[HIGH COURT OF AUSTRALIA.]

THE LIFE INSURANCE COMPANY OF AUSTRALIA LIMITED . . . . } APPELLANT;
DEFENDANT,

AND

PHILLIPS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 4, 5, 6, 26; *June* 11.

Knox C.J., Isaacs and Starke JJ.

Contract — Written contract — Construction — Difference between construction and interpretation—Ambiguity—Consensus ad idem—Evidence to prove intention—Admissibility — Severability of ambiguous part — Validity of contract — Life assurance—Misrepresentation—Rescission—Affirmance of contract by assured—Provision relieving assurer from liability for statements of agent.

By a policy of life assurance the appellant company agreed to pay a certain sum to the respondent's representatives if the respondent died before a certain date, or to the respondent if he were living at that date. It was also declared and agreed that the policy was taken out under the terms of the company's "house purchase policies," and that the respondent was entitled at any time after the policy had been in existence for three years to a loan of the same sum "out of the available funds of the company on a property to be approved by the directors." In an action by the respondent for rescission of the contract or, alternatively, for a declaration that the contract was void and for repayment of four annual premiums which had been paid by him,

Held, that, assuming the policy to be ambiguous with respect to the provision for a loan, evidence was inadmissible to show the meaning which each party put upon that provision when the contract was made, and, that although the evidence wrongly admitted showed that each party put upon the provision a different meaning, the contract was not void on the ground that the parties were not *ad idem*.

Goodfellow v. *Life Assurance Co. of Australia Ltd.*. (1920) V.L.R. 296 42 A.L.T. 11, overruled.

Raffles v. *Wichelhaus*, (1864) 2 H. & C. 906, and *Falck* v. *Williams*, (1900) A.C. 176, distinguished.

Held, also, that, even if that provision were ambiguous, the contract was divisible, and that the validity of the portion of it dealing with life assurance was not affected by the invalidity of the ambiguous provision.

Held, further, that, assuming the respondent to have been induced to enter into the contract by an innocent misrepresentation on the part of an agent of the company, the respondent was not entitled to a rescission of the contract:

By *Knox* C.J., on the ground that on the evidence the respondent had by his conduct elected to affirm the contract;

By *Isaacs* J., on the ground that in the circumstances of the case the respondent was not entitled to rely on such misrepresentation because by a clause in the proposal for the policy the respondent had agreed that no statement made by the person canvassing for the proposal or by any other person should be binding on the company or affect its rights in any way whatsoever;

By *Starke* J., on both those grounds.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

In February 1919 Hector Graham Oliver Phillips signed two proposal forms for insurance upon his life with the Life Insurance Co. of Australia Ltd., each for £500. Each form, which was called therein a "house purchase proposal form," contained the following clause: "I also agree that no statement, promises or information made by or given by the person canvassing for or taking this proposal, or by any other person, shall be binding on the Company or affect its rights in any way whatsoever, except in so far as such statements or promises are contained in the printed tables of the Company or included in writing on this proposal." Endorsed upon the proposals was this statement:—"Annual payments required for each £100. This provides for a loan out of the available funds of £100 on an approved property at any time after the policy has been in force for three years, or, if the loan is not made for the payment of £100 at expiration of 20 years from date of entry or at death if that should occur previously." Then followed a table of premiums payable according to the age of the insured. Two policies were, on 14th April 1919, issued by the Company upon these proposals, by each of which it was agreed and declared that the Company would

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on the death of the life assured, if occurring before 15th February 1939, pay to his executors, administrators or assigns the sum of £500, but, if the life assured should be living on 15th February 1939, would pay that sum to the life assured or his assigns. By each of the policies it was declared that the proposals were the basis of, and should be held to form part of, the contract. Each policy also contained the following declaration and agreement :—" It is hereby further declared and agreed that this policy is taken out under the terms of the Company's house purchase policies, and that the life assured is entitled at any time after the policy has been three years in existence to a loan of five hundred pounds sterling out of the available funds of the Company on a property to be approved of by the directors." Phillips paid four annual premiums on each of these policies for the years 1919, 1920, 1921 and 1922, the total amount paid being £189. By a writ issued on 27th March 1923 Phillips instituted an action in the Supreme Court against the Company claiming (a) rescission of the two contracts constituted by the policies, alternatively (b) a declaration that the said writings or contracts were each of them void and of no effect, and (c) return of the sum of £189 as money had and received. The action was heard by *Macfarlan* J., who gave judgment for the defendant with costs; but the Full Court, on appeal by the plaintiff, allowed the appeal and ordered judgment to be entered for the plaintiff for £189 with costs.

From that decision the defendant now, by special leave, appealed to the High Court.

The other material facts appear in the judgments hereunder.

Owen Dixon K.C. (with him *Jacobs*), for the appellant. The respondent, even if the contract is void for uncertainty, is not entitled to recover the premiums he has paid (*Evanson* v. *Crooks* (1); *Weddel* v. *Lynam* (2)). The proposition of law laid down in *Goodfellow* v. *Life Assurance Co. of Australia* (3) and acted upon in this case—namely, that, where a written contract is ambiguous, evidence is admissible to show in what sense each party understood it when the contract was made, and that if each understood it to have

(1) (1911) 106 L.T. 264. (2) (1795) 1 Esp. 309.
(3) (1920) V.L.R. 296; 42 A.L.T. 11.

a different meaning the parties were not *ad idem* and there is no contract—is wrong. The intention of the parties is to be gathered from the words they have used, and if there be an ambiguity the contract is void for uncertainty. But there is no ambiguity in the clause of the policy dealing with the right of the respondent to obtain a loan. It means that the directors are to exercise their discretion as to whether, having regard to the value of the policy as a security and to the value of the property upon which the loan is to be made, there is a fair margin of security. The loan must be on terms to which no reasonable objection could be taken (see *Donald H. Scott & Co.* v. *Barclays Bank Ltd.* (1). The Company was bound to lend the face value of the policy on a property the value of which the directors should reasonably think would protect the Company from any real danger of loss; the term of the loan was not to exceed twenty years from the date of the policy, but might be a shorter period if the respondent chose; the money due under the assurance might be appropriated by the Company to answer the loan debt; and if the premiums were not duly paid the policy would be void, and the Company might call up the loan. The respondent is not entitled to rely upon the alleged misrepresentation, by reason of the clause in the proposal exonerating the Company from liability for statements made by its agents, and because the respondent with knowledge of the misrepresentation had by his conduct affirmed the contract. The Company having taken the risk for three years, the respondent got consideration for his premiums and is not entitled to recover them in the absence of fraud (see *Kettlewell* v. *Refuge Assurance Co.* (2)). The misrepresentation was not one of fact but was one as to the respondent's legal rights. There was no finding of inducement.

