THE ROYAL GUARDIANS (DEFENDANTS) ..... APPELLANTS;

AND

MARY OLIVE CLARKE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1913
*Nov. 14.
1914
*Feb. 3.

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

Benevolent society—Life insurance—Contract—Payment of assessments—Extension of time—Rules and regulations—Place of payment—Demand—Default—Suspension—Authority to waive conditions — Conduct of officials — Estoppel — Company law—Arts. 1152, 1164, *C.C.*

By the constitution and by-laws of a mutual benevolent society death indemnities were assured to members who, in order to maintain good standing and entitle their beneficiaries to the indemnity, were, thereby, required to make prompt payments of monthly assessments within thirty days from the dates when they became payable. In the subordinate lodge of which C. was a member it had for some time been the practice of its financier to receive such payments fifteen days later than the thirty days so limited and, if then paid, members were not reported as having been in default and, *ipso facto*, under suspension according to the regulations provided by the constitution and by-laws incorporated in the certificate whereby the indemnity was secured. For several years the financier of the subordinate lodge had habitually received these payments from C. at his residence, on or about the last day of this extended term. Seven days after the expiration of the thirty days for payment of the last assessment, and while it was still unpaid, C. died and, on the following day, the overdue assessment was paid to the local financier and a receipt therefor granted by him. The Grand Treasurer of the Society refused to accept this payment on the ground that C. was then under suspension and was not a member in good standing at the time of his death.

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

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Held, affirming the judgment appealed from (Q.R. 21 K.B. 541), Duff J. dissenting, that by the course of conduct in the subordinate lodge, of which the Grand Lodge was aware, the condition as to prompt payment had been waived, that C. remained in good standing until the time of his death and that the death indemnity was exigible by the beneficiaries. *Wing* v. *Harvey* (5 DeG. M. & G. 265; 43 Eng. R. 872); *Tattersall* v. *People's Life Ins. Co.* (9 Ont. L.R. 611); *Buckbee* v. *United States Annuity and Trust Co.* (18 Barb. 541); *Insurance Co.* v. *Wolfe* (95 U.S.R. 326); and *Redmond* v. *Canadian Mutual Aid Association* (18 Ont. App. R. 335), referred to.

Per Fitzpatrick C.J. and Brodeur J.—As no place of payment had been indicated, according to the law of the Province of Quebec (art. 1152 C.C.), assessments were payable at the domicile of the assured; consequently, owing to the practice which had prevailed as to the receipt of payment at C.'s domicile and because no demand for payment had been made at such domicile, there had been no default on the part of C. and he had not become suspended at the time of his death.

Per Duff J., dissenting.—Neither the Grand Lodge nor the subordinate lodge or their officials had power to waive the conditions as to payment prescribed by the constitution and by-laws and the certificate of membership of C.; these instruments constituted the contract of insurance and sufficiently designated the office of the financier of the subordinate lodge as the place where payment of the assessments was to be made; even if article 1152 C.C. applies, no notification was given or proof made conformably to article 1164 C.C., and consequently, failure to make payment of the assessment due within the thirty grace days, at the office of the subordinate lodge, worked a default and, *ipso facto*, the suspension of membership, and, therefore, C. was not in good standing at the time of his death so as to entitle the beneficiaries to the indemnity according to the regulations of the society.

Held, further, *per* Duff J.—As the member must be presumed to know the limitations of the authority of the Grand Lodge, the subordinate lodges, and the officials of each of them, as determined by the constitution and by-laws, the ostensible authority of officials cannot, for any relevant purpose, be of wider scope than the actual authority which is defined specifically and exhaustively by the constitution.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of

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Dunlop J., in the Superior Court, District of Montreal, by which the plaintiffs' action was maintained with costs.

The action was brought by the beneficiaries named in a beneficiary certificate issued by the defendants, a mutual benevolent society, the late Joseph P. Clarke, deceased, a member of a subordinate lodge, constituted by the Grand Lodge of the defendants, which was formerly known as "The Ancient Order of United Workmen of Quebec and the Maritime Provinces," the certificate in question, together with the Constitution and by-laws of the society, being, in effect, a contract of life insurance securing to the beneficiary an indemnity of $2,000 payable upon the death of the member provided he was in good standing in the order at the time of his death.

The circumstances of the case and the questions in issue on the present appeal are stated in the judgments now reported.

T. P. Butler K.C. and *E. Lafleur K.C.* for the appellants.

R. C. McMichael K.C. and *R. O. McMurtry* for the respondents.

THE CHIEF JUSTICE.—The contract here is to be found in the certificate and the application for membership and both make it a condition that, if the assessments are not paid the policy lapses; the payment of the premium is made a condition precedent to the continuance of the liability, or, in other words, to be entitled to the benefits on the policy a member must be in good standing at the time of his death.

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Clarke, the beneficiary, died on the 7th of September, 1908, and the question is: What was his position at that time with respect to the society? It is admitted that the assessments for August, 1908, were not paid, and it was argued on behalf of the society, that, in consequence, he was not in good standing, and his heirs are not entitled to collect the benefits sued for. This is a good defence, unless, as found in the courts below, Clarke was not in default, because it was usual and customary for the financier of the various lodges to receive from their members payment of their monthly dues and assessments after the expiration of the days of grace prescribed by the certificate. There are concurrent findings to that effect in both courts below and those findings are fully borne out by the evidence. Leroux, the financier, testifies that the larger proportion of the members' assessments were paid after the expiration of the thirty days and within the first fifteen days of the following month. It is admitted that the settled practice was not to send in the financier's report, as required by the conditions of the certificate, at the end of the month for which the assessments were due, but fifteen days later, and it is explained that this practice arose out of the fact that the members were usually in arrears in the payment of their assessments. Mr. Patterson, who describes himself as the "General Manager of the Society," admits the existence of this practice and will not deny that it is attributable to the cause assigned by the financier, *i.e.*, to the prevailing custom of extending the days of grace within which members might pay their assessments. Patterson's letter to the financier, written after he heard of Clarke's death, is not to be explained

on any other assumption. Clarke died within the extended period of grace.

There is this additional fact to be considered: there is no provision in the contract with respect to the place of payment of those assessments, in which case they should be collected from the beneficiary at his domicile under the law of Quebec where the contract was made and the society carried on its operations under a charter or licence obtained in the province. (Art. 1152 C.C.) It was proved beyond all doubt that the practice was to collect the assessments from the members, in which case the insured had the right to rely on that practice. It is also clear, on the evidence, that Patterson, the "Grand Recorder," received those assessments as they were paid, after the expiration of the delay with, I am satisfied, knowledge of all the circumstances. I do not think the Society can now be heard to deny that the financier, the agent, whose special duty was to collect the assessments, had the authority to extend the delay: *Nicholson* v. *Piper* (1). In the course of business, as carried on with the knowledge of those in authority, Leroux had the power to do what he did. I am of opinion that, in this case, the Society must be held to have adopted his act: *Wing* v. *Harvey* (2). It is the law that when the practice of collecting the assessments in insurance matters is well established, the beneficiary is entitled to rely upon it, and there can be no default or forfeiture if a demand is not made on him. Planiol, vol. 2, No. 2159, says:—

La résiliation ou la suppression de l'assurance n'ont lieu qu'au cas où la prime arriérée était portable, c'est à dire qu'elle devait être payée par l'assuré au domicile de l'assureur ou de ses agents. D'ordinaire les compagnies stipulent que les primes seront portables, mais

(1) 23 Times L.R. 620, at p. 621.

