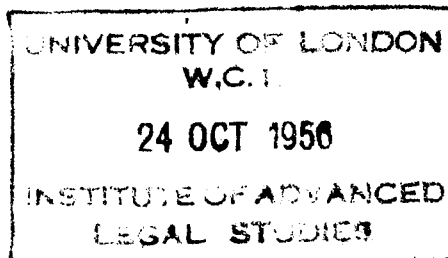


In the Privy Council.

No. 77 of 1896.



29474

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE LONDON AND LANCASHIRE LIFE ASSUR-
ANCE COMPANY (*Defendants*) *Appellants*,

AND

JEAN FLEMING (*Plaintiff*) *Respondent*.

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 77 of 1896.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE LONDON AND LANCASHIRE LIFE ASSUR-
ANCE COMPANY (*Defendants*) *Appellants*,

AND

JEAN FLEMING (*Plaintiff*) *Respondent*.

RECORD OF PROCEEDINGS.

In the Court of Appeal for Ontario.

Case on Appeal to the Court of Appeal for Ontario.

Between

Jean Fleming (*Respondent*) *Plaintiff*,

and

The London and Lancashire Life Assurance Company
(*Appellants*) *Defendants*.

Writ issued the 23rd day of July, 1895.

Statement of Case.

RECORD.

*In the
Court of
Appeal for
Ontario.*

No. 1.

Statement of
Case. Writ
issued 23rd
July, 1895.

10 This is an action by the Plaintiff against the Defendants for the amount of two insurance policies of \$5,000 each upon the life of her son James Fleming, deceased.

The action was tried at Toronto on the 27th day of January 1896, before the Honourable the Chief Justice of the Common Pleas Division of the High Court of Justice, who, on the 11th day of March 1896, delivered judgment in favour of the Plaintiff with costs from which judgment this appeal is brought.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 2.
Statement of
Claim,
delivered
3rd Sept.,
1895.

In the High Court of Justice—Chancery Division.

Writ issued the twenty-third day of July A.D. 1895.

Between

Jean Fleming *Plaintiff,*

and

The London and Lancashire Life Assurance Company . *Defendants.*

Statement of Claim.

1. The Plaintiff is a widow residing at Wyevale in the county of Simcoe. The Defendants are an Insurance Company.

2. By a policy of insurance bearing date the 4th day of December 1894 and 10 numbered 34,063 the Defendants thereby agreed that the funds and property of the said company according to the provisions of the deed of settlement thereof should be liable to the payment of the sum of \$5,000 to the executors, administrators or assigns of the said James Fleming to be paid immediately after satisfactory proof should have been received at the office of the said company of the death of the said James Fleming.

3. By a further policy of insurance bearing date the 4th day of December 1894 and numbered 34,064 the Defendants thereby agreed that the funds and property of the said company according to the provisions of the deed of settle- 20 ment thereof should be liable to the payment of the sum of \$5,000 to the executors, administrators or assigns of the said James Fleming to be paid immediately after satisfactory proof should have been received at the office of the said company of the death of the said James Fleming.

4. On or about the 13th day of June 1895, the said James Fleming by writing under his hand duly assigned the said policy to the Plaintiff and the said assignment was duly forwarded to the Defendants. The said James Fleming died on the 15th day of June 1895 and while the said policies were still existing and in full force and effect and satisfactory proof of the death of the said James Fleming was given to the Defendants at the office of the company in Montreal on the 4th day of July 1895.

5. All conditions were performed and all things were done and all times elapsed necessary to entitle the Plaintiff to a performance by the Defendants of their said agreements and to be paid the sum of \$5,000 under each of the said policies yet the Defendants have not paid the same or any part thereof.

The Plaintiff claims:—

1. Payment of the sum of \$10,000.00 together with interest thereon from the 4th day of July 1895.
2. The costs of this action.

The Plaintiff proposes that this action be tried at Toronto.

Delivered this 3rd day of September 1895, by Messrs. Roaf, Curry, Gunther 40 and Green of number 23, Adelaide Street, East, Toronto, solicitors for the Plaintiff.

Statement of Defence.

1. The Defendants allege as the fact is that on or about the 19th day of November 1894 one James Fleming made a written application to them for insurance in the sum of \$10,000 to be issued in two policies on \$5,000 each, which said application was made upon the ordinary form used by the Defendants.

2. Among the conditions subscribed to by the said James Fleming in the said application were the following:—

“ I do hereby declare that the age of myself does not exceed twenty-six; that I am in good health and ordinarily enjoy good health and that in the above proposal I have not withheld any material circumstances or information touching the past or present state of my health or habits of life with which the Directors of the London and Lancashire Life Assurance Company ought to be made acquainted.

“ I hereby agree that all the foregoing statements and answers whether written by my own hand or not, as well as those that I make or shall make to the company’s medical examiner, in continuation of this application, are true and are offered to the company as the basis of the contract which shall not take effect until the first premium shall have been paid and the policy or interim acceptance receipt shall have been delivered, during my life and continuance in good health.”

3. The said James Fleming also made a personal report to Doctor G. P. Sylvester, medical examiner for the Defendants in which he answered certain questions and stated at the foot of the sheet containing in his said answers as follows:—

“ I hereby declare that the foregoing answers are true, that I have not withheld any important circumstance, and that this declaration shall be held to form a part of the proposal for insurance on my life now made to the company.”

4. The Defendants allege that the statements of the said James Fleming in his said application for insurance and to the company’s medical examiner were untrue to the knowledge of the said James Fleming in certain material particulars, and that but for such untrue statements the said application for the said insurance would not have been entertained by the Defendants.

5. The Defendants further allege that pursuant to the application aforesaid two policies for \$5,000 each, numbers 34,063 and 34,064 were written by the Defendants and transmitted to W. H. White the Defendants’ then agent at Toronto who had procured the application for insurance from the said James Fleming.

6. The said W. H. White in violation of his agreement with the Defendants delivered the said policies to the said James Fleming or to some person representing him without having received the payment of the premiums therefor but having received only two certain notes payable to the said W. H. White himself, and no premium has ever been paid on the said policies nor have the same been entered on the books of the company as a liability and the Defendants claim that the policies were improperly delivered up to the insured and that there never was any contract of assurance attached.

7. In the alternative the Defendants state that if it should be held that the said W. H. White had authority to deliver the said policies on the receipt of the

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 3.
Statement of
Defence,
11th Sept.,
1895.

RECORD.
In the
High Court
of Justice,
Chancery
Division,
Ontario.

No. 3.
Statement of
Defence,
11th Sept.,
1895
— continued.

said notes that the said notes were taken for premiums for and on behalf of the company then the said policies were delivered upon the following conditions among others endorsed upon each of the said policies as follows:—

“ If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or obligation be not paid when due, the policy or assurance becomes null and void at and from default, but such avoidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation and the premium shall be considered as earned and shall be recoverable by the company.”

8. The notes which were received by the said W. H. White matured on the 10 22nd and 25th days of May last respectively, and neither of them was then paid and never has been paid since and thereupon the Defendants claim pursuant to the above recited condition the said policies became null and void if same ever attached.

9. The Defendants further allege that the Plaintiff has refused to comply with certain conditions upon which the said policies were issued, namely, that upon the decease of the assured the claimant must make such proof and give such information respecting her claim as the directors shall think reasonable.

By way of counter-claim the Defendants repeat the foregoing and claim:—

1. That the said policies be ordered to be delivered up by this Honourable 20 Court to be cancelled.
2. Their costs of this action.

Delivered this 11th day of September 1895, by Dickson and Johnston, Manning Arcade, Toronto, solicitors for the Defendants.

No. 4.
Evidence at
trial, 27th
Jan., 1896.

Evidence at Trial.

Fleming

v.

The London and Lancashire Life Insurance Company.

Before Meredith, C.J., and a jury.

Toronto Winter Assizes, 1896.

Mr. B. B. Osler, Q.C., and Mr. J. R. Roaf for Plaintiff.

Mr. W. Nesbitt and Mr. Dickson for Defendants.

Monday, January 27.

Mr. Osler: I put in policy Number 34,063 of the Defendants (Exhibit 1) for \$5,000, endowment at the age of 70 on the life of James Fleming of Wyvale in the Province of Ontario, wood merchant; policy payable June 12; under the seal of the company.

His Lordship: The policy is admitted?

Mr. Osler: Yes, my Lord. Then I put in the other policy (Exhibit 2), 34,064, same date, same amount. The date is the 4th day of December, 1894. I 40 put in the proofs of loss produced by the Defendants—affidavit of claimant, affidavit of undertaker, affidavit of friends and of the doctors (Exhibit 3). Called for, produced by the Defendants' solicitors, and now put in, assignment of

policy—they are separate each in duplicate, signed, witnessed and dated on the 13th day of June 1895. (Exhibit 4). There is also a probate of a will my learned friends call for and want to see; we put it in—a will of James Fleming leaving everything to his mother, this Plaintiff, 13th of June 1895, and appointing her executor. (Exhibit 5).

RECORD.
In the
High Court
of Justice,
Chancery
Division,
Ontario.

James Mix, sworn. Examined by Mr. Osler:—

Q. You live at Elmvale in the County of Simcoe, and you knew James Fleming? A. Yes.

Q. The wood merchant? A. Yes.

10 Q. The son of Jean Fleming the plaintiff? A. Yes.

Q. Were you at the house on the occasion of his death or shortly after his death? A. Yes, just before and just after.

Q. You saw him alive? A. Yes.

Q. You saw him dead. Do you know when he died? A. On the 15th of June 1895.

Q. You helped, I believe, on that occasion to put him into his coffin? A. I did.

Q. And you know that James Fleming of Wyevale, wood merchant, son of Jean Fleming, died on the 15th of June 1895. And you saw him dead in the 20 coffin. You know his signature and can prove it if necessary? A. Yes.

(Execution of the assignment admitted and also the signature of Jean Fleming in the proofs of loss).

This is the case.

No. 5.
Evidence of
James Mix.

Benjamin H. Brown, sworn. Examined by Mr. Nesbitt:—

Q. You are the chief agent for Canada, I believe, of the Defendant company? A. Yes.

Q. Its office for Canada is in Montreal? A. It is.

Q. Chief office. And have you your books here relative to this matter? A. We have not all of them.

30 Q. Well, the ones that contain any important entries? A. Yes. (Book produced).

Q. Two policies are put in here on the life of James Fleming; you know the documents? A. Yes.

Q. Has your company ever received any premiums for either of these policies?

Mr. Osler: I object.

His Lordship: As far as the witness knows.

Witness: No.

Mr. Osler: I suppose he could put in all the directors in England to swear 40 to the same.

Mr. Nesbitt: Those policies were issued, I believe, and sent forward to an agent here called White? A. Yes.

No. 6.
Evidence of
B. H. Brown.

RECORD.
 In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.

No. 6.
 Evidence of
 B. H. Brown
 —continued.

Q. Now is that the agreement between your company and White under which he was acting? (Showing). A. Yes. (Dated 2 August 1892; Exhibit 6; the clauses the defendants rely on are scored in the margin).

Q. Then you forwarded this policy. Did you send any letter with it? A. We did.

Q. You have a letter of November the 27th 1894. enclosing the application. This was the first that you heard, I understand; just see if that is so. (Showing letter). A. Yes, this is the first letter.

Q. That encloses the applications? A. 27th November 1894, one application for \$5,000. (Letter and application Exhibit 7.)

Q. These seem to be two applications? A. No, that was the medical report. This is the application. The medical report and application are on two separate sheets, and the whole forms a complete application. (Part of Exhibit 7.)

Q. Then you write back to him on the 28th of November. (Reads Exhibit 8.) Then on the 5th of December another letter from you debiting his account? A. Yes, on the 5th of December sending acceptance receipts. (Letter Exhibit 9.)

Q. What is an acceptance receipt? Are those the acceptance receipts that they produce? Is that what is referred to? (Showing.) A. Yes.

Q. These are called for from the Plaintiffs and produced by them. Those are the acceptance receipts, numbers 11,709 and 11,710. Those are simply an acknowledgment subject to the terms and conditions of the policy to be issued. (Exhibit 10.) I see you debit him in that case with the Fleming premiums. What is his duty upon receipt of that acceptance receipt?

Mr. Osler: I object. The documents show.

His Lordship: I suppose that would be so as to duty.

Mr. Nesbitt: Of course if my learned friend puts his objection on that ground I withdraw the question.

His Lordship: I think you may ask him what was the practice of this agent.

Mr. Nesbitt: Was his duty in accordance with the document put in? When he gets his acceptance receipt what then is he supposed to do? A. Supposed to collect his premium.

His Lordship: I understand that is objected to; and it is in the document.

Mr. Nesbitt: It is in the document. And if he does not collect his premium, what? A. He must return to us the acceptance receipt.

Q. What about notes? A. An agent may take a note which is provided by the company if a note is to be taken.

Q. There is a form of note. Has he any right to take any other form of note? A. No.

Q. Then I see that he sends a note forward to you for the amount of that premium that would be coming from him. That is a telegram and letter. That is the next? (Showing). A. Yes. (Telegram and letter dated December 31, 1894; Exhibit 11.)

Q. To that you replied on January the 3rd; that is your reply to it? (Showing) A. Yes. (Exhibit 12).

Q. What do you mean by that: "which we will hold as requested"? (Objected to) Had you been requested to hold?

His Lordship: He cannot explain the meaning of it.

Mr. Nesbitt: Unless there had been a conversation.

Witness: Yes, there had been; when I was in Toronto he asked me to—
(Objected to).

His Lordship: I think that is admissible. There had been talk with White when? A. I could not give the date.

Mr. Nesbitt: What was the talk? A. It was in reference to not remitting immediately the amount of the premiums in some special cases, and I told him I must have something to show that the premiums had not been paid in such
10 cases.

Q. And in accordance with that he sends his note as evidence of the debit?

A. Yes.

Q. Then that was just held in your vault?

(Objected to as leading.)

Q. What did you do with that note? A. We held it in our vault.

Q. And, while just pursuing that subject, what ultimately became of the note? Q. It was not paid and handed back to our agent—handed back to W. H. White.

Q. What was done in regard to the policies? A. The policies were
20 cancelled.

Q. At what date? A. I think the entry is in the books—the 31st of May I think the date is. (Book handed to witness.) On page 76 of the Agents' Credit Journal under date 31st May the policies are marked "Not taken" which means cancelled.

Q. Were you aware at all at that time of Fleming's illness? A. We were not.

Q. Then on January the 23rd—to go back again for a moment—and it completes, I think, the entries relating to this—there is a letter from you to Mr. White. There is a post card first, January 22. (Post card and answer
30 Exhibit 13.) Did your company ever receive any notes from the Flemings so far as you are aware? A. Not directly—not during their currency.

Q. You never received any cash, you say? A. No cash, not a penny.

Q. Well, did you ever receive any notes to the company? A. No, no notes to the company.

Q. Did you ever see any notes to the company? A. No.

Q. You received subsequently an assignment of these policies which I believe you filed in your office. No action was taken on it? A. There was action. The premium not having been paid we refused to enter those assignments and returned them.

