THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK (DEFENDANT) ..... APPELLANT;

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*Mar 11, 12, 13.

*May 6.

AND

WILLIAM MOWAT AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance — Terms of contract — Delivery of policy — Payment of premiums.

A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium.

Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiffs.

The action was brought by the plaintiff Mowat for reformation of a policy issued to him by the defendant company or for return of the premiums paid therefor with interest. The facts are stated by Mr. Justice Maclennan in the Court of Appeal as follows:

MACLENNAN J. A.—This action relates to a policy of life insurance on the life of the plaintiff, issued by the defendants, bearing date the 23rd of March, 1891, for the sum of $3,000, in respect of which the plaintiff has paid seven annual premiums of $124.50 each; and the relief sought is that the defendants may be ordered

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 27 Ont. App. R. 675.

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to make good certain representations alleged to have been made to him by them, or to refund to him the premiums paid by him with interest. The judgment is for the repayment of the premiums with interest, and the present appeal is from that judgment.

The learned Chief Justice finds that the plaintiff was induced to enter into the contract of insurance by the representation of one Slaght, an agent of the defendants, that the yearly premium payable by him during his life for the insurance would be $41.50 for each $1,000 insured, and that the amount of such premium would not vary; and that the defendants are bound by that representation. He also finds that the defendants are bound by a representation made by one Matson, the general manager for Canada of the defendants, as to the surrender value of the policy. This last representation was contained in a letter of the 2nd May, 1891, written by Matson to Slaght intended to be and in fact communicated to the plaintiff, in which he says: "I fancy Mr. Mowat will not require to call for a paid up policy, or the cash surrender value; however, in order to satisfy him I beg to say that the cash surrender value of the policy at the end of five years should be about $275, paid up policy should be about $500, or extended insurance about four years. This is as near as I can judge without going into lengthy calculations. If Mr. Mowat needs anything further from me direct I shall be pleased to communicate with him."

In March, 1898, the defendants refused to renew the policy for another year, without an increased premium of $155.63, and refused a tender of the former rate of $124.50. They also refused to issue a paid up policy, or to pay anything for a surrender of the existing one. Thereupon the plaintiff brought his action on the 5th July, 1898.

The application for the policy was signed on the 20th of March, and the policy is dated on the 23rd of the same month, but it was not delivered to or accepted by the plaintiff until some time after the 2nd of May. In the meantime there had been discussion and correspondence on the subject between the plaintiff and the agents, culminating in the letter of the 2nd May written by the agent Matson already referred to. The application was sent forward by Mr. Slaght to Matson in a letter dated the 18th of April, and along with it was enclosed a slip written by the plaintiff asking, as the writer says, for a statement to be attached to his policy shewing the surrender values at the end of the fifth and subsequent years. This slip has not been produced, but the plaintiff in his evidence states the substance to have been, as near as he can remember it, as follows: "The agent of your company, Mr. Slaght, has called upon me with the view of inducing me to effect insurance in your company, and he states at my age, 60, the premium per thousand dollars would be $41.50 per year, that at the end of five years Mr. Slaght states that there will be a large increase in cash value, a large increase of extended insurance value and a large amount of paid up policy."

He adds that perhaps he made a mistake in using the word "*increase*," "a large amount of cash value, large amount of insurable value and extended insurance, without naming any definite amount, and that if I continued my policy the amounts would increase."

He adds: "And I said that if so, if these statements are correct, then I will take a policy for $2,000, and I will insist upon getting a statement in writing to be attached to the policy, setting forth the value of the policy at the end of five years, ten years and so forth."

He says further that in the slip it was stated that the length of time the $41.50 was to be paid was for

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life. This slip or memorandum was sent with the application to Mr. Matson, and was probably also sent by him to the head office of the company in New York. The only response to it, however, came from Mr. Matson in a letter of the 20th of April, in which he states the great difficulty of estimating the cash value at the end of five years and the paid up value, etc., and adding: "We will issue the policy in the meantime, send it to our Mr. Slaght, and I think you will find the conditions to your satisfaction."

The plaintiff answered this by letter on the 22nd April, in which he says: "My intention is to take the $3,000 policy (instead of $2,000 as had been talked of) and you can therefore fill out one for that amount. As for my wanting to know the cash value and paid up value of the policy at, say five years, if you give an approximate that will do."

The policy was accordingly prepared and sent to Slaght by Matson on the 29th April and saying he would rather not make estimates of surrender value, &c, but would try to frame something to suit the plaintiff. The letter of the 2nd May followed and the plaintiff says these letters "to some extent, to a great extent" met his requirements, and he paid the premium. He says he attached the letters of the 20th April and 2nd May to the policy and filed them away.

There is no reference in the letters to the premium as being a fixed rate for life or otherwise. The plaintiff says he got nothing in writing on that subject but took it for granted that in that respect the policy was right.

