GEORGE BROPHY (DEFENDANT).....APPELLANT; 1902

AND *Mar. 20, 21. *May 6.

THE NORTH AMERICAN LIFE ASSURANCE COMPANY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Wager policy—Endowment—14 Geo. 3, c. 48, s. 1, (Imp.) —Action for cancellation—Return of premiums.

If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit and pays all the premiums himself the policy is a wagering policy and void under 14 Geo. 3, ch. 48, sec. 1 (Imp.)

The Act applies to an endowment as well as to an all life policy.

Judgment of the Court of Appeal (2 Ont. L. R. 559) affirmed.

In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation.

Judgment of the Court of Appeal (2 Ont. L. R. 559) reversed, Davies and Mills JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming that portion of the judgment at the trial which ordered the cancellation of the policy and reversing the part which refused to order a return of the premiums.

The facts of the case are thus stated by Armour C.J.O. in his judgment in the Court of Appeal.

"The evidence in respect of the impeached policy of insurance is very plain and simple.

"One Richard Alexander Cromar, a broker and insurance expert as he calls himself, on the 27th of October 1885, wrote to the defendant Brophy, as follows: 'Re

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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the pleasant intercourse we have had in business matters lately, on the condition of your making Mr. A. C., your referee, adviser and broker in any transaction relating to insurance, real estate or monetary investments, I agree and hereby promise to allow you the following rebate or commission on all premiums or amounts paid to any company or institution transacting business in Canada as follows, viz.: Annuity bonds, one-half of one per cent; endowment policies, single premiums, one per cent; endowment policies, annual premiums, ten per cent. On all other transactions the half of commission given me as a general broker. Advice in any matter I will be pleased to give you to the best of my knowledge and ability, gratis.'

"This proposed arrangement was apparently agreed to by defendant Brophy and continued in force until after the impeached policy was effected.

"The defendant Brophy deposed as follows: 'I wanted to know from him the different kinds of insurance, and we had a talk about it two or three times and he was telling me the different plans, and they did not suit me altogether, and I was thinking over that thing one night and wanted to have as little trouble with the business as possible myself, and I was thinking over it one night after we had talked the second or third day, and the next morning I told him what I had been thinking of during the night; that there seemed to be a convenient and easy way for me, and that would be to buy the annuities and let the annuities go for insurance on my life, and he struck the table and said 'that is the best idea I ever heard. I have been a long time doing insurance business, and that never came into my mind before' So he went out of the room where we were, and told the manager then what he proposed, and that he approved

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of so much, and that is the first insurance he did for me.'

"The insurance here referred to was an endowment policy in the New York Life, upon the life of the defendant Brophy, effected in 1885. Shortly before the effecting of the impeached policy the defendant Brophy had an interview with Cromar, and this is the account he gave of it: 'I said I had some more money to put into insurance, and he said 'wouldn't it be much better for you to have a young life? How would it be if I put it on my life?' And he drew out the figures and showed me the difference in the insurance that I would get on his life and on my life, and showed me the advantage of putting it on his life, and that is the way he came to put the insurance on his life.'

"The defendant Brophy thereupon, through Cromar, applied to the plaintiffs for an annuity bond for $300, and Cromar applied for an insurance on his life for an amount, the annual premium for which would be met by the annuity bond, which amount was ascertained to be the sum $6,025.

"The annuity bond was issued by the plaintiffs for the annual sum of $300, payable to the defendant Brophy on the 5th day of March in each year, and the policy of insurance on the life of Cromar for $6,025, in consideration of the annual premium of $300, was issued by the plaintiffs, payable to Cromar on the 5th day of March, 1917, if living, if not, his executors, administrators or assigns. This policy was originally written with premiums payable annually, 20th February, but was altered, making the premiums payable on the 5th day of March in each year, the same day on which the annuity of $300 was payable.

