

to buy advertising space, and were also sellers of their own property. They made the actual contract with themselves, and went through the form of obtaining the contract which they were employed to obtain. The agent to buy property, who, in the pretended discharge of his agency, sells his own property to his principal, without his knowledge, is not entitled to commissions. The first of these principles is applicable to the claim of the plaintiffs for commissions upon the other advertisements. By a pecuniary or other consideration moving from themselves, they obtained the insertion of the advertisements, but by this course of conduct they intentionally prevented their employer from receiving the other benefits which they undertook to obtain for him. It is true that they performed a part of the service which they entered upon, and many cases may be suggested in which an agent should receive compensation, although he has not carried out an undertaking exactly upon the terms upon which it was intrusted to him. 2 Kent, Comm. 619, (6th Ed.) But in this case an important part of the business which they undertook to do was actually, though not in form, omitted to be done, and was omitted by a course of conduct which was a breach of the good faith which it is indispensable should be observed between the principal and agent. It may be said that the plaintiffs should receive the sum which was agreed to be paid for the electrotypes which they might furnish to the different newspapers, but those electrotypes were to be furnished to those papers in which the advertising was done, upon the terms which the agents were employed to obtain; and it has heretofore been said that these terms were entered into by all the proprietors only as a matter of form.

There are other grounds of demurrer, technical in their character, which I do not consider of importance. The demurrer is overruled.

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### O'BRIEN v. UNION MUT. LIFE INS. Co.<sup>1</sup>

(Circuit Court, D. Minnesota. December Term, 1884.)

#### LIFE INSURANCE—PREPAYMENT OF PREMIUM—WAIVER BY AGENT—VALIDITY OF POLICY.

Although in the printed policy and the application for life insurance it is stated that no policy will be considered valid and binding until the premium is paid, a general agent of a foreign company may waive such condition and give credit; and as the evidence in this case shows that the delivery of the policy in suit was unconditional, and that the agent did in fact waive the terms thereof requiring prepayment, the policy should be held valid, and plaintiff allowed to recover the amount of insurance, with interest, after deducting the amount of premium due and unpaid.

At Law.

<sup>1</sup>Reported by Robertson Howard, Esq., of the St. Paul bar.

Thomas H. Quin, for plaintiff.

A. D. Keyes, for defendant.

NELSON, J. This suit is brought by Mary O'Brien against the Union Mutual Life Insurance Company, to recover upon a policy of insurance, dated December 4, 1884, for \$1,000. The insured, Richard J. Vaughan, died March 16, 1883. The evidence showed that among his papers was found this policy on his life, payable to his mother, Mrs. Vaughan, now Mrs. Mary O'Brien, accompanied by a receipt, signed by the agent of the insurance company in the state of Minnesota, for the amount of the first premium; and the policy, with the admission of death and the receipt, being offered, the plaintiff is entitled to a judgment, unless the defendant can overcome the *prima facie* case presented upon the proof thus offered by the plaintiff. The policy contains the following clause:

"If any premium, or any installment of premium, on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, except as hereinafter provided; and the only evidence of payment shall be the receipt of the company, signed by the president or secretary."

And again:

"The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated."

The application for insurance substantially recites the same provision. In the application, which is a part of the policy, it is stated—

"That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company, and the first premium thereon actually paid, during the continuance of the life proposed for insurance in the same condition of health as described in the application."

It appeared upon the trial that the application for insurance was taken on the solicitation of J. J. Hart, acting on the behalf of the defendant, who made it out and sent it to Minneapolis to the manager of the company for Minnesota and Dakota, A. K. Shattuck, who has general charge of the defendant's business. The application was dated November 27, 1882. No premium at that time was paid to Hart, but Vaughan promised to pay for the policy as soon as it issued and was delivered. The application was sent to the superintendent of the western agencies at Chicago, and in due course of time the policy in suit and receipt, dated December 4, 1882, were received by the Minneapolis agent, who entered it in his register of policies, and inclosed it in an envelope with the following letter, dated December 11, 1882, and sent it to Vaughan: "DEAR SIR: Inclosed find your policy 76,494. The first semi-annual premium will be due December 15, 1882. We trust you will find your policy satisfactory. A. K. SHATTUCK, Manager." The books of the company, and the evidence of the manager, show that no premium was ever paid, and an

