1942 *Present :* **Howard C.J. and Hearne J.**

SUPPIAH *v.* THE ORIENTAL GOVERNMENT SOCIETY LIFE ASSURANCE CO., LTD.

88—D. C. Colombo, 11,279.

Life Insurance—Proposal Form—Untrue Statement—Policy avoided only if Statement designedly untrue—Proof of age—Right of Company to insist upon compliance with condition.

In a proposal form which formed the basis of a policy of Life Insurance, the assured stated, *inter alia,* (*a*) that his next birthday was 53, (*b*) that he could produce neither a birth certificate nor a horoscope. To a further question as to whether he could produce other evidence of age, no answer was returned. The final paragraph of the proposal form declared that the statements therein were true and agreed that it should be the basis of the contract between him and the Company and that if any untrue averment be contained therein all moneys paid up on account of the said assurance should be forfeited and the assurance itself should be null and void.

Held, that the policy could not be avoided unless it was established that the statement in the proposal form as to age was designedly untrue.

Held, further, that the Company could insist upon compliance with the condition of the policy that payment would be made upon proof to its satisfaction of the age of the assured, although the Company should have known from the declaration made by the assured that no better or further proof of his age would be available after death.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *E. B. Wickremanayake*), for the defendant, appellant.

E. F. N. Gratiaen (with him *D. W. Fernando*) for the plaintiff, respondent.

Cur. adv. vult.

February 6, 1942. HOWARD C.J.—

This is an appeal by the defendant from a judgment of the District Judge of Colombo entering judgment for the plaintiff for the sum of Rs. 3,000 and profits payable on a policy of Life Insurance dated December 2, 1936, together with interest thereon till date of decree and thereafter till payment. The plaintiff is the administrator of the estate of one Vellayathevar Maruthappen who died on May 17, 1938. On June 13, 1936, the deceased signed a Proposal Form in which he stated that his age next birthday was 53. He also stated that he could produce neither a Municipal certificate of birth nor a horoscope. To the further question as to whether he could produce other evidence of age no answer was returned. The deceased in the final paragraph of the proposal form declared that the statements therein were true and agreed that it should be the basis of the contract between him and the Company and, if any untrue averment be contained therein, all moneys paid up on account of the said assurance should be forfeited and the assurance itself should be null and void. On the same day, that is to say June 13, 1936, the deceased at the instance of the defendant Company was examined by Dr. Rajapakse whose report P 4 was produced in evidence. In this report Dr. Rajapakse states that the deceased does not look older than his age. To P 4 was attached a personal statement by deceased in which the latter declares that according to the best of his knowledge his age does not exceed 53 years. The policy was signed by the deceased on December 2, 1936. It recited that the deceased had agreed that the Proposal and Declaration for Assurance should be the basis of the Assurance and that the Company had received the first premium. The Company then agreed to pay the amount of the assurance upon proof to the satisfaction of the Directors that such sum had become payable. To this liability for payment were attached, *inter alia*, the following provisos:—

(*a*) That proof of age of the deceased and of the title of the persons claiming payment shall be furnished to the satisfaction of the Directors before payment of the sum assured:

(b) That if it appeared that any untrue or incorrect averment was contained in the Proposal and Declaration the Policy should be void and all claim to any benefit shall cease and determine

The deceased died on May 17, 1938. The Medical Attendant's Certificate which was given by Dr. Cooray stated that the apparent age of the deceased was about 70 years. Dr. Cooray gave evidence and produced this certificate. He stated that he gave the deceased's age as 70 merely on information supplied by the Superintendent of the Estate, Mr. Veitch. In connection with the claim made by the personal representative of

