H. C. OF A. 1908.

SLATYER v. THE DAILY TELEGRAPH NEWSPAPER CO. LTD.

Solicitors, for the appellant, *T. J. & J. Hughes.*
Solicitors, for the respondents, *Lawrence & Lawrence.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

H. TRENGROUSE & CO. . . . . APPELLANTS;
PLAINTIFFS,

AND

MARION WYNIE STORY . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *June* 23, 24, 25, 27.

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

Life assurance—Equitable mortgage of policy—Evidence—Pleading—Amendment.

In an action against the widow, who was also the executrix of A., to enforce an equitable mortgage of a policy of life assurance which had been effected by A. on his own life, and legally transferred to the defendant, and then deposited by A. with the plaintiffs as security for his indebtedness to them; the pleadings raised a case of a mortgage of the policy by the defendant acting through A. as her agent. The Court of first instance found that her authority to A. to make the mortgage was not proved.

On appeal to the High Court: *Held*, that the finding was supported by the evidence, and that the plaintiffs should not be allowed to amend their pleadings so as to raise a case of a mortgage by A. anterior to, and having priority over, the transfer to the defendant.

Judgment of the Supreme Court affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by H. Trengrouse & Co. against Marion Wynie Story, and by the statement of claim it was alleged that James William Story, deceased, of whom the defendant was the widow and executrix, was, about March 1901,

indebted to the plaintiffs who threatened legal proceedings, and that Story asked for time, whereupon the plaintiffs agreed to give him time upon obtaining security in respect of such indebtedness; that Story thereupon handed to the plaintiffs a policy of life assurance for £1,000 on his life effected with the Equitable Life Assurance Society of the United States as security by way of equitable deposit for his indebtedness, and undertook to keep the premiums paid as they fell due. The statement of claim then continued:—

"2. On or about 8th October 1903 it was by writing agreed between the plaintiffs and the said J. W. Story that in consideration of the plaintiffs returning to the said J. W. Story the said policy of life assurance the said J. W. Story would replace it with a similar policy for £1,000 on his life effected with the Australian Mutual Provident Society to be held by the plaintiffs on the same terms as the said policy with the Equitable Life Assurance Society.

"3. In accordance with the last mentioned agreement the plaintiffs returned to the said J. W. Story the said policy with the Equitable Life Assurance Society, and received from the said J. W. Story a policy No. 809,088 effected with the Australian Mutual Provident Society on his life which had been transferred by the said J. W. Story to his wife the defendant, and which prior to the same being delivered to the plaintiffs had been endorsed by the defendant in blank by writing her name thereon for the purpose of enabling the same to be dealt with by the said J. W. Story and by reason of the deposit of the last mentioned policy with the plaintiffs as such security as aforesaid the plaintiffs at the request of the said J. W. Story further refrained from pressing the said J. W. Story for the amount of the said indebtedness and from instituting legal proceedings for the recovery thereof."

The statement of claim then went on to allege that on the death of Story the Australian Mutual Provident Society refused to pay the policy moneys to the plaintiffs on the ground that the defendant claimed them in her own right as absolute owner thereof and not as executrix of her husband. The plaintiffs claimed:—

H. C. OF A. 1908.

H. TRENGROUSE & CO. v. STORY.

"1. A declaration that they are entitled to an equitable mortgage of the said policy with the Australian Mutual Provident Society and of the moneys payable thereunder.

"2. An order directing the defendant either personally or as executrix of the said J. W. Story deceased to execute and sign such transfers and things and do such acts and things as may be necessary or proper to enable the plaintiffs to become the legal owners of the said policy and to receive the benefit thereof and the moneys payable thereunder."

In her defence the defendant said (*inter alia*) that the policy of the Equitable Life Assurance Society was expressed to be and was in fact made for her benefit, and was given to the plaintiffs without her knowledge or authority; that the policy of the Australian Mutual Provident Society was taken out by Story in lieu of the last mentioned policy, and was, shortly after its issue, transferred to her, and was given to the plaintiffs without her knowledge or authority; that if she wrote her name on that policy she did so with the intention and for the purpose only of effecting and completing the transfer of the policy to herself.

