In re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE, LIMITED.

P. O. LAWRENCE J.

1922

Jan. 24, 25, 26; *Feb.* 22.

[0084 of 1919.]

Insurance—Policy of Reinsurance—Event dependent on Date of Declaration of Peace—Wager Policy—Marine Policy—P.p.i. Policy—Detachable p.p.i. Slip—Short and long Slips—Winding Up—Proof by Policy Holder—Proof for Debt of Honour—Duty of Liquidator (voluntary) to admit—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48)—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 4—*Gaming Act*, 1845 (8 *& 9 Vict. c.* 109).

In the winding up of a reinsurance company claims were made under, First: a class of policy which was issued by the company by way of reinsurance on a printed form adapted to marine insurance, to insure the payment of a sum of money in respect of a total loss "in the event of peace not being declared between Great Britain and Germany on or before 31 March, 1918." To that policy was attached a detachable p.p.i. slip, which expressly stipulated as follows: "This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from the policy should they so desire. In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest. Full interest admitted." Secondly: a class of marine policy to reinsure a ship therein named against marine risks, such policy having attached thereto a p.p.i. slip similar in all respects to that which was attached to the peace policies, which slip in some cases remained attached and in others had been detached at the date of the claim thereunder.

Upon an application by the company to have it determined by the Court, whether claims under either of those classes of policy ought to be admitted, *Held*: first, as to the peace policies: (*a*) that, as the losses insured against were not incident to any marine adventure, those policies did not come within the definition of a contract of marine insurance in s. 1 of the Marine Insurance Act, 1906; (*b*) that although they were policies of insurance within the meaning of the Life Assurance ("Gambling") Act, 1774, and were not mere wagers, yet, having regard to the description of the subject-matter of the insurance, the existence of the p.p.i. and f.i.a. clauses and the absence of proof of an insurable interest in the original assured, notwithstanding payment by the reassured under the original policy, the policies were by way of gaming and wagering and illegal and void under the above-mentioned Act of 1774; (*c*) that the premiums paid thereunder were irrecoverable. And secondly, as to the marine policies: (*a*) that the p.p.i. slip, having been attached to the policies at the time of signing and issuing the same, formed part of those policies in spite of the stipulation to the contrary on the slip, and that, consequently, such policies were void by virtue of s. 4 of the Marine Insurance Act, 1906, whether the slip remained attached to or was detached from the policy at the date of the claim thereunder; (*b*) even

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assuming the voluntary liquidator occupied the position of an officer of the Court, he was not bound by any principle of equity or honourable dealing to admit claims under those policies which the Legislature had declared void; (c) that, as the "long slips" presented to the insurance company by the assured's broker as the closing instructions contained instructions for the insertion of a p.p.i. clause, in the absence of evidence of a mutual or even a unilateral mistake, those policies ought not to be rectified by striking out the p.p.i. clause on the ground that the "short slip" did not stipulate for a p.p.i. clause; (d) that the consideration for the payment of the premium having wholly failed, claims for premiums paid thereunder ought by virtue of s. 84 of the Marine Insurance Act, 1906, to be allowed by the liquidator.

And accordingly, the Court declared that none of the claims under either of the two classes of policy, except in respect of the premiums on the marine policies, ought to be admitted.

ADJOURNED SUMMONS.

The London County Commercial Reinsurance Office, Ld. (hereinafter called "the company"), was incorporated in 1910, with a subscribed capital of 76,260*l.*, of which 40,000*l.* was paid up.

On March 20, 1917, a petition was presented to wind up the company, and on October 2, 1917, a committee of creditors was appointed. A scheme of arrangement was subsequently approved by that committee and on February 21, 1919, received the sanction of the Court. In pursuance of one of the conditions of the scheme an extraordinary resolution was passed in February, 1919, to voluntarily wind up the company; and Mr. Lionel Maltby was duly appointed liquidator. In the course of his duties as such liquidator he had to investigate numerous claims on policies, which had been issued by the company subject to a condition known as "policy proof of interest" (p.p.i.). The total amount of the claims under these policies was 97,538*l.* Various forms of policy had been issued by the company, but it is sufficient for the purpose of this report to state the following classes of policy: (a) policies of reinsurance, on printed forms generally used for marine policies, issued in the name of G. Chatelain & Co., as brokers for three insurance companies, which in every case had paid upon the policies issued by them to the assured; the risk insured against being a total loss in the event of peace not being declared between Great

Britain (England) and Germany on or before March 31, 1918. To those policies was attached a perforated slip capable of being detached at the option of the assured. The slip had printed upon it the following words: "This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from the policy should they so desire." "In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest." "Full interest admitted."