The application, which is signed by the plaintiff and a copy of which is indorsed upon the policy, so far as material is as follows: "I hereby apply to the Provident Savings Life Association Society of New York for an insurance of $3,000 payable after my death

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upon the L. R. renewal term plan, with surplus left with company to keep premiums level; participating premiums payable annually; on behalf of and for the benefit of Jane Mowat, my wife."

And the application has indorsed upon it the following note: "Please note fully the kind of policy desired, as for instance, renewable term with participating premiums (largest annual dividends) or renewable term with surplus applied towards keeping the premiums level (L. R.) or ten or twenty years renewable term, &c."

By the policy, the company, in consideration of the stipulations and agreements in the application therefor and upon the next page of the policy, all of which are part of the contract, and in consideration of $124.50, being the premium for the first year, promises to pay Jane Mowat $3,000 within sixty days after acceptance of satisfactory proofs of the death of W. Mowat, provided such death shall occur on or before the 23rd of March, 1892. And the said society further agrees to renew and extend this insurance, upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment on or before the 23rd day of March in each year of the renewal premiums in accordance with the schedule rates less the dividends awarded thereon. The second page of the policy contains, among other things, a schedule of yearly renewable rates of premium required to renew each $1,000 of insurance. The schedule gives the rate for renewal, for all ages from 16 to 60, being that paid by the plaintiff. It is stated, however, that no policy is issued at an age higher than sixty years, and that schedule rates on the same basis as above for renewal above that age, subject to reduction by dividends, will be furnished on request. The second page of the policy

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also contains a stipulation for applying the premium income of the company, after deduction for expenses and death claims, towards off-setting any increase of premium on the policy from year to year, or under certain circumstances after five years, towards extending the insurance, or if applied for to purchase paid up insurance.

There is also a stipulation that no agent "is or will be authorized to make, alter or discharge this contract, or to waive any forfeiture thereof, or to extend this insurance, or to grant permits or to receive for premiums anything but cash."

On these facts His Lordship was of opinion that the appeal should be allowed and the action dismissed. The majority of the court took a different view and dismissed the company's appeal. This appeal was then taken to the Supreme Court.

Marsh K.C. for the appellant.

Riddell K.C. and *Harding* for the respondents.

TASCHEREAU J.—As to the facts of this case I refer to the judgment of Mr. Justice Maclennan in the Court of Appeal, as reported in 27 Ont. App. Rep. 675-894, for a full statement thereof, the accuracy of which has not been questioned. As to the law and the principles which should govern the solution of the controversy between the parties, I am of opinion that the view taken by that learned judge is also the correct one, and I adopt his reasoning in its entirety.

However, in addition to his remarks, the importance of the case imposes upon me the duty of expressing my independent opinion upon the main question that it presents.

I premise the observation that this is a class of cases where the rule cannot be too often recalled to

attention that general expressions in every judicial opinion are to be taken in connection with the facts in reference to which those expressions are used. If that rule had not been lost sight of, the respondent would probably not have placed so much reliance upon the case of *The Liverpool and London and Globe Insurance Company* v. *Wyld et al.* (1), as he did at the argument. I will refer again to that case later on.

The policy in question, it is conceded, is strictly in accordance with the respondent's written application. And, by its express terms, it is that application, as printed upon it, that forms part of the contract. So that, as the memorandum in question does not form part of the application that is printed upon the policy, it does not form part of the contract. It is because it so appears by the policy not to form part of the contract that the respondent asks by his statement of claim, as originally drawn, (in the nature of an action for specific performance, *Gray* v. *Fowler* (2)), that the contract be enforced with the conditions contained in that memorandum, recognising, as he always had in the correspondence before action, the policy as a subsisting contract. However, any technical difficulty in relation to the pleadings is removed by the amendment allowed in the Court of Appeal. That amendment reads as follows :

16. And, in the alternative, the plaintiff alleges as follows, that is to say :

A. That he applied to the defendant company for a policy of insurance upon his life at an uniform rate of premium for his life, that is to say, premium $\$124\frac{50}{100}$ per annum.

B. That the defendant company upon receipt of such application sent to the plaintiff the policy of insurance which is mentioned in the previous part of this statement of claim without any intimation to the plaintiff that it varied in terms from the plaintiff's application and proposal, and the plaintiff believed that the said policy was in accord with

(1) 1 Can. S. C. R. 604. (2) L. R. 8 Ex. 249.

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his application and proposal, and only discovered the contrary upon the demand for increased premium being made upon him in March, 1898, as hereinbefore set forth.

C. The plaintiff did not accept the said policy of insurance as so issued and sent to him.

D. The plaintiff paid to the defendant the sum of $124.50 in each of the years 1891, 1892, 1893, 1894, 1895, 1896 and 1897, which payments were without consideration and should be returned to the plaintiff with interest thereon.

E. The said payments were made under mutual mistake of fact.

See *Fowler* v. *Fowler* (1); *Hearne* v. *Marine Insurance Co.* (2).