Latham K.C. (with him *Robert Menzies*), for the respondent. Where a document, intended to embody a contract, is ambiguous so that the Court is unable from its language to determine the intention of the parties, evidence is admissible to show the sense in which the parties understood it at the time the contract was made, and if it then appears that there was no common intention the

(1) (1923) 2 K.B. 1.

(2) (1908) 1 K.B. 545.

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contract is void (*Watcham* v. *East Africa Protectorate* (1); *Houlder Bros. & Co.* v. *Public Works Commissioner* (2); *Bank of New Zealand* v. *Simpson* (3); *Phipson on Evidence*, 6th ed., pp. 605-611; *Welford and Otter-Barry on Fire Insurance*, 2nd ed., p. 195).

[ISAACS J. referred to *Purcell* v. *Bacon* (4); *Bacchus Marsh Concentrated Milk Co. (in Liquidation)* v. *Joseph Nathan & Co.* (5); *Cameron & Co.* v. *L. Slutzkin Pty. Ltd.* (6).]

The contract is ambiguous as to subject matter in the provision for a loan, and that provision cannot be separated from the provision for life assurance. If evidence be not admissible to show the sense in which the parties used the words, the contract is void *ab initio* for uncertainty. If it is void *ab initio*, the respondent is entitled to recover the premiums (*Halsbury's Laws of England*, vol. XVII., p. 558; *Penson* v. *Lee* (7); *Anderson* v. *Thornton* (8)). The respondent has received no benefit by being insured, for the event had not happened upon which the payment was to be made. If the contract is only voidable on the ground of innocent misrepresentation, the fact that the respondent has been protected for some period does not stand in the way of his disaffirming the contract and recovering the premiums (*Kettlewell* v. *Refuge Assurance Co.* (9); *Brown* v. *Smitt* (10); *Hughes* v. *Liverpool Victoria Legal Friendly Society* (11)). The misrepresentation upon which the respondent relies is one of fact going to the root of the contract (*West London Commercial Bank* v. *Kitson* (12)). There were no unequivocal acts of the respondent sufficient to show an election to affirm the contract (*Clough* v. *London and North-Western Railway Co.* (13)). The clause in the proposal protecting the Company from liability for statements made by its agents is irrelevant to the claim for rescission. That clause applies to fraudulent statements as well as innocent statements, and the Company cannot relieve itself from liability for fraudulent statements made by one of its canvassers. The clause cannot be construed so as to apply to innocent statements only.

(1) (1919) A.C. 533, at p. 538.
(2) (1908) A.C. 276, at p. 285.
(3) (1900) A.C. 182.
(4) (1914) 19 C.L.R. 241, at p. 265.
(5) (1919) 26 C.L.R. 410, at p. 427.
(6) (1923) 32 C.L.R. 81, at pp. 90-92.
(7) (1800) 2 Bos. & P. 330.
(8) (1853) 8 Ex. 425, at p. 428.
(9) (1908) 1 K.B., at pp. 549, 551.
(10) (1924) 34 C.L.R. 160, at p. 165.
(11) (1916) 2 K.B. 482, at pp. 486, 487.
(12) (1884) 13 Q.B.D. 360.
(13) (1871) L.R. 7 Ex. 26, at p. 34.

Owen Dixon K.C., in reply. The contract is divisible, and, if the provision as to a loan is void for uncertainty, the provision for life assurance is valid, being quite independent of the former provision. The obligation of the Company as to assurance is dependent solely upon the payment of the premiums. The repayment of the premiums must depend upon the fact that the respondent got nothing in exchange for them; but he got a promise from the Company which bound it to pay the sum assured if the respondent should die during the period in respect of which the premiums were paid. Having accepted the premiums, the Company thereby asserted the validity of the policy and would be estopped from denying its obligation to pay. A contract is said to be void for uncertainty because a promise undoubtedly made is so vague that no legal remedy can be obtained in respect of it. But it does not follow that where a contract consists of several terms the fact that one of them is too vague to be enforced has the effect of vitiating the other terms which are substantial and can be enforced. [Counsel also referred to *Rose & Frank Co.* v. *J. R. Crompton & Brothers Ltd.* (1); *Guthing* v. *Lynn* (2); *In re Clarke*; *Coombe* v. *Carter* (3); *County Hotel and Wine Co.* v. *London and North-Western Railway Co.* (4); *Seddon v. North-Eastern Salt Co.* (5); *Angel* v. *Jay* (6).]

Cur. adv. vult.

June 11.

The following written judgments were delivered :—

KNOX C.J. The respondent's claim in this action was for (a) rescission of two contracts of life insurance or, alternatively, (b) a declaration that such contracts were void and that no contract existed between the parties, and (c) repayment of the amount paid to the appellant by way of premiums as money had and received by the appellant to the use of the respondent. Each policy was for £500.

The relevant allegations in the amended statement of claim are as follows :—" 4. The plaintiff in entering into the aforesaid writings did so in the belief that the statements hereinafter set out were true

(1) (1923) 2 K.B. 261.
(2) (1831) 2 B. & Ad. 232.
(3) (1887) 36 Ch. D. 348, at p. 355.
(4) (1918) 2 K.B. 251, at p. 262; (1921) 1 A.C. 85.
(5) (1905) 1 Ch. 326.
(6) (1911) 1 K.B. 666.

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and intended and believed that the said writings should be and were in accordance with the said statements. (5) (a) Each of the said writings in fact contained (*inter alia*) a clause stating that the life assured was entitled at any time after the policy had been three years in existence to a loan of £500 sterling out of the available funds of the defendant Company on a property to be approved of by the directors thereof; (b) the said clause was and is ambiguous. (6) The defendant in entering into the said writings did so intending and believing that the aforesaid clause would only bind it, the said defendant, to advance the face value of the policy on a property approved by the defendant's directors as of sufficient value to give a reasonable margin of security over the amount advanced. (7) By reason of the facts and matters set out in pars. 4, 5 and 6 hereof the plaintiff and defendant were never *ad idem*. (8) Alternatively with par. 7, if the said writings constituted a contract between the parties hereto the said contract was and is void for uncertainty. (9) Alternatively the plaintiff was induced to enter into the said writings and to pay the amounts of the said premiums by the false representations and/or statements of the defendant's servant or agent one Thomas William Phillips. The said representations and/or statements were untrue and were as follows: (a) That if a house purchase policy were taken out and three payments of premiums made in respect thereof including the payment made at the time of taking out the policy the policy-holder would then be entitled to borrow at six per cent interest an amount equal to the face value of the policy on any property he might wish to purchase which was in fact worth such amount; (b) that such a loan would be granted by the defendant when three payments had been made, even though such payments were made before their due dates."

