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*April. 27,28, Oct. 17. *Nov. 14.

AUGUSTE RÉAL ANGERS (PLAINTIFF) ..... } APPELLANT;

AND

THE MUTUAL RESERVE FUND LIFE ASSOCIATION (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Practice—Quorum of judges—Judgment pronounced in absence of disqualified judge — Jurisdiction — Mutual life insurance — Natural premium system—Level premium—Mortuary calls—Rate of assessment—Rating at attained age—Fraud—Puffing statements—Warranty — Misrepresentation — Acquiescence — Mistake — Rescission of contract—Estoppel.

Art. 1241 C. P. Q. permits four judges of the Court of King's Bench to give judgment in a cause heard before five when the remaining judge, after hearing the case argued, recused himself as disqualified. Davies and Nesbitt JJ. *contra.*

A took out a policy on his life in a mutual association relying on statements contained in circulars issued by the association stating that interest on the reserve fund would be sufficient to cover increases in the death rates and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest and then allowed his policy to lapse and sued for a return of the payments he had made with interest and for a declaration that the contracts were void *ab initio.*

Held, Sedgewick and Nesbitt JJ. dissenting, that the statements in the circulars only expressed the expectation of the managers of the association as to the future and did not prevent the rates being increased in the discretion of the directors. *The Mutual Reserve Fund Life Association* v. *Foster* (20 Times L. R. 715) distinguished. *The Provident Savings Life Assurance Society* v. *Mowat* (32 Can. S. C. R. 147) referred to.

Per Taschereau C. J. As the contracts of A. with the association were only voidable he was not entitled to be repaid the premiums for

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

which he had received value by being insured as long as the contracts were in force. *Bernardin* v. *La Réserve Mutuelle des Etats-Unis* (Cour d'Appel, Paris, 10 Feb. 1904 : Gaz. des Trib. 26 fév. 1904), referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court and dismissing the plaintiff's action with costs.

The declaration of the plaintiff alleged that he had been, in 1885 and 1887, solicited and induced by the agent of the defendants to become a member of the association and insure his life therein upon the assessment system at an annual rate of contribution by mortuary calls according to a minimum and maximum rate determined by his age at entry, the contributions not to be increased as age advanced but subject to decrease by quinquennial divisions of profits and in no case to exceed, in any year, the maximum rate of assessment indicated by the tables of the association ; that one-fourth of the assessments collected were to be accumulated as a reserve fund for the benefit of policy holders, and that he should pay $30 admission fee and $20 for dues annually. He further alleged that he was induced to enter into the contracts of insurance he made with the association and to persist therein for some time by their written false and fraudulent representations in their circulars and statements; that, in May, 1898, when the rates of assessment had been greatly increased by virtue of powers given by certain clauses in the certificates or policies of insurance issued to him, he became aware of the fraud, deceit and wilful misrepresentations so made by the association for the first time, that he then protested against the increased rates as being contrary to the terms on which he had been induced to apply for membership, discontinued further

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payments and was, at his increased age, unable to obtain life insurance in another company or association without great loss and increased rates of premium. The action was for $6,509.57 damages, being the amount of the payments made with interest, and to have the policies declared null and void *ab initio*. The defence was a denial of any fraud, deceit or misrepresentation, that the association carried on the business of mutual life assurance effectually according to the provisions of its charter and the conditions of the contracts with the plaintiff in accordance with his applications, certificates of membership and the constitution and by-laws of the association. It alleged that the association had the right of increasing the assessments as they did, that it was necessary and obligatory for them to do so for the benefit of members of the association and under the laws of the State of New York; that the plaintiff had received value for all payments made by him by the insurance of his life while he continued a member of the association; that, for a time, the plaintiff had continued to pay the increased rates and had acquiesced in the increased assessments; that, having failed to pay his assessments his contracts of insurance had lapsed and all moneys paid thereon had been forfeited to the association in virtue of the conditions, by-laws and regulations to which they were subject and that he was estopped of any right of action upon any ground whatever.

In the trial court Lavergne J. entered judgment for the plaintiff for the amount demanded with interest, declared the contracts void *ab initio*, that the payments made by the plaintiff had been made in error and by reason of the false and fraudulent representations and concealment by the defendants and that they had been received by them in bad faith.

In the Court of King's Bench, on appeal, the case was argued before five judges, in September, 1902, but, when it was ripe for judgment, on 23rd December, 1902, one of the judges, Mr. Justice Würtèle, withdrew from the court for special reasons on account of which he considered himself disqualified and incompetent to take part in the judgment about to be rendered. The four remaining judges then proceeded to render the judgment now appealed from, allowed the appeal, reversed the judgment of the Superior Court and dismissed the plaintiff's action with costs.

When the appeal came on for hearing in the Supreme Court of Canada, counsel on behalf of the appellant took preliminary objections to the validity of the judgment of the Court of King's Bench, on the grounds that the four remaining judges in that court had taken an erroneous view of the provisions of art. 1241 C. P. Q.; that as the hearing had taken place before five judges, art. 1227 C. P. Q. could not have the effect of reducing the court to a bare quorum; that the case did not fall within the exceptions mentioned in arts. 1205, and 1206 C. P. Q. but was one of disqualification or incompetency ruled solely by art. 1242 C. P. Q.; that, consequently, the judgment so rendered was an absolute nullity, that no appeal was necessary and that the judgment of the Superior Court should stand restored and confirmed with costs to the appellant in all the courts.

After hearing counsel on the question, the majority of the court overruled the objection, Davies and Nesbitt JJ. dissenting, and the hearing on the merits was proceeded with.

The questions arising on the present appeal are stated in the judgments now reported.

