Case No. 4,259a.

EATON v. SUPREME LODGE K. OF. H.

[22 Cent. Law J. 560.][1]

Circuit Court, S. D. Ohio. Oct. 28, 1885.

BENEFIT SOCIETY—CONDITIONS—BURDEN OF PROOF—EXCUSES FOR NONPAYMENT OF ASSESSMENTS—INSUFFICIENT NOTICE—AGENT'S UNAUTHORIZED ACT—WAIVER—OFFICER—MISAPPROPRIATION—FRACTIONS OF DAY—DRAFTS ON TREASURY—SICK BENEFITS.

1. In a suit on a contract of life insurance, with conditions precedent which are referred to on the face of the contract, the burden is on the plaintiff to prove a compliance with such conditions, or a sufficient excuse for non-compliance.
2. If the excuse be a want of sufficient notice to pay an assessment, plaintiff must prove the insufficiency.
3. The act of an agent in receiving money at a time not authorized by the rules of the society does not bind the society.
4. To establish a waiver as to such act, plaintiff must show knowledge and acquiescence on the part of the managing officers of the central society.
5. In the Knights of Honor, the financial reporter of the local lodge is not an officer of the supreme lodge.
6. If the member fails to object to a misappropriation of the funds contributed by him, his beneficiary cannot complain thereof.
7. Such a misappropriation would not excuse the non-payment of subsequent assessments, or justify a member in refusal to pay.
8. The rule charging with assessments all members who take the final degree "on and prior to" a certain date, makes them liable to contribute to all deaths occurring during that calendar day.
9. Moneys in the hands of the treasurer of the order, if already legally drawn upon to a less sum than $2,000, are not "in" the W. and O. B. fund, so as to prohibit the caling of a new assessment.
10. It is optional with the local lodges to allow sick benefits, and they are under no legal duty to pay the amount thereof, when allowed, upon the assessments of their members.

This action was brought upon a certificate issued by defendant to the husband of plaintiff, assuring to her the sum of $2,000, from the "Widows' and Orphans' Benefit Fund," if her husband, Lyman B. Eaton, should die while a member in good standing of the order. The petition alleges that said Lyman B. Eaton died on the 27th day of April, 1883, being at the time a member in good standing, and that plaintiff is entitled to said sum in accordance with the provisions of her certificate. The answer denies that Eaton was a member in good standing at the time of his death, and alleges that the constitution and by-laws of the order provide that any member failing to pay an assessment when due, having received thirty days notice thereof, ceases to be a member in good standing; that Eaton having received due notice failed to pay assessment No. 111 when due, and that plaintiff was therefore

not entitled to participate in the widows' and orphans' fund.

The reply is a general denial of the allegations contained in the answer. The testimony introduced by plaintiff shows that the assessment in question (No. 111), was called December 23, 1882, falling due January 22, 1883, and that it was not paid by Eaton within that time. It also appears that he had received notice of the assessment previous to January 22, but how long previous thereto did not appear. The delinquency was reported at the ensuing meeting of the local lodge to which he belonged, held on February 1, and his suspension was noted upon the minutes. On February 4, Eaton sent the amount by a messenger to the financial reporter of his local lodge, who received the same without objection at the time, entering credit therefor on Eaton's pass-book, and also upon his own cash book; but a few days thereafter notified Eaton that he could not receive the money. The entry thereof in the cash book was erased and the money was not turned over to the treasurer of the lodge, but several weeks afterwards was returned to Eaton. It was claimed on behalf of plaintiff that Eaton was wrongfully suspended for non-payment of this assessment, in support of which claim, testimony was introduced tending to show: 1. That the financial reporter of the local lodge had previously received assessments from Eaton after expiration of the time allowed for payment 2. That Eaton had been suffering with inflammatory rheumatism since the middle of December, and was unable to fully attend to business, for which reason he was entitled to "sick benefits" from his lodge, which should have been applied by the lodge to payment of this assessment. 3. That Eaton had been unlawfully included in assessment No. 54, which was called upon a death occurring on the same day whereon he became a member, but before the hour; that the money collected from him on that assessment had been paid to the treasurer of the supreme lodge, and should be applied to payment of assessment No. 111. 4. That when assessment No. 111 was called, there was more than $2,000 in the treasury to the credit of the widows' and orphans' fund, and that the laws of the order do not authorize an assessment until the amount to the credit of that fund is reduced below that sum. 5. That money derived from assessments in which Eaton was included had been applied to death losses to which he was not bound to contribute.