(2) 5 DeG. M. & G. 265; 43 Eng. Rep. 872.

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comme elles ont l'habitude de faire encaisser les primes à domicile par leurs agents, pour être plus sûres de leurs rentrées, la jurisprudence décide que cette circonstance change la nature de la prime qui, de portable qu'elle était d'après la police, devient quérable (très nombreux arrêts depuis plus de cinquante ans: Cass. 21 août, 1854; D., 54.1.366; S.V., 54.1.359; Cass. 31 janvier, 1872; D., 73.1.86; S.V., 75.1.113). Cette jurisprudence a été pendant longtemps très énergiquement combattue par les compagnies; elle n'est plus discutée aujourd'hui. Vide Laurent, vol. 16, No. 182, page 245; Fuzier-Herman, vo. "Assurance," nos. 697 *et seq.*

The appeal should be dismissed with costs.

IDINGTON J.—The appellants are a fraternal society carrying on a life insurance business. They were, as many of these societies, constituted by a constitution which vested the supreme authority in a Grand Lodge which was enabled thereby to charter subordinate lodges with definite powers.

The members of these subordinate lodges managed the details of their business by acting within the powers so granted. These members were in this instance enabled to obtain life insurance by different plans, of which the one now in question provided for monthly payments of a fixed sum according to the age of the members; to be advanced, however, at the end of each successive period of five years during the life of the member.

The payments were made to the officer of the local lodge called its "financier." No place of payment was fixed though, according to the practice in many instances, they were made at the lodge-room.

The monthly payments are spoken of as assessments and as having been levied. This seems to me rather an inapt way of expressing the substance of the transaction.

I rather think there are insurance societies or com-

panies which proceed upon the basis of making good the losses sustained by a varying payment commensurate with the loss to be made up, and in such cases these terms might be apt ones to use.

But when the monthly payment was fixed and to be progressively increased by a mere mathematical rule, as here, other considerations are applicable to such a system than those carried on upon the basis I have just suggested as possible.

The Grand Lodge officers, each month, published in a paper called "The Protector," mailed to each member, a list of these monthly dues, by way of reminding the members of their respective amounts of dues.

These monthly dues became payable on the first of each month and, according to the term of the constitution, should have been paid within thirty days thereafter.

The Grand Recorder of the Grand Lodge was, to use his own language,

> practically you might say the manager of the institution in the Province of Quebec and the Maritime Provinces.

This Grand Recorder tells us a practice grew up of his sending out, about the twentieth or twenty-fourth of the month, to each of the financiers of the local lodges a form on which was entered the list of the members in each lodge with the amount payable by each for that month.

On this form the financier was expected to fill in the respective amounts paid him by each member, and such facts as the suspension or death or withdrawal of any member, and when so completed, to return it with the money collected to the Grand Recorder.

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The system was simple and, if acted upon promptly, brought under the eyes of this manager of the institution exactly how each member stood.

In the local lodge now in question there were some thirty to forty members, no doubt slightly varying from time to time.

The number ran up into the hundreds in some of the local lodges.

But, in any case, there does not seem to have been any large amount of clerical work involved in completing the return after the payments were made. So far as I can see there was nothing involved in all this but a few hours' labour next day after the end of the month, yet, for some reason or other, as much as fifteen days was allowed for it, at other times ten days, and at the time of the trial of this case, eight days was fixed for such returns. At the time we are concerned with, it was fifteen days.

I will advert to the bearing of all this presently.

The late Mr. Clarke had entered "Columbus Lodge, No. 26," on the 15th of December, 1896, and continued as a member till death, save one or two suspensions which are now out of the case or at least are not made part of the defence herein — and the alleged suspension of September, 1908.

He died, suddenly, on the 7th of that month and a friend paid, next day, the sum due by him for the month of August to a person acting for the financier in his absence. The appellant, the Grand Lodge, refused to accept this money from the financier, or recognize payment, claiming that the insurance had ceased under and by virtue of the terms of article 98 of the Constitution, which was as follows:—

98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the financier of his lodge by each member of the Order on the first day of each month unless he be notified to the contrary and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

The learned trial judge and the court of appeal have held that by virtue of a long course of dealing adopted by the parties this cannot furnish a bar to recovery.

It has been argued, with great force, before us that the language of this rule is so explicit and the limitation of the authority of the financier of the Columbus Lodge, No. 26, so clear that neither could this term of the constitution be varied nor the authority of the financier be so extended as to justify its variation.

I may observe that this Constitution, of which we have heard so much, seems to me nothing more nor less than a contract which the association and those applying for membership therein each undertook to observe.

And I would further observe that the association, acting by and through its duly constituted officers, may by its course of conduct in its relations with its members as their insurer or with other persons in any of its dealings with them vary the terms of any contract not requiring by law to be written or may vary the mode of carrying same out; so long as not departing from the ordinary lines of conduct necessary to the success of its business as an insurer or not in absolute violation of the organic terms of the instrument under which it is operating.

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Let us, therefore, see just what this article 98 says and implies.

It expressly provides for the possible case of a "special notice" and the case of a member being "notified to the contrary" of the general rule that payments were to be made as specified in the rate table.

Surely if anything ever can be implied, it is implied in this very article, that the Grand Recorder may so notify and that if he did, even if in excess of authority I submit, those insuring and relying upon his express notice are entitled to have his notification observed.

Nay, more, I submit it is implied thereby that in some such cases it is to be presupposed that he had authority for so acting.

I am not concerned with reconciling all the terms of this instrument. I am only concerned to know that it clearly never was intended that the hands of all the officers acting under it were so tied that they could not, for what seemed to them good and sufficient reasons, change the terms of the time of payment.

Once we thus, by the manifest implication that some of the administrative officers had such powers, get rid of the need of all or a majority even of the members of the association sanctioning such proposals we have the very ordinary case of the conduct of the executive alone to consider.

That an executive so empowered can bind by their conduct those it represents in carrying out its contracts and its contractual relations with others, does not seem to me to need argument. Now let us see how little there was to do or be left undone herein as between appellants and those it insured.

The two last lines sound very formidable to one

who does not stop to consider. They admittedly mean that a man may become *ipso facto* suspended at midnight, and next morning pay a trifling sum and be *ipso facto* restored.

This is not the case of requiring to consult any one or ask his leave or be examined by a medical man or, in short, anything but the awakened will of him most concerned. It is not the case which article 107 is evidently aimed at.

Its whole purpose is evidently to hold the lash over the laggard — nothing more — unless he actually wishes to withdraw. To say that the waiver of such a term of this contract is something beyond the competence of the executive, seems to me idle.

