THE MANUFACTURERS LIFE INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

JOSEPH NAPOLEON ANCTIL (PLAINTIFF) ..... } RESPONDENT.

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*Oct. 11, 12.

*Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

*Insurance, life — Wagering policy — Nullity — Waiver of illegality— Insurable interest—Estoppel—*14 *Geo. III. c.* 48 *(Imp.)—Arts.* 2474, 2480, 2590 *C. C.*

A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.

Judgment of the Court of Queen's Bench reversed, Sedgewick J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court sitting in Review at Quebec, and ordering judgment to be entered for the plaintiff with costs.

The action was tried in the District of Kamouraska, before Mr. Justice Cimon and a jury, and upon the answers by the jury to the questions submitted both the plaintiff and the defendant moved for judgment, the defendants also moving alternately for a new trial, before the Superior Court sitting in Review at Quebec, where judgment was rendered by the majority of the court (Cimon J. dissenting), dismissing the plaintiff's motion for judgment, and granting the defendants' motion for a new trial. On appeal the Court of Queen's Bench reversed the Superior Court judgment

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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and ordered a judgment to be entered upon the verdict for $2,000 in favour of the plaintiff with costs. From the latter judgment the defendant appealed.

The case is sufficiently stated in the judgments reported.

Casgrain Q.C. for the appellant. Combining the findings of the jury with the admissions, it appears that at the time of the application for insurance and afterwards, the insured was without means, and unable to pay the premiums; that he was not related to the respondent, but only very remotely a connection of the latter's wife; he owed the respondent nothing at the time he made the application; and the respondent had then no pecuniary or other interest in his life; he never had the intention of insuring his life and paying the premiums, but executed the application upon being assured that the respondent would pay the premiums as agreed previously on condition that the policy should be made payable to him. The respondent participated in the application by entering into a contemporaneous agreement to give Pettigrew what he needed, provided the policy should be so issued, and never regarded the policy otherwise than as a speculation. The undertaking by the insured to pay the premiums was therefore only colourable, and devised to mask the fact that the respondent intended to pay the premiums in return for the benefit of the policy, and that he was the sole party interested. Compare *The North American Life Assurance Co.* v. *Craigen* (1) and remarks by Strong J. at pages 291-292. See also Imperial Statute, 14 Geo. III, c. 48, Arts. 2474, 2480, 2590 C. C. and *Vézina* v. *The New York Life Insurance Co.* (2). The facts that the insured lent himself to the device of ostensibly insuring his life

(1) 13 Can. S. C. R. 278. (2) 6 Can. S. C. R. 30.

and undertaking to pay premiums that he knew were far beyond his means and position in life, and that the company's agent connived at the contrivance, cannot alter the essence of the policy. From its inception it was a wager by the respondent on the length of another person's life. The respondent's interest was not in Pettigrew's life, but in his death. We also refer to *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (1); *Bloomington Mutual Benefit Association* v. *Blue* (2); Crawley on Life Insurance, p. 26; *Wainewright* v *Bland* (3), *Shilling* v. *Accidental Death Insurance Co.* (4).

The Court of Queen's Bench, considered that the effect of the clause declaring the policy to be indisputable, was to require proof of moral fraud, or intentional concealment, contrary to the doctrine laid down in *Venner* v. *The Sun Life Insurance Co.* (5), a case of an unconditional policy effected by a debtor on his life in favour of a creditor. Here however the policy was void *ab initio;* there never was any valid existing contract which could be declared indisputable and the consent of the appellants to the insurance was fraudulently obtained upon warranties subsequently proved to be false. The case of *Wheelton* v. *Hardisty* (6), is easily distinguished. Here the falsity of the warranties goes to the very essence of the undertaking, and makes the insurance void from the beginning. 3 Bedarride, Dol et Fraude, § 1287; Ruben de Couder, Dict. de Droit vo. "Assurance sur la Vie," nos. 295, 305, 369, *et seq.*; Crawley on Life Insurance, p. 119; Bliss, (2 ed.) § 36; Porter, (2 ed.) 146, 197; 24 Laurent, no. 254.

(1) 94 U. S. R. 457.
(2) 120 Ill. 121.
(3) 1 Moo. & R. 481.
(4) 1 F. & F. 116; 2 H. & N. 42.
(5) 17 Can. S. C. R. 394.
(6) 8 E. & B. 232; 5 Jur. N.S. 14.

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Fitzpatrick Q.C. and *Lafleur* for the respondent. The jury have found that there was no fraud or material misrepresentation or concealment, and these findings on matters of fact were adopted by the Court of Queen's Bench and ought not to be disturbed in a second appellate court. *Demers* v. *Montreal Steam Laundry Co.* (1). There is an important distinction between false declarations innocently made and those fraudulently made; *Wheelton* v. *Hardisty* (2); *Wood* v. *Dwarris* (3). The answers of the insured were given in good faith and they must consequently be favourably interpreted (4), and the clause providing that the policy shall be indisputable after a lapse of one year must be given its fullest effect. The Court of Review was unanimous in considering this clause as decisive, and the jury found that whatever errors may have been made, the answers in the application were given in good faith without intent to deceive. The Court of Queen's Bench unanimously adopted the same view. The respondent's relations to the insured were merely of a benevolent character and could of course give him no interest of an insurable nature in the life, but the insured could insure his own life (5), and this is what he did for the benefit he might receive in obtaining the tontine endowment or other advantages at the end of the fifteen years, the term of the policy, incidentally making his benefactor a beneficiary in case he died before that time. There is nothing illegal in this. The jury found no fraud, and the verdict should not be disturbed on this point either; *Metropolitan Railway Co.* v. *Wright* (6); 2 Graham & Waterman, New Trials, (2 ed.) 1283-7 and 1290 *et seq.* There was evidence to support the findings of the jury.