the deceased, another document, D 3, a certificate of identity, was furnished to the Company. This document was signed by a clerk of Eheliyagoda estate and contained a statement that the approximate age of the deceased was 70 years. The Superintendent of the estate, Mr. Veitch, in consequence of an application from the defendant Company, gave a certificate D 4 in which he stated, in reply to the query "Approximate age of deceased at death," should say "about 70 years". In giving evidence Mr. Veitch stated that the deceased was the Head Kangany of the estate and had worked under him for 9 years. The statement in D 4 of the deceased's age was only an estimate. He also stated that the deceased had a serious attack of malaria in 1937. After this attack he aged very considerably and his condition deteriorated until he died. In connection with the evidence of Mr. Veitch, it appears that he by informing the Company of the death of the deceased initiated the steps which led to the formulation of a claim by the personal Representative of the deceased. Counsel for the appellants has contended that the claim of the plaintiff cannot be maintained inasmuch as (1) the latter has not furnished proof of the age of the deceased and (2) the proposal and declaration contained an untrue and incorrect averment, namely, that the age of the deceased was 53 years. In my opinion contention (2) is covered by the cases of *Fowkes v. The Manchester and London Life Assurance & Loan Association*[1] and *Hemmings v. Sceptre Life Association Limited*[2]. In *Fowkes v. The Manchester & London Life Assurance & Loan Association* (*supra*) life policy of insurance was entered into with a company on the life of H. F., which was founded on a written declaration of the assured, agreed to be the basis of the contract between the parties, and contained a proviso that "if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy should have been effected by or through any wilful representation, concealment or false averment whatsoever, or if the said H. F. should go to any place beyond the limits of Europe, &c., the policy should be void, and all monies paid in respect thereof should be forfeited to the said Association". The proposal and declaration contained the usual particulars, and proceeded as follows:— "I do hereby declare that the above written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and The Manchester and London Life Assurance Association, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy, granted in respect of such assurance, shall be absolutely null and void". It was held that the policy and declaration must be read together, and so reading them the policy was not avoided by an untrue statement in the declaration, unless designedly untrue. This case was followed in *Hemmings v. Sceptre Life Association Limited* (*supra*) where a policy of life assurance was granted upon the basis of a proposal which concluded with

[1] *122 E. R. 343.*

[2] *(1905) 1 Ch. 365.*

a declaration that the answers given in the proposal were true to the best of the proposer's knowledge and belief, and an agreement that the proposal and declaration should be the basis of the contract, and that if it should thereafter appear that the proposer had made any untrue statement therein the policy should be void and the premiums forfeited. In the proposal the assured made a mistake as to her age, and stated that she was three years younger than she was. The policy, after reciting the declaration and the statement by the assured as to her age, evidence of which the insurance company required to be produced, provided for the payment by the Company of the policy moneys upon proof of the death of the assured, or of her having attained the age of sixty years, and it contained a proviso for avoidance of the policy and forfeiture of the premiums in the event of the policy having been obtained by wilful misrepresentation. After discovery of the mistake as to the age of the assured the Company accepted two annual premiums. It was held (1) following *Fowkes v. Manchester and London Life Assurance and Loan Association*[1] that the declaration was to be read with the policy, and that the Company were not entitled to avoid the policy and forfeit the premiums unless the statement in the proposal was designedly untrue, although upon the discovery of the mistake they might have declined to continue the policy upon returning the back premiums; (2) that by accepting premiums after knowledge of the facts they must be taken to have affirmed the policy as it stood, and that consequently they were bound to pay the policy moneys upon the assured actually attaining the age of sixty years and were not entitled to postpone payment until the assured had attained that age upon the assumption of her age at the date of the proposal having been as therein stated. It appears from these two cases that the policy is not avoided by an untrue statement in the proposal and declaration, unless designedly untrue. It has not been established in this case that the statement made by the deceased with regard to his age was designedly untrue.

The first point raised by Mr. Perera is, however, of a more substantial character. The defendant Company had notice of the fact stated in the proposal and declaration made by the deceased that the only proof he could furnish of his age was his own declaration. In those circumstances can the Company now come to Court and rely on the proviso contained in the policy that proof of the age of the deceased shall be furnished to the satisfaction of the Directors? The documents that found their way into the hands of the Company after the death of the deceased do not, to my mind, in any way establish the age of the latter. On the other hand the Company must have known from the proposal and declaration made by the deceased that no better or further proof of his age would be available after his death. In these circumstances it does not seem to be just or equitable that they should be allowed to take advantage of the proviso in the policy requiring proof of age. On the other hand it may be argued that the deceased entered into the contract embodied in the policy with his eyes open. He must have realized that

[1] (1853) 3 E. & S. 917.

his personal representatives after his death would be unable to furnish the proof required to draw the money due on the policy. It is with great reluctance that I have come to the conclusion that the plaintiff has not complied with the condition requiring proof of age. In these circumstances the claim of the plaintiff cannot be maintained and the appeal must be allowed. In the circumstances we make no order as to costs.

HEARNE J.—I agree with the proposed order.

Appeal allowed.