

COURT OF APPEAL.

JUNE 28TH, 1912.

SMITH v. EXCELSIOR LIFE ASSCE. CO.

3 O. W. N. 1521.

Life Insurance — Policy — Condition — Breach — Assured Taking Employment on Railway without Permit — Knowledge of Agent of Insurance Company — Acceptance of Premiums by Company — Authority of Agent — Absence of Notice to or Knowledge of Company.

Action by beneficiary under a policy of insurance issued by defendants upon the life of one C. F. Smith dated May 16th, 1898, for the amount of the policy \$1,000. The policy provided that, if within two years of its date the insured then a farmer should be employed on a railway without a permit from defendants the policy should become void and all premiums paid thereunder should be forfeited. Within two years from the date of the policy deceased was employed on a railway and continued in such employment until his death in a railroad accident on July 20th, 1911. The company had no knowledge of a change of occupation, but some time after the two-year period their local agent at Sarnia who had sent in the application heard of it but did not notify the company. By the terms of the policy the local agent was not allowed to alter or modify any terms of the policy or grant any permits.

BRITTON, J., *held*, (20 O. W. R. 449; 3 O. W. N. 261), that defendants had waived the condition and gave judgment for plaintiff with costs.

COURT OF APPEAL *held*, that defendants having no notice or knowledge of the facts could not be deemed to have waived the condition nor could they be estopped from setting it up.

Western Assurance Co. v. Doull, 12 S. C. R. 446, and other cases referred to as to authority of local agent.

Appeal allowed and action dismissed both with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE BRITTON at the trial in favour of the plaintiff, 20 O. W. R. 449; 3 O. W. N. 261.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

H. E. Rose, K.C., for the defendants, appellants.

John R. Logan, for the plaintiffs, respondents.

HON. MR. JUSTICE GARROW:—The action was brought upon an insurance policy issued by the defendant for one thousand dollars upon the life of Charles F. Smith payable to his mother the plaintiff Zillah Smith. The policy is