H. C. OF A. 1910.

YUILL v. KIDMAN.

Isaacs J.

case for deduction disappears, and the appeal must be allowed. I agree with the order as stated by the learned Chief Justice.

Appeal allowed.

Solicitors, for appellant, *Macnamara & Smith.*
Solicitors, for respondent, *Sly & Russell.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

RICHARD JOHN NEWIS . . . . APPELLANT;
PLAINTIFF,

AND

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION . . } RESPONDENTS.
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *Nov.* 15, 16.

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

Contract—Policy of fire insurance—Agreement to pay for loss by fire after payment of premium—Premium not paid prior to loss—Interim receipt given for premium before payment—Waiver—Estoppel—Fraudulent device to obtain benefit under policy—Evidence that cheques and letters were not written on day they were dated.

The defendants, by a policy of fire insurance, dated 7th September 1909, agreed to pay the plaintiff for losses caused to his property by fire after payment of the premium. The policy provided that if any fraudulent device should be used by the plaintiff to obtain any benefit under the policy, the policy should be forfeited. On 6th September the plaintiff signed and handed to H., an insurance agent, a proposal for the insurance. The plaintiff subsequently received a receipt from the defendants, dated 6th September,

for the premium which he had not in fact paid. The policy stated that the plaintiff having paid the defendants the premium, the defendants agreed with the plaintiff that if the property insured should be destroyed by fire after payment of the premium, the defendants would make good the loss. On 6th September the defendants sent to the plaintiff a demand for payment of the premium, and renewed their demand by letter on 10th November and 9th December, enclosing the account. On 14th December the property was destroyed by fire. On 15th December the plaintiff gave H. a cheque dated 13th December for the amount of the premium, which H. handed to the defendants on the same day, and which the defendants then refused to accept.

Held, that the defendants were not estopped from showing that the premium had not been paid before the fire; that under the contract payment of the premium before the fire occurred was a condition precedent to the plaintiff's right to recover; and that the loss having occurred before the premium was paid, the defendants were not liable under the policy.

Held, also, upon the whole of the evidence, that, there being evidence that the cheque was not drawn on the day it was dated, the jury were justified in finding that the plaintiff had adopted a fraudulent device to obtain a benefit under the policy.

Decision of the Supreme Court: *Newis* v. *General Accident Fire and Life Assurance Corporation*, 10 S.R. (N.S.W.), 413; 27 W.N. (N.S.W.), 104, varied.

APPEAL by the plaintiff, by special leave, from so much of the judgment of the Supreme Court dated 3rd June 1910 as ordered that the rule *nisi* granted in the action should be discharged with costs, upon the grounds: 1. That the Court should have made the rule *nisi* absolute. 2. That the Court was in error in deciding that the plaintiff was disentitled to recover under his policy or agreement for insurance by reason of the non-payment of the premium before the fire. 3. That the Court was in error in deciding that there was no evidence of waiver of prepayment of the premium. 4. That the Court was in error in deciding that the respondents were not estopped from setting up the non-payment of the premium before the fire as a defence to the appellant's claim.

The action was for detention of a policy of fire insurance, dated 7th September 1909, and for payment of the sum which the defendants had agreed to pay for damage caused by fire under the policy of insurance, or under an agreement made with the plaintiff. The pleas, so far as material, were: 1. Denial of the

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

detention. 2. That the insurance was only in respect of loss incurred after payment of the premiums and that the property was not destroyed by fire after payment of the premium. 3. That it was a term and condition of the policy and agreement that if any fraudulent device should be used by the plaintiff to obtain any benefit under the policy and agreement, all benefit under the policy and agreement should be forfeited, and the plaintiff used a fraudulent device to obtain a benefit under the policy and agreement, that is to say the plaintiff fraudulently dated a cheque drawn by him for the amount of the premium payable under the policy and a letter written by him accompanying the same, thereby fraudulently representing to the defendants that the said cheque and letter were drawn and written on the day on which they purported to be drawn and written respectively, which was a day before the loss and damage had occurred, in order thereby to induce the defendants to believe that the cheque and letter were drawn and written, and the amount of the premium paid before the said loss and damage had occurred, and in order to induce the defendants to pay the amount of the loss and damage without regard to a term and condition of the policy and agreement, to wit that the defendants should be bound to pay the amount of such loss and damage only as should occur after the payment of the premium. Whereas in fact the said cheque and letter were drawn and written on a day after the occurrence of the loss and damage.