The constitution and laws of the order were offered in evidence, included in which were the following provisions: "No member shall be assessed for a death that occurs prior to his attaining the third or degree of manhood." "After paying said benefit, if the sum of two thousand dollars is left in the supreme treasury, no assessment will be made, but when less than two thousand dollars is left in the supreme treasury, after paying a benefit, then a call will be made on each lodge for the amount of one assessment on all members upon whom the degree of manhood was conferred on and prior to the date of the death of the deceased brother." "Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member

failing to pay such assessment within thirty days, shall, by such failure, stand suspended from membership in the order, and his name shall be so entered and carried upon the books of the reporter and financial reporter of his lodge." "He (the financial reporter), shall close his account with each assessment at the expiration of thirty days from the date of said assessment and shall not receive money thereon from any member except the suspended member shall have fully complied with the law governing suspended members." "Any member in good standing, and not in arrears for dues or fines, having six months previously obtained the degree of manhood, who may become disabled by sickness or other disability, from following his usual business, or some other occupation, may be entitled to receive from the funds of this lodge such weekly benefits (to be paid weekly), as this lodge may in its by-laws prescribe, which may not be less than one dollar per week: provided said sickness or disability has not originated from intemperance, vicious or other immoral conduct or practice; and the lodge may by by-law enact that no benefits shall be paid for the first week's sickness or disability."

At the conclusion of plaintiff's testimony, the court was asked to instruct the jury to return a verdict for defendant upon said testimony, which motion was fully argued by counsel.

J. R. Von Seggern and J. J. Glidden, for plaintiff.

James O. Pierce and Channing Richards, for defendant.

SAGE, District Judge (orally instructing jury). The question presented by the motion is, whether the evidence offered on behalf of the plaintiff, allowing to it its greatest probative force, is sufficient to support a verdict.

The petition alleges full compliance by deceased with all conditions of the certificate, and that he was a member of the order in good standing at the time of his death. These allegations are denied by defendant, and it is necessary for plaintiff to establish the same by evidence. The burden is upon her to prove that he had complied with the laws governing the order, that being a condition of the certificate; or to show a valid excuse for non-compliance.

The evidence she has introduced shows that Baton did not pay assessment No. 111 when due, and under the laws of the order such non-payment deprives a member of good standing; but she attempts to excuse nonpayment on various grounds.

2. The testimony does not show when notice of this assessment was served upon Eaton, but it does show that the assessment was called on December 23, 1882, and was payable on or before January 22, 1883, and if plaintiff relies upon want of due notice to excuse non-payment, she must herself prove it.

3. The receipt of an assessment after maturity is expressly forbidden by the laws of the order, and the receipt of the assessment on February 4, by the financial reporter of the local lodge, was not binding upon defendant, unless authority, express or implied, was given to receive it. No express authority has been shown, but it is claimed the receipt of previous assessments by him from Eaton after the same were past due, amounted to a waiver of prompt payment. The financial reporter of the local lodge is not an officer of the supreme lodge, or under its control; at most he is only its agent, and to establish a waiver as against defendant by reason of his previous conduct it must be shown that the managing officers of the supreme lodge had knowledge thereof, and acquiesced in it. There is no such testimony from which a waiver can be found.

4. It is further claimed that assessment No. 54 was improperly collected from Eaton, and the amount so collected should be credited upon No. 111. That assessment was called upon a death occurring on the same day Eaton attained the third degree in the order. The laws of the order provide that an assessment shall be collected from all members, upon whom the third degree was conferred on and before the date of the death upon which the same is called. Plaintiff has offered testimony tending to prove that No. 54 was called upon a death occurring at 9 p. m., about an hour before the degree was conferred on Eaton, and for the purposes of this motion that is to be considered as a fact established. The general rule of law is to disregard fractions of a day. If the circumstances show that it was otherwise intended, such division may be made; but in this case the language of the by-law does not warrant it and the facts do not require it. Moreover, no objection was made by Eaton. He permitted the application of his money to that assessment, and it did not remain to his credit in either the local or supreme lodge.

