THE TORONTO GENERAL TRUSTS CORPORATION ..... APPELLANT; * Mar. 23, 24. * April 21.

1936

AND

MILDRED GOODERHAM .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

Insurance (sickness)—Policy issued in 1920 against disability from accident or sickness—Wife of insured designated as beneficiary—Sickness of insured in 1934—Question whether payments by insurance company during insured's disability belonged to committee of estate of insured or to insured's wife—Provisions of policy—Ontario Insurance Act, R.S.O. 1914, c. 183, s. 178 (in force when policy issued)—Subsequent statutory changes—Question as to retrospective effect—1922, c 61; 1924, c. 50; R.S.O. 1927, c. 222; 1928, c. 35; 1931, c. 49—"Continuous" policy—Right of wife to recover insurance moneys direct without intervention of committee.

In 1920, G., then 44 years of age, residing in Toronto, Ontario, obtained an insurance policy against disability from accident or sickness. His application therefor, attached to the policy, was for a "non-cancelable income policy," and designated his wife as beneficiary. By provisions of the policy, it expired one year from date except as it might be continued by renewal for terms of one year each (or by a certain period of grace), and until the insured became 60 years of age he should have the right to renew the policy from year to year by payment of premium. The policy was kept alive by payment of annual premiums. In 1934, G. was declared, under R.S.O. 1927, c. 98, to be incapable of managing his affairs, and a committee of his estate was appointed. The main question in dispute was whether the monthly payments made by the insurance company under the policy during G.'s disability belonged to the committee or to G.'s wife. Sec. 178 of the *Ontario Insurance Act*, R.S.O. 1914, c. 183, in force when the policy was issued, provided that where the contract of insurance or declaration provided that the insurance money should be for the benefit of a "preferred beneficiary" (that term including a wife), such contract or declaration should (subject as therein provided) create a trust in favour of such beneficiary and that "so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate." The committee contended that any trust thereby created in respect of the policy in question had been destroyed by subsequent statutory enactments.

Held: G.'s wife was entitled to the proceeds of the policy. By said designation of her as beneficiary and the operation of said s. 178, a trust was created in her favour; and it was impossible, on the general language of the subsequent amendments, to conclude that the legislature thereby destroyed or intended to destroy said trust or the operation and effect of the above quoted provision in said s. 178. (The subsequent enactments dealt with in the judgment included, *inter alia*, 1924, c. 50, ss. 114, 134, 135, 136, 139, 177 (3), 180; 1928, c. 35, ss. 4, 6 (2), and new statutory condition 19 substituted for that

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Davis JJ.

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

introduced in 1922 (c. 61); 1931, c. 49, s. 11 (2)). The policy in question was not an annual renewal policy, but a continuous policy, and the distinction (discussed) becomes of importance in considering changes in a general statute governing policies of insurance. Where, as in this case, the contract is of continuous insurance, kept alive, merely by payment of the stipulated annual premium, it requires very clear and precise language in general amendments to destroy a statutory trust created in favour of a named beneficiary at the time the policy was taken out. The subsequent amendments in question may have been intended to have, to a certain extent, retrospective effect, but when the language is not plain the new law ought to be construed so as to interfere as little as possible with vested rights and should not be given a larger retrospective power than one can plainly see the legislature intended (*Reid* v. *Reid*, 31 Ch. D. 402, at 408-409).

Held, further: The wife was entitled, as between her and the committee, to recover the insurance moneys direct from the insurance company without the intervention of the committee. (*National Life Assur. Co. of Canada* v. *McCoubrey*, [1926] Can. S.C.R. 277).

Judgment of the Court of Appeal for Ontario, [1935] 2 D.L.R. 329, affirmed in the result, with a variation declaring the wife's rights lastly above mentioned.