At the trial the plaintiff was allowed to add a plea of waiver of payment of the premium.

It appeared that the plaintiff on 6th September 1909 signed a proposal for insurance, and handed the proposal to one Hamblin, an insurance agent acting for defendants, from whom he subsequently got a receipt, dated 6th September, for £3 10s. 11d., the amount of the premium, which he had not in fact paid. This receipt was stated to be subject to the printed conditions of the defendants' policies. The policy of insurance, dated 7th September, stated that the plaintiff having paid to the defendants the sum of £3 10s. 11d., the defendants agreed with the plaintiff (but subject to the conditions printed on the back of the policy, which were to be taken as part of the policy, and to the other condi-

tions therein expressed), that if the property insured should be destroyed or damaged by fire, after payment of the premium, between 6th September 1909 and 6th September 1910 the defendants would pay or make good the loss or damage. One of the conditions provided (*inter alia*), that if the claim were in any respect fraudulent, or if any false declaration were made or used in support thereof, or if any fraudulent means or devices were used by the insured, or anyone acting on his behalf, to obtain any benefit under the policy, all benefit under the policy should be forfeited.

On 6th September and again on 10th November, the defendants by letter requested payment of the premium, but it was not paid.

On 14th December the property insured was destroyed by fire. On the evening of that day the plaintiff met Hamblin at a railway station, and travelled with him in the train. He told Hamblin he had not paid the premium, and asked him what he ought to do. On 15th December the plaintiff again travelled in the train with Hamblin. He gave Hamblin an envelope containing a cheque, dated 13th December, in favour of the defendants for £3 12s. 11d. together with a letter dated 13th December, addressed to the defendants, in the following terms: "Fire Insurance Co. With reference to yours of the 9th inst. I am very sorry to have given you so much trouble over this account, but I thought Gibbs, Bolton could have obliged me by paying this, as I have so much dealings with them, however I herewith enclose cheque for the amount £3 12s. 11d."

The plaintiff swore that he drew the cheque for the premium on 13th December, and also wrote the above letter on that date. His cheque book was produced, and it appeared from the butts that on 14th December he drew three cheques, No. 165016 in favour of T. Aiken for £4 13s. 6d., No. 165017 in favour of R. Pond for £4 15s., No. 165018 in favour of cash, for £1 5s. The first two were paid by the bank on 17th December and the third on 15th December. Cheque No. 165019 was the cheque dated 13th December in favour of the defendants for £3 12s. 11d. The three following cheques were also dated 13th December.

H. C. OF A. 1911.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

The plaintiff alleged that the three cheques dated 14th December were drawn on 10th December, and were post-dated.

On 15th December the cheque dated 13th December in payment of the premium, with the letter of that date, were handed over the counter to the defendant company by Hamblin.

On the same day the defendants wrote to the plaintiff as follows: "Dear Sir,—Your letter dated the 13th inst. enclosing cheque has been handed over the counter this morning by Mr. Hamblin, but we are not prepared to accept payment now, and decline to admit any liability under your policy. The cheque is returned herewith."

On the same day the plaintiff gave the policy to Hamblin with a notification of the fire in the following terms:—"Proposal, 15th December. Fire Assurance Co. I am very sorry to say that there has been a fire at Cabramatta Railway Station, and that I have been burnt out.—Yours truly, R. J. Newis."

The policy had not been returned by the defendants to the plaintiff.

The butt of the cheque No. 165016 was endorsed as follows: "14th December, 1909. T. Aiken. To 13th December, 1909, lost half day, cash 1s., £4 13s. 6d."

At the trial of the action, before *Cullen* C.J., after a nonsuit had been applied for and refused, the defendants' counsel consented to a verdict for the plaintiff on the first plea, with 21s. damages, for detention of the policy, and the defendants obtained a verdict on all the other issues.

Upon the hearing of a rule *nisi* for a new trial, the majority of the Court were of opinion that there was not sufficient evidence to justify the finding by the jury that the plaintiff had used a fraudulent device to obtain a benefit under the policy and agreement, and directed that the verdict be entered for the plaintiff on this issue. As to the rest, the rule *nisi* was discharged (1).

