts of appeal have come, on this question of fact, to a contrary conclusion in which my learned brothers concur.

GIROUARD J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated in the court below.

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

Idington J.

DAVIES J.—I agree that the appeal should be dismissed with costs for the reasons stated by my brother Anglin.

IDINGTON J.—The deceased, Farlinger, having received the letter of the 4th July, 1906, telling him he could "forward the next and future assessments" to the financier of Longueuil Lodge, and, in the same letter, a certificate of his transfer to said lodge which could only issue on the faith of all pending and past assessments having been paid, must be taken to have made such payments and to have relied thenceforward upon that and the direction as to the next assessments, unless it is established all this was clearly erroneous. The dates of his later payments are in accord therewith.

If we are to assume these dates are respectively applicable to prior months, then his insurance, at least twice if not three times, had so elapsed that he could have been reported as in default, yet that does not seem to have been done till the 9th of November, 1906.

And, curiously enough, on the 20th of November, 1906, a postal card was addressed to him by the financier notwithstanding this reported default, reminding him his assessment No. 11, *i.e.*, for 1st November, would be due on the 28th, and requesting him to pay "before that date, in order to avoid suspension," when in fact, if report well founded, he was already under a suspension from which he could only be relieved by being able to satisfy onerous specified conditions.

The man died on the 19th of November. There is

nothing in all this late report and the sequel thereto directly in law affecting the issues raised.

But, when we are asked to reject the strong case made by the facts above stated and upon which the courts below, other than the Superior Court, have rested judgment, we must ask ourselves if we can because, and simply because, the numbers of the assessments for which the same financier, making his grotesque mistakes just referred to, gave credits, can be held to overbear the case made. I think not. I may suspect that there being so many irregularities the affiliation of deceased with Longueuil Lodge was also founded on an irregularity. In fact, that is what is now in effect, though not admittedly so, claimed to have taken place.

We are asked to hear the evidence of the Grand Recorder to shew that a payment made in June was in respect of what was due for May, and thus leave a pending assessment, on the 1st of June, unpaid and outstanding at the time he was admitted to the Longueuil Lodge, notwithstanding the express prohibition apparent on the face of his clearance card against such a thing being done.

In answer to the motion to admit here and now such evidence, I do not think, even if we have the power to do so (relative to which I say nothing), it would be in accordance with the due administration of justice to exercise such a power.

And, on the case as it stands, I think the appeal should be dismissed with costs.

DUFF J.—At the trial it was assumed, and on that basis argument before this court proceeded, that the Longueuil Lodge, in its reception of the deceased, John

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

Duff J.

Augustus Farlinger, as a member, was governed by the provisions of article 188 of the constitution of the society. By the provisions of that article he could not become a member without first paying all the "dues and assessments" for, *inter alia,* the month in which his application was made. It was admitted at the trial that his application was made on the 2nd of June; and, the fact of his election is, therefore, *primâ facie* evidence that the June payments were made on that date at the latest. So far (as against the society) the presumption of regularity in their proceedings will carry us.

This *primâ facie* case has not been met; and, as four subsequent payments were made, it follows that the last of them must be attributed to the month of October, and, consequently, that Farlinger was in good standing at the date of his death.

ANGLIN J.—At the opening of this appeal the appellants applied, under section 98 of the "Supreme Court Act," to be allowed to supplement the evidence in the record by a further examination of one Patterson, Grand Recorder of the Grand Lodge, A.O.U.W. of Quebec, who had given evidence at the trial. Assuming that section 98 confers power on this court, in a proper case, to entertain such an application — having regard to its history, its collocation and the cases in which it has been considered, I think it does not — in the exercise of a sound discretion the present motion should be refused.

The purposes of the proposed re-examination of the witness would be to establish that, when he was received into Longueuil Lodge on the 2nd or 4th of June, 1906, the deceased, Farlinger, still owed the

assessment which fell due on the 1st of June. The materiality of this question was made apparent in the plaintiff's factum prepared for the Court of Review. The basis of the judgment of that court was its holding that Farlinger had paid this assessment before his admission into Longueuil Lodge. Again in the Court of King's Bench, the principal contest was about this point and the opinion of the judges of that court, confirming the judgment of the Superior Court in Review, proceed on the specific finding that Farlinger had paid the June assessment before his election to Longueuil Lodge. Either in Review or in the Court of King's Bench the appellants might have asked to be permitted to supplement their proof as they now desire. Certainly in Review, and, I think, also in the Court of King's Bench, their application, if made, could have been entertained and given effect to. Articles 1208 and 1248, C.P.Q. No such application was made. In these circumstances, if this court had the discretionary power which the appellants invoke, their application would be entirely too late. Moreover, the evidence which it is now sought to introduce might have been given at the trial. No sufficient excuse is made for the failure to adduce it then. Its materiality and importance upon the distinct issue raised by the fifth paragraph of the plaintiff's declaration should have been apparent. For these reasons, if clothed with such a discretionary power as the appellant invokes, the court should refuse to exercise it on this appeal.

The ground on which the appellant resists the payment of the plaintiff's claim is that, at the time of his death, on the 19th November, 1906, Farlinger was properly under suspension for non-payment of the

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

Anglin J.

October assessment. He paid assessments to Longueuil Lodge on the 3rd July, the 2nd August, the 31st August, or the 6th September (it is not quite clear on which date this payment was actually made), and the 5th of October. If he had paid his June assessment before admission to the lodge his payment on the 3rd of July was of the assessment for the month of July; and, in that case, his payment of the 5th of October was of the October assessment, and he was not in default and was not legally suspended.

At bar, this case was treated as within article 188 of the Constitution of the Grand Lodge of Quebec. I shall presently deal with the matter on the assumption that this article applies.