APPEAL by the Toronto General Trusts Corporation, Committee of the estate of Henry F. Gooderham (who was, by an order in the Supreme Court of Ontario, declared to be a person incapable of managing his affairs), from the judgment of the Court of Appeal for Ontario (1) allowing an appeal by Mildred Gooderham, wife of the said Henry F. Gooderham, from the order of Kerwin J. declaring that the said committee was entitled to the moneys theretofore paid and thereafter payable under a certain policy insuring the said Henry F. Gooderham against total disability from sickness. The judgment of the Court of Appeal set aside the order of Kerwin J. and declared that the said committee held the insurance moneys paid and would hold those thereafter payable under the policy in trust for the said Mildred Gooderham, the present respondent. The latter cross-appealed for variation of the judgment of the Court of Appeal, to provide that the moneys theretofore paid and thereafter to be paid under the policy should be declared to be payable and should be directed to be paid to her (i.e., that she was entitled to recover direct from the insurance company without the intervention of the committee).

(1) [1935] 2 D.L.R. 329; [1935] Ont. W.N. 138.

The material facts of the case, the material provisions of the policy, and the relevant statutory enactments, are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed and the cross-appeal allowed, with costs throughout.

J. C. McRuer K.C. and *F. A. Brewin* for the appellant.

J. Jennings K.C. and *G. Lovatt* for the respondent.

The judgment of the court was delivered by

DAVIS J.—On June 24, 1920, Henry F. Gooderham, a barrister residing in the city of Toronto, then 44 years of age, applied to the Continental Casualty Company, incorporated by the State of Indiana, one of the United States of America, for a policy of insurance against total disability, and in pursuance thereof the company duly issued its policy on August 21, 1920, to Mr. Gooderham insuring him

against disability resulting either from accidental bodily injury or from sickness, if such disability from either cause originates while this policy is in force and results in continuous total loss of business time.

The indemnity payable for loss of business time as so defined was $500 per month and the annual premium was $100. The written application for the insurance designated Mildred Gooderham, wife of the insured, as beneficiary under the policy applied for. The policy was kept alive by payment of the annual premiums when, on January 8, 1934, a Judge of the Supreme Court of Ontario, under the provisions of chapter 98 of the Revised Statutes of Ontario, 1927, declared Mr. Gooderham to be a person incapable of managing his affairs, appointed the Toronto General Trusts Corporation to be Committee of his estate and ordered that it be referred to the Master of the said Court to propound and report a scheme for the management of the estate and for the maintenance of Mr. Gooderham.

The Continental Casualty Company did not dispute liability upon the policy and monthly payments of $500 as from the 26th of December, 1933 (being the day fixed by an order of a Judge of the Supreme Court of Ontario, dated March 22, 1934, for the commencement of the monthly payments), have been paid regularly by the company to the Committee.

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

The question raised in these proceedings is whether or not these moneys belong to the Toronto General Trusts Corporation (appellant) as such Committee or to Mildred Gooderham (respondent), the wife of the insured, as the designated beneficiary. The company is not a party to the proceedings. The Trust Company moved before a Judge of the Supreme Court of Ontario, on notice to the wife and to the Public Trustee, for an order declaring it, as Committee of Mr. Gooderham's estate, entitled to the moneys payable under the policy in question. The learned Judge who heard the motion, declared in favour of the Committee; the wife appealed to the Court of Appeal of Ontario who reversed the order and declared in favour of the wife; and from that order the Committee appealed to this Court. It is only fair to the wife to say that her claim is not in fact an effort to deprive her husband of the fruits of the policy during the unfortunate period of his total disability but is an obvious effort to avoid these moneys becoming available to her husband's creditors who appear to have reached out for the moneys.

The appeal raises an interesting and important question as to the effect of the provisions of the Ontario *Insurance Act* in respect of this policy of accident or sickness insurance. Before considering the relevant provisions of the *Insurance Act* it is advisable that some observations be made upon the exact wording of the particular policy. The application made by Mr. Gooderham to the company, which was attached to the policy, was for a "non-cancellable income policy" to provide "$500 per month for disability." To one of several printed questions set out on the form of application,

> 9. Whom do you designate as beneficiary under policy applied for, and what relationship is such beneficiary to you?

Mr. Gooderham filled in the answer opposite the printed word "name:" "Mildred," and opposite the printed word "Relationship:" "Wife." The application contained an agreement by Mr. Gooderham to pay an annual premium of $100. The policy issued pursuant to this application states that

> After one year from its date this policy shall be incontestable as to the time of origin of any disability commencing thereafter.

and

> The indemnity payable for loss of business time as before defined and as hereinafter made payable is Five Hundred Dollars per month to

be paid in monthly instalments during the Company's liability on any claim.