After the case had been argued judgment was reserved pending the decision of a case by the same

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association against Foster then pending in the House of Lords, on appeal from the decision of the King's Bench Division, in England (1), and which was subsequently decided against the association (2). After this decision, on the application of the association, the Supreme Court of Canada ordered a re-hearing upon the points of somewhat similar nature to those in the *Foster Case* (2) involved on the present appeal. These questions are shortly stated in the arguments of counsel.

T. Chase Casgrain K.C. and *Lafleur K.C.* for the appellant. The appellant was deceived by the false representations made by the association in their circulars, prospectuses and written statements issued by them from time to time, and kept under delusion and in error up to the time he protested against the increased assessments and allowed his insurances to lapse. The extracts printed in our factum clearly shew how he was kept in ignorance and the payments exacted from him in bad faith. He was even induced to believe that the association could eventually shew that the Superintendent of Insurance for the State of New York was wrong in compelling the association to change their system of assessment and that, in the end, there would be a general reimbursement and the old rates, as at age of entry, resumed. He did not discover the fraud until the last moment and, consequently, never acquiesced in the increased mortuary calls. In fact, he never ceased to protest against the increases. No one can complain that another has believed too implicitedly in the truth of his statements. This is specially so when the party making the statements is an expert. Pollock on Contracts, pp. 535, 537, 547, 550, 571; Kerr on Fraud and Mistake, pp. 54 and 55; Bigelow on Torts, pp. 63 and 64;

(1) 19 Times L. R. 342. (2) 20 Times L. R. 715.

Encycl. of the Laws of England, vo. "Company" p. 184; *New Brunswick and Canada Railway and Land Co.* v. *Muggeridge* (1); *Central Railway Co. of Venezuela* v. *Kisch* (2), at page 113. If the statements forming the basis of the contract are false the contract must be rescinded. See *Ranger* v. *The Great Western Co.* (3). *In re Reese River Mining Co.; Smith's Case* (4); *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (5). It is only necessary to shew that there was a material misrepresentation; *Derry* v. *Peek* (6), at page 359; *Arkwright* v. *Newbold* (7); Dalloz Rep. "Obligations" no. 218; *Sun Mutual Life Insurance Co.* v. *Béland* (8); Pand. Fr. vo. "Assurance Mutuelles" nn. 311-317; S. V. '80, 1, 125; Pand. Fr. vo. "Assurances en general" nn. 63, 421, 422, 423. We also refer to arts. 993, 1047, 1049, 2488 C. C The appellant relies with confidence on the decision of the House of Lords in the *Foster Case* (9), which involves points exactly similar to those in the present case.

Beaudin K.C. and *Aimé Geoffrion K.C.* for the respondents. There has been no proof of fraud made and none can be presumed; Art. 993 C. C. It requires proof in writing in the case of a contract of mutual insurance; Art. 2471 C. C. Testimony can be received only in the cases mentioned in Art. 1233 C. C. There is not even a written protest proved, and a verbal protest, even if proved, would be insufficient. On the contrary, it is shewn that the plaintiff acquiesced in the increase of the rates by making voluntary payments for three years, six times in each year, and is, consequently, estopped from disputing his rating at

(1) 1 Dr. & S. 363.
(2) L. R. 2 H. L. 99.
(3) 5 H. L. Cas. 72.
(4) 2 Ch. App. 604.
(5) [1896] 1 Ch 178.
(6) 14 App. Cas. 337.
(7) 17 Ch. D. 301.
(8) 5 Legal News 42.
(9) 20 Times L. R. 715.

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this stage. *Bain* v. *City of Montreal* (1); *Baker* v. *The Forest City Lodge* (2).

It is quite clear from the circulars that the rating was to be on the natural premium system according to current age, that is, according to the attained age of the insured, from time to time, as assessments were made. There was no warranty as to level premium as at age of entry in the circulars, no representations of the kind were made. The applications and contracts make none, and they, alone, constitute the contracts between the parties. They do not mention any premium nor fix any maximum rates. However, it is not contended that the maximum assessment according to attained age has been exceeded.

No rescission of the contracts is necessary here because the plaintiff voluntarily allowed his contracts to lapse. If he ever had any right of action for specific performance, (arts. 1065, 1066 C. C.,) he lost it by ceasing to make payments for the purpose of keeping the insurances alive. Art. 1067 C. C. He simply dropped out of the association after getting full value for the moneys he paid by the insurance carried on his life from the time he entered until the contracts lapsed, under the conditions therein expressed, by default to continue payments of the assessments. Consequently, the plaintiff is not entitled to recover back any of the moneys so paid for value received.

It is not shewn that any wilfully false statements were made or that any artifice, deceit or trick was practised upon the plaintiff. Even if the prospects proved to be exaggerated or puffed up in the circulars and statements, they were made in good faith according to the expectations of the managers of the association. Such statements cannot amount to fraud or

(1) 8 Can. S. C. R. 252.

(2) 24 Ont. App. R. 585; 28 O. R. 238.

misrepresentation, although they may afterwards have turned out less advantageous on account of a mistake in their scheme of insurance.

