1954

June 8

June 30

BETWEEN:

HARRIETTE ROSELLA MILLET .....SUPPLIANT,

AND

HER MAJESTY THE QUEEN .....RESPONDENT,

Crown—Petition of Right—Contract of insurance—The Veterans Insurance Act, S. of C. 1944-45, 8 Geo. VI, c. 49 and amendments thereto—The Veterans Insurance Regulations, Regulations 4(2)(3) and 14—Payment of premiums—Failure to pay premiums as they become due—Acceptance of cheque later dishonoured not an absolute payment of premium—Crown not bound by estoppel by reason of action of its officers or servants.

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On November 29, 1950, an insurance policy was issued by the Crown to suppliant's husband under the Veterans Insurance Act, S. of C. 1944-45, 8 Geo. VI, c. 49, and amendments thereto, the amount thereof payable in the event of the insured's death, to suppliant. By the Veterans Insurance Regulations the premiums were payable monthly to the Department of Veterans' Affairs, at Ottawa, with an allowance of a grace period of one month for the payment of any premium after the first, after which period the policy would not be maintained in force beyond the due date of the next premium. From the date of issuance of the policy to the date of the insured's death on February 10, 1952, all the payments were made within the period of grace, except on one occasion and no protest on behalf of the Department was then made for the delay, and on another occasion when a cheque received eight days after the expiration of the said period was returned later marked "N.S.F.". The amount of the cheque was deducted from the insured's insurance credit leaving the account paid to November 30, 1951, and the insured advised accordingly. A last payment made on January 15, 1952, was received at Ottawa on February 7, 1952. The defence was that as a result of the insured's failure to pay the last two premiums as they became due, the policy had lapsed.

Held: That the acceptance by the Department of the cheque dated December 26, 1951, though later dishonoured, did not constitute an absolute payment of the premium due December 1, 1951, nor was it intended to be so. The cheque was not honoured when presented for payment. *London and Lancashire Life Insurance Co.* v. *Fleming* [1897] A.C. 499; *Hutchings* v. *National Life Assurance Co.* (1906) 37 S.C.R. 124 referred to and followed.

2. That even though the departmental officers would not have themselves complied with the provisions of the insurance contract, the action of these officers could not bind the Crown. The acts of the Crown's officers or servants cannot bind the Crown by estoppel. *Attorney-General of Canada* v. *C. C. Fields and Co.* [1943] 1 D.L.R. 434 referred to and followed. Where a particular obligation or duty is imposed by statute or by regulation validly made thereunder and embodied in a contract, no estoppel should be allowed to give relief from the said obligation.

3. That the last payment made by the insured was for the premium due on November 1, 1951, and the policy was maintained in force up to the due date of the next premium, namely, December 1, 1951. From that date onward the policy was not in force, had no effect and suppliant has no claim thereunder against respondent.

PETITION OF RIGHT to recover an amount alleged payable to suppliant under a policy of insurance issued by the Crown pursuant to the Veterans Insurance Act.

The action was tried before the Honourable Mr. Justice Fournier at Moncton.

R. M. Palmer, Q.C. for suppliant.

D. J. Friel and *K. E. Eaton* for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

FOURNIER J. now (June 30, 1954) delivered the following judgment:

This is a claim by petition of right for the amount payable to the suppliant under a contract or policy of insurance made and issued by the Crown to Richard Edward Millet pursuant to the Veterans Insurance Act, Statutes of Canada (8 George VI), 1944-45, chap. 49, and amendments thereto.

The facts leading up to these proceedings are hereinafter summarized.

On November 29, 1950, Richard Edward Millet signed an application for insurance under the Veterans Insurance Act. In consideration of this application and the payment of the premiums provided in the contract and subject to the provisions and conditions set forth in the policy or attached thereto and to the provisions of the said Act and any amendments thereto and the regulations made thereunder, an insurance policy for $5,000 and bearing No. V-27706 was issued to the applicant. In the event of his death, the amount of the insurance became payable to the suppliant as follows: $1,000 in cash and the balance of $4,000 to be applied to purchase an annuity certain payable quarterly for a term of ten years.

The premiums were payable monthly. From the date of the issuance of the contract to the date of his death on February 10, 1952, the insured paid all the premiums by cheques drawn on the Bank of Montreal, Moncton, N.B., except the last payment which was made by a Bank Money Order. The first premium was paid by cheque at the time of the application and bears the date of November 29, 1950. All the other cheques—twelve in number and filed as Exhibits 5 to 16 inclusive—are dated within the period of grace. The dates of receipt of these cheques, payable to the Receiver General of Canada, as they appear on Exhibit 18 (Statement of remittances on policy No. V-27706), with the exception of the cheque dated July 28, 1951, and the cheque dated December 26, 1951, are also dates within the period of grace.