5. It appears that the treasurer of the supreme lodge had a large sum of money. In his hands to credit of the widows‘ and orphans‘ fund, when assessment No. 111 was called; but it also appears that orders had been drawn against it to pay death losses, sufficient when paid to reduce the fund below $2,000, which authorized the call of a new assessment. It was not necessary to await payment of the outstanding orders; the money on hand having been appropriated to the payment of certain claims, it was not in the treasury so as to prevent an assessment to provide for the payment of further claims which had been proved.

6. As to any misappropriations of previous assessments, if any there were, there is no testimony to sustain any claim of plaintiff on that account. Inasmuch as Eaton had acquiesced in such appropriation, she cannot object, and in any event it would not excuse non-payment of an assessment made to pay claims for which he was clearly liable.

7. As to "sick benefits," their allowance was within the discretion of the local lodge. There is no testimony to show that any such provision had been made by this lodge, and if there were, it was expressly made applicable to other purposes, and could not be applied by the lodge to payment of an assessment.

8. Upon the whole testimony the court finds that no valid excuse has been shown for non-payment of the assessment and plaintiff has therefore failed to establish the allegations of her petition.

The jury is therefore instructed to return a verdict for defendant (Which was accordingly done.)

A motion for a new trial was made on behalf of plaintiff, which, after full argument and consideration, was overruled on March 30, 1886.

NOTE. I. Conditions Precedent. It seems well established, as to the contract of life insurance made by a mutual benefit association, that the rules and regulations of, the order are conditions precedent to the contract. Knights of the Golden Rule v. Ainsworth, 71 Ala. 436; Coleman v. Supreme Lodge K. of H., 18 Mo. App. 189: Karcher v. Knights of Honor, 137 Mass. 368; Chamberlain v. Lincoln, 129 Mass. 70; Grosvenor v. United Soc., etc., 118 Mass. 78. "The written contract, so far as it goes, is the measure of the rights of all parties." Supreme Lodge K. of H. v. Nairn, 60 Mich. 44, 26 N. W. 826. "The charter and by-laws constituted the terms of an executory contract to which the member assented when he accepted admission into the order." Hellenberg v. Order of B'Nai Berith, 94 N. Y. 584. "They must be complied with, in order to secure the benefits arising from the connection with this association." Harrington v. Workingmen's Ben. Ass'n, 70 Ga. 341. So the contract of the old-style life insurance company may be by its own terms conditioned that if the premium be not paid on the stipulated day, the policy shall "cease and determine;" and in such a case, the condition is precedent to the continuance of the contract and is self-operative. Equitable Life Assur. Soc. v. McLennan (Tenn.) 4 Cent. Law. T. 150; Marston v. Massachusetts Life Ins. Co., 59 N. H. 92. Such condition is "the very substance of the contract" Klein v. New York Life Ins. Co., 104 U. S. 91; Robert v. Ins. Co., 2 Disn. 106. It is not a "mere mode of securing payment;" it is intended "to enable the company to promptly make payment in case of death;" and therefore, a failure to perform "destroys the life of the policy." Insurance Co. v. Robinson,

40 Ohio St. 273, 274. Sickness of the member is no excuse for non-payment. Klein v. New York Life Ins. Co. 104 U. S. 88; Thompson v. Knickerbocker Life Ins. Co., Id. 252. Nor is his insanity an excuse. Yoe v. Masonic Mut. Ben. Ass'n (Md.) 24 Am. Law Reg. 546.