(1) 27 Can. S. C. R. 537.
(2) 8 E. & B. 232; 5 Jur. N.S. 14.
(3) 11 Ex. 493; 25 L. J. Ex. 129.
(4) Art. 2588 C. C.
(5) Art. 2474 C. C.
(6) 11 App. Cas. 152.

The company is also estopped from pleading its own turpitude, even if the contract be held to be a wagering policy and voidable on that account, for they accepted the premiums and hold them still and ought not to be allowed to benefit by their own fault. The jury have found that the company was fully aware of the relations existing between the insured and the respondent, and that with this knowledge they issued the policy. The observations of Henry J., at page 45, in *Vézina* v. *New York Life Insurance Co.* (1) are in point, so also those of Ritchie C.J., at page 289, in *The North American Life Assurance Co.* v. *Craigen* (2). The true principles are laid down in *The Phœnix Insurance Co.* v. *McGhee* (3).

TASCHEREAU J.—This appeal must be allowed and the action dismissed. I have had communication of my brother Gwynne's opinion, and I could not add anything to it. I concur in every word of it. The clause by which the company stipulated that this policy would not be disputed after one year does not help the respondent's case. "*Pactis privatorum juri publico non derogatur*" (4). Private interests must give way before public interests The stipulation itself is contrary to law and public order. The company, appellant's, position in this case is certainly not a deserving one, but a defence like theirs to an action of this nature is allowed not for the sake of the defendant, but of the law itself. There can be no waiver of such an objection. *Coppell* v. *Hall* (5); 2 Solon, Nullité, no. 345. "La partie qui a contracté une obligation en fraude de la loi est recevable à en demander la nullité." Dalloz, '46, 2, 195; S. V. '65,

(1) 6 Can. S. C. R. 30.
(2) 13 Can. S. C. R. 278.
(3) 18 Can. S. C. R. 61.
(4) Broom's Maxims (6 ed.) 651.
(5) 7 Wall. 542.

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1, 77; '67, 2, 86; '70, 1, 357; *Barlow* v. *Kennedy* (1); Bédarride, Dol et Fraude, nos. 1294, 1295. But the action will be dismissed without costs. The appeal will be allowed with costs.

GWYNNE J.—This is an action upon a policy of insurance issued by the defendants upon the life of one Antoine Pettigrew, deceased. The plaintiff in his declaration alleges that the defendants by a policy of insurance by them issued upon the 12th day of May, 1894, upon the life of Antoine Pettigrew, promised the plaintiff to pay him the sum of $2,000 upon his furnishing proof of the death of the said Pettigrew. It then avers the death of Pettigrew upon the 9th of October, 1895. It then avers fulfilment of all conditions of the policy and that the plaintiff "en sa qualité de bénéficiaire du montant de la dite police d'assurance" has in accordance with the regulations of the company and the conditions of the policy made application for the payment of the said sum of two thousand dollars. To this declaration the defendants pleaded eighteen pleas with three of which only, the 11th, 14th, and 16th, we propose to deal, the rest contain various statements which are alleged to have been falsely and fraudulently made in the application for the insurance. The three pleas with which we are dealing taken together set up but one defence, which if established is in law a complete bar to the action, and in substance is, that the plaintiff never has had any insurable interest in the life of the said Antoine Pettigrew, and that the plaintiff was the person really assured; that the contract of insurance is one really by the plaintiff for his own profit upon the life of the said Antoine Pettigrew; and that the said policy of insurance is simply a wagering policy obtained with a view of making an

(1) 17 L. C. Jur. 253.

illegal speculation. Upon issue being joined on these pleas, a long list containing twenty questions, each containing several subdivisions, was directed by the court in accordance with the practice prevailing in the province of Quebec, to be submitted to the jury.

At the trial, upon the policy sued upon being produced and its execution admitted, and upon its being admitted that Pettigrew died on the 9th of October, 1895, as alleged in the declaration, the defendants entered upon the defence and commenced by calling the plaintiff himself upon whose examination it appeared beyond controversy that he had no insurable interest in the life of Pettigrew. His account of the steps taken in the initiation and procuration of the policy was as follows: He said that the defendant's agent Michaud first spoke to him *about taking a policy on the life of Pettigrew;* that Michaud at first asked plaintiff to take a policy on his own life which plaintiff refused to do; that shortly afterwards on a subsequent day, Michaud told witness that he had seen Pettigrew, and that he had said that he had no money; that Michaud then asked the plaintiff if he would pay for a policy on the life of Pettigrew to which the plaintiff replied that he would if the policy should be made payable to himself; that he preferred paying premiums for another to paying premiums on his own life; that this was a way to manage well, "que c'était un moyen d'économiser." He again repeated that it was the defendant's agent Michaud who made to him the proposition that he should insure Pettigrew. He further said that he was present when at his own house the application for the policy was prepared by Michaud and signed by Pettigrew with a [×] cross, the plaintiff himself having written Pettigrew's name to it. It was, he said, Michaud who inserted therein the words describing the plaintiff as Pettigrew's "pro-