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"The amount charged for the annuity, was ... $2,546 70
And for the premium of insurance.. 300 00
$2,846 70
And from this was deducted one-half of one per cent. on the sum paid for the annuity bond of $12.73, and ten per cent. on the premium of insurance $30.00 ... 42 73
$2,803 97

these deductions being made in pursuance of the arrangement contained in the letter of Cromar of the 27th October, 1885. And for this balance of $2803 97, the defendant Brophy sent his cheque to the plaintiffs."

"Thereafter, until the death of Cromar, who died on the 24th April, 1900, the money payable by the annuity bond was applied in payment of the premiums payable by the policy of insurance."

"On the 13th of March, 1897, Cromar, by assignment under his hand and seal, assigned, transferred and set over unto the defendant Brophy, and for his sole use and benefit, all his right, title and interest in and to the said policy of insurance, subject to all its terms and conditions, expressly reserving to the insured however, sole right and power to make choice of any investment, option or options granted under the conditions of said policy, and personally to receive the full benefit thereof without the consent of any person or persons named therein as assignee or assignees, and that in the event of the death of the said assignee or assignees before the policy became due, then and in that case the proceeds thereof should be payable, when due, to the insured, his executors, administrators or assigns."

"The defendant Brophy said that this assignment was not according to his agreement with Cromar, that by it he was entitled to an absolute assignment, but that he submitted to taking it rather than have any trouble."

At the trial judgment was given in favour of the plaintiff company ordering the policy to be delivered up to be cancelled and dismissing the defendant's counterclaim by which he demanded payment of the amount of the policy and such further and other relief as was necessary and proper. The Court of Appeal affirmed this judgment but varied it by ordering the company to return the premiums paid on the policy with interest. The defendant appealed and the company gave notice of cross-appeal against the order for return of the premiums.

Daniel O'Connell and *Butler* for the appellant. Brophy had only a partial interest in the policy to which the Act 14 Geo. 4, ch. 48, sec. 1, does not apply. *Vezina* v. *New York Life Ins. Co.* (1)

The Act does not apply to an endowment policy. *Simons* v. *New York Life Ins. Co.* (2); *North American Life Ins. Co.* v. *Craigen* (3); *Manufacturers' Life Ins. Co.* v. *Anctil* (4).

In any event the company cannot retain the premiums if the policy is declared void. *Feise* v. *Parkinson* (5); *Dowker* v. *Canada Life Ins. Co.* (6).

Kerr K.C. and *Paterson* for the respondent. As to returns of premiums see *Palyart* v. *Leckie* (7); *Anderson* v. *Fitzgerald* (8).

Return of premiums was not asked by the counterclaim and cannot be ordered. *Knights of Macabees* v.

(1) 6 Can. S. C. R. 30.
(2) 38 Hun. (N.Y.) 309.
(3) 13 Can. S. C. R. 278.
(4) 28 Can. S. C. R. 103.
(5) 4 Taun. 640.
(6) 24 U. C Q. B. 591.
(7) 6 M. & S. 290.
(8) 4 H. L. Cas. 484.

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Hilliker (1); *Allen* v. *Merchants Marine Ins. Co.* (2). The policy is void under the Act. *McFarlane* v. *Royal London Friendly Society* (3); *Evans* v. *Bignold* (4).

TASCHEREAU J.—This is an appeal and cross-appeal from the judgment of the Court of Appeal for Ontario, reported at page 559, vol. 2, of the Ontario law reports.

The appellant, Brophy, appeals from that part of the judgment which decrees the cancellation of the policy and dismisses his counter-claim for the amount thereof, and the company appeal from that part of it which orders them to return the premiums they have received upon it.