The grave question is whether or not the executive did in fact waive it and to the extent claimed and in such deliberate fashion by their long course of conduct as to preclude them from setting up herein the contrary.

Although Patterson, the Grand Recorder, was acting with and under the directions of an executive committee, we must not lose sight of the fact that he was "practically the manager of the institution."

He, on the morning of Clarke's death being announced, telephoned to one Gilbert, acting for Leroux, the financier of Columbus Lodge, No. 26, to know if Clarke had paid his dues of last month, and followed this up by the following letter:—

J. Leroux, Esq.,
Financier, Columbus Lodge, No. 26.

Dear Sir and Bro.—Be good enough to give the date of last payment made by the late Bro. J. P. Clarke and amount of same. Please be particular to give this exact as you may be called upon to attest

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same under oath. I beg to warn you not to accept any money on his behalf for assessments. Kindly reply at once.

Yours fraternally,

(Signed) A. T. PATTERSON,
Grand Recorder.

It is not often honest men furnish such cogent evidence against themselves as this conduct of Grand Recorder Patterson does, in my judgment, against him relative to the knowledge of the course of dealing now in question, when read in light of all the previous history and surrounding facts and circumstances.

Why this feverish haste and urgency a week or more after the books had been forever closed if he honestly believed this clause of the constitution had been observed — and did not know that it had been more honoured in the breach than in the observance ?

As the evidence he gave is full of that sort of equivocation, and apparently mental reservation, regarding which we need the eyes and ears of the learned trial judge to guide us in appeal, I accept that which his report indicates as being conclusive so far as it goes.

I shall, therefore, not deal at length with the details of the evidence bearing upon the question of the knowledge of the executive, by and through Patterson, of almost all, and in substance all, that Leroux, the financier, tells us. And assuming the Grand Recorder knew or had good reason to know the substance of what Leroux tells we need not doubt the conclusion to be reached.

I must observe, however, that it seems impossible to me for any man of the alert mind of Mr. Patterson, as shewn in the course of his evidence, not to have appreciated the full meaning of the financial secretaries' need for more time to make their returns on any other

hypothesis than that the moneys had not always come in just as quickly as the threatening rule required.

I have outlined the nature of these returns and the little to be done if money all in and ready to complete the business. Why was fifteen days needed ? There is no explanation. Why was the period varied from time to time ? Who took the side of the laggards in all the discussions leading to these changes ? Who was afraid to cut them off ? Who was to profit by their business ? Who was to lose if they were cut off ?

Is it not plain as if written that, while keeping in the constitution a plea for urgency, the executive was anxious to do business ? Is it not equally plain that all this course of dealing was saying to the members, though the letter says thirty days we mean you have forty-five days if you cannot pay ?

In doing so they were but conforming by acts and conduct to the actual language of the policy in the case of *Tattersall* v. *The People's Life Insurance Co.* (1), which I suppose is a usual provision.

Even fraternal societies have to observe the trend of competitive exigencies in the insurance business and act accordingly.

I think appellants' conduct in this instance, and so many others in the same matter of time, was tantamount to extending the time of payment and should be treated accordingly.

The remarkably clean slate that the reports for months produced do shew, regarding the lapses of the kind now in question, though shewing others more serious in import certainly, did not pass unnoticed

(1) 9 Ont. L.R. 611.

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unless it was just what this manager from his knowledge of the situation expected.

When we consider the frame of the Grand Recorder's approved form which has a column for "suspended, etc.," under heading "membership deceased" and another column for "arrears," and find, in practice, that it was under this latter and not under the former that such defaults as in question were put when the report was made to conform to what the Grand Recorder approved in this very instance, surely we must conclude there was a distinction in his mind between actual suspension and merely being in arrears with a "susp" added.

However that may be, it seems suggestive.

As to the local law requiring the demand of payment from the debtor I do not say more than that such doubt as created thereby lent aid to this way of looking at the business in hand.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I shall first state what appear to me to be the relevant facts, that is to say, the facts upon which, as it seems to me, the rights of the parties to this litigation must be determined. Other facts upon which the respondent largely rests her case, but which seem to me, for reasons I shall state, to be beside the point, may be considered later. On the 15th day of December, 1896, the deceased, Joseph P. Clarke, became a member of the Columbus Lodge of the Ancient Order of the United Workmen of Quebec and the Maritime Provinces and received a beneficiary certificate, the material provisions of which are as follows:

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THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC AND THE MARITIME PROVINCES, DOMINION OF CANADA.

This Certificate cannot be assigned or hypothecated.

This Certificate issued by the authority of the Grand Lodge of the Ancient Order of United Workmen of Quebec and the Maritime Provinces, witnesseth that Brother Joseph P. Clarke, a Workman Degree member of Columbus Lodge, No. 26, of said Order, located at Montreal, in this jurisdiction, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen of the Jurisdiction of Quebec and the Maritime Provinces and to designate the beneficiary to whom the sum of TWO THOUSAND DOLLARS, without use or interest of the Beneficiary Fund of the Order at his death, be paid.

This Certificate is issued upon the express condition that said Joseph P. Clarke shall in every particular while a member of said order comply with all the laws, rules and requirements thereof.

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ENDORSEMENT.—"ASSESSMENT SYSTEM."

Besides the terms and conditions appearing in the body hereof, this Certificate is issued upon the following further terms and conditions which are to be read as forming a part of this contract, viz.:—

(1) That the member to whom this Beneficiary Certificate is granted is bound not only by the Constitution, Laws and Amendments of the Order now in operation, but also by any Amendments that may subsequently be made thereto.

(2) That only persons entitled under such Constitution, Laws and Amendments to become beneficiaries can be named as such by the member to whom this Certificate is granted.

(3) *That this Grand Lodge shall not be liable to pay any sum under this Contract,* if * * * *he is not a Member of this Order in good standing.*

(Sig. of Member) ..... Attest..... Recorder ..... Lodge, No. .....

The Ancient Order of United Workmen appears to have been organized, in 1868, in Pennsylvania. The Order comprised a Supreme Lodge by which Grand Lodges of inferior jurisdiction were established, the Grand Lodge of Quebec and the Maritime Provinces being first constituted in 1894. In 1898, this Grand Lodge was registered under the Benevolent Associations Act of the Province of Quebec and, thereby, be-

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came a body corporate. In September, 1907, the Grand Lodge for Quebec and the Maritime Provinces seceded from the parent order and became an entirely independent body. In 1908, the name was changed by the authority of an order of the Lieutenant-Governor in Council of Quebec to "The Royal Guardians" and in May, 1910, after the commencement of this action, the Royal Guardians were incorporated by an Act of the Parliament of Canada. The constitution of the order and the laws governing the Grand Lodge and the members of the order subject to its jurisdiction, as adopted in 1906, are in evidence and (with certain changes not material to any question on this appeal made necessary in consequence of the secession from the jurisdiction of the Supreme Lodge of the parent order) are admitted to have been the constitution governing the Grand Lodge in 1908, when Clarke died, and the suspension was alleged to have arisen which is the principal subject in controversy before us. The constitution provides, article 2:—

> 2. The following Constitution, as hereinafter set forth, subject to such changes as may be ordained by the Supreme Lodge, shall govern this Grand Lodge and the subordinate lodges and members of the Order in this jurisdiction, and no amendment or alteration shall be made in the said Constitution by this Grand Lodge except at a stated or special meeting of Grand Lodge, nor unless notice of such amendment shall have been given to the Grand Recorder sixty days prior to session of Grand Lodge and a copy thereof sent by him to each subordinate lodge thirty days previous to such meeting, and that a two-thirds majority of votes of the members of G. L. present at such meeting of Grand Lodge shall be cast in favour of such amendment or alteration.

