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*May 21.
*Oct. 7.

JOHN R. SHAW (PLAINTIFF) ..... APPELLANT;

AND

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Endowment policy—Surrender—Cash value—Action for rescission—Representation by agent—Inducement to insure.

The life of S. was insured by a twenty year endowment policy which provided that at the end of the term he could exercise one of three options including that of surrender of the policy on receipt of a sum to be ascertained in a specified manner. About ten months before the policy expired he wrote to the company asking for the amount payable on surrender which was promptly furnished, and, more than a year later, he brought action for a larger cash payment and in the alternative for rescission of the contract for insurance and return of the premium paid with interest alleging that when he applied for the insurance he was informed by the agent of the company that the cash value of the policies surrendered would be the larger amount claimed. The trial judge directed rescission and return of the premiums as prayed. This judgment was reversed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (23 Ont. L.R. 559) that as S. did not swear nor the evidence he adduced establish that he was induced to enter into the contract by the representations of the agent as to the sum payable on surrender, and it might fairly be inferred that had he been given the true figures he would still have taken the policy, his action must fail.

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

The material facts are stated in the above headnote.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 23 Ont. L.R. 559.

Hellmuth K.C. for the appellant. The misrepresentation of the agent entitled plaintiff to rescind. *Smith* v. *Chadwick*(1) shews that the difference in the amount of surrender value was a material inducement to plaintiff to accept the policy. See also *Smith* v. *Kay*(2), at page 759; *Gordon* v. *Street*(3).

Nesbitt K.C. and *Arnoldi K.C.* for the respondents. The alleged misrepresentation was inconsistent with the terms of the policy and evidence of it inadmissible. *Horncastle* v. *Equitable Life Assurance Society*(4).

The contract having been executed it could only be rescinded for fraud.

THE CHIEF JUSTICE.—This action was brought originally to enforce the contracts of insurance evidenced by the two policies; but at the trial, by an amendment, resiliation of the contracts and return of the payments for premiums was asked for. There is no allegation of fraud; the ground or cause of resiliation relied upon is the alleged representation made by the special agent of the company with respect to the surrender value of the policy at the expiration of the 20 year period, when the insured had, besides the protection of the policy in case of death in the interval, three options open to him:—

(*a*) The right to require paid up policy at end of term.

(*b*) The right to surrender at end of term of twenty years.

(*c*) The right to continue the policy as insurance with annuity after twenty years.

(1) 20 Ch. D. 27, at p. 44.
(2) 7 H.L. Cas. 750.
(3) [1899] 2 Q.B. 641.
(4) 22 Times L.R. 735.

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He chose to exercise his right to surrender. The surrender clause is in these terms:—

> This policy may be surrendered to the company at the end of the said first period of twenty years and the full reserve computed by the American Table of Mortality and four per cent. interest and the surplus as defined above will be paid therefor in cash.

This clause does not attempt to fix the surrender value or the amount of the reserve; but postpones the ascertaining of those amounts till the end of the first period of 20 years; it is, in effect, a promise to pay 20 years after the date of the policy, an amount to be ascertained then by a fixed method and on a fixed basis. The misrepresentation alleged consists in a statement made by the agent of the company at the time the policy was taken out to the effect that, calculated according to the terms of the surrender clause, the insured would be entitled to a money payment of $1,013, whereas it is now ascertained that the clause and the other provisions of the policy give the insured a lesser sum of $678.82.

The question is: Does the calculation made, at the time the policy issued, at the request of the insured, by the agent, although admitted now to have been made in error, render the policy voidable?

I hold not. There is nothing in the evidence to satisfy me, and the plaintiff has not said so when examined as a witness, that he was induced to enter into the contract by the error made by the agent in his calculation of the surrender value of the policy at the end of the term of twenty years. On the contrary, I think the fair inference, on all the evidence, is that, if the true surrender value had then been ascertained and given to the insured, he would still have taken the policy. This is not a case of fraud practised by or on behalf of the company, but an error in calculation

made with respect to the benefit to be derived by the insured, assuming the contract to be carried out honestly and in the best of good faith. The company is careful not only to fix the basis upon which the benefit is to be obtained, but also to stipulate against the binding effect of any promise made by the agent such as is now relied upon. The policy has this provision:—

NOTICE TO THE HOLDER OF THIS POLICY.—No agent has power on behalf of the company to make or modify this or any Contract of Insurance, to extend the time for paying the premium, *to bind the company by making any promises*, or by receiving any representation or information not contained in the Application for this Policy.