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tector" if he ever should be in want. It was then that he said that he would provide for Pettigrew if ever he should be in want "*pourvu*" to use the plaintiff's own language, "*pourvu que la police serait donnée en mon nom.*"

He further said that Michaud and the plaintiff's wife, in her maiden name, by Michaud's direction, signed as witnesses; that Michaud took away the application and some few days afterwards brought to plaintiff a policy on Pettigrew's life and made payable to Pettigrew and his representatives which the plaintiff refused to receive because it was not made payable to himself. He had, he said, *exacted* that if the company should wish to issue a policy *payable to himself directly* he would pay the premiums, but that otherwise he would not take it. Thereupon the policy was returned to the company by Michaud and another policy in place of the first, (the one now sued upon) was sent to Michaud who delivered it to the plaintiff, who accepted it and paid the premiums upon it. Here it is to be observed that Michaud when returning the first policy to the company gave the company to understand that it was Pettigrew who refused to take the policy in the shape in which it was, whereas it appears that Pettigrew had no knowledge whatever of the proceeding. Michaud in his letter dated the 16th May, 1894, to the defendant's agent at Montreal says :—

J'ai reçu les trois dernières polices envoyées dont je vous en retourne une pour correction, celle de M. A. Pettigrew au lieu d'être payable à ses exécuteurs, administrateurs, &c. *il vent léguer* dans sa police pour le montant de la dite police à M. *Joseph Napoleon Anctil* et *il vous demande* s'il vous plaît d'en faire faire la correction *et aussi j'espère* que la compagnie voudra bien faire ce changement ; dans son application c'était M. Anctil qui était *l'héritier bénéficière.*

Michaud having been called as a witness by the plaintiff declared himself to be *l'instigateur* of the

policy sued upon. He gave a somewhat different account from that given by the plaintiff as to the circumstances attending its initiation. He agreed with the plaintiff that he had first asked the plaintiff to insure his own life which the plaintiff declined, but he says that Pettigrew was present at this conversation between him and the plaintiff and that he took an interest in it and joined in it, and he then relates a long conversation which he says then took place between him and Pettigrew in relation to life insurance and the insurance of Pettigrew's own life. It is singular, to say the least, (although what he says took place between him and the dead man is not very material upon the point in issue) that all that Michaud says took place between him and Pettigrew in the plaintiff's presence should have so taken place, and that the plaintiff in his evidence should not have said a word upon the subject. Michaud however says that he had another conversation a few days afterwards with Pettigrew, in consequence of which *he returned* to the plaintiff and asked him "*if he would not himself* take Pettigrew?" and that plaintiff then asked, *what it would cost to insure him?* That Michaud told him the price, whereupon the plaintiff said:

Submit it to him. See him and if he wishes *perhaps I will take the risk, but upon one condition, that the policy shall be made payable to myself.*

This is plainly the occasion upon which Michaud in his cross-examination tells how he overcame plaintiff's objection to taking the risk which Michaud was pressing him to incur. There he said that Anctil at first refused saying that he thought it would cost too much, whereupon Michaud told him how much it would cost and that the plaintiff in reply said:

Voyez-vous, le père peut vivre encore dix à quinze ans, et s'il vivait dix ans, et encore quand bien même qu'il vivrait rien que sept ans, je perdrais de l'argent, ça c'est un coup de dés, on ne sait pas.

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It thus appears that the plaintiff knew very well that what Michaud proposed to him was that he should enter into a gambling speculation, which in the plaintiff's opinion was attended with considerable risk of loss rather than with hope of profit. Michaud then tells how he overcame the plaintiff's scruples. He says that he told him that there is a condition in the defendant's policies which provides that after three years, when a person has paid three years if he wishes to give up the policy the company is obliged to give "*une police acceptée*" and that he, Michaud, thought that one would lose nothing, "*avec une police acceptée.*" He says that to this information and opinion given by Michaud, the plaintiff replied by asking, "*c'est inclus dans la police çela?*" to which Michaud replied by showing plaintiff one of the company's policies which he says he had with him, and he adds that the plaintiff took cognizance of it and after examining it said "*Faites l'examiner et s'il consent je le ferai assurer.*" Thus it appears that the plaintiff was satisfied that if poor Pettigrew should unfortunately live for three years he, the plaintiff, would be safe enough if the company should enter into a policy with himself directly in his own name upon Pettigrew's life with such a condition in it. Michaud then says that up to this time not a word had been said about the plaintiff giving anything to Pettigrew for his support, and he proceeds to say that after the above conversation with the plaintiff he went to Pettigrew and told him that he, Michaud, had found a person to pay the premiums, and that it was the plaintiff, and that he said to Pettigrew "*Je pense qu'il payera les primes; entendez-vous avec lui.*" This, he says, took place on the 5th or 6th of May. Now it does not appear that Pettigrew ever had any interview with the plaintiff in relation to the policy

or made any arrangement with him in respect thereof. Nothing appears to have passed between them save that when the application was being prepared by Michaud in the plaintiff's house for Pettigrew to sign, the plaintiff, apparently to give colour to the statement put into the application by Michaud as Pettigrew's answer to a question required to be answered by the person whose life was proposed to be insured that the plaintiff was Pettigrew's "protector." The plaintiff said that he would provide for Pettigrew if ever he should be in want *provided that*, as the plaintiff says in his own language, "*pourvu que la police serait donnée en mon nom.*" This proviso so frequently insisted upon by the plaintiff appears to be a very explicit expression of the plaintiff's determination to have nothing to do with a policy upon Pettigrew's life unless the company should choose to issue to himself as sole beneficiary a policy to be made in his own name on Pettigrew's life. In fact the proviso attached to the making of the promise and the time when it was made seem rather to indicate that the sole object of the making the promise was to get Pettigrew to sign the application as prepared by Michaud for the purpose of assisting the plaintiff in his project of procuring a policy upon Pettigrew's life to be issued to the plaintiff in his own name.