We rely, also, upon the following authorities: *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1); *Hiven* v. *La Réserve Mutuelle des Etats-Unis* (2), at page 42; *Bernardin* v. *La Reserve Mutuelle des Etats-Unis* (3); R. S. C. ch. 124, ss. 36 to 39; Paud. Fr. vo. "Obligations" nn. 7281, 7285, 7288, 7291, 7296-9, 7303; Fuzier-Herman vo. "Assurance Mutuelle" nn. 53, 54, 55; Beaudry-Lacantinerie, "Obligations," vol. I, no. 109, note 2, no. 111; *Banque Ville-Marie* v. *Montplaisir* (4); *Lovell* v. *St. Louis Mutual Life Insurance Co.* (5); *Grymes* v. *Saunders* (6); and Lindley on Companies (8 ed.) p. 62

We contend that the case of *The Mutual Reserve Fund Life Association* v. *Foster* (7), recently decided in the House of Lords differs from the present case in the following respects: The policies were in different form; there were different representations made to the assured; there was no acquiescence by Foster; there were different questions of laches and no question as to the amount Foster should recover on cancellation of the policy arose, as in this case.

THE CHIEF JUSTICE.—Though as the result of the decision of the House of Lords in the *Foster Case* (8), the respondents are precluded, in my view of the evidence, from supporting the judgment *a quo* upon the *considérants* of the court of appeal on the facts of the case and the inferences of fact there-

(1) 32 Can. S. C. R. 147.
(2) [1901] Pasicrisie, 3.
(3) Trib. Civ. de la Seine, 12 fev. 1902; Gaz. des Trib. 26 fév. 1904.
(4) 18 R. L. 153.
(5) 111 U. S. R. 264.
(6) 93 U. S. R. 55.
(7) 20 Times L. R. 715.

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from, the proof of the company's fraud being still stronger in this case than in that one, and the appellant's policies being in terms as tricky and intentionally misleading as Foster's was, yet, under the civil law which, it is conceded, governs the present controversy, the appeal, in my opinion, fails, and the action must stand dismissed upon the ground that though the appellant be entitled to a rescission of the contracts *ab initio*, his claim to the reimbursement of premiums, either as *condictio indebiti*, or as damages, is unfounded in law. Under the latter head, all that he demands by his declaration is the amount, with interest, of the premiums. So that the same reasons militate against both branches of his action. If he recovered judgment for the amounts he paid because they were payments *indus*, he could not recover in this action any additional amount for damages. And, *a converso* he cannot recover as damages the amounts he paid if they were not payments *indus*. As to any other, could they be considered as claimed, none but remote, indirect, fictitious and exaggerated damages to himself personally are in evidence.

This is not, as in the *Foster Case* (1), an action for rescission of an existing contract. The appellant and respondents had both determined, before the institution of the action, to treat these policies as rescinded for the future; and it is mutual ground that to all intents and purposes they stand rescinded from that time. (Pars. X, XI, of conditions indorsed on second policy). The action is consequently nothing but one by the appellant to recover back the premiums he has paid to the company respondent during the continuance of the policies. Pothier, Oblig. No. 29; 24 Demol. No. 181; arts. 988,

(1) 20 Times L. R. 715.

993, 1000 C.C. As Laurent well puts it, Vol. 20, No. 346 :

> Si la résolution doit être demandée en justice, l'action en répétition de l'indu se confond avec l'action qui tend à résoudre le contrat.

Now, upon principle, the appellant's contentions cannot prevail.

The rescinding *ab initio* of a contract for fraud has no doubt the same effect as would the rescinding of a contract under an express resolutory clause in the case provided for by art. 1088 C. C. A contract such as those in question here is, in law, subject to the tacit resolutory clause that, if it be obtained by fraud, the party defrauded and suffering prejudice thereby, will have the right to have it rescinded. Consequently the appellant's proposition that the parties must, in the latter case as in the former, be restored, *as far as possible* to "as they were" before they entered into the contract is undeniably correct.

But in a case like this one, where a contract of mutual insurance may be rescinded at the suit of the insured for false representations by the insurer, the insured, as said by DeLalande, Assur. No. 825, is not entitled to the return of the premiums, because they were

> l'équivalent des risques que la compagnie a réellement courus. Suscepti periculum pretium' (says Pothier, Assur. No 1).

The appellant got for his money all the value he had bargained for. It was indeed by false representations that he was induced to enter into the partnership that this mutual company in law constitutes ; 1 Couteau, assur. Nos. 132 *et seq.*, 192 ; 2 Couteau, Nos. 364, 382, 433, 438 ; Dall. 76, 1,345 ; Pand. fr. 86, 1, 220 ; S. V. 86, 2, 225 ; Delangle, Sociétés, Nos. 41 to 47 ; but he put no capital therein ; the premiums he paid did not inure to the benefit of the company ; they went in satisfaction of his obligations as co-insurer towards his co-

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insured; he got all the benefit from these payments that he could expect; the company, consisting of himself and his co-insurers, fulfilled its obligation to carry the risk of the amount insured on his life; his co-partners had the right to exact from him his share of the burdens of the co-partnership so long as he enjoyed his share of its benefits; and no court, no power on earth, can declare that he has not been effectively insured; he suffered no loss from the fraud he now complains of, and fraud without damage gives him no cause of action. *Petrie* v. *Guelph Lumber Co.* (1); Bedarride, Dol & Fraude, Vol. 1, Nos. 268, 270, 272, 300 to 308. His claim lacks one of the essential ingredients required by the law. *Point d'intérêt, point d'action.* An action in rescission *ab initio*, (*restitutio ad integrum* of the Roman law) cannot be maintained when the contract has previously come to an end if the plaintiff has not been *lésé*. 2 Bonjean, des actions en dr. rom. page 144; Ancien Dénizart, *vo.* Rescission; 1 Solon Nullités, Nos. 426, 431.

Pour proposer une nullité, (says Favard de Langlade, Rep. vo. Nullité, part. 3), il faut y avoir intérêt. Une nullité serait même susceptible d'être prononcée dans l'intérêt de la loi qu'elle ne pourrait pas l'être dans celui de la partie à qui elle ne fait aucun tort.

