

THE SUPREME TENT KNIGHTS
OF THE MACABEES OF THE } APPELLANTS; 1898
WORLD (DEFENDANTS) } *Oct. 27, 28.

AND

HARRIET HILLIKER (PLAINTIFF).....RESPONDENT. 1899
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Feb. 22.

*Life insurance—Benefit association—Payment of assessments—Forfeiture—
Waiver—Pleading.*

A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived.

Held, reversing the judgment of the Court of Appeal, that the waiver not having been pleaded it could not be relied on as an answer to the plea of non-payment. *Allen v. Merchants Marine Ins. Co.* (15 Can. S. C. R. 488) followed.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division of the court, the judgment at the trial in favour of the plaintiff.

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

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The respondent is the widow of the late Asa E. Hilliker, who, on the 11th day of December, 1894, applied for membership into plaintiff's Order in Norwich Tent, no. 143, located at the Village of Norwich, in the Province of Ontario, and was duly admitted a member on the 31st day of December, 1894; and the benefit certificate sued on in this action for the sum of \$3,000 payable to the respondent in case of the death of her husband was then issued by the appellants on that day. Asa E. Hilliker on the 21st of August, 1895, was killed by a railway train near the Village of Norwich. At the time of his death Hilliker was suspended under the rules of the society for non-payment of two assessments and to the respondent's action on the benefit certificate this suspension was pleaded and also misrepresentation in the application for membership, it being alleged that deceased was of intemperate habits, though in his answers to questions in said application he had stated that he never used intoxicating liquors to excess and had not been intoxicated during the preceding year.

On the trial a non-suit was refused and the jury gave a verdict for plaintiff finding in answer to questions submitted that there had been no misrepresentation as alleged. On appeal to the Court of Appeal the verdict was sustained by an equal division of the judges.

The non-payment of assessments was admitted by respondent who maintained, however, that the consequent forfeiture had been waived by the society.

Paterson for the appellant referred to *Fitzrandolph v. Mutual Relief Society of Nova Scotia* (1); *Venner v. Sun Life Ins. Co.* (2); *Peet v. Knights of Macabees* (3).

(1) 17 Can. S. C. R. 333.

(2) 17 Can. S. C. R. 394.

(3) 83 Mich. 92.

Ball Q.C. and *Ball* for the respondent cited *Thomson v. Weems* (1); *Gravel v. L'Union St. Thomas* (2).

The judgment of the court was delivered by :

GIROUARD J.—This case is a simple one of life insurance. At the argument, however, the respondent has complicated it by raising numerous questions which do not come up under the issue between the parties.

The appellants are a friendly or benefit association, duly incorporated under the laws of the Province of Ontario, with power to issue benefit certificates to its members. There is a General or Supreme Tent, which is the governing body, and there are subordinate tents, which are called the local tents. On the 11th of December, 1894, Asa E. Hilliker, cattle drover, applied for membership to the local tent, known as Norwich Tent, No. 143, located at the Village of Norwich, in the Province of Ontario, and was duly admitted a member on the 31st December, 1894, and a benefit certificate for the sum of \$3,000 payable to his wife, the respondent, in case of his death, was then issued by the appellants.

On the 21st of August, 1895, Asa E. Hilliker was killed by a railway train near the village of Norwich. Hence the present action by the respondent against the appellants, in which she alleges :

5. The said Asa E. Hilliker was assessed by the defendants for the said insurance at the rate of fifty cents per thousand dollars per month, and also some months a double assessment was made by the defendants, all of which assessments were regularly and duly paid, as well as his entrance fees, by the said Asa E. Hilliker to the proper officer appointed by the defendants to receive the same, except the last assessment, which was not due and payable until after the death of the said Asa E. Hilliker.

The appellants pleaded : 1st. Misrepresentation by deceased in his application for membership as to his

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drinking habits. 2nd. Non-payment of dues and assessments, and more particularly of the double assessment Nos. 114 and 115, due May, 1895, monthly assessment No. 116, due June, 1895, and monthly assessment No. 117, due July, 1895.

The case was tried at Woodstock on the 22nd of March, 1897, before Chancellor Boyd and a jury. At the close of the plaintiff's case, the defendants moved for a non-suit, but the learned Chancellor refused the motion and allowed the case to go to the jury, who returned a general verdict against the appellants for the full amount of the certificate. Judgment was accordingly entered against them for \$3,000 and costs.

In appeal, the case was heard before four judges, who were equally divided, Burton C. J. and MacLennan J. being in favour of the appellants, and Moss and Osler JJ. against.

The evidence is contradictory as to the drinking habits of the deceased at the time of his application, and the non-payment of the double assessments Nos. 114 and 115, and we may fairly accept the findings of the jury in these particulars. But there is no dispute as to the non-payment of the monthly assessments Nos. 116 and 117; they were payable at fixed dates under the regulations of the association (Rule 182) which form part of the certificate and provide that

any member failing to pay the monthly assessment within thirty days from the date thereof shall stand suspended from all the rights and benefits of a beneficial member of the order.

The non-payment of these two monthly assessments is admitted by the respondent in her evidence; the most she can say is that her husband paid no. 116, but she did not see him do it. She admits that no. 117 was not paid. All the witnesses, who are in a position to know, agree that these two monthly assessments were not paid, and the fact is even conceded by the

respondent's counsel, both in his factum and at the hearing before us. He endeavours to meet the plea of non-payment of these two monthly assessments by alleging various facts and circumstances which, if well founded, would amount to a waiver of forfeiture of the certificate, for instance, that no notice of the call of said assessments was given; that at all events the deceased was entitled to a notice that he was in arrears; that he had been illegally suspended for non-payment of assessments; and finally that the local Tent of Norwich was suspended from June 1st to August 5th, and that in consequence it was impossible for him to make any payment. Mr. Justice Maclellan, in his elaborate opinion, clearly demonstrates that all these excuses are without foundation, and I have no hesitation in agreeing with him. But the judgment of this court is based upon another ground, namely that the facts and circumstances which are invoked as grounds of waiver of forfeiture of the certificate should have been pleaded by the respondent. The reason why the last assessment, probably no. 118, and clearly that due 1st to 31st August, was not paid, is set forth in the statement of claim, but nothing more. There is no such issue raised on the record as the one pressed by the respondent's counsel; and following the decision of this court in *Allen v. The Merchant's Marine Ins. Co.* (1), we are of opinion that the appeal must be allowed. The motion for a non-suit is therefore granted and respondent's action dismissed with costs before all the courts.

*Appeal allowed with costs.*

Solicitors for the appellants: *Kerr, McDonald, Davidson & Paterson.*

Solicitors for the respondent: *Ball & Ball.*

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