Pettigrew's presence at the plaintiff's house, where the application was prepared and signed, is thus explained by Michaud. He says that upon the 8th of May, as he was returning to Anctil's house he met Pettigrew on the street and asked him if he would come into Anctil's, saying to him, "*on va terminer cela.*" He adds;

Alors je suis entré.' J'avais une plume et du papier sur moi et j'ai demandé à monsieur Anctil s'il voulait me permettre d'écrire; il a dit: Ecrivez tout ce que vous vondrez. Je lui ai dit que je voulais

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assurer le père Pettigrew. Je lui ai dit. *L'acceptez-vous s'il passe.* Je lui ai dit il peut être refusé par l'examinateur de la compagnie aussi. Et M. Anctil a dit: *C'est votre affaire, si la compagnie accepte payable à moi, alors je paierai les primes.*

Then as to the policy as first issued, he said that the plaintiff refused to accept it when he took it to him, because it was made payable to Pettigrew's representatives and not to himself, and that he told Michaud that he might return it to the company to do as they liked with it for that he would not accept it. Thereupon Michaud (no doubt in his admitted character of "*instigateur*" of the policy), wrote to the company's agent at Montreal (their head office being in Toronto), the disingenuous and untrue letter of the 16th May, 1894; and he admits that he never spoke to Pettigrew upon this matter, and that this transaction of the return of the first policy by the plaintiff's direction and the substitution therefor of the one now sued upon took place without the knowledge or consent of Pettigrew. Now if Pettigrew was ever intended to have any interest in the policy which Michaud was thus promoting; if as Michaud alleges in his letter to the company's Montreal agent of the 16th May, 1894, Pettigrew's object in signing the application, which he did sign in manner aforementioned, was that he might *bequeath* a policy to be issued upon the application to the plaintiff whom he intended to make his "*heretier beneficiare*," the policy as first sent to Michaud was framed in the precise shape which would have enabled Pettigrew to fulfil such intention. He could have transferred the policy had it been delivered to him in its original shape in his lifetime to the plaintiff, or he could have bequeathed it to him by will, but that, as we have seen, was not what the plaintiff had intended. *He had exacted* that the policy should be entered into by the company directly with

himself in his own name, and for this reason he refused it and directed Michaud to return it to the company to do what they liked with it for that if they did not choose to enter into a policy with himself in his own name he would have nothing to do with it. When then Michaud brought to him the policy now sued upon in substitution for the one he had refused, he accepted it as being in precise conformity with the terms he had exacted. It is thus established by the terms of the policy itself which is sued upon and by the evidence of the plaintiff himself and of his witness Michaud that Pettigrew never had and that it never was intended by the plaintiff that he should have any possession of the policy, any interest in it or control over it, and that the plaintiff is the sole person who ever was or that the plaintiff ever intended should be the holder thereof, or who should have any interest therein otherwise than by title derived from himself. Such being the undisputed facts appearing in evidence, and it appearing also that the plaintiff had no insurable interest in Pettigrew's life, the law pronounces the policy to be null and void, and under the circumstances appearing in evidence no verdict whether general or special which should be rendered by a jury in favour of the plaintiff in respect of the issue under consideration could ever be sustained in law. The plaintiff's evidence and the terms of the policy itself, left in point of fact nothing for a jury to entertain as regards the issue under consideration, and the questions assigned before the trial to be submitted to the jury on the trial became in truth inappropriate having regard to the undisputed facts which appeared in evidence.

There were two arguments pressed upon us to which it is only necessary to allude briefly. First, that assuming the policy to be a wagering policy

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as entered into by the defendant with the plaintiff who had no insurable interest in Pettigrew's life, still that as the policy was initiated and investigated by the company's agent who knew all the circumstances attending its initiation and promotion the defendant's should be held to be *in pari delicto* and estopped from urging this defence; but as it is the law which, upon grounds of public policy, pronounces the policy to be void under the circumstances the doctrine of estoppel has no application. It certainly seems strange that the suspicions of the company's agent at Montreal should not have been awakened when he saw on the application the statement in answer to a question submitted to the person whose life was proposed to be insured that the only relationship existing between the plaintiff and Pettigrew was that the former was the latter's "protector." Michaud's letter of the 16th May, 1894, seems to have been written in terms calculated if not intended to mislead, and perhaps it did mislead the Montreal agent, and so the defendants can not be said to be *in pari delicto*, but in no case can they be held to be bound to the plaintiff by a contract entered into under circumstances which the law upon grounds of public policy pronounces to be null and void, and for the same reason, to a policy so made null and void the clause in the policy that it shall be indisputable after the expiration of one year can have no application. Secondly, it was argued that by the tontine provisions of the policy Pettigrew, if he should live for fifteen years and the policy should be kept in force so long, would derive substantial benefit from the policy, but this argument ignores the following facts, namely: that without the plaintiff's consent that policy could not continue in force for fifteen years: that the plaintiff took special care that the policy should be entered

into with himself directly in his own name: that before consenting to accept it he satisfied himself that he could at the expiration of three years terminate it advantageously, under the condition in the policy in that behalf, if Pettigrew should so long live: that by the express terms of the tontine provisions it is the *lawful holder* of the policy who alone becomes entitled to the benefit of those provisions; and lastly, that the plaintiff himself with whom the policy was entered into, or his personal representative in case of his death, or some person claiming lawful title under him, could alone be such *lawful holder* if the policy should be in force at the expiration of fifteen years.