I cannot see how, even assuming it to have been satisfactorily proved, which it is not, that the calculation made by the agent was a promissory representation to the insured, the company can be bound, in view of all the provisions of the policy.

I would dismiss the appeal with costs.

DAVIES J. concurred with ANGLIN J.

IDINGTON J.—The appellant made an application to respondent on the 27th September, 1889, for $2,000 insurance on his life upon the 20 Payment Life Ret. Prem. Plan 20 Year Distribution; gave his promissory note at one month for the first premium of thirty-three dollars and paid that and nineteen succeeding premiums. He got, two months later, as requested, two policies each for $1,000. He brought thereon this action on the 22nd February, 1910, to recover the sum of $2,026, and by his declaration of the 2nd April, 1910, alleged the issue of said policies, and further, that the agent of the respondent had induced him to apply for said policies

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on the distinct representation and assurance that the reserve on each of the said policies computed by the American Table of Mortality and four per cent. interest was a fixed sum, and that said sum on the expiration of the twenty years during which the premiums were payable would amount to $527 on each of the said policies.

And further:—

8. The said agent as a further inducement represented to the plaintiff that the surplus on each of the said policies at the expiration of twenty years from the date of issue of the said policies would amount to the sum of $486 on each of the said policies.

He alleged also that relying upon the truth of said representations he had paid the premiums for the full period of twenty years which had expired on the second of November, 1909.

At the trial on the 18th May, 1910, he was allowed to amend this declaration by adding a prayer for rescission of the said contracts and a repayment of the premiums so paid and interest from dates of payment.

The learned trial judge gave this latter form of relief, and allowed the recovery of $1,354.64, but was reversed by the Court of Appeal for Ontario.

Appellant's contention was that the agent had represented that upon the expiry of the twenty years he would be entitled, as one of four options given, to receive on each policy the sum of $527 out of a reserve fund and $486 out of a surplus fund.

The policies each expressly provided as follows:—

SURRENDER.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve computed by the American Table of Mortality, and four per cent. interest, and the surplus as defined above, will be paid therefor in cash.

The alleged representations as to the amount to be expected out of the surplus fund could not be enforced because any verbal representation such as alleged could not legally vary the written policy, and could not in any case be held to have been misrepresenta-

tions of fact upon which fraud could be assigned and recovery thereon be based. This claim, therefore, was disallowed by the learned trial judge and no further contention has been made as to it.

The questions raised are thus reduced to the sole question of whether or not there was such a fraudulent representation by the agent as to entitle the appellant to claim rescission of the contract and a return of the premiums paid with interest.

The case is peculiar in this that the alleged representations were oral and the appellant does not pretend he can remember and give literally all that was said to him by the agent or agents twenty years ago, but depends on a memorandum in writing made later and speaks by that.

There were two agents concerned in the application. One Belfry first came to canvass appellant, saw him several times at his office and on the street, and later one McNeil representing himself as a special agent came, and then both interviewd him. This resulted, as stated above, in his signing an application, being examined, and giving his note.

On the 6th November following he seems to have written McNeil for some explanation.

We have no copy of this letter and, properly speaking, no secondary evidence of its contents. He produced and proved a letter in reply from McNeil dated the 11th November, 1889, which refers to this letter of the 6th. The greater part of this reply consists of an explanation of delays, and assuring him that the policy had been issued and gone to Mr. Belfry, to whom he had wired to deliver the policy if that had not already been done. The reply then continues as follows:—

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You seem to be in doubt as to the kind of a policy you applied for. In order to make it clear to you I send a slip to shew your plan.

You will observe that the cash value in 20 years is composed of two elements, *i.e.*, the reserve and the surplus.

For particulars see plan.

This plan was a sheet of printed paper in which evidently there had been filled in a number of the masses of figures it contains. A good deal has been said as to its being a thing given the agents to use and as to its want of heading indicating its non-authoritative issue, but in the view I take this is of little consequence.

The appellant says he got this in the same envelope as the letter and that he read it and being satisfied with it placed it for safe keeping with the policies.

