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*Mar. 29.

EMMA JANE McGEACHIE (PLAINTIFF) APPELLANT;

AND

THE NORTH AMERICAN LIFE INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.

A condition in a policy of life insurance provided that if any premium, or note, etc., given therefor, was not paid when due the policy should be void.

Held, affirming the decision of the Court of Appeal, that where a note given for a premium under said policy was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void.

Held further, that a demand for payment after the maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2) and restoring that of Street J. at the trial by which the plaintiff's action was dismissed.

The plaintiff was the widow of one Robert McGeachie who was insured with the defendant company in the sum of $1000. The action was brought to recover that amount and interest.

The facts of the case are not in dispute. The policy of insurance upon the life of Robert McGeachie was issued by the defendants on the 6th day of December, 1889, and he died on the 6th day of November following (1890). The amount of the insurance premium

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

(1) 20 Ont. App. R. 187. (2) 22 O. R. 151.

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was $31.10 annually. This amount was not paid to the defendants in cash upon the issuing of their policy but by agreement with the plaintiff the defendants accepted instead the promissory note of Robert McGeachie, at six months, for $31.10, with interest thereon at seven per cent per annum. This note became due on the 7th day of June, 1890. It was not then paid by the maker, but by agreement between him and the defendants a renewal note was taken instead, at thirty days, for the amount of the first note with interest added, $32.20, the second note itself bearing interest also at the rate of seven per cent per annum.

At the maturity of the second note (10th July 1890), $10 cash was paid by Robert McGeachie upon account and a third note at two months given for the balance ($22.40), this third note also bearing interest at seven per cent per annum.

The third note fell due on the 13th September, 1890, when it was renewed at one month by a fourth note, in which the interest was added to the previous amount thus making $22.80.

This fourth note became due on the 16th October, 1890, and remained in defendants' possession overdue and unpaid up to the death of Robert McGeachie, three weeks after the maturity of the note. Upon the death taking place defendants refused to receive payment of the note.

The acceptance of the note in the first place, and of the different renewal notes, was in each case a matter of arrangement and agreement between the parties. During the currency of the second note Robert McGeachie wrote (2nd July, 1890,) to the defendants, asking to have the policy cancelled, but was answered that such a request was unreasonable and could not be entertained.

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After maturity of the last note defendants, on 5th November, 1890, wrote the maker demanding payment of it.

This letter reached St. Catharines on the day on which Robert McGeachie died and was delivered to his brother on the same day. The local agent of the company was at once communicated with and asked if he would accept the money, but refused to do so. On the following Monday, four days later, the amount was formally tendered to the defendants at their head office but was refused.

At the trial of the action at St. Catharines in May, 1891, before the Honourable Mr. Justice Street without a jury, judgment was reserved, and afterwards judgment was given in the defendants' favour. From this decision the plaintiff appealed to the Queen's Bench Divisional Court, and by the judgment of that court, pronounced on the 27th February, 1892, the plaintiff recovered the amount of her claim in this action. Thereupon the defendants appealed to the Court of Appeal for Ontario, and by the judgment of that court pronounced on the 17th January, 1893, the action was dismissed. The plaintiff appealed from that decision to the Supreme Court of Canada.

The defendant company relied on the following condition in the policy.

"If any premium, note, cheque, or other obligation given on account of a premium be not paid when due * * * * this policy shall be void, and all payments made upon it shall be forfeited to the Company."

Aylesworth Q.C. for the appellant. Credit was intended to be given for the premium and under the circumstances the non-payment of the note did not avoid the policy. *Miller* v. *Brooklyn Life Insurance Company* (1)

(1) 12 Wall. 285

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The condition is one of which performance could be waived and waiver will be inferred by the court. *Universal Fire Insurance Company* v. *Block*. (1)

The policy, at all events, was only voidable and the company never elected to avoid it. *McCrae* v. *Waterloo County Mutual Insurance Company*. (2) *Mutual Benefit Life Insurance Company* v. *French*. (3)

Kerr Q.C. for the respondents was not called on.

FOURNIER J.—I am of opinion that it is not necessary to hear counsel for respondents, and that the appeal should be dismissed.

TASCHEREAU J.—I am of the same opinion. After hearing the able argument advanced on behalf of the appellant I am not convinced that the policy existed at the death of the assured, if it ever existed. The appeal should be dismissed.

GWYNNE J.—The first condition of the policy was quite sufficient to entitle the company to claim that the policy was void for non-payment of the premium. It was paid by a promissory note which enabled the policy to issue, but it was agreed that if the note was not paid the policy was to be void, or, if not void, voidable and I do not think it would aid the appellant to hold that it was only voidable. I agree with the judgment of the Chief Justice of the Court of Appeal and would dismiss this appeal with costs.

SEDGEWICK J.—I am also of opinion that the appeal should be dismissed.

KING J.—The note was taken as conditional payment of the premium and until it matured the policy was

(1) 109 Penn. 535 (2) 1 Ont. App. R. 218.
(3) 2 Cinn. (S.C.) 321.

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valid, but when it matured and was not paid it came within the first condition and made the policy void. I think the term void in that condition means voidable. The stipulation was for the benefit of the company who had a right to elect whether it should be void or not. Then, was anything done to show an intention on the part of the company that the policy should continue notwithstanding the breach of the condition? I cannot see that what was done was equivalent to an expression of any such intention. The insured had had eleven months of protection under the policy and I cannot see that the request for payment of the note would operate as a waiver of the forfeiture.

I agree in the appeal being dismissed.

*Appeal dismissed with costs.**

Solicitors for appellant: *Rykert & Marquis.*

Solicitors for respondents: *Kerr, Macdonald, Davidson & Paterson.*

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*On May 22d, 1894, an appeal in the case of *Frank* v. *The Sun Life Assurance Company* was argued before the Supreme Court. In that case the policy contained no provision that it was to be void if the premiums were not paid. The first premium was paid by two agreements in the form of promissory notes maturing at different dates and each providing that the policy was to be void if it was not paid at maturity, when the assured died the first agreement was overdue and unpaid and the second had not matured. The court, without reserving judgment, dismissed an appeal from the decision of the Court of Appeal [20 Ont. App. R. 564] holding the policy void.