[HIGH COURT OF AUSTRALIA.]

MAYE . . . . . APPELLANT;
PLAINTIFF,

AND

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 16, 17, 27.

Isaacs A.C.J., Rich and Starke JJ.

Life Assurance—Policy of assurance—Untrue answer to question in proposal—Condition for avoidance—Illiterate proposer—Answers filled in by canvasser—Knowledge of untruth—No knowledge of proposer that untrue statement made—Principal and agent—Canvasser—Agent for proposer or for insurer—Misrepresentation—Fraud—Warranty.

A policy of assurance was issued by a life assurance society to M. The policy was founded on a proposal and declaration and a personal statement. The proposal consisted of answers given to questions on a printed form, and the declaration was a printed form, at the end of the questions and answers, stating that the proposer declared that to the best of his knowledge and belief the particulars were in all respects true. A condition of the policy provided that the society "relies on the truth of the statements in the proposal, declaration and personal statement . . . and if the assurance hereby granted shall have been obtained through any fraudulent misrepresentation or concealment this policy shall be void and all moneys in respect hereof shall be forfeited to the society." M. was illiterate. A convasser of the society called upon him at his farm and suggested that he insure with it. M. said that another assurance society had "turned him down" as a first class life. Subsequently the canvasser saw M. in Brisbane, and requested him to visit the society's office and see the manager. M. did so, and proposed for assurance with the society. The manager instructed the canvasser to get the proposal form filled up and completed. The canvasser filled in the answers to the questions in the proposal form without reference to M. One of the questions

in the proposal form was : " Have you ever proposed to this society or any other office for life assurance ? If so, state when, amounts proposed, whether accepted, withdrawn, deferred or declined." This question the canvasser answered untruly, and without M. knowing or suspecting that it was untruly answered. A jury found that the canvasser wrote the answers to the questions knowing them to be incorrect or incomplete, and without caring whether they were or were not correct or complete ; and that in filling in the answers to the questions the canvasser was acting as agent for the society.

Held, by *Isaacs* A.C.J. and *Rich* J. (*Starke* J. dissenting), (1) that, in construing the above condition of the policy, the word " truth " must be interpreted in the same sense as in the declaration, and meant truth to the best of the knowledge and belief of the assured ; (2) that avoidance of the policy and forfeiture of premiums could be made only for fraud ; and (3) that, as the assured was personally honest and the canvasser did not act as his agent towards the society, the policy was not avoided for fraud on the part of the assured or his agent.

Held also, by *Isaacs* A.C.J. and *Rich* J. (*Starke* J. dissenting), that, even if the contract required a warranty of absolute truth, the position of the canvasser entitled the plaintiff, on the facts and the findings of the jury, to succeed in the action, for the canvasser was regarded and trusted by the assured as the appropriate representative of the society, and the society was responsible for his fraudulent act.

Per Starke J. : (1) The canvasser was the amanuensis for the assured and nothing more, and the society was not responsible for the canvasser's carelessness or fraud. (2) The clauses in the condition were independent and cumulative provisions and each might operate to cause avoidance of the policy.

Decision of the Supreme Court of Queensland (*Shand* J.) reversed.

APPEAL from the Supreme Court of Queensland.

Sarah Agnes Maye, the administratrix of the estate of her husband, Patrick John Maye, and the beneficiary under a policy of life assurance, brought an action to recover from the Colonial Mutual Life Assurance Society Ltd. the amount of money assured by the policy, which had been effected by her husband with that Society. Except that he could sign his name, the assured was unable to read or write. The policy was founded on a " proposal and declaration for assurance " which was signed by Maye. The proposal consisted of a number of printed questions requiring answers by the proposer. The answers were filled in by one Thomas Joseph Willis, an employee of the Society. One of the questions was :—" Have you ever proposed to this Society or any other office (A) for life assurance ?

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(B) for accident or sickness assurance ? If so, state when, amounts proposed, whether accepted, withdrawn, deferred or declined, or if any extra was charged." Opposite (A) was written "Yes"; opposite (B) was written "No"; and opposite the last part of the question was written "C. M. L." In fact Maye had previously made a proposal for life assurance to the Mutual Life and Citizens' Assurance Co. Ltd. which had not been accepted but had been deferred.

The action was tried before *Shand* J. and a jury.

The following questions were put to the jury, who gave the answers following them, respectively:—(1) Did the answer set opposite to the question referred to in par. 4 of the defence (the question above set out) omit to mention material facts with reference to Maye's previous proposal to the Mutual Life and Citizens' Assurance Co. ? —Yes. (2) At the time when Maye signed Ex. 2 [the proposal and declaration] did he know the material facts so omitted to be mentioned ?—Yes. (3) At the time when the witness Willis filled in the answers to the questions contained in Ex. 2, had he been informed by Maye of any and what facts relating to the said proposals ?—Yes: the fact that Maye was turned down by Dr. Dovaston, who classed him as class 2 in Gibb's Co. [Citizens' Co.] which Maye refused, stating he would not accept class 2; if not good enough for 1st class he would have none; this fact was told Willis, who invited Maye to come to Brisbane and he would get him through as city doctors knew more than country doctors. (4) Did Willis write out the answers to the questions contained in Ex. 2 without first asking Maye the questions or making any inquiry from Maye to ascertain whether such answers were true or correct ? —Yes. (5) Did Maye sign Ex. 2 without reading or having it read to him ?—Yes. (6) Did Willis knowingly permit Maye to sign Ex. 2 proposal without calling his attention to the questions or answers therein ?—Yes. (7) In filling in the answers to the said questions was Willis acting as agent for the defendant Society or as agent for Maye ?—As agent for the defendant Society. (8) At the time when Maye signed Ex. 2 did he know or suspect that Willis had incorrectly answered or had omitted to answer any questions ? —No. (9) Did Willis write the answers to the questions contained in Ex. 2, knowing them to be incorrect or incomplete or recklessly

and without caring whether they were or were not correct or complete ?—Yes. (10) In not stating in Ex. 2 the material facts relating to his previous proposal to the Citizens' Co. was Maye acting fraudulently, that is to say, designedly concealing the truth ?—No. (11) Was the answer set opposite to the questions referred to in par. 6 of the defence [questions asked in the personal statement] untrue by reason of its omitting reference to Dr. Dovaston having previously examined Maye ?—No. (12) In omitting from Ex. 4 [the personal statement] any reference to his examination by Dr. Dovaston was Maye acting fraudulently, that is to say, designedly concealing the truth ?—No. (13) Was Maye unable to read or to write except by signing his name ?—Yes. (14) If so, at the time when Maye signed Ex. 2 did Willis know that he was so unable to read or write ?—Yes. (15) At the time when Maye signed Ex. 1 [a cheque in payment of the premium] did Corbett [the New Business Manager of the Society] know that he was so unable to read or write ?—Yes. (16) Did Willis communicate to any officer of the defendant Society before acceptance of proposal (Ex. 2), or the issue of the policy (Ex. 3) any facts known to him relative to the previous proposal to the Citizens' Co. ?—No. (17) Did the defendant Society, on discovering that Maye had made a previous proposal to the Citizens' Co., write the letter Ex. 16 ?—Yes. (18) Has the defendant Society ever withdrawn from the position taken up by it in reference to Ex. 16 ?—No.

On motion for judgment, *Shand* J. was of opinion that there was no evidence on which the jury could reasonably answer the seventh question in the way they did, and he therefore entered judgment for the defendant Society notwithstanding the findings of the jury.

From that decision the plaintiff now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Stumm K.C. (with him *Walsh*), for the appellant. The findings of the jury do not necessarily involve a finding of fraud. They have found that Willis acted as the agent of the Society in filling in the answers because, in doing so, he followed the instructions of the New Business Manager, and they were warranted in finding such agency. If, on the proper construction of condition 1 of the policy,

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fraud, and fraud only, vitiates the policy, Maye was not responsible for the agent's fraud; for Maye made an honest and full disclosure of all facts (*Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1)). But really there is no finding of fraud; the jury merely gave credence to Maye and refused to believe Willis. The knowledge of Willis was knowledge of his principal, the Society (*Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (2); *Keeling* v. *Pearl Assurance Co.* (3); *Paxman* v. *Union Assurance Society Ltd.* (4); *Hough* v. *Guardian Fire and Life Assurance Co.* (5)). Questions of agency are questions of fact, and on the facts the jury were bound to find the agency of Willis for the Society. On all the findings, justified as they were by the evidence, judgment should have been given for the plaintiff.