It is exclusively upon the question of the amount of premium that is based the judgment appealed from in favour of the respondent.

As remarked by Mr. Justice Maclennan:

The case is simply this: The plaintiff signs an application and with it another paper requiring certain assurances, and that he desired the premium to be a fixed rate for life. The application and the additional paper were sent forward to the general agent and company; a correspondence ensued, and he says the letters he received "to a great extent met my requirements and I gave a cheque for the amount." There was not a word in the correspondence about the rate of premium, and the company prepared and sent him a policy, not according to the slip, but in accordance with the signed application. He accepted it, paid the premium, and continued to do so without question for seven years.

I doubt very much that the memorandum contained anything in reference to the premium. We have only the respondent's own uncorroborated assertions for it, and no cases have been cited at bar in which a written document has been cancelled upon such slight and unsatisfactory evidence as is to be found in the case. However, assuming that the material facts are as alleged by the respondent, and that he did not get the policy he, at one time, might have expected from the company, I do not think that he can succeed in this action.

(1) 4 DeG. & J. 250. (2) 20 Wall. 488.

It is not disputed that he had ample opportunity, several times during several days, to read his policy before paying the first premium. Neither can it be contended that the company did anything whatever, when delivering the policy, or at any time during the seven years, to mislead him or to put him off his guard, or to induce him not to read it. They had no reason whatever to believe that he would not read it. And, if he did not read it he has no one but himself to blame. As an inference of fact, from the facts proved, I find that he acted with gross carelessness. And a court of equity will not, it is trite to say, any more than a court of law, relieve anyone from the consequences of his own carelessness. *Mackenzie* v. *Coulson* (1); *Grymes* v. *Sanders* (2); *Pope* v. *Hoopes* (3). "*Vigilantibus non dormientibus subvenit lex.*" By the judgment *a quo*, he has benefited from his careless act. He has been insured gratis for seven years. If he had died during that period his wife would have got $3,000 from the company. Yet the company is ordered to return him the premiums.

His contention that he was justified in trusting that it was what he had previously bargained for that the company handed him is met by the most salutary rule, that parol negotiations leading up to a written contract are merged in the subsequent written instrument, which is conclusively presumed, in the absence of fraud (and none is found here), to contain the entire engagements of the parties, and by which alone their intentions are to be ascertained. *Carroll* v. *The Provincial Natural Gas and Fuel Company of Ontario* (4), and the cases there cited; *Inglis* v. *Buttery* (5).

And if, in the course of making a contract, one party delivers to another a written document, and the party

(1) L. R. 8 Eq. 368.
(2) 93 U. S. R. 55.
(3) 90 Fed. Rep. 451.
(4) 26 Can. S. C. R. 181.
(5) 3 App. Cas. 552.

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receiving the paper knows that the other party hands him the document as the contract between them, then the party accepting the document and keeping it assents to the conditions it contains, and agrees that the contract is as expressed therein, although he does not read it and does not know what they are. *Van Toll* v. *The South Eastern Railway Company* (1); *Lewis* v. *McKee* (2); *Parker* v. *The South Eastern Railway Company* (3); *Watkins* v. *Rymill* (4); *Coombs* v. *The Queen* (5); *Burke* v. *The South Eastern Railway Company* (6).

When the company handed this policy to the respondent they said to him, the law speaking for them, as in *Parker* v. *The South Eastern Railway Company* (per Bramwell L. J.) (3).

> Read—Examine. Be careful, for never mind what we or you may have said previously, we accept your application to insure you, but we cannot give you any other policy but this one, and in that document alone is contained the contract between us; pay the first premium only if you are satisfied with it. If you accept it without reading it, you will not be allowed to contend hereafter that it does not correctly express the contract between us. Whatever is not found therein will be understood to have been reciprocally waived and abandoned.

He thereupon paid the premium. Then, and then only, was the contract formed. Then only was the respondent insured. All that had passed previously was preliminary. No final contract was intended until this payment. *Canning* v. *Farquhar* (7); *MacKenzie* v. *Coulson* (8); *London and Lancashire Assurance Company* v. *Fleming* (9); *The Canadian Fire Insurance Company* v. *Robinson* (10); *Parker* v. *The South Eastern Railway Company* (3).

(1) 12 C. B. N. S. 75.
(2) L. R. 4 Ex. 58, 61.
(3) 2 C. P. D. 416, 421.
(4) 10 Q. B. D. 178.
(5) 26 Can. S. C. R. 13.
(6) 5 C. P. D. 1.
(7) 16 Q. B. D. 727.
(8) L. R. 8 Eq. 368.
(9) [1897] A. C. 499.
(10) 31 Can. S. C. R. 488.

If he had signed at the foot of the policy "I agree to the conditions and stipulations aforesaid," he would not have had the right subsequently to be released from his contract simply upon the ground that he had not read it. Now, that is what he implicitly did, and must be held to have done. He said, in effect, by accepting the policy offered to him as his only contract with the company, "I assent to the terms contained therein, whatever they may be." *Stewart* v. *London and North Western Railway Co.* (1).