The appellant denied these allegations and set up two substantial grounds of defence, namely, (1) a condition in the proposals signed by the respondent whereby he agreed that no statement, promise or information made or given by the person canvassing for or taking the said proposals, or by any other person, should be binding on the defendant or affect its right in any way whatsoever, except in so far as such statements or promises were contained in the printed tables of the defendant or included in writing on the said proposals;

(2) that after discovering the falsity of the representation alleged to have been made to him the respondent elected to affirm the contract.

At the trial *Macfarlan* J. dismissed the action. On appeal to the Full Court of the Supreme Court the judgment of *Macfarlan* J. was reversed and judgment was entered for the respondent for the amount claimed by him. From this judgment this appeal is brought by special leave.

The Supreme Court took the view (a) that *Macfarlan* J. was right in holding that the respondent, at the time the parties purported to contract, was under the belief that by the clause relating to the loan it was provided that at the end of the specified period he was to be entitled to a loan of £1,000 on a property of that value subject to the approval of the directors, and (b) that on the evidence the Company was at that time of opinion that the clause meant that the respondent would be entitled only to an advance which, having regard to the value of the property submitted, would leave the Company a margin sufficient to satisfy the directors. On this view of the facts the Supreme Court held, following a previous decision in *Goodfellow* v. *Life Assurance Co. of Australia* (1), that the parties were never *ad idem*, and that, as therefore no contractual relationship ever existed between them, the respondent was entitled to recover from the appellant the premiums paid as money had and received to his use.

The first question for our consideration is whether the decision in *Goodfellow's Case* (1) was right in law. In his reasons for judgment in that case *Irvine* C.J. said (2):—"The only question is whether the plaintiff, having signed the document in question, can be allowed to say that he understood it to mean what he says. He cannot if the meaning he gives to it is different from its true meaning. But where the document is reasonably capable of more than one meaning, and it appears that one party has signed it in the belief that it has one meaning and the other that it has the other meaning, there is no contract, even though both have put their names to the same piece of paper." *Schutt* J. summed up his view as follows (3):

(1) (1920) V.L.R. 296; 42 A.L.T. 11.
(2) (1920) V.L.R., at p. 301; 42 A.L.T., at p. 12.
(3) (1920) V.L.R., at p. 303; 42 A.L.T., at p. 13.

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"The proposal and the policy seem to me to be couched in such studiously ambiguous language as to leave the meaning of the alleged agreement open to either of the two possible constructions; and, if that be so, and if, as seems clear enough, the parties were purporting to contract under totally different impressions as to what these ambiguous documents meant with regard to a most material matter, it follows that no true agreement was ever reached." *Mann* J. said (1):—"But the true position is that the contract is in vital respects ambiguous, and upon having recourse to extrinsic evidence to find in what sense the parties were speaking of 'house purchase' agreements, it appears, as the learned Judge of the County Court has found, that the parties never had any common intention on this vital point at all. It is true that every person who becomes a party to a written contract contracts to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument, whatever his real intention may have been (see per Lord *Watson* in *Stewart* v. *Kennedy* [*No.* 2] (2)), or, as other authorities prefer to put it, is estopped from alleging any other intention than that which the Court finds to be expressed in the instrument (see *Williams* on *Vendors and Purchasers*, 2nd ed., p. 75 and note). But it is not, as I think, a corollary to either of the foregoing statements of the law that every written instrument intended to be the repository of an agreement by the parties executing it is to be deemed in law to express some common intention. Ambiguity may arise, not only from the use of a word of dual meaning, but also from the use of words and phrases which show that something is to be implied without disclosing what the implication is. In my opinion, the words referring to 'house purchase' cannot be treated as other than an essential part of the intended contract, their meaning and effect is left in doubt, and the supposed contract is void for uncertainty, or, what amounts to the same thing, is void because the parties never had any common intention."

The condition laid down in that case for the admission of extrinsic evidence as to the intention or belief of the parties is, according to

(1) (1920) V.L.R., at pp. 305, 306; 42 A.L.T., at p. 14.
(2) (1890) 15 App. Cas. 108, at p. 123.

the learned Chief Justice, that the document shall be reasonably capable of more than one meaning, and, according to *Schutt* and *Mann* JJ., that the document shall be ambiguous. No distinction is drawn between patent and latent ambiguity; nor is there any suggestion that the words of the document under discussion were technical words, or terms of art, or other than ordinary English words, or that read in their natural meaning as English words they were unintelligible or insensible. The decision appears to me to go to the full length of the proposition that, in every case in which the words of a document *inter partes*—e.g., a contract—are reasonably capable of more than one meaning, evidence is admissible to show what meaning each party attached to the words when signing, although his understanding of the meaning was not communicated to the other party. The corollary is that unless both parties understood the words in the same sense, they were not *ad idem* and there is no contract. I find myself unable to assent to this proposition, which seems to me not to be warranted either on principle or by authority. We have not been referred to any decision, and I have found none, which supports the proposition. The decision in *Falck* v. *Williams* (1) to which *Schutt* J. referred is not in point. That decision turned on the application of the well recognized rule that a person who receives from another and acts upon a letter or telegram, which is fairly open to the meaning which the recipient puts upon it, incurs no liability by reason of the fact that the sender intended the message to be understood in a different sense in which also it might reasonably be understood. In *Goodfellow's Case* (2) the question was not as to the meaning which one party put upon a communication made to him by the other but as to the true interpretation of a formal document intended to embody the terms of an agreement between the parties. The absence of any authority in support of the proposition above referred to is the more significant because experience shows that the words of many, if not of most, documents *inter partes* are reasonably capable of more than one meaning. But there is, I think, authority opposed to the proposition laid down in *Goodfellow's Case*. In *McClean*

(1) (1900) A.C. 176. (2) (1920) V.L.R. 296; 42 A.L.T. 11.