I would dismiss the principal appeal. As held by this court in the *North American Life Assurance Co.* v. *Craigen* (5), it is only when a person insures the life of another that the question of interest in that life becomes important, and any one may lawfully *bonâ fide* insure his own life and make the insurance payable to one who is totally without an insurable interest in his life. *Vézina* v. *The New York Life Insurance Co.* (6); *Stuart* v. *Sutcliffe* (7). Here, however, it is plain, by uncontroverted evidence, that the arrangement between the appellant and Cromar was that he, the appellant, who had no interest in Cromar's life, should insure it for his own benefit, he, the appellant, paying the premiums. That it is consequently a wagering policy, immoral in its nature and tendency, and void, as found by the two courts below, is not, in my mind, susceptible of doubt. The evidence satisfies me that this transaction was only a part of a wide scheme between the appellant and Cromar to engage in the wholesale business of speculating on

(1) 29 Can. S. C. R. 397.
(2) 15 Can. S. C. R. 488.
(3) 2 Times L. R. 755.
(4) L. R. 4 Q. B. 622.
(5) 13 Can. S. C. R. 278.
(6) 6 Can. S. C. R. 30.
(7) 46 La. An. 240.

wagering insurances. Counsel for appellant strenuously relied upon the tontine feature of this insurance with the respondents, and the fact that the tontine privileges accrued to Cromar. Some remarks in the opinion of Gwynne J., in *The Manufacturers Life Insurance Co.* v. *Anctil* (1), would appear to give support to the contentions in favour of the appellant on that point, but, in the Privy Council (2), in answer to the argument that as at the end of the endowment period the insured would have a proprietary interest, it was, therefore, not a gaming policy, Lord Watson said:

> That may be so, but his interest was contingent upon his surviving the date of the policy for a period of fifteen years. In the event of his death at any time during that period, the sole owner of the policy was the appellant, Anctil.

And the judgment of this court, declaring the policy there in question void as being a wagering policy, was affirmed.

I would dismiss Brophy's appeal, and we are all of that opinion.

Upon the company's appeal, I would allow it, and restore the decree of Street J., at the trial.

The court *a quo* orders the company to return the premiums *ex proprio motu*, without any plea by the defendant to that effect, upon the ground that as they had fired the first shot and filed a bill to get the policy cancelled, before action by Brophy, they cannot get the relief asked for without returning the premiums, for the reason that where equity relieves in ordering an instrument to be cancelled, the general rule is that the party in whose favour the decree is made must do equity by returning the consideration. A question arose in the Court of Appeal as to the power to make such a decree in this case in the absence of a tender of the premiums, or of sufficient conclusions in the

(1) 28 Can. S. C. R. 103. (2) [1899] A. C. 604.

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bill, but, in the view I take of the case, it is unnecessary for us to consider that point, which, I may say, however, would appear to be one upon which this court would probably not interfere with the judgment of the court of the province.

Then, had it been necessary to do so, this would most likely have been a case for us to exercise the power to amend given by sections 63 and 64 of the Supreme Court Act, by adding to the conclusions of the bill the words necessary to sustain the court's action in the matter. However, this is immaterial from my point of view, as I am of opinion, with deference, that there is error in the decree of the Court of Appeal, by which the company are ordered to return the premiums. It cannot be controverted that the appellant could not have maintained an action to recover them

not from any merit of the company which justifies them in retaining the moneys which do not justly belong to them, but from the demerit of the appellant, who, as a punishment for his illegal act, is denied a remedy to draw these moneys out of the company's hands.

Per Washington J. of the United States Supreme Court, in *Schwarts* v. *The United States Insurance Co.* (1).

Upon this well established principle, it was held in *Taylor* v. *Chester*, (2), that a plaintiff cannot recover moneys paid out on an illegal consideration to which he himself was a party, where the illegality must appear by his own allegations,

for the courts will not assist an illegal transaction in any respect.

See also *Lowry* v. *Bourdieu* (3); *Palyart* v. *Leckie* (4); *Paterson* v. *Powell* (5); *Sykes* v. *Beadon* (6); *Begbie* v. *The Phosphate Sewage Co.* (7); *Scott* v. *Brown* (8). That decision rests upon the maxim "*in pari delicto melior est causa possidentis*," which, however, does not

(1) 3 Wash. C. C. Rep. 170.
(2) L. R. 4 Q. B. 309.
(3) Doug. 468.
(4) 6 M. & S. 290.
(5) [1832] 2 L. J. C. P. 13.
(6) 11 Ch. D. 170.
(7) L. R. 10 Q. B. 491.
(8) [1892] 2 Q. B. 724.

apply, for here there is no "*delictum*" on the part of the company. The rule that governs in this case is "*cessat quidem condictio, quum turpiter datur.*" Pothier, Pand. lib. 12, tit. 5, art. 12, par. 8. The law is not so irrational as to make the *causa possidentis* less favourable when he is not *particeps criminis*, than when he is as guilty as the other party.