The policy further states that

Its annual premium is One Hundred Dollars, to be paid in advance.

and provides that

The Company will pay said indemnity for loss of business time during the continuance of disability as defined above, until such time as the Insured engages in a gainful occupation; provided, however, that no indemnity shall be paid for the first month of any period of disability.

Then follow in the policy what are termed "Statutory Provisions." There were no such statutory provisions, at the date of the issue of the policy, in the *Ontario Insurance Act* and these provisions in the policy were substantially taken from the then Dominion *Insurance Act*. They have, of course, the force of contract between the parties. It is necessary to refer specifically to a few of these provisions or parts of them.

1. This policy, including the endorsements and attached papers, if any, contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates as provided in paragraph 6 of these statutory provisions.

2. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall be used in defense to a claim under this policy unless it is contained in the copy of the application for this policy which is endorsed hereon or attached hereto.

5. Upon request of the Insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

7. Written notice of injury or sickness on which claim may be based must be given to the Company within thirty days after the date of the accident causing such injury or within fifteen days after the commencement of disability from such sickness.

8. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Head Office, in Toronto, Canada, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

9. The Company upon receipt of such notice, will furnish to the Claimant such forms as are usually furnished by it for filing proofs of loss. * * *

Following the statutory provisions in the policy are certain provisions termed "Miscellaneous Provisions," to several of which reference should be made.

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

1. This policy is issued in consideration of the statements and agreements contained in the application therefor and the payment of an annual premium as therein provided. The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, shall bar all right to recovery under this policy.

2. This policy becomes effective upon its issue and delivery, if said annual premium has then been paid in full, but otherwise it does not become effective until said premium has been so paid. It expires at 12 o'clock noon (Standard time at residence of Insured) one year from date except as it may be continued by renewal for terms of one year each or by the period of grace hereinafter given.

4. Until the Insured becomes sixty years of age, he shall have the right to renew this policy from year to year by the payment of premium as herein provided. * * *

6. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder.

8. All indemnities of the policy are payable to the insured at the Head Office of the Company in Canada. Upon the payment of claim hereunder any premium then due or unpaid or covered by any note or written order may be deducted therefrom.

11. Strict compliance on the part of the Insured with all the provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity.

It is plain that neither the application nor the policy covered indemnity for accidental loss of life, but only indemnity against disability.

Before departing from the exact language of the policy and the application therefor, it is to be noted that the policy itself does not specifically say to whom the proceeds of the policy are to be paid. The policy merely states that it "hereby insures" Mr. Gooderham "hereinafter called the Insured" against disability. But the application for the policy specifically designated the wife as the beneficiary and nos. 7 and 8 of the Statutory Provisions provide that written notice of injury or sickness on which claim may be based may be given "by or in behalf of the Insured or beneficiary, as the case may be, to the Company." No. 2 of the Statutory Provisions expressly states that "the application for this policy" is "endorsed hereon or attached hereto." And by no. 1 of the Statutory Provisions, "This policy, including the endorsements and attached papers, if any, contains the entire contract of insurance." Then as to the right of renewal, no. 2 of the Miscellaneous Provisions provides that the policy expires one year from its date "except as it may be continued by renewal for terms of one year each or by the period of grace hereinafter given."

And by no. 4 of the Miscellaneous Provisions, "Until the Insured becomes sixty years of age, he shall have the right to renew this policy from year to year by the payment of premium as herein provided." Further, the application was for a "non-cancelable income policy" on the basis of an annual premium of $100.

At the date of the issue of the policy, the *Ontario Insurance Act* then in force was that contained in the Revised Statutes of Ontario, 1914, Ch. 183, and amendments thereto. By sec. 2 (6) "beneficiary" included every person entitled to insurance money; by sec. 2 (19) "declaration" included any mode of designating in writing a beneficiary; and by sec. 2 (35) "insurance of the person" included insurance against death, sickness, infirmity, casualty, accident, disability, or against any change of physical or mental condition. Sec. 171 (3) provided that,

> The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, * * *

Sec. 178 defined the rights of preferred beneficiaries, and, the first two subsections being vital to the question in issue in this appeal, I shall set them out in full:

> (1) Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grand-children and mother of the assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries.
>
> (2) Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

Sections 171 and 178 were by sec. 170 made applicable to all contracts of insurance of the person and declarations whether made before or after the passing of the Act.