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v. *Kennard* (1) *James* L.J. said (2):—"What the intentions of the plaintiffs were, what they thought or believed, or what conversations took place, seem to me to be utterly inadmissible when once we have got a written document, and have got the facts which were existing at the time when that written document was entered into; and it would be utterly unsafe in the dealings of mankind if anyone could be relieved from the effects of a document which he has signed by saying that he had received some information that somebody else would have been bound by it, and that that was the great inducement to enter into the contract. The whole of that evidence is, in my mind, legally inadmissible, and even if admissible, seems to me to have not the slightest weight whatever." And *Mellish* L.J. said (3):—"I agree with what the Vice-Chancellor said, that according to the evidence the parties differed as to what they intended. But the Court cannot consider what the parties say they intended. The question really is, what is the legal effect of the agreement? The Vice-Chancellor thought that this agreement professed to be by all the executors and all the trustees of Robert William Kennard, and that because one who had been named a trustee had not signed, therefore the agreement had not been signed by all the parties who were intended to sign it. But in my opinion that is not the true construction of the agreement." And, after stating that in his opinion the true construction of the agreement was that it was to be signed by the persons who might turn out to be executors and trustees of the testator's will, the learned Lord Justice proceeds (4):—"In my opinion that is the true construction of the agreement, and we must collect what was the intention of the parties from what they have said in the agreement itself. Even if it was admissible, we ought not to attend to evidence—not that the partners were deceived by any representations made to them by the Kennards or by anybody else—but simply that they had put a particular construction on the agreement. It is impossible that a party can get free from an agreement which he has signed by saying he thought it meant something different to that which it does mean." In that case *Bacon* V.C. had held (5), as the Supreme Court held in *Goodfellow's*

(1) (1874) L.R. 9 Ch. 336.
(2) (1874) L.R. 9 Ch., at pp. 345, 346.
(3) (1874) L.R. 9 Ch., at pp. 347, 348.
(4) (1874) L.R. 9 Ch., at p. 349.
(5) (1874) L.R. 9 Ch., at p. 342.

Case (1), that the evidence of intention showed that there was a "total absence of that consensus which is the essential and indispensable element in every agreement" and that consequently the alleged agreements were not binding. It was this evidence of intention which the Court of Appeal held to be inadmissible. No doubt, it is open to a party to an alleged agreement to establish by evidence, if he can, that the document which is put forward as embodying the terms of an agreement was signed by him *alio intuitu*, or that his signature was obtained by fraud, or that the document was not intended to contain all the terms of the agreement, or that it was intended to operate on a condition which had not been fulfilled, and there are other cases in which extrinsic evidence of intention may be given (see *Halsbury's Laws of England*, vol. XIII., pars. 775-776, pp. 567-568). But the general rule is that extrinsic evidence is not admissible in order to prove that the intention of the parties was other than that appearing on the face of the instrument. And the fact that the words of the instrument are capable of more than one meaning is not sufficient to justify the admission of extrinsic evidence of the meaning intended by either party. In *Stewart* v. *Kennedy* [*No.* 1] (2) Lord *Watson* said: "The fact that the construction of a term in the contract is attended with doubt and difficulty, evidenced it may be by the different meanings attributed to it by Courts or individual Judges, ought not, in my opinion, to prevent its receiving its full legal effect, according to the interpretation finally put upon it by a competent tribunal." (Reference may also be made to *Hunter* v. *Walters* (3), *National Provincial Bank of England* v. *Jackson* (4) and *Howatson* v. *Webb* (5).)

For these reasons I am of opinion that *Goodfellow's Case* (1) was wrongly decided and that the evidence tendered in the present case to prove the intention or understanding of the respondent as to the meaning of the words of the policies ought not to have been admitted.

The next question is whether the policies are void for uncertainty. The argument for the respondent on this point was founded on the clause in each policy which provides for a loan of £500 after three

(1) (1920) V.L.R. 296; 42 A.L.T. 11.
(2) (1890) 15 App. Cas. 75, at p. 103.
(3) (1871) L.R. 7 Ch. 75.
(4) (1886) 33 Ch. D. 1.
(5) (1907) 1 Ch. 537.

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annual premiums shall have been paid. It was said that the words of that clause were so vague that the obligation which it was intended to impose on the Company could not be enforced. But, assuming this to be established, it does not necessarily follow that the whole agreement embodied in the policy is void. When a contract contains a number of stipulations one of which is void for uncertainty, the question whether the whole contract is void depends on the intention of the parties to be gathered from the instrument as a whole. If the contract be divisible, the part which is void may be separated from the rest and does not affect its validity. In this case I think it is clear that the stipulations contained in the contract are divisible. There is no uncertainty or ambiguity in the promise on the part of the Company that in consideration of the payment of the annual premiums it will on 5th February 1939, or on the death of the respondent if occurring before that date, pay to the respondent or his representatives, as the case may be, the sum of £500. The obligation imposed on the Company by this provision came into force immediately on the payment by the respondent of the first premium, and if he had died during the twelve months next succeeding that payment this obligation could undoubtedly have been enforced. The provision for a loan would not then have been operative, and it would have been impossible for the Company, having received the premium and thus treated the contract as valid, to contend successfully that, by reason of the vagueness or uncertainty of the provision for a loan, the whole contract was void and it was under no obligation to pay the amount assured. If the contract were void no obligation could be imposed by it on the Company, and, conversely, if by reason of the contract the Company has come under an obligation the contract cannot be wholly void. For these reasons I am of opinion that the contention of the respondent on this point fails, and that it is unnecessary to consider what is the true meaning of the provision for a loan of £500 or whether that provision is so vague in its terms as to be unenforceable.

The respondent having failed to show that the contract is void, the only remaining question is whether he has made out a case for rescission. It appears from the reasons given by *Macfarlan* J. that he found as a fact that the representation alleged in par. 9 (a)

of the amended statement of claim was made, and that the respondent believed it. I think it must also be taken that the learned Judge found that the respondent was induced by that representation to take up the policies. Accepting these findings of fact, the question is whether the respondent at the time of instituting these proceedings was entitled to rescind the contract. The respondent's right to rescission was disputed by the appellant on two grounds, namely, (a) that the respondent with full knowledge of the facts had elected to affirm the contracts and (b) that his right was barred by the condition contained in the proposals referred to above. As to (a) I think the finding of *Macfarlan* J. that the respondent became aware of the true position of affairs in February 1922, a short time after he had paid the last of the three premiums on the policies, is amply justified by the evidence. It is proved also that at that time he knew the effect of the decision in *Goodfellow's Case* (1). Until November 1922 nothing was said or done by the respondent amounting to an unequivocal statement or act showing that he intended either to affirm or to repudiate the contract. In fact there is no evidence that during that period the respondent said or did anything relevant to this question. In November 1922 the respondent's mother at his request inquired at the office of the Company whether the respondent could get a loan of £1,000 on his policies to buy some property at St. Kilda, and was informed that from £500 to £650 would be the maximum amount that could be advanced as the Company must have a margin, that the property would have to be valued and that a valuation fee would have to be paid. Mrs. Phillips communicated this information to the respondent, and apparently the valuer went to inspect the property, for early in December 1922 Mrs. Phillips took to the office of the Company a memorandum written by the respondent in the following words :—" The Secretary, L.C.A., Queen Street, Melbourne.—Dear Sir,—Your valuer (Mr. Leith) having seen the premises 6 & 8 Pattison Street which are to be sold by public auction 6th December 1922, will you advise me of the maximum amounts your Company will loan me to purchase one or both of these houses should I apply for a loan on my policies, Numbers 40048-9 ? " This memorandum

(1) (1920) V.L.R. 296 ; 42 A.L.T. 11.

