[HIGH COURT OF AUSTRALIA.]

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK . . . . . } APPELLANTS;
DEFENDANTS,

AND

PECHOTSCH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *Sep.* 11, 12.

Griffith C.J., Barton and O'Connor JJ.

Life assurance—Policy for the benefit of wife and children of insured—Surrender before maturity—Right of insurer to recover surrender value—Trustee—Power to give receipt—Life, Fire and Marine Insurance Act (N.S.W.) (No. 49 of 1902), secs. 8, 9.

The *Life, Fire and Marine Insurance Act* (No. 49 of 1902), sec. 8 protects from creditors the moneys payable under a policy of insurance effected by a husband for the benefit of his wife and children, and provides that such a policy shall create a trust in favour of the objects named therein. Sec. 9 provides *inter alia* that the insured may appoint a trustee or trustees of the policy, and that, in default of such appointment, the policy shall vest in the insured in trust for the purposes mentioned, and that the receipt of a trustee or trustees duly appointed, or in default of appointment, the receipt of the legal personal representative of the insured shall be a discharge to the insurers for the sum secured by the policy.

A husband effected such a policy to secure the payment of £300 to his wife and children at the end of 20 years, subject to a provision that the policy might be surrendered after the payment of three yearly premiums.

Held, that the insured was entitled by the terms of the contract of insurance to surrender the policy, and to sue for and recover the surrender value, and that the Act had not the effect of taking away this right, or of imposing on the insurers any obligation to see to the application of the moneys payable under the policy.

The latter part of sec. 9 merely protects the insurers from claims by the insured, when they have paid the trustee duly appointed under the Act. It does not exclude the implication that the insured has power to give a valid discharge for the moneys payable under the policy, either as legal owner or as trustee under the Act.

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Sowarsby v. *Lacy*, 4 Madd., 142, and *Ford* v. *Ryan*, 4 Ir. Ch. R., 342, applied.

Decision of the Supreme Court, *Pechotsch* v. *Mutual Life Insurance Company of New York*, (1905) 5 S.R. (N.S.W.), 252, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondent took out a policy of life insurance upon his own life with the appellant company. The policy was on the endowment system, and in it the appellant company promised to pay at the end of twenty years to the wife of the appellant if living, and if not living, then to the children of their marriage their executors administrators and assigns £300, to be due and payable on the day of the month and year twenty years from the date of the policy if the insured should be then living, or if he should die before that time, to be paid to the wife if living, and if not living to the children. There was also a provision that after the payment of three years premiums the policy might be surrendered, and, on that being done, the company would pay the surrender value calculated upon a specified basis. In 1904, after three years premiums had been paid, the respondent with the consent of his wife applied to the appellant company to be paid the surrender value of the policy. The appellants were notified of the consent of the wife. They however refused to pay, on the ground that, by virtue of the provisions of the Act No. 49 of 1902, secs. 8 and 9, the respondent was not entitled to receive the moneys, and could not give the appellants a valid discharge for them. At that time there were two children living, both under age. No trustee had been appointed by the insured or by the Court under sec. 9 of the Act.

The respondent brought an action in the District Court to recover the amount of the surrender value, £18 6s., and *Heydon* D.C.J., who tried the case, found a verdict for the plaintiff for the amount claimed. From this decision the appellants appealed to the Supreme Court.

The Supreme Court held that the respondent, with his wife's consent, could surrender the policy and give an effectual discharge to the appellants for the surrender value, and dismissed the

appeal: *Pechotsch* v. *Mutual Life Insurance Company of New York* (1).

From this decision the present appeal was brought, by special leave.

The material conditions of the policy and the terms of secs. 8 and 9 of the Act No. 49 of 1902, appear in the judgments.

Gordon K.C. (with him *Lingen*), for the appellants. The right to surrender is not disputed, but, as no trustee has been appointed under sec. 9 of the *Life, Fire and Marine Insurance Act*, 1902, the appellants, if they pay the surrender value to the insured, may have to see to the proper application of the trust moneys. The insured is not able to give a valid discharge. The only person who can do so is a trustee duly appointed under sec. 9, or in default of appointment, the legal personal representative of the insured.