The defendants gave notice that they intended to apply that the verdict of the jury on the issue as to the use by the plaintiff of a fraudulent device to obtain a benefit under the policy should be restored.

(1) 10 S.R. (N.S.W.), 413; 27 W.N. (N.S.W.), 104.

Shand K.C. and *Monahan*, for the appellant. The plaintiff was entitled to recover for loss by fire under this policy in three cases: 1. If the fire occurred after payment of the premium; 2. If the defendants are estopped from alleging that the premium has not been paid; 3. If the evidence shows that the defendants have waived the pre-payment of the premium.

[GRIFFITH C.J.—I do not think the question of waiver arises in this case. The only contract is to pay for damage caused by fire after the premium is paid. The plaintiff no doubt would be entitled to prove that the defendants had agreed to accept an equivalent for actual payment, as, for instance, that they agreed to set off a debt due by them to the plaintiff. But to say that payment may be altogether dispensed with is to make a new contract. An agreement to pay for damage caused by a fire after payment of the premium may in one sense be called conditional. But a promise to pay on condition that something is done by the promisee is a conditional promise in another sense. I do not know of any case where it has been held that there can be a waiver of a condition which qualifies the promise itself. I promise to pay £100 three months after A. goes to Rome. If A. never goes to Rome no obligation to pay arises.

O'CONNOR J.—Suppose the agreement is to pay for damage caused by a fire on Sunday. Your contention is that under such a contract there may be an obligation to pay for damage caused by a fire on another day.

ISAACS J.—What is the consideration to support a new contract?]

The appellant can only rely on estoppel. By the interim receipt, prior to the issue of the policy, the defendants admit that a certain sum has been paid in respect of a policy which is to issue in accordance with the plaintiff's proposal. They give a receipt for money which has not in fact been paid, and agree to treat the plaintiff as their debtor for the sum they have lent to him. The debt is not for the premium, but for money advanced to the plaintiff. On 10th November the defendants say the policy has been in force since 6th September, and on 9th December they say the insurance has now been current for three months. The policy was clearly not operative unless the premium had

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

been paid. They therefore represent that the premium has been paid.

[ISAACS J.—The plaintiff knew that the premium had not been paid. How can he say that he was misled by the defendants' statement that it had been paid ? The object of the letters is to press for payment.]

It was a question for the jury what was the meaning of the expressions used, taken in conjunction with the circumstances. The position is the same as if the plaintiff had gone into the defendants' office and asked them to lend him the money, and he had then paid the premium and got a receipt. The jury could say that the defendants had paid the plaintiff this money, and agreed to treat him as their debtor. The acts and declarations of the defendants have induced the plaintiff to rely on their assertion that the premium has been paid, and that the policy is current and in force. On the defendants' contention the plaintiff was never covered at all, not even by the interim receipt. [Reference was made to *Joyce on Insurance*, 1897 ed., pars. 58, 1356; *Equitable Fire and Accident Office Ltd.* v. *The Ching Wo Hong* (1).]

The Supreme Court were right in holding that there was no evidence on which the jury could find that the plaintiff had been guilty of fraud. There was no attempt to obtain a benefit under the policy. The plaintiff did not suggest that the premiums had been paid before the fire. Unless there is some compelling circumstance the jury were not entitled to disbelieve the plaintiff's positive evidence that the cheque was drawn on the day it bears date. The only effect of writing a date on a cheque is that the bank cannot honour it before that day. The jury could not infer from anything written on the cheques that the evidence given by the plaintiff was untrustworthy. There was no evidence of a fraudulent device, or of the use of any device to obtain a benefit under the policy.

[GRIFFITH C.J.—If there was a representation that the cheque had been paid to the defendants' agent on 13th September, that would be some evidence to support the jury's finding. If the letter and cheque were handed in over the counter by the agent,

(1) (1907) A.C., 96.

there was a good sporting chance that the defendants would suppose that they had been delivered to the agent before the fire.]

There was no evidence that the plaintiff intended that the agent should represent that the letter and cheque had been handed to him on the 13th.