[ISAACS A.C.J. Under what power was judgment entered for the defendant notwithstanding the findings of the jury?]

In accordance with the *Rules of the Supreme Court* (Q.), Order XLII., rule 6, and on the authority of *Hendle* v. *Qualtrough* (6). On the construction of the policy, see *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1). The policy is not expressly avoided on the ground that an untrue statement was made in the proposal unless the statement was fraudulently made; clause 1 of the conditions of the policy makes the policy void only on "fraudulent misrepresentation or concealment." Maye did not warrant the truth of all statements but only the absence of any fraud by him. Therefore the policy is not void by reason of the first part of clause 1; and is not void for fraud, for Maye himself was not fraudulent.

Hart and *Douglas*, for the respondent. Having regard to findings 3 and 6, finding 9 is a finding of fraud against Willis; he knowingly wrote incorrect answers (*Derry* v. *Peek* (7)), and, knowing that incorrect answers had been made therein, allowed Maye to sign the proposal. There is no evidence to support the answer to question 7; the Society did not take the responsibility of fraud

(1) (1863) 3 B. & S. 917.
(2) (1892) 2 Q.B. 534.
(3) (1923) 129 L.T. 573.
(4) (1923) 39 T.L.R. 424.
(5) (1902) 18 T.L.R. 273.
(6) (1899) 9 Q.L.J. 218.
(7) (1889) 14 App. Cas. 337.

(or negligence) on Willis's part; Maye must be considered as having adopted the acts of Willis by signing the proposal and to have employed him; he was culpable in not having the proposal read over to him, and that neglect made the fraud of Willis possible (*McMillan* v. *Accident Insurance Co.* (1); *Life and Health Assurance Association Ltd.* v. *Yule* (2)). The fraud of Willis rendered Maye responsible, for he employed Willis as his amanuensis (*New York Life Insurance Co.* v. *Fletcher* (3)). The proposal must be taken as Maye's proposal, with all its faults (*Phœnix Assurance Co.* v. *Berechree* (4); *Union Credit Bank Ltd.* v. *Mersey Docks and Harbour Board* (5)).

[STARKE J. referred to *Lothian* v. *Rickards* (6).]

In order to enable the respondent to sustain the judgment, it is sufficient that the untrue answer was in fact given by Maye, for he warranted the truth of the answers in the proposal and declaration and personal statement—clause 1 of conditions of policy (*Dawsons Ltd.* v. *Bonnin* (7); *Biggar* v. *Rock Life Assurance Co.* (8); *Levy* v. *Scottish Employers' Insurance Co.* (9)).

[RICH J. referred to *Wells* v. *Smith* (10).]

Maye is in the same position as if he had expressly told Willis to include or to omit whatever was included in or omitted from the proposal. The cases following *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (11) are not applicable in view of the express clauses in this policy. Maye or his representative either did or did not put forward the proposal as Maye's proposal; if either of them did, everything in the proposal is binding on the plaintiff; and if neither of them did, there never was a binding contract.

Stumm K.C., in reply, referred to *Anstey* v. *British Natural Premium Life Association Ltd.* (12).

Cur. adv. vult.

(1) (1907) S.C. 484.
(2) (1904) 6 F. (Ct. of Sess.) 437.
(3) (1886) 117 U.S. 519, at p. 534.
(4) (1906) 3 C.L.R. 946, at p. 962.
(5) (1899) 2 Q.B. 205, at p. 209.
(6) (1911) 12 C.L.R. 165; (1913) 16 C.L.R. 387.
(7) (1922) 2 A.C. 413.
(8) (1902) 1 K.B. 516.
(9) (1901) 17 T.L.R. 229.
(10) (1914) 3 K.B. 722.
(11) (1892) 2 Q.B. 534.
(12) (1908) 24 T.L.R. 871.

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June 27.

The following written judgments were delivered :—

ISAACS A.C.J. The appellant is the widow of Patrick John Maye, who died in November 1920. Maye had insured his life in favour of his wife with the respondent by two policies, as to one of which for £100 we have no concern. As to the other, No. 190368, effected on 27th April 1920 for £500, the company disputes liability. By the defence, three grounds were relied on : (a) Untrue statements and non-disclosure of material facts in his personal statement to the company's medical officer ; (b) untrue statements and non-disclosure of material facts in the proposal and declaration ; (c) false and fraudulent statements and concealment. The trial took place before *Shand* J. and a jury ; and several questions were sent to the jury, and all answered in favour of the appellant. On motion for judgment, there being no application for a new trial, the learned Judge, holding that there was no evidence upon which the jury could reasonably find in favour of the appellant on one of the questions and there having been an application for a direction at the trial as to this question, disregarded the answer and directed judgment to be entered for the defendant with costs.

On that occasion learned counsel for the company, as appears from the judgment of the learned primary Judge, did not challenge the validity of the finding of the jury in respect of the 11th question. Nor did learned counsel, in argument before us, challenge that finding. It stands, therefore, that in fact there was no untruth in respect of the personal statement. Nor did learned counsel challenge before us the accuracy of the conclusion of law as stated by *Shand* J. with respect to that finding. The personal statement may, therefore, now be left out of consideration. The points of law raised and argued were as to the proper construction of the contract, and as to whether Maye was, in the circumstances, personally or by imputation guilty of fraudulent misrepresentation or concealment.

The respondent contends that the contract contains as the basis a warranty by Maye of the absolute and literal truth of his answers to the questions in the proposal. It also contends that, although Maye in view of the unchallenged answers of the jury must be personally regarded as entirely free from all fraudulent conduct, yet, by reason of the fraud of the company's own employee, Willis,

found by the jury and now relied on by the company, fraud should be legally imputed to the morally innocent man Maye, whose money the company received and retains, and, therefore, it need not pay.

For the appellant it is contended that the fair construction of the documents constituting the contract, prepared by the company itself, is that Maye was required, not to give, and did not give, a warranty of the absolute and literal truth of his answers, but only to give honest answers, and next that Willis, who wrote them down, was in the circumstances really acting as the representative of the company, and his fraud, if he were fraudulent, should not be saddled on Maye.

Shand J. determined the question of construction of the contract in favour of the appellant, but felt constrained, in the circumstances as he viewed them, to decide in favour of the company on the ground that in law Willis could not be held to be the company's agent to write the answers, and therefore his fraud must be imputed to Maye. But the learned Judge, while so holding, expressed his "surprise that in the circumstances of this case any self-respecting institution should have thought fit to contest its liability." I most emphatically concur in that observation. Until the facts were elucidated at the trial, the company was well within its legal and moral rights in requiring an investigation as to whether Maye was honest or not, and whether or not he personally kept back an important fact. But the position was entirely different as soon as it was established that Maye, an illiterate man, told the truth and the whole truth to the company's employee; that it was in the company's own office in Brisbane he signed his name to the company's document, drawn up in print by the company and in writing by the company's own employee; and that it was there he paid his premium, which is still retained by the company. The company, so far from contesting its own employee's fraud, is relying on it as a shield against paying the insurance money of an admittedly honest man.

Passing to the law of the case, I may say at once that in my opinion the company is legally in the wrong, and that this appeal should be allowed. I further say that I arrive at this conclusion, even though on the point of construction the company's view ought to prevail. But, as that is a very important point in itself

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and has been pronounced upon by *Shand* J. and argued here, I shall, before stating the grounds on which I am prepared to rest my judgment, say fully why I do not agree with the company's contention and why I hold that the view taken on this branch of the case by the learned primary Judge is sound.