GRIFFITH C.J.—[By sec. 8 the insured is a trustee of the policy in favour of the objects named therein. Is there any answer at law to a claim by the trustee? The contract is made with him.]

There is no covenant to pay him. It is only by virtue of the Statute that he can sue as trustee at all. He must therefore exercise his right within the restrictions imposed by the Act. A right to sue does not arise until there is a failure to pay the beneficiaries. The Court of Equity would restrain the appellants by injunction from paying anyone else, even the insured, unless they saw to the proper application of the moneys. The general rule applies that, if a person has in his hand moneys to which another person is entitled, he cannot discharge himself from his liability except by paying to the person entitled: *Lewin on Trusts*, 11th ed., p. 529. In this case the wife and, in certain events, the children are the only persons entitled. The appellants are not justified in paying anybody until a trustee is appointed. The insured has no beneficial interest in the moneys payable: sec. 8. He is trustee of the policy without a right to receive the moneys payable under it. He is not a trustee of the settlement. Sec. 9, by providing for the appointment of a trustee, ensures that there will be some person entitled to sue for the moneys and give

(1) (1905) 5 S.R. (N.S.W.), 252.

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a discharge to the company. The only power to receive the moneys is that conferred on the trustee by that section. The Statute takes the place of the trust deed. The mere power of sale involved in the right to surrender does not necessarily imply any power to receive the moneys: *Cox* v. *Cox* (1). It may be that, where there is a trust with power to sell, it will be implied that the trustee has power to receive the moneys where there is no provision for anybody else to do so. That is an implication arising from the necessity of there being some one to receive them in order to give effect to the power of sale. But the express provision in sec. 9 that the trustee duly appointed shall be able to give a discharge for the purchase money altogether rebuts any implication that might have arisen in the absence of such a provision. There cannot be two persons to whom the appellants are liable.

[He referred to *Bunyon on Life Assurance*, 4th ed., pp. 578, 579; *Porter on Life Insurance*, 3rd ed., p. 355; *Lewin on Trusts*, 9th ed., p. 525.]

[GRIFFITH C.J. referred to *Sowarsby* v. *Lacy* (2), and *Locke* v. *Lomas* (3).]

There would be no difficulty in having a trustee appointed by the Court in default of appointment by the insured. That is provided for by the *Trustee Act*, 1898.

Moreover, it is impossible to say at this stage who will be ultimately entitled. The policy has fixed the time at which the class is to be ascertained as at the end of 20 years. When that time arrives the wife may or may not be living, or more children may have been born. There is no acceleration of the period at the end of which the class is to be ascertained. The fact that the policy may be surrendered does not affect that question. The children, who may ultimately turn out to be the persons entitled, are not parties to this action, and would not be bound by the decision. The appellants would still be liable to them, if the wife should fail to survive. It would be a breach of trust for the husband to pay the moneys to the wife at this stage. Her consent is therefore no protection to the appellants. Sec. 64 of

(1) 1 K. & J., 251, at p. 253. (2) 4 Madd., 142.
(3) 5 De G. & S., 326.

the *Trustee Act*, 1898, has no application, because it only deals with cases where the trustee has power to receive the moneys.

Curtis, for the respondent. The husband is not a trustee of the surrender value at all. The provision for surrender has the effect of removing the policy from the operation of secs. 8 and 9 in certain contingencies. In addition to the promise to pay £300 at the end of 20 years there is a special promise to pay the surrender value when demanded, if certain conditions are complied with. Even if the insured is not entitled under the Act to give a discharge for the moneys payable at maturity, that is no answer to this claim for the surrender value. The policy is in effect a conditional trust liable to be defeated by surrender, in the same way as it might be defeated by failure to pay premiums. It could not be contended that the husband was bound to keep the policy alive. There is simply a trust as to the £300 when due. By the terms of the policy the insured may borrow on it as security. The right to borrow and surrender are clearly limitations upon the interest of the wife and children, and may defeat it altogether. The insured pays a higher premium for these rights, and should not be deprived of them. The trust may be determined though not altered. As long as the policy exists the trust continues on the original terms of the trust deed, but the trust ceases when the policy comes to an end in any of the ways contemplated by the parties to the original contract. There is nothing in the Act to prevent an insurer from destroying the policy by surrender: *Bunyon on Life Assurance*, 4th ed., p. 367. [He referred also to *Married Women's Property Act* (42 Vict. No. 11) sec. 10.] There is no hardship to the wife and children. They pay nothing, and may in certain events be the gainers by the contract, but they are not deprived of any rights by the surrender. They must take their benefit subject to these contingencies. The purpose of the Act was, not to protect the wife and children from the husband, but to save the insurance from the creditors of the insured, and so to encourage insurance. The only alternative to this contention is that the insured can neither surrender nor borrow although the contract has specially provided for it. So far as the special terms of the contract are