II. Burden of Proof. Payment of assessments being a condition precedent to the continuance of the contract, the onus probandi as to payment was on the plaintiff. Such is the general rule as to all conditions precedent. Tayl. Ev. § 365; Buny. Life Ins. p. 81. Archbold says, as to life insurance, "If the matter of any averment be a condition precedent to the plaintiff's right to recover, it must be strictly averred, and as strictly proved." 2 Nisi Prius, p. 293. This rule applies to two classes of conditions, viz: (1) Conditions precedent to the contract, and (2) conditions precedent to the right of action. Authorities are numerous, in cases of both classes, to the effect that the burden of proving compliance rests on the plaintiff. Worsley v. Wood, 6 Term R. 710; Huckman v. Fernie, 3 Mees. & W. 510. 517; Ashby v. Bates, 15 Mees. & W. 589, 596, 597;Craig v. Fenn, 1 Car. & M. 43; Graig v. U. S. Ins. Co. {Case No. 3,340];Bobbitt v. Ins. Co., 66 N. C. 78, 79;Wilson v. Hampden F. Ins. Co., 4 R. I. 171, 172; Peoria Mar. & F. Ins. Co. v. Walser, 22 Ind. 73; Insurance Co. v. Terry, 15 Wall. {82 U. S.} 580. Lord Denman said, of a condition precedent to the contract: "It lies on the plaintiffs to establish that which is the very condition of the insurance." Rawlins v. Desborough, 2 Moody & R. 70. In Seamans v. Life Ins. Co. {3 Fed. 325], which turned on the alleged fault of the defendant as an excuse for failure to perform, it was "conceded that the premium was not in fact paid, and that unless plaintiff has shown a waiver of payment, or that the non-payment resulted from the fault of defendant, the policy sued on is forfeited." So, a petition on a policy which does not aver performance of conditions precedent appearing on the face of the policy, or else a waiver thereof, is bad upon demurrer. Home Ins. Co. v. Lindsey, 26 Ohio St. 356. And if plaintiff declares on a policy, without conditions, but offers in evidence a policy containing such conditions, this will be a fatal variance. Rockford Ins. Co. v. Nelson, 65 111, 418. The burden is not shifted by the fact that the answer, in addition to a denial of performance, specifically enumerates several instances of failure to perform. Mehurin v. Stone, 37 Ohio St. 50. Nor is the neglect of plaintiff to prove performance of a condition precedent cured by evidence on the part of defendant which leaves the question in doubt. Cornell v. Hope Ins. Co., 3 Mart. (N. S.) 223.

III. Waiver. The receipt of money by the agent of the insurance company, outside of its rules, is ultra vires. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 81. So the agent of a mutual benevolent society cannot bind it by his acts which are outside of its established rules, in the matter of reinstatement after suspension. Painter v. Industrial Life Ass'n, 14 Ins. Law J. 556. The mode of transacting its business, prescribed by the rules of the society, is exclusive of all other modes. Coleman v. Supreme Lodge K. of H. 18 Mo.

App. 189. The waiver of the condition in such a case, must be a waiver by the company, not by its agent only. "The material question is whether the company had authorized its agent to waive the forfeiture." Insurance Co. v. Norton, 96 U. S. 239. "The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not be sufficient, unless sanctioned by the company itself." Insurance Co. v. Eggleston. Id. 577. It is the waiver by the company itself, through its managing officers, which will bind it. Phoenix Mut. Life Ins. Co. v. Doster, 106 U. S. 32 [1 Sup. Ct. 20]. One act of receiving money ultra vires, or even a custom, so to receive it, confers no right upon the other party to continue so to pay. Illinois Masons' Ben. Soc. v. Baldwin, 86 Ill. 479; Marston v. Massachusetts Life Ins. Co., 59 N. H. 92; Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 259.

IV. Fractions of a Day. It was once considered a general rule of law that fractions of a day are not to be regarded. It may now be said that there is no general rule on the subject, but that courts will regard or disregard fractions of a day, according as the substantial justice of the particular case may demand. The authorities on both sides of the question are collated with some fullness in Burgess v. Salmon, 97 U. S. 381, and Louisville v. Portsmouth Sav. Bank, 104 U. S. 469, in each of which cases divisions of the day were noticed. In Maine v. Gilman, 11 Fed. 214, Lowell, J., thought the ancient maxim "now chiefly known by its exceptions." In Lapeyre v. U. S., 17 Wall. [84 U. S.] 191, and U. S. v. Norton, 97 U. S. 164, it was held that the president's trade proclamation of June 13, 1865, took effect at the beginning of that day, so as to include transactions occurring during that day. In Burgess v. Salmon, it was held that the approval by the president of a revenue law at a late hour on a certain day did not operate to make illegal a transaction completed at an earlier hour in conformity with the previous law. In Louisville v. Portsmouth Sav. Bank, it was held that the popular adoption of a constitutional provision did not make such provision applicable to a transaction, otherwise constitutional, which occurred before the close of the constitutional election. The question whether the repeal of the bankrupt law on March 3, 1843, affected a petition in bankruptcy filed on the same day was decided in contrary ways, in two different districts, by Prentiss, J., in Re Welman, 20 Vt. 653; and Story, J., in Re Richardson [Case No. 11,777]. In both these cases, it was thought proper to ignore arbitrary rules, and attempt to establish one which should be practicable and convenient. Prentiss, J., said: "Of what practical importance can it be, whether a law takes effect on one or another part of a particular day? If it be meant that no law should go into operation, before the people have had the means of knowing its provisions, the proposition is a plain one and easily understood; but it is not so easy to see or understand how it can be very material, so far as it respects the people's knowing or having the means of knowing the law, whether it takes effect the first or last part of the day on which it is approved. As it is known and understood that laws, after passing