The defendant counterclaimed for delivery up to her by the plaintiffs of the policy, and £100 damages for its detention.

The action was heard before *à Beckett* J.

As evidence of the contents of the policy of the Equitable Life Assurance Society, the proposal was put in, which contained the following:—"Make policy payable to Marion Wynie Story, wife of applicant, . . . if living at my death; otherwise to my executors, administrators, or assigns—it being expressly understood and agreed that I reserve the right, provided the policy is not then assigned, to change any beneficiary or beneficiaries named by me, by filing with the Society during the continuance of the policy a written request duly acknowledged accompanied by the policy, such change to take effect upon the endorsement of the same on the policy by the Society."

On the back of the policy of the Australian Mutual Provident Society was endorsed a memorandum of transfer in the form required by sec. 371 of the *Companies Act* 1890 dated 19th October 1903, and which contained the signature of the defendant, and her signature also appeared below this memorandum of

transfer. When this policy was first brought by Story to the plaintiffs the evidence showed that the memorandum of transfer was upon it, but not the second signature of the defendant; that Story took it away saying that he would get the defendant's endorsement as soon as she returned from the country in a week or ten days; and that Story brought back the policy about 3rd February 1904 with that signature of the defendant upon it.

The other facts sufficiently appear in the judgments hereunder.

à Beckett J. having given judgment for the defendant and ordered the plaintiffs to deliver up the policy of assurance to the defendant, the plaintiffs appealed to the High Court.

Mitchell K.C. (with him *Hayes*), for the appellants. On the undisputed facts which existed on 8th October 1903 an equitable charge was created by Story in favour of the appellants over this policy as soon as the policy was obtained by him and before he transferred it to the respondent, and he could not then, at any rate in favour of a mere volunteer, deal with the policy except subject to that charge. The presumption which would arise in the case of a voluntary transfer to a wife, that the thing transferred was for the benefit of the wife, may be rebutted in part, and in this case the presumption is rebutted to such an extent that the respondent's interest in the policy is subject to the equitable title of the appellant: *Wh. & T. L. C.*, 6th ed., vol. I., p. 253.

[HIGGINS J. referred to *Chaplin & Co. Ltd.* v. *Brammall* (1).]

Notwithstanding sec. 371 of the *Companies Act* 1890 an equitable charge can be created over a life assurance policy: *Dufaur* v. *Professional Life Assurance Co.* (2); *Jones* v. *Consolidated Investment and Assurance Co.* (3); *In re King*; *Sewell* v. *King* (4).

[HIGGINS J. referred to *Evans* v. *Stevenson* (5). Can an equitable charge be created over a policy not yet in existence in the same way as if it were in existence?]

Yes. *Wh. & T. L. C.*, 7th ed., pp. 103, 105; *Tailby* v. *Official Receiver* (6); *Drysdale* v. *Drysdale* (7); *In re Turcan* (8);

(1) (1908) 1 K.B., 233.
(2) 25 Beav., 599; 27 L.J. Ch., 817.
(3) 26 Beav., 256; 28 L.J. Ch., 66.
(4) 14 Ch. D., 179.
(5) 8 V.L.R. (E.), 108.
(6) 13 App. Cas., 523, at p. 546.
(7) (1906) V.L.R., 87; 27 A.L.T., 133.
(8) 40 Ch. D., 5.

H. C. OF A. 1908.

H. TRENGROUSE & CO. v. STORY.

Jenkins v. *Brahe and Gair* (1); *London Chartered Bank* v. *Hayes* (2); *Guest's Transfer of Land Act*, p. 72.

[GRIFFITH C.J. referred to *Ex parte Orrett*; *In re Pye* (3)].