Q. And they were sent back to you again, then, were they? A. Well, they
40 may have been.

His Lordship: Was that before or after death? A. Before the death; before we knew about illness or anything of that kind.

Mr. Nesbitt: These assignments were sent down to you, you say, before you knew anything about illness, and you returned them, the policies having been cancelled? A. The policies were cancelled.

His Lordship: Returned them to whom? A. We returned them to the source from which they came to us.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.
Evidence of
B. H. Brown
—continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.
Evidence of
B. H. Brown
—continued.

Q. What was that? A. I won't be positive, but I think they came from White.

Cross-examined by Mr. Osler:—

Q. Did you charge Mr. White in December with the amount of these premiums? A. We debited his account with the amount of them.

Q. On the 5th of December 1894? A. Well, in accordance with our letter.

Q. Well, your letter says, "I send herewith undernoted acceptance receipts and debit your account with \$333.01"? A. Yes.

Q. Which sum included the Fleming insurance and another insurance? A. I 10 believe so.

Q. So that you charged Mr. White with that amount. And did you carry that business, that insurance, into your business for the year ending 31st December? A. Yes.

Q. That was carried into your business as an outstanding policy? A. As a policy issued.

Q. Something that the Company had parted with? A. Not necessarily.

Q. Well, you had issued the policy? A. I think as a fact the interim acceptance receipt was sent in December.

Q. And you followed them with policies? A. The policies were issued in 20 January.

Q. You treated it as an insurance in force? A. Yes.

Q. And I suppose the necessity for the telegraph on the 31st of December was that it might appear in your books as closed business? A. No.

Q. There was a telegram on the last day of the year. Do you close your year with the calendar year? A. Yes.

Q. Well then, I suppose the telegram of the 31st of December was so that that matter could be closed—treated as closed? A. Not necessarily. It was not as a matter of fact.

Q. Well, you took Mr. White's note? A. Mr. White should have remitted 30 us the cash.

Q. I am not asking what he should have done. You took Mr. White's note, did not you for that? I understand on the 31st of December you took Mr. White's note for \$135.16, did not you? A. Well, that telegram I want to explain.

Q. Answer the question. Did you take his note? A. We did.

Q. Did that note include other premiums besides Flemings? A. I believe it did.

Q. That is McGlade's and Thompson's? A. Yes.

Q. Are those existing insurances against the company? A. They are not so 40 far as I remember.

Q. Were they? A. They were until they were cancelled.

Q. You have a form of note when you give credit to the person who is insured; your have a regular form of note, have not you? A. Yes.

Q. And you did not use that form of note in this case, as you told my

learned friend. Your Company did not take any note for this premium? *A.* We did not authorise any note to be taken. RECORD.

Q. Well, you did not take any notes from the Flemings for these premiums? *A.* We did not know that any notes existed. *In the High Court of Justice, Chancery Division, Ontario.*

Q. Except that you took your own agent's note for the premiums. Now how much of that note was given to you and how much to the agent? *A.* About fifty per cent of it.

Q. Not about but exactly? *A.* Well, I think the agreement states.

Q. Surely you know? We have upwards of two hundred agents in the 10 country. *A.* No. 6. Evidence of B. H. Brown — continued.

Q. On all premiums paid in cash fifty five per cent. on the first year? (Looking at agreement). *A.* Yes.

Q. So White had a bigger interest in this premium than your company had, had he not? *A.* Apparently.

Q. Now the note of White's that was sent down was the actual balance that was coming to your company after deducting his premium? *A.* Yes.

Q. So that you issued your policy, you issued your acceptance receipt, you debited White your agent in an account with the \$232, and then you accepted his note for the amount that was due to your company out of these premiums?

20 *Mr. Nesbitt:* He did not accept the note.

Witness: No, we never passed it through our books as paid.

Mr. Osler: You say you cancelled this policy; will you show me the entry? (Witness refers to book, page 76). *A.* That is it.

Q. Agents' Credit Journal. Where is your policy registered?—We had all these books here and I think there was an agreement.

Q. Where is the policy register? *A.* Everything we have having an entry we sent to Toronto.

Q. Who makes this entry? *A.* The accountant.

Q. Who is the accountant? *A.* Mr. M. J. Flanagan.

30 *Q.* Under whose authority does he make the entry? *A.* Well, in his capacity as the accountant of the company.

Q. But whose authority? *A.* Well, I am the manager for Canada and responsible for the conduct of the business.

Q. This has been a more or less altered entry? *A.* Nothing is blotted out though; it is all there.

Q. No, it has an alteration which avoids the very bad habit of scratching something out in the books; and still I want to know who instructed this entry. How did it come to be made? *A.* Well, the accountant has his duties outlined by the English head office of the company.

40 *Q.* Is this done by the accountant without any directions by you; or did you give directions? *A.* It is done in his usual course of transacting his business without any directions from me—that is, applicable to any particular case.

Q. Then instead of saying it is not paid for you simply say not taken? *A.* Yes.

Q. The policy was outstanding, the acceptance receipts not returned? *A.* Well, that is in compliance with the—

Q. Well, but your entry is wrong. Your policy is out; your acceptance

RECORD.
 In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.
 No. 6.
 Evidence of
 B. H. Brown
 —continued.

receipt is out; and yet your accountant enters that—not cancelled for want of payment of the receipt, but says “not taken”? A. You will find that in all the cases with the new policies. Where the premium is not paid we simply write “not taken” and so return to the Government.

Q. Is the man here who made these entries? A. No.

Q. Where is he? A. Montreal.

Q. Are there any minutes, orders or directions except the general directions from England under which this entry is made, “Not taken”? A. No.

Q. What is that alteration? From 21 to 11? A. Yes, that is White’s district number. 10

Q. Was Number 11? A. Yes, should be Number 11.

Q. Did you afterwards make, or was there a settlement made with White afterwards by your company? A. Well, as far as possible, the business extending over eight or ten years.

Q. Well, just answer my question kindly just as it is put. Was there a settlement made between your company and Mr. White; for instance to start with, did you charge up this note to Mr. White in his account on the 5th April, 1895? A. We wrote Mr. White.

Q. Did you charge it up in his account? A. It was charged to 11.

Q. Have you got Mr. White’s account here? A. I presume it is there. 20

Q. Give me the statement 5th of April, 1895?

His Lordship: Is that a statement sent by the company to White?

Mr. Osler: Montreal 5th of April, 1895 \$135.16. Is this an account current with Mr. White, and did you debit him with that note as cash on that 5th of April? A. No, we do not; we show him that he still owes us that.

Q. You treat that as a debt of his on that day, do not you?—A. Still outstanding.

Q. You debit him with that note of \$135.16, and you debit him with interest upon that note for waiting on it, do not you? A. Yes.

Q. \$2.42? A. Yes. 30

Q. So you treat that as a cash debit from White to you on which you charge him interest? A. Oh, no.

Q. Well, you charge him interest? A. We do not treat it as a cash transaction at all.

Q. You charge him interest, do not you?

His Lordship: The account shows that?

Mr. Nesbitt: That is not interest.

Mr. Osler: Is not that \$2.42 interest on the \$135.16? A. I do not say positively because I do not know.

Q. Well, look at it? A. It may be interest on the note. (Exhibit 14.) 40

Q. That on the 5th of April is how you treated that amount. Now, did you have a settlement with Mr. White afterwards? A. We did.

Q. Was that early in June? A. The company never had a settlement in June.

Q. Had you a provisional settlement in June? A. What do you mean by provisional?

Q. Well, you are a business man; answer my question, please? A. I do not know what you mean to convey by provisional.

- Q. Was there any negotiations in June for a settlement with White? A. RECORD.
Yes.
- Q. Did you come to a balance? A. The company never did.
- Q. Did you? A. No, not myself personally.
- Q. Who conducted the business? A. The inspector was there.
- Q. What is his name? A. Torropp.
- Q. Is he here? A. No.
- Q. He conducted a settlement with White, or a negotiation with White, and a balance was struck, was not it? A. A conditional one.
- 10 Q. A provisional one. Let us see now the conditional or provisional settlement. Where are your documents? A. It was repudiated immediately it was sent.
- Q. Where is the document? A. I have not got a document; it was returned.
- Q. Was there a document? A. There was a paper.
- Q. What became of that paper? A. I have no knowledge.
- Q. Did you see the paper? A. I did.
- Q. In whose hands did you see it? A. In my own.
- Q. Who handed it to you? A. It came by mail.
- 20 Q. From whom? A. From Mr. Torrop.
- Q. From your Inspector? A. Yes.
- Q. Have you Mr. Inspector's letter with you? A. Yes.
- Q. Let me have it? A. I have not it here; it is in the office in Montreal.
- Q. That letter is important. You were asked to produce it. Well, that letter contains a settlement of accounts, did it, that Mr. Inspector proposed? A. Yes, a proposed settlement.
- Q. Did that settlement include the debit of \$135 and interest? A. I cannot say.
- Q. Will you say it did not? A. It may have included it. It was an
30 unsatisfactory proposition.
- Q. I am not asking you as to that. Will you say it did not? A. No, I will not say it did not.
- Q. Do you know that it did? A. I think I have answered your question.
- Q. Now that I have drawn your attention to it, will you say that it did not contain that note and interest? A. I will not say it did or did not.
- Q. What was the amount arrived at? A. It was so unsatisfactory that it was not entertained.
- His Lordship: Answer the question.
Witness: I do not know.
- 40 Mr. Osler: What was Torrop employed to do? A. He was employed to come to Toronto, ascertain the exact position of affairs, propose a settlement, submit it to the Board for approval.
- Q. Torrop lived in Montreal or in England? A. In Montreal.
- Q. That is, your local board? A. Yes.
- Q. When did you hear that this was likely to be a claim? A. I think about the 17th or 18th of June.

In the
High Court
of Justice,
Chancery
Division,
Ontario.

No. 6.
Evidence of
B. H. Brown
---continued.

RECORD.

In the
High Court
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No. 6.
Evidence of
B. H. Brown
—continued.

Q. When was Torrop up here? A. I think he was here the early portion of June.

Q. After you heard the man was ill? A. No, we knew nothing about it.

Q. And you did not know whether the amount was included in his debit or not; but afterwards when you heard of the death you threw the amount out, did not you? A. After we knew the true position, yes.

Q. After you heard of the death. Then for the first time you dropped your claim against White? A. The first time we found the premium had not been paid.

Q. No, answer my question. Was it after the death you dropped your 10 claim against White? A. Yes.

Q. And up to the time of the death you had kept that as a claim against White and charged him interest on it? A. I think our accounts speak for themselves.

Q. Up to that time did you not charge that as a debit against White? A. As a matter of fact I think not.

Q. Well, where did you give credit for it first? Show me your books. Show me your accounts.

His Lordship: Credit to White, of course.

Mr. Osler: The Torrop settlement, as I think we can show, included the 20 amount to his debit, and then when you heard of the death you sent up and undid that settlement and made a new one excluding it? A. That is not right. We repudiated that settlement immediately that morning by wire as soon as it reached us. It was when Mr. Torrop was here in June.

Q. Did you see Mr. White after the death? A. Yes.

Q. Did you have after the death in your possession your note against White? A. We had.

Q. Where was that interview? A. In Mr. White's office.

Q. In Toronto? A. In Toronto.

Q. What date? A. I do not know. 30

Q. Was it in July? A. It might have been.

Q. Was it after you had heard of the death? A. Yes.

Q. Did you on that occasion hand up to Mr. White his note which included this premium? A. I returned Mr. White his note.

Q. That note of \$135? A. Yes, after we had had our settlement.

Q. And did you ask him to destroy it? A. I do not think so.

Q. Was it destroyed in your presence? A. I am not positive.

Q. Then up to a time after the death you held the White note? A. Yes.

Q. And it was only surrendered and delivered up on some day in July when perhaps you came up to arrange a settlement? A. Yes. 40

Q. At that time did you do anything more? Was there anything more done with regard to this insurance at that time? Do you know Messrs. Burk and Graham? A. Yes.

Q. Bankers? A. Yes.

Q. Did you do anything with reference to a claim they held at that time? A. I really cannot remember.

Q. Did you at any time? A. I saw Mr. Graham—I think it was Mr. Graham—once or twice.

Q. What does Mr. Graham do? A. Mr. Graham is a banker—a private banker here.

Q. Well, was it before or after you had given up White his note that you went to Burk and Graham's? A. Well, it is very difficult to——

Q. Answer my question if you can, and if you cannot, say so? A. You say it was before.

Q. Was it before or after the \$135 note was given up to White that you went to Graham & Burk's bank? A. I saw Mr. Graham immediately when I arrived in Toronto.

10 Q. What for, this matter? A. Yes.

Q. And this matter only? A. In connection with Mr. White.

Q. It was in connection with this Fleming insurance? A. No, there was another matter which led up to it.

Q. Well, we will confine ourselves if possible to this matter. Did you find that Messrs. Burk and Graham held some notes that Mr. White had discounted with them? A. Yes.

Q. Were those notes of James Fleming and Robert Fleming? A. They were.

Q. Did you find that out after the death? A. Yes.

20 Q. Were your company liable upon those notes? A. Well, strictly speaking I think there would be a question.

Q. You were no party; your company were not on the notes? A. During their currency had death occurred I presume we would have been liable.

Mr. Nesbitt: That is not what Mr. Osler is asking. Were you liable to Burk and Graham on the notes? A. Certainly not; we were not aware of their existence.

Mr. Osler: Did your company go and take up those notes? A. Mr. White took those notes up.

30 Q. Did your company take those notes up? Did your company furnish funds to take those notes up? A. Well, Mr. White can speak for himself.

Q. Did your company furnish money to take those notes up? A. Well, our solicitor did.

Q. Well, you instructed your solicitor to do it? A. Yes.

Q. So that your company might be said to hold past due notes against these policies? That was your idea? A. I suppose so.

Q. Are these the notes do you know? (Showing) A. They appear to be. (Exhibit 15).

40 Q. And then after the death some time in July you go to the private bankers who hold the notes, one note made by W. H. Fleming to James White for the sum of \$105 with an endorsement of \$5 paid; and another note of Robert Fleming payable to the order of W. H. White for \$105.80. Those two notes after the death; and before or after you gave up White his note to be cancelled, was it? A. Before.

Q. Before you gave up White his note to be cancelled your company had advanced the money to take those notes up? A. Yes.

Q. And paid the amount of Burk and Graham's claim upon those notes and acquired them? A. Yes.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.
Evidence of
B. H. Brown
—continued.

RECORD.
 In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.

No. 6.
 Evidence of
 B. H. Brown
 —continued.

Q. This was done through your solicitor; and those notes, you understand, represented cash premium on those policies? A. These notes we understand had been given for the premium.

Q. On those policies? A. Yes.

Q. So that at the time of the death the notes for the premium on those policies were outstanding in the hands of independent holders, Burk and Graham?