That the defendant did not read the charter and by-laws, said the United States Supreme Court, in *Upton* v. *Trebilcock* (2), if such were the fact, was his own fault. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it. If this were permitted contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission.

As said by Gibson C.J. *In re Greenfield's Estate* (3);

If a party who can read will not read a deed put before him for execution * * * he is guilty of supine negligence, which, I take it, is not the subject for protection, either in equity or at law.

And in appeal, Bell J. said:

The general rule is that a party executing a legal instrument is presumed to be acquainted with the contents * * * the authorities show that, usually, if one who is about to execute an instrument can read it, and neglects to do so * * * he will, (in the absence of fraud or deceit,) be bound to it, though it turn out to be contrary to his mind.

And an old case is cited from Skinner, 159, where a lessee who could read, having signed a lease for one year, believing it to be for twenty-one years, as previously agreed upon with the lessor, was refused relief in equity "because, being able to read, it was his own folly." These, no doubt, were cases of sealed instru-

(1) 3 H. & C. 135, 139. (2) 91 U. S. R. 45, 50.
(3) 14 Pa. St. 489-496.

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ments, but besides the special rules that govern such documents, there are, in these decisions, a common sense reasoning which I would apply to the facts of this case.

In the case, (not cited at bar,) of *Mackenzie* v. *Coulson* (1), the insurers had filed a bill for the rectification of the policy, so as to make it conformable to that which they said was the real contract, in proof of which they produced in evidence a slip which had been signed when the insurance had been applied for. By that slip, the insurance was "free from particular average." By the policy, it was not; the insurers taking it for granted that it was drafted in accordance with the slip, had signed it without reading it. The insured denied that they had ever entered into any contract other than expressed by the policy. It was held that as the slip formed no contract, there was no binding agreement between the parties until the policy was signed and the premium paid; and the bill was dismissed. Said the Vice Chancellor:

> If all the plaintiffs can say is, we have been careless * * * it is useless for them to apply for relief.

That case, though the converse of the present one as to the party impugning the policy, cannot, it seems to me, be distinguished.

If here, it were the agent of the company, under orders from headquarters, who had said to the respondent that to his application they would attach a memorandum to the effect that the company reserved to themselves the right to increase the premiums in accordance with their rules, and if the policy, as drafted, had not reserved that right, but had been signed without being read and issued under the belief that it did, and the company had asked a reformation of their policy upon the ground that it was not drafted

(1) L. R. 8 Eq. 368.

in accordance with what they believed it to be when they issued it, or a cancellation of it upon the ground that they had not consented to make the contract evidenced by it, they could not have succeeded if that case of *Mackenzie* v. *Coulson* (1) is law; and I am not aware that it has ever been questioned.

In the much litigated case of *The New York Life Insurance Co.* v. *Macmaster* (2); (see also *Graves* v. *The Boston Marine Ins. Co.* (3); *Travellers Ins. Co.* v. *Henderson* (4); *Chicago, etc., Railway Co.* v. *Belliwith* (5); *Quinlan* v. *Providence Washington Insurance Co.* (6); *Insurance Co.* v. *Mowry* (7); *McConnell* v. *Provident Savings Life Assur. Soc.* (8); the agent of an insurance company had told the insured at the time of taking the application that his policy would give him thirteen months insurance upon the payment of the first annual premium, but the policy subsequently issued by the company did not do so. Upon an action to reform the policy, so as to make it read in accordance with what the agent had said, it was proved that the insured had accepted his policy without reading it.

But, said the court, customary negotiations for insurance do not constitute a contract where there is no intention to contract otherwise than by a policy made and delivered upon payment of the first premium * * * It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read and to learn their contents, and, if he did not, it was his own gross negligence and no act of the insurance company or of its agent that concealed them and misled him as to their effect. The statement of the agent fourteen days before the deceased received the policies, that they would insure him for thirteen months from the payment of the first premium, was not a statement of an existing fact. It was not calculated to impose upon him, or to prevent him from reading his policies

(1) L. R. 8 Eq. 368.
(2) 87 Fed. Rep. 63; 90 Fed. Rep. 40, and 99 Fed. Rep. 856.
(3) 2 Cranch 419-444.
(4) 69 Fed. Rep. 762.
(5) 83 Fed. Rep. 437.
(6) 133 N. Y. 356 at pp. 364-365.
(7) 96 U. S. R. 544.
(8) 92 Fed. Rep. 769.

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and learning for himself whether this promise had been kept or broken. It was not a fraudulent representation, because fraud never can be predicated of a promise or a prophecy. Neither the company nor its agent, therefore, made any representation or promise, or used any artifice or deceit to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement.