The contract which the insured himself made with the insurance company was in favour of his wife, and as a wife was one of the class of preferred beneficiaries named in the statute at the time of the making of the contract, the statute operated upon the contract which the insured made and gave effect to the contract as a statutory trust

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

in favour of the wife as beneficiary, and the statute provided that the moneys payable under the contract should not be subject to the control of the insured or of his creditors or form part of his estate. The contention of the appellant, as Committee of the insured, is that this trust has been destroyed by subsequent statutory enactments. Clearly it would require very plain and precise language in a subsequent statute to destroy the trust created at the time of the issue of the policy. It becomes necessary, therefore, for us to examine carefully the subsequent statutory provisions upon which counsel for the appellant relies.

In 1922, by 12-13 Geo. V, ch. 61, certain amendments were made to the *Ontario Insurance Act*. Accident and sickness insurance were defined by sec. 2 as follows:—

2. (1a) "Accident Insurance" shall mean insurance against loss arising from accident to the person of the insured.

(51a) "Sickness Insurance" shall mean insurance other than Life insurance against loss through sickness or disability of the insured not arising from accident or old age.

The Act of 1922 introduced by sec. 12 statutory provisions relating to accident and sickness insurance by adding certain sections, of which 190a (1) and 190c (1) and (2) are material to the question involved in this appeal.

190a. (1) Sections 190a to 190h inclusive shall apply to accident and sickness insurance and to an insurer undertaking accident and sickness insurance in the Province but shall not apply to any fraternal society or to its contracts.

190c. (1) The conditions set forth in this section shall be deemed, subject to the provisions of sections 190d, 190e, and 190f, to be part of every contract of accident and of sickness insurance in force in Ontario, and shall be printed on every policy hereafter issued under the heading "Statutory Conditions."

(2) An insurer may renew an existing contract of insurance by issue of a renewal receipt on which is printed in conspicuous type, "This policy is subject to the Statutory Conditions respecting contracts of Accident and Sickness Insurance contained in Section 190c of *The Ontario Insurance Act*.

Only one of the statutory conditions referred to in sec. 190c appears to be material and is as follows:—

STATUTORY CONDITION 19

Subject to the laws of the Province in which this contract is made, the insured may, without the consent of the beneficiary assign the policy and may, from time to time, change the beneficiary or revoke the benefits thereof, or make it entirely payable to himself or to his estate, pro-

vided that if the beneficiary is a preferred beneficiary under the statutes of the Province in which the contract is made, the rights of the insured and the beneficiaries hereunder shall be subject to such statutes.

It is admitted by counsel for the appellant that the amendments made in 1922 did not affect the trust declared by the statute in respect of the policy in question, but reference is made to these amendments for the purpose of better understanding subsequent amendments which, it is argued, have a destructive effect upon the trust created in favour of the wife as preferred beneficiary by the statute as it stood at the date of the issue of the policy. It may be observed in passing that while sec. 190c of the 1922 amendments provided that the conditions set forth in that section shall be deemed to be part of every contract of accident and of sickness insurance "in force" in Ontario, the section specifically states that the conditions shall be printed on every policy "hereafter issued" and that

an insurer may renew an existing contract of insurance by issue of a renewal receipt on which is printed in conspicuous type "This policy is subject to the Statutory Conditions respecting contracts of Accident and Sickness Insurance contained in section 190c of *The Ontario Insurance Act.*"

It is admitted that in this case no renewal receipts were issued; the policy continued in force from year to year merely by virtue of the payment of the annual premium of $100. It should be observed further that statutory condition 19 carefully preserved the rights of preferred beneficiaries.