By article 4, the Grand Lodge was to consist of certain officers and representatives from subordinate lodges within the jurisdiction.

By article 78:—

The following rules (arts. 78-118) are prescribed for the government of this Grand Lodge Beneficiary Jurisdiction in the collection, management and disbursement of the Beneficiary Fund.

By article 79: The Grand Lodge guarantees payment of the amount mentioned in the beneficiary certificate to the members named, provided:—

That said member shall fully comply with each and all requirements of the hereinafter specified conditions, with the Constitution, and the general laws governing the Order and shall at his death be a member of the Order in good standing.

The provisions as to the manner of assessment, the period of grace allowed for the payment of the sums levied and as to suspension for non-payment and reinstatement are set out in articles 96-110 inclusive. The parts of these provisions which are immediately material are these. Article 97 provides that (in certain circumstances mentioned in the article indicating that the beneficiary fund of the Grand Lodge needs replenishment in order to provide funds for the payment of benefits),

it shall be the duty of the Grand Recorder to call upon the subordinate lodges to forward the beneficiary funds in their respective treasuries and at the time of making such call to make an assessment upon each member of the Order who shall have received the Workmen Degree prior to the date of the last assessment.

Sections 98, 99 and 100 (pp. 51 and 52) are as follows:—

98. Unless otherwise announced by the Grand Recorder, either in the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month unless he be notified to the contrary, and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his Beneficiary Certificate shall thereby lapse and become void.

99. Every call made upon subordinate lodges to forward Bene-

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ficiary Funds shall be made upon the first day of the month that is not Sunday or a legal holiday, shall contain a list of deaths officially reported to the Grand Recorder prior to the last day of the preceding month, and not included in the preceding call, and all necessary instructions relative to forwarding the funds called for. The notice of such call is given by the Grand Recorder having it printed in the official organ of Grand Lodge, or by mailing a special notice to the Recorder of each Lodge.

100. Any member not receiving the said official organ or official notice before the fifteenth day of any month shall write the Financier of his Lodge to ascertain whether an assessment has been made and shall also by registered letter, give notice to the Grand Recorder of the non-receipt of such official organ or notice: otherwise default to pay an assessment within the required delay shall not be excused on any plea of want of notice.

The two remaining sections which are material are sections 106 and 107 which are in these terms:—

106. The Grand Recorder is hereby instructed, so soon as he receives the Subordinate Lodge's report to give notice to any member reported as having failed to pay to the Financier of the Lodge of which he is a member, on or before the expiration of thirty days after an assessment has been made for the Beneficiary or other Funds, and who, if under the Level Rate Plan, for a period of three years has not sufficient money to his credit in his reserve to cover the amount of such assessment, that his interest and benefit, and those of all claiming through him, from and after said date, and such member shall not be reinstated except as hereinafter provided. Such notice to be delivered or sent by mail (registered) to the last address of such member known in the Grand Recorder's office.

The above notice by the Grand Recorder is, however, only a matter of courtesy, and failure to give or to receive the same cannot be pleaded by a defaulting member, as in any way avoiding the suspension caused by his default.

Payment to the Financier of his Subordinate Lodge within thirty days from date of such suspension shall be for the purposes of this clause considered as payment to the Grand Lodge.

107. Any suspended member who has forfeited all his rights by reason of non-payment of assessments for the Beneficiary or other Funds, may be reinstated, if he be living, at any time within a period of three months from the date of such suspension, upon the following conditions, and none other, that is to say: He shall pay all assessments that have been made during that time, including the one or more for the non-payment of which he had become suspended, together with his dues to date, and if thirty days have passed since such non-payment, he shall at the same time furnish a certificate, by

a duly qualified medical practitioner, that he is in good health. The Financier shall report the same to the Lodge at its next stated meeting and the fact of the reinstatement shall be entered on the minutes; such report, however, is not to be a condition precedent to the reinstatement. But it is hereby expressly declared that the death of a member while so suspended, and during the said three months, shall debar him from being restored into good standing or from being reinstated, by payment of any assessments, either of the one or more for the non-payment of which he became suspended, or those that shall have been made against him during the said period; it being an absolute condition that all membership rights are forfeited by such non-payment, and the Beneficiary cannot claim any rights in case the member should die before complying with all the above conditions and before being reinstated as provided in this constitution and payment or tender by his personal representative or representatives during said period, shall in no case be held to restore the said member into good standing in the Order.

On the 1st of August, 1908, a call was made upon the subordinate lodges under the provisions of article 97, and, at the same time, an assessment was made and notice of it was given in the official organ of the Grand Lodge. The assessment and the notice are as follows:

Official Notice of the Beneficiary Fund Assessment, No. 8, for August, 1908.

Office of the Grand Recorder,
Fraternal Chambers, A.O.U.W. Building,
Cor. Sherbrook St. and Park Ave.
Montreal, Que., August 1st, 1908.

To the Members of the Ancient Order of United Workmen,
Jurisdiction Grand Lodge of Quebec and the Maritime Provinces.

You are hereby notified of the following deaths, necessitating the levy of one assessment:—

* * * * * *

In order to provide for payment of death losses, Assessment No. 8 is hereby levied upon each Workman Degree member who has taken the degree prior to the 1st of August, 1908, according to Tables of Rates in adjoining column.

The said assessment is now due, and must be paid to the Financier of your Lodge on or before the 31st instant. Failing to comply within the above stated dates, you will forfeit all your rights, benefits and privileges, by becoming suspended.

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Should you change your address notify your Financier, also the publisher of "The Protector," giving name and number of your Lodge.

* * * * * *

A. T. PATTERSON,
Grand Recorder.

Note (section 97, Grand Lodge Constitution, amended 1907).—Unless otherwise announced by the Grand Recorder, either by the official organ of Grand Lodge, or by special notice, it is understood that an assessment is levied and it is hereby declared that an assessment is due and payable to the Financier of his Lodge by each member of the Order on the first day of each month, and any member making default for thirty days to pay the same, shall *ipso facto* be deemed suspended from all privileges of the Order, and his beneficiary certificate shall thereby lapse and become void.

Clarke died on the 7th of September, 1908, without having paid this assessment. After his death the amount was paid by some friends to the financier of his lodge, who accepted it but the responsible officers of the Grand Lodge taking the position that Clarke had incurred suspension by reason of the non-payment of his assessment on the 31st of August, refused to recognize this payment and declined to pay the benefits to which the respondents would have been entitled had Clarke been a member of the order in good standing.