That case is not a binding authority upon us, but its reasoning seems to me to be unassailable. It is based upon principles which, in the interest of the business community, courts of justice should everywhere apply to transactions of this character. Undoubtedly, the wholesome rules that it lays down must sometimes yield to circumstances, but, not to apply them to the facts of this case would be to seriously impair their efficiency and reduce to very narrow limits indeed the possibility of their application.

Since the argument, I have noticed that the United States Supreme Court have reversed the decision in that *MacMaster Case* (1). But the court exclusively based its conclusions, first, upon the fact that the agent of the company had inserted material words in the application, after it had been signed, without applicant's knowledge; secondly, upon the fact that the agent of the company, when delivering the policy, had deliberately put the insured off his guard and induced him not to read it by the express assertion, in answer to the insured, that the policy was in the terms agreed upon. Had it not been for these two facts, to which sufficient weight had not been given in the lower courts, their judgment against the plaintiff's conten-

(1) [1901] 22 S. C. Rep. 10.

tions, as I read Chief Justice Fuller's opinion, would have been sustained by the Supreme Court.

I refer to the case of *Leigh* v. *Brown* (1), where it was held that:

Where a policy of life insurance which was duly delivered to an applicant differed in any material respect from the kind of policy for which he had contracted, it was his duty, if he did not desire to retain and accept the policy received by him, to return the same within a reasonable time to the company and, upon his failing to do, the applicant could not avoid paying a promissory note which he had given for the first premium.

And to *Reeve* v. *The Phœnix Insurance Co.* (2), holding that the insured is bound by all the conditions clearly written or printed in the body of the policy. Having accepted and taken possession of the policy he is presumed to know all its clauses and provisions. If the insured did not examine the policy, it has been his own fault.

The cases relied upon by the respondent are clearly distinguishable. In the case of *Bate* v. *The Canadian Pacific Railway Co.* (3), (see Burton J. in 15 Ont. App. R. at page 402), the ticket issuer, as remarked by the Chief Justice, in *Coombs* v. *The Queen* (4), had induced the purchaser into error, and this court held that she, having relied upon the statement of the ticket issuer not to read the contract, she could not be held to have been negligent in not reading it. In the case of *Henderson* v. *Stevenson* (5), the House of Lords' holding is, in effect, that there was no evidence of any other contract than that appearing upon the face of the ticket, and that the ticket-holder could not reasonably be held to have known that the ticket contained the special condition that the company were not to be liable for losses of any kind or from any cause.

In *Richardson, Spence & Co.* v. *Rowntree* (6), all that the House of Lords determined is that, upon the

(1) 99 Ga. 258.
(2) 23 La. An. 219.
(3) 15 Ont. App. R. 388; 18 Can. S. C. R. 697.
(4) 26 Can. S. C. R. 13.
(5) L. R. 2 H. L. Sc. 470.
(6) [1894] A. C. 217.

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evidence given at the trial, the jury could properly find that the plaintiff had in fact no notice of the conditions upon which the company claimed exemption from liability. Then these ticket cases have no application. As remarked by Mr. Justice Maclennan:

> The case of a formal instrument like the present, prepared and executed, after a long negotiation, and correspondence delivered and accepted, and acted upon for years, is wholly different from the cases relating to railways and steamship and cloak-room tickets, in which it has been held that conditions qualifying the principal contract of carriage or bailment, not sufficiently brought to the attention of the passenger or bailor are not binding upon him. Such contracts are usually made in moments of more or less haste and confusion and stand by themselves.

As to the case of *The Liverpool and London and Globe Insurance Co.* v. *Wyld et al.* (1), it is clearly distinguishable. In that case the fire insurance company had by their interim receipt entered into contractual relations with the insured and they thereby became legally bound to issue a policy in accordance with the provisions of the interim receipt, and, when they did issue their policy, the insured was entitled to assume that they had conformed to their legal obligation, and, therefore, there was no negligence on the part of the insured in not examining the policy. The interim receipt was, by itself, a written contract, and the premium had been paid upon its being issued, the insured had become insured from that date, and the insurers had contracted to issue a policy in accordance with the interim receipt, or if not, at their will, to refund the premium. They did issue a policy, but it was not in accordance with it. The interim receipt, therefore, was the only document evidencing the real contract. The premium had been paid, not for the contract contained in the policy, but for the contract contained in the interim receipt. Here there was no contract

(1) 1 Can. S. C. R. 604.

between the appellants and the respondent before the delivery of the policy and the payment of the premium. The respondent was not insured till then, and the appellants had not contracted to insure him. They had till then the right to arbitrarily refuse to insure him.

That case would bind us here, if an interim receipt, upon payment of the first premium, had been issued upon the respondent's life, as had there been upon the insured property. But it is not so. The only contract between the parties was formed when the policy was accepted and paid for by the respondent.