It is on this principle that, under the civil law, a minor who, after becoming of age, obtains the rescission of a contract entered into with the required formalities whilst he was a minor, is given that recourse, as a general rule, not *tanquam minor sed tanquam læsus.*

After saying that a contract of insurance so rescinded *ab initio* must be considered as never having produced any effect, Lefort, Assur. sur la vie, Vol. 3, pages 9 and 17, adds, quoting other leading commentators:

(1) 11 Can. S. C. R. 450.

Mais il importe de noter que le contrat ayant eu une existence, la responsibilité de l'assureur ayant été engagée, ce dernier a le droit de conserver les primes qui représentent les risques courus. * * Dans l'assurance, il est impossible que l'assuré rende l'assureur ce qu'il a reçu de lui, c'est-à-dire la garantie de la chose assurée.

And Demolombe, Vol. 25, No. 464, citing cases in the Cour de Cassation and other courts upon an analogous question, points out how, in a case of this kind, it is impossible to replace things in the same state as if the contract had never existed, in the words of art. 1088 of the Code, saying

car le caractère de la convention est tel qu'il est impossible d'effacer, in præteritum, les conséquences qu'elle a produites, tant qu'elle existait.

See also Troplong, Contrats Aléatoires, Nos. 154,298.

For the same reasons the action, taken as one *condictione sine causâ*, arts. 984 and 989 C. C., must likewise fail.

The appellant has received from the company in return for the premiums all the value and consideration he could expect up to the time he chose not to renew his bi-monthly contracts with them. Were he now to be re-imbursed all that he has paid to the company, he would make a speculation out of their fraud. And that he cannot be allowed to do. Where a party to a voidable contract has received a benefit under it, he is bound by it; and if the contract be rescinded and it be, as in this case, impossible for him to return the benefit because of the nature of the benefit, he cannot recover the sum he paid for it. He is not entitled to both. He paid for nothing that he did not get. He got everything that he paid for.

For every mortuary call he paid, he received compensation by the assurance that if he were to be the next one to be called out of the world his surviving partners would pay to his executors or beneficiaries the $20,000 he was insured for.

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L'assureur, ayant jusqu'au jour de l'annulation du contrat couru les risques, les primes qui correspondent à la période des risques n'ont pas été payées sans cause et ne sont pas sujettes à répétition. Dall. 78, 2, 58, 60.

A judgment reported in Sirey, 83, 2, 19, orders the return of the premiums upon the rescission of a policy, but there the policy was void, *nulle ab initio* (not merely voidable, *annulable*) for a reason that might have been invoked by the insurer as well as by the insured. And the Court of Appeal affirming the judgment *de première instance* distinctly points out the difference and holds that if the policy had been valid at its origin, the insured would not have been entitled to a return of the premiums.

The judgment (reprinted in the factum) of the court of original jurisdiction in the case precisely similar to this one of Bernardin against this same company, now respondent, has since been affirmed by the Paris Court of Appeal on the 10th February last [*Bernardin* v. *La Réserve Mutuelle des Etats-Unis*] (1). One of the *considérants* upon which the judgment of that court dismissing the action rests, has its full application here. It reads as follows:

> Considérant que les demandeurs ont joui respectivement des avantages de l'assurance pendant plus de dix ou onze ans, qu'ainsi l'effet de l'assurance, qui consiste dans la garantie du risque mortuaire, a été produite contre la compagnie, alors que, par la restitution des primes, si elle était ordonnée, l'effet de l'assurance ne se produirait pas contre eux, et que l'allocation de dommages-intérêts, réquise au profit de mutualistes sortis volontairement de l'association, aurait pour conséquence d'en faire supporter la charge par les nouveaux associés, derniers admis, ce qui serait contraire à l'équité et à la règle de l'égalité qui doit persister entre mutualistes * * *

Such is the law that rules this case.

I would dismiss the appeal, without costs however, as the findings of fraud by the trial judge against the

(1) Gaz. des Trib. 26 fév. 1904.

company respondent are amply supported by the evidence of record.

SEDGEWICK J.—I dissent from the judgment of the majority of the court dismissing this appeal for the reasons stated by my brother Nesbitt, in which I entirely concur.

DAVIES J.—For the reasons given by the Chief Justice of the Court of King's Bench, speaking for the whole court, I am of opinion that this appeal should be dismissed.

I think the fact that the company was a mutual one and carried on under the assessment system, and that the underlying principle of the company was over and over again in its documents and literature declared to be the natural premium principle as distinct from the level rate premium adopted by all old line companies, would call for very strong and positive evidence to shew that these principles were to be so far departed from as to ensure to the appellant an assurance for $20,000 on assessment calculated upon his age at entry into the association and which assessments were not to be subsequently increased. Such evidence as I shall shew is, in my opinion, distinctly wanting.

Nor do I think plaintiff has succeeded in shewing that there were other fraudulent representations made to him going to the basis of the contract at and before the time he entered into it, and which induced him to enter into it, which would avail him to have all the premiums he paid during the years, he was insured returned to him.

We have been pressed with the argument that the late decision in the House of Lords of *The Mutual Reserve Fund Life Association* v. *Foster* (1), confirming a

(1) 20 Times L. R. 715.