A. Yes, outstanding.

Q. And your company hold those notes now? A. They are here.

Q. And James Fleming's estate is good? A. It is not.

Q. Well, you can make it good? A. Yes, we can.

Q. Had you a bond given by Mr. White as security for his agency?
 A. Not applicable to this last agreement.

Q. Had you a bond? Produce it please.

Mr. Nesbitt: No, we had not a bond.

Witness: We had not a bond.

Mr. Osler: This is a bond that you had. (Showing.) A. Yes. (Exhibit 16.)

Q. Did you get any promissory notes, any endorsed promissory notes, from White for your balance? A. The note that we received from Mr. W. H. White was endorsed by G. A. White, his brother—the first note—the note that was sent on the 31st day of December—the note for the premium.

Q. That note for \$135.16—that was endorsed by G. A. White, was not it?
 A. Yes.

Q. Did you do anything or direct your solicitor to do anything with reference to instructions that had been given to Burk and Graham to send forward the notes held by them with a sight draft attached? A. So far as I remember we did not.

Q. Would you say that that was not done? A. By his solicitor for us?

Q. Yes. A. Yes, I will say it was not done.

Q. What I am instructed at the time that those notes were taken up Mr. Robert Fleming had arranged with Burk and Graham to send them forward with a sight draft attached to Wyevale. That is, before they were taken up. Did you know of that? A. That they had been sent forward?

Q. No, that there were instructions to send them forward. Did not your company come up in a hurry, finding these notes were to be paid, and try to stop the draft going forward? A. I do not know.

Q. Did you hear it from your solicitors? A. I cannot say that I did.

Q. Was not that the situation? A. I heard that it was.

Q. Did you meet Robert Fleming at Burk and Graham's? A. I did not know Robert Fleming.

Q. Did not your solicitor, Mr. Dickson, point Mr. Fleming out to you?

His Lordship: What difference would this make, Mr. Osler?

Mr. Osler: Perhaps not. Well, did you make any threat against Mr. White if you did not get possession of those notes? Did you threaten to arrest him?
 A. At what time?

Q. At any time. A. I may have done.

Q. Did you? A. I think I did speak to Mr. White.

Q. And you threatened to arrest him, did not you, if he did not get those notes up from Burk and Graham? A. No.

Q. When did you threaten to arrest him? After they had been paid off and handed over to a third party, and then conditions were made as to how they should be handed up—after they had been taken up and the agreement broken between Mr. White and myself.

Q. After those notes had been taken up and handed to a third party; who was the third party? A. Mr. E. F. B. Johnston.

Q. One of your solicitors, was he? A. I think he was Mr. White's
10 solicitor.

Q. The notes were taken up and handed to Mr. Johnston? A. Yes.

Q. And then you threatened Mr. White with arrest for what? A. I told him he was breaking faith—that he had taken up these notes—had promised to hand them to me and had not done so.

Q. And the arrangement was that he was to hand them to you? A. They were to be given up.

Q. And then you threatened if he did not give them up you would have him arrested; is it that? A. Yes.

Q. So you were apparently very anxious to get the notes? A. They were
20 my property.

Q. You had advanced the money. Was it you or your company bought these notes? A. Mr. White bought them. Our solicitor furnished the money.

Q. Whose money? A. The London & Lancashire Life's money.

Q. Then the London & Lancashire are the purchasers of these notes?
A. Through Mr. White. We gave Mr. White the money through Mr. Dickson.

Q. What had Mr. E. F. B. Johnston to do with it? A. Very little.

Re-examined by Mr. Nesbitt:

Q. I understand that this was sometime after the death of this man Fleming in July? A. That this occurred? Yes.

Q. You said that White was entitled to take a note instead of cash premium
30 on the company's form. Is that the type? (Showing). A. Yes.

Q. And the only type of note he was authorised to take? A. The only one (Exhibit 17). A receipt attaches to that note.

Q. Have you got a form of that? A. I think you have.

His Lordship: You mean when he takes the note he gives a particular form of receipt? A. Yes.

Mr. Nesbitt: That is the type of receipt you refer to, is it? (Showing.)
A. Yes. (Part of Exhibit 17).

Q. So far as you know when you first debited that note to Mr. White he had
40 received the premium? A. Yes.

Q. He is supposed to have received the premium; he retains 55 per cent. on such a transaction as this; and he ought to send you the balance? A. Yes.

Q. And if he does not do that he has no right to hand up the policy unless with a note in this form and with that receipt attached? A. And which note must first be submitted and approved at the head office.

Q. So that you supposed it was a cash transaction with White? A. I did.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.

Evidence of
B. H. Brown
—continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.
Evidence of
B. H. Brown
—continued.

Q. Then in April when you debited him again with that? That is in. Well, then, you were asked when you credited. Did you credit in May when you marked the policies as not taken? Did you credit him then with this amount? Just see in your book there? A. No, I think not.

Q. On page 133 of the debit journal he gets credit for it, does he? A. The 31st of May credited as \$211.60.

Q. Who was the brother that was on it? Was that a clerk in Mr. White's office? A. I think so.

Q. It is in the Credit Journal that the 31st of May the entry is? It is credited back as not taken? 10

His Lordship: What do you mean by that? Is there a credit to White on the 31st of May?

Mr. Nesbitt: Yes, my Lord, in the Credit Journal.

His Lordship: Then you say you were wrong?

Mr. Nesbitt: Yes. Here is the Debit Journal of December, 1894. He is credited with these payments on Agency 11 in December 1894; he is debited with \$105.80. Then on May the 31st the same entry that my learned friend was asking about is marked as not taken. There is the entry of \$105.80 under the head of "Premiums cancelled"? A. The first year.

Q. And further on under the head of "Remarks" is "J. Fleming, not 20 taken." That, you say, is the expression that is used for all policies that are not taken, the first year policies. I see there are a number of these on the same period of the same kind, not taken? And that is the return you have to make to the Government? A. Yes.

Q. Not that they have lapsed or anything like that, but simply that the policy has not been taken? A. Yes.

Q. Then in what is called Ledger Number 3 where district Number 11 is collected I find under the head of December, under the head of "New" \$300.35, which included this, I believe?

Mr. Osler: That is not evidence against us. 30

His Lordship: He can say what is in the books, I suppose.

Mr. Nesbitt: You have been asked about some settlement with a man called Torrop? Mr. Torrop, you say, was an inspector who was sent up here to look into White's accounts? A. Yes.

Q. In the early part of June? A. Yes.

Q. Was it then that you first discovered that he had not in fact received the Fleming money? A. No, we did not discover that.

Q. Did not discover that even then? A. No.

Q. Then the rejection of the Torrop settlement, which you say was done by telegram the moment White sent it forward, had nothing to do with this? 40
A. No.

Q. It was not because as my learned friend suggested? A. Not at all. The Fleming matter came up subsequently—entirely a different matter.

Q. Then subsequent to the death all this that is spoken about of Burk and Graham came in? A. Yes.

Q. That was, Mr. Johnston was acting for Mr. White and Mr. Dickson was acting for you? A. Yes.

Q. And then at that time Mr. Dickson took up the paper in Burke and Graham's that White had discounted there? A. Yes.

Q. Had the threat of arrest to White to do with Fleming or was that on account of other matters as well? A. Well, other matters entered in to the consideration.

Q. You were asked whether you had a bond. Had that anything to do with the then present employment or was it under the previous agency? A. It was under a former agreement.

Q. Then you had no bond under this agreement? A. No.

10 *Re-cross-examined by Mr. Osler:*

Q. That (showing) is something signed by Mr. White, is not it? A. Yes. (Exhibit 18).

Mr. Nesbitt: That, of course, this witness has never seen before.

Witness: The first time I have seen it.

Mr. Osler: Then this is Mr. White's signature? A. I think so. (Dated June 5, 1895; Exhibit 19.)

Q. Did you get a document when your Inspector Torrop came back signed by W. H. White and H. S. Mullin? A. That was the document referred to earlier. We did.

20 Mr. Nesbitt: What was done with that document? A. It was returned.

Mr. Osler: Have you got the letter returning it? A. No.

His Lordship: You say you did not become aware that a note had been taken until after the death of Fleming. Is that so? A. Yes.

Q. Then why, if you had been proceeding upon the assumption that the money had been paid to White, did you assume to cancel the policy? A. Well, we had a note from Mr. White.

Q. Then although the money had been paid to White, because you got his note—because he had not settled with you—you cancelled the policy. Is that the idea? A. Yes. We had received no money.

30 Q. Surely you could not think that? A. We were proceeding on the clause that was in our policy.

Q. Then that must have been upon the assumption that White had not got the money, was not it? A. Things were in a very unsatisfactory condition, and possibly it was arbitrary on our part to cancel our policy; but the real facts in the case came out subsequently.

(Intermission for luncheon.)

William H. White, *sworn. Examined by Mr. Nesbitt:—*

Q. You were the agent we have been referring to more than once in this matter? A. Yes.

40 Q. Did you ever receive any moneys when this application was granted and sent forward and policies brought to you—did you receive any money? A. No.

Q. The notes have been put in here; how did they come to be made?

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RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 6.
Evidence of
B. H. Brown
—continued.

No. 7.
Evidence of
W. H. White.

RECORD. (Exhibit 15.) Here is a note dated 19th of November; is that one that you got? *A.* Yes.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

Q. That is a note made by James Fleming at six months. Was that note ever paid? *A.* No.

Q. I see an endorsement put on it of five dollars; under what circumstances was that got? On June the 6th? *A.* Robert Fleming came to me with five dollars and a renewal note and asked me if I would renew that note for a while longer—that they could not pay it.

No. 7.
Evidence of
W. H. White
—continued.

Q. And what occurred? *A.* I told them I did not think—I did not know whether we could renew it or not. 10

Q. When you say “we” who do you mean; yourself? *A.* Yes.

Q. Then what occurred? *A.* I took the renewal note which he gave me over to the bank along with the five dollars.

Q. When you say the bank what do you mean? Burk and Graham?
A. Yes.

Q. You took the note and the five dollars over to Burk and Graham; and they would not renew? *A.* No.

Q. Then what did you do? *A.* My recollection is that I tendered him back the five dollars.

Q. And the note? *A.* No, the five dollars was endorsed on the whole note; 20 and I am not sure whether I tendered him back the renewal note or not; I think I did.

Q. At any rate by a condition in the policy I see, assuming these were notes you would have been entitled to collect them at any rate although the policy had been cancelled. Did you know at that time the policy had been cancelled? *A.* At what date is that?

Q. June the 6th? *A.* I am not positive; but I think I did.

Q. Did you say anything to him about that? *A.* About the policy being cancelled?

Q. Yes. *A.* I do not think it. I do not recollect saying anything. 30

Q. Did you know at that time that his brother was just dying? *A.* No.

Q. Did he say anything about that? *A.* He did not mention it.

Q. The first note that you got signed by Robert Fleming, what became of it? 10th of December that is dated; is that it? (Showing.) *A.* Yes. (Exhibit 20.)

Q. That was due on March the 13th. When that fell due what became of it? *A.* I think there was a renewal note taken for it.

Q. And that was not paid when it came due? *A.* No.

Q. That came due on the 24th of May. Did you notify Robert Fleming that the note could not be renewed after you went over to Burk and Graham's to see if it could be renewed? What did you say to him? *A.* I saw him; and I am not sure; but I think I told him that it was not renewed—that they would not renew it.

Q. And then what was said? Anything? *A.* There was nothing done, I think the bank refused to renew it.

Q. Burk and Graham refused to renew it? *A.* Refused to renew it. I told them this note would be paid at maturity. They said they would write to Fleming.

Q. You had discounted it with them? A. Yes.

Cross-examined by Mr. Osler:

Q. This was your own transaction with Burk and Graham? A. Yes.

Q. Your own personal transaction? A. Yes.

Q. The company had nothing to do with that? A. No.

Q. The larger part of the note would be coming to you as a first premium?
A. Yes, a little over half.

Q. Did you have a current discount account with Burk and Graham? A.
Yes.

10 Q. And there you carried your own account? A. Yes, part of it.

Q. And you carried these two notes into your own account just as you
would any other note that you chose to discount there? A. Yes.

Q. You sent the company down something upon the 31st of December;
what was that note for? That is, \$135.16, I think it was. What was that note
for? Any specific premium or your balance of account; which? A. It included
the Fleming premium and one McGlade and Thompson if I recollect right.

Q. Did you owe the company anything else? Was there anything else
over? A. I think not at that time.

Q. So that the note which you sent down would be a note squaring your
20 account as at the end of the year? A. Yes.

Q. Was there anything else due, or was that a closing of accounts? A. I
do not recollect exactly; but I know it included those three items.

Q. Was that note of \$135.16 endorsed by your brother? A. I think not.
I think it was my own personal note.

Q. Do you remember when the inspector came up? A. The inspector was
accustomed to passing through every few weeks.

Q. Who did you adjust accounts with? What was the inspector for? A. He
was for adjusting accounts and assisting to secure business.

Q. Did you have a settlement of accounts with the inspector at any time,
30 say in early June? A. No, I did not have a settlement. We had a proposal for
a new contract, a settlement bond.

Q. Did he sign something? Did you sign something and did a surety sign
something? A. Yes, I think we did.

Q. Was there a document signed by you? A. I think so.

Q. And who else was it signed by? A. By Mr. Mullin, I think.

Q. Who is Mr. Mullin? A. He is a man who resides here in the city.

Q. What had he to do with the transaction? A. Well, in arranging as I
proposed to do with the company at that time I had to give them security.

Q. Well, did you give them security on that occasion? Yes.

40 Q. You gave them security of whom? A. Mullin.

Q. How much was the balance? A. Well, it included all that was between
the company and me.

Q. Did it include this \$135? A. I am not sure whether that was in it or
not.

Q. Well, there was an account? A. Yes.

Q. Well, where is that account? A. I did not have it.

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RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 7.

Evidence of
W. H. White
—continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 7.
Evidence of
W. H. White
—continued.

Q. Well, how did you get at any particular balance? A. I presume it was an account sent by the office to me agent.

Q. And where is it? A. Well, the inspector had it.

Q. What is the last you saw of that document? A. Mr. Torrop had it the last I saw of it.

Q. I am told that includes the balance of that note? What do you say to that? A. I do not recollect.

Q. Can you remember the amount that you gave security for then? Where is the document? A. It was some six or seven hundred dollars if I recollect right. 10

Q. Who signed that document? A. I did.

Q. And your surety signed it? A. Yes.

Q. You do not know whether that included this amount or not. Did it include all the company claimed? A. I think it did.

Q. What is your impression as to this amount? A. Well, I am inclined to think that it was in it; but I am not sure.

Q. Do you remember what day that was settled? A. That is the Torrop agreement?

Q. Yes. A. No. I do not remember the exact date.

Q. Was it in June? Was it before this death? A. It was about that 20 time. I think it was before it.

Q. Before you knew of the death at all events? A. I think so.

Q. And about the time of it? A. About the time.

Q. Then did the company hear of the death? A. I do not understand.

Q. Did Mr. Brown come up? Mr. Brown came up after he heard of the death, did not he? A. I think that was some time afterwards.