Knox K.C., *Windeyer* and *Barton*, for the respondents, were not called upon to argue the first point. As to the second point they submitted that on inspection of the butts of the cheques, it was apparent that the cheque in payment of the premium was not drawn in due course, and the plaintiff had a strong motive for ante-dating it. The plaintiff was called upon to explain this discrepancy, and the jury were entitled to disbelieve the explanation he gave. If the cheque was drawn on the 13th, why did the plaintiff keep it in his possession until the 15th? The fact that a covering letter was written bearing the same date, strengthens the inference against the *bona fides* of the transaction. The plaintiff will not swear that he did not come to Sydney with Hamblin on 15th December. A fraudulent device, used to obtain money in discharge of the defendants' alleged liability under the policy, comes within the condition in the policy. It is the intention and not the effect of the device that is material.

GRIFFITH C.J. This is an action on a policy of fire insurance, dated 7th September 1909, by which the defendants agreed with the plaintiff that if the property therein described, or any part thereof, should be destroyed or damaged by fire, after payment of the premium, between 6th September 1909 and 6th September 1910 they would compensate him for such loss or damage. The plaintiff's property was damaged by fire on 14th December. The premium had not then been paid. The first contention relied upon by the appellant was that prior payment of the premium had been waived by the defendants. At the trial the pleadings were amended to allow this contention to be set up, but the amendment was not formally made. In my opinion the word "waiver" is entirely out of place in reference to a contract in this form. The contract is to pay for losses caused by fire

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

Griffith C.J.

after payment of the premium, and not for losses occurring at any other time, and to treat it as a contract to pay for losses arising before payment of the premium would be to alter the subject matter of the contract. It will appear clearly that there is no question of waiver if we suppose a count to have been formally drawn up in accordance with the leave to amend. The count would set out the contract as I have stated it, and then contain an allegation that the defendants had exonerated and discharged the plaintiff from the obligation of paying the premium before the loss occurred. Such a count would clearly be bad on its face. Mr. *Shand* indeed admitted that he could not press this point, and he then relied on the doctrine of estoppel, and contended that the defendants were estopped from saying that the premium had not been paid. The policy contained a recital "the insured having paid to the corporation the sum of £3 10s. 11d." and provided that "the corporation hereby agrees with the insured that if the property is destroyed after payment of the premium they will pay or make good," &c. The policy is not under seal. But even if it had been the case of the *Equitable Fire and Accident Office Ltd.* v. *The Ching Wo Hong* (1), in which the same words were considered by the Privy Council, shows that there would be no estoppel. The facts are that on 6th September an interim receipt was given for the premium, but the money was not paid. Subsequently two or three letters were written to the plaintiff asking for payment of the premium, but he did not pay it. He knew that, although the receipt had been given, the premium had not in fact been paid. It is impossible under such circumstances to say that the defendants are now estopped from saying that the premium was not paid. The only way in which the plaintiff's case could be put would be that there was a new contract to hold the plaintiff insured whether the premium had in fact been paid or not. No such case was set up, and it cannot be suggested on the actual facts that if it had been set up there was any evidence of such a new contract. We were told that at the trial of the action the learned Chief Justice held that payment of the premium had been waived, and that the only issue he left to the jury was the question of fraud. I cannot help

(1) (1907) A.C., 96.

thinking that there is some mistake on this point, for at the conclusion of the trial a verdict was entered for the defendants on all the counts except the first (for detention of the policy), and an application by the plaintiff's counsel that a verdict should be entered for the plaintiff on all the issues except the issue of fraud was refused.

An application was then made by the plaintiff for a new trial. The Full Court held that no case of waiver or estoppel had been made out, but the majority of the Court thought that there was not sufficient evidence of fraud to justify the finding of the jury against the plaintiff on that issue, and they varied the judgment accordingly. In the view which I take of the other part of the case this point is only material on the question of costs, but as it has been fully argued I think it right to express my opinion upon it.

As I have said, the fire occurred on 14th December. The premium had not then been paid. On 15th December two envelopes were handed in at the defendant's office by an insurance agent through whom the policy had been effected. These envelopes had been handed to the agent by the plaintiff on the morning of 15th December. One of them contained a letter, dated 13th December, in which the plaintiff said: "With reference to yours of the 9th inst. I am very sorry to have given you so much trouble over this account, but I thought Gibbs, Bolton could have obliged me by paying this, as I have so much dealings with them. However I herewith enclose cheque for the amount £3 12s. 11d." The cheque enclosed was dated 13th December. The other envelope contained a letter, dated 15th December, in which the plaintiff said he was very sorry to say there had been a fire, and that he had been burnt out. In cross-examination the plaintiff was shown the butts of his cheque book, from which it appeared that the cheque for £3 12s. 11d., dated 13th December, was preceded by the butt of a cheque dated 14th December for "cash," which was in fact cashed on 15th December. There were two other preceding cheques also dated the 14th. The first was for payment of wages up to 13th December, deducting half a day for time lost. On the evening of the day of the fire, the 12th, the plaintiff saw the agent in the