As to the other grounds of the respondent's action, upon which the majority of the Court of Appeal did not have to pass, that the appellants, by their agents, falsely represented to him that at the end of five years the policy would have a large amount of cash value, large amount of insurable value, and value for extended insurance, I need not do more than refer to the opinion of Mr. Justice Maclennan thereupon in the last paragraph of his remarks. It is upon the question of premium that the respondent mainly rested his case at the argument here.

I would allow the appeal with costs and dismiss the action with costs.

SEDGEWICK and GIROUARD JJ. concurred.

DAVIES J.—I have reached the conclusion that this appeal should be allowed for the reasons stated in the Court of Appeal by Mr. Justice Maclennan. I desire, however, to add a few observations. It was agreed by Mr. Riddell, who argued the appeal for the respondent, that, if Mr. Mowat accepted the policy, he was bound by it, but he relied upon *Wyld's Case* as showing that he did not accept it and was not bound to

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read it. I think *Wyld's Case* clearly distinguishable, because, in that case, there was a pre-existing contract arising out of the payment of the insurance premium and the giving of the receipt therefor. The subsequent policy was supposed to be a carrying out of this contract and the plaintiff had a right to assume it conformed to the contract already made out and was not bound to read the policy so to ascertain.

But, in the case of a life policy, such as this, it is entirely different. There never was any payment of the premium made or any contract existing until the payment of the premium by the plaintiff at or after the receipt of the policy by him, and after he had all the time and opportunity for its inspection he desired. This payment and the acceptance of the policy constituted the contract. All that went before were mere negotiations. Even if the policy did not comply with all the plaintiff desired and applied for, still as it was in the nature of a counter-offer, which the plaintiff could either accept or reject, if he, with ample opportunities for examination, chose to accept and pay his premium, he cannot, in the absence of fraud, complain. There is no fraud charged here. The policy set out on its face plaintiff's application in full. He had his attention specifically drawn to its terms and ample time and opportunities for inspection and examination when the policy was first submitted to him for examination. He discussed the matter with the sub-agent, and, eventually, satisfied himself, as he says in his evidence, that to a great extent the latter's letters "met his requirements." This indicates to me strongly that he not only had ample opportunities of acquainting himself with the contents of the policy, but that he had availed himself of these opportunities.

Now these letters which "to a great extent met his requirements," do not contain any reference whatever

to that which the plaintiff puts forward as his principal claim, viz., that the policy he was to get was to be a level rate life premium policy, or any reference whatever to level rate premiums. The policy tendered him was a yearly renewable one whereby the surplus, if any, was to be applied towards keeping the premium level. The application, on which it purports to be based, is set out in full on its face, and shows that such was the kind of policy applied for, and the original application which was forwarded to this court with the records, shows that these words "with surplus left with the company to keep the premium level" were written into the printed form of application in the blank designating the character of the policy the appellant desired.

Even at the end of the seven years, when the plaintiff was complaining that the policy he had received was not in accordance with his application, he persisted that "the policy did not read in such a way as to indicate that the premium was liable to be increased." In this he was clearly in error, as the policy unmistakably indicates this liability to an increase and contains a schedule of rates showing the yearly increase up to sixty years of age and specially refers to means of keeping the premium down to a level rate, with a memorandum at the foot of the schedule, pointing out that, for further years beyond sixty, schedule rates for renewals would be furnished on request.

I am of opinion that in a case such as this, the entire engagement of the parties, with all the conditions on which its fulfilment could be claimed, must, in the absence of fraud, be conclusively presumed to be stated in the policy. If, by inadvertence, or mistake, provisions, other than those intended, were inserted or stipulated provisions were omitted, the parties

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could have had recourse, for a correction of the policy, to the equitable jurisdiction of the court. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and the insurance company. *Insurance Company* v. *Mowry* (1).

It was strenuously contended, on the authority of *Wyld's Case* (2), and of some observations of the learned Chief Justice of this court in *Robertson* v. *The Grand Trunk Railway Co.* (3) that the plaintiff was not bound to read his policy and was not bound by its conditions or terms, in so far as they differed from or altered the terms and conditions which he supposed he had applied for and was getting. But I do not think either of these cases, or the language of the learned Chief Justice, supports any such proposition.

I have already distinguished *Wyld's Case* (1), and the language of the Chief Justice of this court, quoted from the latter case, does not go further than this, that in so far as *Henderson* v. *Stevenson* (4) might conflict with *Watkins* v. *Rymill* (5), this court following the later case of *Richardson, Spence & Co.* v. *Rowntree* (6), would follow *Henderson* v. *Stevenson* (4).