He does not pretend to remember more than that he is sure it bore out the representations made him verbally. His evidence is as follows in his examination:—

I do not pretend now to say that I remember them, but they said there would be a cash surrender value, or an annuity, or other benefits of the policy, that is from memory. I signed an application for $2,000. * * * I was satisfied when I received this slip of paper, because it sets forth the representations made to me verbally by McNeil and Belfry, and I attached it to my policy, kept it with the policy, and have had it for twenty years. At the expiry of that time I expected the representations made in that paper to be made good. Instead of that I have been deceived. * * *

Q. You can't recollect what was said to you before you received that letter?

A. No, I do not pretend to recollect the conversation. * * *

Q. And are you prepared to swear here now what the figures were they gave you?

A. Yes.

I may observe that the letter of McNeil by no means clearly indicates that the exact amounts involved were what had concerned appellant. On the

contrary it is information regarding the nature of the plan of insurance and not the accuracy of any figures involved that would seem to have been desired.

The learned trial judge believed him and no attempt is made to discredit him. I assume, therefore, he is a truthful witness and the inferences I draw must not be taken as indicating the contrary.

But I must bear in mind that the charge now made is one of fraud, and the nature of the alleged fraud, and ask myself if I can properly say such a charge so founded on that sort of recollection of a conversation, indeed of many conversations, made twenty years ago, is sustained.

It seems to me, as Mr. Justice Magee has observed in the Court of Appeal, that it was quite possible that the item of reserve payable might have been correctly stated by McNeil or Belfry in their conversations, and that when the appellant saw the amount in question stated therein even slightly better than Belfry or McNeil had stated, he put it away as he says satisfied. I do not take it he is swearing to an identification of each line, letter and figure as the exact verification of what he could recall.

Therein are set forth the figures for each year of twenty years that would be payable at death, and the figures for each result according to the four options he was entitled to select from in case of surviving the twenty years.

To be quite sure that all or any one of these numerous figures were identical with what he had been told in the conversations that had taken place six weeks or more before, is a feat of memory that would be unusual.

Indeed, the most any man can say in such a case is

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just what the appellant does say and that is liable to the honest mistake Mr. Justice Magee suggests as possible, and I think in this case, quite probable.

It is hardly likely that an insurance agent intending to defraud would have selected an item which was based on tables of mortality accessible to any one choosing to inquire and make the requisite calculation his policy on its face rested on.

The risk of doing it with a gentleman of education and especially of the legal profession liable to have the subject brought to his mind at any moment, and of a young man likely to be canvassed again by others for additional insurance, seems altogether too great to permit of one readily assuming there was fraud involved in the evident mistake.

It evidently was a mistake, I think. In this appellant's own case we have furnished an apt illustration of how mistakes will occur.

He seems, in January, 1909, to have anticipated the falling due of these policies. He wrote on the 28th of that month to respondents in Toronto a letter of inquiry setting forth in blank the several options. The figures were filled in on this letter at the Toronto office; is the note made in the case and is confirmed by appellant's evidence, I think, as a fact. And a letter is written on the 1st February, 1909, from that office repeating same information. In reply to this, appellant on the fifth of the same month writes as follows:

Dear Sir:

Re Policies Nos. 378136 and 378138.

When I took out these policies with your company over 20 years ago I was supplied with a guarantee shewing what the result would be to me if I survived the period. The following are the figures. In view of the figures submitted in yours on the 1st inst. would be glad to know before I take whatever action I deem advisable, whether the options submitted in yours of the 1st inst. are final.

Figures submitted and guaranteed when insurance was effected.
20 year Investment Policy $1,000, age 27, rate, $33 per $1,000.

1. Surrender Policy for Cash, Reserve.....$527.00
   Surplus..... 486.00
   ——— $1,013.00
2. Paid up Policy for $1,825.00.
3. Paid up Policy for $1,000.00 and Cash $486.00.
4. Annuity for Life, $81.50.

Yours truly,
J. R. SHAW.

Now it so happens that the very memorandum on which he relies in writing this letter, and in this case, makes it plain that as to the surrender policy for cash the reserve item was guaranteed, but the surplus item was only estimated and based on past experience. I am quite sure no one would be justified in suggesting fraud in this mistaken representation by appellant of what he was guaranteed. But this is more than mere illustration, it is an apt test of the appellant's powers of accurate observation as well as recollection. I do not think it would be safe, resting entirely thereon as we must, to maintain this appeal.