The rights of the beneficiaries under Clarke's certificate rest upon the condition, which is an essential condition of them, that he shall have been a member of the order in good standing at the time of his death and that the beneficiary named shall be entitled to demand payment under the provisions of the constitution and laws of the order in force at the time of his death. Articles 97, 98, 100, 106 and 107, above quoted, provide in the most explicit terms that the failure to pay an assessment at the expiration of thirty days after it is made (and, by article 98, an assessment is deemed to have been made on the first of each month unless notice to the contrary is given) shall *ipso facto*

involve the suspension of the delinquent member with the consequence of the lapsing of all rights under that member's beneficiary certificate; and section 107, moreover, contains a specific declaration to the effect that on the death of a member while under suspension the provisions of the constitution as to reinstatement cease to have any application and all potential rights under the beneficiary certificate irrevocably disappear.

I have been forced to the conclusion, very much indeed to my regret, that there is nothing in the circumstances of this case affording any way of escape from the operation of these provisions which I think have the construction and effect contended for by the appellants and that the claim of the respondent fails. The grounds upon which the respondent rests her case are two: 1st, it is contended that, giving the articles referred to the legal effect assigned to them by the law of Quebec, the assessment was payable at the domicile of the member, that, consequently, it was the duty of the creditor to make demand at the member's domicile and that its failure to do so had the effect, in law, of excusing non-payment. The second contention, I am obliged to say, I have some difficulty in stating with precision; the general effect of it is that the Grand Lodge is precluded, because of certain alleged practices connected with the collection and receipt of assessments, from setting up the articles of the constitution upon which it relies.

First, then, of the legal effect of these articles as touching the place where the payment of the assessments is exigible.

A question suggests itself *in limine* which it may be worth while to indicate although in my view it is

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unnecessary to pass any opinion upon it; and it is this: Is the legal effect of Clarke's contract necessarily ruled by the law of Quebec?

The Grand Lodge of Quebec and the Maritime Provinces was when first constituted an unincorporated association having members and subordinate lodges in the Maritime Provinces as well as in Quebec. The Grand Lodge was affiliated with other lodges all under the jurisdiction of the Supreme Lodge of the order which had been organized in Pennsylvania.

The contract governing the rights of the members of the order in Quebec and the Maritime Provinces was expressed in the constitution of the Grand Lodge, subject, however, to the provisions of the constitution of the Supreme Lodge in case of conflict. It might, I think, be suggested with some shew of plausibility, that, in the matter — the vital matter — of the payment of assessments, the constitution itself affords conclusive internal evidence of an intention that the obligations of the members, whether in Quebec or in the three Maritime Provinces, should be governed by a single law and, moreover, having regard to the origin of the order and of the constitutional provisions upon this subject and to the actual circumstances of this particular Grand Lodge itself, that these provisions contemplate in this respect the application of the common law rule according to which, reasonably, the debtor seeks his creditor rather than the rule of the French law.

In this matter of the law to be applied, the principle of the law of Quebec seems to be the same as the principle of the law of England, viz., that the actual or presumed intention of the parties as ascertained

from the instrument and the circumstances must, in the last resort, govern.

I pass over this question because, according to the law of Quebec, I think the respondent's contention on this point fails.

The relevant provisions of the Civil Code do not seem to leave the rule of law in doubt.

Articles 1152 and 1164 are as follows:—

1152. Payment must be made in the place expressly or impliedly indicated by the obligation.

If no place be so indicated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of contracting the obligation.

In all other cases payment must be made at the domicile of the debtor; subject, nevertheless, to the rules provided under the titles relating to particular contracts.

1164. If, by the terms of the obligation or by law, payment is to be made at the domicile of the debtor, a notification in writing by him to the creditor that he is ready to make payment has the same effect as an actual tender, provided that in any action afterwards brought the debtor make proof that he had the money or thing due ready for the payment at the time and place when and where the same was payable.

The provisions of this constitution, above quoted, when read with the other provisions relating to the making and collection of assessments seem to imply that the member shall seek out the financier *and not* the financier the member.

In articles 165, 166 and 167, which define the duties of the officers of the subordinate lodges, there is no provision for the taking of active steps by any of these officers for the purpose of collecting assessments. One sees further that no provision is made for the payment of these officers. The lodges are organized with a view to economical administration and the constitution seems to contemplate that the offices shall be honorary and filled by persons who in the ordinary course are largely occupied with their own vocations.

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That seems hardly consistent with the notion that the assessments are intended to be in point of law payable at the domicile of the member.

But the arguments advanced involve the proposition that the making of the demand at the domicile is a condition which must be complied with to put the member in default. Assuming for the moment that this view is consistent with article 1164, above quoted, is seems clear enough that you cannot give effect to this view without doing violence to the intentions of the framers of this instrument as expressed in sections 97, 98, 99, 100, 102, and 106. Article 98, for example, says that an assessment is due and payable on the 1st of each month by each member unless he is notified to the contrary and any member making default for thirty days shall suffer the consequences therein mentioned. According to the argument of the respondent default would never take place until demand at the domicile of the member, from which time only the period of thirty days would begin to run. That would necessitate a demand at the domicile of each member on a given day for which no sort of provision is made and which cannot be supposed to have been in the contemplation of the constitution; or demands on successive days with the effect of giving different delays to different members in violation of the principle of equality which obviously pervades the constitution. The other articles are open to similar observations. The application of the rule suggested would throw the whole scheme into confusion. I think the proper conclusion is that, upon this point, the rule to be applied is that above indicated.

But, assuming the effect of article 1152 C.C. is to make the assessment payable at the member's domi-

cile, the failure to demand payment there is not in itself sufficient to excuse the failure to pay. Article 1164 C.C. seems conclusive upon that point; and the evidence, unfortunately, does not bring the appellants within the protection of that article.

I come now to the second ground which is that, for certain reasons, the appellants are precluded from alleging Clarke's non-performance of the conditions of his contract.

Before stating the facts upon which the respondents rely in support of this contention it would be convenient first to refer to section 115 of the Constitution. That section is as follows:—

> It shall be the duty of each Subordinate Lodge to make a monthly report to Grand Lodge, which report shall be closed on the last day of each month, signed by the Financier and Recorder, and at once sent to the Grand Recorder.
>
> This report shall be in the form provided by Grand Lodge, and contain the information thereby demanded.
>
> Should said report fail to reach the Grand Recorder on the fifteenth day of any month, it shall be his duty to call upon the Recorder of each delinquent Lodge, by telegram or otherwise, to forward said report forthwith. In months in which no assessment is called, a report shall be made as if there were an assessment, except that the blank for current assessments shall not be filled.