In my opinion, however, these cases of *Henderson* v. *Stevenson* (4) and *Richardson, Spence & Co.* v. *Rowntree* (6) do not support the propositions the respondent contends for on this appeal. They were cases arising out of conditions attempted to be attached by carriers of passengers to tickets for carriage, and they determined that where it was properly found that the passenger did not know that the writing or printing on the ticket contained conditions relating to the terms of his contract and that the carrier company had not done what was reasonably sufficient to give the pas-

(1) 96 U. S. R. 544.
(2) 1 Can. S. C. R. 604.
(3) 24 Can. S. C. R. 611 at pp. 617-8.
(4) L. R. 2 H. L. Sc. 470.
(5) 10 Q. B. D. 178.
(6) [1894] A. C. 217.

senger notice of the conditions, he was not to be held bound by them. Such decisions can have no possible application to a policy of life insurance issued, as this was, after prolonged negotiations, and the amplest opportunity on the part of the assured of accepting or rejecting the contemplated offer. The rule fairly deducible from the authorities with reference to the duty on the part of the assured to read his policy or otherwise acquaint himself with its contents is thus laid down by the Circuit Court of Appeal of the United States in *The New York Life Assurance Co.* v. *Macmaster* (1), and seems to me to be a sound one.

> If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement.

Mr. Justice Moss, in the course of his judgment, seems entirely to ignore the fact that the plaintiff's application expressly applies for a L.R. renewal term with surplus left with the company to keep premium level. The learned judge says that the defendant company in this case took no steps to notify the plaintiff or draw his attention to the fact that the policy was, as regards the premium, not expressed to be in the terms called for by the application. But, apart from the fact that the tender of a policy is not to be deemed so much an acceptance of the application as in the nature of a counter-offer made by the company as decided by the Court of Appeal in *Canning* v. *Farquhar* (2), there are one or two important facts which the learned judge seems to have overlooked, viz., that the policy offered to the respondent purported to set out on its face verbatim the application made by him, and such application was not for a level rate life premium policy but for a level rate yearly renewable one, "with

(1) 87 Fed. Rep. 63. (2) 16 Q. B. D. 727.

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surplus left with the company to keep premium level"; it also contained the schedule of yearly rates payable on each $1,000 of insurance for each age from 16 to 60, shewing the rate of increase each year with age, with notice that schedule rates on the same basis as above for renewal above sixty would be furnished on request.

No person of ordinary intelligence, reading the policy handed to the plaintiff with such recitals and information, could fail to understand its nature, or see that it did not stipulate, as the plaintiff says he thought it did, for a level rate premium for his whole life, but that, on the contrary, it was a yearly renewable policy in accordance with the schedule of rates which were subject to be reduced by the surplus, so far as it would go, to keep the premium level.

It is true that no notice, dehors the policy, was given to the applicant of any difference between the application made and the policy granted. The company contend that he got just the policy applied for. Assuming for argument that there was any difference however, the circumstances themselves, the long delay in accepting, the conversations if not disputes with the sub-agent and the correspondence with the general agent, the payment of the first premium and the continued payment of the premiums for six years afterwards, combine, in my opinion, to conclude the respondent from now denying that the policy he received was not the policy he applied for or, at any rate, that it did not constitute the contract made between him and the company.

I have nothing useful to add to what Mr. Justice Maclennan has said on the other branch of the case, viz., the alleged misrepresentation of the value of the policy at the end of five years. Whether or not the misrepresentation, if found in the plaintiff's favour, would enable him to maintain, as against the agent or

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the company, an action for damages for deceit, is not now before us and, upon that question, I express no opinion.

MILLS J.—In this case, William Mowat, the plaintiff, was a banker, residing in the city of Stratford, in the province of Ontario, and the company are a corporation under the laws of the state of New York, that carried on the business of life insurance in the province of Ontario.

In March, 1891, one Slaght was the general agent of the said company at the city of London in Ontario, who canvassed the plaintiff with a view of obtaining from him an application for insurance on his life with the defendant company. Negotiations took place between Slaght and the plaintiff with a view of effecting this insurance. During the negotiations the agent represented to the plaintiff that the premium payable by him for such insurance at the age of sixty years would be $41.50, per thousand dollars of insurance, and the plaintiff could renew such insurance from year to year upon the payment of this premium. The plaintiff was told that after five years the policy would have a large cash surrender value which might be applied in the purchase of a paid up insurance for a lesser amount or for extending the existing insurance. The plaintiff insisted upon more definite information touching the amount of such surrender value. The general manager of the defendant company in a letter to Slaght, intended to communicate to the plaintiff the impression that the cash surrender value of the policy at the end of five years should be about $275, paid-up policy should be about $500 or the equivalent of an extended insurance of about four years. The plaintiff applied for insurance to the amount of $3,000 upon the level rate plan and paid

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the premium therefor. In March, 1892, the defendants applied to the plaintiff for the payment of a renewal premium upon the said policy. The plaintiff paid $124.50, being at the rate of $41.50 a thousand, and this sum, he continued to pay each year until 1898, when he was informed that the sum that he was required to pay was $155.63, and the company contend that the renewals were in 1892, $135; in 1893, $147; in 1894, $159; in 1895, $172.50; in 1896, $182.28; in 1897, $194.88, and in 1898, $212.16, and that it was merely by grace of the company that it had not demanded these larger premiums.