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

Griffith C.J.

train and told him he had not paid the premium and asked him what he should do about it. He did not mention to the agent that he had drawn a cheque and written a letter to the defendants on the previous day. The question is whether on these facts a jury could reasonably come to the conclusion that the letter and cheque bearing date 13th December had not been drawn on that day but were drawn after the fire. In my opinion reasonable men could properly come to that conclusion. There was *primâ facie* evidence on the face of the written documents that the cheque was drawn on 14th December. The onus was on the plaintiff to explain the apparent discrepancy, and the jury might reasonably come to the conclusion that the explanation he gave was untrue.

The condition in the policy on which this plea was founded provided that, if any fraudulent means or devices were used by the insured to obtain a benefit under the policy, all benefit under the policy should be forfeited. The fraudulent device suggested was ante-dating the cheque, and sending it by hand through an agent of the defendants in an envelope under such circumstances that it might reasonably be supposed that it had been drawn on the 13th, and handed to the agent on that day. If the suggested device succeeded the result would be that it would appear to the company that the fire had occurred after payment of the premium had substantially been made. In my opinion, if these were the real facts, it was a device to obtain a benefit under the policy, that is, to induce the defendants to pay the plaintiff a sum which they were not really liable to pay under the policy. In my opinion, therefore, there was no ground for disturbing the finding of the jury on this plea. I think therefore that the judgment of the Supreme Court should be varied by omitting the direction to enter a verdict for the plaintiff on the seventh plea, and that the judgment so varied should be affirmed.

BARTON J. I am of the same opinion. The appellant's case, as it comes to us, has been grounded on the policy only, and as Mr. *Shand* rightly said, there are three possible cases in which the plaintiff might have recovered under the policy:—(1), if he had paid the premium; (2), if the defendants were estopped from

saying it had not been paid; (3), if the defendants had waived the payment and given credit for it. I think from what appears upon the notes made by the learned Chief Justice at the trial that he must have left the question of waiver to the jury, as in fact it ought to have been left. Taking it to have been so left, I think the verdict given negatives the allegation of waiver. In that case we are not concerned with it, and if we were, Mr. *Shand* now admits that he can only rely upon the doctrine of estoppel. He relies for proof of this upon the acts and conduct of the defendants, and principally on the fact that they gave an interim receipt in the first instance for the premium, and that they afterwards wrote certain letters in which they refer to the policy as having been current and in force for some time. The interim receipt was accompanied by an account asking for payment of the premium as such. Each letter contains a similar demand, and fails to give any support to the view of the transaction that Mr. *Shand* would have us adopt, namely, that the defendants treated the premium as having been paid for the plaintiff, and were only asking for a refund of the money they had paid to him. That is not the aspect in which the letters should be viewed. Each of them, as I have said, contains a demand for payment of the money as due for premium, and refers to the number of the policy, in which document it is expressly stated that the liability of the defendants arises in case of fire only after payment of the premium. It is not very easy to imagine how the defendants could have more clearly expressed their intention to hold the plaintiff liable for payment of the premium as such. It seems to me, therefore, that there is no warrant for the contention that an estoppel arose. It is impossible to say that there was in act or word any incorrect representation made by the company or that they caused the plaintiff to alter his position to his prejudice. The risk only arose upon payment of the premium, and as the fire occurred before the premium was paid, the plaintiff is not entitled to recover under the policy.