In *Howard* v. *The Refuge Friendly Society* (1), the plaintiff claimed the repayment of premiums upon a wagering policy which he had discontinued. "How can he bring an action upon such a transaction?," said Mathew J for the court, and the action was dismissed.

The case of *Dowker* v. *The Canada Life Assurance Co.* (2), is not in a contrary sense. Draper C. J., expressly says that if the plaintiff in that case was entitled to recover the premium it was because the policy in question, though null and void, was not a wagering policy nor one obtained by fraud.

The recent case of *The British Workman's and General Assurance Company* v. *Cunliffe* (3) depended on its own special circumstances and has no application.

Nothing further need be added upon that point. There is no room for controversy upon it. So that, the conclusion of Brophy's counter-claim "for such further and other relief as may be deemed necessary and proper" (assuming it to be sufficient to include, alternatively, a claim for these premiums), must be dismissed. That being so, it would seem singular that, in the same case, a judgment would dismiss his claim for the premiums, and at the same time order the company to return them to him. It is upon a broader ground, however, that I rest my opinion, that, in this case, the want of equity is no bar to the company's relief, leaving out of consideration altogether the appellant's counter-claim.

(1) 54 L. T. 644. (2) 24 U. C. Q. B. 591.
(3) 18 Times L. R. 425-502.

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Where a company asks the cancellation of a policy on the ground of fraud and misrepresentation by the insured the rule of the courts of equity, as laid down by the Court of Appeal, has its full application. Such are the cases of *Barker* v. *Walters* (1); *Whittingham* v. *Thornburgh* (2), *DeCosta* v. *Scandret* (3); *Wilson* v. *Ducket* (4); *The Prince of Wales etc. Association* v. *Palmer* (5); *The British Equitable Assurance Co.* v. *The Great Western Railway Co.* (6); *London Assurance* v. *Mansel* (7), wherein the premiums received by the insurers who were seeking to set aside the policies on the ground of fraud had to be returned to the insured as a condition of their relief, though in the analogous cases of *Willyams* v. *Bullmore* (8); and *W*—— v. *B*—— (9), that does not seem to have been required.

But where a policy is cancelled upon the ground that it covers a wagering contract (especially without any guilty participation by the company, as found in this case by the two provincial courts), a distinction should be made, in my opinion, and the company, in such a case, should not be ordered to return the premiums. An insurance company is then acting in the public interest, as well as in its own. It is as against public policy that such an instrument is void, and in their endeavours to put a stop to acts which the law reprobates it is a duty to the public that the company perform. It is an offence against the state, a fraud against the law, that they ask the court to punish by the cancellation of all the claims that the offender might otherwise have against them. They are allowed to waive all the rights that fraud or misrepresentation by the insured would

(1) 8 Beav. 92.
(2) 2 Vern. 206.
(3) 2 P. Wms. 170.
(4) 3 Burr. 1361.
(5) 25 Beav. 605.
(6) 38 L. J. Ch. 132.
(7) 11 Ch. D. 363.
(8) 33 L. J. Eq. 461.
(9) 32 Beav. 574.

have entitled them to, but the law denies them the right to waive the nullities that it has enacted for the common weal. Cf. *St. John* v. *St. John* (1). A court of equity should therefore, in such a case, relax its general rule and consider it superseded, by refraining from imposing upon a relief which the public interest requires a condition which might have the effect of hindering and impeding a company in the performance of their duty to the state. An interference, in the name of equity, to alleviate the offender's punishment by ordering the return of the premiums into his guilty hands would seem to me an inconsistency. The insured is not in a position to ask the assistance of the court, nor to invoke rules of equity the sole effect of which would be then to benefit the sole culprit. He has received no consideration from the company for the moneys he has paid, it is true, but he owes his loss to his own turpitude, and the court should have no pity upon him and no mercy for him, under any circumstances. I would apply to him the rule that he who has committed iniquity cannot claim equity.