Q. Have you got the letters that passed at the time? A. Well, my conversation was principally with the inspector who was here.

Q. Let me see your books, please? (Witness produces books.)

His Lordship: Is there to be any evidence on the other issues Mr. Nesbitt? 30 If not, I think I will dispense with the jury.

Mr. Nesbitt: That is what we were going to suggest—that your lordship should dispose of this question at any rate.

His Lordship: Then as to this question I think I will dispense with the jury. However, I will see.

Mr. Nesbitt retires to consult a medical man, Mr. Osler and Witness meanwhile examining books. Upon Mr. Nesbitt's return to Court the following occurs:—

Mr. Osler: I understand that the whole of the evidence with regard to the condition of health—that is, the misrepresentations pleaded in the statement of 40 defence in paragraphs 2, 3, 4, 5 and 9—is abandoned, and the counterclaim so far as it related to the matter set up in those paragraphs of the statement of defence; and my learned friend's company pleading this condition of health and abandoning it, it is but fair to them to say that on the first of January, a very short time after the policy was made, incipient consumption or phthisis appeared, and the man died of phthisis or rapid consumption on the date in question.

Mr. Nesbitt: Of course we do not say rapid; we say he died of consumption.

I do not desire the company to appear as defending on any technicality whatever, as this company has never been sued in our Courts before. The admission, I think, justifies the enquiry.

His Lordship: Then these defences being out of the way I shall not require the services of the gentlemen of the jury any longer, and they can retire from the box.

Cross-examination of White by Mr. Nesbitt:—

Q. You spoke of having given a security signed by Mullin; is that the suggested settlement which the company refused to accept? A. Yes.

10 Q. So that there never was any security signed by him? A. No.

Q. Except in this sense. Have you any doubt that the note that you sent down for \$135 or \$105.16, whichever it is, was not signed by your brother or endorsed? A. No, I am pretty sure this was not.

Q. It is the habit of the company when you are debited with premiums, as you debit them to keep track of them by taking notes as collateral to them? A. Well, usually my custom was to pay the company cash for the business that I had done. In some cases I sent them notes—not in payment of the premium, but simply to hold as an evidence that the premium was not paid.

Q. As being debited to you? A. Yes, when I had not been paid myself.

20 Q. You were asked whether that secured your account. The letter speaks for itself how they were sent and what the arrangement was? A. Yes.

His Lordship: At the time that Mr. Torrop was here was the company claiming from you payment of this note that you had sent down to them? A. I think not.

Q. Well, what would you send notes down for? Mr. Brown says that where it was cash it was your duty to send the cash, where it was a note it was your duty to get the authority of the company to take the particular note you did take, and then of course you would not be indebted to the company at all? A. My contract varied. We did not always stick to the written contract.

30 Q. That is what he says the obligation was. He says there were two classes; he says it was your duty to get that note approved of by the company—and I presume to send it to the company. Is that not so? A. I do not quite understand it the way you put it.

Q. What I mean is this: You insure a man, and he owes you so much of a premium, if he paid cash; as I understand Mr. Brown's evidence, it was your duty to send that cash down; if he wanted time and gave a note, then your duty was to report that to your company, get their approval of the security he proposed to give, and then you had authority to accept it. Is that so? A. Yes.

40 Q. Then what would you be giving a note for at all unless it was for what you owed the company? A. Where I had given time on premiums, and the cash had not been paid to me, and I had not the cash to pay myself, I gave a note myself as evidence there was something due them—not as payment of the premium.

Q. I do not understand that, consistent with what Mr. Brown says. He says your business was either to get cash or give a note approved by the company? A. Mr. Brown knew before—some time in April, at least, I told him

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 7.

Evidence of
W. H. White
—continued.

RECORD. —which I think he is forgetting—that the Flemings had not paid, and that he would cancel the policy.

—
In the
High Court
of Justice,
Chancery
Division,
Ontario.

This is the defence.

Reply.

—
No. 8.
Evidence of
A. White.

Albert White, *sworn*. Examined by Mr. Osler:

Q. You were present when the inspector and your brother—is not it—the agent of this insurance company met for that settlement? A. Yes.

Q. Was there an adjustment of accounts? A. Yes.

Q. What did that adjustment include? A. I could not itemise it from memory. 10

Q. Well, do you know of a note of the 31st of December? A. Yes.

Q. Had that settlement anything to do with that note?

Mr. Nesbitt: That settlement, I suppose, was reduced to writing.

His Lordship: But it is you that have got rid of the writing, is not it? All that evidence was gone into without objection.

Mr. Nesbitt: The whole thing fell through.

His Lordship: There was no objection to the reception of the evidence of any of the papers Mr. Torrop took away. You have proved the letters without producing them. I will adjourn the case to enable it to be put into proper shape to give the evidence if it is not in shape now. 20

Mr. Nesbitt: Well, that had perhaps better be done. I understand that this man cannot speak of that.

Mr. Osler: Can you speak of the amount of that note? A. Yes.

Q. What was done with that note in the settlement? A. It was included in it.

Mr. Nesbitt: Then we ought to have that here.

Mr. Osler: That note was included in it. What shape did that settlement take? What is your recollection of it? A. The company, when it was signed and forwarded to the company the company refused to accept it.

Q. When? A. As soon as it reached the head office in Montreal. 30

Q. Well, the inspector was here for the company? A. Yes.

Q. And an adjustment was arrived at? A. Yes.

Q. What had you to do with that adjustment? A. I was present at the time we went into the accounts.

Q. And do you not recollect the other items? Do you recollect the total amount? A. Yes.

Q. How much was the amount arrived at? A. \$858.

Q. What shape? Can you recollect the contents of that document, what it was. In the first place, what became of the document? A. The document was signed in duplicate and one was forwarded to the company and the other was 40 given to W. H. White.

Q. Where is that one which was kept by Mr. White gone? A. I really do not know where it is.

Q. Do you remember the date of that settlement? A. It was about the 10th of June. RECORD.

Q. When do you say that came back? A. It never came back to W. H. White's office—that is, the copy forwarded to the company.

Q. What did come back? A. There was not any came back.

Q. Nothing came back. Well, why do you say it was repudiated? What was the document or how did the repudiation come about? A. We learned that through the inspector, Mr. Torrop.

Q. When did you learn that from the inspector, Mr. Torrop; with reference 10 to the death or illness of Fleming? A. I could not tell you that.

Q. You do not know whether you learned it from Torrop before or after hearing of the death or illness? A. Could not tell.

Q. Did you hear of the illness of Fleming before his death? A. Yes.

Q. How long before his death? A. About two weeks, I think.

Q. What was your knowledge with regard to Fleming's condition at the time of the adjustment of accounts? A. We knew that he was poorly. I knew that he was poorly; but I did not know that he was seriously ill.

Q. You knew that he was poorly; did the inspector know it? A. Not that I am aware of.

Q. Was there any adjustment afterwards? A. Yes. 20

Q. What items were changed in the statement—adjustment? A. The \$135 note.

Q. What became of the other items of the adjustment? A. They were included in the final settlement.

Q. What was the condition with regard to knowledge of Fleming's condition of health or life when the second adjustment was made throwing out the \$135 note? A. What was my knowledge of it?

Q. Yes? Was Mr. Fleming alive or dead at that time? A. He was dead.

Q. So that the sole change, then, had to do with that \$135 note? A. The 30 conditions were changed also.

Q. How were the conditions changed? A. Well, it was a different kind of agreement altogether.

Q. Well was the amount changed except in the \$135 note item? A. The amount of the account except the \$135 note was the same.

Cross-examined by Mr. Nesbitt:

Q. What had you to do about the matters? A. I was book-keeper for W. H. White.

Q. You were a great friend of Robert Fleming's, were you not? A. No.

Q. How is it that you come to remember when your brother does not? 40 A. I cannot account for his memory.

Q. But so far as you know Mr. Torrop had no knowledge, good, bad, or indifferent, about Fleming? A. Not at the time the Torrop agreement was signed.

Q. When you say that was cancelled at once, it was cancelled as soon as the document got to the head office, I think you dropped the remark? We heard from Torrop it was.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 8.
Evidence of
A. White
—continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 8.
Evidence of
A. White
— continued.

Q. Immediately? A. Yes.

Q. Whatever the reasons were, whenever the so-called adjustment went down there they said "That won't do at all"? A. Yes.

Q. You do not know whether Mr. Torrop was at all aware of the credit which had been given your brother apparently in the books at the head office on the 31st of May? A. Well, he brought a copy of the account with him.

Q. Copy of what account? A. Statement of W. H. White's account.

Q. Well, do you know when that statement had been prepared? A. I do not.

Q. Then Mr. Torrop went away apparently? A. Yes. 10

Q. Do you know whether your brother knew of Fleming's illness at that time? A. Well, I think he did.

Q. Do you know? A. At the time of the Torrop agreement.

Q. What you call the Torrop agreement. You say as far as you know Torrop did not know anything about it? A. Yes. I think he did.

Q. You think your brother did? A. Yes.

Q. Do you know whether Mr. Torrop knew that your brother had not in fact got any money at all or not? A. I could not say.

Q. At any rate, when the matter came to be finally closed out with your brother no charges were made in connection with this Fleming premium? 20
A. No.

Q. The company had at that time, Mr. Brown tells us, discovered what the real fact was? A. Yes.

Q. You said there was only \$135 difference between the two accounts, and you state he first had \$858. Is that correct? A. The first account was \$858.

Q. Well, the next is only \$562. There seems to be a difference of \$300 somewhere. There is the complete statement. (Showing). In that is the McGlade account. So that it cannot have taken simply the \$135 off.

His Lordship: Was there any payments made by White in the meantime? 30
A. Yes, there has been \$200 paid on account of that.

Mr. Nesbitt: But there had not been \$200 paid on account of the \$858? A. \$200 added to that with the \$138 would make it up.

Q. \$200 was paid on account of this agreement, Mr. Dickson tells me. The \$135 is made up of three amounts, and one of them is in here? A. Yes. There is the balance of \$110, and the \$340 premium, \$200 cash paid, and \$500 makes \$700, and \$135 makes \$835.

His Lordship: Is that document in?

Mr. Nesbitt: No, my Lord, I do not think anything turns upon it.

His Lordship: Is your brother still the agent of the company? A. No. 40

Q. When did he cease to be agent? A. I do not exactly mind.

Q. At the time this settlement was made? A. Yes.

Mr. Osler: Did you see this \$135 note afterwards? A. No.

Q. Do you know of its destruction? A. No.

Q. These items that my learned friend refers to add up to \$562.92, to which should be added \$200 that the agreement calls for as paid on the 2nd of July. What is that \$200 in the agreement? A. That \$200 is the amount paid in cash.

Q. \$562.92; add \$200 and we have \$762.92? A. Yes. \$30.76 and \$9.18 should come off that.

Q. Why? A. Because they were included in the \$135 note.

Q. \$858 you say, is the amount of the former settlement? A. Yes.

(Settlement between the Defendants and White dated 4th July, 1895, Exhibit 21).

This is the reply.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

Exhibit No. 1.

London and Lancashire Life Assurance Company.

10 Plan of assurance.

Endowt. at age 70 years.

Profits to shorten period.

Sum assured

\$5,000.

With participation.

No. 34,063.

Premium

\$105.80

Payable, yearly.

1st December.

No. 9.
Exhibit 1.
Policy No.
34,063, 4th
Dec., 1894.

Chief office: No. 66 Cornhill, London, England.

Chief office for Canada: Corner of St. James Street and
Place D'Armes Square, Montreal.

20 Whereas James Fleming of Wyevale in the Province of Ontario, wood merchant, is desirous of effecting an assurance with the London and Lancashire Life Assurance Company, in the sum of five thousand dollars upon the life of himself, payable on his attaining the age of seventy years or earlier in the event of death and hath delivered into the office of the said company a statement in writing, dated the nineteenth day of November one thousand eight hundred and ninety-four, setting forth the age, and the past, present and ordinary state of health of the said James Fleming and which statement the said James Fleming thereby agreed should be the basis of his contract with the said company.

30 Now therefore these presents witness, that it is hereby declared by the said company, that in consideration of the sum of one hundred and five dollars, eighty cents., now paid by the said James Fleming to the said company; and in case he shall on the first day of December which will be in every succeeding year during the continuance of this assurance pay unto the said company, the premium of one hundred and five dollars eighty cents., the funds and property of the said company, according to the provisions of the deed of settlement thereof, shall be liable to the payment of the sum of five thousand dollars to the executors, administrators or assigns of the said James Fleming, to be paid immediately after satisfactory proof shall have been received at the office of the said company of the death of the said James Fleming or payable to himself on his attaining the age of seventy years as
40 aforesaid or on the earlier maturity of this policy by the application of such profits as may be declared in respect of this assurance.

And it is hereby further declared, that the funds and property of the said company shall also be liable as aforesaid to the payment of such further sum or sums, if any, as shall be assigned to or in respect of this policy, pursuant to the

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 9.
Exhibit 1.
Policy No.
34,063, 4th
Dec., 1894
—continued.

rules and regulations for the time being of the said company, as or by way of reduction of the original endowment period.

Provided nevertheless, that this policy and the sum hereby assured, shall be subject to the conditions hereon endorsed.

Provided further, and it is hereby stipulated and agreed, that the directors signing this policy, and the other proprietors or holders of shares in the company shall not individually in any manner be or by any process be made liable to make good any claim or demand whatsoever under or by virtue of this policy, further than to pay and contribute to the capital of the company the full amount of his or her share in such capital, and that all such claims and demands shall alone be satisfied out of the capital, funds and property of the company for the time being. 10

In witness whereof, the Common Seal of the said company having been affixed hereto by order of the board of directors of the said company, we, being two of the directors of the Canada board and the manager for Canada, duly authorised by power of attorney, have hereunto set our hands the fourth day of December, one thousand eight hundred and ninety-four.

(Sgd.) B. HAL BROWN, Manager for Canada
(Sgd.) A. T. PATERSON } Directors for Canada.
(Sgd.) ROBERT BENNY. }

20

(Coy's Seal.)

Examined (Sgd.) M. M. J. F.

Entered G. F. N.

Agency No. 11 W. H. W.

Any notice of assignment of the within policy must be given at the chief office of the company for Canada at Montreal.

Conditions within referred to on which this policy is granted.

I. Policies shall not be in force until the first premium be paid, and those upon which the age is admitted are held to be unchallengeable on any ground whatever connected with the documents on which the assurance was granted, except in the case of fraud or misrepresentation. 30

II. Policies will not become void if the stipulated premium be paid within thirty days after the dates named by the policy for payment; and if the premium be not paid within such days of grace, the policy will become void, but may be revived in the lifetime of the assured, within twelve months from the expiration of the days of grace, without evidence of health, on payment of the overdue premium or premiums, together with a fine of \$1 per \$1,000 per month on the sum assured, or with satisfactory evidence of health on payment of arrears of premium with 6 per cent. interest.