Then in 1924, by 14 Geo. V, Ch. 50, the *Ontario Insurance Act* separated the provisions relating to life insurance from the provisions relating to accident and sickness insurance, the former being put under Part V and the latter under Part VII of the Act. Under Part VII we find by sec. 177 (3) that, except where inconsistent with the provisions of Part VII or with any statutory policy condition required to be inserted in contracts of accident and sickness insurance, the provisions of Part V relating to contracts of life insurance, except subsection 2 of sec. 122 and sec. 123 (not here material), shall apply *mutatis mutandis* to contracts of accident and sickness insurance. Sec. 180 under Part VII sets forth certain conditions which "shall be deemed, subject to the provisions of secs. 181 to 185, to be part of every contract of accident and of sickness insurance in force in Ontario" and shall be printed

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

on every policy "hereafter issued" under the heading "Statutory Conditions." Sections 181 to 185 do not affect this case. Statutory condition no. 19 remained the same as in the 1922 Act. By sec. 275 of the 1924 statute the provisions of the *Ontario Insurance Act*, being Ch. 183 of the Revised Statutes of Ontario, 1914, were repealed.

Counsel for the appellant contends that sec. 114, which comes under Part V, applies to accident and sickness insurance by virtue of sec. 177 (3). The material portions of sec. 114 are as follows:—

> 114. (1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the coming into force of this Part, and any term in any such contract inconsistent with the provisions of this Part shall be null and void.
>
> (2) Unless hereinafter otherwise specifically provided, this Part shall apply to the unmatured obligations of every contract of life insurance made in the Province before the coming into force of this Part.

But the provisions of Part V are not made to apply to contracts of accident and sickness insurance where they are "inconsistent with" the provisions of Part VII (sec. 177 (3)). It seems to me doubtful if sec. 114 relating to every contract of life insurance made in the province after the coming into force of Part V can be said to be consistent with the provisions of Part VII which relate to accident and sickness insurance, but in any event sec. 114 (1) clearly refers only to contracts made "after the coming into force" of Part V (i.e., 1924) and cannot apply to the contract with which we are concerned that was made in 1920. Sec. 114 (2) presents some difficulty in that it provides that Part V shall apply "to the unmatured obligations" of every contract of life insurance made in the province "before the coming into force" of this Part. Again it seems doubtful to me if that subsection, limited to contracts of life insurance made before the coming into force of the section, can be read to apply to the accident or sickness policy with which we are concerned, and what is the exact import of the words "unmatured obligations" is not plain. There is, at any rate, no such precise language used in any of the changes made in the 1924 statute as would destroy the plain statutory trust created in favour of the wife as beneficiary of the policy in question, particularly when the provisions relating to preferred beneficiaries (secs. 134, 135, 136 and 139) remained substantially the same as

in the prior legislation, definitely creating a trust in favour of the designated beneficiary and providing that the insurance money shall not be subject to the control of the insured or of his creditors or form part of the estate of the insured.

In 1928, by 18 Geo. V, Chap. 35, further amendments were made to the Ontario *Insurance Act*, and counsel for the appellant particularly points to these amendments as effective to extinguish any statutory trust or trusts created in relation to policies of sickness or accident insurance such as we are concerned with in this appeal. The Ontario statutes had been revised in 1927, the *Insurance Act* being Chap. 222. Section 177 of the 1924 Act became sec. 184 in the revised statute. By sec. 4 of the 1928 statute, subsections 2 and 3 of sec. 184 were repealed and others substituted therefor. New subsection 4 of sec. 184 reads:—

(4) Sections 122, 133 to 138 and 161 shall apply to contracts to which this Part applies.

The effect was that the provision found in the 1924 Act whereby, except where inconsistent with the provisions of Part VII or with any statutory policy condition required to be inserted in contracts of accident and sickness insurance, the provisions of Part V relating to contracts of life insurance, except subsection 2 of sec. 122 and sec. 123, should apply *mutatis mutandis* to contracts of accident and sickness insurance, was stricken out. By new sec. 184 (4), only sections 122, 133 to 138 and 161 under Part V remained applicable to contracts to which Part VII applies, and none of these sections is material here. The 1928 statute, moreover, repealed (by sec. 6 (2) thereof) condition 19 and substituted the following therefor:

19. Where moneys are payable under this policy upon the death of the insured by accident, the insured may from time to time designate a beneficiary, appoint, appropriate or apportion such moneys and alter or revoke any prior designation, appointment, appropriation or apportionment.