This last cheque dated December 26, 1951, and issued in payment of the premium due December 1, 1951, appears to have been received by the Department of Veterans Affairs, Insurance Division, on January 9, 1952. It was deposited with the Bank of Canada on that date. On January 11, 1952, it was presented for payment to the Bank of Montreal, Moncton, N.B., but was returned unpaid to Ottawa a few days later, with the notation "N.S.F." By letter dated January 18, 1952, the insured was notified that this cheque had not been honoured. The letter reads as follows: "The enclosed cheque for $16.25 has been returned by the bank marked 'not sufficient funds'. This amount, therefore, has been removed from your insurance credit, leaving the account paid to November 30, 1951." The last payment made by the insured was a Bank Money Order dated January 15, 1952, and received in Ottawa on February 7, 1952.

The official receipts, twelve in number, filed as Exhibits 20 to 31 inclusive, bear only the date on which the cheques were deposited with the Bank of Canada, with the exception of Exhibit 31 (cheque dated December 26, 1951), which has no date.

As above stated, the policy was issued pursuant to the Veterans Insurance Act which, by its section 16, empowers the Governor in Council to make regulations.

Section 16 and the subsections thereof applicable to this case read thus:—

16. The Governor in Council may make regulations,—

(*a*) prescribing the form of contracts and such other forms as he may consider necessary under this Act;

(*c*) prescribing the mode of paying money under contracts of insurance;

(*l*) for any other purpose for which it is deemed expedient to make regulations in order to carry this Act into effect.

The Veterans Insurance Regulations to be considered in relation to the dispute in this case are the following:—

Regulation 4. All money due under any policy shall be payable in the City of Ottawa in the Province of Ontario;

And under the heading—"Provisions and conditions":—

(2) Payment of premiums.

All premiums are payable on or before their due dates to the Receiver General of Canada and may be sent to the chief treasury officer of the Department of Veterans Affairs, Ottawa, Canada. Premiums

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may be paid monthly, quarterly, semi-annually or annually in advance but to effect a change in the frequency of premium payment, request therefor must be made to the superintendent of Veterans Insurance, Ottawa; except as expressly provided herein, the payment of a premium shall not maintain the policy in force beyond the due date of the next premium.

(3) A grace period of one month shall be allowed for the payment of any premium after the first, without interest charge, during which period the policy shall continue in force, but if the insured dies during such period, the premium, if then unpaid, shall be deducted from the insurance money payable hereunder.

(14) If any premium due hereunder is not paid within the period of grace, and if the cash surrender value or reduced paid up insurance has not been granted, the insured may, with the consent of the Minister and subject to such evidence of insurability as the Minister may require, reinstate the policy in full force at any time within five years from the due date of the first premium in default by payment of the arrears of premiums with interest at the rate of five per cent per annum compounded annually.

The contract or policy of insurance was issued to the insured subject to the above conditions which are all written into the terms, conditions and provisions of the policy. By accepting this policy, the insured became obligated to all its terms and conditions. Every cheque and the money order sent in as payment of the premiums were dated during the period of grace, which would indicate that he was aware that if the remittance was not made during that period he would be in default in his payments. There does not seem to have been any misunderstanding on this point. The suppliant in her evidence states that when the insured received a form comprising a receipt and a notice of payment he then or soon thereafter would sign a cheque, enclose it in an envelope with the receipt part of the form, address and stamp the envelope. On certain occasions, she saw the insured mail the envelope, but she could not remember the dates on which the envelopes were mailed.

It is contended for the suppliant that the "N.S.F." cheque of December 26, 1951, was accepted as absolute payment of the premium of December 1, 1951. At the time it was received and deposited in the Bank of Canada and an official receipt was issued and the amount of the cheque credited to the deceased's account on the Department's books. In support of this contention, it is in evidence that at the time the deceased wrote the cheque his account at the Bank was in funds and remained in funds until the time of his death

with the exception of a period of ten days in the month of January 1952, during which period the cheque was presented for payment to the deceased's Bank in Moncton, N.B.

The fact that the insured had sufficient funds in the Bank to cover the cheque at the time it was issued, in my view, is not a valid reason to support the conclusion that its receipt and acceptance was an absolute payment of the premium. The necessary funds should have been at all times or during a reasonable period in the deceased's Bank account, if the prescriptions of the regulation were to be met. All the moneys due under the policy were to be paid in Ottawa. It was the insured's obligation to see that he had the necessary funds to cover the cheque when it was presented to his Bank for payment. I do not believe that the receipt and acceptance of the cheque or the fact that an official receipt was issued and the amount of the cheque credited to his account are sufficient to establish that it was accepted as absolute payment of the premium. It lacked the essential prerequisite, the payment of money, the cheque having been dishonoured.