Those policies (hereinafter called "the peace policies") were prepared from "long slips" which contained instructions for "p.p.i." and "f.i.a." policies.

(*b*) Policies of insurance and reinsurance in the names of Alrik Sunden-Cullberg of Stockholm to cover war risks on steamships therein named. These policies had attached to them perforated slips capable of being detached at the option of the assured, such slips having printed on them the same p.p.i. and f.i.a. conditions as those printed on the slips attached to the peace policies. But the slips on these policies had not been detached at the time claims were made thereunder. In respect of these policies neither long nor short slips had been used. They were effected with the company by A. H. Davies as broker for the firm of Sunden-Cullberg, Mr. Davies at that time also occupying the position of managing director of the company. As the evidence showed Mr. Davies exceeded his authority as broker in allowing the p.p.i. condition to be inserted in those policies.

(*c*) Policies of reinsurance effected in the names of Hamilton Smith & Co., on ships, with p.p.i. slips attached similar to those attached to the Sunden-Cullberg policies. In the case of these policies, the slips had been detached at the time claims were made thereunder. The short slips to these policies contained no stipulation for a p.p.i. clause, while the long slips did contain instructions for such a clause, and it was alleged that those instructions were unauthorized by the reassured. These were further policies similar to the policies under the foregoing heads (*a*), (*b*) and (*c*), described

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under heads (*d*), (*e*) and (*f*), the validity of which was questioned having regard to the conditions appearing therein respectively—namely, f.i.a. (i.e., "full interest admitted"), f.a.a. (i.e., "free of all average" without "benefit of salvage"), and v.o.p. (i.e., valued as in original policy).

The following evidence was furnished to the Court by a director of the firm of Hamilton Smith & Co., insurance brokers in the City of London, as to the customary practice in marine insurance or reinsurance business, where the underwriters are a limited company: The broker, who is the agent of the assured, writes on a short slip the necessary particulars of the insurance proposed. Those particulars are sufficient as a rule, especially in cases of reinsurance, to enable a policy to be drawn up. The broker then submits the short slip to the company's underwriter who, if he is prepared to accept the risk offered, enters on the slip the amount which he is willing to insure and signs the slip with his initials and generally dates the signature. In this way by one or by several underwriters the full amount is insured. The short slip, thus initialled, is, according to marine insurance practice, deemed to be a complete and final contract, and neither party can, except with the assent of the other, deviate from the terms so agreed upon without a breach of faith. When under the contract, thus concluded, the broker requires a policy, in the case of an insurance with Lloyds underwriters he prepares it himself and submits it to them for signature, but, in the case of an insurance with a company, he hands to the company closing instructions in a document sometimes known as the "long slip," and from those instructions the company prepares and signs the policy. The broker, as agent for the assured, makes out the long slip, without which the company could not prepare the policy, as the broker takes away and keeps the short slip after it has been initialled. The underwriter signs the short slip only, and it is by the terms of the short slip alone that he is bound. If there is any variation between the short slip and the long slip, the former and not the latter is the authoritative expression and evidence of the contract; and that is so, whether the

insurance is made with Lloyds underwriters or with a company. In the ordinary understanding of brokers and underwriters engaged in marine insurance the term p.p.i. in a policy does not necessarily indicate that the assured has no insurable interest or does not expect to acquire an insurable interest. That term is inserted because the insurable interest is such that a loss in respect of it, though real, would be difficult to prove or assess. By the addition of such a term to the contract the underwriters agree to release the assured, in the event of a claim, from the difficulty and expense of proving his interest. It has become usual to add a p.p.i. clause (when required) by means of a slip bearing the following form of words: "This slip is no part of the policy and is not to be attached thereto, but is to be considered as binding in honour on the underwriters: the assured however having permission to remove it from the policy should they so desire."

One of the grounds, but a minor ground, on which it was sought to uphold the claims under the peace policies was the following: it was alleged that, pending the submission of the scheme of arrangement to the meeting of creditors, the solicitors acting for the creditors received a letter dated December 30, 1918, from Messrs. Wansey, Stammers & Co., solicitors acting for a reinsurance company in Denmark (which, as guarantor in respect of policies issued by the company, was a party to the said scheme), in which that firm stated that they had their clients' authority to agree that, if the creditors of the company to the extent of 56,000*l*., including amongst them "the peace policy" holders, would support the scheme and the same were passed by the requisite majority and received the sanction of the Court, their clients would not dispute bona fide claims on the part of "the peace policy" holders, provided that such claims did not exceed 5000*l*. And it was claimed that as those conditions had been complied with, the liquidator was bound to admit the claims made by such policy holders.