We are in the matter unfettered by authority. Not a single case has been quoted at bar, and after much labour I have not been able to find any, in which, where such a document has been cancelled at the suit of the company as being a wagering policy, it has been held contradictorily that a company are bound to return the premiums.

In *The Prince of Wales etc. Association* v. *Palmer* (2), though it would seem that the policy was of a wagering character, yet the suit seems to have been instituted and determined upon the ground of fraud, as the assignee of the policy had murdered the insured to get the insurance, a fact which would have had no importance, if the policy had been a

(1) 11 Ves. Jr. 525. (2) 25 Beav. 605.

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wagering policy. And there, the company did not oppose the repayment of the premiums; they probably had tendered it by their bill. In the case of *Desborough* v. *Curlewis* (1), there are dicta that would seem to support the view that premiums have to be returned, but no direct decision upon the point.

Under these circumstances, in expounding the law for this Dominion, this Court should, in my opinion, determine that an insurance company is not bound to tender before action, or to deposit in court, the premiums they have received on a policy the cancellation of which is asked upon the ground of its being a wagering contract and void as against public interest and the positive enactments of the statute.

There is another ground taken at bar on behalf of the company upon their contention that they should not, in this case, be liable for the repayment of the premiums.

The appellant Brophy did not and could not, at the trial, consistently claim to be repaid these premiums, as he was throughout claiming the amount of the policy as a valid policy. If he had claimed the premiums, or if he may be now considered as claiming them, the respondent might invoke the express condition thereof

that if any fraudulent or materially incorrect averment has been made, or any material information has been withheld by the insured, all sums which shall have been paid to the company on account of the insurance made in consequence hereof shall be forfeited.

The appellant, Brophy, and the deceased, Cromar, undoubtedly made fraudulent and incorrect averments and withheld material information upon the initiation of this contract, in not informing the respondents that the policy, from its very inception, was taken out by Cromar ostensibly on his own life, but really by the

(1) 3 Y. & C. Ex. 175.

appellant Brophy, for his own benefit, he agreeing to pay all premiums and contracting to get all the benefits, and in not fully disclosing to the respondents all the facts and circumstances of the case which made the professed contract of insurance a gambling contract. The judgment of the court which absolves the respondents of any guilt in the matter necessarily imports that they were deceived.

Upon the authority of *Duckett* v. *Williams* (1), and *Venner* v. *The Sun Life Insurance Company* (2), I would think that under this clause alone the company were not obliged to tender or pay into court premiums that were forfeited by an express stipulation of the contract, any more than if the forfeiture were decreed by a statutory enactment, as was the case, for instance, in *United States* v. *Minor* (3). However, as I think they were not obliged to do so under any circumstances, it is unnecessary for me to consider hypothetically what should be the result of the case if it depended upon that clause.

The appeal is dismissed with costs, the cross-appeal is allowed with costs, and the judgment of Street J., is restored, the costs in the Court of Appeal to be against the appellant.

SEDGEWICK J.—I entirely concur in the judgment of my brother Taschereau, but I wish to add a few words.

In Ontario, as in England, since the Judicature Acts, the filing of a bill in chancery, or the bringing of a suit to restrain an action at law in a Superior Court, is an impossibility. The jurisdiction formerly possessed by the Courts of Chancery, Queen's

(1) 2 Cr. & M. 348.
(2) 17 Can. S.C.R. 394.
(3) 114 U. S. R. 233-238.

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Bench, Common Pleas and Exchequer, (and other courts as well), has been fused and is now exercisable, not by a court of law or by a court of equity, but by the High Court of Justice alone. The machinery for enforcing civil rights and redressing civil wrongs is, in these acts, duly provided for and a litigant, in pursuing his remedies (speaking generally), is not required to have recourse to the old common law or chancery rules of practice—different and repugnant as they usually were—but avails himself of the new procedure specially created for the amalgamated court.