Construction of Contract.—There are certain canons of construction relevant to this case which I think I ought to state at once, so as to indicate the course of reasoning applied to the contract in hand. (1) A contract is to be construed as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after (*Barton* v. *Fitzgerald* (1); *Thomson* v. *Weems* (2); *Colquhoun* v. *Brooks* (3); *M'Cowan* v. *Baine*; *The Niobe* (4); *Elderslie Steamship Co.* v. *Borthwick* (5); *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.* (6); *Toronto Suburban Railway Co.* v. *Toronto Corporation* (7)). (2) Where a policy incorporates by reference other documents, all must be read and construed together in order to arrive at the true contract (*Worsley* v. *Wood* (8)). (3) If the terms ascertained from the whole of the documents are unambiguous in themselves and independently consistent with each other, effect must be given to each according to its verbal tenor, as severally construed (*In re United London and Scottish Insurance Co.*; *Brown's Claim* (9)). (4) If by reason of its own language in relation to the matter, or by reason of the context or of conflicting or differing provisions elsewhere, a term when fairly read is doubtful or ambiguous and reasonably susceptible of two constructions, that construction should be adopted which is the more favourable to the assured, because that is of the two the more reasonable in the circumstances (*Braunstein* v. *Accidental Death Insurance Co.* (10); *Cornish* v. *Accident Insurance Co.* (11); *Fitton* v. *Accidental Death Insurance Co.* (12); *Smith* v. *Accident Insurance Co.* (13); *Notman* v. *Anchor Assurance Co.* (14); *Elderslie*

(1) (1812) 15 East 530, at p. 541.
(2) (1884) 9 App. Cas. 671, at p. 683.
(3) (1889) 14 App. Cas. 493, at p. 506.
(4) (1891) A.C. 401, at p. 408.
(5) (1905) A.C. 93, at p. 96.
(6) (1908) A.C. 16, at p. 20.
(7) (1915) A.C. 590, at p. 597.
(8) (1796) 6 T.R. 710.
(9) (1915) 2 Ch. 167.
(10) (1861) 1 B. & S. 782, at p. 799.
(11) (1889) 23 Q.B.D. 453, at p. 456.
(12) (1864) 17 C.B. (N.S.) 122, at pp. 134, 135.
(13) (1870) L.R. 5 Ex. 302, at p. 307.
(14) (1858) 4 C.B. (N.S.) 476, at p. 481.

Case (1); *Brown's Claim* (2); *Condogianis* v. *Guardian Assurance Co.* (3); *Dawsons Ltd.* v. *Bonnin* (4)). (5) "*Expressio unius est exclusio alterius*, or, as it is also worded, *Expressum facit cessare tacitum*. The express mention of fraudulent concealment and designedly untrue statement fairly lead to the construction that the declaration parts with the implied tacit agreement that any untrue particulars should vitiate the policy, and that it means that, if there were designedly untrue statements, the policy should be void, and not otherwise" (per Lord *Blackburn* in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (5)). (6) If one of the documents is ambiguous in its terms but another is clear, then force is to be given to the one the terms of which are clear, so as to interpret the one containing ambiguous terms (*Re Phœnix Bessemer Steel Co.* (6)).

Applying the first and second canons of construction, I find that the policy incorporates, by the following words, "a proposal, declaration, and personal statement, which form the basis of this contract." All four documents, if they may be so called, namely, policy, proposal, declaration and personal statement, have to be looked at, and the three latter are "the basis of this contract." What is the effect of that statement, when the whole of the documents are considered, has yet to be ascertained. We may put aside at once the personal statement, as to which the jury's finding is not complained of and on which no reliance was placed by the company in argument either before the learned primary Judge or before us. The first documents in order of time are contemporaneous and are, in reality, one instrument—the proposal and the declaration. They are treated as one in the policy schedule and at the foot of the declaration itself. They are also, as I hold, the most important for the present purpose. They are the documents ordinarily placed before any assured for his signature and as conveying to his mind the terms to which he is asked to pledge himself when entering upon the transaction.

The relevant written answer in the proposal—that to the fifth

(1) (1905) A.C., at p. 96.
(2) (1915) 2 Ch., at p. 170.
(3) (1921) 2 A.C. 125, at p. 130; 29 C.L.R. 341, at p. 344.
(4) (1922) 2 A.C. 413.
(5) (1863) 3 B., & S., at p. 930.
(6) (1875) 44 L.J. Ch. 683, at p. 685.

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question—when read unqualified, is admittedly untrue in the absolute and literal sense. The declaration, however, is not a declaration as to the absolute or literal truth of the answer. It is in these terms : " I do hereby declare that *to the best of my knowledge and belief* the above particulars are in all respects true " (I omit the reference to personal statement to be made). Then the declaration continues : " And I agree that this proposal and declaration, together with the said personal statement, shall be the basis of contract between myself and the Society."

I refer to another portion of the declaration, not because I think it at all material to this case, but because it was relied on by the company. The assured further declared : " I also agree that no statements, promises, or information made or given by or to the person canvassing for or taking this proposal, or by or to any other person, shall be binding on the Society or affect its rights in any way whatsoever, unless such statements, promises, or information are reduced to writing and endorsed in this proposal, and are accepted by the directors of the Society." I do not in any way base my judgment on any information, &c., given by or to any officer of the company. I base it, as will be seen, on the conduct of the company as represented by its accredited officers for the ordinary transaction of its business at its head office in Queensland. The clause in question is irrelevant.

Reverting to the prior part of the declaration, it appears to me clear that, while the proponent agrees that the proposal and declaration are to be " the basis of contract "—with whatever effect that may prove eventually to have—he limits his declaration of accuracy to " the best of his knowledge and belief." That is the outstanding and, as I think, the dominant feature.

Now we come to the policy :—It recites, as I have said, that the " proposal, declaration (and personal statement) form the basis of this contract " ; but, so far, that cannot extend the limits of the declaration or convert it into a declaration of pure warranty of truth, irrespective of " knowledge and belief." The policy then proceeds to witness that, subject to payment of premiums " the Society will, subject to the terms and conditions of this policy, pay," &c. The only other relevant term is the first of the " privileges

and conditions," it runs thus :—" 1. Proposal and declaration and personal statement.—The Society relies on the *truth* of the statements made in the *proposal and declaration* and the *personal* statement made in connection with this assurance." It is said by the company that this clause, like the recital above referred to, insists on the absolute and literal truth of the answers in the proposal and that there is a tacit condition of such absolute and literal accuracy. Even if the clause stopped there, I should hesitate to hold so—and for this reason : the *truth* referred to is not simply the truth of the statements made in the answers found in the " proposal " but in the " proposal and declaration." If that document, which is headed " proposal and declaration " and is signed once and as a whole, there being no signature to the answers, be read apart from the declaration, it appears to me to be, not only the fairest, but the most reasonable construction that the words " the Society relies on the truth of the statements made in the proposal and declaration," mean *the truth as stated in the declaration.* That is, as before, the truth " to the best of my knowledge and belief." In *Macdonald* v. *Law Union and Life Insurance Co.* (1) *Lush* J. draws pointed attention to the significance of such a qualification. *Cockburn* C.J. (1) repeats the distinction; and, as I read the judgment of *Blackburn* J., that learned Judge was of the same opinion. (See, in *Jones* v. *Provincial Insurance Co.* (2), the observations of *Cresswell* J.). If it be true, as Lord *St. Leonards* says in *Anderson* v. *Fitzgerald* (3), that " a policy ought to be so framed, that he who runs can read," and if that learned Lord be right in what he says (4) as to " the man's knowledge," then it does seem to me nothing short of a trap to ask a man to limit himself in that way, take his money, and then to disregard the limitation expressly inserted, without which, probably, many persons would refrain from definitely answering without qualification. It is as if every answer were prefaced with the words " to the best of my knowledge and belief." It is also in the circumstances, as I shall indicate, something more, but for the present I defer that.

But the words of the first clause do not end there. The clause,

(1) (1874) L.R. 9 Q.B. 328, at p. 331.
(2) (1857) 3 C.B. (N.S.) 65, at p. 86.
(3) (1853) 4 H.L.C. 484, at p. 510.
(4) (1853) 4 H.L.C. at p. 512.