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judgment of the Court of Appeal for a rescission of the policy and a return of all the moneys paid thereunder settled the questions in controversy in this appeal and is binding on us. If the substantial questions there determined were to be determined on this appeal and on the same or analogous facts, I should not for a moment hesitate to follow that decision. We have had the advantage of having a re-argument of this appeal on this one point as to whether the decision of the House of Lords substantially covers it, and I am opinion that it does not. It is true the company is the same and that in very many particulars the policy there rescinded was the same as those in question on this appeal. But *Foster's Case* (1) was one for rescission of an existing contract in which it was not necessary to allege or prove fraud, and the grounds upon which the contract was rescinded were that the policy was not such a policy as was held out to him being wholly inconsistent with Bridgeman's letter supported by its accompanying documents, and that it differed essentially and on the vital point of the age on which assessments should be levied from the representations made to the plaintiff before and at the time when the proposal was signed and upon which he acted, and that the documents circulated by the company and on which Foster and Bridgeman, their officer, acted were tricky and misleading on this vital point of age for assessment purposes.

The policy in the *Foster Case* (1) expressly declared in its third clause or provision that

> There should be payable to the association a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount should not exceed the maximum rates indorsed thereon according to the age of each member.

(1) 20 Times L. R. 715.

Indorsed upon the policy was a schedule showing in columns the ages of the members from 25 to 60 and opposite to each age two sums in separate columns, one being headed "largest amount which may be collected every two months" and the other "maximum amount which can be collected annually on each £100 insured." The main question there debated was whether the age of the member was intended to mean his age "at entry" or at the time of the call or assessment. It was held, under the terms of the policy, to mean the latter; but the contract was set aside because of the Bridgeman letter and other documents submitted to Foster at the time he applied for insurance which it was held justified him in believing that he was only to be assessed at the rates as of the age of entry. The Bridgeman letter was clear and specific. He was assured that "it (the assurance) would cost him about £70 per annum only" and calculated on the basis of *age at entry* that was correct, but on the basis of *attained age* at the time the calls would be made, which was the legal construction of the policy given Foster, was entirely misleading.

This action is entirely different. It is not an action to have an existing policy declared to mean what the insurer was led to believe it did mean when entering into it or in the alternative to have it rescinded, but is one brought to have it declared that on policies which the plaintiff knowingly allowed to lapse, before action brought, the lapsed policies should be declared void *ab initio* and all the assessments paid under them returned to the plaintiff with interest on the ground of fraudulent representations made before and at the time of plaintiff taking out his policy.

The first policy in this case taken out by plaintiff for $10,000 in 1885, was in its fifth clause expressly made

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subject to all the provisions and conditions contained in the constitution and by-laws of this association with the amendments made and that may be hereafter made thereto.

Clause 1 provided for the levying of assessments

at such rates according to the age of each member as may be established by the said Board of Directors,

while clause 3, in its closing words, declared that

at each apportionment the rate of assessment may be changed to correspond with the actual mortality experience of the association.

Nowhere in this contract, either in the body or in the table of rates indorsed upon it, is any reference made to any "maximum rates" which could not be exceeded, or to any "age of entry" as the age on which assessments should be based. So far from that being true the provision was for

such rates according to the age of each member as might be established by the Board of Directors,

and that without regard to any limit. That, together with the express power at each apportionment to change the rate, seems to me to be the main and broad distinction between the policy in the *Foster Case* (1) and the first one in the present appeal. The plaintiff's chief claim, as I understand, is that he is entitled to have had a maximum rate and that such rate should be based upon his age at entry, and the answer is that so far as the first policy is concerned there was no reference whatever to any maximum rate or any limit except the rate which might be fixed by the directors as necessary to meet the accruing death charges.

Then, is there anything in the evidence here with respect to the inducements held out to the plaintiff to take out policies analogous to the Bridgeman letter and its accompanying documents as shewing that the "age of entry" was intended as the age on which the assessment should be made? I am not able to find

(1) 20 Times L. R. 715.

anything, and a careful reading of the evidence given by the plaintiff himself as to the inducements held out to him to insure convinces me that whatever else they were, the right to be assessed for calls only on the "age of entry" was not one of them.

The plaintiff says he was solicited to take the insurance and, to induce him, the agent used the circular put in evidence. He quotes the parts of the circular on which he says he relied and so far as its truthfulness is challenged his evidence reads as follows:

"The expenses of the management limited to $2 on each $1,000." That was very material for me.

"A Reserve fund which provides against excessive assessments. The interest on the reserve fund is applied to the payment of death claims. This will be nearly, or quite sufficient to pay all claims caused by any increase in the death rate by reason of the advancing age of the association". That I considered most important.

"Graded assessments so that each member pays only his exact share. Its system provides through its reserve fund for the decrease of assessments and this lessens payment in after years. The assessment of persistent members will be greatly reduced in fifteen years, and it is estimated that the certificate will be nearly, if not quite self-sustaining."

"It pays all legitimate claims promptly and in full."

"Its members have a voice and vote in the management."

And on page 5: "Insurance actuaries calculate that should this association experience the same mortality and ratio of lapses as that experienced by the level premium companies in the past decade, its certificates will be self sustaining after fifteen years."

The foregoing are substantially all the alleged representations which induced the plaintiff to take out his policy. Where is anything said or called to plaintiff's attention which could have induced him to believe that age of entry was to be the only age at which he could be assessed. I do not find anything. Much was pointed out which convinced him the policy would be a much more favourable one than it turned out to be.

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But on the crucial point of "age of entry" the representations are silent. The broad comment I would make upon these extracts from the circular (on which the plaintiff says he relied) as shewing how different this case is from Foster's, is that they make no reference to maximum or minimum rates, nor do they say anything with respect to the crucial question whether these rates were to be calculated as plaintiff now contends he was induced to believe on the "age of entry" or the "attained age" when the calls were made.