It being then impossible that upon the facts in evidence judgment could ever be recovered by the plaintiff upon the issue under consideration, it remains now to be considered how that issue, in presence of the incontrovertable facts established in evidence, should be dealt with. It would be unfortunate if for any technical reason a new trial should be ordered of an issue the trial of which has already cost so much, and which if tried again must, as the evidence shows, eventuate in judgment for the defendants. The trial having taken place upon an assignment of facts answered by the jury, both plaintiff and defendants moved for judgment before the Court of Review, each claiming to be entitled thereto, and the defendants moved also in the alternative for a new trial. The Court of Review rejected plaintiff's motion for judgment and ordered a new trial. From this judgment the plaintiff, insisting still that he was entitled to judgment in his favour, appealed to the Court of Queen's Bench at Quebec. By this appeal the case was again, we think, at large before the Court of Queen's Bench which court should have pronounced the judgment which should have been pronounced by

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the Court of Review on the original motions. That court reversed the judgment of the Court of Review and granted the plaintiff's motion for judgment. From that judgment the defendants now appeal to this court, and we are bound to give the judgment which, we are of opinion, should have been given by the Court of Queen's Bench and by the Court of Review upon the original motions for judgment in that court; and for the reasons already given we are of opinion that judgment cannot be rendered in favour of the plaintiff.

Then as to the defendants' motion for judgment there are only three questions of the jury the answers to which appear to require consideration; the answers of the jury to the other questions relating to the issue under consideration are in perfect accord with the evidence as given by the plaintiff and relied upon by the defendants. As to these latter questions the jury in substance say:—

1. That the policy sued upon was issued by the defendants and that the plaintiff is the Joseph Napoleon Anctil mentioned in the policy:—2. That the said policy was issued upon an application signed by Pettigrew with his mark:—3. That the plaintiff wrote the name of Pettigrew to the application:—4. That Pettigrew's name was written by the plaintiff with the consent of Pettigrew:—5. That Pettigrew at the time of setting his name to the application was a poor man not having any means whatever:—6. That plaintiff paid all the premiums which were paid:—7. That before the issuing to the plaintiff of the policy sued upon the defendants had upon the said application issued a policy payable to Pettigrew or his representatives, and that the plaintiff refused to accept that policy and in substitution for it had exacted the policy sued upon.

All these answers are in perfect accord with the contention of the defendants and with the evidence as given by the plaintiff himself and on his behalf by Michaud in support of defendants' contention. The only questions, the answers to which require any consideration, are the 6th, 8th and 9th in the assignment of facts prepared before the trial for submission to the jury. The first of these is a question submitted to the jury immediately after and in close context with questions relating to the signing of the application which elicited the answers of the jury to the effect that the application was signed by Pettigrew with his × mark, his name having been subscribed thereto by the plaintiff, and that the plaintiff's wife had subscribed as a witness in her maiden name, and that at the time of its having been so signed Pettigrew was a poor man without any means whatever. Then is put the 6th question for the purpose plainly of eliciting the opinion of the jury upon the question whether, from the manner of procuring the signature of Pettigrew to the application it was or was not the plaintiff who was applying for an insurance to himself for his own benefit upon Pettigrew's life; the question is--

Est-il vrai que c'est le demandeur lui-même qui a fait *ainsi* assurer la vie du dit Antoine Pettigrew?

Was it the plaintiff who "*ainsi*" that is, who *thus*, by this mode of getting Pettigrew's signature to the application who was for his own benefit proposing to insure Pettigrew's life; to which the jury answer:

Non, c'est Antoine Pettigrew lui-même qui s'est fait assurer.

The plain meaning of which answer appears to be that it was Pettigrew himself who was applying for a policy of insurance to be issued to himself upon his own life. We are not concerned at present to inquire whether that answer so relating to the time of the application being signed by Pettigrew could be sup-

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ported upon the whole of the evidence, for it has no relation to the policy sued upon, as plainly appears by the answer of the jury to another question wherein they have found as a fact, as already mentioned, that although the defendants prepared a policy intended to be issued to Pettigrew in pursuance of the application and purporting to be entered into with him and his representatives, yet upon its being brought to the plaintiff he refused to accept it and *exacted* the issuing of the policy sued upon, to himself alone, thus in very substance adopting the evidence of the plaintiff himself, who, when Michaud brought to him the first policy (because it was entered into with Pettigrew and his representatives he refused to accept it), adding in his own language,

> J'ai exigé que si la compagnie défenderesse voulait émaner une police payable à moi directement que je paierais les primes autrement que je n'en voulais pas.