A summons was accordingly taken out by the liquidator to have it determined whether he ought to admit the claims

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made under the policies described under the foregoing heads, (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), or any and which of them, and whether, in the event of any of those policies being held to be void and no claims maintainable thereunder he ought to admit a claim for premiums paid in respect of any such void policy.

Messrs. G. Chatelain & Co. were appointed to defend and represent all the holders of the peace policies; Alrik Sunden-Cullberg was appointed for that purpose in respect of policies under head (*b*) and Messrs. Hamilton Smith & Co. were appointed in respect of policies under heads (*c*), (*d*) and (*f*); and Bertie N. L. Whiteaway was appointed in respect of policies under head (*e*).

R. A. Wright K.C. and *Whinney* for the liquidator. The peace policies are wagering contracts and are illegal and void under the Life Assurance Act ("Gambling"), 1774 (1), and the premiums paid thereunder are irrecoverable. As to the marine policies, under the Marine Insurance Act, 1746 (19 Geo. 2, c. 37), they would have been illegal, but by the Marine Insurance Act, 1906, they are rendered null and void by s. 4 thereof. It is immaterial to consider the "short slip" if the "long slip" (which contains the final instructions by the broker, as agent of the assured, and constitutes the real contract) contains instructions for a p.p.i. policy. When the long slip has been accepted by the assurers it may only be rectified on the ground of common mistake.

The detachable slip attached to a policy is part of the contract, notwithstanding a stipulation between the parties to the contrary: *Cheshire & Co.* v. *Vaughan Bros. & Co.* (2) Such a stipulation is a culpable evasion of the prohibition

(1) The Life Assurance Act, 1774, enacts that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering: and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever."

(2) [1920] 3 K. B. 240.

of the Legislature based on the ground of public policy, and if it forms part of the contract, it renders the policy void by virtue of s. 4 of the Marine Insurance Act, 1906. (1)

Stuart Bevan K.C. and *Le Quesne*, for G. Chatelain & Co., representing holders of the peace policies. The peace policies, although they are upon marine policy forms, are not marine policies. There are no marine losses mentioned in the policies, nor is there any marine adventure, and there is no mention of a ship. These policies, not being marine, do not come under the Marine Insurance Act, 1906. The p.p.i. conditions on the detachable slip form no part of the contract of reinsurance. But assuming they are to be taken as forming part of the contract: at common law, these p.p.i. policies, before the Marine Insurance Act, 1746 (19 Geo. 2, c. 37), were not void at all: see Arnould on Marine Insurance, 10th ed., s. 311, dealing with "wager policies" at p. 428. A wager policy—i.e., one in which the parties by express terms (as, e.g., by a p.p.i. clause) disclaim the making of a contract of indemnity, is a valid contract of insurance. Then under the Marine Insurance Act of 1746, a contract on a ship without proof of interest (p.p.i.) or by way of gaming or wagering was null and void and was (being a prohibited contract) decided to be an illegal contract. Under the Marine Insurance Act, 1906 (which applied to foreign as well as to British ships), such a contract was made not illegal, but only void. That Act applies to marine insurance policies, and does not apply to the peace policies. The marine policies are not void under the Gaming Acts of 1845 or 1892;

(1) Sect. 4 of the Marine Insurance Act, 1906, is as follows:—"(1.) Every contract of marine insurance by way of gaming or wagering is void.

(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) Where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any like term.

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

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the p.p.i. clause is not inconsistent with an insurable interest in the assured; the clause is inserted to avoid the difficulty and trouble of proving an insurable interest. Notwithstanding the existence of a p.p.i. clause, if the assured has in fact or expects to acquire such an interest as shows that he did not intend to make a wager, the policy will not be void under the Gaming Acts. And such a policy is not brought within those Gaming Acts by means of s. 4 of the Marine Insurance Act, 1906, which declares that every policy containing a p.p.i. clause is deemed to be a gaming and wagering contract. The definition of such a contract for the purposes of that Act cannot enlarge the meaning of the term "contract by way of gaming or wagering" in the Gaming Act, 1845: see Arnould on Marine Insurance, 10th ed., s. 315, at p. 434, and Mr. Arthur Cohen's article in Halsbury's Laws of England, vol. xvii., para. 746, p. 377. These policies are prima facie consistent with the assured having an insurable interest, and it is for the liquidator to show the contrary. The assured has paid the losses under the original policies and that is prima facie proof of interest; until the liquidator has proved that the reassured were not liable to pay the losses, it must be assumed that they were liable. The detachable p.p.i. slip constituted an undertaking by the company that it would not raise the point as to the absence of an insurable interest. It was such an honourable undertaking as the liquidator ought to give effect to. The Life Assurance Act of 1774 does not apply at all to contracts by way of gaming or wagering, but only to contracts of insurance in the ordinary sense of the word: Halsbury's Laws of England, vol. xvii., s. 4, "Wager policies: The Gambling Act, 1774"; at p. 514. If the policies are within the Gaming Acts, then the policies being void and the consideration having failed, the holders are entitled to a return of their premiums.