With regard to the truthfulness or otherwise of the statement or predictions themselves it does seem to me that there might be great difficulty in reaching a conclusion as to them if instead of assessing on the basis of "age of entry" the directors had from the time plaintiff became a member assessed on that of "attained age", and if the members themselves had allowed the reserve fund to remain intact. But, in the beginning of the year 1889, the members themselves at the annual meeting, by what is known as the Shield's resolution, determined that the age of entry should be retained and continued as the basis upon which assessments should be levied and radically impaired the *surplus reserve emergency fund* by applying the current receipts applicable to it to the payment of death claims. These expedients gave temporary relief to the existing members it is true, but they were the action of the members themselves or of the necessary majority under the constitution. But the carrying out of this Shield's resolution could only have one result, and that was the impairment of the reserve and eventually its destruction with the alternative of bankruptcy or the placing of the assessments upon the only possible scientific basis (if indeed it is that) of attained age. If the reserve system and the "attained age" as the basis of the assessments had not been

departed from there might possibly have been a substantial reduction in the amount of assessments of "persistent members in fifteen years" as promised, and the statements as to the calculations of insurance actuaries would not necessarily be false. It might require a lively imagination to believe in the fulfilment of the predictions but, granted the data I have assumed, namely, the assessment of all the members at their respective attained ages and the maintenance intact of the reserve, I do not find any evidence to convince me that the statements quoted from the circular by the plaintiff were necessarily false, much less false to the knowledge of those who made them. Of course if you assume age of entry as the basis of the actuarial statements of the circulars on which plaintiff says he relied it would be easy to prove their falsity, and a not unreasonable conclusion that their author must have known them to be so.

The same inducements were placed before plaintiff to take out his second policy, namely, the company's circular, known as Exhibit No. 3, from which I have quoted above.

Plaintiff also refers to another circular, Exhibit No. 26, as having been shown to him, but does not point out specially anything in it as distinct from the statements of the first circular upon which he depended. It seems clear to me, at any rate in the absence of any special statement in the latter circular having been relied on by plaintiff, that his case must rest upon his first policy and the inducements under which heapplied for it. The second policy differed from the first in having the "Table of Rates" indorsed showing a "maximum amount which could be collected annually on each $1,000," with a note at the foot stating that this rate was based upon the mortality tables and the experience of the association for *current ages*

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The body of the policy expressly provided for a bi-monthly

payment of a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount shall be at such rates according to the age of each member as may be established by the Board of Directors.

The question of maximum and minimum rates has been magnified. The complaint is not that the maximum of one or other age has been exceeded—indeed that of attained age is admitted not to have been—but that "attained age" was adopted and exacted in levying assessments instead of age of entry. And it seems to me that the question on this branch of the case has been reduced to whether there is such evidence in the case as shews that the plaintiff was clearly induced to take out his policy by representations that his premium annually would not exceed the maximum sum payable on his age at entry and so bring it within the principle laid down in the House of Lords in the *Foster Case* (1).

The fact that for years subsequent to the taking out of his policies and the passage of the Shield's resolution the assessments were based upon the *age of entry* and that the calls upon the members for these assessments gave prominence to this fact cannot in any way avail the plaintiff. Both he and the management may have been living in a fool's paradise. It appears to me the passage of the Shield's resolution by the members of the association and the attempt to carry on the company on the basis it prescribed foredoomed the company to failure, but there is nothing in anything which transpired after his policies were taken out which can avail plaintiff in this action.

Having reached these conclusions I have not thought it necessary to go into the question of the effect of the

(1) 20 Times L. R. 715.

plaintiff's acquiescence in the raising of the rates or as to whether considering the pecuniary and other benefits he derived from the assurance on his life for so many years at the premiums paid by him the facts shew he has really sustained actionable damage. On both points I incline against the appellant.

As the majority of the court is not agreed as to the grounds upon which the appeal should be dismissed I concur that under the circumstances there should be no costs.

NESBITT J. (dissenting).—I have had the advantage of reading the judgments of the Chief Justice and my brother Davies. I am unable to agree with the g ounds upon which either arrives at the result of dismissal of this appeal. I concur with the Chief Justice that both policies were obtained by misleading and fraudulent misrepresentations.

I cannot view the so-called puffing circulars as mere boastings or think that the plaintiff should have looked upon them as mere expressions of hope and expectation. Language which under some circumstances may well be held to be hope and expectation may, under other circumstances, be looked upon as a representation which a party is entitled to rely upon, and I think that in this case the plaintiff would be entitled to assume that the statements were statements of fact. The language was adopted by experts in insurance who professed to have discovered a new system of insurance which differed from any other system in vogue, and that the result of this system was that the person insuring would save from one half to two-thirds of capital which he otherwise would take from his business to pay the old line companies for the same amount of insurance; that by the use of the reserve fund his certificate would be practically

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self-sustaining after fifteen years as the reserve fund provided against excessive assessments, and that the reserve fund had securely invested more than was necessary to meet all liabilities; and that by reason of the cutting down of the cost of management the company was able to furnish life insurance at one-half the rates of ordinary companies, and that cost would not increase as age advanced. It might be less, but it would not exceed the maximum amount indicated by tables, etc.

It is urged that the second policy differs from the first inasmuch as the second policy has a table on the back containing minimum and maximum amounts. But the constitution and by-laws of the society are made part of the first policy, and I cannot read the policy with the constitution and by-laws as reasonably indicating to a person of average intelligence that the premiums which he was asked to pay would not exceed the amount stated upon the back of the policy as at age of entry, coupled with the representation which the plaintiff was led to rely upon as coming from experts asserting that they had discovered a new system of insurance. I think that the two policies are upon the same footing and that both are substantially upon the same footing as the policy in the *Foster Case* (1) and the more recent case of *Cross* v. *Mutual Reserve Life Ins. Co.* (2). It is answered that, assuming the circulars and agents' statements were untrue, the plaintiff upon reading his policy should have discovered the fraud, that in fact he had become a member of a company which entitled the directors to assess at least up to the maximum amounts called for by the policies at current age, that with the knowledge of such a condition of things he elected to treat the policy as existing, and that he has received benefits

(1) 20 Times L. R. 715. (2) 21 Times L. R. 15.

under the policy by being kept insured during a number of years.