III. With a view of preserving to holders of policies, their equitable rights, the company will hold at their disposal for a period of one year from the date of lapsing, the surrender value attaching to the policy. 40

IV. Persons assured in this office, if not engaged in a seafaring occupation, may travel and reside in any part of the world, without payment of extra premium, except that policies on the lives of persons who have not attained the age of 30, or who are in the military or naval services may be treated as forfeited

if such persons go to a tropical climate, or enter upon actual warfare, unless permission shall have been previously obtained, and when required such a premium paid as the directors may deem adequate to the risk.

V. Policies on the lives of persons who shall die by suicide within the first year of assurance will become void, except where a policy shall have been assigned to or effected by a *bona fide* creditor, in which case it will be held valid to the extent of his interest in the policy upon satisfactory proof of such interest being given to the directors, provided that in case of an assignment, notice in writing thereof shall have been given to the office not less than one month
10 previous to the death of the assured.

VI. Any claimant, upon the decease of a person whose life shall have been assured by the company, must make such proof, and give such information respecting the claim, as the directors shall think reasonable. Proof of age will be required unless previously admitted.

VII. Claims on policies will be settled immediately after the proper documents to substantiate them have been passed by the board of directors.

VIII. If policies on the half-yearly or quarterly scale of premiums become payable before the whole amount of premium for the year shall have been paid, the remainder of the annual premium due shall be deducted from the amount of
20 the policy.

IX. Receipts for premiums are only valid when on the printed form, signed by the manager, and countersigned by an official or agent of the company.

X. If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or obligation be not paid when due, the policy or assurance becomes null and void at and from default, but such voidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation, and the premium shall be considered as earned and shall be recoverable by the company. The policy or assurance, however, may be revived and re-instated at the discretion of the directors on condition of payment of the
30 premium and interest, and evidence of continued good health. Should any note or other obligation for premium be current at death, or other event upon which the sum assured becomes payable, the amount of the note or obligation shall be deducted from the claim.

In compliance with the Statutes of Canada.

The statement referred to in the policy and contained in the proposal or application for assurance is in this form:—

“I do hereby declare that the age of myself does not exceed twenty six years; that I am in good health and ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstances or information
40 touching the past or present state of my health or habits of life, with which the directors of the London & Lancashire Life Assurance Company ought to be made acquainted.”

“I hereby agree that all the foregoing statements and answers (namely those contained in the said proposal or application), whether written by my own hand

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 9.
Exhibit 1.
Policy No.
34,063, 4th
Dec., 1894
—continued.

RECORD.
*In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.*
 No. 9.
 Exhibit 1.
 Policy No.
 34,063, 4th
 Dec., 1894
 — continued.

or not, as well as those that I make or shall make to the company's medical examiner, in continuation of this application are true and are offered to the company as the basis of the contract, which shall not take effect until the first premium shall have been paid and the policy or interim acceptance receipt shall have been delivered, during my life and continuance in good health; and
 "I further agree that in any distribution of profits the principles and methods which may be adopted by the company for such distribution and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed."

10

Dated at Toronto this 19th day of November 1894.

Signature
 (Sgd) JAMES FLEMING.

Witness.
 "W. H. WHITE."

No. 10.
 Exhibit 2.
 Policy No.
 34,064, 4th
 Dec., 1894.

Exhibit No. 2.

Policy of Insurance No. 34,064 upon the life of James Fleming being identical with Policy No. 34,063, is omitted from this book by consent, dated 4th December 1894.

No. 11.
 Exhibit 3.
 Proofs of
 death of
 James
 Fleming.

Exhibit No. 3.

Proofs of death of the insured James Fleming, omitted from this book by consent, dated 28th June, 1895.

20

No. 12.
 Exhibit 4.
 Assignment
 of Policies to
 Plaintiff.

Exhibit No. 4.

Assignments of Policies Nos. 34,063 and 34,064 by James Fleming to Plaintiff, omitted from this book by consent, dated 13th June 1895.

No. 13.
 Exhibit 5.
 Will of James
 Fleming.

Exhibit No. 5.

Will of James Fleming, dated 13th June 1895, omitted from this book by consent.

No. 14.
 Exhibit 6.
 Agreement
 between
 Appellants
 and their
 Agent,
 White, 2nd
 Aug., 1892.

Exhibit No. 6.

Memorandum of Agreement in duplicate made this second day of August A.D. 1892 between the London and Lancashire Life Assurance Company of London England, hereinafter called the company, herein acting by B. Hal. Brown, its manager for Canada, and W. H. White of Toronto, in the County of York and Province of Ontario, hereinafter called the agent. Witnesseth that the said parties have agreed as follows:—

30

First.—That the said W. H. White shall act as the general agent of the said

London and Lancashire Life Assurance Company in the following district City of Toronto and vicinity, but said district is not exclusively assigned to said agent.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 14.
Exhibit 6.
Agreement
between
Appellants
and their
Agent,
White, 2nd
Aug., 1892
—continued.

Second.—That while acting as such agent he shall canvas for new insurance and shall use all diligence in the performance of his duties as such agent; and shall carry out and perform all duties connected with the office as agent; that he will remit as directed from time to time to the company's office at Montreal, all moneys, securities for money, notes or bills which he may receive in connection with the business of the company. That upon being furnished with the head office renewal receipts he shall collect the premiums thereunder, and also all other premiums for which the receipts or policies have been sent to him, payable in his district, but shall not under any circumstance, collect or receive, payment of any premium without giving the head office receipt or policy therefor.

Third.—All premiums shall be paid in cash or notes approved by the company and the agent shall not receive payment for premiums or renewals thereof in any other manner.

Fourth.—The said agent shall have no authority to make, alter, vary or discharge, any contract on behalf of the company, or to waive any forfeiture on behalf of the company, or assume to bind the company to do such act or any act whatsoever without the written instructions, and authority of the company.

Fifth.—The said agent shall not do any business for any other life assurance company so long as this appointment continues in force.

Sixth.—It is hereby further agreed that the said agent will execute and carry out all written and printed instructions that may from time to time be sent to him by the company in connection with the business of the company, notwithstanding that the same may be outside of the ordinary course of his duties as such agent.

Seventh.—In case the said agent shall make default in or fail to comply with any of the requirements of this agreement the company may, on giving written notice to him, immediately terminate the appointment.

Eighth.—It is understood and agreed that the said company reserves to itself the right at any time to send its inspectors, travelling agents, or other officers to said district to solicit applications, deliver policies and collect premiums, and the said agent agrees when so requested by the company to give such inspector, travelling agent or other officer his co-operation and assistance and to attend to all unfinished business of such representative in delivering policies and collecting premiums, and in every possible way advancing the interest of the company on the terms of remuneration set out in tenth section, less ten per cent. upon all such joint and unfinished business, having reference to first year's premiums.

Ninth.—And it is also understood by the said agent and he hereby agrees that in performance of the duties imposed upon him under the present agreement and any modifications thereof he shall be held liable to all conditions and penalties imposed by law as between a company and their clerks and servants, and employee and employer.

Tenth.—The full compensation of the said W. H. White in addition to postages, exchanges and express charges shall be as follows:—A commission of:—
on all premiums paid in cash.

RECORD.
In the
High Court
of Justice,
Chancery
Division,
Ontario.

No. 14.
Exhibit 6.
Agreement
between
Appellants
and their
Agent,
White, 2nd
Aug., 1892
—continued.

1. Fifty-five per cent. on first year.
2. Ten per cent. on second year.
3. Five per cent. on subsequent renewals.
4. Five per cent on single payments and temporary assurances.

In consideration of the above terms, the said agent agrees to remit in cash, each month, for all new assurances, for which official receipts shall have been sent to him up to the 20th day of such month.

Eleventh.—No expenses or charges other than those specifically allowed in this contract, and no stationary or other supplies not ordered by and paid for direct by the head office will be paid by the company. 10

Twelfth.—Should a policy of life insurance be issued by the company in accordance with the terms of an application received from the said agent, and the said policy be, for any reason, not accepted and paid for by the applicant, then the said agent shall pay to the said company, the sum of five dollars for each such policy as part payment of the expenses incurred thereon.

Thirteenth.—This agreement may be terminated by either party giving thirty days' notice in writing to the other.

(Sgd.) W. H. WHITE.
Manager for Canada.

Signed and sealed in the presence of
(Sgd.) G. A. WHITE.

20

No. 15.
Exhibit 7.
Letter, White
to Appel-
lants, 27th
Nov., 1894.
Application
for Insurance
and Medical
Examina-
tion, 19th
Nov. 1884.

Exhibit No. 7.

Toronto, November 27th 1894.

Manager London and Lancashire Life,
Montreal.

Dear Sir:—

* * * * *

I enclose you herein application as follows:—

James Fleming, endowment, age 70 plan, \$5,000.—Prem. \$105.80 payable half-yearly. 30

John McGlade, endowment age 70 plan, \$2,000.—Prem. 39.62, payable half-yearly.

Yours truly,
(Sgd) W. H. WHITE.

Application
for Insur-
ance, 19th
Nov., 1894.

(B) The application for insurance, with the exception of the two following clauses which appear in said application signed by the assured, is omitted from this book by consent.

SUM TO BE ASSURED?

\$10,000 in policies of \$5,000 each 'W.H.W.

W.H.W. Six Ten thousand Dollars

(Please state the amount in writing also.)

With or Without Profits? *with*

Premium, \$ *105.80*

How payable? *Yearly*

RECORD.

In the High Court of Justice, Chancery Division, Ontario.

Application for Insurance, 19th Nov., 1894 —continued.

91

“ I hereby agree that the foregoing statements and answers, whether written
 “ by my own hand or not, as well as those that I make or shall make to the
 “ company’s medical examiner, in continuation of this application, are true and
 10 “ are offered to the company as the basis of the contract which shall not take
 “ effect until the first premium shall have been paid and the policy or interim
 “ acceptance receipt shall have been delivered, during my life and continuance in
 “ good health.”

(c) The medical examination made in connection with the application for insurance is omitted from this book by consent.

Medical Examination.

Exhibit No. 8.

Montreal, November 28th 1894.

W. H. White Esq.,
 18, Toronto Street,
 Toronto, Ont.

No. 16.
 Exhibit 8.
 Letter,
 Appellants
 to Agent,
 White, Nov.
 28th, 1894.

20

Dear Sir:—

* * * * *

I have also to thank you for proposals Fleming and McGlade enclosed in your letter.

Yours truly,
 (Sgd.) B. HAL. BROWN,
 Manager.

RECORD.

Exhibit No. 9.

Montreal, 5th Dec. 1894.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

W. H. White Esq.,
Toronto, Ont.

Dear Sir,

I send you herewith undernoted acceptance receipts and debit your account with \$232.01.

Yours truly,

(Sgd)

B. HAL. BROWN,
Manager for Canada.

10

No. 17.
Exhibit 9.
Letter,
Appellants
to Agent,
White,
5th Dec.,
1894.

11,709	J. Fleming	\$5,000	\$105.80
11,710	Do.	5,000	105.80
11,711	J. McGlade	2,000	20.41

\$232.01

Exhibit No. 10.

No. 11709.

No. 18.
Exhibit 10.
Acceptance
Receipts,
Nos. 11,709
and 11,710,
5th Dec.,
1894.

Agency, Toronto,

London & Lancashire Life Assurance Company, of London, England,
Canadian Branch, Head Office, Montreal

Interim Acceptance Receipt.

20

Sum assured \$5,000.

Premium \$105.80.

This is to certify that the application for assurance of James Fleming has been accepted and in consideration of the premium above mentioned, the company hereby expresses its liability for the sum assured, subject to the terms and conditions of the policy to be issued, under the plan of assurance applied for.

Dated at Montreal this 5th day of December 1894. Countersigned by
(Sgd) W. H. WHITE, (Sgd) B. HAL BROWN,
Agent. Manager for Canada.

30

Receipts to be valid must be signed by the manager and countersigned by the agent.

(Acceptance receipt number 11,710, being identical with receipt number 11,709 is omitted from this book by consent).

Exhibit No. 11.

Dec. 31st 1894.

No. 19.
Exhibit 11.
Telegram
and Letter,
White to
Appellants,
31st Dec.,
1894.

Telegram

From Toronto, Ont.

To London & Lancashire Life, Montreal.

Mailed my note one thirty-five 16 for premiums, Fleming, McGlade, 40
Thompson.

(Sgd) W. H. WHITE.

Toronto, Decr. 31st 1894.
 Manager, London & Lancashire Life, Montreal.

Dear Sir:—

I omitted to enclose settlement of new premiums hence I wired you to-day as follows:—"Mailed my note \$135.16 for premiums Fleming, McGlade, Thompson, which I enclose herein.

Yours truly,
 (Sgd) W. H. WHITE.

RECORD.
 In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.

Exhibit No. 12.

Montreal, January 3rd 1895.

10 W. H. White, Esq.,
 18, Toronto Street, Toronto Ont.

Dear Sir,

I am in receipt of your letter of the 31st ult. enclosing note at three months for \$135.16, which we will hold as requested.

Yours truly,
 (Sgd) B. HAL BROWN,
 Manager.

No. 20.
 Exhibit 12.
 Letter,
 Appellants to
 White, 3rd
 Jan., 1895.

Exhibit No. 13.

Toronto, Jan. 22nd 1895.

20 Dear Sir,

Kindly send the following policies, F. H. Thompson, and Jas. Fleming. I have retained the inspector for to-day and to-morrow, expects to reach Kingston Thursday morning.

Yours truly,
 (Sgd) W. H. WHITE.

No. 21.
 Exhibit 13.
 Post Card,
 White to
 Appellants,
 22nd Jan.,
 1895, and
 Letter,
 Appellants to
 White, 23rd
 Jan., 1895.

Montreal, Jan. 23rd 1895.

W. H. White Esq.
 18 Toronto St.,
 Toronto, Ont.

30 Dear Sir,

As requested in your post card I herewith send you the undernoted policies, with which your account has been debited.

I note your remarks *re* the inspector.

Pol. No. 34,063	J. Fleming	\$5,000	\$105.80.
No. 34,064	J. Fleming	5,000	105.80.
No. 34,084	F. H. Thompson	5,000	68.34.

Yours truly,
 (Sgd) B. HAL BROWN,
 Manager.

RECORD.

Exhibit No. 14.

In the
High Court
of Justice,
Chancery
Division,
Ontario.

London and Lancashire Life Assurance Company.
Montreal,

5th April, 1895.

Renewal receipts sent to Mr. W. H. White of Toronto.

This list must be returned to head office, Montreal, not later than.....

189..

10

No. 22.
Exhibit 14.
Statement,
Appellants to
White, 5th
April, 1895.

