

Verdict—"For the pursuer, damages L.50."

Jeffrey and A. M'Neill, for the Pursuer.

Skene and J. H. Robertson, for the Defender.

(Agents, *John Turner*, w. s. and *Walter Duthie*, w. s.)

PROMOTER LIFE
INSURANCE CO.

v.

BARRIE'S RE-
PRESENTATIVES.



PRESENT.

LORDS CHIEF COMMISSIONER AND CRINGLETIE.



PROMOTER LIFE INSURANCE CO. v. BARRIE'S
REPRESENTATIVES.

1830.
Jan. 9.

REDUCTION of a policy of insurance, on the ground of misrepresentation as to the health and habits of the person whose life was insured.

Finding for the defender in a reduction of a policy of insurance, on the ground of misrepresentation.

DEFENCE.—The representations were true.

ISSUE.

“ Whether the Policy of Insurance No. 9
“ of Process, bearing to be an Insurance by
“ the pursuers, of the sum of L. 1000 on the
“ life of the late Andrew Barrie, surgeon in
“ the Royal Navy, for a year, from the 29th
“ day of August 1827, is not the Policy of the
“ pursuers ?”

PROMOTER LIFE
INSURANCE CO.

v.

BARRIE'S RE-
PRESENTATIVES.



Cockburn opened for the pursuers and said, Insurance is a contract depending on mutual good faith, and here there was not only concealment, but misrepresentation. A policy may be void where there is no fraud, as a person may have swallowed poison without knowing it, but intentional misrepresentation is much stronger. The question here is, whether *Barrie* was addicted to the habit of drunkenness, and to such an extent as to render the policy void? He was represented as having no disease or infirmity tending to shorten life, and the person who made this representation had warned him of the danger of his habits.

A letter written by a person not intrusted in a suit, admitted in evidence after the writer became interested in it.

Murray and *Cockburn* proposed to produce a letter from the friend who granted the certificate of *Barrie's* health, and said, He is a defender; but, if he were only a witness, we would be entitled to ask him whether he said he had tricked the office.

Jeffrey, D. F.—This is not an action of damages against this person. I deny that they can prove any thing as to him.

LORD CHIEF COMMISSIONER.—The difficulty in my mind is, that they are entitled to falsify the statements in the certificate, but they

must do it by legal evidence. Suppose the parties were all in the same situation as when the certificate was granted, then the surgeon had no interest or character to prevent him from being a witness, and, in that case, you might show him his letter, but must trust to his oath. He has, however, now altered his condition, by being a defender; and the question now is, whether, in this character, his letter may be used against him.

PROMOTER LIFE
INSURANCE CO.
v.
BARRIE'S RE-
PRESENTATIVES.



Jeffrey.—He was not a party at the time, and it is only when a person, being a party, makes an admission, that it can be used against him.

LORD CHIEF COMMISSIONER.—The principle of the law of Scotland by which you may prove what was said by a witness who is dead, bears on this point, and, as you cannot call him as a witness, I think the letter may be received.

An affidavit made by a brother of Barrie was tendered but rejected. A medical gentleman was called, and asked whether dram-drinking is injurious to the liver.

Jeffrey, D. F.—This is surprise.

LORD CHIEF COMMISSIONER.—They may

PROMOTER LIFE
INSURANCE CO.

v.

BARRIE'S RE-
PRESENTATIVES.

In a reduction of a policy on the ground that a habit of dram-drinking was concealed, incompetent to ask whether the party was reputed a dram-drinker.

prove the habits of this person, and the effect it had on his liver.

A witness being asked whether Barrie was reputed a dram-drinker, his Lordship observed, that this was a case where the nail must be hit on the head, and that the way to do it, was by getting into the dram-shops and proving what he drank.

Objections were also sustained to the questions. In what terms would you have granted a certificate? Was you surprised at the certificate granted? Was you surprised that he got an insurance? Was his an insurable life? On the question, was the falling off in his health the effect of drinking? His Lordship said, The only way you could get at this evidence, would be to prove in presence of a medical gentleman, the number of drams he took, and then ask what effect they would have.

Incompetent to prove a certificate false, by proof of contrary statements by the person who granted it.

When a question was put to prove that Aiton, who along with the brother-in-law granted the certificate, had made statements contradictory to his certificate.