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in perfect consonance with the limited pledge of truth (see per *Cockburn* C.J. in *Macdonald* v. *Law Union Fire and Life Insurance Co.* (1)), proceeds to state the condition of avoidance. It continues *without a break*, adding these words, " and if the assurance hereby granted shall have been obtained through any fraudulent misrepresentation or concealment, this policy shall be void, and all moneys paid in respect thereof shall be forfeited to the Society." One has only to compare the terms of the policy and documents in this case with those in such cases as *Anderson* v. *Fitzgerald* (2), *Thomson* v. *Weems* (3) and *Condogianis' Case* (4). There seems almost an intentional departure from the ordinary form. If the test suggested in *Condogianis' Case* (5) be applied, the answer does not seem doubtful. The test applied to this case would be : Could a man making a proposal for insurance fairly read the combined and somewhat varied phraseology of the company, beginning with the declaration and ending with the first clause endorsed on the policy, as avoiding the policy and forfeiting the premiums only in the event of fraudulent misrepresentation or concealment ? It seems to me he could, and I would add, though it is unnecessary, in all probability he would. I should certainly think so myself, even though more acquainted with insurance law than the hypothetical proponent. Applying the fourth and fifth of the above formulated canons of construction I should have, and I judicially have, no difficulty whatever in saying that the true construction, having regard to the totality of the relevant expressions of the company, is that for fraud only is there to be forfeiture of policy and premiums. At the risk of repetition, I may cite *Fowkes's Case* (6). There *Cockburn* C.J. said (7) that insurance conditions must be construed in the sense in which the agreement would be understood by a layman who was *about to enter upon* an insurance transaction. *Blackburn* J. said (8) :—" In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other. If there is any ambiguous

(1) (1874) L.R. 9 Q.B., at p. 331.
(2) (1853) 4 H.L.C. 484.
(3) (1884) 9 App. Cas., at p. 678.
(4) (1921) 2 A.C., at p. 129 ; 29 C.L.R., at p. 344.
(5) (1921) 2 A.C., at p. 132 ; 29 C.L.R., at p. 346.
(6) (1863) 3 B. & S. 917.
(7) (1863) 3 B. & S., at p. 925.
(8) (1863) 3 B. & S., at p. 929-930.

phrase, another rule of construction, which was also known to the civil law, applies, '*Verba chartarum fortius accipiuntur contra proferentem.*' . . . Ambiguous words . . . ought to be construed in that sense in which a prudent and reasonable man on the other side would understand them." See per Lord President *Inglis* in *Life Association of Scotland* v. *Foster* (1), and per Lord *Deas* (2) and per Lord *Ardmillan* (3). At page 371 it is, in effect, said that the meaning of one party's obligation is that which the other party is to understand, and the learned Judge adds "not that which, in my own favour, I wrap up in general phrase, or hide in multiplicity or generality of words, and mean to put upon it myself." That is very apposite to the generality of the phrase first occurring in clause 1 of the conditions: "The Society relies on the truth of the statements in the proposal and declaration." Does "truth" there mean the literal truth of every answer as it stands unaffected by the terms of the declaration; or does it mean as controlled or modified by the declaration? What is meant by the "statements"—does the word mean both the "literal truth" of the answers standing by themselves, and also the modified "truth to the best of knowledge and belief"? Which is the "basis" recited in the body of the policy; or are there two "bases"? And when, added to this, there is the *express* stipulation as to avoidance for fraud, it does seem to me that Lord *Ardmillan's* words are specially in point.

If we pass from the mere consideration of construction by collocation to the effect of the express stipulation for "avoidance," there are some cases of great importance. *Fowkes's Case* (4) is an illustration of some principles. Those principles include that which is commonly phrased *Expressum facit cessare tacitum*, which has been above formulated. In applying that principle Lord *Blackburn* says (5)—as (substituting "truth" for "untrue") we may say here—"*When we bring the declaration so understood into the policy, we must construe the word 'untrue' in the policy in the same sense as in the declaration.*" Neither *Fowkes's Case*, nor any other

(1) (1873) 11 Ct. of Sess. Cas. (3rd ser.) 351, at p. 359.
(2) (1873) 11 Ct. of Sess. Cas. (3rd ser.), at pp. 364, 369.
(3) (1873) 11 Ct. of Sess. (3rd ser.), at p. 371.
(4) (1863) 3 B. & S. 917.
(5) (1863) 3 B. & S., at p. 930.

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case dealing with policies in different terms, can control the construction of the present policy. But the principle on which the construction should proceed is not doubtful. *Fowkes's Case* (1) establishes that, notwithstanding a policy contains a term that the proposal and declaration are the basis of the contract, yet a condition avoiding the policy in the event of fraudulent misrepresentation or concealment may have the effect of limiting avoidance to the expressed event. Whether in a given case this result follows must depend entirely on the nature of the respective competing provisions.

From *Fowkes's Case* (1), *Scottish Provident Institution* v. *Boddam* (2), *Reid & Co.* v. *Employers' Accident and Live Stock Insurance Co.* (3) and *Dawsons Ltd.* v. *Bonnin* (4), I draw the principles (1) that, where there is no express stipulation that mere untruth in the absolute sense shall avoid the contract, the Court must examine the "basis" provision and the "express avoidance" provision with a view to determine whether the primary tacit implication arising from the "basis" provision is excluded; and (2) that at least one great test of such exclusion is whether the "express avoidance" clause covers ground occupied by the "basis" clause, or is confined to matters outside the "basis" clause. If the former, then primarily, at all events, there is exclusion of a tacit warranty; and if the latter, the prima facie tacit warranty has full play. The reasoning in *Fowkes's Case* indicates why this should be the test. In *Reid's Case* (5) there is a passage I shall quote from the judgment of Lord *Trayner*. Speaking of the "avoidance" clause, his Lordship observed:—"If it only meant that the policy was to be void if the issuing of it had been induced by fraudulent misdescription, it was quite unnecessary, as no contract induced by fraud can be enforced. The clause in that view of it was, as I have said, mere surplusage, for the law, without any such clause, would have held what the pursuers say the clause was intended to provide." The express "avoidance" provision in this case is in the widest terms up to the making of the contract, for the words "any fraudulent misrepresentation or concealment" clearly include

(1) (1863) 3 B. & S. 917.
(2) (1893) 9 T.L.R. 385.
(3) (1899) 1 F. (Ct. of Sess.) 1031, particularly at p. 1036.
(4) (1922) 2 A.C. 413, particularly at pp. 421, 430, 433 and 438.
(5) (1899) 1 F. (Ct. of Sess.), at p. 1037.

within their ambit the statements in the proposal and declaration, and the personal statement also. But they do not go further than the time the assurance is "obtained." That provision, consequently, does what the corresponding provision did in *Fowkes's Case* (1) and *Boddam's Case* (2), and what the corresponding clause in *Reid's Case* (3) and *Dawsons Ltd.* v. *Bonnin* (4) did not do — namely, cover ground occupied by the "basis" clause. It is, therefore, open to the obvious observation which has been so clearly expressed by Lord *Trayner*. Nor can we attribute a different intention to it by reason of its reference to the forfeiture of premiums for fraud. The generally accepted view is that premiums are never recoverable by the insured where he is guilty of fraud, though as a condition of active equitable interposition their return may be required (*Feise* v. *Parkinson* (5); *Anderson* v. *Thornton* (6)). The text-writers on insurance take this view; and especially may I instance the very clear statement in *Arnould's Marine Insurance*, 10th ed. (1921), par. 1256, pp. 1604-1605. It will be observed that the principle is impliedly recognized by the Imperial Legislature in the *Marine Insurance Act* 1906, sec. 84, which is adopted by the Commonwealth Parliament in the Australian *Marine Insurance Act* 1909, sec. 90. (See, also, *Bunyon on Fire Insurance*, 7th ed. (1923), at p. 130.) It is clear, therefore, that the express "avoidance" clause was not inserted for any intended effective purpose unless to make clear—as I think it does—that avoidance of contract and forfeiture of premium were to ensue only in case of fraud. The sixth canon of construction enables me to say that when the various documents are placed together, the unmistakable clearness of the declaration, in limiting the insured's statements to "knowledge and belief," makes any obscurity with regard to the operation of the first condition of the policy yield for the sake of consistency to the former instrument. And, in addition, as I have stated, the former is the dominant instrument in ascertaining the intention of the insured.

The result of what I have said is that, in my opinion, the respondent

(1) (1863) 3 B. & S. 917.
(2) (1893) 9 T.L.R. 385.
(3) (1899) 1 F. (Ct. of Sess.) 1031.
(4) (1922) 2 A.C. 413.
(5) (1812) 4 Taunt. 640, at p. 641.
(6) (1853) 8 Exch. 425, at p. 427.

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company cannot succeed unless it can establish the fraud of Maye, either personal or legally imputable to him.