This change in the wording of statutory condition 19 is the real point of emphasis made by counsel for the appellant. The contention is that the former right to designate preferred beneficiaries of sickness and accident policies was expressly taken away except where moneys under such policies are payable in the event of the death of the insured by accident. Upon the language of this amendment it is argued that the wife in the policy we have to consider is

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

no longer a beneficiary within the statute, and this argument is based upon the contention that there is now no right by statute, the policy not providing for the death of the insured by accident, to designate a beneficiary. It is further argued that we must read new condition 19, as it appears in the 1928 statute, with the provisions of sec. 180 in the 1924 statute (now sec. 187 of the Revised Statutes) as a condition which "shall be deemed, subject to the provisions of sections 181 to 185, to be part of every contract of accident and of sickness insurance in force in Ontario." Sections 181 to 185 in the 1924 statute are now sections 188 to 192 of the Revised Statutes of 1927 and are not material here. We have observed, however, that the words "in force in Ontario" in sec. 180 (now sec. 187) are immediately followed by the words "and shall be printed on every policy hereafter issued under the heading 'Statutory Conditions'."

In 1931 (21 Geo. V, Ch. 49) the *Insurance Act* was further amended and sec. 11 (2) added the words "and no other provisions contained in Part V," after the figures 161 in subsection 4 of sec. 184 as enacted by sec. 4 of *The Insurance Act, 1928*. The subsection now reads:—

> Sections 122, 133 to 138 and 161 and no other provisions contained in Part V shall apply to contracts to which this Part applies.

The insertion of the words "and no other provisions contained in Part V" did not add anything to the amendment of 1928; it was plain enough that only sections 122, 133 to 138 and 161 under Part V thereafter should apply to contracts to which Part VII applied.

It is impossible, on the general language of the subsequent amendments relied upon by counsel for the appellant, to reach the conclusion that the Legislature by such amendments destroyed or intended to destroy the statutory trust created in 1920 in favour of the wife as the designated preferred beneficiary of the policy in question and the statutory provision that "so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate." There might be some support for such a contention were the policy an annual renewal policy rather than a continuous policy. The distinction between what is regarded as a continuous policy and what is regarded as a renewal policy in insurance law is

clearly established. For instance, a policy of life insurance usually contemplates the insurance continuing until death; consequently, stipulations giving an absolute right of renewal are in the main confined to life policies, but the accident or sickness policy with which we have to deal in this appeal gives an absolute right of renewal until the insured is sixty years of age and contemplates the continuance of the insurance from year to year merely by the payment of the stipulated annual premium. Except in such cases of continuous insurance, policies are renewable only by mutual consent. The assured, if he wishes to renew the policy, may apply to the insurers for renewal and tender the renewal premium, but they are not bound to accept the renewal premium or renew the policy. Under the former type of policy, the contract is a continuing contract, inasmuch as it is made once and for all at the commencement of the insurance and is kept in force by the renewal. There is not a fresh contract on each renewal. On the other hand, where the policy is renewable only by mutual consent at the expiration of a stipulated period of time, the position is different. On each renewal there must be an agreement between the parties to renew the policy, and each renewal constitutes a fresh contract. See Halsbury (2nd ed.), Vol. XVIII, pp. 455-457. The distinction between continuing insurance and a renewal policy becomes of importance in considering changes in a general statute governing policies of insurance. One can quite understand that, where you have in law a fresh contract with each renewal, the statutory provisions in force at the date of each renewal may operate upon the contract made at the time, but where you have, as in this case, a contract of continuous insurance made in 1920 and kept alive merely by the payment of the stipulated annual premium until the date of the event insured against, it requires very clear and precise language in general amendments to destroy a statutory trust created in favour of a named beneficiary at the time the policy was taken out. There is a good deal of difficulty in determining exactly what is the full effect to be given to the amendments to the *Ontario Insurance Act* discussed before us. To a certain extent they may have been intended to have retrospective effect, but when the language is not plain the new law ought to be construed so as to interfere as little as possible with vested rights

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

and should not be given a larger retrospective power than one can plainly see the legislature intended. This was the view taken by Lord Bowen in *Reid* v. *Reid* (1), where he said:—

> Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant.