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was handed by Mrs. Phillips to the secretary of the Company and was endorsed by him or by another officer of the Company with the words following: "Cannot say definitely, as far as manager can say at present £500. Will have to be submitted to Board of Directors." The memorandum with this endorsement was returned by Mrs. Phillips to the respondent. Apparently a form of application for loan was handed to Mrs. Phillips at or about this time. On 11th December 1922 respondent wrote to the Company a letter which is not in evidence, but some information as to its contents can be gleaned from the reply of the Company dated 12th December 1922, which is as follows:—"I have to acknowledge receipt of your letter of the 11th inst. and note your remarks. In the first place, I would like to state that the valuation fee of £2 2s. was not paid to this Company but was evidently paid direct to Mr. Leith, the valuator, from whom you should have obtained a receipt in acknowledgment. With regard to loan, I would like to state that we have not yet received loan application which was handed to Mrs. Phillips for completion, and until same is received by us the matter cannot be proceeded with. In case the previous form was mislaid I am enclosing herewith another. On receipt of this the matter will be placed before the Board of Directors for consideration, and the result advised you immediately after."

I gather from the evidence that up to this point the property which the respondent contemplated purchasing and offering as security was in Pattison Street, St. Kilda. Nothing more appears to have been done until 22nd January 1923, when the respondent signed an application for a loan on the form supplied by the Company. This application was for a loan of £1,000 on a property situate at Beach Street, Port Melbourne, and contained an undertaking by the respondent to pay in advance the cost of a valuation and, upon application being granted, to execute a mortgage and pay certain other expenses. On 24th January 1923 the respondent was informed that the Company would grant a loan of £650. It will be observed that before either application was made the respondent knew, not only what attitude the Company had taken up with regard to other policies similar to those issued to him, but also that, in the case of any advance made to him in pursuance of

the terms of his policies, the Company would require a margin of security or, in other words, would not advance £1,000 on a property only worth that amount. Knowing this, he made two separate applications for loans on the policies, a course of conduct consistent only with the hypothesis that the policies were binding on the Company and that he was entitled under the policies to obtain the loans for which he applied. In this state of facts I think the proper conclusion from his conduct is that he elected to affirm the contracts or, in other words, to treat them as valid contracts binding the Company to make an advance to him in accordance with the terms of the policies, and by so electing lost his right to rescission.

This conclusion renders it unnecessary to consider the effect of the condition in the proposals excluding liability for statements made by canvassers.

In my opinion the appeal should be allowed, but the appellant must pay the costs of the appeal pursuant to its undertaking.

ISAACS J. The respondent, who had applied for and obtained on 15th February 1919, two policies of life assurance by the appellant Company, sued for rescission of the policies or a declaration that they were void, and also for the return of £189, being four annual premiums of £47 5s., which he had paid respectively in 1919, 1920, 1921 and 1922. *Macfarlan* J., who was the primary Judge, gave judgment for the defendant, the present appellant. He did so on the ground that, though he was, of course, bound by the case of *Goodfellow* v. *Life Insurance Co. of Australia* (1), there was not a total failure of consideration. On appeal to the State Full Court the decision was reversed and judgment entered for the present respondent for £189 with costs. From that decision this appeal is brought. The State Full Court first naturally founded itself on *Goodfellow's Case*. That, being a decision upon a form of policy identical with those in hand, was so far decisive. The Court held, further, that the present respondent had not by any conduct disentitled himself to the full benefit of that decision.

It is necessary to state the grounds upon which the respondent claimed the relief sought. He alleged three grounds: (1) that

(1) (1920) V.L.R. 296; 42 A.L.T. 11.

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there was no contract of assurance because he and the Company were not *ad idem*; (2) that the policy was void for uncertainty; (3) that there was innocent misrepresentation by an agent of the Company.

Diverse Intention.—The first ground was based on *Goodfellow's Case*. That case, so far as material, laid down a principle which is correctly summarized in the first paragraph of the head-note in these terms (1): "Where a document, relied on as a contract, is ambiguous and reasonably capable of more than one meaning, evidence may be given to show in what sense each party understood it when signing, and if it appears that one party signed it in the belief that it had one meaning, and the other in the belief that it had another meaning, there is no contract, the parties never having been *ad idem*." The proposition is too broad. Doubtless, as said *Cleasby* B. for himself and *Channell* B. in *Davis* v. *Haycock* (2), "it is of the essence of a contract that there should be a concurrence of intention between the parties as to the terms." But there are few principles more firmly entrenched in the law, than that which refers the intention of the parties to the writing which they have mutually created as the binding record of their agreement (see *Gordon* v. *Macgregor* (3)). In *Beacon Life and Fire Assurance Co.* v. *Gibb* (4) Lord *Chelmsford* for the Judicial Committee quotes with approval the words of Lord *Denman* in *Rickman* v. *Carstairs* (5): "The question, in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used." In 1923 in *Drughorn* v. *Moore* (6) Viscount *Haldane* said: "The jurisprudence of this country allows people a large latitude in bargaining about property, but they must understand that if they make contracts they must be judged as to their intentions by the words they have used and not by their intentions otherwise conceived." In *Fry on Specific Performance*, par. 765, quoted in part from the fifth edition by *Swinfen-Eady* L.J. in *Eastes* v. *Russ* (7), and since repeated in the

(1) (1920) V.L.R., 296.
(2) (1869) L.R. 4 Ex. 363, at p. 381.
(3) (1909) 8 C.L.R. 316, at pp. 322, 323.
(4) (1862) 1 Moo. P.C.C. (N.S.) 73, at p. 97.
(5) (1833) 5 B. & Ad. 651, at p. 663.
(6) (1924) A.C. 53, at p. 57.
(7) (1914) 1 Ch. 468, at p. 480.