Fraud.—It will be convenient if I state *in limine*, and as succinctly as possible, why I am of opinion that the appellant should succeed on the question of fraud. "Fraudulent representation or concealment" in the condition means the fraud of Maye either personally or by his agent. Personally, he was not fraudulent; agent he had none. Whether Willis was the agent or representative of the company in writing the answers attributed to Maye and signed by him, or not, is immaterial on this issue. Willis, at most, was amanuensis for Maye. He occupied, even on the respondent's case, no other position than that which would be filled by a clerk in a merchant's office, filling in a document for his employer, who himself presents it to the other principal. *Willis did not act for Maye towards the company.* Maye did that himself. Willis handed Maye's signed proposal to Corbett, but in no other guise than (as I think) a sub-official to his superior or (alternatively) as a mere hand to deliver it. Willis did not in any sense fill the position of *agent* in the transaction (see *Halsbury's Laws of England*, vol. I., p. 148, "Agency," par. 327). There is no ground, therefore, for imputing to Maye any mental obliquity of Willis. At most, Maye could in such a case be said to be negligent. But negligence, however great, is consistent with honesty, and is not equivalent to fraud (*Halsbury's Laws of England*, vol. XX., p. 692, "Misrepresentation," par. 1671, and cases there cited, and especially see *Derry* v. *Peek* (1) and *Nocton* v. *Ashburton* (2)). Unless, therefore, Maye is disentitled by negligence, he is not disentitled at all. If my construction of the contract be right, he, being personally honest and not being affected by Willis's mind as the mind of his *agent*, is not touched by the condition of avoidance.

Willis's Position.—No doubt, whatever view be taken of the true construction of the contract, the central fact in this case is the capacity in which Willis wrote the answers in the proposal. That is the ultimate fact to be ascertained, and perhaps it may be considered a conclusion of mixed fact and law. In my opinion, even accepting for the purpose of argument the highest and most

(1) (1889) 14 A.C. 337.

(2) (1914) A.C. 932.

stringent construction of the contract—a warranty of absolute truth —Willis's position was such as to entitle the appellant to succeed. In collecting facts upon which that conclusion depends, we must accept the jury's findings so far as they are unchallenged. All the findings except that to question No. 7 are unchallenged, and must on this proceeding be accepted as correct (*Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1)). Under Order XLII., rule 6, of the *Rules of the Supreme Court* of Queensland (corresponding to the English Order XL., rule 10), the Court on the motion for judgment may draw inferences of fact not inconsistent with the finding of the jury. But that, as stated, does not, in my opinion, permit the Court to disregard an actual finding unless, perhaps, a direction was asked for and the application postponed ; nor does it enable the Court to substitute itself for the jury on a substantive issue which should have been submitted to them (*Milissich* v. *Lloyds* (2)).

With these observations the facts may be stated as follows :— Maye (the deceased) was an illiterate man : he could sign his name and that is all ; beyond that he could neither read nor write. His cheques were filled in by other people. Willis in 1920 was a canvassing agent for the defendant company. In March of that year he canvassed Maye at the latter's farm for insurance. Maye told Willis that he had applied to another company, which he called Gibb's Company, that he did not pass and that he had been turned down by Dr. Dovaston as a first class life, and Maye told Willis about class No. 2 and said he would not go into class 2. Willis suggested to Maye to come to Brisbane, saying he would get Maye pushed through by their doctor, and added : " He is a better doctor than the country doctors." Maye did not go then ; later on Mr. and Mrs. Maye came to Brisbane, where they stayed with friends. Willis met them in the street, near the defendant company's office. He took them into the office, and was shown into the room of Mr. Corbett. Corbett was at that time what is called the " New Business Manager "—that is to say, the manager for getting new business, such as getting the proposal from Maye. Corbett and Maye conversed for some time. Corbett advised Maye to take out a probate policy. Ultimately Maye agreed ; Corbett brought a

(1) (1896) A.C. 257. (2) (1877) 36 L.T. 423.

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proposal form from the main office, with a beneficiary form attached. He handed them, not to Maye, but to Willis, telling him, in Maye's presence, to go on with the filling in of the proposal form. There was no request or direction from Maye to Willis to fill in the proposal, and no request from Maye to Corbett to provide an amanuensis for him. The only direction was from Corbett to Willis, as from a superior to a subordinate officer. That is how the matter would naturally present itself to a member of the public. Corbett remained there while the operation took place, talking to Mrs. Maye, whilst Willis wrote. Mrs. Maye, her attention being thus engaged in conversation, is unable to say all that took place; but Willis's own account is sufficiently graphic and indicates, perhaps unconsciously, but, if so, all the more certainly, by the use of the word "We," his identification for the moment with his employer and not with the customer. He says in cross-examination:—"Maye had a difficulty in signing his name. I couldn't say he couldn't read. I wouldn't say he is illiterate. He is a straight man. I should say he had very little education from his handwriting. We often fill in cheques. *Maye did not attempt to read the proposal. He relied on what we put down. He made no attempt to read out what we put down.* Corbett was the man dealing with new business. He brought me the proposal form. *We* did it all in that little room, and the cheque was given the next day. *I was told by Corbett to get the proposal filled and completed. I would give it to him after the completion.* Rouse was only in five or ten minutes. Just introduced. He took no part in the business. Whilst he was there *our work* stopped for a time." In re-examination he added:—"I would *ask* for his name and age, and then I would write the rest out of my head. I would not know the facts, but I would write the answers without reference to him. *I did not read to him what I had written.*" Mr. Rouse was the Resident Secretary at Brisbane of the defendant company. He says that on 27th April 1920, which was the day of the transaction, he was in the room five or ten minutes with the party. He states that while he was there "we were engaged in general conversation, no business being done." I may interpose this observation: that there was little doubt he thoroughly understood that Corbett and Willis were

conducting business of the Society with Maye. Mr. Corbett said: —"I was in the room part of the time whilst the proposal was being written out. I chatted to Mrs. Maye at the door. I was speaking to Rouse previously. I brought Rouse in and introduced him to Maye. Whilst I was in the room nobody said anything about a previous proposal to the Citizens' or any other company, or about his being turned down or deferred by Citizens' Co., or being examined by a doctor for insurance company or classed as second class by a doctor, or anything to indicate he had made a proposal to any other company or treated with any other company." But he does not say anything affirmative as to anything Maye said. In cross-examination he says: "I saw Willis asking Maye questions and writing on the proposal whilst I was talking to Mrs. Maye"; and, further on, he said of Maye: "I did not regard him as an educated man, he was not a man I would expect to write a letter; he gave no indication that he could not read nor that he could; he asked me to fill up the cheque." The relevant questions put to the jury and the answers they gave were as follows:—[The questions and answers were here set out]. The questions had been typed by direction of the learned Judge, and evidently submitted to counsel before placing them before the jury. Counsel for the respondent after the summing-up asked for a direction as to question 7, which was refused. He also suggested the following questions:—(1) "Did Maye deliver the document Ex. 2 to the defendant as a proposal for an insurance?" Counsel for appellant thereupon admitted that after signing it Maye left it at the office and never had it in his possession again. Thereupon the learned Judge saw no necessity to put the question. (2) Question 16, which was put to the jury. (3) "Did defendant accept the proposal and issue the policy on the first of the statements made in Ex. 2 and the personal statements made by the doctor?" The learned Judge's notes say: "No evidence as to anybody having thought anything about it; I decline to put the question." (4) Question 17 and (5) Question 18; these were put with further directions. This having been the conduct of the case, I am of opinion that the parties are bound by it to the extent that, provided there be any evidence whatever or any other substantive point fit to

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be submitted to the jury, the Court has no power to determine it, and fraud least of all (see *Yorkshire Insurance Co.* v. *Craine* (1)).

On these facts and findings, then, what is the proper conclusion at which the Court ought, in the circumstances, to arrive as to the capacity in which Willis acted in writing out the answers in the proposal ? It is said, and it may be true, that apart from what was said and done on that occasion, Willis had no authority to act as the agent of the company in writing out the answers. But that is nothing to the point here. The question is, what is the effect of the events of 27th April 1920 ? Maye effected the transaction, not with a canvassing agent on a distant farm, but with the company itself at its head place of business in Queensland. It was the company's home in Queensland : that is a feature which distinguishes this case from *Biggar's Case* (2), and, indeed, all the cases relied on by the respondent. In some cases, such as *Bawden's Case* (3), *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (4) and *Keeling's Case* (5), there seems to be the element of implied authority based on the position which the company permitted the agent to assume. That may be viewed as ostensible authority or as estoppel. But, as *Bailhache* J. said in *Keeling's Case* (6), when an agent of the company is allowed by the company to " negotiate these contracts and . . . to fill up these forms for people who cannot fill them up for themselves—when you find that, and when you find that the answers which the agent puts down are contrary to the facts which are stated to him by the assured— . . . the line of cases to be followed is the *Bawden* line of cases rather than the *Biggar* line of cases." That introduces another feature distinguishing this case from *Biggar's Case.* There the insured told the agent nothing, but knowingly let him invent : here Maye told Willis substantially everything, and thought he told him in effect all, and had no suspicion that Willis either invented or concealed. The proceeding was that Maye was ushered into the presence of the New Business Manager, Mr. Corbett, specially charged with