To support the argument that the cheque was given as absolute payment, the opinion of the Ontario Court of Appeal in *Nesbitt* v. *Redican* (1) was cited. At page 379, Mowat J., whose judgment was confirmed, says:—

> Though the general effect of giving and taking a bill or note is that the debt is conditionally paid, there is nothing to prevent its being given and taken as an absolute payment if the parties so intend. It is a question of fact what the intention of the parties was.
>
> If the seller takes a negotiable security in preference to payment in cash, whether cash has been offered or not, the security is deemed to be taken as an absolute, not a conditional, payment.

In the present case, the intention of the parties was that the policy would only be in force and effect if the amounts of the premiums were paid on specified dates and the moneys due would be paid in Ottawa. If the moneys were not paid in Ottawa on the due dates or within the period of grace, the policy would not be maintained in force beyond the due date of the next premium.

The only evidence before the Court is that the above mentioned cheque in payment of the permium of December 1, 1951, was received in Ottawa on January 9, 1952. That

(1) (1923) 24 O.W.N., 378, 588.

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would be eight days after the expiration of the period of grace. I cannot agree with the proposition that the acceptance of the cheque, though later dishonoured, should be considered as an absolute payment of the premium due or that it was intended to be so.

In *London & Lancashire Life Insurance Co.* v. *Fleming* (1) it was held that, though the notes were accepted by the agent in payment of the premiums, the condition applied in their non-payment and the policies became void.

In *Hutchings* v. *National Life Assurance Co.* (2) it was decided that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due.

In my view these decisions can readily be applied to the present issue. In the above cases, notes were accepted in payment of premiums, but the notes were not honoured when presented for payment on maturity. In this instance, the cheque was not cashed, but returned for lack of funds in the insured's Bank account.

It is also urged on behalf of the suppliant that on several occasions premium payments were received at Ottawa after the expiration of the grace period allowed and that these overdue payments were accepted, official receipts issued and consequent payments accepted. This, it was argued, would indicate a course of conduct arrived at by at least implied agreement between the insured and the Department which estops the respondent from now claiming that the policy became forfeited for failure to make payments on the appointed day.

The documentary evidence establishes that all the negotiable instruments received in payment of premiums were dated during the grace period and that only two were received by the Department after the due date. I think counsel is in error when he contends that the cheques received on the first day of the month were paid after the expiration of the appointed delay, because clause 2 of the contract says that the payment of a premium shall not maintain the policy in force beyond the due date of the next premium. I take this to mean that the policy would

(1) [1897] A.C. 499. (2) (1906) 37 S.C.R. 124.

remain in force till the last minute of the day on which the premium was due and if the next premium was payable on the first day of the month the policy would not lapse.

There remain the two cheques dated one on July 28, 1951, and received on August 2, 1951, and the other on December 26, 1951. As to the first cheque received on August 2, 1951, it appears that nobody protested the delay. The only explanation I can find in the evidence is that the entries of remittances on account of premiums received are not always made on the day of their receipt. When the mail is extremely heavy it may be necessary to carry over. This may mean one or more days' delay, especially if the heavy mail is on the eve of one or more days of holidays. At all events, one occasion would not indicate a course of action which would imply that delays in payments would be overlooked. As to the second, it is useless to repeat at length what has been already said. It was received after the appointed date, not covered and returned.

In her reply to the respondent's defence, the suppliant alleges that the respondent, acting by and through its proper officers, waived the right to insist upon the literal performance of the conditions of the policy because these officers did not themselves comply with the provisions of the contract. Therefore, the respondent is estopped from now alleging that they either lapsed or became null and void or ceased to be in force.

The suppliant takes the position that the rule of estoppel applies as against the Crown and refers the Court to the following cases.

In the case of *The King* v. *The Canadian Pacific Railway Company* (1) Audette J. stated (p. 37):

> . . . while it may be readily conceded that the Crown is not bound by estoppel by deed . . ., yet it is held in the case of *Attorney-General* v. *Collom,* (1916) L.R. 2 K.B. 193, at 204, that the Crown is bound by estoppel in pais. See also *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Co.,* 63 Ont. L.R. 49, 66, 67; *City of Montreal* v. *Harbour of Montreal,* (1926) A.C. 299, 313; *Attorney-General* v. *Holt & Co. Ltd.* (1915) A.C. 599.