sixth edition, it is said :—" It seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would open the door to perjury and to destroy the security of contracts. Whether the objection to such evidence is derived from the doctrine that every person who becomes a party to a contract, contracts to be bound in case of dispute by the interpretation which a Court would put on the language used, or from any other doctrine, the objection seems to be certainly valid." *Phillimore* L.J. says in *Eastes* v. *Russ* (1) :—" The second defence I have been wholly unable to grasp, and I am not sure that I shall state it correctly now, for the argument seemed to me so elusive, but as I apprehend it it was to the effect that there is a rule of law that when the construction of an agreement is not absolutely clear and the form of the agreement is such that it is proposed or drafted by one side and accepted by the other the acceptor is to be allowed to say that he mistook the true meaning of the words. If that is the argument I think it is unsound and bad law." That is very much in point, and is not inconsistent with the principle that, where one party misleads the other as to the meaning of words, the party so misled may defend himself (see per *Lindley* L.J. in *Wilding* v. *Sanderson* (2)). Nor is it in conflict with the law as to essential mistake or as to equitable relief. In *Preston* v. *Luck* (3) *Cotton* L.J. points the distinction very clearly. He says :—" Where parties enter into a written contract, what they have agreed to must depend on the construction of that contract. It is very true that in some cases, if the party against whom specific performance is sought to be obtained, satisfies the Court by clear evidence that what he on the terms of the contract appears to have contracted for was not in his mind the thing in respect of which he was bargaining, the Court will refuse specific performance, but that is only because in cases of specific performance the Court does not grant that special equitable relief if it finds, for any reason, that it would be what is called a hardship or unreasonable to compel the defendant specifically to

(1) (1914) 1 Ch., at p. 489. (2) (1897) 2 Ch. 534, at p. 550.
(3) (1884) 27 Ch. D. 497, at pp. 506, 507.

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perform the contract." And again : " The mere fact that they put an erroneous construction on a contract in writing existing between them and the defendant . . . and insisted that it included what it does not in fact include, is, in my opinion, no ground for saying that there is no contract."

A document purporting to be a contract may be ambiguous. But the term " ambiguity " is itself not inflexible. It may arise from doubt as to the construction in their totality of the ordinary and in themselves well-understood English words the parties have employed. That is true construction. Or it may arise from the diversity of subjects to which those words may in the circumstances be applied. That is rather interpretation of terms. Or again, it may arise from obscurity as to the full expression in ordinary language of some abbreviated term or arbitrary form that has been adopted. That again is interpretation of terms. Very different consequences attach according as the ambiguity rests in construction or in interpretation. *Lindley* L.J. in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1) employs the same word " construction " for both ideas, but keeps the ideas distinct. He says :—" The expression ' construction,' as applied to a document, at all events as used by English lawyers, includes two things : first, the meaning of the words ; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law." The " meaning of the words " is what I call interpretation, whether the words to be interpreted into ordinary English are foreign words or code words or trade words or mere signs or even ordinary English words which on examination of surrounding circumstances turn out to be incomplete. Their effect when translated into complete English is construction. If that distinction be borne in mind very little difficulty remains.

As to construction, there is always one and only one true meaning to be given to fully expressed words. Sir *Montague Smith*, speaking for the Judicial Committee in *McConnel* v. *Murphy* (2), said :—" In questions of difficult interpretation, not only two, but frequently

(1) (1891) 1 Q.B. 79, at p. 85.

(2) (1873) L.R. 5 P.C. 203, at p. 219.

many constructions may be suggested. And, after all, there must be one true construction ; and if that true construction can be arrived at with reasonable certainty, although with difficulty, then it cannot properly be said that there are two meanings to the contract." Once there is established the full mutual expression of the agreement in English words, the construction of the document is, as *Lindley* L.J. says, a pure matter of law. Lord *Chelmsford* in *Di Sora* v. *Phillipps* (1) makes this clear to demonstration, and there separates the interpretative function from that of true construction (see also per Lord *Atkinson* in *Williams Brothers* v. *Ed. T. Agius Ltd.* (2)). For this purpose no external evidence is permissible. All preliminary operations of interpretation are assumed to have been performed and, if necessary, by appropriate evidence, as explained by Lord *Chelmsford* in *Di Sora* v. *Phillipps*, and, the Judge's mind being sufficiently informed, he must be left to his own office of construing the language of the instrument in question.

The distinct function of the interpretation of terms may require external evidence. If words which in the absence of complicating circumstances appear unambiguous are shown by reason of such circumstances to be ambiguous, then actual intention may be decisive. That is because every contract must be applied to its proper subject matter. *Raffles* v. *Wichelhaus* (3) exemplifies this. The action was for not accepting cotton " to arrive ex *Peerless* from Bombay." Had there been but one such ship no question could have arisen. The defendant could not have pleaded that by the *Peerless* he intended the *Bellerophon*. But, as there were two ships equally answering the description in the agreement, it was ambiguous because as applied to the circumstances it did not fully express the name of the ship. By *Peerless* it distinguished the ship from all other ships not called *Peerless*, but as between the two ships proved to have that name the words used in the agreement were incomplete. Then there were no further circumstances showing that the ship leaving Bombay in October was the subject matter of the contract, and consequently the way was open to the defendant to satisfy the Court which of the two he meant. The result was a divergence of

(1) (1863) 10 H.L.C. 624, at pp. 638, 639. (2) (1914) A.C. 510, at p. 527.
(3) (1864) 2 H. & C. 906.

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intention, and so no *consensus ad idem*. *Falck* v. *Williams* (1) is sometimes misapprehended. It is a decision not really upon "construction" as above defined but upon interpretation. Though the word "construction" is there used, a telegraphic code was employed including the words "begloom" and "estcorte." In rendering the coded telegram into ordinary English, the defendant accepted the plaintiff's offer thinking "estcorte" connected with what went before, while the plaintiff intended it to relate to what followed it. The plaintiff sued for non-performance as he intended; and failed. Lord *Macnaghten* pointed out that when the message was sent there were three matters under consideration—a Barcelona matter, a Liverpool matter and a Fiji matter. The written communications did not in themselves unambiguously select any one of the three as the subject matter so as to constitute a contract, whatever the defendant intended. Then, in attempting to write out the coded telegram in expanded form, it was found that there was no such obviousness as led to but one conclusion. There was room for the defendant's honest misapprehension as to subject matter; and, that having occurred, the plaintiff failed. There was no contract in fact. Further, on the question as to whether the defendant could be heard to say so, it appears that, though the plaintiff's agent was in fault in not sending a clearer telegram, yet, as I understand the reasoning of Lord *Macnaghten*, the circumstances were such that the recipient could see that the plaintiff might possibly be intending the Fiji matter, and so the defendant, if he had been maintaining his "construction," could not have succeeded in establishing identity of offer and acceptance. But both *Raffles* v. *Wichelhaus* (2) and *Falck* v. *Williams* are irrelevant to a case like the present, where the subject matter is not in dispute and where the terminology of the instrument is not in controversy, the sole question being the legal effect of the mutually agreed words in their accepted signification. In my opinion the broad proposition on which *Goodfellow's Case* (3) was based cannot be sustained and the first ground of the plaintiff's claim should be denied.