Policy No.	Name.	Premium (renewal.)	Interest.	Total sum in receipt.	Date when due.
	Payne W. R.	39.42	1.18	40.60	Sept.
	Sht. remt'd. Jan.			1.28	
	„ „ Feb.			5.97	
	Cheque and protest			266.69	
	Note 3/4/95			135.16	
	Interest		2.42	2.42	

(Overdue receipts are to be returned herewith to the head office.)

Exhibit No. 15.

No. 23.
Exhibit 15.
Note, James
Fleming to
W. H. White,
19th Nov.,
1894, and
Note, Robert
Fleming to
W. H. White,
21st March,
1895.

\$105.80

Toronto,

20

November 19th 1894.

Six months after date I promise to pay to the order of W. H. White, at the office of Burk and Graham, bankers, here the sum of one hundred and five $\frac{80}{100}$ dollars, value received.

(Signed) JAMES FLEMING.

Endorsement. I hereby waive protest and guarantee payment of within note—27th Mar. 1895.

(Signed) W. H. WHITE.

June 6th, paid \$5.00.

\$105.80

Toronto,

30

March 21st, 1895.

Two months after date I promise to pay to the order of W. H. White at the office of Burk and Graham, bankers, here, the sum of one hundred and five $\frac{80}{100}$ dollars value received.

(Signed) ROBERT FLEMING.

Endorsement. I hereby waive protest and guarantee payment of within note—Mar. 21st 1895.

(Signed) W. H. WHITE.

Exhibit No. 16.
Bond.

RECORD.
*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 24.
Exhibit 16.
Bond, White
to Appellants,
3rd March,
1891.

Know all men by these presents that we, W. H. White of Toronto, Ontario and T. J. White of Toronto, Ontario and G. A. White of Toronto Ontario are jointly and severally held and firmly bound unto the London and Lancashire Life Assurance Company in the sum of two thousand dollars of lawful money of Canada, to be paid to the said company, their successors or assigns, for which payment, to be well and truly made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators firmly by these presents,
10 sealed with our seals dated this third day of March in the year of our Lord one thousand eight hundred and ninety-one.

The condition of the above obligation is such that if the above bounden W. H. White shall, during the time for which he shall act as the agent of the said company, observe, perform and obey all the bye-laws and regulations of the said company, and pay to the said company, their successors, or assigns monthly, during the time for which he shall act as their agent, all monies which he shall receive for premiums, on application for insurance, or otherwise for the use of the said company and shall refund to the applicant or person entitled to the same, all sums of money which he shall receive for premiums on application for insurance
20 not accepted by said company and shall at the expiration or determination of said agency pay over and deliver to the said company, their successors or assigns, all monies securities for money, books, documents, papers, accounts, and all things in his possession or control of or belonging to the said company, and also shall, in all things, conduct himself as the agent of the said company in all things required of him as such agent then this obligation to be null and void, otherwise to remain in full force and virtue.

And it is hereby declared and agreed that it shall be lawful for the said company, their successors or assigns, to give to the said W. H. White time for the payment of all or any of the said monthly or other payments or any part
30 thereof, without giving notice to or obtaining the consent of the above named T. J. White or G. A. White their or either of their executors or administrators; and further that no change in the mode of compensation for the services of the said W. H. White, or in the mode of his appointment, or the duration of his office, as agent shall in any way affect the liability of the said J. T. White and G. A. White their executors or administrators under the above obligation.

And it is also declared and agreed that this bond will be binding on us without notice of acceptance by the company.

It is also understood and agreed that this bond will cover payment of any and all notes made by W. H. White that the company may accept from the said
40 W. H. White for premiums under policies effected by him as well and effectually as if no such notes or note were taken.

(Sgd.) Agent's signature W. H. WHITE.
(Sgd.) Surety's signature J. T. WHITE.
(Sgd.) Surety's signature G. A. WHITE.

Signed sealed and delivered in the presence of
(Sgd.) R. M. PILSWORTH.

RECORD.

In the High Court of Justice, Chancery Division, Ontario.

No. 25. Exhibit 17. Appellants' Form for Agent's interim Receipt and Note to be taken from assured.

No. 6,190.

Exhibit No. 17.

(In duplicate).

London and Lancashire Life Assurance Co. Agent's interim receipt.

Note payable.

Received from.....Esq. of.....his promissory note for.....dollars (on which the sum of.....dollars has been credited), being for the.....premium for an assurance of \$..... on the life of.....provided the application be accepted by the company, and if accepted I agree to deliver the official acceptance receipt from the head office of the company in Montreal; or should the said application be declined, I undertake to return to.....Esq. or to his order the said promissory note. It is hereby understood and agreed, that if the note be not paid at maturity, the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full.

.....Agent.

Date.....

Place.....

No..... Due.....

\$.....189..... after date I promise to pay to the London and Lancashire Life Assurance Company, or order at..... the sum of.....dollars, with interest thereon at the rate of seven per cent. per annum till paid: for value received as per agent's receipt No.....issued in duplicate.

Witness

Exhibit No. 18.

No. 26. Exhibit 18. Interim Receipt, No. 4,400, 19th Nov., 1894.

No. 4,400.

(In duplicate).

Note payable 6 mos.

London and Lancashire Life Assurance Company. Agent's interim receipt.

Received from James Fleming Esq., of Wyevale, his promissory note for one hundred and five ⁸⁰/₁₀₀ dollars (on which the sum of.....dollars has been credited) being for the first premium for an assurance of \$5,000 on the life of himself provided the application be accepted by the company, and if accepted I agree to deliver the official acceptance receipt from the head office of the company in Montreal; or should the said application be declined, I undertake to return to James Fleming Esq., or to his order the said promissory note †[within 15 days. "W. H. W."]. It is hereby understood and agreed, that if the note be not paid at maturity, the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full.*

*So ruled out in original.

(Sgd.) W. H. WHITE, Dist. Mangr.

40

Date 19.11.94.

Place Toronto.

† NOTE.—The words and initials in square brackets are an interlineation in the original.

Exhibit No. 19.

Toronto,
June 5th 1895.
Received from Robert Fleming, James Fleming's note for \$100.80 and cash \$5.00 to retire James Fleming's note for \$105.80, due May 22nd 1895.
(Sgd.) W. H. WHITE.

RECORD.
*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

Exhibit No. 20.

\$105.80
Toronto,
December 10th, 1894.

No. 27.
Exhibit 19.
Receipt of
White to
Robert Flem-
ing, 5th June,
1895.

10 Three months after date I promise to pay to the order of W. H. White at the office of Burk and Graham, bankers, here the sum of one hundred and five $\frac{80}{100}$ dollars value received.

No. 28.
Exhibit 20.
Note for
\$105.80,
Robert Flem-
ing to W. H.
White, 10th
Dec., 1894.

Endorsement.

(Sgd.) ROBERT FLEMING.

I hereby waive protest and guarantee payment of within note—Dec. 22nd 1894.

(Sgd.) W. H. WHITE.

Exhibit No. 21.

20 This agreement made in duplicate this fourth day of July A.D. 1895.

No. 29.
Exhibit 21.
Settlement
between Ap-
pellants and
W.H. White,
4th July,
1895.

Between

The London & Lancashire Life Assurance Company,
hereinafter called the Company Of the first part
and

W. H. White of the City of Toronto in the County of
York, agent Of the second part

Whereas the said White was formerly an agent at Toronto for the said company and is indebted to the said company in the amounts shown and set forth in the statement hereto annexed.

30 And whereas it has been agreed by the said company, in order that the said White may follow business enterprises and pursuits unembarrassed by reason of his aforesaid indebtedness, to forego its legal claim against the said White with reference only to the above mentioned and hereto annexed statement of moneys collected and owing.

Now therefore this indenture witnesseth that in consideration of the premises and of the sum of the two hundred dollars (\$200) now paid by the said White to the said company (the receipt whereof is hereby acknowledged) the said company do hereby remise and release the said White his heirs, and assigns of and from all liability with reference only to the moneys set forth in the annexed
40 statement and do hereby agree with the said White that no legal or other proceedings of any nature whatsoever shall be instituted against the said White

RECORD. to recover the said amounts and premiums in said annexed statement shown but shall regard the same as an uncollectable debt.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 29.
Exhibit 21.
Settlement
between Ap-
pellants and
W. H. White,
4th July,
1895

—continued.

It is expressly understood and agreed that this agreement shall not affect and does not refer to any debts or claims due by the said White to the said company (in case there are any) which are not set out and referred to in the said annexed statement.

The sureties on the bond given by the said White to the said company are hereby released in connection with the indebtedness shown in the said annexed statement only.

And the said White hereby agrees that the said statement is true and correct to the best of his information and belief.

In witness whereof the said parties hereto have hereunto set their hands and seals and the said company by its manager for Canada.

(Sgd) W. H. WHITE.
(Sgd) B. HAL BROWN.

Manager for Canada,
London & Lancashire Life Assurance
Company.

Signed sealed and delivered in presence of

(Sgd) GEORGE ROSS.

20

(In duplicate.)

The statement referred to and being part of the annexed agreement.

Premiums and amounts overdue and unpaid:—

Fulton	\$13.00	\$13.00
Keiran	340.00 less 10 per cent. commission (\$306) (balance unpaid)	106.00
Cheque	265.04 and protest \$1.65	269.69
Thompson	68.34 less 55 per cent. commission	30.76
McGlade	20.41 less 55 per cent. commission	9.18
Interest	2.42	2.42
Note	131.91 (returned to W. H. White)	131.91

30

Witness

(Sgd.) GEORGE ROSS.

(Sgd.) W. H. WHITE.
(Sgd.) B. HAL BROWN.

No. 30.
Judgment of
Meredith,
C.J., 11th
Mar., 1896.

Judgment of Meredith C.J.
Delivered 11th March 1896.

Action tried before me without a jury on the 27th January last at the Toronto Assizes.

This action is brought to recover the amount of two policies of insurance of 40 the Defendants on the life of James Fleming, dated the 4th December 1894, for \$5,000.00 each.

The applications for the insurance were made by Fleming on the 19th November 1894, to W. H. White who was the Defendants' general agent for the district of Toronto and vicinity and the premium payable in respect of each of them was \$105.80. fifty-five per cent. of which the agent was under the terms of his agreement with the Defendants of the 2nd August 1892, entitled to as his commission for obtaining the risks.

The applications were forwarded in due course by the general agent to the head office of the Defendants at Montreal and were considered and accepted on the 4th December 1894, and on the following day interim acceptance receipts on the Defendants' usual form were forwarded to White accompanied by a letter of the same date (Exhibit 9) in which he was informed that his account had been debited with the amount of them and with another receipt relating to another insurance which was sent to him at the same time.

By the terms of the agreement between the Defendants, Exhibit 6, and White he was not "under any circumstances" to "collect or receive payments of any premium without giving the head office receipt of policy therefor," and it was provided that all premiums should be paid in cash or notes approved by the Defendants, and that the agent should not receive payment for premiums or renewals thereof in any other manner.

White was furnished by the Defendants with forms of receipts, which, from their terms would appear to have been intended to be given to Applicants for insurance who desired to pay their first premium by note, or partly by note and partly in cash.

The following is one of these forms put in at the trial, Exhibit 17:—

No. 4,420.

Note payable

London and Lancashire Life Assurance Company.

Agent's Interim Receipt.

(In duplicate.)

Received from.....Esq. of.....
 his promissory note for.....dollars, (on which the sum of
dollars has been credited), being for the.....
 premium for an assurance of \$.....on the life of.....
provided the application be accepted by the company, and
 if accepted, I agree to deliver the official acceptance receipt from the head office
 of the company in Montreal; or should the said application be declined, I under-
 take to return to.....Esq., or to his order the said
 promissory note. It is hereby understood and agreed that if the note be not
 paid at maturity the policy or official receipt shall be null and void, but never-
 theless the note shall be paid in full.

40

Date.....

Place, Toronto.

.....Agent.

White had given to Fleming two receipts dated the 19th November 1894 for promissory notes for the amounts of the premiums payable by the latter. The receipts were upon the forms I have just referred to, except that all the

RECORD.

In the
 High Court
 of Justice,
 Chancery
 Division,
 Ontario.

No. 30.
 Judgment of
 Meredith,
 C.J., 11th
 Mar., 1896
 —continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 30.
Judgment of
Meredith,
C.J., 11th
Mar., 1896
--continued.

words in it commencing with the words "It is hereby understood" down to the end of the receipt were stricken out, and the words "within 15 days" interlined.

One of these promissory notes made by Fleming, the insured, was dated the 19th November 1894 and was payable to the order of White six months after date, and the other made by Robert Fleming, a brother of the insured, was dated the 10th December 1894, and was payable in like manner three months after date.

White did not communicate to the Defendants the fact that he had taken these promissory notes, or informed them how he had arranged with Fleming for the payment of the premiums, but on the 31st December 1894 he telegraphed the 10 Defendants as follows:—

"Mailed my note one thirty five 16 for premiums Fleming, McGlade, Thompson," and on the same day he wrote the Defendants as follows:—"I omitted to enclose settlement of new premiums hence I wired you to-day as follows:—Mailed my note \$135.16 for premiums Fleming, McGlade, Thompson which I enclose you herein."

The amount mentioned in the telegram and letter was made up of the premiums of the two insurances in question and those of McGlade and Thompson after deducting the agent's commission of 55 per cent.

On the 3rd January, 1895, the manager at the head office wrote to White 20 acknowledging the receipt of his letter of the 31st December in these terms:—"I am in receipt of your letter of 31st ult. enclosing note at three months for \$135.16 which we will hold as requested."

According to the evidence of the manager the policies in question were included in the Defendants' return to the insurance department, and it must therefore have represented the promissory note of White as an asset of the Defendants, and the policies "as outstanding policies in force."

At this time, according also to the evidence of the manager, he assumed that White had received the premiums in cash.

It did not appear in evidence when the interim acceptance receipts were 30 handed by White to Fleming, but they were produced by the Plaintiff, and are countersigned by White—his countersigning being, according to a note at the foot of the receipts, necessary to their validity.

White, after receiving the promissory notes, but at what time was not disclosed in evidence, discounted them with Burk and Graham, a firm of private bankers, in Toronto, receiving the amounts of them less the discount and indorsing them to Burk and Graham.

It is important at this point to note that at the date when White forwarded his own promissory note to the Defendants, he had possessed himself by means of the discount, of Fleming's promissory notes, and had in hand (far more money 40 than would have been sufficient to pay to the Defendants that part of the premiums to which they were entitled.

On the 22nd January 1895 White wrote the Defendants asking them to forward among others the policies in question, and they were accordingly forwarded to him on the following day with a letter which informed him that he had been debited with the premiums in respect of them.