MacKinnon K.C., *Le Quesne* and *H. Claughton Scott*, for Alrik Sunden-Cullberg and Hamilton Smith & Co. These are all genuine marine policies. The liquidator ought to act in accordance with the stipulation on the p.p.i. slips attached to the policies and admit the claims thereunder:

Ex parte James. (1). In that case the Court directed money paid to a trustee in bankruptcy in mistake of law to be repaid to an execution creditor. James L.J. said: "I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far . . . . I am of opinion that a trustee in bankruptcy is an officer of the Court . . . . and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

[P. O. LAWRENCE J. That principle was applied because the Court was acting. How does the principle apply to a voluntary liquidator?]

There is no necessity for treating a liquidator as a litigant defendant. As an officer of the Court he should be impartial between the persons whose interests are involved in the winding up: *Gooch's Case* (2); *Ex parte Simmonds.* (3) Although there is no case where the principle has been applied to a liquidator in voluntary winding up, it is submitted there is no reason why the principle should not extend to such a case: *In re Wigzell* (4), where it was held that there was nothing dishonest in a trustee in bankruptcy enforcing rights given him by the Legislature.

[P. O. LAWRENCE J. How can I apply that principle to a case where an Act says that certain things are null and void, because it is really against public policy?]

If the transactions were mere bets, the liquidator ought not to pay. But they are not mere betting transactions. The claimants have genuine insurable interests; they have paid the whole of the losses. It is a pure technicality if the reinsurers can refuse payment on the ground of the insertion of the p.p.i. clause. The Court leans in favour of there being

(1) (1874) L. R. 9 Ch. 609, 614.
(2) (1872) L. R. 7 Ch. 207, 211.
(3) (1885) 16 Q. B. D. 308.
(4) [1921] 2 K. B. 835.

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an insurable interest, where the underwriters have been taking the premiums: *Stock* v. *Inglis*. (1) The liquidator may deal with the claims on the footing that the p.p.i. clauses were deleted: *Gedge* v. *Royal Exchange Assurance Corporation*. (2) As to the Sunden-Cullberg policies: the p.p.i. clauses were inserted in the policies without the authority of the reinsurers; there were no p.p.i. slips. The firm of brokers, the nominal agents of Sunden-Cullberg, the reinsurers, were practically the same as the reinsuring company itself, and the policies were retained in the possession of the firm or the company, and the presence of the p.p.i. clauses was unknown to the reassured. As to the Hamilton Smith policies: the short slip governs the contract if there is any variation between the short slip and the long slip. In the case of some of those policies, the short slip did not contain the p.p.i. clause, neither did the policies made out from those short slips; consequently those policies ought to be rectified by deleting the detachable slips, so as to make the policies correspond with the contracts concluded by the original (short) slips.

Whinney in reply. These peace policies are policies of insurance within the Gambling Act of 1774, or are null and void under the Gaming and Wagering Act, 1845: Halsbury's Laws of England, vol. xvii., s. 1012, at p. 514. A policy is a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to: *Wilson* v. *Jones*. (3) That is the form the peace policies took. An interest in an event is defined in *Barclay* v. *Cousins* (4) and *Lucena* v. *Craufurd* (5) that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss. These are policies, and the claimants under them can prove in respect of a loss and recover by way of indemnity. The reinsurers are only liable in cases where the original insurances are good. Even if the onus is on the reinsurers to prove that the assured had no

(1) (1884) 12 Q. B. D. 564.
(2) [1900] 2 Q. B. 214, 221.
(3) (1867) L. R. 2 Ex. 139.
(4) (1802) 2 East, 544.
(5) (1802) 3 B. & P. 75.