This section was construed, not unnaturally — I think, indeed, it is probably the proper construction of it — as giving to the officials of the subordinate lodge a delay of fifteen days to make up and forward the report referred to. The forms provided for by the Grand Lodge referred to in the section, called for a statement of the assessments paid for the month to which the report related, by the members of the lodge, and of the names of the members suspended for non-payment. By section 166(*c*), it was the duty of the financier of the subordinate lodge to notify the Grand Recorder

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of all members who stand suspended on the last day of each month. The practice was to treat the report provided for by section 115 in which this information ought to be contained, as being a sufficient notification under section 116 (*c*). According to the strict letter of these provisions, therefore, members failing to pay an assessment due, on the first of a given month, within the thirty days of grace allowed by the rules should be marked suspended in the report under section 115. On the other hand, the effect of this would obviously be in some cases to give rise to what would very naturally appear to the officials of such an organization as this as quite useless trouble, not only to the officials themselves, but to the members, and at the same time involve the members in some, it is true, very slight expense. I am dwelling on this because it seems to be necessary to consider the practicable working of section 115 and section 166 (*c*) from the point of view of the member and the official of the subordinate lodge in order to appreciate the contention I am about to consider.

The constitution requires this report to be made up as of the last day of each month. But consider the case of a member having failed to pay during the given month his assessment for that month, but paying it a day or two after the end of the month to the financier. What is the position of that member ? During the period which elapsed after the expiration of thirty days from the first day of the month when his assessment became due and the day on which the assessment was paid to the financier the member was, according to the provisions of sections 98 and 107, suspended. If he died during that period (on this point section 107 is most explicit) no rights could arise

under his beneficiary certificate. But, if living, on payment at any time within thirty days after the date on which the suspension accrued he became by virtue of the payment *ipso facto* restored to his status as a member. That is the construction and effect attributed to section 107 by the Grand Lodge, and that, in my view, is the proper construction of that section. The requirement that the member who has become suspended

> shall pay all assessments that have been made during that time

has been construed and, in my judgment, rightly construed, as requiring the payment of such assessments in accordance with the provisions of the constitution, viz., within the period of grace allowed; and it follows that where the member pays prior to the expiration of the thirty days following the accrual of the suspension he is obliged to pay the assessment in respect of which he has made default and that assessment only, in order to obtain re-instatement. Section 107 requires that where the conditions of re-instatement have been satisfied, which in the case we are considering are limited to the payment of the overdue assessment, the fact of the re-instatement is to be reported to the next meeting of the lodge, but this declaration is added,

> such report, however, is not to be a condition precedent to the re-instatement.

Such then being the position of a member who, having failed to pay his assessment within the month for which it is levied, pays it within the first few days of the next month and, thereby, recovers his status as a member of the order in good standing and becomes re-invested with the rights under his beneficiary certificate which had suffered a temporary lapse during

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the period of suspension, one understands how the inutility of reporting such a member as suspended would impress itself upon the financier and recorder of his lodge. The reporting him as suspended would necessitate a formal notice by the Grand Recorder under section 106 and the entry of the suspension in the records of the Grand Lodge, the payment of a small fine by the defaulting member, and would involve, it may be, some discredit for the lodge itself.

The result was that a practice appears to have grown up, certainly in Columbus Lodge, and probably this practice was general, of not reporting as suspended members who paid their assessments at any time before the report was sent forward under section 115; and this practice, while irregular and involving a violation of section 115, could not, in itself, prejudicially affect the rights of the Grand Lodge, *vis-à-vis* the holders of beneficiary certificates, provided the provisions of section 107 were observed and no assessment was received on behalf of a defaulting member who had died while under suspension.

It is this practice which is in the main relied upon as constituting the foundation of the respondents' contention that the appellants are precluded from setting up Clarke's default

The contention is put in two ways: First, it is said that the provisions of the constitution quoted above became superseded by a practice or custom which extended the period of grace from thirty days to the date not later than the fifteenth of the month following the making of the assessment when it became necessary for the officers of the subordinate lodge to forward their report in time to reach the Grand Recorder by the fifteenth of that month. Secondly, it is

said that, in effect, by this practice members were treated as being in good standing so long as their assessments were paid in time to be forwarded with the monthly report, and that the practice was known and acquiesced in by the Grand Lodge and that this acquiescence precludes the Grand Lodge from asserting that Clarke was not in good standing at the time of his death.

Before analysing this contention I should summarize the features of the evidence bearing upon it which must be kept in view. There is no evidence that, except in Clarke's case, an assessment was ever accepted by any financier of a subordinate lodge on behalf of a member who had died while under suspension. Leroux, the financier of Columbus Lodge, says that he had never done so. And the effect of the evidence seems to be that if such a thing had occurred it had not come to the knowledge of the officials of the Grand Lodge. Then it is not denied that in each month in which an assessment was levied a notice was sent through the official organ of the Grand Lodge, the newspaper "Protector," in the form of a notice for August quoted above in full — a notice specially emphasizing the consequences of failing to pay within the month, and quoting verbatim the section 97 in which these consequences are declared. This notice was mailed to every member as required by the rules, and by the great majority of members, no doubt, was received. In the case of Columbus Lodge, it appears to have been a common thing for members to delay the payment of their assessments until after the expiration of the month, but it was by no means universal. Columbus Lodge seems to have been in a state of

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disorganization for a number of years; Leroux states that for four years there had not been a meeting of the Lodge. As to the other lodges there is really no evidence to justify the inference that there was any general practice of delaying the payment of assessments beyond the time allowed by the rules. Patterson, the Grand Recorder, says that he had his suspicions that assessments were received after expiration of the days of grace, and forwarded without any report of the default. But he denies any knowledge of such cases and, according to his statement, at all events, his evident belief that such cases did exist was simply an inference founded upon the probabilities, and the fact that the reports were sometimes delayed beyond the fifteenth. Brady, the Grand Master Workman, denied any knowledge of any such practice, although he too had his suspicions.

There is, however, no evidence and there appear to be no facts upon which an inference could properly be based that delinquent members who allowed themselves the indulgence of falling into default were under any delusion as to the provisions of the constitution applicable to such a case, or as to the nature of the risk they were running. Larkin, who was called as a witness on behalf of the respondents, and says he considered himself in good standing if he paid before the forwarding of the monthly report, admits that he was acquainted with the provisions of the constitution, requiring payment before the thirtieth of the month. The members who indulged in this practice seem to have been aware of the importance of concealing the facts from the officials of the Grand Lodge. In Columbus Lodge the pass books of the members in which the financier receipted the payment of the assessments did

not shew the date of payment, but only the month to which the assessment was attributed. In lodges in which the practice was to give the date of payment the receipts in such cases were antedated. The friends who paid Clarke's assessment were evidently impressed with the necessity of doing so at the earliest moment; obviously they did not entertain the idea that Clarke was legally entitled to postpone payment until the report was forwarded. It is nowhere suggested that any act of the Grand Lodge or of any of its officials or any of its records or any communication made or published under its authority had justified or created in any way a belief amongst the members that sections 98 and 107 were no longer in force or that the provisions of the constitution were in any respect other than those which are now produced in this litigation. On the contrary the monthly notice, as I have already mentioned, pointedly called the attention of members to the terms of section 98 and the effect of non-compliance with them.