effort is made to show by the evidence of Hart—and he so testified—that in a conversation with Vaughan before he died, and five or six weeks after the policy was sent by the Minneapolis agent, he stated that “he would give up the policy, as he did not feel able to pay for it, and would return the policy to Shattuck.” He never did so, however. I hardly think this testimony is admissible, Vaughan being dead, and no one present at the conversation but Vaughan and witness. However, giving it full force and effect, in connection with the other evidence of the defendant’s witnesses, Messrs. Shattuck and Lawrence, it is clear to my mind that the company, through its agent, waived the cash payment and delivered the policy, giving him time to pay the premium. In so doing, the contract of insurance was complete, whether the company charged the agent with the amount of the premium when the policy was delivered without actual payment or not, and although no return of premium was ever made to the company.

The defendant received the policy in December, 1882, and as late as January 9, 1883, the manager addressed a letter to Vaughan, calling his attention to the amount of premium due and requesting its payment, thus recognizing the contract of insurance. It was not unusual for policies to be delivered without cash payments, as appears by the testimony, but in every instance previous time notes were taken for the amount of the premium due, and these notes were furnished the agents by the company. It is urged that the company’s agent or manager had no authority to deliver policies without the payment of the semi-annual premium, or receipt of a note for it; but the facts in the case, including the letters of the agent, Shattuck, show clearly a credit was intended; and it is well settled that although in the printed policy and application it is stated that no policy will be considered valid and binding until the premium is paid, yet an agent like Shattuck, representing a foreign company, may waive such condition and give credit, and such appears to be the manner of conducting the business of the company by the manager in this state. There is no evidence that the policy was delivered to the assured on condition that the premium should be paid or the policy returned. Vaughan agreed with the solicitor, Hart, November 27, 1882, to take the insurance and pay the premium when he went to Minneapolis, or send the money, and the policy was delivered on such terms. He failed to fulfill his promise and did not return the policy. That such failure did not render the contract of insurance invalid, and that the manager did not so regard it, is clear; for as late as January 9, 1883, he wrote a letter to Vaughan, above referred to, which reads as follows: “January 9th. *Richard J. Vaughan, Faribault, Minn.*—DEAR SIR: Please remit \$16.13, the first semi-annual premium on your policy of \$1,000. It was due the first of this month, but we overlooked you. Please respond at once. Respectfully, A. R. SHATTUCK.” This letter recognizes the contract of insurance as valid and subsisting. If agents of

insurance companies do not intend to give credit for the payment of premiums, they should not deliver the policies without payment. There is no evidence in this case to indicate a conditional delivery of the policy. On the contrary, I am of the opinion that the agent waived the terms of the policy requiring the prepayment of the premium before the policy took effect, which was binding upon the company. The plaintiff is entitled to a judgment for the sum of \$1,000, with interest from May 29, 1883, to date, deducting the amount of the premium due, \$16.13. Judgment will be entered for that amount.

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MERRILL v. TOWN OF MONTICELLO.

(Circuit Court, D. Indiana. December 20, 1884.)

1. MUNICIPAL BONDS—AUTHORITY OF INDIANA TOWNS TO ISSUE FOR SALE—INDIANA ACT OF 1852, § 27—REVISION OF 1881, §§ 3342-3345, 3348, 3349.

An incorporated town in Indiana may issue bonds for sale in the market to raise money to meet at maturity a lawful indebtedness for which it has no other legal means of providing payment.

2. SAME—"FUNDING BONDS."

That the bonds so issued purport to be "funding bonds" will not affect their validity.

On Demurrer to Reply.

*Roache & Lamme* and *Harris & Calkins*, for plaintiff.

*David Turpie* and *W. E. Uhl*, for defendant.

WOODS, J. This action is brought to recover principal and interest of 143 bonds of \$100 each, with coupons attached for interest at the rate of 7 per cent. per annum. The complaint alleges the execution of the bonds by the defendant, default in the payment of the second interest coupons, and that the plaintiff had elected to treat as due the principal of each bond, and before bringing the suit had notified the defendant of this election. Copies are filed with the complaint, of a bond and one coupon, which read as follows:

EXHIBIT A. (COPY OF BOND.)

*United States of America.*

No. 1.

STATE OF INDIANA.

\$100.

*Funding Bond of the Town of Monticello.*

Ten years after date, the town of Monticello, in the county of White, state of Indiana, promises to pay to the bearer, at the Importers' & Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent. per annum, payable annually in gold at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the state of Indiana. The principal of this bond shall be due and payable at the option of