interest, there is evidence on the face of the policies and their terms that no subject matter of risk is stated. They were either illegal as gambling policies under the Act of 1774, or were null and void as bets under the Gaming and Wagering Act, 1845: Halsbury's Laws of England, vol. xvii., s. 746, at p. 377. If these policies are merely bets, the reinsured cannot insure against having to pay a debt of honour, because no legal loss or damage could be proved. As regards the Sunden-Cullberg and Hamilton Smith marine policies: the p.p.i. slip forms part of the policy, whether it remains attached or has been detached at the time the claim is made under such policy. If when the policy is issued, the p.p.i. slip is attached, it forms part of the contract, and it is immaterial that it has been torn off even by arrangement or permission afterwards; the policy cannot remain void for a period and then suddenly become valid because the slip is torn off; every term of the insurance must be contained in the policy: *Cheshire & Co.* v. *Vaughan Bros. & Co.* (1) The present case does not fall within the principle of *Ex parte James.* (2) All the cases are concerned with a trustee in bankruptcy or a liquidator in a compulsory winding up. Even if the liquidator here can be treated as an officer of the Court it is submitted that on the authority of *In re Wigzell* (3) he ought not to be directed to pay a voluntary debt which the company is not legally liable to pay, unless by way of compromise for the benefit of the estate as a whole: see also *Granville & Co.* v. *Firth.* (4) As to rectification, there is no evidence of a common mistake or a mistake by either of the parties. The short slip contains the proposed terms of the contract, but there is no reason why the assured should not send in closing instructions by means of a long slip amplifying or varying the short slip, and if accepted by the company such instructions make a good contract, and the short slip is superseded. As to the Sunden-Cullberg policies: if in fact the p.p.i. clause was unauthorized it is not claimed that those policies are bad, especially as Davies, who was acting

(1) [1920] 3 K. B. 240.
(2) L. R. 9 Ch. 609.
(3) [1921] 2 K. B. 835.
(4) (1903) 88 L. T. 9.

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as broker, was also a director of the company with which he was dealing.

Werninck for B. N. L. Whiteaway.

Cur. adv. vult.

Feb. 22. P. O. LAWRENCE J. The first question which arises on this summons is as to the validity of the peace policies.

In my judgment these policies are not contracts of marine insurance. It is true that they are made out on the printed form which the company generally uses for its marine policies, but that fact alone does not, in my opinion, make them marine policies. None of the printed clauses contained in these policies have any application to the subject matter of the insurance, and when the substance of these policies is looked at, it is obvious that the losses insured against are not losses incident to any marine adventure. These policies therefore do not come within the definition of contracts of marine insurance contained in s. 1 of the Marine Insurance Act, 1906, and the provisions of that Act do not apply to them.

The next question to be determined is whether these policies are insurances forbidden by the Life Assurance Act, 1774 (14 Geo. 3, c. 48).

Although it would appear from the title of this Act as if the Act were confined to life insurances, yet its operative part extends to insurances on any events whatsoever except insurances on ships, goods, and merchandise. This Act, however, does not extend to all contracts by way of gaming or wagering, but is confined to contracts of insurance.

The first matter to be considered, therefore, is whether these policies are insurances within the true meaning and intent of s. 1 of the Act. In *Wilson* v. *Jones* (1) Blackburn J., in pointing out the distinction between a policy of insurance and a mere wager, defines a policy as a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to. Applying

(1) L. R. 2 Ex. 139, 150.

that definition to the facts of this case, it will be seen that in form these policies undoubtedly are contracts of insurance, as they purport to indemnify the assured against loss in the event of peace not being declared before a certain date. Moreover, the policies were all effected by way of reinsurance having been issued to Mr. Chatelain as broker on behalf of the Lloyds de France Insurance Co. and the English and Foreign Insurance Co. for the purpose of re-insuring the risks undertaken by those companies under certain policies issued (also by way of reinsurance) to certain underwriters at Lloyds, who had underwritten the original policies. In these circumstances I am clearly of opinion (and indeed Mr. Stuart Bevan in the course of his argument felt himself constrained to admit) that the peace policies purport to be contracts of insurance in the ordinary sense of the words and not mere wagers.

That being so, the next question arises whether these policies are insurances on some event wherein the assured has no interest, or insurances by way of gaming or wagering within the meaning of the Act of 1774, and consequently illegal and void.

In my opinion the fact that the policies contain the p.p.i. clause does not of itself prove that the assured has no insurable interest in the subject matter of the insurance, or that the policies are gaming or wagering policies, as that clause may have been inserted on account of some difficulty in proving interest. Mr. Stuart Bevan has called my attention to the judgment of Brett M.R. in *Stock* v. *Inglis* (1), where that learned judge states that in his opinion it is the duty of the Court always to lean in favour of an insurable interest, if possible, and I have assumed that this opinion correctly expresses the attitude in which the Court ought to approach the present case. In my judgment, however, the facts disclosed by the evidence here are such that it is impossible to hold that the assured had any insurable interest. In my opinion the description of the subject matter of the insurance, the existence of the p.p.i.

(1) 12 Q. B. D. 564, 571.