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inconsistent with the trust provided for in the Act, they must prevail. [He referred to *In re Seyton*; *Seyton* v. *Satterthwaite* (1); and *Cleaver* v. *Mutual Reserve Fund Life Association* (2).] There is no danger of frauds upon creditors, because they are specifically excepted from the beneficial operation of the Act. It may be that the surrender value when paid would not be protected from creditors. The Act only protects certain kinds of insurance at a certain stage. If they do not reach that stage they are not protected.

Assuming that the husband is a trustee of the whole of the benefits of the policy, and therefore of the surrender value, he is able to give a valid discharge for all moneys payable under it both at common law and by the Statute. The Statute makes him a trustee of the policy, and therefore he is as much a "trustee duly appointed" as his nominee or nominees, and is within the meaning of that part of sec. 9 which confers the power to give a receipt. If that were not so he would be competent to give a receipt by virtue of the provisions of the *Trustee Act* 1898. At common law he is the legal owner of the policy and of the benefits arising under it, and it does not matter to the appellants whether he is a trustee or not. Even where there is no express power to give a receipt, payment to the insurer is a discharge to the company, and there is no obligation on the latter to see to the application of the purchase money: *Ford* v. *Ryan* (3). It is an implication of law that the person who insures can give a discharge for moneys payable under the policy: *Curtin* v. *Jellicoe* (4); *Bunyon on Life Assurance*, 4th ed., p. 616.

Gordon, K.C. in reply. The argument for the respondent would necessitate the trust being regarded as revocable. That is altogether opposed to the meaning and intention of secs. 8 and 9. They make all the moneys payable under the policy subject to the trust. To hold otherwise would defeat the object of the Act and open the door to frauds on creditors. *Curtin* v. *Jellicoe* (4) does not touch this case because there full power to sue for,

(1) 34 Ch. D., 511, at p. 514.
(2) (1892) 1 Q.B., 147.
(3) 4 Ir. Ch. R., 342.
(4) 13 Ir. Ch. R., 180.

demand, and recover the moneys payable was given by the trust deed. [He referred also to *Ford* v. *Ryan* (1); *Schultze* v. *Schultze* (2); *Porter on Life Assurance*, 3rd ed., p. 355.]

GRIFFITH C.J. This case, although the amount involved is small, raises questions of some importance to insurance societies in regard to the application of the Act called the *Life, Fire and Marine Insurance Act* (No. 49 of 1902). Sec. 8 of that Act provides that:—"A policy of insurance by any man on his own life, effected before or after the passing of this Act, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them . . . shall create a trust in favour of the objects named therein, and the moneys payable under any such policy shall not, as long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts." Then sec. 9 provides that in a case of that kind the insured may appoint a trustee "of the moneys payable under the policy, and from time to time appoint a new trustee or trustees thereof, and may make provision for the appointment of a new trustee or trustees thereof, and for the investment of the moneys payable under such policy." The section then goes on to provide that "in default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his . . . legal personal representatives in trust for the purposes aforesaid," and "if, at the time of the death of the insured, or at any time afterwards, there is no trustee, or if it is expedient to appoint a new trustee or new trustees, a trustee or a new trustee, or trustees, may be appointed by any Court having jurisdiction under the provisions of the *Trustee Act*, 1898, or any Act amending the same." Then there follows a provision in these words:—"The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part." The contention raised by the appellants is based principally upon that last paragraph.

(1) 4 Ir. Ch. R., 342.

(2) 56 L.J. Ch., 356.