The jury have thus substantially found as a fact that (whatever may have been Pettigrew's intention in signing the application) that intention was never carried into effect but was frustrated by the plaintiff insisting that a policy should be issued upon Pettigrew's application entered into with the plaintiff himself alone in his own name for his own benefit, which was accordingly done as appeared by the policy sued upon, and such policy must in law be held to be null and void unless the plaintiff had an insurable interest in Pettigrew's life. The answers of the jury to questions 8 and 9 relate to the insurable interest which the plaintiff had, if he had any, on Pettigrew's life. The 8th inquires whether there was any family relationship existing between Pettigrew and the plaintiff, and if yea, what relationship? To which the jury, answer: "Yes; a remote affinity." The 9th question was plainly put upon the assumption that

the policy sued upon was entered into with the plaintiff himself for his own benefit, upon Pettigrew's life. It is: "Had the plaintiff an interest *other than* that of affinity to insure for his own benefit the life of Pettigrew as he has done?" to which the jury answer, "Yes; as protector." As to these answers it is sufficient to say that they do not establish that the plaintiff had an insurable interest in the life of Pettigrew, and the evidence plainly showed that he had not.

Upon the whole therefore we are of opinion that as by the terms of the policy it plainly appears that it was entered into with the plaintiff in his own name for his own benefit, and by the plaintiff's own evidence that it was never intended by him that it should be otherwise, and as it appears that the answers of the jury to all the questions submitted to them bearing upon the issue under consideration are in perfect accord with such terms of the policy and such evidence of the plaintiff himself, and as it appears by the evidence and the finding of the jury upon the questions submitted to them that the plaintiff had no insurable interest in the life of Pettigrew the law pronounces the policy to be null and void, and the appeal must be allowed with costs in this court and the Court of Queen's Bench and judgment entered in the Superior Court for the defendants.

SEDGEWICK J.—I regretfully find myself obliged to differ from the conclusions arrived at by the majority of the court in this case. My opinion as to the soundness of the judgment appealed from is so strong that I feel it to be my duty to give expression to it, but under the circumstances, very shortly.

The insurance company has set up two defences, namely, (1), misrepresentation in the application for the policy, and (2), its wagering character.

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The instrument sued on contains this clause:

After this policy has been in force one full year it will be indisputable on any ground whatever, provided the premiums have been promptly paid, and the age of the insured admitted.

The death occurred after the year had expired.

This provision has an important bearing upon both branches of the defence, affording, as I think, in the first branch, a conclusive answer to it.

It is of recent origin, having in principle been first accepted by a company in England less than twenty years ago, the period of attack however being there limited to three years, the leading companies of Canada and the United States subsequently adopting it. In several cases the prescriptive limit has since been reduced to two years. The defendant company, more public spirited, enterprising and benevolent than its competitors has made it one. There can be no difference of opinion as to what was intended by it and as to what it really means. It was intended to preclude an insurance company upon the trial of an action against it by the holder of a policy from setting up after the death of the assured any defence except non-payment of premium, age being admitted. The defence of innocent, though inaccurate representation, or of wilful misrepresentation or of any species of fraud on the part of the assured was alike included, the object being to make a policy after a prescribed lapse of time, the premiums being paid, an equivalent of money; a promise to pay absolutely and at all events.

There have been no decisions, so far as I know, in England or Canada, except the one appealed from, dealing with this clause, and we are at liberty to consider it untrammelled by authority. Thinking as I do that it means what it says—and it being admitted that it means what it says—let me discuss for a moment

the only answer that is set up in respect to it. That answer is that any contract stipulating whether directly or indirectly that the question of fraud shall not be raised, is against public policy and therefore void. Take a policy like the present where this particular clause has not been inserted. The statements made in the application for the policy form the basis of it. Any deviation from the most exact and scrupulous accuracy in answering the questions contained in the application or in the medical certificate voids the policy, no matter how long and to what amount the premiums have been paid. A representation though innocently made, if untrue, is as fatal as if wilfully made, and it has often happened that policies after having been many years in force have been defeated upon the company showing after the death of the assured that some harmless or innocent mistake had been made. Absolute accuracy of statement is a prerequisite to the indefeasibility of an insurance policy, otherwise it cannot avail in the holder's hands. A security of this kind is therefore of a most precarious nature. The fact that such defences had often succeeded, the possibility that such defences might still be raised, no matter the length of time during which the assured had paid his premiums, was not calculated to advance either the interests of the insurers or the insured, and insurance companies began to feel the necessity of removing this manifest hindrance to the development of their business. The plan adopted was to declare that policies *three* years old should be incontestable for any cause whatever. The idea was that this was not taking a great risk, inasmuch as no man was likely in advance to contemplate and purpose suicide at the expiration of so long a period as three years, nor was he likely to live for that length of time if he had made serious mis-statements regarding his health

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which had also escaped the scrutiny of the company's medical officers. From their point of view the risk was indefinite, while the gain by making policies incontestable was very clear indeed. Policies for very large amounts were being taken out both in the United States and Canada, and the complaint was made that in the hands of a third party they constituted no certain security, as in the event of the death of the assured the claim might be contested on any ground, good or bad, evidence being forthcoming to prove it. By making them incontestable after three years, they became an absolute security at least to the extent of their surrender value, and in the event of the continuous payment of premiums for its full amount, provided the company was financially sound. It was doubtless under the influence of these considerations that the plan of inserting in life policies this kind of stipulation was generally adopted. Then as to the way the assured would view it: He doubtless would be required to pay an increased premium in consideration of what was in fact an increased risk, and the inducements operating upon his mind justifying such increased payment would be the incontestability of the policy after the prescribed time, and its consequent largely increased value, whether to himself in his lifetime, as a negotiable security for money, or in the event of his death to his representatives, by reason of its payment without dispute. It does not appear to me that any principle of public policy is violated by the making of such a contract. I may enter into any contract of insurance I like with an insurance company providing for the payment of a sum of money at my death. I may say: "I will make no representations as to my age or as to the state of my health. I do not propose to give you any information as to my personal habits, or as to the character of my life as a

risk, or as to whether in my view I shall live or die within a certain date. Find that out for yourself. All I propose to do is to pay you so much money while I live in consideration of your paying my estate so much money when I die." If a company chooses to enter into a contract upon those terms there is nothing to prevent them from doing so. They can make any bargain they please. I may know that my life will not be a long one; I may not as a business man upon the terms I propose be willing to insure myself against my own death, but I am not under any obligation (legally, at all events), to make disclosure of any fact. They may or may not take the risk, and if they do take it they must abide by it. *Uberrima fides* not being required in this species of insurance no defence of fraud or misrepresentation would be available, for the reason that there was none.