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and f.i.a. clause on all the policies, and the absence of any attempt on the part of the claimants to prove that the original assured had any insurable interest, lead to the irresistible inference that these policies were insurances by way of gaming or wagering, and I should require the clearest possible evidence to convince me to the contrary. If I were to accede to the argument addressed to me by Mr. MacKinnon that I ought to uphold these policies, because the original assured might possibly have had some insurable interest, I should be shutting my eyes to the true nature of these policies and stretching the rule expressed by the Master of the Rolls in *Stock* v. *Inglis* (1) beyond its proper limits.

The fact that the policies are reinsurance policies and that the reassured have paid under the policies which they have issued does not in my judgment operate to enable them to substantiate their claims against the company. It is well settled that (subject to any provision to the contrary in the reinsurance policy) the reassured, in order to recover from their underwriters, must prove the loss in the same manner as the original assured must have proved it against them, and the reinsurers can raise all defences which were open to the reassured against the original assured. This is equally true whether the reassured had or had not paid their assured, inasmuch as it would be inequitable for them to renounce any of their defences so as to prejudice the reinsurers: see the article written by the late Mr. Arthur Cohen in Halsbury's Laws of England, vol. xvii., s. 744, p. 375. Nor does the fact that the reassured in this case were only themselves reinsurers assist the claimants, as it only operates to throw the position one step further back.

If it once be established that the original insurances were illegal, it follows in my judgment that all the reinsurances are tainted with that illegality and are themselves illegal and void. In the result I hold that the peace policies are gaming or wagering policies within the meaning of s. 1 of the Act of 1774, and are consequently illegal and void. It

(1) 12 Q. B. D. 564.

follows from the fact that these policies are illegal that the claimants cannot recover either the amounts thereby insured or the premiums paid for effecting them.

A further point, however, was taken on behalf of the claimants—namely, that the company had agreed not to dispute the claims under these policies in consideration of the claimants supporting the scheme of arrangement which was then about to be submitted to the creditors for their approval.

There are at least three answers to this contention, each of which in my opinion is conclusive. In the first place, the letter of December 30, 1918, which was relied upon as constituting the bargain, was not in fact written on behalf of the company, and therefore does not bind the liquidator. In the second place a bargain not to dispute a claim arising under an illegal contract is one which the Court would not give effect to under any circumstances, much less where it purports to affect persons who were no parties to it. In the third place this bargain, which, if valid, would have materially affected the rights of the general body of creditors, was not disclosed to the Court when asked to sanction the scheme, and therefore the Court ought not to pay any attention to it when adjudicating upon the rights of the creditors in the liquidation.

In the result I propose to make a declaration that the liquidator ought not to admit any claims under the peace policies either for the moneys purporting to be assured thereby or for the return of the premiums paid in respect thereof.

The next policies as to which questions arise are those issued by the company to Hamilton Smith & Co. These are undoubtedly marine policies. They were taken out to reinsure genuine marine risks which the reassured had underwritten and were in no sense gaming or wagering policies.

The first question which arises on these policies is whether the fact that a detachable p.p.i. clause was gummed on to the policies when they were signed and issued does not render them void under s. 4 of the Marine Insurance Act, 1906. In

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my judgment there is no difference between the policies which still have the p.p.i. clause attached to them and those from which the p.p.i. clause has been detached. It is not necessary to consider what course the Court would have adopted if, before the policies had been brought to its attention, the p.p.i. clause had been detached, and neither of the litigating parties had raised the point that such a clause had ever formed part of the policies, because in the present case evidence has been adduced on behalf of the liquidator which proves clearly that the p.p.i. clause was attached to all the policies when they were signed and handed to the assured. In my judgment the proper time to judge whether these policies are valid or void is *at* the time when they are issued. The subsequent tearing off of the p.p.i. clause by the assured (even though it was done with the permission of the insurers) cannot in my opinion have the effect of rendering the policies valid if they were null and void when they were issued.

It was contended, however, that the Court ought not to regard any of these policies as p.p.i. policies, because of the introductory words preceding the p.p.i. clause on the detachable slip, which stipulate that the p.p.i. clause is no part of the policy, but is to be binding in honour on the underwriters and may be removed by the assured. In my opinion this contention cannot prevail. The stipulation relied upon is a palpable, and, in my opinion, wholly futile attempt to evade the provisions of s. 4 of the Act of 1906. A stipulation that an important clause affecting the whole tenor of the policy should form no part of the policy and might be removed by the assured stands self-condemned and cannot in my opinion have the effect of making the policy what it is not—namely, a policy not containing such a clause. Moreover, the statement that the p.p.i. clause should be binding on the insurer in honour only does not affect the position at all, as, even without that statement, the clause would not have bound the insurers in any other way. The policies as issued were in substance and in fact p.p.i. policies and the effect of attaching the p.p.i. clause was in my judgment to render the policies void by virtue of the provisions of s. 4 of the Act

of 1906. In my judgment therefore, unless the assured can succeed in their claim for rectification, all the policies to which the p.p.i. clause was attached at the time of issue are void.