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They contend that, as express provision is made that the receipt of a trustee duly appointed shall be a discharge, the insured himself, though he is a trustee, cannot give a valid receipt for the moneys payable under the policy, and therefore, by necessary intendment, is not entitled to recover those moneys. The present action is brought to recover the surrender value of the policy. The policy was made on 13th September, 1901. By it the company promised "to pay at the end of twenty years . . . unto Mary Pechotsch wife of Raimund Pechotsch the insured if living and if not living then to the children of their marriage their executors administrators or assigns £300." The policy was made subject to the provisions stated on the back, which were made part of the policy. The provision in question was in these words:—"*Cash surrender value.*—After three full years premium have been paid, upon the non-payment of any subsequent premium on the date called for in the policy and within 60 days thereafter, this policy may be surrendered and the company will pay therefor, within 60 days from the date of such surrender, the amount provided for in the table below for the end of the last completed policy year; deducting any unpaid loan thereon." The promise, therefore, by the company, was not merely a promise to pay £300 at the expiration of the 20 years, but also a promise to pay the surrender value of the policy at any time after three years from the date of the policy, at the option of someone. Now the words are "this policy may be surrendered." If it is to be surrendered, it must be by somebody. And if it is surrendered, the company must pay the surrender value to someone. Now the person to surrender and the person to receive must apparently be the same. The only parties to the contract are the insured and the company. *Primâ facie* the only person who can sue for the surrender value would be the insured. But the policy is made subject to the terms of the Act, and the contract must be considered subject to its provisions. What is to be inferred upon the application of the Act to the right to receive payment under the policy? There is a promise, depending only upon the option of someone, to pay this sum on the happening of some event. That promise must be capable of performance. But to whom is it to be performed? Considering the matter apart from the Statute the right to insist

upon performance must clearly be that of the promisee. So that, if there were no more in it than that, the insured would be entitled to bring the action. Is there then anything in the Act to take away this right? The only contention set up by the appellants is that the Act constitutes the insured a trustee, and, that being so, he has no right to receive the moneys in question. But why? At law where there is a contract made between two persons, involving the payment of money, the person liable to pay cannot set up as a reason why he should not pay that the person to whom he made the promise, and who claims to be paid, is a trustee for someone else. But it is said that there is a different doctrine in equity. No doubt there are many cases in which a Court of Equity will not order the payment of money to the person who is at law entitled to claim it. There are many cases also, in which, when a debtor pays a creditor or the person in law entitled to money, he is held liable in equity to see to the proper application of the money paid. But that is a rule of convenience which must give place to the express or implied terms of the trust itself. The question is whether that rule, even supposing that it is *primâ facie* applicable, is excluded by the terms of the trust deed. The doctrine was clearly stated by *Sir John Leach* V.C., in *Sowarsby* v. *Lacy*(1). He said: "It is plain the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and not capable of signing receipts. I must therefore infer that the testator meant to give the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose." Now, in this policy it is clear that it was intended that the power to surrender might be exercised before the expiration of the 20 years, and therefore somebody must be entitled to surrender it and receive the surrender value. Who should be this person if not the insured himself, who is declared by the Statute to be the trustee? There can be no doubt that the trusts declared by the Statute extend to the surrender value as well as to the moneys payable at the end of the twenty years. In a later case, *Cox* v. *Cox* (2), *Wood* V.C., said with reference to the terms of the will then under consideration, in which powers of sale and exchange were given to trustees as tenants for life of

(1) 4 Madd., 142, at p. 143.

(2) 1 K. & J., 251, at p. 254.