Farlinger had been a member of Valleyfield Lodge, which had been dissolved. His transfer was effected not upon a card issued from this defunct lodge, but upon a clearance card issued by the Grand Recorder under article 213 which expressly provides for such a case. A perusal of articles 185-189 shews that article 188 is not in terms applicable. It deals only with the case of a clearance card issued by the local lodge of which the applicant for election had been a member. It requires that before electing as a member a person so transferred the lodge to which he has applied for admission shall ascertain by inquiry from the local lodge which granted his clearance card that

> all lodge dues and assessments have been paid by the brother holding the card up to and including the month in which the application is made.

The constitution contains no corresponding provision governing the case of the transfer of a member of a defunct lodge under clearance card issued by the Grand Recorder. The card issued by that officer to Farlinger contained these clauses:

That he must pay all assessments for which he is liable, to the Grand Recorder of the Grand Lodge of Quebec, A.O.U.W., *until he is elected* a member of some subordinate lodge of the order.

That no lodge has any right to accept this card after it has expired, nor to elect the member holding this card until officially notified by the Grand Recorder, signing this card, that all *pending* and past assessments have been paid.

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC *v.* TURNER.

Anglin J.

This latter provision is, I think, at least open to the construction that, before electing Farlinger as a member, Longueuil Lodge should have obtained from the Grand Recorder an official notice that he had paid all past assessments and the assessment which was then, *i.e.*, at the time of his election, "pending." If so, the very fact of his election on the 2nd or 4th of June, which is conceded, raises a strong presumption —conclusive in the absence of proof to the contrary— that the June assessment had been duly paid before he was admitted to Longueuil Lodge.

But, assuming that, in the absence of any other corresponding provision in the constitution governing Farlinger's case, article 188 applies and that Longueuil Lodge, before electing him, was only required to satisfy itself that he had paid the assessment for the month "in which his application was made" and all prior assessments, upon the evidence in the record the result must be the same.

The Superior Court in Review and the Court of King's Bench have both found that Farlinger made application for admission to Longueuil Lodge on the 2nd of June. The evidence supports this conclusion. It includes the following letter:

MONTREAL, June 4th, 1906.

J. A. Farlinger, Esq.,
Morrisburg, Ont.

Dear Sir and Bro.:

In accordance with your letter of 2nd inst. I have arranged for your transfer to Longueuil Lodge, No. 21. The Financier of that

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

Anglin J.

Lodge is A. P. Pigeon, No. 1595 Ontario St., Montreal, to whom you can forward *next* and future assessments, also lodge dues of 40c. per month, which includes your capita tax.

I enclose your receipt, also certificate indorsed as being transferred to Longueuil Lodge.

Yours fraternally,
A. T. PATTERSON,
Grand Recorder.

On examination, Mr. Patterson said:

Q. Then the statement in paragraph number five of the plaintiff's declaration to the effect that on the 2nd of June, 1906, the said Farlinger requested that he be transferred to and made a member of the Longueuil Lodge, Number 21, which said request was granted, and said transfer duly and properly made, is correct? A. Yes, as far as I know.

There is no other evidence in the record bearing upon the date of Farlinger's application for admission to Longueuil Lodge.

For the appellant it is contended that the provisions of the constitution cannot have been complied with if Farlinger was admitted on the 2nd or 4th of June on an application made on the 2nd of June. They, therefore, maintain that it must be assumed that this application was in fact made in the month of May. No doubt, in the ordinary course of events, some days would elapse between the receipt by a lodge of an application for transfer and the election of the applicant. But, as pointed out by Mr. Justice Archambault, there is nothing in the requirements of the constitution which would prevent an election within a few hours of the receipt of the application, where the Grand Recorder's certificate that all assessments due, including that of the current month, have been paid by the applicant, is immediately available. In the present instance, Farlinger appears to have made his application through the Grand Recorder himself, who happened to be also a member of Longueuil Lodge.

This would, no doubt, facilitate the taking of the requisite steps preliminary to a regular and valid election. We have no evidence of the actual procedure followed by Longueuil Lodge. The appellant had that evidence in its own hands and should have furnished it if it would have shewn an application by Farlinger earlier than in June. Since it is quite possible that making application on the 2nd of June Farlinger could have been duly elected on that day or on the 3rd or 4th of June without violation or disregard of any provision of the constitution, there is no ground for the conclusion, urged by the appellant, that his application must have been made in the month of May, notwithstanding the indication of Mr. Patterson's letter and his oral testimony above quoted that it was made in June.

Not only is it impossible on the evidence before us to say that the Superior Court in Review and the Court of King's Bench were clearly wrong in holding that the application of Farlinger was made on the 2nd of June—as we must be prepared to do if we would reverse them: *Demers* v. *Montreal Steam Laundry Co.* (1); on the contrary, from that evidence, in my opinion, no other conclusion can legitimately be drawn.

If article 188 of the constitution was applicable either by analogy, or by reason of some practice of the order, under the maxim *omnia præsumuntur rite esse acta,* it must be assumed that before electing Farlinger Longueuil Lodge ascertained that all dues and assessments had been paid by him up to and including the month in which his application was made. In the absence of convincing proof to the contrary (the record contains none at all) this suffices to establish

(1) 27 Can. S.C.R. 537.

1910

ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER.

Anglin J.

that Farlinger had paid his June assessment before he became a member of Longueuil Lodge. If that be the case, his subsequent payments were applicable to the months in which they were respectively made—treating that of the 31st August or the 6th of September as having been made in September. It follows that he duly paid his October assessment and that, at the time of his death, he was not in default and not under suspension, but was a member of the order in good standing.

The appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *T. P. Butler.*
Solicitors for the respondent: *Cook & Magee.*