through the different legislative stages, take effect in general, and unless it is otherwise specially provided, the day they are approved and signed by the president, there is very little reason for saying there is any surprise upon the public." Story, J., applying the same rule of convenience, reached a contrary result, suggesting that as to offenses against the law, the constitutional prohibition upon ex post facto legislation required that the hour of the day be looked to; and said: "In cases of doubt, the time should be construed favorably for the citizens; the legislature have it in their power to prescribe the very moment, in future, when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect." In Lapeyre v. U. S., the majority opinion of the supreme court approves the reasoning employed by Judge Prentiss, while in Louisville v. Portsmouth Sav. Bank, the opinion of Judge Story receives like approval. These apparently conflicting authorities may be reconciled by adopting the view that the substantial justice of the particular case should govern, as it probably did do in both the cases last named. In the principal case, the language of the by-law seems to have been intended to avoid all questions of doubt,

and to establish the rule that the entire day was included. The language, making liable to the assessment "all members upon whom the degree of manhood was conferred on and prior to the date of the death of the deceased brother," includes, (1) all members upon whom the degree was conferred on the date, and (2) all upon whom the degree was conferred prior thereto; and the word "date" has evident application to the entire day to which such date is given by the custom of business men.

V. Sick Benefits. In the holding that the allowance of "sick benefits" was wholly within the discretion of the local lodge, and that when allowed such benefits could not be by the lodge alone applied to the payment of an assessment, the principal case is in accord with the case of Ancient Order of United Workmen v. Moore, 9 Ins. Law J. 539, decided by the court of appeals of Kentucky. In that case, the provisions of the by-laws were substantially the same as in the Knights of Honor. It was held that (1) sick benefits when allowed, were for the present relief of the member and his family, and (2) the right of the member to receive them as such deprived the local lodge of the power to apply them, without his direction, to the payment of an assessment. The object of paying sick benefits being a charitable one, the member who seeks to recover them is not to be considered as simply a creditor; he must show a case arising under the by-laws, and adequate action actually taken by the society in reference thereto. St. Patrick's M. Ben. Soc. v. McVey, 92 Pa. St. 510. To declare that he is entitled by the by-laws to sick benefits, without declaring that the society has acted, is insufficient as a pleading. Irish Catholic Ben. Ass'nv. O'Shaughnessey, 76 Ind. 191. Where the laws of the order provide for a settlement of all disputes as to sick benefits, which settlement is to be final, in case the tribunal of the order has acted, the courts will not interfere. Order Bed Men v. Murbach, 13 Ind. 91; Black & White Smith's Soc. v. Vandyke, 2 Whart (Pa.) 309; Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492, 16 N. W. 576. And where the by-laws provide for the approval by a committee of the application for sick benefits, the member must comply with this regulation before he can appeal to the courts. Harrington v. Ben. Ass'n, 70 Ga. 340; Robinson v. Ben. Soc. (Cal.) 14 Ins. Law J. 790. So, where after the death of the member, the beneficiary claims, as in the principal case, that there was a right to sick benefits that should have been recognized, she is no less than the member himself bound by the rule that made it his duty to exhaust all the remedies provided by the society before complaining to the courts. Karcher v. Knights of Honor, 137 Mass. 368.

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