Now, it is a term of every beneficiary certificate that the member shall observe the conditions of the by-laws and constitution and amendments thereof.

Among these are, of course, the rules prescribed (articles 78-116) for the collection, management and disbursement of the beneficiary fund and in particular, the rules governing rights of the Grand Lodge in the levying of assessments and the consequences of non-payment.

While each member is bound by these rules himself he is entitled to have them observed by others, that is to say, by the members in their dealings with the

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Grand Lodge and by the Grand Lodge in dealings with members.

Article 2. "The constitution" * * * shall govern this Grand Lodge and "the subordinate lodges and all members of the Order"; and the rules just referred to "are prescribed" in the words of article 79 "for the government of this Grand Lodge beneficiary jurisdiction." These rules, in a word, constitute, in effect, a single contract to which the Grand Lodge and all beneficiary members are for the time being parties. It follows, of course, that they cannot be altered except in accordance with some provision of the constitution, *i.e.*, the contract itself or by the consent of all parties.

The constitution makes provision for amendment by the Grand Lodge by a two-thirds vote after certain notices have been given. The Grand Master Workman has power to grant dispensations *not inconsistent with the Constitution* and the Grand Lodge may adopt standing regulations *not inconsistent with the constitution* for the purpose of carrying the same into effect.

But it is clear enough that the Grand Lodge would have no authority, except by means of an amendment of the Constitution, to change the provisions of articles 97, 98, 100, 106 and 107, already quoted providing *ipso facto* suspension of members who fail to pay their assessments within the thirty days of grace provided for. An express resolution to that effect would, in itself, be inoperative.

And still less would the Grand Lodge have power to provide for the exemption of particular members or particular lodges from these provisions for giving, for example, to the members of some lodges forty-five days of grace instead of thirty days, the period allowed

the other members. Equality is the fundamental principle of every such constitution as this.

There could, therefore, be no such thing as an amendment of these rules by the operation of "custom." It is conceivable that a practice might become established by the acquiescence of every member of the order the validity of which everybody would be estopped from disputing; but that would be a very difficult case to maintain where new members are constantly being added. No such case is suggested here.

Almost as difficult would it be to make out that the Grand Lodge is by reason of some practice precluded from setting up the provisions of these rules, for example, sections 98 and 107.

Any such contention when analysed must come to this — that the Grand Lodge in permitting the practice relied upon had led the members to believe that these provisions would not be enforced and that the courts would compel the Grand Lodge to give effect to this expectation in favour of members acting upon it in good faith. In the case of the specific provisions now under consideration the contention being that in permitting the particular practice already described, the Grand Lodge encouraged the members of Columbus Lodge to act upon the assumption that these sections in so far as they provide for suspension on non-payment within the prescribed delay, would not be enforced provided the monthly assessments were paid in time to be forwarded to the Grand Lodge on the 15th of the month following that in which they became due. But the Grand Lodge having no authority to exempt lodges or members by express declaration from compliance with these provisions of the con-

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stitution, it seems obvious that it could not so do by mere acquiescence in a course of conduct. Such a course of conduct, so long as there should be members entitled to insist upon the provisions of the constitution being observed, could not prevent the Grand Lodge insisting upon compliance with the provisions of the constitution.

Then a decisive answer to this argument on behalf of the respondent appears to be this, viz., that no member or person seeking to enforce rights under a beneficiary certificate can be heard to say that he did not know the provisions of the constitution which are made part of his contract. I exclude, of course, cases in which a member has been misinformed as, for example, of some amendment of the constitution through some communication made by some official or agency under the proper authority of the Grand Lodge or by means of some error in the record of the Grand Lodge itself. Knowing the rules as to the payment of assessments and the consequences of non-payment as prescribed by the rules, and knowing that the Grand Lodge has no authority to exempt lodges and members from the observance of these rules or from the consequences of non-observance, it must be taken that when he, alone or in concert with others, departs from them he does so at the risk of having to suffer the consequences pointed out by the constitution.

Coming to the case at bar, in addition to the knowledge of the rules which must be imputed to Clarke there are the circumstances mentioned above — the monthly notice, in view of the terms of which it is impossible to suppose that there could have been anything like a general belief in the order that the provi-

sions of sections 98 and 107 would not be enforced, the fact that there is no evidence of a single instance in which a defaulting member, dying while in default within the meaning of sections 98 and 107, was recognized as having died in good standing, the fact that the conclusive proof that no such case had occurred in the history of Columbus Lodge, at all events since the year 1903, that the practice, even such as it was, was obviously a clandestine practice — it seems impossible to conclude as a fact that members generally were really misled into a belief that they could fall into a default without suffering the consequences pointed out in sections 98 and 107. What they did understand doubtless was this: That they would not be reported to the Grand Recorder as being in default, or as being suspended, if they paid their assessments in time to enable their financier to forward them with his monthly report; and that they would not suffer the inconveniences, whatever they might be, arising from being reported as defaulters. But there is no solid basis disclosed by the evidence upon which one can fairly found the conclusion that the members of Columbus Lodge, and still less the members of the order generally, did not understand that in failing to pay within the prescribed thirty days they were making default within the provisions of the constitution which remained in full force. Again even assuming that there may have been members who in fact were ignorant of the constitution who never read the notices they received who having before their minds a sort of impression that in order to avoid obvious and immediate inconvenience an assessment must be paid by the fifteenth of each month at the latest and without thinking of ulterior and more serious conse-

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quences paid only at the last moment — Is there anything in the circumstances of this case which can fairly be said, on legal principles, to cast upon the Grand Lodge the responsibility for such ignorance and neglect ? The answer, it seems to me, must be in the negative if only for the simple reason that the whole pith of the complaint against the Grand Lodge rests upon the members' supposed ignorance of the provisions of the constitution. Take away this supposition of ignorance and there is nothing left. The Grand Lodge cannot be responsible for that, as I have already said, for the reason that a person who enters into a contract such as that expressed in these beneficiary certificates, and constitutional rules and by-laws, cannot excuse himself from non-performance of conditions on the ground that he does not know the provisions of his contract. It is his duty to know them. He must be held to know them. It is impossible to work out such a system as this upon any other principle. Then again, assuming ignorance in fact, on what ground is the Grand Lodge to be held responsible for it ? There is nothing in the circumstances of this case to shew that the officials of the Grand Lodge had reason to suspect any general ignorance of the provisions in question. As I have already said, the evidence shews, on the contrary, that there was no such ignorance. Everything that could reasonably be suggested was being done by the Grand Lodge to induce members to pay promptly by keeping before their eyes the consequences of default; and the officials had, apparently, every reason to believe, what I think was the fact, that these provisions were generally understood. Default, where there was default, they doubtless attributed to reasons other than ignorance.