The promissory note of the 10th December 1894 was renewed in full on the

21st March 1895 by a new promissory note at 2 months, and on the 5th June 1895, the other promissory note of the 19th November was renewed for \$100.80. \$5, being paid in cash to White, who gave a receipt for the note and cash as having been received "to retire James Fleming's note for \$105.80, due May 22nd 1896," but on this latter note being taken to Burk & Graham they refused to renew and retained the note of the 19th November 1894 in their own hands overdue. The promissory note of the 31st March 1895 was not paid at maturity, and it with the note of the 19th November 1894 remained overdue and unpaid in Burk and Graham's hands until sometime in July, when in order that the

10 Defendants might be in a position to say that they held the notes as past due notes they were taken up by White with moneys furnished to him by the Defendants, to whom they were handed over.

Fleming was at this time dead, his death having taken place on the previous 15th June.

Upon this state of facts the Defendants contend that the policies were never binding on them at all, because as they say White neither received the cash nor promissory notes approved of by them for the premiums, and that, even if the promissory notes, taken by him or White's own note are to be treated as notes given for the insurance premiums, or even if the latter was accepted in satisfaction

20 and discharge of the premiums and conditions indorsed in the policies prevent the Plaintiff recovering—the policies having, as they contend—become void in consequence of the notes not having been paid at maturity, and they invoke in support of this contention, condition one, which provides that policies shall not be in force until the first premium is paid, and condition ten, which is as follows:—"If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or obligation be not paid when due the policy or assurance becomes null and void, at and from default, but such voidance of the policy or assurance shall not relieve the maker thereof from payment of the note or obligation, and the premium shall be considered as earned and shall be recoverable

30 by the company. The policy or assurance however, may be revived and reinstated at the discretion of the directors on condition of payment of the premium and interest, and evidence of continued good health. Should any note or other obligation for premium be current at death, or other event, upon which the sum assured becomes payable, the amount of the note or obligation shall be deducted from the claim."

And they further contend that the renewal of the promissory note of the 19th November 1894, after it was overdue, was an unauthorised act of the agent and not binding on them, and that after default, the directors and they only, could revive or reinstate the policy.

40 It was urged on behalf of the Plaintiff that the effect of the transaction between White and Fleming was that there was a payment in cash of the premiums, and that even if that be not so, the Defendants accepted White's promissory note for \$135.16 in payment of the portion of the premiums to which they were entitled, and that the condition relied on has no application to a case where the promissory note of a third person is accepted in satisfaction of the premium.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 30.
Judgment of
Meredith,
C.J., 11th
Mar., 1896
— continued.

RECORD.

*In the
High Court
of Justice,
Chancery
Division,
Ontario.*

No. 30.
Judgment of
Meredith,
C.J., 11th
Mar., 1896
—continued.

The case is by no means free from difficulty but I have after much consideration, come to the conclusion that the Plaintiff is entitled to succeed.

There is nothing, so far as I can see, to prevent a company such as the Defendant company is, accepting in satisfaction and discharge of a first or any other premium, the note of a third person, if the company chooses to do so, and it seems to me that a promissory note so taken, condition ten can have no application. It would indeed be an anomaly, if after payment by such a promissory note, and the premium being thereby satisfied and discharged the default of the maker of the note in paying it should void the policy and render the insured also liable to pay the premiums in satisfaction of which it had been 10 accepted. The condition is in my opinion not applicable to such a case, but to cases where the promissory note is taken not in satisfaction and discharge of the premium, but for and on account of it, where it would operate only as a conditional payment to be absolute if and when the note was paid at maturity.

If this be the correct view as to the law, what is the proper finding of fact as to the way in which White's promissory note was received by the Defendants? It is, I think, that the note was taken in satisfaction and discharge of the premiums.

As I have pointed out, White had the proceeds of the promissory notes given by the Flemings in his hands, though he was liable to Burk and Graham 20 as indorser on them—the notes were not taken by him on the Defendants' account, but were taken and dealt with as a transaction between him and the insured and for the purpose as I think the fair inference is, of enabling him to pay to the Defendants in cash the share of the premiums to which they were entitled, and to give to him the present use of his own share of them, and White, I think, when he sent his letter and telegram of the 31st December 1894 to the Defendants, intended that they should take, and they in receiving his promissory note, intended to take and took it in satisfaction and discharge of the premiums due to them in respect of the policies to which they had reference. On reaching this conclusion I rely on the language used in the correspondence read 30 in connection with what had taken place, and the manner in which the Defendants afterwards treated and dealt with the policies rather than the recollection of White and Brown (the manager) as to what the true character of the transaction was. The provisions of the bond given by White and his sureties to the Defendants in 1891 are not without significance. In addition to the provisions contained in the printed form used, which I take to be the ordinary ones, I find a special provision in these words:—

“It is understood and agreed that this bond will cover payment of any and all notes made by W. H. White that the company may accept from the said W. H. White for premiums under policies effected by him as well and effectually 40 as if no such note or notes were taken.”

It may well be, I think, that the arrangement made between White and Brown (the manager) to which the latter referred in his evidence, was that to which this term of the bond refers and it was probably in pursuance of it, that White assumed the right to send, as he did, his own promissory note in settlement of the premiums.

I am inclined to think also, that the transaction between White and the

insured amounted, when the proceeds of the promissory notes which he received came into White's hands to a payment in cash of the premiums, and that the Plaintiff's right to recover may be supported on that ground also.

The Defendants' counsel cited the case of McCormack v. The Temperance and General Insurance Co., which he contended was a conclusive authority in favour of the Defendants, but I was unable to agree to that view, and the language of the learned Chief Justice (Armour) seems to me to indicate that in his opinion, on a state of facts similar to that which exists in this case, a conclusion ought to be come to different from that which was arrived at in that case, He says: "The liability of the agent to pay the Defendants the amount of the note of the insured could not be substituted for the liability of the insured to pay it by the act of the agent without the consent of the Defendant."

Upon the whole the Plaintiff is, in my opinion, entitled to judgment for the full amount of the policies with interest from the date of the receipt by the Defendants of the proof of death, together with her costs of suit.

RECORD.
—
In the High Court of Justice, Chancery Division, Ontario.
—
No. 30.
Judgment of Meredith, C.J., 11th Mar., 1896
— continued.

Formal Judgment.
In the High Court of Justice.
Wednesday the 11th day of March 1896.
Meredith C.J. C.P.

No. 31.
Formal Judgment, 11th Mar., 1896.

20

Between
Jean Fleming *Plaintiff*
and

The London and Lancashire Life Assurance Company . . . *Defendants.*

This action coming for trial on the 27th day of January 1896 at the Assizes holden at Toronto before the Honourable Mr. Chief Justice Meredith in the presence of counsel for the Plaintiff and for the Defendants, upon hearing read the pleadings the evidence adduced and what was alleged by counsel for all parties, it was ordered that the said action do stand over for judgment and the same coming on for judgment this day accordingly.

30

1. This Court doth order and adjudge that the Plaintiff do recover against the Defendants the sum of \$10,412.60.

2. And this Court doth further order and adjudge that the Defendants do pay to the Plaintiff her costs of this action forthwith after taxation thereof.

(Sgd.) GEO. S. HOLMSTED,
Registrar.

Judgment signed the 24th day of March 1896.

RECORD.

*In the
Court of
Appeal for
Ontario.*

No. 32.
Reasons of
Appeal to
Court of
Appeal for
Ontario.

In the Court of Appeal for Ontario.

Between

Jean Fleming (*Respondent*) *Plaintiff*,

and

The London and Lancashire Life Assurance Company
(*Appellants*) *Defendants*.

Reasons of Appeal.

1. The learned judge was in error in holding that the transaction was other than notes given for premiums, which notes subsequently were dishonoured and upon such dishonour the policy lapsed. 10

2. There was not a jot or tittle of evidence to warrant the assumption that either the insured or Robert Fleming who negotiated the transaction ever contemplated or arranged that the notes were to be taken by the agent and the agent's responsibility taken by the company as and for the liability of the insured and such a transaction must be found as a fact before an argument can be put forward that the company ever received payment except by note.

3. In any event the whole principle underlying the contract of life insurance is payment of premiums in advance and the Plaintiff here is handed a policy in which it is stated that payment is received and if such payment has taken the form of a note such policy lapses on non-payment of the note and therefore 20 whether it is the note of Fleming or of White or of any other person the insured takes the risk of its payment or the lapsing of the policy.

4. It cannot even be argued that there ever was any intention to take White's note as a cash payment.

5. No matter what the parties thought when the facts appear it is shown that no premium ever was paid and the risk was written off long before the death and without the knowledge of illness and because of such non-receipt of premiums.

6. The admission made by the Plaintiff's counsel shows that before delivery of the policy the insured had incipient phthisis and the whole transaction is ear- 30 marked with fraud on the part of Robert Fleming and the insured and nothing should be presumed in favour of the Plaintiff.

7. The utmost that can be said is, that the agent's note was taken as evidencing the amount the company supposed was due from him and held as such and the fact of debiting him with such amount on the presumption that he had received it is evidential of nothing in favour of the insured who must stand upon what the real facts turn out to be and there is no pretence that the transaction was ever other than notes given for the premiums, attempted to be renewed as such and attempted to be paid afterwards in the hope of holding the policy and therefore no liability on the part of the Defendants. 40

8. The Appellants will rely upon the following amongst other authorities:—

Acey v. Fernie, 7 M. & W. 151.

McCormack v. Temperance & General (not reported)

Manufacturers v. Gordon, 20. A. R. 309.

McGeachie v. North American Life, 20. A. R. 187.

23, S. C. R. 148

Frank v. Sun Life, 20. A. R. 564.

23. S. C. R. 152.

Tiernan v. People's Life 26, O. R. 596.

WALLACE NESBITT,
Of Counsel for Appellants.

RECORD.

*In the
Court of
Appeal for
Ontario.*

No. 33.

Reasons
against
Appeal.

Reasons against Appeal.

1. The transactions between the late James Fleming and Robert Fleming and White the agent of the Defendants' company amounted to a payment in cash to the said White of the premiums upon the insurance upon the life of the said 10 James Fleming.

2. That the transactions between the said Flemings and the said White placed the said White in possession of funds whereby he could pay to the Defendant company that portion of the premiums payable to the company in respect of the said insurance and the Defendant Company having accepted from the said White his promissory note and accepted him as their debtor in place of Fleming cannot now claim to cancel the policies in question herein by reason of default in payment by the said White of the promissory note made by said White to the company.

3. Condition No. 10 upon the said policies only applies to promissory notes 20 made by the insured and does not apply to promissory notes made by other parties taken and accepted by the Defendant Company in payment of premiums of insurance upon the lives of parties other than the makers of the said notes.

4. The promissory notes having been accepted for the first premium of insurance and the said notes having been renewed and being current at the time of death of the insured the Defendant Company is liable for the payment of the policy of insurance payable by them upon the life of the said James Fleming.

5. The Defendant abandoned at the trial all defences which had reference to the state of health of the insured, and cannot now urge the matters set forth in 30 the sixth paragraph of the reasons of appeal.

6. The Plaintiff relies upon the finding of fact and reasons given in the judgment of the learned Chief Justice herein.

(Sgd.) B. B. OSLER,
Counsel for Respondent.

In the Court of Appeal for Ontario.

Between

Jean Fleming (Respondent) Plaintiff,

and

The London & Lancashire Life Assurance
Company (Appellants) Defendants.

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Argued before the Court consisting of Hagarty C.J.O. and Burton, Osler,
and MacLennan, J.J.A. on the 1st and 2nd days of June 1896.

Judgment delivered the 30th day of June 1896.

No. 34.
Reasons for
Judgment.

RECORD.

Opinions of the Judges.

*In the
Court of
Appeal for
Ontario.*

No. 34.
Reasons for
Judgment
—continued.
Judgment of
Hagarty,
C.J.O.

Hagarty, C.J.O.

It seems clear that the assured never paid any money on his first year's premium, that he gave notes therefor instead, not to the Company but to their agent as if it was a transaction between them individually, payable to his order at the office of a Toronto private bank, no reference whatever appearing thereon as to the Defendants. The Company have regularly printed forms of notes, payable to themselves, for use if required. These notes were discounted by the agent with his own bankers and stamped as their property. The agent gave to the assured a receipt for his note, being for the first premium on his insurance, 10 on the ordinary printed receipt of the company. It was part of the condition of the contract that the policy should not have effect till the first premium was paid, and that if a note taken for the first or renewal premiums should not be paid when due, the policy should become null and void, but the maker of the note should remain liable to pay same.

The case is free from any difficulty as to the assured having been misled or deceived by the Defendants or their agent, or of having paid any money which has been intercepted or misapplied by the agent. If he had duly paid his notes at maturity, there need have been no difficulty.

The ground on which the Plaintiff seeks to recover, notwithstanding the 20 default, is rested almost wholly on the dealings between the company and its agent.

Assuming that the premium had been actually paid, they debited him with the amount and took from him at the end of the month his note at a short date for the amount of this and one or two other premiums. This apparently was not an uncommon proceeding between them.

The life dropped in June, only six or seven months after the risk had been taken. Up to the time of death the Company had always been under the belief that the premium had been duly received by the agent. Both notes by the assured were overdue and unpaid. 30

I find great difficulty in holding that the Plaintiff can be heard to urge that by debiting the premium to the agent or taking his note therefor the premium must be considered as paid.

If the company knowingly took the agent's obligation to pay in substitution for, or satisfaction of their claim on the assured, we can understand such a contention.

But has the assured a right to treat what did take place here as equivalent to payment? If the agent had given the assured to understand that he had duly paid the amount for him or that the company had accepted his note as payment therefor, it would have introduced the element of misrepresentation and deceit 40 practised on the assured to his serious detriment. No such question arises here.

The case of *Acey v. Fernie*, 7. M. & W. 151 (1840) has a strong bearing on the rights of the assured to take advantage of arrangements between the company and their agent. There the premium was payable on the 15th of March. The rule was that if not paid within fifteen days at latest, the receipt should be returned to the head office and the insurance cancelled, and immediate notice given.

The premium was paid to the agent on the 12th of April outside the fifteen days, and a receipt was given by him. No notice was given to the company of non-payment within the fifteen days, and according to the usual practice the premium was entered as paid on the 15th of March (the proper day) and the agent debited with the amount.

Lord Abinger, who tried the case, held the Defendants not liable and on the argument in term he said "It seems to me that the provision, that he should be debited as if the premium was paid, was to operate as a penalty on him; but does not authorise third persons to take advantage of that which was a mere private arrangement between the company and the agent, for the purpose of insuring the due payment of all moneys received by him."

Parke B. said "It is impossible to consider the debiting of the agent with the amount of the premium as a payment on the original day, according to the allegation in the first count, the only question is, did the company mean to make themselves liable as on a new contract? It seems to me that they did not, and that the meaning of the transaction was merely to keep their agents right, and in case of neglect to be able to come upon them for the amount of the premium by way of penalty * * . It is only on the ground that they became liable upon a new contract, that anything can be made of the case on the part of the Plaintiff."