Other decisions indicate that while the doctrine of estoppel by deed does not apply as against the Crown, yet

(1) [1930] Ex. C.R. 26.

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estoppel *in pais* does so operate. I will refer only to *The King* v. *Gooderham & Worts Ltd.* (1) where Grant J. A. said (p. 133):

> Although it may be considered as well settled that the defence of estoppel in pais may be effectual even as against the Crown, yet, upon the facts as I find them, there is no sufficient basis for applying that doctrine in the present case.

The law of estoppel operates, said Lord Denman C.J. in *Pickard* v. *Sears* (2) at page 474:

> When one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

See also *Mew's Digest of England Case Law to 1924*, vol. 8, 2nd ed., p. 747; *Halsbury's Laws of England*, vol. 13, 2nd ed., p. 167.

To entitle the suppliant to the benefit of the rule of estoppel it must be established that the acceptance of the insured's cheques after the due date of the payment of the premiums, the issuance of the official receipts, the demands for subsequent premiums and the crediting of the proceeds of the remittances to his account had been done to lead the insured to believe and had in fact led him to believe that the provisions and the conditions of his contract of insurance had been changed and that he had acted according to that belief. Even at that I have serious doubts that the rule of estoppel would apply as against the Crown.

The Veterans Insurance Act and its regulations, in my opinion, is the law of the land applicable to this contract of insurance. The contention that these regulations did not bind the parties or have force of law is not based on any sound reason. They are not repugnant to or beyond the reasonable contemplation or purview of the terms of the Act. This being the case, I would be inclined to follow the principle laid down in *Phipson on Evidence*, 8th ed., p. 667, in fine, viz.:—

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

This principle has been upheld in many cases.

(1) [1928] 3 D.L.R. 109. (2) (1837) 6 A. & E. 469.

In *The King* v. *The Royal Bank of Canada* (1) Cameron J. made the following observations (p. 304):

> It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them.
>
> This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

In *The Bank of Montreal and The King* (2) three judges held that estoppel could not be invoked against the Crown.

In *Gillies Bros. Limited* v. *The King* (3) Cameron J. stated (p. 223):

> My finding, therefore, is that in this case the doctrine of estoppel cannot be raised so as to prevent the Crown from proving the true nature of the transaction between the parties.

Similar decisions were rendered in *Maritime Electric Company Limited* v. *General Dairies, Limited* (4) and *St. Ann's Island Shooting and Fishing Club Limited* v. *The King* (5).

In the present case, the Crown, under the provisions of a statute, the Veterans Insurance Act and its amendments and regulations, issued a contract of insurance to the insured. The contract embodies the terms, conditions and provisions enacted by law. The insured accepted these terms, conditions and provisions. He failed to comply with the conditions set forth in clauses 2, 3 and 14 of the policy. Specially, he failed to pay the two last premiums due before his death in the manner and at the time stipulated in the contract. The Crown bases its defence on these defaults, because in accordance with clauses 2, 3 and 14 of the Veterans Insurance Act regulations, if the insured defaulted in the payment of the premiums, the policy could not be maintained in force. It could be reinstated only with the consent of the Minister. This consent was never requested nor granted.

There is no evidence to show that the insured was deceived and acted because he was induced to believe that the premiums could be legally paid after the due date or within the period of grace.

(1) (1920) 50 D.L.R. 293.
(2) (1907) 38 S.C.R. 258.
(3) [1947] Ex. C.R. 210.
(4) [1937] A.C. 610.
(5) [1950] S.C.R. 211, at 220.

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Even though statements would have been made by a Crown departmental official, these statements could not bind the Crown. The acts of the Crown's servants or agents cannot bind the Crown by estoppel.

In the case of *Attorney-General of Canada* v. *C. C. Fields & Co.* (1) it was held that the Crown cannot be estopped, by reason of the action of its officials, from insisting on strict compliance with regulations, validly made under s. 60 of the Special War Revenue Act, R.S.C. 1927, c. 179, providing for the collection by stockbrokers of excise taxes payable upon sales of securities.

In my view, where a particular obligation or duty is imposed by statute or by regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation.

I do not believe that the rule of estoppel can be invoked to prevent the Crown from establishing the conditions of a contract between the parties and the facts pertinent to the dispute.

My finding is that the last payment made by the insured was for the premium due on November 1, 1951, and that the policy was maintained in force up to the due date of the next premium, namely, December 1, 1951. From that date onward the policy was not in force, had no effect and the suppliant had no claim thereunder against the respondent.

Therefore, the petition of right is dismissed, with costs.

Judgment accordingly.