The presumption from the facts here is that Story only intended to give the respondent a beneficial right subject to the equitable charge of the appellants. There is a presumption that if a man does an act he does it honestly and not fraudulently: *Best on Evidence*, 9th ed., p. 304. The facts stated in paragraphs 2 and 3 of the statement of claim sufficiently raise the case that the transfer of the policy to the respondent was subject to the equitable charge given by Story of the appellants. Those facts are sufficient to give the appellants a claim against the respondent either personally or as executrix of her husband.

[Counsel also referred to *Worthington* v. *Curtis* (4); *In re Policy No. 6,402 of the Scottish Equitable Life Assurance Society* (5); *Soar* v. *Foster* (6).]

Irvine K.C. (with him *Davis*), for the respondent. The pleadings not only do not raise the facts which are material to the case now made by the appellants, but they deliberately raise facts which are relevant only to the case the respondent prepared to meet, viz., that an equitable charge over the policy was given by the respondent. No amendment should now be allowed to raise such a case. The first policy was within sec. 14 of the *Married Women's Property Act* 1890, and on 8th October 1903 it belonged to her. The second policy was merely a substitution for the first, and Story effectually declared himself a trustee of it for the respondent. The agreement of 8th October 1903 was that Story would procure the respondent to mortgage the policy to the appellants. *à Beckett* J. found that the respondent never did mortgage the policy, and this Court should not reverse that finding: *Wilson* v. *Carmichael* (7); *Turnbull & Co.* v. *Duval* (8). The burden is upon the appellants of proving that the respondent mortgaged the policy: *Bischoff's Trustee* v. *Frank* (9); *Berdoe* v. *Dawson* (10).

(1) 27 V.L.R., 643, at p. 647; 23 A.L.T., 194.
(2) 2 V.R. (E.), 104.
(3) 3 Mont. & Ay., 153.
(4) 1 Ch. D., 419.
(5) (1902) 1 Ch., 282.
(6) 4 Kay & J., 152.
(7) 2 C.L.R., 190, at p. 194.
(8) (1902) A.C., 429.
(9) 89 L.T., 188.
(10) 34 Beav., 603.

Mitchell K.C., in reply, referred to *Coote on Mortgages*, 7th ed., p. 75; *Bank of New South Wales* v. *O'Connor* (1); *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (2); *Kelly* v. *Tucker* (3).

Cur. adv. vult.

June 2.

GRIFFITH C.J. This was an action brought by the appellants against the respondent claiming to enforce an equitable mortgage by deposit of a policy of insurance for the sum of £1,000, which had been taken out in the name of the respondent's husband and formally transferred to the respondent under the provisions of the *Companies Act* 1890. The case made by the appellants, according to the statement of claim, was that the respondent's husband, Story, was indebted to them, and that to secure the debt Story deposited with them a policy of life assurance on his life effected with the Equitable Life Assurance Society of the United States; that on 8th October 1893 it was by writing agreed between the appellants and Story that that policy should be returned to him, and that in lieu thereof he should deposit with them a similar policy for the same amount effected with the Australian Mutual Provident Society to be held upon the same terms; that in accordance with that agreement they returned the Equitable policy to Story and received from him the Australian Mutual Provident Society policy in question, which had been transferred by Story to his wife, the respondent, and which, prior to its delivery to the appellants, had been endorsed by her in blank by her writing her name thereon for the purpose of enabling the policy to be dealt with by Story.

At the trial before *à Beckett* J., he regarded these pleadings as setting up a mortgage by deposit of a policy the property of the respondent, the deposit being by her authority. Having considered the evidence, he came to the conclusion that her authority to deposit the policy had not been made out by the appellants, and on that ground he dismissed the action. The learned Judge was invited to take an alternative view of the pleadings, and to say that they might also be read as alleging an equitable mortgage of the policy by Story himself before it became the pro-

(1) 14 App. Cas., 273.
(2) 1 C.L.R., 243, at p. 279.
(3) 5 C.L.R., 1, at p. 9.

H. C. OF A. 1908.

H. TRENGROUSE & CO. v. STORY.

Griffith C.J.

perty of his wife, but the learned Judge did not think that the pleadings raised any such case, and he did not pursue that matter further. I will say more upon that point later on, and will deal first with the point which the learned Judge decided.