Then may I not say to an insurance company: "I will pay you annually during my life such a sum of money in consideration of your paying upon my death another sum of money? In my application I have answered certain questions you have put to me. These answers may be true, or they may be untrue, but I want you to fix a time beyond which you will not go in making the inquiry. You may make it one year, or three years, or any period you like, the shorter you make it, the more I will pay you; but whatever the limit is I want a certain definite time fixed so that after that I may know that my life is in fact and truth *assured.*" The company asks: "Why this unusual request?" My answer is: "When you are called upon to pay this policy many years may have intervened. I will be dead, and my executors may have to sue you. I cannot give evidence; I cannot then prove the accuracy of the statements I have now made, but you may then bring witnesses against me to show

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that either in some material or immaterial fact I have made a mistake, or even a misstatement, and you may be able in my absence to convince the jury or the court that your allegation, though false, is true. I want to be assured that such a thing is impossible. I will not take the risk of fallible memory or of incorrect or even perjured testimony which may be produced against me when I am gone. You will be as anxious then to escape liability as you are now to secure my premiums, and I want you *now* to take these risks." And the insurance company assenting, issues the policy upon these terms. How can a contract of that kind possibly be against public policy? The company has the period specified, one, two or three years, as the case may be, within which to make inquiries as to fraud or any matter of defence, and may bring their action within that period to set the policy aside. In the event of death within that period the policy may be found void. The ordinary law during the prescribed period as to the absolute accuracy of the application and of the statements made therein has full effect. But after that period it is just as if no formal application had been made at all—no representations true or false had been made—but as if the policy had been issued without them. After the lapse of the term of prescription they are all swept out of the bargain. The policy is a *tabula rasa* as far as they are concerned, the contracting parties understanding that thereupon it has become indisputable. Can there be anything against public policy in such an arrangement? Nay, rather is it not much more against public policy to allow a company that has entered into such a contract, that has year after year taken the premiums of the assured and has allowed him to act upon the faith of it, he borrowing, and third parties lending money upon the faith of its being

what the company has in express terms said it was, "indisputable," after his death to repudiate it altogether by resurrecting these stipulations which had fulfilled their office and become extinct—it may be half a century before—and one, two or three years after the issue of the policy? If public policy permits this, it becomes an aider and abettor in the most flagrant dishonesty.

Public policy much less requires it when we consider that from 1886 to the present time, as public statistics show, the sum total of life insurance in Canada has risen from one hundred and seventy-one millions to three hundred and twenty-seven millions, such rapid increase being no doubt largely brought about by the introduction of this very stipulation, and that upon the strength of it hundreds of millions of money, on this continent at least, have been loaned and borrowed. To hold it void would be by one blow to inflict a fatal wound upon the value of these securities imperilling at the same time the whole insurance interests of the continent.

An additional consideration leads me to the same conclusion. Suppose this policy did not contain the indisputability clause and that there had been as a matter of fact misrepresentation on the part of the assured. Let us suppose that one, two, or three years after the issue of the policy the idea forced itself upon the assured that his representatives could not recover, and he went to the insurance company and informed it of his fraud and suggested the payment of an increased premium if the stipulation in regard to it were eliminated altogether, and in consideration of the increased premium the company agreed to keep the policy alive; could it, under these circumstances set up the original fraud as a defence? The present is substantially a similar case. The company says:

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"Upon the faith of your statements being true, and for the money you now pay us, we will insure you for one year. If within the year you die and your statements are untrue, we pay nothing, but if you live beyond the year we will insure you until you die for the annual premium, whether your statements are true or not." Is such an agreement contrary to public policy? I do not believe that in the Province of Quebec freedom of contract is handicapped by any such doctrine or that life insurance companies, or even individuals, labour under any such obnoxious disability, or that the value and security of an insurance policy whether to the assured or to a money lender is less in Quebec than in the other Provinces of Canada. Another consideration influences me. According to the Code (article 993) fraud is a cause of nullity only when the party against whom it is practised would not have contracted had there been no fraud. That is elementary and natural justice. But this policy was issued and an increased premium exacted upon the assumption that there was or might be fraud on the part of the applicant. There was a time limit within which it was stipulated that advantage might be taken of the fraud, but it was also stipulated that if death occurred beyond that limit—fraud or no fraud—the company would be liable. Besides, I am not sure that had there been no misrepresentation—had the applicant stated that he recently had had for the first time, an attack of appoplexy, brought on by his intemperate habits, this company would have refused the risk. That is a question upon which there is absolutely no evidence. Successful competition, the immediate possession of premium money, and the new business, these and other considerations relating to the chances of death within the time limit, might one or all have influenced the com-

pany, had accurate answers been made, and for all I know, and as far as the evidence goes, the policy might nevertheless have issued. It has not conclusively been proved that the alleged "artifices" came within the principle of "*dans locum contractui.*"