The question then arises whether the claimants are entitled to have these policies rectified by striking out the p.p.i. clause. It is argued that the Court ought to rectify the policies because the short slips, which it is said contain the true terms of the bargain arrived at between the parties, did not stipulate for a p.p.i. clause. In my opinion the claim for rectification cannot possibly succeed as there is no evidence whatever of a common or even of a unilateral mistake. The reason why the company attached the p.p.i. clause to these policies is because the closing instructions expressly stipulated that the policy should be a p.p.i. policy. It is true that none of the short slips mentioned the p.p.i. clause as one of the terms of insurance, but (according to the custom prevailing where the insurer is a company) these short slips were in each case followed by the long slips or closing instructions drawn up by or on behalf of the assured and presented to the company in order that the company might prepare the policy in the terms of these long slips. In every case the long slips contained instructions for the insertion of a p.p.i. clause, and I have no doubt whatever that the assured desired to have p.p.i. policies.

It was suggested that the long slips did not contain the real terms agreed upon, but were prepared by office boys or clerks who had no authority to insert the instructions for a p.p.i. clause. Even if this suggestion were true it does not prove that the company made any mistake, but as a matter of fact there is no evidence whatever to support the suggestion. The true inference to be drawn from the evidence is that the long slips were prepared in the office of the brokers and presented to the company in the ordinary course of business. In these circumstances the Court cannot possibly assume that the persons who made out the long slips acted without authority, more especially as Mr. Hobbs, a director of Hamilton Smith & Co., Ld., has made a long affidavit and has not ventured to say that the insertion of the p.p.i. clause in the

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closing instructions was not authorized by him. No doubt the company could, without any breach of faith, have refused to issue p.p.i. policies because when it underwrote the risk on the short slips the p.p.i. clause was not mentioned, but as a matter of fact the company in every case accepted the closing instructions without demur, and issued policies in accordance with those instructions. The policies were accepted by the reassured with full knowledge that they contained the p.p.i. clause in accordance with the closing instructions; and in the circumstances it is plain that the terms contained in the short slips were by agreement between the parties superseded by the terms which were eventually embodied in the final contracts of insurance. The policies therefore contain the real terms agreed upon between the parties, and in my judgment the claim that they should now be rectified at the instance of the assured by omitting the p.p.i. clause is a hopeless claim, and one which the Court cannot possibly entertain.

But then it is contended that the Court ought to order the liquidator to admit the claims under these policies, in spite of the fact that they are void, on the ground that the liquidator is in the position of an officer of the Court and that the principle that the Court ought to be as honest as other people (per James L.J. in *Ex parte James* (1)) and will direct its officers to do that which any high-minded man would do (per Lord Esher M.R. in *Ex parte Simmonds* (2)) applies to the facts of this case.

It is said that, as these policies were not in fact gaming or wagering policies, and as actual loss could in each case be proved to have been sustained, not only by the reassured but also by the original assured, the liquidator would only be acting as an honourable man would act if he were to admit the claims, and therefore the Court ought to compel him to admit them notwithstanding the statute makes the policies void. In my judgment the Court cannot possibly accede to this contention. Even if the voluntary liquidator were in the position of an officer of the Court for this purpose (which I think is open to doubt), I am of opinion that the doctrine

(1) L. R. 9 Ch. 609, 614. (2) 16 Q. B. D. 308, 312.

has no application to a case such as this where a claim is made under a contract which the Legislature has for sufficient reasons thought fit to declare void.

Under s. 4, sub-s. 2 (*b*), of the Act of 1906 every policy containing the p.p.i. clause is to be deemed to be a gaming or wagering policy and therefore it is void under s. 4, sub-s. 1, whether it is in fact a gaming or wagering policy or not: see *Cheshire & Co.* v. *Vaughan Bros. & Co.* (1), p. 240. Moreover it is by no means clear that the Court, on having its attention drawn to the p.p.i. clause, ought not to treat the policies as void, even though the parties themselves may not desire to have them so treated. In these circumstances it is in my opinion hopeless to contend that the Court ought to hold that it is contrary to honourable or high-minded conduct for an insurer (or, as in this case, a liquidator of an insolvent insurer) to rely on the provisions of this section. To order the liquidator to admit these claims would in effect be repealing this section so far as this liquidation is concerned: see *In re Wigzell.* (2)

There remains to be considered the question whether the claimants under these policies are entitled to the return of the premiums which they have paid. Having regard to the fact that the Act 19 Geo. 2, c. 37, which rendered marine policies effected by way of gaming or wagering illegal, was repealed by s. 92 of the Act of 1906, and that the latter Act merely renders such policies void, I am of opinion that the claimants are entitled to prove for the amount of the premiums paid by them in respect of these policies. It is admitted that the original assured, and therefore the reassured, had an insurable interest in the subject matter of the policies and that there was no fraud or illegality on the part of the assured or reassured or their agents. In these circumstances I am of opinion that, as the consideration for the payment of the premiums has totally failed, s. 84, sub-s. 1, of the Act of 1906 applies and the premiums are returnable by the company. In my judgment therefore the liquidator ought to admit the claimants under these policies as creditors in respect of the premiums paid by them.