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certain lands, that looking at all the circumstances of the case, it would not be right to hold that one of the trustees had a power to give receipts for the purchase money. "It is a power," he said, "which is by no means inserted as of course in legal instruments, it is often excluded, and, where excluded, it has never, so far as I am aware, except under very special circumstances, been held to be capable of being implied." But this is a trust under which money may be payable at any moment. Somebody therefore must be entitled to give a receipt for it. I have, therefore, no difficulty in holding that the trustee can bring the action unless there is some other provision taking away that right. In the case of *Ford* v. *Ryan* (1), *Brady* L.C., dealing with the question whether the assured when suing on the policy could recover the moneys payable under it, and whether the assurers were bound to see that the policy moneys went to the beneficiaries, said: "It is certainly not easy to see why the company should become trustees for everyone interested in a policy of insurance. Here is a legal contract, under which arises a duty to be fulfilled. When the event insured against occurs," that is, when that event occurs on which the insurance money becomes payable, "it becomes the duty of the company to pay the amount to the owner of the policy; it is the duty of such owner to receive the amount due." Then after having shown that the case of assignment did not make any difference, the learned Lord Chancellor went on (2): "It comes then to this simple question; is it the law that, on the assignment of the policy to A.B. in trust to call in the amount and employ it upon trust for certain specified persons, the company is prohibited from paying the amount to him if he be not armed with receipts from those persons, or with some special authority dispensing with such receipts?" and then stated that he could see no reason why, if the debtor paid the trustee, he could be sued anew by the *cestuis que trustent*. I confess that these words seem to me to express an eminently common sense view. *Primâ facie*, therefore, the insured is entitled to sue, and the fact that he is a trustee does not disentitle him to do so. But it is suggested that the insured is likely to misapply the moneys if he receives them. Why is he more likely

(1) 4 Ir. Ch. R., 342, at p. 344. (2) 4 Ir. Ch. R., 342, at p. 345.

to misapply them than any other person who might have been a trustee? It is clear that, if any other person had been appointed trustee, he would have been entitled to sue, and the company could have safely paid him the money. So far from the legislature having declared that the assured was not to be entrusted with these moneys, they have actually declared him to be a trustee of the policy. He is the very person who has been made a trustee by the Act, showing that the legislature has reposed implicit trust in him to see to the proper disposal of the moneys. It is said that the words "the receipt of a trustee or trustees duly appointed, or in default of any such appointment, . . . the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy," negative that. Why? Because, it is said, that provision would be idle if the assured himself was to have the right to give a receipt. Suppose that provision were omitted. It might be contended that the assured himself would still have the right to bring an action, and that if the company were sued by him, and were to set up in answer to the action that they had already paid someone appointed by him, it might be said: "True; he was appointed trustee of the fund, but what is there to prevent the bringing of the action by the person with whom the contract was made?" This provision was inserted for the protection of the insurance company in such a case, although they have not formally kept their contract with the person to whom they made the promise. That construction gives sufficient effect to those words.

For these reasons I think that the plaintiff was clearly entitled to bring the action for the moneys payable by way of surrender value, and the suggestion that he might misapply the money when he receives it, is, I think, no answer to the action. It is immaterial that this money will be held by the husband on the same trusts as the moneys which would have been payable at maturity, or what those trusts are as applied to the surrender value. Nor would any decision which we could give be binding upon the infants. They are not parties to this action. It is not, therefore, necessary or proper to express any opinion whether they may ultimately be entitled to it or not. It is sufficient for the company to know that they have no answer to the claim, and

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that they will be protected if they pay it. For these reasons I think that the decision of the Supreme Court was right, and that the appeal should be dismissed.

BARTON and O'CONNOR, JJ., concurred.

Appeal dismissed with costs.

Solicitors, for the appellants, *Pigott & Stinson.*
Solicitor, for the respondent, *A. Deery.*

C. A. W.

Foll *Daley, In re* (1907) 5 CLR 193

[HIGH COURT OF AUSTRALIA.]

IN RE COLEMAN.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *June* 16.

Griffith C.J., Barton and O'Connor JJ.

Practice—Special leave to appeal—Suspension of Solicitor by Supreme Court—Misconduct clearly established—Discretion of Supreme Court as to punishment.

The High Court will not grant special leave to appeal from an order of the Supreme Court of a State suspending a solicitor from practice, merely on the ground that the punishment inflicted was excessive. Where misconduct meriting punishment of some kind is clearly established, the nature of the punishment to be inflicted is a matter entirely within the discretion of the Supreme Court.

Special leave to appeal from the decision of the Supreme Court, *In re Coleman*, (1905) 5 S.R. (N.S.W.), 272, refused.

MOTION for special leave to appeal.

The applicant was a solicitor practising in New South Wales. One of his clients executed a mortgage over certain sheep to a