Treating the case as an action to enforce an equitable mortgage made by the respondent's authority, it is, of course, necessary to prove that authority. The only evidence of authority offered was that her name appears written upon the back of the policy. When it was first taken to the appellants it did not bear any signature of hers upon the back except the signature necessary under the *Companies Act* 1890 to perfect the transfer to herself, but Story said he would get her endorsement as soon as she returned from the country in a week or ten days. He took the policy away with him, and shortly afterwards brought it back with her name written upon it. That is all that the appellants proved. The respondent, when asked what she knew about the transaction, said that she signed her name on the back of the policy at the same time as, and for the purpose of, the transfer of it to herself. That was evidently a mistake, because when the policy was first taken to the appellants it did not bear her signature elsewhere than in the transfer form. Then she said she had no recollection of the matter. It was sought to show that she and her husband were so mixed up in business transactions at this time that it ought to be inferred that she knew that she was mortgaging the policy, and that she put her name on the back of it to show that her husband had authority to mortgage it. Those may have been the facts, but it was for the appellants to prove them. The onus of proving that a married woman has disposed of her property lies upon those who assert the fact. If they trust to her husband as their agent to procure her authority to make a mortgage, they must take the consequences. It is an established rule that, when property of a wife is claimed by or through her husband, there must be clear evidence that the wife really intended to dispose of it. The learned Judge was of opinion that the respondent was a witness of truth, and that she did not know that it was intended to dispose of the policy otherwise than for her own benefit. Whether he could have come to another conclusion is not for

this Court to decide. For my part, I am quite unable to say that I think the learned Judge was wrong, and therefore, so far as that point is concerned, the appeal fails.

I pass now to the other point. It is suggested that, upon the transaction as it clearly appeared in the evidence, an equitable charge upon the policy had been created by Story before his wife acquired any right to it, so that any right she afterwards acquired was subject to the appellants' equity. I will assume that, if there had been a binding contract to mortgage the inchoate contract of insurance before the assignment of the policy to the respondent, that charge would prevail over her registered title. That has been so decided by the Supreme Court of Victoria in *Evans* v. *Stevenson* (1), and I will assume that decision to be correct. The main facts relied upon in support of that view are a letter of 8th October 1903 referred to in the pleadings, and the events which took place at the time. That letter, written by Story to the appellants, was as follows:— "In consideration of your returning life policy lodged with you as per my letter of 24th June 1903 I undertake to replace it with a similar policy in the Australian Mutual Provident Society and surrender to you on same terms as the one you now hold." The letter of 24th June 1903 referred to was as follows:—"While not admitting any liability under the claim made by your firm I would prefer to compromise it rather than your firm and myself should be at variance. I therefore hand you as arranged policy of assurance for £1,000 in Equitable Life Assurance Company, and I undertake to get Mrs. Story to make necessary endorsement—this policy to be held by you until I am in a position to make satisfactory proposition to you."

From these documents it would appear that the Equitable Society's policy originally mortgaged was a policy to the benefit of which the respondent was entitled. This appears also from the terms of the policy itself, as far as we can ascertain them. It could not have been made available as a security without the respondent's consent. Then in the letter of 8th October Story agreed to replace that policy with a similar one which was to be handed by him to the appellants on the same terms. A "similar

(1) 8 V.L.R. (E.), 108.

H. C. OF A. 1908.

H. TRENGROUSE & Co. v. STORY.

Griffith C.J.