There is no such language in the amendments to the *Ontario Insurance Act* upon which counsel for the appellant relies to justify the contention that the statutory trust in respect of the policy before us has been extinguished.

That is sufficient to dispose of the appeal and to affirm the judgment of the Court of Appeal for Ontario that the wife is entitled to the proceeds of the policy. But the Court of Appeal rested its judgment, not only upon the ground that the subsequent amendments to the statute did not destroy the trust, but also upon the ground that

> whatever may have been the case before the *Married Women's Property Act*, since that Act when such a policy as this is issued with the wife named as the beneficiary, while she may not sue the insurer in her own name, the insurance money when received by the husband or his representatives is held in trust for her.

It must be observed, however, that sec. 11 of the *Married Women's Property Act*, Imperial Statutes (1882) 45-46 Vic., ch. 75, was limited to "a policy of assurance effected by any man on his own life" and did not extend to a policy of sickness or accident insurance. Further, when the *Married Women's Property Act* was carried into the Ontario Statutes in 1884 (by 47 Vic., ch. 19), sec. 11 of the Imperial Act was not reproduced. A similar provision appeared, however, in the 1884 Statutes of Ontario, ch. 20 thereof being "An Act to Secure to Wives and Children the Benefit of Life Insurance," but here again the statute was limited to life insurance. This latter Act was repealed

(1) (1886) 31 Ch. D. 402, at 408-409.

in 1897 by 60 Vic., ch. 36, and thereafter became part of the Insurance Act, and as such was carried forward in the Insurance Acts from time to time until 1912 when, by omitting the preliminary words "when a person effects insurance on his or her own life * * *", the preferred beneficiary provisions first became applicable to accident and sickness insurance policies. It was not, then, by virtue of the *Married Women's Property Act*, but by virtue of the 1912 *Ontario Insurance Act*, that a husband could effect accident or sickness insurance for the benefit of his wife.

It becomes unnecessary for us to consider the further interesting and rather difficult point raised during the argument as to whether or not, apart from the statute, the insurance moneys, to the extent to which they have reached the hands of the Committee, are impressed with a trust in favour of the wife by reason of the terms of the application of the insured to the company for the policy. In the *Maybrick* case (1), the moneys had never reached the insured or his legal representative and the point was not really in issue.

There is a cross-appeal by the wife from the judgment of the Court of Appeal in so far as the judgment treats the Committee as the person lawfully entitled to enforce and collect upon the policy. The wife contends that, as designated preferred beneficiary, she is entitled herself under the statute to recover these insurance moneys direct from the insurance company without the intervention of the Committee. She obviously fears an abstraction from the monthly payments of the regular fees and disbursements of the Committee as a trustee, if the judgment remains whereby the trust company as Committee is declared not only to have been the proper recipient of the moneys already paid but the person entitled to collect all future payments, though bound upon receipt thereof to turn them over to the wife.

This Court decided in *National Life Assurance Co. of Canada* v. *McCoubrey* (2) that the widow, as preferred beneficiary of a life policy, was entitled to payment of the insurance moneys from the insurance company without the appointment of a legal representative of her

(1) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147.

(2) [1926] S.C.R. 277.

1936

THE TORONTO GENERAL TRUSTS CORPORATION v. GOODERHAM.

Davis J.

deceased husband where there was no notice or knowledge on the part of the company of any change of beneficiary. The insurance company there insisted that the will of the deceased should be probated before payment could be made to the widow. Having determined in the present case that the wife as designated preferred beneficiary is entitled under the statute to the moneys under the policy with which we are now dealing, it follows that she is entitled to the moneys direct from the company and the order below should be varied accordingly. The insurance company not being a party to these proceedings, our judgment is, of course, only a declaration of right as between the Committee and the wife.

The appeal should be dismissed, and the cross-appeal allowed by varying the judgment appealed from to provide for payment over by the appellant to the respondent, without deduction, of the total amount received by the appellant as proceeds of the policy in question, and by declaring that the respondent is entitled, as between her and the appellant, to enforce the policy. The appellant must pay the respondent all her costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the appellant: *McRuer, Mason, Cameron & Brewin.*

Solicitors for the respondent: *Jennings & Clute.*