The plaintiff demands from the company payment of the cash surrender value of the said policy, and the company maintain that the said policy has no cash surrender value, and refuse to pay any sum whatever. The plaintiff maintains that the term level rate plan has a well understood and well defined meaning in the business of life insurance, and signifies that in a policy issued upon such plan, the annual premium is not subject to any increase whatever, but continues throughout the whole period the same.

The defendant contends that neither Mr. Slaght nor the general manager was authorized to make, nor did they make any representation to, or contract with the plaintiff, in any way inconsistent with the terms of the contract.

The policy of insurance was shewn by the defendant to the plaintiff before the plaintiff paid the first premium thereon, and the company contends that the plaintiff accepted the same as set forth. The defendant pleads the Statute of Frauds.

The correspondence relating to this policy of insurance is set out with sufficient fulness to a clear understanding of the case in the judgment of Chief Justice Armour. The company always charged the plaintiff

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the same annual premium up to 1898. The defendants, the Chief Justice says, were bound by the knowledge and acquiescence in the representations made by Slaght and by the general manager as to the surrender value of the policy and should make good the same, and he held that Mowat should recover back the various sums of money that he had paid together with interest upon the same.

The question was taken to the Court of Appeal and, there, the judgment of the Queen's Bench Division was upheld, Mr. Justice Maclennan dissenting, being of the opinion that the appeal should be allowed and the action dismissed.

In this case the respondent desired a policy of a certain sort, one in which the premium would be a uniform amount throughout life. This was what he asked for. This was what he supposed he had received, and the fact that he paid a uniform premium of $124.50 each year for several years, confirmed him in this mistaken notion.

Had he died at any time during this period, the difference between his opinion and that of the company would never have been disclosed It is fair to assume that in that event, the policy would have been paid and that the difference between himself and the company on this subject would have remained unknown. I think that during all these years his life was in fact insured, but since the difference between himself and the company has become known to him, his age is now such that he can no longer secure for the same annual payments the same amount of insurance upon his life, and he has undoubtedly sustained a loss to the amount of the difference between what he would now be called upon to pay and what he would have had to pay annually beginning at that time for the period of life which remains to him, according to the tables of mortality.

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But it is important to consider whether or not the law would excuse him for not having read his policy of insurance By the case of *Biggar* v. *The Rock Life Assurance Co.* (1) decided in the King's Bench, 1901, it was held that it was the duty of the applicant to read the answers in a proposal made by him for insurance before signing it, and that he must be taken to have read and adopted them, and secondly, that in filling in false answers in the proposal, the agent of the company who did so, was acting, not as agent of the insurance company, but as the agent of the applicant. In that case the agent falsified Biggar's answers to a series of questions in his proposal. Biggar signed the proposal without reading it. His attention was not called to the questions and answers. These false statements afforded a good defence to the company. Wright J., who presided at the trial, held that the correctness of the answers was a condition precedent to the validity of the policy. He said that the plaintiff was disentitled to recover because he signed a paper containing certain other particulars, and especially the statement that no company had ever declined to assure him or to renew his policy.

I am inclined, said Mr. Justice Wright, to think that this is, of itself, sufficient to prevent him from having any claim against the company.

But he did not rest his decision on this ground, but adopted the principles which were laid down by the Supreme Court of the United States in *The New York Life Insurance Co.* v. *Fletcher* (2).

In that case the opinion of the whole court was delivered by Mr. Justice Field, of which Wright J. says:

I agree with the view taken by the Supreme Court in that case, and apparently in other cases there cited, that if a person in the position

(1) 1902] 1 K. B. 516. (2) 117 U. S. R. 519.

of a claimant chooses to sign, without reading it, a proposal form which somebody else fills in, and if he acquiesces in that being sent in as signed by him, without taking the trouble to read it, he must be treated as having adopted it.

Business could not be carried on, if that were not the law. On that ground I think the claimant is in great difficulty. The court held that the agent in filling in the answers in the proposal which Biggar signed, was acting as Biggar's agent, and not as the agent of the company. It cannot be imagined that the agent of the insurance company can be treated as its agent to invent the answers to the questions in the proposal form. In this case as the untruthfulness of the answers in the proposal were known to Biggar it was his duty to see that they were correct. Reasonable diligence and good faith were alike required. In that case the insured had it in his power to prevent the misrepresentation and the insurer had not.

Here, the most that can be said is that the respondent was negligent in not having read his policy, and the insurance company must have known that he did not receive what he applied for, but when he continued to pay the premiums for several years, it may well be that the company assumed that he acquiesced in their proposal.

Whether or not he has any claim against the company on other grounds, I am not called upon to consider. I do not think he is legally entitled to receive back the moneys which he has paid for the reason that during the period for which the premiums were paid, his life was insured for the sum named in the policy.

Appeal allowed with costs.

Solicitors for the appellant: *Lount, Marsh & Cameron.*

Solicitor for the respondent: *R. T. Harding.*