(1) (1922) 2 A.C. 541, at pp. 552, 553 ; 31 C.L.R. 27, at p. 38.
(2) (1902) 1 K.B. 516.
(3) (1892) 2 Q.B. 534.
(4) (1907) 23 T.L.R. 521.
(5) (1923) 129 L.T. 573.
(6) (1923) 129 L.T., at p. 575.

this class of business. He (Corbett) deputed Willis to transact the business with Maye, and he himself directed Willis to proceed to write out the answers in the proposal. Further, he remained there while the process was gone through. He in no way controverts the statement of Willis in re-examination, that the latter wrote down the answers without questioning Maye, except as to name and age. He also was aware that the answers were not read out to Maye, and that Maye, who wrote his own name with difficulty, trusted to Willis to state the answers accurately. In short, Maye was on the insured's side of the table and Willis was on the insurer's side ; they were representing different interests. Whatever Willis's actual authority previously might have been, or even as between himself and the company then was, the company by its highest officials in Brisbane (Rouse and Corbett) obviously acted so as to lead Maye to believe that Willis was properly acting for the company in doing what he did, and that Maye could rely on the efficacy of the transaction (see per Lord *Trevithin* (then *Lawrence* J.) in *Ayrey* v. *British Legal and United Provident Assurance Co.* (1)). The next day, 28th April, Maye and his wife went again to the defendant's office, saw Corbett and Willis in the same room as before ; Corbett said he had a report from the doctor, first class, A1 table. On this occasion Corbett drew out the cheque for £29 6s. 4d. in favour of the respondent company and Maye signed it.

There are some cases of great authority that aid materially in solving this question. One is *The Apollo* (2). The judgments of Lord *Halsbury* L.C., Lord *Watson*, and Lord *Herschell* (with whom Lord *Macnaghten* concurred), are greatly in point. Remembering that the transaction took place at the Queensland headquarters of the company, and there are several similar offices, that it must necessarily be within the contemplation of the company that persons of varied attainments and capacity may enter to do business—perhaps foreigners, perhaps blind, perhaps illiterate—the observations of Lord *Halsbury* and the important principle he affirms are particularly apposite. He says of the facts in that case (3) :—" Now, that Johns at least permitted this to be done, and in respect of this particular

(1) (1918) 1 K.B. 136, at p. 140.
(2) (1891) A.C. 499, at pp. 507-508, 510, 517-518.
(3) (1891) A.C., at pp. 507-508.

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place, there can be no doubt, and a dock company, I think, must be taken to hold out their harbour-master, or the person who fills that character for the moment, as possessing sufficient authority to inform ships where they may safely ground. Apart therefore from the controversy who first suggested this operation, and confining myself to the admitted fact that this thing was done by permission of Johns with such assurances of its being safe as induced the captain to act upon them, I am of opinion that the company would be responsible for the harbour-master's act and representations. I quote *Jervis* C.J. in *Giles* v. *Taff Vale Railway Co.* (1): 'I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot someone with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand.' In that case the Chief Justice was dealing with a railway and with the question whether planting quicks and giving directions in respect of them was an act within the authority of the general superintendent of the line, and it was agreed that the company was a railway company for carrying goods and not a market gardening company for the purpose of planting 'quicks.' But the reply was given in the words which I have quoted, and which I certainly adopt. The Chief Justice continues: 'I think he had authority, in the exigency of the traffic, to keep the quicks in the mode in which they were kept, and that consequently they were in the custody of the company in the course of their ordinary business.' So here, I think the grounding of the vessel in a place which it may be quite true was not in the original construction of the docks intended as a dry dock, but would, looking to the assurance from the person left in charge of the business of the dock company, be fit and appropriate for the purpose, would be an act which to my mind is neither abnormal nor extraordinary, if by those words it is intended to convey something outside anything that could be ordinarily and reasonably contemplated as part of the business which the dock company were carrying on." Lord *Watson* agrees with Lord *Halsbury* as well as with Lord *Herschell*, and the latter learned Lord deduces actual authority from the circumstances. Whether, therefore, it be correct to say that the

(1) (1853) 2 E. & B. 822, at p. 829.

circumstances here indicate actual authority to reduce to writing the answers of an illiterate or apparently illiterate proponent and to lead him to believe his answers are faithfully recorded, or whether it be more accurate to say that the circumstances evince a holding out of such authority, is, to my mind, immaterial. I do not regard Willis as an "agent" in the true sense for either party. He was either simply acting as an amanuensis for and on behalf of Maye, or he was *pro hac vice* the living acting official of the abstraction called the Society. Maye, as I have pointed out, did not act by any agent. What he did in relation to the company he did personally. He gave the necessary and true information at some time or other; he gave it to Willis when Willis approached him as canvasser for the company. I may interpose that, if Maye did not use the word "deferred," it is immaterial. The substance was told as set forth in par. 2 of the reply (in which it was stated that Maye had informed the company that he had previously entered into negotiations with the Mutual Life and Citizens' Assurance Co. for life assurance, that Dr. Dovaston had classed him as class 2, which Maye had refused to accept, and that the negotiations had not resulted in the issue of a policy). So the jury found. And, at least, Maye may well have thought he did and thereby state the substance of the matter. No question was asked as to this, and no suggestion was made that it was not in effect covered by the questions put. Maye signed the proposal himself, he handed in the proposal himself at the company's office to the only person representing the company for that purpose. He is, therefore, responsible for what he *did* and for his own *state of mind*, and for that only. Willis, on the other hand, was the ear and hand of the company in writing the answers and taking the proposal, either with invested authority for the occasion or with its equivalent by holding out. The company received the proposal, not *from* Willis, but *by* Willis, who handed it to Corbett, his superior, without any direction from Maye; and all this to the knowledge and by the direction of Corbett, who, with full knowledge of the manner of doing the business, continued it and received the proponent's cheque. There was, to say the very least, abundance of material upon which the jury were at liberty to find as they did, that Willis was the agent of the company in filling in the answers to the questions.

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They were the appropriate tribunal for that purpose, and their finding cannot be disregarded as a nullity (see per Sir *Robert Collier* for the Privy Council in *Connecticut Life Insurance Co.* v. *Moore* (1)). It must be remembered that it is not as if the Full Court on a new trial motion exercised some discretionary power of granting a new trial. The Court has simply, as a matter of law, held the finding impossible and disregarded it. I think that course not sustainable in view of the evidence. I can, therefore, see no reason for imputing Willis's bad faith to Maye. But I do see every reason for imputing it to the company of which he was the active official and which has received and retained the benefit of the fraud he committed. Assuming Willis to be correctly described as "agent" of the company, in the broad sense that he acted for it, the case of *Lloyd* v. *Grace, Smith & Co.* (2) is a valuable guide here. Lord *Loreburn* says (3): "If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it." Lord *Macnaghten* says (4) "that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate." It would be to "approbate and reprobate" if, knowing the actual method adopted by Willis, including the withholding of any communication of the contents of the proposal on 27th April 1920, the company, after receiving by its undoubtedly accredited representative Corbett the cheque of 28th April, were to be permitted to object to the written answers on the ground of their want of conformity with the truth as known to Willis by previous statements of Maye. It may be hard on the company to suffer from the fraud of Willis; it would be harder on Maye's representatives. Hard cases, of course, must not be allowed to make bad law. But in determining on which of the two the burden falls, the law is clear. As far back as about 1700 *Holt* C.J. in *Hern* v. *Nichols* (5), as pointed out by Lord *Halsbury* in 1912 in *Lloyd* v. *Grace, Smith & Co.* (6), held that "seeing somebody must be a loser by this deceit, it is more reason that he that employs and

(1) (1881) 6 App. Cas. 644, at p. 653.
(2) (1912) A.C. 716.
(3) (1912) A.C., at p. 725.
(4) (1912) A.C., at p. 738.
(5) (Undated) 1 Salk. 289.
(6) (1912) A.C., at p. 727.

puts a trust and confidence in the deceiver should be a loser, than a stranger." In 1785, in *Fitzherbert* v. *Mather* (1), *Buller* J. laid down the same rule. There is very little difference between that method of stating the position, and the method stated by Lord *Bramwell* and quoted by Lord *Macnaghten* in *Lloyd* v. *Grace, Smith & Co.* (2), that the person authorizing another to act for him in making a contract "undertakes for the absence of fraud in that person" in executing the authority given.