I have not expressed any opinion as to whether or not the finding of the jury upon the question of misrepresentation was so unreasonable that justice required that it should be set aside. Of course there was uncontradicted evidence that an untrue statement had been made, but I think there is sufficient evidence to support the finding that it was not wilfully untrue. Then as to the question of this being a wager policy. With all possible respect for my brother Gwynne's carefully prepared judgment, I differ from him absolutely in his treatment of this point. There is no difference of opinion as to what a wager policy is, or as to the fact that courts of justice will not enforce it. Divergence of view, however, occurs as to the application of facts to the admitted law. I think the evidence here conclusively proves that Pettigrew insured his own life for his own benefit, obtaining from Anctil money to pay the premium, and Anctil advancing it, induced to do so by the fact that he, being made the beneficiary, would be comparatively secure, as he was assured that in the event of three annual payments a paid-up policy would be issued. *Primâ facie*, upon the documentary evidence, Pettigrew insured his own life. It is not the case of a man having no interest in the life of another insuring that life for his own benefit. If Anctil had been the original mover in this matter, if he had gone to the insurance agent and had instituted the negotiations which eventually led to the execution of the contract, that would have been important in showing that Pettigrew was a mere tool or instrument for the purpose

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of carrying out his design. But the application was made by Pettigrew after the company's agent had asked him to insure, and he had come to Anctil and had his promise—based upon what consideration is immaterial—that he would see that the premium was paid. The security which Anctil took for the repayment of the insurance moneys was the provision that in case of death the policy should be paid to him, an ordinary and common thing in case of life insurance. There is nothing to prevent one from insuring his life, making the policy payable in the event of death to an absolute stranger, as is common in many places making it payable to a university or a public charitable institution. The fact that Anctil was named the beneficiary is in itself of no consequence in determining the character of the policy. It is not in my view arguable that the contract was in the present case, as a matter of law, between Anctil and the company. The contracting parties were Pettigrew and the company, Anctil being, in the event of death, the beneficiary. The contention that Anctil alone was interested in the policy is absolutely refuted by the provisions of it. It is true that in the event of death the money was payable to Anctil, but in the event of the assured living until the 5th of May, 1909, then the tontine provisions of the policy took effect, and he, Pettigrew, then being the legal holder of the policy, as he was at the time of his death, would be entitled to the cash, or the paid up insurance, or the annuity or other benefits provided for thereby.

In Pettigrew's application for insurance (made a part of the policy) he says that in the event of death the policy is to be paid to Anctil, but he is equally explicit in his statement that the payment is to be made to himself at the expiration of the tontine period. The finding of the jury upon this point was

in my view justified by the evidence, and even if I thought the weight of evidence was the other way, under the circumstances, we should not disturb it. But I am also of opinion that this defence is not such a defence as, having in view the indisputability clause, this company can set up. It is one of the grounds which insurance companies frequently raise as a defence, but it is equally a ground which the company has precluded itself from setting up under the clause in question. If the policy was subject to this vice, it was a vice into which they were bound to inquire within the prescribed period. Not having made that inquiry then they are precluded now from making it, and all the more so since it is undisputed that the company's agent was perfectly familiar with all the facts relating to this branch of the case and communicated these facts to the head office of the company before the policy issued. I admit that a court of justice will not enforce a wagering policy, no matter what agreement may be come to between the parties. Courts will not enforce immoral or illegal contracts, and if such appears to be the character of the transaction from evidence properly adduced in the course of a trial then they ought to refuse to give effect to it, leaving the parties *in statu quo*. In the present case upon proper principles of pleading the plea in relation to wager should have been struck out, as well as the plea in respect of misrepresentation, and all the evidence on both points was irrelevant. Had the evidence been excluded the court would have had no material in the present case upon which they could find upon the question of wager, the documentary evidence all being the other way, and therefore could not on its own motion dismiss the action upon that ground. Circumstances might arise at a trial justifying a court in making a special inquiry as to the real

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character of a suspicious contract; but I do not think that in a case like the present, the conduct of the insurance company being as it was, the court should be too astute in finding reasons to support a suggestion that possibly the instrument sued on was a wagering policy.

In Quebec under a practice unknown in other parts of Canada, one not a party to but beneficially interested in a contract may enforce it, our English doctrine of privity not prevailing. It is by virtue of this that Anctil is plaintiff in the present action. I do not however understand that it necessarily follows that he becomes entitled to the amount of the judgment irrespective of the claim of the legal representatives of Pettigrew and they may still be entitled to call him to account, allowing him to retain thereout his advances and reasonable interest.

In dealing with this case I may perhaps have gone beyond the record in discussing the "indisputability" clause, but I have referred generally to its object and history as courts have frequently done in discussing stipulations crystalized by usage into definite shape, the "sue and labour" clause in marine policies, for example, or the "restraint upon anticipation" clause in marriage settlements.

One other observation I may make. I have assumed in this discussion that there was a policy—an actual contract both in law and in fact—an agreement or *consensus* of thought between the parties, of which the instrument in question was but the written expression and evidence, and it is only to such a case that this opinion applies.

In my view the judgment of the court appealed from should be sustained.

KING and GIROUARD JJ. concurred with GWYNNE J.

Appeal allowed with costs.

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

Solicitors for the respondent: *Lemieux & Lane.*

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