Clarke's case unfortunately illustrates my meaning. He was a persistent defaulter, being recorded again and again as suspended, making default no doubt with a full knowledge of the consequences. Indeed, there seems to be grave reason to doubt whether, strictly speaking, he was a member in good standing during the month of August. I mention this, of course, not for the purpose of insisting upon a point that the appellants have quite properly refused to take, but for the purpose of pointing out the difficulty of inferring that Clarke's default was due to a lack of appreciation of the consequences of default. Leroux's evidence, moreover, shews that, notwithstanding a reprimand administered to Columbus Lodge for the looseness of its methods, no change has since taken place, and, notwithstanding the position the Grand Lodge has taken in this litigation, the former practice is apparently continued.

Then the respondent says that the practice of the financier in sending for her husband's assessment on the fifteenth of every month established a course of business by which the Grand Lodge is bound. Now, first, it is perfectly clear that neither the financier nor Columbus Lodge had any authority to exempt Clarke from the operation of sections 98 and 107, yet the contention must come to this, if it is to have any force, that the financier by his conduct had relieved Clarke from the operation of those provisions of the constitution. The contention appears to assume that the financier having no actual authority, had ostensible authority to bind the Grand Lodge by such a course of conduct. The argument seems to be that the Grand Lodge must have had notice through the financier of what was going on and receiving the as-

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sessment, with notice of the facts, ratified the acts of the financier. The contention, unfortunately, is compounded of fallacies, even leaving aside the fatal objections that the Grand Lodge itself had no authority under the constitution to exempt Clarke from these provisions except by amending the constitution.

Clarke must be taken to have known the limits of the financier's authority, and the limits of the constitutional power of the Grand Lodge itself, with respect to these provisions of the constitution. Again, as Clarke was entitled to pay the financier when he did pay and to be treated thereafter as a member in good standing notwithstanding any pre-existing suspension, the acceptance of the assessment ratified nothing. The receipt by the financier must be presumed to be a rightful one, not a receipt in violation of the constitution. And, still again, the reasonable explanation of the financier's conduct, considered as a matter of fact, in sending his messenger to collect Clarke's assessment, is that he did it out of kindness for Clarke who, unfortunately, seems to have had a very hard struggle to keep up his payments. It is not good policy to interpret such kindly acts of indulgence as establishing a course of business, in breach of the duty of the agents doing them, unless it is quite clear that such is the proper construction of them. It has been pointed out again and again that such extreme interpretations have a tendency to compel people to stand on their strict rights for their own protection rather than follow the more natural human kindly way, and for that reason they should be avoided except where there are really solid grounds for them. In this case the evidence utterly fails to begin to make a

case shewing that Clarke was misled by the kindness of the financier.

What I have already said will make it clear that, apart from numerous other grounds of distinction which become obvious when one keeps the facts of this case in view, the cases cited, of which *Wing* v. *Harvey* (1) is perhaps the type, can have no bearing upon any question before us on this appeal, for this short reason: That, as the member is conclusively presumed to know the limits of the authority of the Grand Lodge, the subordinate lodges and the officials of each (which are defined specifically and exhaustively by the constitution and by-laws), the ostensible authority of the officials cannot for any relevant purpose be of wider scope than the actual authority.

ANGLIN J.—I concur in the dismissal of this appeal. The evidence establishes that the financier of Columbus Lodge, to which the deceased Clarke belonged, was in the habit of collecting assessments from members, including Clarke, at their residences after the period of thirty days during which, under the by-laws of the society, they might pay without incurring suspension, had expired, *i.e.*, he collected up to the 15th day of the month following that on the first of which the assessment became due. It was then that the financier was required to make his return to the Grand Lodge. His custom was, to return, on the 15th day of the following month, the moneys so collected after the expiry of the month in which they were payable as assessments paid in the ordinary course and not as moneys received from suspended

(1) 5 DeG. M. & G. 265; 43 Eng. Rep. 872.

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members. This practice had continued for at least five years before Clarke's death. It appears to have prevailed also in other lodges. The learned trial judge drew the inference from the evidence that the Grand Lodge officials were aware of what was going on. That inference has been accepted by the Court of Appeal and I am not prepared to hold that it is erroneous.

Upon this state of facts it has been held by the provincial courts that the provision for forfeiture for non-payment of the assessments during the month in which they were levied was waived and that the time for payment was extended at least until the 15th day of the following month prior to which payment might be made without suspension being incurred.

The deceased died on the 7th of September leaving his August assessment unpaid. It was paid on the following day. I accept the conclusion reached in the provincial courts that the practice above stated, known to the officials of the Grand Lodge and not repudiated by them, constituted a waiver of the provision for forfeiture which the defendants invoke. The assessment was not in default and Clarke had not incurred suspension at the time of his death. At least the defendants are estopped from contending that he had. To the authorities cited in the judgments of Mr. Justice Dunlop and Mr. Justice Cross I would merely add a reference to *Buckbee* v. *The United States Insurance and Trust Co.*(1); *Insurance Co.* v. *Wolff* (2), at page 333; and *Redmond* v. *Canadian Mutual Aid Association*(3), at pages 341-342. The course of

(1) 18 Barb. 541, at p. 544. (2) 95 U.S.R. 326.
(3) 18 Ont. App. R. 335.

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dealing by the society with Clarke was such, in my opinion, as to induce his failure to make payment within the thirty days prescribed by the by-laws and it would operate as a fraud upon his representatives if the Society were now

allowed to disavow its conduct and enforce the condition.

Neither can I see any distinction in principle, such as has been suggested, between mutual-benefit insurance societies and joint-stock insurance companies in regard to the effect of the conduct of high officials in creating a waiver or estoppel. In the management of its business these officials in the case of mutual-benefit societies represent the members of the society, who are its owners and presumably have entrusted the management of its affairs to such officials because they repose confidence in them, quite as much as the directors and high office holders in the joint-stock company represent its owners, the shareholders. Shareholders and participating policy-holders in the latter are quite as much interested in the strict observance of provisions respecting forfeitures and lapses as the members of the former. The shareholders and participating policy-holders in the joint-stock company reap the benefit of forfeitures and lapses in the form of profits. Members of the mutual-benefit society reap a like advantage in reduction of assessments either in number or amount. In either case the management of the business is entrusted to officials who are its representatives and agents. With them the insured must deal. I cannot see that it makes any difference whether the conditions of the risk are expressed in the contract of insurance itself or are contained in a constitution or by-laws incorporated with

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the contract. Conduct of officials which will render it inequitable for the insurer to set up a condition entailing forfeiture in the one case will be equally effective in the other.

Another answer made by the plaintiffs to the claim of forfeiture is that, according to the civil law of the Province of Quebec, where the contract in question was made and the insured lived, in the absence of a contrary stipulation — the policy contained none — the creditor must seek his debtor. The financier of Columbus Lodge had by his practice recognized this rule as applicable to the insurance contract sued upon. His custom was to go himself or to send some person to collect the assessments from the assured. He had not demanded the August assessment. Therefore, it is contended, the assured was not in default when he died. I do not wish to be understood as rejecting this answer of the respondents. Finding the ground first stated sufficient for the disposition of the appeal, it is unnecessary for me to deal with this further contention.

BRODEUR J.—I agree that this appeal should be dismissed for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellants: *T. P. Butler.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*