Uncertainty.—It is essential to a contract that by its terms

(1) (1900) A.C. 176.
(2) (1864) 2 H. & C. 906.
(3) (1920) V.L.R. 296; 42 A.L.T. 11.

express or implied there is created an obligation sufficiently definite to be measurable by the Court. This essential, it is said, is absent from the covenant in the policy to make a loan. It is said the term of the loan, the availability of funds and the discretion given to the directors as to approving of the security, are all so vague and indefinite that a Court cannot properly apply to the clause a legal standard of obligation. The present is not a case where the alleged breach of that clause is directly in question. Such a case may arise and therefore, as in my opinion its determination is not necessary, I pass by its construction, merely saying that for the purposes of this case I shall assume it is so uncertain as to be in itself void. Nevertheless, I do not hold that upon that assumption the life assurance covenant is also void. The two are distinct covenants. They have been treated by the parties, to a great extent at all events, as separate and independent. The life assurance covenant comes into operation immediately; the second is intended not to operate for three years, and even then, if the insured so wishes, it may never operate. I agree with the contention of learned counsel for the Company that, if the life had dropped within three years, the Company would not have been absolved from paying merely because —assumedly—the lending clause was too vague for legal obligation. No doubt, as *Mellish* L.J. said in *Wilkinson* v. *Clements* (1), "as a general rule all agreements must be considered as entire. Generally speaking the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other." But, in that case, which in principle and up to a certain point bears considerable resemblance to this, there were divisible obligations, and the contract was so treated. It may well be that the respondent could refuse, if so bound, to pay future premiums unless the second clause is binding, but at the trial he refused rescission unless he could recover the premiums already paid. That is quite different: it is one thing to liberate the Company from any future responsibility, even under the first clause, and quite another to have had the benefit of that responsibility in the past. There being no element of uncertainty in the first clause and the risk having been incurred by the Company during

(1) (1872) L.R. 8 Ch. 96, at p. 110.

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the time the premiums reclaimed were paid, the second ground also fails.

Misrepresentation.—Admittedly there was no fraud. Admittedly also the agent whose misrepresentation is relied on was a canvassing agent only. Further, it does not appear that the statements relied on as misrepresentations were contained in the printed tables of the Company or included in the proposal. In those circumstances, there being nothing further to bind the Company in respect of his statements, the agreement in the proposal precludes reliance on his innocent misstatement of what the effect of the transaction was. The proposal of the respondent states expressly: "I also agree that no statement, promises or information made by or given by the person canvassing for or taking this proposal, or by any other person, shall be binding on the Company or affect its rights in any way whatsoever, except in so far as such statements or promises are contained in the printed tables of the Company or included in writing on this proposal." I am far from saying that that clause would be read and applied so widely as to shield the Company if a superior responsible officer representing the Company misled the insured. But in such a case as the present I think it fairly applies. Further, the misrepresentation alleged in the statement of claim is "that if a house purchase policy were taken out and three payments of premiums made in respect thereof including the payment made at the time of taking out the policy the policy-holder would then be entitled to borrow at six per cent interest an amount equal to the face value of the policy on any property he might wish to purchase which was in fact worth such amount," and "that such a loan would be granted by the defendant when three payments had been made even though such payments were made before their due dates." The evidence of the respondent himself as to the latter part of the representation is that he was told "after the policy has been in force for three years and after you have paid three premiums you can get a loan of £1,000 on your policy, the face value of which is £1,000." That is not a representation of office practice but rather of right under the policy. In other words, the whole representation was a description of the legal rights he would have under such a policy (see per *Bailhache* J. in

In re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co. (1)). In those circumstances, assuming a right to rescission, there would not be a right to rescind so as to demand a return of the premiums.

There is no fraud, and, if necessary, I would be prepared to adopt the view of Lord *Wrenbury* (then *Buckley* L.J.) in *Kettlewell's Case* (2). But, by reason of the protective clause in the proposal, it is not necessary to say more about it.

In my opinion the appeal should be allowed and judgment entered for the appellant.

STARKE J. Phillips brought an action against the Life Insurance Co. of Australia Ltd. claiming that two house purchase policies issued to him, each for the sum of £500, should be rescinded or declared void and of no effect, and premiums paid under them returned. The Supreme Court of Victoria, following a case of *Goodfellow* v. *Life Insurance Co. of Australia* (3), held that the parties to these contracts of insurance were never *ad idem*, and that, as no contractual relationship existed between them, Phillips was entitled to recover the premium from the Company as money had and received to his use. *Irvine* C.J., in *Goodfellow's Case* (4), thus stated the ground of the decision: " Where " a " document is reasonably capable of more than one meaning, and it appears that one party has signed it in the belief that it has one meaning and the other that it has the other meaning, there is no contract, even though both have put their names to the same piece of paper." It must be remembered that a document " is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction " (*In re Grainger*; *Dawson* v. *Higgins* (5); *Higgins* v. *Dawson* (6); *In re Clarke*; *Coombe* v. *Carter* (7)).

(1) (1920) 1 K.B. 257.
(2) (1908) 1 K.B., at p. 552.
(3) (1920) V.L.R. 296; 42 A.L.T. 11.
(4) (1920) V.L.R., at p. 301; 42 A.L.T., at p. 12.
(5) (1900) 2 Ch. 756, at p. 764.
(6) (1902) A.C. 1, at p. 10.
(7) (1887) 36 Ch. D., at p. 355.