In my view the policies were framed in such tricky and misleading language and the calls which were sent to the plaintiff were so framed that any reasonable person would be thrown off his guard and would have remained in a state of blissful ignorance of the real nature of the contract and have been entitled to assume that the age of entry was what was intended, and that when a highly increased assessment was asked for it was only asked for by way of advanced payment in order to satisfy the technical requirements of the Superintendent of Insurance for the State of New York. I think, therefore, that the defence of approbation of the contract, if I may so describe it, fails, and that when the plaintiff really became aware of the nature of the gross fraud which, in my opinion, has been perpetrated upon him, he, within a reasonable time, took action to recover the premium.

I find in the record in the *Foster Case* (1), in the House of Lords that the very point was made that there could not be a return of the premium because the plaintiff in that case had been kept insured and had in reality suffered no damage, but, notwithstanding such an argument, the House ordered a return of the premiums with interest, and the same argument was addressed to the court in the *Cross Case* (2), but without avail. It seems to me that where the plaintiff has been induced by fraud to enter into a contract of insurance (although he may be said to be kept insured during the time that he remained ignorant of the fraud and until he claimed a return of his money) he is entitled as against the person guilty of the fraud to say, you obtained my money in bad faith, you shall not be heard to say that I have received benefit. As a

(1) 20 Times L. R. 715. (2) 21 Times L. R. 15.

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fact it is difficult to say whether he had received a benefit by the so-called contract of insurance which he allowed to expire. Had he died in the meantime and the company had offered to pay the money his representatives would not be able to elect to take the money and also claim that the premiums had been obtained through fraud, and ask for a return of them; but, is he in this position? If it is found that the premiums were obtained through fraud, and the plaintiff is to be defeated in this case, I do not see how Foster was able to obtain a return of his premiums where he (Foster) had received precisely the same benefits as plaintiff did, and was asking to rescind the contract. I cannot see what difference it makes that the plaintiff, unable to keep up the extortionate demands made upon him, pays under protest, and says, in this case: "the contract is obtained by fraud—I have just discovered it—I demand my premiums so paid;" and, in the other case says: "I have been misled into a contract different from what I expected I was entering into, and as the court finds that the contract is as the other side argued for it I claim to be entitled to receive my money back." Both the parties may be said to have enjoyed the benefit of insurance during the time they remained ignorant.

In the last case the House of Lords has said that the premiums are to be returned with interest. In the present case I think the principle of that decision is clearly applicable and that the plaintiff is entitled to recover the premiums paid, with interest, and costs in all the courts. It may be said that this is hard measure, but there is high authority for saying "the way of the transgressor is hard." The case is one of much importance and involves, we are told, many others, and I regret that the questions of law cannot be said

to be settled by our present decision which proceeds on such various grounds.

KILLAM J.—In the main I agree with the views so well expressed by Sir Alexander Lacoste C.J., in the Court of Appeal for Quebec, and by my brother Davies here.

I desire to state as briefly as possible the grounds upon which, particularly, I base the conclusion that this appeal should be dismissed.

The formal transaction began in each case with the filling up, by the appellant himself, of blanks in a printed form entitled "Application for a Membership in the Mutual Reserve Fund Life Association," and its signature by him. Each application was, by its terms, expressed to be subject to all the limitations and requirements of the constitution and by-laws of the association, with the amendments made or that might thereafter be made thereto, all of which were thereby made part of any certificate that might be issued on the application. And the applicant agreed that, if he or his representatives should omit or neglect to make any payment as required by the conditions of such certificate or by the constitution and by-laws of the association, then the certificate to be issued upon the application should be null and void, and the officers of the association might cancel the certificate, and all money paid thereon should be forfeited to the association.

At the top of each form were the words: "This abstract of the application is to be filled up at the office only." Certain particulars were given, among them "assessments", the blanks following which were filled in "$17.60" and "$20.00" respectively. These particulars were evidently memoranda for the company's convenience, not intended to be part of the

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application. The blanks are not shewn to have been filled in by the appellant or before he signed, and I infer that they were not filled in until after the applications were received at the head office. I would not take these particulars either as forming any part of the application or as having influenced the appellant to enter into the contract.

Upon each application was issued what was called a "Certificate of Membership". Between the two documents there were differences which in some aspects might be material, but for the purposes of my present reasoning I treat the two as practically alike. By each it was stated that, in consideration of the application (which was expressed to be made a part of the contract), the association thereby received the applicant as a member of the association. By each there was to be payable to the legal representatives of the applicant, upon his death, $10,000. Each provided for the making of assessments upon the members to meet death claims, the assessments to be at such rates, according to the age of each member, as might be established by the Board of Directors, and the amounts (less 25 per cent) to go into a death fund out of which the death claims were primarily to be paid. The 25 per cent was to go into a reserve fund and, at the expiration of each period of five years, a bond was to be issued to each member for an equitable proportion of the reserve fund; and it was provided that, at each apportionment, the rate of assessment might be changed to correspond with the actual mortality experience of the association.

The first instrument expressly provided (par. 5) that it should be subject to all the provisions and conditions contained in the constitution and by-laws of the association, with the amendments made and that might thereafter be made thereto. The second did not

set out such a provision in terms, but through the incorporation of the application it appears to have embodied it.