(1) [1920] 3 K. B. 240. (2) [1921] 2 K. B. 835, 863.

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I propose accordingly to make a declaration that the liquidator ought not to admit the claimants under the policies issued to Hamilton Smith & Co., Ld., or under any other marine policies to which the p.p.i. clause was at the date of issue attached (except the Sunden-Cullberg policies which have yet to be dealt with), as creditors in respect of the moneys thereby insured, but ought to admit them as creditors for the amount of the premiums paid by them to the company.

I now come to the Sunden-Cullberg policies which relate to the steamers *C. Sundt*, *Robert*, and *Theodor Williams*. These policies stand on an entirely different footing from the Hamilton Smith policies, and the liquidator has by his counsel stated that he is not in a position to contest the claims made by the assured under them. In these circumstances I will content myself by stating quite shortly why I think the Court is justified in holding that these policies ought to be treated as rectified by deleting the p.p.i. clause. Mr. Davies, the managing director of the company, acted as broker for the Stockholm firm, who had instructed him to reinsure certain risks which they had underwritten. I am satisfied on the evidence that the instructions given to Mr. Davies by the Stockholm firm were instructions to effect ordinary reinsurance policies and that the Stockholm firm never contemplated having p.p.i. policies and never knew until after the liquidation that p.p.i. policies had in fact been issued. As Mr. Davies was the managing director of the company, both short and long slips seem to have been dispensed with and Mr. Davies himself signed and issued the policies. In these circumstances he either made a mistake which must be treated as a common mistake or else he knowingly exceeded his instructions, in which case the company cannot take advantage of the wrongful act of its own managing director. The assured have produced satisfactory proof of interest and loss, and I therefore propose to make a declaration that the liquidator ought to admit the claimants under the Sunden-Cullberg policies as creditors in respect of the amounts covered by their policies.

In conclusion I will only add that the policies referred to

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under the headings (*d*), (*e*) and (*f*) in the summons are covered by my decision in the *Hamilton Smith Case*, as it appears from the exhibits to the liquidator's affidavit that p.p.i. clauses are attached to all these policies.

That being so, I am relieved from dealing with the further objection to the policy mentioned under head (*e*) of the summons on the ground that it is made subject to the term "warranted f.a.a. without 'benefit of salvage,'" as to the effect of which I prefer not to express an opinion.

The costs of all parties to this application will be taxed as between solicitor and client and retained and paid by the liquidator out of the assets.

Solicitors: *Wansey, Stammers & Co.; Hicks, Arnold & Bender; Simmons & Simmons; Waltons & Co.; Richards & Butler.*

H. C. H.

SCRANTON'S TRUSTEE *v.* PEARSE.

C. A. 1922 ASTBURY J. *March 2, 24; April 5.* C. A. *May 8, 9.*

[1921. S. 1725.]

Bankruptcy—Bets paid by Cheque—Trustee's Right to recover—Action by Trustee—Officer of Court—Stay of Action—Gaming Act, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 2—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 18, 38, 45, 53.

In 1919 the debtor paid the defendant, a bookmaker, various cheques for bets lost on horse racing, and these cheques were cleared through various banks, as holders. On August 30, 1920, the debtor was adjudicated a bankrupt, and on March 30, 1921, his trustee in bankruptcy, by the direction of his committee of inspection, commenced this action in the King's Bench Division to recover 955*l.*, the amount admitted to be due, if recoverable. The action was transferred to the judge in bankruptcy under r. 123 of the Bankruptcy Rules, 1915. The defendant took the point that such an action ought not to be brought by an officer of the Court, as the claim, however legal, was practically dishonest, and that all Courts must recognize and apply the rule in *Ex parte James* (1874) L. R. 9 Ch. 609, 614. During the argument, however, in order to avoid any question of jurisdiction, the defendant was by consent given leave to serve a notice of motion in bankruptcy to stay all further proceedings, and the case proceeded on the footing that that motion was before the Court sitting in bankruptcy:—

Held by Astbury J., that there being no special circumstances in the case, it was neither honourable nor high-minded for the trustee in