There remains the question of fraud. I agree with the Chief Justice in thinking that, while one jury might find this issue in one way, and another in a different way, there was

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

Barton J.

evidence upon which the jury could find, not against reason, that the plea of fraud had been sustained. The comparison of the butts in the cheque book shows a transaction, not in the regular course, from which an intention to represent a cheque made after the 14th as having been made before that date might *primâ facie* be inferred. There were facts calling for an explanation, and from which an inference of fraudulent conduct might easily have been drawn, if the jury did not choose to adopt the explanation offered by the plaintiff. Some explanation was particularly called for as to the plaintiff's conduct in keeping back the cheque and the letter, if the date they bore was the true date, and not posting or sending them in the interval between the 13th and 15th of December. Moreover in his conversation with Hamblin on the day of the fire, although he told him he had not paid the premium before the fire, and asked his advice as to what he ought to do, and although he had the letter and the cheque in his pocket or at home, he did not put what he now alleges to be the true facts before him, and tell him that he had drawn a cheque for the premium which unfortunately had not been delivered before the fire. There was a good deal to be explained, and if the jury considered the explanation unsatisfactory, taken in conjunction with the evidence of the cheque butts in the plaintiff's own handwriting, their verdict is not one which reasonable men could not find. I do not say that the evidence would have convinced me as a juryman that the plaintiff was guilty of fraud, but that is not the point.

Having regard to the condition in the policy, it seems to me that the jury might well conclude that what the plaintiff desired to do, if in point of fact it was a fictitious transaction, was to obtain money from the defendants upon the footing of the policy, by causing them to waive the fact that the premium had not been received in time, seeing that there was a letter from him bearing date the 13th, the day before the fire, enclosing a cheque bearing the same date. If they believed the letter and cheque to have been written on the 13th, any insurance company would be justified in not insisting on their strict legal rights under the policy, and in holding that the plaintiff was entitled to recover upon his claim. It appears to me that there was evidence that the

plaintiff attempted to obtain a benefit under the policy without a strict compliance with its conditions. I agree that the judgment of the Supreme Court should be varied in the way suggested by the Chief Justice, and affirmed as varied.

O'CONNOR J. I agree with the judgment of the Chief Justice, and have very little to add. The main feature to be noted in the policy on which the action is brought is the form of the promise to pay. It is not a promise to pay generally on the destruction of the property by fire, but to pay only in the event of the property being destroyed by fire after payment of the premium. The payment of the premium is thus an essential condition of the defendants' liability under the policy. The plaintiff sought to get over the difficulty of having failed to pay the premium before the fire by alleging that that stipulation had been waived. It is evident that a promise of that kind cannot be a subject of waiver. The alteration sought to be made is an alteration, not in a condition to be performed by the insured, but in the promise of the insurer. However Mr *Shand* properly conceded that he could not establish a case of waiver on the evidence, and he relied on his defence of estoppel. Estoppel arises when a party is prevented by something he has done to the prejudice of another from asserting the true facts in a transaction. The true fact here is that the premium was not paid. But it is contended that the defendants, by reason of their conduct, cannot now be heard to say so. Having regard to the facts upon which it is sought to base the defence of estoppel, the contention seems to be somewhat daring. It is important to recognize that the insurance is divided into two periods. An interim receipt was given before the issue of the policy. That in express language acknowledges the receipt of the premium. If the fire had occurred at any time between then and the issue of the policy there might be a good deal to be said in favour of Mr. *Shand's* argument. But within a month after the interim receipt was given the policy was issued, the interim cover of the receipt then came to an end. The policy certainly contains a recital that the insured has paid the premium. But, as has been pointed out, it has been authoritatively decided that such a recital does not prevent the insurer from proving

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

O'Connor J.

the real fact. The recital therefore does not carry the case any further. The plaintiff however relied also upon two letters of the defendants written subsequently to that. When they were written the plaintiff had in his possession the policy expressly stating that he is not to be entitled to compensation unless the premium is paid before the fire. Both letters remind him that he has not yet paid the premium. One was dated 10th November, a month after he got the policy. That encloses the account for the premium and goes on to say: "As this (the policy) has been in force since 6th September, I should be obliged if you would let me have a cheque." It in fact demands payment of the premium. In answer the plaintiff apparently refers the defendants' agent to the firm of Gibbs, Bolton & Co. The next letter is the company's reply of 9th December as follows:—"We have seen Messrs. Gibbs, Bolton & Co. with reference to payment of enclosed account, and are informed that all they can do is to honor a draft of yours for the account if drawn on them. As the insurance has now been current for three months I would ask you to let us have such an order or your cheque by return of post." There again a demand is made and the policy is incidentally referred to as current. The use in these letters of the words "in force" and "current" with reference to the policy is relied on by the plaintiff as involving a representation that the defendants treated the premium as having been paid, because it is said that the policy could not be in force or current unless it was paid. I do not wish to use any harsh words about the contention, but it seems to me an exceedingly daring thing to assert on facts such as these that the use of these words in letters actually demanding payment of the premium will estop the defendants from asserting that the premium was not at that time paid. In my opinion there is no ground whatever for such a contention. The policy therefore must be taken as it stands, and the plaintiff not having complied with its terms is not entitled to recover.