On the back of the first certificate there was indorsed what was styled a "table of rates," in which it was stated "the basis of the assessment rate for each member, according to the age taken at the nearest birthday, on each $1,000, is as follows"; this was followed by columns giving rates opposite different ages.

On the back of the second certificate there was indorsed what was styled "mortuary rates and comparison of cost," composed of columns for "age," "minimum rate of each bi-monthly assessment on $1,000 insurance," "maximum amount which can be collected annually on each $1,000 insurance," and "old line rates," giving amounts opposite different ages.

The judgment of the Superior Court proceeded solely upon the ground that the appellant had been induced by misrepresentation to enter into the contracts. Upon this point alone the case has been argued before us. There is no question of contravention of either contract, or of the levy of assessments in excess of what the terms of the contracts warranted.

Fortunately we are not left to evidence of verbal representations, but the appellant points to two circulars issued by the association (exhibits 3 and 26) as containing the representations, and to no others. These alone should be considered for the purpose.

These circulars set out the system of insurance adopted by the association. Naturally they magnified the advantages of the system and its prospective results, and made claim to great superiority over other systems. In so far as the nature of the system was concerned it was accurately described. Unfortunately

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the expectations were not realized; the advantages and superiority were not all that were claimed.

I will not go over the circulars in detail but will refer only to the portions upon which the argument for the appellant appears to be the strongest. The principal complaint on the part of the appellant is that he was induced to believe that the contracts were to be such that assessments were always to be made with reference to ages of entry into the association, and were not to advance beyond the maxium amounts shewn by the table for the ages of entry. There does not seem to me to have been anything in the circulars representing such a limitation as part of the contracts into which parties were invited to enter. The tables of maximum rates did not specify that they were to be calculated upon the ages of entry. The strongest clause of the circulars in this respect was one to the effect that

> the interest on the reserve fund is applied to the payment of death claims. This will be nearly or quite sufficient to pay all claims caused by any increase in the death rate by reason of the advancing age of the association.

This is claimed to amount to a representation that the assessment would not increase with the age of the insured.

There is a manifest difference between increase by reason of the advancing age of the association and increase due to the advancing age of the insured. The framers of the circulars might think that, for some years at least, there would be an increase in the death rate among members which would not be wholly met by the addition of new members, and that the interest on the reserve fund would make up this deficiency. The realization of this expectation would depend upon many contingencies. The expression of the expectation could not properly be understood as more than an expression of opinion.

But all the members had to bear in some proportions the assessments necessary to meet death claims, even if the aggregate did not increase by reason of the advancing age of the association. And as new members were introduced, if, as stated in the circulars, the assessments were to be graded so that each member would pay only his exact share, the apportionment among them should have reference to relative ages and chances of life, for which purpose actual ages ought to be taken. This clause of the circulars did not touch upon that subject.

And those responsible for the circulars might have honestly believed and honestly expressed the opinion that the system provided, through its reserve fund, for the decrease of assessments, that this would lessen payments in after years, and that the payments of members would be greatly reduced in fifteen years, if the assessments should be properly apportioned among members and the reserve fund kept increasing according to the system—that there would come a time when the accumulation in the reserve fund would provide sufficient to largely or wholly pay for insurance during the balance of life.

The circulars should not be read as expressing more than the opinions of the responsible heads of the association in these respects. We have not to consider whether the system was sound or fallacious, whether the expectations were reasonable or unreasonable, but whether or not the proposed contracts were wrongly represented.

Evidence of experts in insurance was given for the purpose of shewing that actuaries could not have made the calculations stated in the circulars; but this evidence does not appear to me to prove that, if the system had been fairly laid before actuaries deemed to be reliable, they might not have so calculated. The

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experts were probably referring to the practice subsequently followed and not to the real system outlined. The other portions of the circulars seem sufficiently covered by these remarks. I cannot find that there was in either any misrepresentation sufficient to avoid the contracts, whether under the law of England or under that of Quebec. It was not proved that anything stated as a fact was untrue, or that anything stated as matter of opinion or expectation did not represent the real opinion or expectation of the responsible heads of the association.

I wish to add but a few words as to *Foster's Case* (1). It appears to have determined only that an assured person in his position, deceived as he was adjuged to have been deceived, and drawn into accepting as the embodiment of his contract a written document calculated, as that was adjuged to have been, to maintain the deception, may have judgment for the rescission of the contract and a return of the moneys paid under it, even after acting under it to the extent that he did, and after suing in the alternative as he did and failing upon the question of interpretation. When it is sought to apply the decision in another case, it is necessary to consider whether there have been similar misrepresentations or other material and false representations inducing the contract and whether the policy is similarly deceiving.

In my opinion neither the representations nor the policies or certificates in this case were similar to the representations or the policy in *Foster's Case* (1). These documents provided for assessments at such rates, according to the age of each member (presumably at the age of assessment), as might be established by the board of directors, and also for changes in the rates. Thus, on the face of the

(1) 20 Times L. R. 715.

documents, apart entirely from the constitution and by-laws (to which I have purposely omitted specific reference as their terms did not appear in the documents), there was no apparent limitation upon the powers of the directors and nothing to mislead in that regard. The contracts being clear in these respects upon their face, and there being no evidence that the appellant was misled as to their terms, the decision in *The Provident Savings Life Assurance Society* v. *Mowat* (1), and the cases there cited seem applicable.

Under the circumstances I agree that there shall be no costs.

Appeal dismissed without costs.

Solicitors for the appellant: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitors for the respondents: *Geoffrion, Geoffrion & Cusson.*

(1) 32 Can. S. C. R. 147.