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Now, the argument of Mr. *Dixon* went far to convince me that, whatever difficulties of construction there may be, there is no ambiguity, in any relevant sense, in the clauses of the policies which have been challenged. The policies are styled "house purchase policies." By one clause the Company agrees, on the death of the assured before a certain date, to pay the sum of £500 to his executors, administrators or assigns, but, if he be alive on such date, then to pay the sum to the assured or his assigns. And by another it is agreed that the policy is taken out under the terms of the Company's house purchase policy, and that the life assured is entitled at any time, after the policy has been three years in existence, to a loan of £500 sterling out of the available funds of the Company on a property approved by the directors; interest to be charged at the rate of 6 per cent per annum. One of the chief advantages claimed for this form of insurance is that it enables the assured to purchase a home on easy terms. I do not myself see much benefit to the assured in this vaunted scheme; and I am surprised to find reputable men of business supporting it, and claiming that it has any advantage over the ordinary forms of life insurance. The basis of the transaction, in my opinion, is that the policy is security for the loan as well as the property approved by the directors. It was said that the duration of the loan was not fixed—if that be of any importance—but the duration of the policy, which is part security for the loan, indicates clearly enough, in my opinion, the term of the loan. Next it was urged that "the available funds of the Company" were too uncertain to set any legal standard of right or obligation. That is a somewhat similar problem to the one dealt with in *Brett* v. *Monarch Investment Building Society* (1); and may be answered similarly.

It was also insisted that an agreement to lend £500 on property to be approved by the directors was not capable of affecting legal relations, that it was indefinite and illusory, and too vague to be enforced as a legal obligation. The Supreme Court did not, I think, consider this aspect of the case. However, the question now argued raises, to my mind, the most serious problem in it (cf. *Montreal Gas Co.* v. *Vasey* (2)). I incline to the view that the words used do

(1) (1894) 1 Q.B. 367.

(2) (1900) A.C. 595.

not, in the connection in which they are found, give the directors an uncontrolled and unfettered discretion, but a discretion to be exercised reasonably and only for the purpose of securing the Company against loss in connection with the advance. The view of the Supreme Court was that the relevant clause was ambiguous, that " standing by themselves " the words used therein would have a natural significance such as contended for by the Company, that is, would import an agreement to advance £500 on a property approved by the directors as being of sufficient value to give, with the premiums already paid, a reasonable margin of security over that amount, but that in connection with the policies in question, they were literally capable of meaning that the directors' approval is limited to an approval of the house as being substantially worth the money paid for it—the Company's margin of security being provided for by the premium already paid. The learned Judges resolved this ambiguity by calling in aid the direct evidence of the parties as to their intention and as to their understanding of the clause. That method is, I think, contrary to English law as now settled. Learned Judges and authors have said that the question is: What is the meaning of the words used by the parties? (Cf. *Wigram's* " *Extrinsic Evidence*," 5th ed., p. 9; *Doe d. Gwillim* v. *Gwillim* (1); *Rickman* v. *Carstairs* (2).) Others have insisted that the object of interpretation is to ascertain the intention and meaning of the parties (*Thayer, Preliminary Treatise on Evidence*, ch. x., p. 390—the Parol Evidence Rule; *Principles of Legal Interpretation* by *F. Vaughan Hawkins* (App. C. to *Thayer*, p. 577). And others again have pointed out that it is " not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer " (see *Law Quarterly Review*, vol. xx., article by *Phipson* on " *Extrinsic Evidence in aid of Interpretation*," at p. 254). But, whatever the true principle be, all agree that " direct evidence of the intention of the parties is inadmissible " except in the case of equivocation where the description of a person or " thing is equally applicable in all its parts to more than one " (*Charter* v. *Charter* (3); *Watcham* v. *Attorney-General of the East Africa*

(1) (1833) 5 B. & Ad. 122, at p. 129. (2) (1833) 5 B. & Ad., at p. 663.
(3) (1874) L.R. 7 H.L. 364, at p. 384.

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Protectorate (1); *Thayer, Preliminary Treatise on Evidence*, pp. 444-445). "Among . . . extrinsic facts these outward marks and signs from which . . . in connection with the words of the document and not from those words alone the intention embodied in the written expression is to be collected, there is one thing which cannot under our law be used, namely, extrinsic expressions of the writer as to his intention in the writing" (*Thayer, Preliminary Treatise on Evidence*, pp. 413-414).

Assuming, however, that the promises in the policies for a loan are too vague to be enforced as a legal obligation, still that cannot, in my opinion, invalidate the other promise on the part of the Company relating to insurance. An attempt was made during the argument to treat these promises as dependent the one upon the other, and the premiums as if they were paid for a single consideration. But I cannot agree. They are divisible promises—just as divisible, in my opinion, as were the promises in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) and many other cases (see *Anson, Law of Contract*, 15th ed., p. 359). If the Company took premiums, could it be allowed to say that its promise to pay £500 on the stipulated day was unenforceable because its promise to advance money on loan created no legal obligation? Clearly not, in my opinion, because either its promises are divisible or else its conduct estopped it from so contending. And in this connection it may be observed that the obligation to make a loan does not even operate until after the policy has been three years in existence.

Finally, it was contended that the proposal for house purchase insurance was procured by misrepresentation of fact. I have examined the evidence on this point with some suspicion of the Company and its agent, owing to the nature of the insurance. *Macfarlan* J., who tried the case, found that the proposal had been induced by the statement of an agent of the Company to the effect that the assured, on the combined security of the policy and the property purchased, was, after the policy had been in existence three years, entitled to an advance of the full face value of the policy and not merely to an amount which would leave a safe margin to the Company. That seems to me a representation of fact, and

(1) (1919) A.C. 533, at p. 540. (2) (1884) 9 App. Cas. 434.

not a representation of a matter of law, though, no doubt, it does involve some conclusion of law (*West London Commercial Bank* v. *Kitson* (1)). As *Jessel* M.R. observed in *Eaglesfield* v. *Marquis of Londonderry* (2), " when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law." But the assured cannot, in my opinion, rely upon this misrepresentation for two reasons. One because on discovery of the true fact he so acted as to affirm the contracts. The Chief Justice has examined the evidence on this aspect of the case, and I adopt his conclusion. The other because the assured in his proposal to the Company agreed " that no statement, promises or information made by or given by the person canvassing for or taking the proposal, or by any other person, shall be binding on the Company or affect its rights in any way whatsoever, except in so far as such statements or promises are contained in the printed tables of the Company or included in writing on this proposal." No fraud was proved in this case—simply an inaccurate representation by the agent of the Company; and the assured admitted that he had " read the proposal forms and everything on them before he signed them, and understood them." And he added that he read them after the statement relied upon by him as an inducement had been made. A claim for the rescission of the contracts of insurance under circumstances such as these cannot be entertained.

The appeal should therefore be allowed.

Appeal allowed. Judgment of Macfarlan J. restored. Respondent to pay costs of appeal to Full Court. Appellant to pay costs of appeal to this Court in accordance with its undertaking.

Solicitors for the appellant, *Strongman & Crouch.*

Solicitors for the respondent, *Weigall & Crowther.*

B. L.

(1) (1884) 13 Q.B.D. 360.

(2) (1876) 4 Ch. D. 693, at p. 702.