With regard to the other contention raised on the seventh plea, which affects only the question of costs, I think that there was sufficient evidence before the jury to entitle them as reasonable men to come to the conclusion that that plea was established. I agree therefore that the verdict found by the jury on this issue

ought not to be disturbed, and that the judgment of the Supreme Court as so varied should be affirmed.

ISAACS. I am of the same opinion. I start with the form of the policy which says:—"If the property shall be destroyed or damaged by fire after the payment of the premium" then the company will pay compensation. The performance of that condition, or the existence of that fact, of payment of the premium, is an essential element in the creation of liability. The defendants' liability starts from that point. Therefore the performance of that factor must be proved—the premium must have been paid. I agree that the doctrine of waiver is quite inapplicable. Waiver might be applied in this way—under the policy the premium has to be paid in money. That form of payment might be waived. Something might be taken as equivalent to money, as, for instance, a negotiable instrument. But the fact of payment must be established in some form or other. If this has to be proved it can only be proved in one of two ways, either by proving the actual payment itself as a real fact, or by estoppel. The principle of estoppel has been thoroughly well and authoritatively settled. In *Ex parte Adamson*; *In re Collie* (1), *James* L.J. says:—"Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do." Lord *Shand* in delivering judgment for the Privy Council in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2) said:—"The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if

(1) 8 Ch. D., 807, at p. 817. (2) L.R. 19 Ind. App., 203, at p. 215.

H. C. OF A. 1910.

NEWIS v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

Isaacs J.

another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet.* It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do." Of course, "act" there includes omission to act. In this case the plaintiff knew that he had not made the payment, although he was asked to do so time after time. From the moment of his getting the receipt, which was accompanied by a demand for payment, until the 9th December, the company were continually asking him to pay. Therefore I can see no indication of their having treated him as having paid. He knew the real fact, and could not have been misled, and in addition to that there is his own sworn statement showing he did not believe he was being treated as having paid. He admitted that in his conversation with Mr. Hamblin, the company's agent, he told him he had not paid the premium, and asked him what he ought to do. That is not the language of a man who thought he was treated as having paid the premium. And when he sends his letter and cheque, and gets a reply from the company saying: "We are not prepared to accept payment now," he does not say a single word about it; not only does he not say so to Hamblin, but he does not at a critical juncture say to the company: "I understood I was regarded as having paid this premium," or intimate that the cheque represented the return of money, in effect, advanced by the company to pay his premium. Therefore I can see no possible ground for applying the doctrine of estoppel.

I thoroughly agree with the opinions expressed by my learned brothers as to the seventh plea, which raises the question of fraud. I am not surprised the jury took the view they did.

The evidence showed a most abnormal and unbusinesslike course of procedure, and there was a strong motive for the plain-

tiff's conduct. The jury had an opportunity to put their construction upon the facts. I have also looked at the letters dated 13th and 15th, and can well understand that the jury might have been of the opinion that they were written on the same day.

Judgment appealed from varied by omitting direction to enter a verdict for plaintiff on the seventh plea, and as so varied affirmed. Appellant to pay costs of appeal.

Solicitor, for appellant, *G. Crichton Smith.*
Solicitor, for respondents, *W. A. Windeyer.*

[HIGH COURT OF AUSTRALIA.]

JAMES BYRNE . . . . . APPELLANT;
PLAINTIFF.

AND

THE MOST REVEREND ROBERT DUNNE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Will—Construction—Charitable trust—Gift for religious purposes—Uncertainty—Overriding trust—Gift of residue to Roman Catholic Archbishop and his successors—Gift to be used and expended wholly or in part as donee may judge most conducive to the good of religion—Presumption against intestacy.

A testator, a Roman Catholic priest, left the residue of his estate to the Archbishop of his diocese and his successors to be used and expended, wholly or in part, as the Archbishop should judge most conducive to the good of religion in the diocese.