I may observe that the sum of $93 is but a fractional part of the entire obligation the respondents by this form of policy undertook with and towards the appellant. His life was insured for twenty years, and then after the respondent had carried that, he had the option of selecting and calling upon it for further benefits. It is not a correct appreciation of the bargain and benefits to be had thereunder to compare the $93 with what he was entitled to on the basis of one of two items of a single option to be made after he had meantime enjoyed twenty years insurance of $1,000 and various sums increasing yearly up to $1,627. And when he selected this first option of surrender to say it was the proportion of that sum of $93 to a total of

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$434, is surely delusive. To appreciate accurately the materiality of this $93 in its relation to the whole contract we ought at least to know what it would have cost to carry such an insurance on such a life for twenty years.

This question only becomes material when we come to consider the question of whether or not the appellant was in fact induced by this mistake to do anything; and if found a fraudulent mistake to enable, or see if it would enable, the court to indemnify him without robbing the respondent of the value of the contract so far as executed.

He does not venture to swear that he was induced thereby to enter into this contract. Nor do I wish to lay down as law that in a case of fraud it is always necessary to swear to the inducement. It may be inferred from the nature of the transaction and the substantial materiality of what has been misrepresented when regard is had to the entire contract and the relative value of the part or thing so misrepresented bears to the whole transaction.

Can any one safely infer, in this case at this distance of time and on such defective evidence of the material facts which should be known, as a fact that, if the appellant had seen in this memorandum the true figures $434, instead of $535, he would have withdrawn from the contract.

I cannot so infer. To do so would imply on his part an accuracy of observation and of calculation and taste for making same, he evidently had not, or he would have seen and tested the tables of mortality for himself, or in this case have seen to it that he had duly estimated the value of twenty years insurance and deducted that service value from the sum he al-

ternatively claimed in the event of rescission. Assuming, as I do not, that under such circumstances he was entitled to rescission, I need not discuss or pass an opinion either on that or the question of whether or not his true remedy was not an action on the warranty that misrepresentation generally carries in it.

Whatever rescission means it does not mean that he rescinding is entitled to retain any, much less large, part of what he bargained for, and to get back all he paid with interest as awarded appellant at trial hereof.

Another thing I cannot understand is how the appellant, who came to realize on the 5th of February, 1909, this mistake, and to sue on the policies a year later, could be permitted to rescind his contract in May, 1910.

If it was a fraud that had, as now is of necessity urged, been committed upon him, he was bound, if electing to rescind on such ground, to have repudiated the contract at once on its discovery, and rescind, or claim rescission then. He should not, and in law I submit could not, take full advantage of being insured for the rest of that year and then later on attempt repudiation.

Every hour of this he was putting respondent, who could not rescind, at a disadvantage. He was not entitled to have attempted such a thing. I tried on the argument to get his counsel to explain how the last paragraph of the statement of claim was at all consistent with this requirement of the law. I am yet without a satisfactory reply.

I assume counsel must have read the judgment of Mr. Justice Meredith who deals with this from the

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pleading point of view, and had found that the least said the better.

I am unable to understand how the real question of proper repudiation was not raised and argued out on facts so patent as here. Fortunately the other grounds I rest on suffice.

It is usual to claim rescission by the writ in cases of fraud if it be the purpose to repudiate the contract.

This appeal should be dismissed with costs.

DUFF J.—I concur in the result.

ANGLIN J.—After a careful study of the evidence, oral and documentary, I find myself unable to say that it has been satisfactorily established that the appellant was induced upwards of twenty years ago by a material misrepresentation to enter into the contract of insurance of which he now claims rescission on that ground. My brother Idington has indicated reasons why the appellant's evidence is insufficient to sustain his claim and to justify a reversal of the judgment of the Court of Appeal. Apart from the difficulty created by his failure to bring action promptly on discovering the alleged misrepresentation and his omission to pledge his oath that that misrepresentation actually induced him to enter into the contract (which I regard as most important), for lack of satisfactory evidence of the misrepresentation itself, which, in the circumstances of this case, would require to be even more than usually clear and convincing, this action fails.

The appeal should be dismissed with costs.

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BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kilmer, McAndrew & Irving.*

Solicitors for the respondents: *Arnoldi & Grierson.*