Maye trusted Willis, not as an individual, but as the appropriate representative of the company; the company trusted Willis as an individual: the company must, therefore, abide by his act.

RICH J. I have come to the conclusion that the appeal should be allowed. This case was essentially one upon which a jury would be entitled to find their own conclusions. There was, in my opinion, ample evidence, beginning with the visit of Willis to the farm of the deceased and what took place in the company's office in Brisbane, upon which to arrive at a conclusion one way or another whether the deceased told Willis in substance the truth with regard to his application to the Citizens' Company. The jury found that he did. And there was enough evidence, in my opinion, for the jury to form their own judgment as to what an intending customer of the respondent company would, as a reasonable man, be likely to understand by what was said and done by Corbett and Willis with regard to the filling in of the proposal and declaration. That is an inference which a jury drawn from various classes of the community are specially fitted, and, at all events, are entrusted by the law, to make, if they think right. Judicially I hold that, in the circumstances of the case as admitted, proved or found, the principle referred to in the judgment of my brother *Isaacs*, as quoted from the judgment of Lord *Halsbury*, in the case of *The Apollo* (3), applies here.

It will be observed on the back of the proposal and declaration that, although the principal office of the Society is in Victoria, it has a branch office in the capital city of every State of the

(1) (1785) 1 T.R. 12, at p. 16. (2) (1912) A.C., at p. 737.
(3) (1891) A.C., at p. 507.

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Commonwealth, in Fiji, in New Zealand, in South Africa and in London. It seems undeniable to me that the officers in charge in these various branch offices must be impliedly empowered to deal with such an exigency as an illiterate applicant, as Maye was dealt with in this case; that is to say, that in such a case the company itself, by some officer, undertakes to reduce to writing what the applicant states and to receive his signature on the understanding that his signature attests what he has said. I do not agree with the suggestion that the company throws the responsibility of its own officer's fraud on the illiterate applicant and at the same time, by retaining the premium as here—a premium paid on the faith of the accurate transcription of the oral answers—retains the benefit of that fraud. I do not feel absolutely compelled to inquire whether the contract bound the applicant by warranty of absolute truth or to an honest statement of knowledge and belief. In either event I think the appellant should succeed. But I am of opinion, for the reasons stated in the judgment of my brother *Isaacs*, that the policy on its true construction was avoidable, not for mere inaccuracy, but only for fraudulent misrepresentation or concealment.

STARKE J. This action was brought upon a policy of assurance issued by the defendant Society to Patrick John Maye. The plaintiff is the widow and administratrix of Maye, and the beneficiary under the policy. The policy was founded upon a proposal, declaration and personal statement which, it recites, form the basis of the contract. The proposal is on a form prepared by and printed for the Society, and signed by Maye. It consists, as is usual, of a number of questions and the answers thereto of the proposer, and a declaration of (*inter alia*) the truth of those answers to the best of his knowledge and belief.

One of these questions was as follows :—" Have you ever proposed to this Society or any other office (A) for life assurance ? (B) for accident or sickness assurance ? If so, state when, amounts proposed, whether accepted, withdrawn, deferred or declined, or if any extra was charged." To which the answer was given :—" (A) Yes; (B) No. C. M. L." These letters " C. M. L." referred to other assurance with the Society. In point of fact, Maye had, early in

the year 1920, proposed for assurance on his life under Table A1 to another office, the Mutual Life and Citizens' Assurance Co., in the sum of £300, but this company deferred the consideration of the proposal for three years and offered another form of assurance, known as Table B5, which Maye declined, and he obtained a refund of the deposit paid on his proposal. It appears, therefore, that the answer to this question was untrue (see *Condogianis' Case* (1)).

Maye declared that, to the best of his knowledge and belief, the above answer was in all respects true, and agreed that his proposal and declaration and personal statement should "be the basis of the contract between him and the Society." Further, the policy recited that Maye had, by a proposal, declaration and personal statement, "which form the basis of the contract," applied, in substance, for assurance, and a term and condition of the policy was as follows:—"1. Proposal and Declaration and Personal Statement.—The Society relies on the truth of the statements made in the proposal and declaration and the personal statement made in connection with this assurance, and, if the assurance hereby granted shall have been obtained through any fraudulent misrepresentation or concealment, this policy shall be void, and all moneys paid in respect thereof shall be forfeited to the Society."

Prima facie, then, a statement was made untrue to the knowledge of Maye, which rendered the policy void and freed the Society from any liability. But the plaintiff seeks to avoid this conclusion in the special circumstances of the case.

Maye was unable to read or write. A canvasser of the Society, Willis, called upon him at his farm and suggested that he should assure his life with it. Maye told him that he had been "turned down" by Dr. Dovaston as a first class life, and that if he was not good enough for Class 1 Table he was not going into Class 2 Table. Willis asked "What company was that?" and was told "Gibb's Company," which was, in fact, the Mutual Life and Citizens' Assurance Company. Willis said:—"I don't go much on that company. You come up to Brisbane and I'll get you through. The Brisbane doctors have more experience than the country doctors." Later, Maye and the plaintiff were in Brisbane together.

(1) (1919) 26 C.L.R. 231; (1921) 29 C.L.R. 341; (1921) 2 A.C. 125.

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Willis saw them in the street, and spoke to Maye. He said: "You won't go back without seeing Mr. Corbett?" Corbett was the manager of the New Business Department of the Society. All three proceeded to the Society's office in Brisbane, and saw Corbett. Some time was spent in the office, and Maye was apparently persuaded to propose for assurance with the Society. Willis said in his evidence:—"Corbett told me to go on with the filling in of the proposal form. I looked for a proposal form but did not find one. Corbett brought one out of the main office to me with beneficiary form attached. . . . Maye did not attempt to read the proposal. He relied on what we put down. . . . Corbett was the man dealing with the new business. He brought me the proposal form. I was told by Corbett to get the proposal filled and completed. . . . I would ask his (Maye's) name and age, and then I would write the rest out of my head. . . . I would not know the facts, but I would write the answers without reference to him. I didn't read to him what I had written."

The action was tried before a jury; and, in answer to questions put to them by the learned Judge at the trial (*Shand* J.), they found (*inter alia*) as follows:— (1) That Maye was "unable to read or to write except by signing his name," and that both Willis and Corbett knew "that he was so unable to read or write"; (2) that Maye informed Willis that he had been "turned down by Dr. Dovaston, who classed him as Class 2," in the Mutual Life and Citizens' Assurance Co., which classification he refused, and said that if he were not good enough for first class "he would have none"; (3) that Willis wrote out the answers in the proposal without first asking Maye the questions or making any inquiry from him whether the answers were true or correct, that Maye signed the proposal without reading or having it read to him, and that Willis knowingly permitted him to do so without calling his attention to the questions or answers; (4) that Willis wrote the answers in the proposal knowing them to be incorrect or incomplete and without caring whether they were or were not correct or complete; (5) that Maye did not know or suspect that Willis had incorrectly answered or omitted to answer any question and was not acting fraudulently, that is to say, designedly concealing the truth in relation to his previous proposal

to the Mutual Life and Citizens' Assurance Co.; (6) that in filling in the answers to the questions Willis was acting as agent for the defendant Society.

The learned Judge was of opinion that there was no evidence to go to the jury in support of this last finding. He, therefore, notwithstanding the findings of the jury, entered judgment for the defendant, according to the practice of the Supreme Court of Queensland (see *Hendle* v. *Qualtrough* (1)), and that procedure was not challenged before this Court.