policy" would apparently be a policy for the benefit of the respondent, and to the validity of a mortgage of which her consent would be necessary. But it happened that on the same 8th October Story deposited with the appellants the premium receipt in respect of the new policy, which itself operated as an interim insurance, and it is contended that the deposit of the premium receipt concurrently with the letter of 8th October operated as an equitable mortgage of the contract of insurance. That might be so, if it was the intention of the parties. But it is extremely doubtful, to say the least, whether it ever was the intention of the parties that there should be a mortgage of that contract of insurance, irrespective of the respondent. When the new policy was taken to the appellants it had been already transferred to the respondent, so that it was hers and not her husband's property. No objection, however, was made on that score. It was not objected that the policy was on its face the respondent's. On the contrary, Story said "I will get my wife's endorsement." So that it appears to me clear that the intention of the parties was that the policy to be mortgaged was a policy not belonging to Story but to his wife. If that was the intention of the parties, it is evident that the letter of the 8th October does not record the whole of the contract, and cannot be conclusive. The facts, therefore, tend strongly to show that it was never intended that there should be a mortgage of the contract of insurance by Story irrespective of his wife's rights.

But, even supposing that it was so intended, it is clear that some further evidence might possibly have been given on that point, if the question had been fairly put in issue. The learned Judge thought it was not put in issue, and I have come to the same conclusion. It appears to me that the statement of claim is based on a mortgage of policy belonging to the respondent —a mortgage made by her authority—and I think it would be a complete alteration of the nature of the claim to turn it into one to establish a mortgage of a policy belonging to the husband as against her as a voluntary transferee, and therefore bound by any equities attaching to the policy when transferred. In any event, therefore, it would not be right to give judgment for the appellants without sending the case back for a new

trial. But I think the case sought to be set up would be a different case, in support of which there is little, if any, evidence. I think, therefore, that the decision appealed from was right, and I do not think that the appellants ought to be allowed to set up a new case at this stage.

O'CONNOR J. read the following judgment:—

I agree that this appeal must fail, and concur in the judgment just delivered.

One of the arguments used by the appellants' counsel before this Court was founded on the third ground of appeal, namely, that the plaintiffs were equitable mortgagees of the policy, and that, whatever rights the defendant had in respect of it, were subject to their prior rights as equitable mortgagees. The learned Judge in the Court below declined to consider the case from that point of view, holding, rightly as I think, that it was not open to the plaintiffs on the pleadings.

The essential feature of that contention is that Trengrouse and Company's position as equitable mortgagees was complete without any transfer or consent on the part of Mrs. Story, in other words, that the policy was her husband's property. But the case, and the only case made on the pleadings, was that it was the wife's property, and that with her consent, and as her agent, her husband had deposited it with the plaintiffs as security. The two positions were entirely different, and even if the facts were conclusively in the plaintiffs' favour on this contention, and I do not think they are, it is impossible that this Court should give the plaintiffs an opportunity of succeeding on an issue here which was neither raised in the pleadings nor litigated in the Court below.

The only matter, therefore, for our consideration is whether the learned Judge came to the right conclusion on the issue tried by him. That issue, following the words of the statement of claim, may be put as follows:—"Did the defendant prior to the policy being delivered by her husband to the plaintiffs endorse it in blank by writing her name thereon for the purpose of enabling it to be dealt with by him?" That is entirely a question of fact, proof of which is on the plaintiffs. The only direct evidence put

H. C. OF A. 1908.

H. TRENGROUSE & Co. v. STORY.

O'Connor J.

forward was the defendant's signature on the back of the policy. It is written there at the foot of the statutory form of endorsement. The signature is connected with no words of transfer, consent, or authorization, on the part of the defendant. Of itself it proves nothing, and there was no direct evidence to connect it with any consent or intention on her part to transfer to the plaintiffs, or to authorize her husband to deal in any way with the policy. But the plaintiffs gave in evidence certain facts and documents showing, at the least, her formal connection with her husband's business, from which they asked the learned Judge to infer that she had endorsed her name on the policy on the last occasion with the intention of authorizing her husband to bind her interest in depositing the policy with the plaintiffs.

It is not clear to my mind that there was sufficient evidence to justify that inference. But, however that may be, the defendant as a witness on her own behalf expressly denied having given her husband any such authority or having endorsed the policy with any such intention. Her explanation was that she wrote her name on the policy, whether on one occasion or on more than one merely, as she understood, for the purpose of completing the transfer of the policy from her husband to herself. The learned Judge then had to decide between the inference to be drawn from the facts and documents relied on by the plaintiffs and the defendant's own evidence in direct denial. His conclusion necessarily depended upon the value he attached to her testimony. He believed her and decided accordingly.