Jeffrey, D. F.—It is not competent to prove this fraud against a person who may be called as a witness. They must prove the facts

stated not to be true, but they cannot do so by proving his belief.

J. A. Murray.—I may prove the statements false ; but as the party warrants that the certificate was granted *bona fide*, I may also prove that they laid their heads together to grant a coloured certificate, or that they rest on one known to be false.

LORD CHIEF COMMISSIONER.—My difficulty here is not on principle. There is no question here as to the fraud of Aiton, and the only point is, whether you can prove this certificate true or false, through this medium. It is trying the truth of a certificate by statements ?

In England there is no doubt it would be competent, but I wish to know whether a person who is called as a witness can have proof brought against him of statements made to another. If the law of Scotland would allow it, the truth of the fact in the certificate may be inquired into, by proof of declarations elsewhere, or the witness may be cross-examined from a deposition. But at a very early period of this institution, I learned that this is incompetent here, and the present case appeared to me analogous, and my doubts have been confirmed by Lord Cringletie.

PROMOTER LIFE
INSURANCE CO.

v.

BARRIE'S RE-
PRESENTATIVES.



PROMOTER LIFE
INSURANCE CO.
v.
BARRIE'S RE-
PRESENTATIVES.



There is no doubt that a false certificate, or a certificate known to be false, will set aside the contract, but this must be proved by evidence competent by the law of Scotland. If you prove that the person granting the certificate went to the dram-shop with Barrie, you may in this way prove the certificate false, and that he knew it false, but you cannot prove it by his declarations.

At the close of the pursuer's case the jury may find for the defender without hearing his counsel.

At the close of the evidence for the pursuer, the Dean said, he thought, before addressing the jury, he was entitled to ask whether they had any doubt on the case? Mr Cockburn answered, that he thought the jury were entitled to say so without being asked.

LORD CHIEF COMMISSIONER.—I am not quite sure whether the jury are fully aware of the points to which their attention ought to be directed. With great respect for Mr Cockburn, I must say I think he overstated his case.

This is a question as to a policy of insurance, and before it is entered into, certain questions are put and answered, and, according to the answer to these, the policy is granted or refused. The first point for consideration is, whether these questions are answered in such a

way as to amount to misrepresentation or not, and whether the concealment was such, that if the facts proved had been disclosed, the life would not then have been insured? I shall not state my opinion on the evidence now, but I feel more anxious on this subject, as a delicate question arose on a rule of evidence peculiar to Scotland.

PROMOTER LIFE
INSURANCE CO.

v.

BARRIE'S RE-
PRESENTATIVES



(The jury here intimated that their minds were made up.)

I wish you to be aware that, in a life assurance, if there is an existing disease at the time the policy is granted, it is like the case of a ship not being sea-worthy in marine insurance; but here the case is rested on representations made by persons competent to make them, who state, that Barrie took a glass of grog, but was not otherwise intemperate, and he denied to Dr Ballingall that he was intemperate, which, as well as the certificates, is a fact for your consideration. It was said he had the habit of drinking whisky, which must mean undiluted, but the pursuers do not bring the highest evidence, as there is only one witness who speaks to his drinking one or two glasses of whisky on one occasion; and though it was proved that he went into other shops where spirits are sold, no one was brought from these shops to prove

PROMOTER LIFE
INSURANCE Co.

v.

BARRIE'S RE-
PRESENTATIVES.



his having got spirits. This is important evidence in favour of the conclusion to which you have come; but there is other evidence to balance, and though you judge of the fact, it is important that you should be in possession of the views of the Court, as so much law has been stated.

The other witnesses do not speak of spirits, but mention generally the smell of spirits, and that he took grog at noon. You will consider whether this is the glass of grog mentioned in the certificate, or whether it is a larger quantity; and whether it does not fairly come under the term temperate, as there was no proof of drinking beyond the term in the certificate. Something was proved of his being warned that he would kill himself if he did not change his habits, but there was no evidence of the date of this, and, though the use of spirits is injurious to health, I cannot say it is proved to the extent to take away the truth of the certificate, or that there was such misrepresentation or concealment as will void a policy made on the faith of the certificate.

Verdict—"For the defenders."

J. A. Murray and Cockburn, for the Pursuers.

Jeffrey, D. F. and E. Monteath, for the Defenders.

(Agents, *John Whitehead, s. s. c. Fr. Hamilton, w. s.*)