The actual authority of Willis is explicitly stated in the evidence. It was to canvas for insurance generally, to get proposals and submit them to his employer: he had no authority to accept proposals. And it is certainly not within the scope of that authority to fill in proposals on behalf of the Society. As the Lord Justice-Clerk (*Macdonald*) said in *McMillan* v. *Accident Insurance Co.* (2), "the proposal is the pursuer's proposal. It is his duty to see that his proposal is true in all substantial particulars. If he chooses to allow another person to fill it up, then such a person in filling it up is not acting in the course of his duty to any third person, he is acting as the agent for the proposer and nobody else. If a person gets another to fill up an insurance proposal for him, signs it and causes it to be delivered to the insurance company, the proposal contains what the company are entitled to hold as the proposer's declaration, and to hold him bound by it." Now, however, it is suggested that Willis was allowed by the Society some ostensible authority to negotiate and settle the terms of the proposal, to fill up the proposal for a person who could not fill it up himself, and to see that it was properly done (*Bawden's Case* (3); *Paxman's Case* (4); *Keeling* v. *Pearl Assurance Co.* (5); *Lloyd* v. *Grace, Smith & Co.* (6)). And if, in these circumstances, Willis put down answers contrary to the facts which were stated to him by the assured, then, it is said, "the Society cannot rely" upon the incorrectness of the answers in the proposal form. The argument means, I suppose, that the Society is estopped in such cases from alleging that the answer is

(1) (1899) 9 Q.L.J. 218.
(2) (1907) S.C., at pp. 490-491.
(3) (1892) 2 Q.B. 534.
(4) (1923) 39 T.L.R. 424.
(5) (1923) 129 L.T. 573.
(6) (1912) A.C. 716.

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untrue. Such a conclusion may possibly be legitimate in cases in which the ostensible authority is as suggested. But what warrant is there for saying that the jury found an authority in any such sense? We have not the charge of the learned Judge to the jury, but the sense in which he put the question to the jury is apparent from his judgment. The jury's verdict is treated as a finding that the act done was in the course of Willis's employment, and was not an act beyond the scope of his authority as agent for the Society. But, of the ostensible authority now relied upon, there is not a suggestion, either in the judgment or in the notes of the argument addressed to the learned Judge. All this, however, is somewhat technical; for, in any case, in my opinion, there is no evidence that Willis had any such ostensible authority as suggested. No doubt the Society might confer such an authority *pro hac vice*, just as Maye might authorize Willis to be an agent *pro hac vice* for him (see the Lord Ordinary (*Salvesen*) in *McMillan's Case* (1)). But the evidence shows no more, in my opinion, than that Willis "was the hand" which Maye used to save him the trouble of filling in the required answers. Willis was the amanuensis of Maye, and nothing more. It is not permissible, in my opinion, upon any recognized legal principle, to infer from the facts proved in this case that the Society took on itself responsibility for the carelessness or fraud of Willis, or led Maye to believe that it would do so. "If a person chooses to sign . . . a proposal form which somebody else filled in, and if he acquiesces in that being sent in as signed by him . . . he must be treated as having adopted it. Business could not be carried on if that were not the law" (*Biggar's Case* (2); *New York Life Insurance Co.* v. *Fletcher* (3); *McMillan* v. *Accident Insurance Co.* (4); *Phœnix Case* (5)). I entirely agree with *Shand* J. that there cannot be one law for the literate and another for the illiterate.

Another aspect of the facts, which was not, I think, touched upon below or at the bar, makes a judgment against the Society in this case most unsatisfactory. If it be true that the Society cannot rely upon the untruth of statements put down by Willis contrary to the

(1) (1907) S.C. 484.
(2) (1902) 1 K.B., at p. 524.
(3) (1886) 117 U.S. 519.
(4) (1907) S.C. 484.
(5) (1906) 3 C.L.R. 946.

facts stated to him by the proposer, still it ought to be able to rely upon facts falsely stated to or concealed from him by the proposer. Now all that the proposer disclosed to Willis was that he had been "turned down" by Dr. Dovaston, who rejected him as a first class life and treated him as a second class life. As Willis said, this simply meant a loaded policy, with additional premium for the added years. But the action of the Mutual Life and Citizens' Co. was much more serious and very different. It deferred Maye's proposal for three years, and offered him a policy, under which, if he died within the first seven years, only the actual premium received, plus $3\frac{1}{2}$ per cent compound interest, would be payable. Maye knew all these facts, and did not state them to Willis. It may be true, but it is nothing to the point, to say that Willis was put upon inquiry by the information he received. Maye's duty was to answer the inquiries in all respects truly. Consequently, even on the basis that Willis was the agent of the Society to write down correctly the answers or information given him by Maye, still, in my opinion, information within the ambit of the question and within Maye's knowledge was not given to or was concealed from him. These facts are not in dispute, and, prima facie at all events, afford a good defence to this action.

Lastly, the construction of the policy must be dealt with. The learned Judge from whom this appeal is brought was of opinion that the policy could not be avoided on the ground of untrue statements contained in the proposal, unless such statements were made fraudulently. It is purely a question of construction, and one of no little difficulty. My opinion is against the decision of the learned Judge on this point. The clauses in condition 1 of the policy contain, I think, "independent and cumulative provisions, each of which must take effect" (see *Dawsons Ltd.* v. *Bonnin* (1); *Condogianis* v. *Guardian &c. Co.* (2); *Reid &c. Co.* v. *Employers Accident &c. Co.* (3)). The principle of *Fowkes's Case* (4), and the cases following it, is not in question, but simply the construction of this particular policy. The proposal is, perhaps, ambiguous (see *Dalgety & Co.* v. *Australian Mutual Provident*

(1) (1922) 2 A.C. 413.
(2) (1921) 2 A.C., at pp. 129-130; 29 C.L.R., at pp. 343-344.
(3) (1899) 36 Scot.L.R. 825.
(4) (1863) 3 B. & S. 917.

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Society (1)). But the policy by condition 1 puts the matter beyond dispute. "The Society *relies on the truth of the statements made in the proposal.*" Prima facie, therefore, the accuracy of the statements goes to the root of the contract, and they are what are called "foundational" or "fundamental" stipulations. But it is said that the parties have, by the succeeding words in the condition, modified the effect of what precedes them and so put their own meaning upon the word "truth." In other words, it is contended that the statements need not be "true" in the absolute sense of "accurate," but only true in the sense that they must not be fraudulent. So, by means of these few words, a contract belonging to a class in which ordinarily the utmost good faith is required, is excluded from the operation of the general principles of law relating to such contracts and the Society, indeed, put in a worse position as to rescission of this contract of assurance than in the case of an ordinary contract. Such an intention seems improbable from a business point of view, and contrary to all modern experience of assurance. A contract is voidable for fraud without any stipulation to that effect, and there is authority for saying that where an insurer avoids a policy for fraud on the part of the assured, then the latter cannot recover any premiums which he has paid to the insurer, or, to use the language common in insurance policies, the premiums are forfeited to the insurer (*Chapman* v. *Fraser* (2), cited in *Stone's Insurance Cases*, vol. I., case 936, and see p. 399; *MacGillivray on Insurance Law*, p. 788). The suggested construction of condition 1 ought, in my opinion, to be rejected.

It may be conceded that the words "any fraudulent misrepresentation or concealment" are wide enough to cover statements or concealments in the proposal, but it is clear that they cover statements and concealments "beyond those to which the proposal statements are confined." Effect can be given to both parts of the condition without destroying or nullifying or "doing violence" to either.

Fowkes's Case (3) is no authority for the construction of this policy, because, as regards the words actually used and also their collocation, that case is quite different from the present.

(1) (1908) V.L.R. 481; 30 A.L.T. 4. (2) Park on Insurance, 7th ed., 329.
(3) (1863) 3 B. & S. 917.

It appears to me that the parties, by the words they used, made it perfectly clear that certain statements were fundamental to the contract. I do not forget the canon of construction *Verba chartarum fortius accipiuntur contra proferentum.* But that canon is nothing more than an aid to construction in case of ambiguity, and ought not to be used for the purpose of creating an ambiguity. Here we have words which, in their primary and ordinary sense, make certain statements fundamental to the contract, but which, if the construction now suggested is adopted, serve no purpose whatever and are quite useless. And I cannot think that the concluding words of the clause so dominate, control or explain these words as to reduce them to ineffectiveness. Full effect ought to be given to the stipulation that certain statements are fundamental to the contract; and, if this be so, then the concluding words of the condition can only be applied to other statements, or to "misstatements and concealments which go beyond those" fundamental to the contract.

The construction of the policy which I adopt, admittedly defeats the plaintiff's action unless the company is precluded from alleging that the statement contained in the proposal is untrue.

My opinion is that the judgment below is right, and that the appeal should be dismissed.

Appeal allowed with costs. Judgment of Shand J. discharged and in lieu thereof judgment entered for the plaintiff for £500; *defendant to pay plaintiff's costs in the Supreme Court, including extra counsel's fees for first day of trial and refreshers to senior and junior counsel for each day after the first.*

Solicitors for the appellant, *Stephens & Tozer.*

Solicitors for the respondent, *Chambers, McNab & McNab.*

J. L. W.