This case is discussed in Bunyon's "Law of Life Assurance," 3rd ed., pp. 88, 253, 256, with reference to the American cases. It is also noted with approval in *Busteed v. West of England Fire and Life Insurance Company* 5 Ir. Ch. 553, at p. 569 (1857).

The question for decision here is not depending on the extent of the authority given by the company to its agent. It is almost wholly as to whether the company by debiting the premium to their agent, or taking his note therefor in the belief that he had received the premium, can absolve the assured from his default.

It seems to me that both by reason and authority the assured cannot take advantage of any such arrangement as here shown, to which he was no party, and which was merely a matter between principal and agent for the convenience of their business.

The assured was wholly in default, and was in no particular misled or deceived.

All the proceedings of the agent seem to have been strangely irregular—taking notes to himself payable at his private bank without any reference to the subject matter of insurance for which they were given.

I cannot see how the discounting of these notes by the agent for his own purposes, turning them as it were, into cash, can help the assured. The company, I assume, could discount or obtain an advance on such notes, payable to itself, without in any way discharging the maker from the liability to pay at the proper time.

I am wholly at a loss to understand the action of the company in paying the amount of the notes to the discounters and thus obtaining possession of them. Whatever may have been intended, I do not see how it alters the rights between them and the assured.

It is specially argued that as the company reserves the right of collecting

RECORD.

*In the
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No. 34.
Reasons for
Judgment
—continued.

RECORD.

*In the
Court of
Appeal for
Ontario.*No. 34.
Reasons for
Judgment
—continued.

the amount of the notes notwithstanding the lapse of the insurance by default, that they are thus enabled to pay themselves out of the insurance moneys. That is not the point for decision. The legal consequences of default in payment as agreed worked a forfeiture of the insurance. If the life had dropped before default in payment of the first note, they might have had to pay.

The decision must not be made to depend on whether the company were in no worse position than if the assured had regularly paid the premium in cash to the agent, who had never paid his note therefor to his employers.

I consider that the assured was wholly in default and that the appeal must be allowed. 10

I am aware of the conflicting American decisions as to the great latitude allowed to agents for insurance companies. One of their text writers May, On Insurance, 2nd ed. sec. 136, remarks that the weight of authority seems against the law of *Acey v. Fernie* 7 M. & W. 151.

Judgment of
Burton, J.A.

Burton J.A.

I find that on the close of the argument I made this note: "I have come to a clear conclusion that judgment ought to be given for the Defendants." A subsequent examination of the evidence has confirmed me in that opinion.

It was suggested by counsel for the Plaintiff that it was a matter of common occurrence for an assured not having the cash in hand to apply to the agent to discount his note and pass the proceeds to the payment of the premium. I cannot say how that is, but if that had been the case here the Defendants would presumably not be before us, as nothing can be clearer than that whether the agent misappropriated the money to his own use or not the company would be liable to make good the policy to the assured.

But there is not a particle of evidence of any such dealing in this case; on the contrary, the inference to be drawn from the evidence is all the other way.

The agent had no authority to deliver the policy to the assured except upon receipt of the premium in cash unless the company agreed to accept a note approved of by them on the forms specially prepared for the purpose and in which they are named as the payees. 30

It is said that the fact of the notes being made payable personally to the agent and made payable at a bank is some evidence of an agreement between the applicant and the agent to discount them for him and apply the money on his premium. To my mind it affords no such evidence, even if it stood alone, but White gives no such version. Robert Fleming is not called, and it is directly at variance with the receipt produced, which shows that it was not given for the purpose of being discounted, and paying the premium from the proceeds, but that it was given and accepted as the first premium.

It affords, I think, very cogent evidence that the agent contemplated from the first making an improper use of the notes and negotiating them for his own purposes, but not the most remote evidence of an agreement between the applicant and the agent to raise money for him to pay the premium. 40

I think, therefore, we may reject any such theory as that the notes were given for any such purpose.

The notes were not then and there discounted for the purpose of raising the necessary funds to pay the premium, but one was discounted on the 22nd of December and the other at a much later period.

The certificates of acceptance sent by the company to the applicant were duly delivered to him and express upon their faces that the policy to be issued is subject to the terms and conditions of such policy under the plan of assurance applied for.

The applicant was aware that he had paid nothing in cash and that by the terms of the policy it would be void if the note he had given was not paid at maturity, and under these circumstances no possible liability could exist against the company unless its dealings with its own agent could be invoked by the applicant as something intended for his benefit. But upon what principle? It is "*res inter alios acta*." If the company had chosen for any reason of its own to make a present to the agent of any arrears in his hands which he ought to have paid over, how is that any affair of the assured?

There is nothing, as the learned Chief Justice remarks to prevent the company taking the note of a third person in satisfaction of a premium, but there is nothing to warrant the conclusion that this note of the agent was accepted upon any such terms. The agent had not received any money in payment of the premium; if he had, that in itself would, as I have said been sufficient to fix the company with liability. He led them to suppose, contrary to the fact, that he had been paid the premiums with others, and the company under the idea that that was true, agreed to wait a short time for them, taking his own note or an endorsed note, as the fact may be for their payment. They afterwards discovered that no money had been received by him as their agent at all, and that the assured had never paid any portion of the premium.

On discovering the facts the company promptly repudiated the transaction, and declined to do anything which might be construed into an adoption of the pretended receipt of money on their behalf, as they were quite justified in doing.

Whilst in ignorance of the true facts, the manager, under a mistaken view of his rights, treated the \$135 note as being subject to the same condition as the notes taken originally for the premiums. In this he was in error. But why should the assured profit by that error? The company may lose the arrears due by the agent by neglecting to enforce the payment as soon as they might have done, but why should that act enure for the benefit of this assured, who never has paid his premiums, and is in no way prejudiced by the Defendants' action?

I must confess I do not understand why the company were advised to retire the notes in the hands of the bankers, the holders; it was probably a fortunate thing for the bankers but I do not see how it affects the liability of any of the parties in this proceeding.

I think we ought to allow the appeal and dismiss the action.

Osler J.A.

I have had an opportunity of reading the judgment prepared by my brother

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RECORD.

In the
Court of
Appeal for
Ontario.

No. 34.

Reasons for
Judgment
—continued.

Judgment of
Osler, J.A.

RECORD. Maclellan, and I think, for the reasons given by him, that the appeal should be dismissed.

*In the
Court of
Appeal for
Ontario.*

Maclellan J.A.

No. 34.
Reasons for
Judgment
—continued.

I am of opinion that this appeal should be dismissed and I agree substantially with the reasons for his judgment given by the learned Chief Justice in the court below.

Judgment of
Maclellan,
J.A.

I do not think this case is governed by any of the cases to which we were referred. It is sworn and not disputed that the notes given by the assured to the agent, the one dated the 19th of November, and the other the 10th of December, were transactions not between the assured and the company, but 10 between the assured and the agent White. They are not drawn upon the company's forms, but upon forms of Burk and Graham, who were the agent's bankers. They were not at any time, the property of the company, nor intended so to be. One was discounted by White with his own bankers, on his own endorsement, on the 27th of November, and the other on the 22nd of December 1894. On the same day on which the first note was discounted, White sent the application for insurance to the head office. The application, in the first instance was for \$5,000 insurance only, and when that was sent forward White had in his hands, as the proceeds of the note given by the assured, a sum of cash more than sufficient to pay the company's share of the premiums, 20 not only for a policy of \$5,000 but for two such policies. Between the 27th of November and the 5th of December, it was agreed between the Applicant and White to make the application one for \$10,000 in two policies of \$5,000 each instead of what was first intended a single policy for \$5,000. The application was accordingly changed from \$5,000 to \$10,000 and on the 5th of December formal acceptances for both policies were issued at the head office.

These were delivered to the assured, and it was after that, on the 10th of December that the second note for the premium on the second policy was given. It was not the note of the assured but the note of his brother Robert Fleming and that was discounted on the 22nd of December. After the 30 22nd of December, therefore, the agent White had in his hands actual cash applicable to these premiums and which, having regard to all that had taken place, was the undoubted money of the Company, less the proportion thereof due to him for his commission. It was the company's money, not only as between them and White, but it was so also as between White and the assured. If that was so, then the premiums were actually paid in cash, and when afterwards, on the 23rd of January 1895, the policies were sent forward by the head office and delivered to the assured, the assurance became absolute for one year, and the payment of the notes was entirely a matter 40 between the agent and the makers. The only circumstance indicating that the notes were not intended to be the property of the agent, is the form of the receipt which was given for the first note. One of the company's forms was used, and it is signed by White describing himself as agent. It is, however, expressed to be the personal receipt of the agent, and the undertaking to return the note, in the event of the non-acceptance of the application, is the personal undertaking of

the agent. I think, therefore, this circumstance is wholly insufficient to overcome the positive testimony that the giving of the notes was a private transaction with the agent, for the very purpose of raising the money for the premiums, and that the notes never were the property of the company. It does not appear whether any, or if so what, receipt was given for the second note, probably not any, for by that time the interim acceptance receipts had been issued by the company for both policies. This view of the case is in my judgment confirmed by the acceptance of White's note by the company on the 31st of December for the balance owing by him to them, on the assumption of his having received the premiums in question. I see no reason why an agent should not assist an intending insurer to raise the money for his first or other premium by taking his note, as his own personal property, and getting it discounted; nor do I think the stipulation in this company's agreement with their agent, requiring all premiums to be paid in cash, or notes approved by the company, and not otherwise, forbids that to be done.

I think the appeal must be dismissed.

Appeal dismissed, the members of the Court being divided in opinion.

In the Court of Appeal for Ontario.
Tuesday the thirtieth of June, 1896.

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Between
Jean Fleming (Respondent) Plaintiff
and
The London and Lancashire Life Assurance
Company (Appellants) Defendants.

This is to certify that the appeal of the above-named Appellants from the judgment of the Honourable William Ralph Meredith, one of the Chief Justices of the High Court of Justice of Ontario pronounced on the eleventh day of March, 1896, having come on to be argued before this Court on the first and second days of June instant whereupon and upon hearing counsel as well for the Appellants as the Respondent this Court was pleased to direct that the matter of the said appeal should stand over for judgment; and the same having come on this day for judgment; It was ordered and adjudged that the said appeal should be and the same was dismissed with costs to be paid by the Appellants to the Respondent forthwith after taxation thereof.

(Sgd.) A. GRANT,
Registrar.

(Seal)

RECORD.
In the
Court of
Appeal for
Ontario.
No. 34.
Reasons for
Judgment
—continued.

No. 35.
Certificate of
Judgment of
Court of
Appeal for
Ontario, 30th
June, 1896.

RECORD.

In the Court of Appeal for Ontario.

No. 36.
Order allowing Appellants to pay money into Court in lieu of filing Appeal Bond, 22nd July, 1896.

In the Court of Appeal for Ontario.
The Honourable Mr. Justice Burton in Chambers.
Wednesday, the 22nd day of July, 1896.

Between
Jean Fleming (*Respondent*) *Plaintiff*,
and
The London and Lancashire Life Assurance Company (*Appellants*) *Defendants*.

Upon motion made on behalf of the Appellants, upon reading the affidavit of R. L. Johnston filed and upon hearing counsel on behalf of the Appellants. 10

It is ordered that the said Appellants be allowed in lieu of filing a bond to pay into Court the sum of \$2,000 as security for the Respondent for her costs of the appeal being taken by the said Appellants to Her Majesty in Her Privy Council from the judgment of this Court, and that upon payment into Court of such amount the said appeal be and the same is hereby allowed.

And it is further ordered that the said Appellants be allowed to pay into Court the amount of the judgment herein fixed by consent at \$12,300 in lieu of filing a bond to secure the same, and that upon payment into Court of such amount execution upon said judgment shall be stayed.

And it is further ordered that the costs of this application be costs in the 20 cause.

(Signed) A. GRANT,
Registrar.

No. 37.
Certificate of payment of money into Court, 30th July, 1896.

In the Court of Appeal for Ontario.

Fleming
v.
London and Lancashire Life Assurance Company.
30th July 1896.

I certify that it appears from the entries in the books in the accountant's office that fourteen thousand three hundred dollars have been paid into 30 Court to the credit of this cause by the Defendants.

(Sgd.) GEO. S. HOLMSTED,
Accountant, S.C.J.O.

No. 38.
Certificate verifying Transcript Record, and as to security for costs, 30th Oct., 1896.

In the Court of Appeal for Ontario.

Between
Jean Fleming (*Respondent*) *Plaintiff*.
and
The London and Lancashire Life Assurance Company (*Appellants*) *Defendants*.

I, Alexander Grant, of the city of Toronto, Registrar of the Court of Appeal 40 for Ontario humbly certify to the Queen's Most Excellent Majesty in Her Privy

Council that the documents mentioned in schedule hereto annexed comprise the record of the proceedings in this cause.

And I further certify that the correct transcript of such record is hereto annexed and that an index of the same is contained in the said schedule.

And I further certify that every sheet of such record is marked with my signature and that the seal of the Court of Appeal for Ontario is affixed hereto with the sanction of the said Court, and that the fees and expenses incurred and paid by the Appellants the London and Lancashire Life Insurance Company for the preparation of such transcript amounts to the sum of £41.14.6.

10 And I further certify that the said Appellants the London and Lancashire Life Insurance Company have given security to the Respondent upon their said appeal to Her Majesty in Council by depositing in Court the sum of two thousand dollars (\$2,000) and which deposit has been allowed as a good and sufficient security to the Respondent for his costs of the appeal herein by an Order of the Honourable Mr. Justice Burton made in Chambers and dated the 22nd day of July, 1896.

In witness whereof I have hereunto set my hand and affixed the seal of the Court of Appeal for Ontario this 30th October 1896.

A. GRANT,
Registrar.

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(Seal)

RECORD.

*In the
Court of
Appeal for
Ontario.*

No. 38.
Certificate
verifying
Transcript
Record, and
as to security
for costs,
30th Oct.,
1896

— *continued.*

Schedule.

1. Type-written copy of the pleadings evidence and exhibits used upon the argument of the case in the Court of Appeal together with the reasons for and against the appeal in that Court.

2. The opinions of the several judges by whom the appeal was heard.

3. Certificate of judgment in the Court of Appeal.

4. Order of the Honourable Mr. Justice Burton for payment into Court of the sum of \$2,000 for security for costs on the appeal to Her Majesty in
30 Council.

5. Certificate of the accountant of Supreme Court of Judicature for Ontario showing the amount to the credit of this cause which includes the sum of \$2,000 security for costs of this appeal.

In the Privy Council.

No. 77 of 1896.

*On Appeal from the Court of Appeal
for Ontario.*

BETWEEN

THE LONDON AND LANCASHIRE
LIFE ASSURANCE COMPANY

(Defendants) Appellants,

AND

JEAN FLEMING . *(Plaintiff) Respondent.*

RECORD OF PROCEEDINGS.

PAINES, BLYTH & HUXTABLE,

14, St. Helen's Place, E.C.,

for Appellants.

S. V. BLAKE,

17, Victoria Street, S.W.,

for Respondent.