There are, no doubt, cases in which the inference from established facts and documents is so conclusive as to render not reasonably credible the evidence of a witness who is in contradiction with such an inference. In a case of that kind the Court of Appeal would not hesitate to set aside a decision founded on the testimony of the witness. But this is not such a case. There is nothing inherently improbable in the defendant's account of her part in the transaction. Whether her evidence was to be trusted, notwithstanding the inference from the facts and documents on which the plaintiffs relied, depended entirely upon the opinion the Judge formed as to her credibility after having the advantage of being in a position to judge her

character, temperament and mental capacity as she gave evidence. It is impossible for any tribunal that has not had that advantage to come to a satisfactory conclusion in such a case. Apart, therefore, from the view which I take of the circumstances, it is one of those cases in which I think the Court should be slow to disturb the finding upon facts of the Court of first instance. But, beyond that, I am satisfied from a consideration of the whole case that *à Beckett* J. came to a right conclusion, and upon reasoning in which I entirely concur. I am therefore of opinion that the appeal must fail.

HIGGINS J. read the following judgment:—

I concur. The plaintiffs rested their case in their pleadings and at the trial on an equitable mortgage of the Australian Mutual Provident Society policy said to have been made by the defendant, the wife, acting through her husband as agent. The learned Judge at the trial saw the defendant in the box, and believed her evidence that the defendant did not give the authority to her husband; and he also pointed out, as an additional reason for his conclusion, that the plaintiffs would have to satisfy him that the wife clearly understood what she was doing, and was not unduly influenced by the husband. Now the plaintiffs' counsel seek to rely on an equitable mortgage of the policy by the husband, by the letter of 8th October 1903, set out in paragraph 2 of the statement of claim, and urge that the registered transfer of the policy by the husband to the wife was intended to be subject to his equitable mortgage, especially as in fact the premium receipt was deposited on that date. Apart altogether from the husband's intention in the registered transfer, I thought, during the argument, that there might be a strong case made under the doctrine as to assignments of choses in action—that the equitable mortgage being prior in time had priority in right over the registered transfer; and for this purpose the Victorian case of *Evans* v. *Stevenson* (1) was cited as an authority. But I am clearly of opinion that it would be unjust to the defendant to allow such a contention to be raised on these pleadings, and especially at this stage of the case. It is enough to say that possibly the defendant could

(1) 8 V.L.R. (E.), 108.

H. C. OF A. 1908.

H. TRENGROUSE & Co. v. STORY.

Higgins J.

have adduced material evidence as to the agreement made by Story on the 8th October 1903; and that the policy in question, effected with the Australian Mutual Provident Society, does not fit the terms of the letter of that date—for it was not a "similar" policy to the policy which, under that letter, was to be replaced.

Appeal dismissed with costs.

Solicitors, for the appellants, *Nunn, Smith & Jeffreson.*
Solicitor, for the respondent, *W. M. McIllwrick.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MARTIN JOSEPH BRENNAN AND HENRY ALMAN . . . . . PLAINTIFFS, } APPELLANTS;

AND

JAMES HURTLE MORPHETT . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1908.

BRISBANE, *April* 28, 29.

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

Sale of a mining area—Reservation of an interest by vendor—Subsequent declaration of trust without further consideration—Mining Act 1898 (*Qd.*), (62 *Vict. No.* 24)—*Estoppel.*

In 1889 the respondent was the registered proprietor of a mining claim which he had purchased from one Hart who retained a one-fifteenth "fully paid up" share. In 1900, and without any further consideration, the respondent made a declaration which was registered in the Warden's Register, stating that he held "one-fifteenth interest in the said claim in trust for and on behalf of the said George Hart of Hampden in the Colony of Queensland the said one-fifteenth being a fully paid up share in the said claim and any company formed or associated to work the said claim."