In the case before us, we have the court in one breath declaring that Father Brophy is not entitled to receive back the insurance premiums and in another breath that he is. It was for the purpose of abolishing this and other anomalies in the administration of justice that the Judicature Acts were passed, and, although the legislatures gave their confirmation and preference to equitable doctrines in regard to civil rights in preference to common law doctrines, where there was a difference, there was no similar declaration, either in favour of or against the old machinery and procedure, by the use of which these rights were thereafter to be determined and enforced.

The Chancellor had, from the first, claimed jurisdiction to set aside and cancel agreements upon the ground of fraud, forbidding, at the same time, the parties in fault from suing thereon. That claim was eventually, after much conflict, acquiesced in by the common law courts, and this jurisdiction, so established in Ontario, is now vested (the Court of Chancery, as such, having been abolished), in the High Court of Justice. It was in virtue of this specially transferred jurisdiction that the plaintiff company brought this suit and asked, in effect, for a declaratory judgment as to the respective rights of Father Brophy and itself in regard to the

policy in question. The assured was then dead. His assignee, Father Brophy, had, as I understand, delivered his proofs of loss and fulfilled all the conditions antecedently necessary to entitle him to payment. The only question in dispute was as to the company's liability for the full amount insured. Father Brophy had never asked, he repudiated as satisfaction of his claim, for the payment to him of premiums paid to the company. The company likewise repudiated any obligation to do even that. The issue then was one which could only be adjudicated upon and determined by a judicial tribunal—in the present case, the High Court of Justice.

What *then* were the rights and liabilities of the disputants? That was the only question. Why the company began hostilities, instead of waiting for Father Brophy to make the first attack, has not been explained. Had the latter begun, making his counterclaim his statement of claim his action would have been dismissed and no return of premiums would have been decreed. That, as I understand, is the opinion of the trial judge, and of every judge of the Court of Appeal and of this Court. But it was within the company's right to begin. The Chancery Court had given it and the Judicature Acts had confirmed and ratified it. Nevertheless, the judgment of the court below has imposed upon the company, as a condition of success in its rightful claim, the payment of a sum of money which, in the same judgment, it has found the claimant not entitled to and the company does not owe

We have hitherto been taught that *vigilantibus non dormientibus equitas subvenit*, but the lesson now is that in litigation, the Fabian policy is the right one, and that he who, in the exercise of his rights has

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taken the opposite course, is to be punished for his vigilance.

There are, of course, many cases in which a plaintiff may be ordered to pay money as a condition of relief. If in the present case, the ground upon which the cancellation is asked had been that there never was a real policy, owing to lack of the consensus *ad idem* at its inception, in such a case a refund of the premium might be ordered, these moneys never having been the company's property, and he that seeks equity must do equity.

Here, however, the money in question was the company's money, validly received by it in consideration of a policy lawfully issued and renewed by it. It was money held by the company, for the purposes of the company—for the benefit and security of and in trust for its shareholders and policy holders. It would, under such circumstances, have been a breach of trust upon the part of the company's executive had they made a present of it to Father Brophy, or to any one else. How can a court of justice order the violation of that trust by decreeing a refund?

I have gone over the cases referred to by Mr. Justice Osler. Most of the English cases were decided before the Judicature Act, the only one since was that of *London Assurance* v. *Mansel* (1), before Sir George Jessel, M.R., where the question in controversy here was never argued and the refund was made by consent.

GIROUARD J.—I concur in the opinion of Mr. Justice Taschereau.

(1) 11 Ch. D. 363

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DAVIES J.—I concur in the judgment dismissing this appeal but I am of opinion that the cross-appeal should be dismissed and the judgment of the Court of Appeal for Ontario sustained. I have nothing useful to add to the reasons given by the Court of Appeal for its judgment.

MILLS J.—I concur in the opinion of my brother Davies

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitor for the appellant: *Daniel O'Connell.*

Solicitors for the respondent: *Kerr, Davidson, Paterson & Grant.*