THE ÆTNA LIFE INSURANCE COMPANY ..... } APPELLANTS;

AND

WILLIAM BRODIE ..... RESPONDENT.

1879
*Nov. 5, 7, 8.

1880
*April 10.

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

Life Insurance—Mistake as to amount insured—Premium—Parol evidence—Costs.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000; that as soon as the mistake had been discovered they had offered a policy for $1,000, and that previous to the institution of the action they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy.

Held,—1st. That the insurance effected was for $1,000 only, and that the policy had by *mistake* been issued for $2,000.

2nd. As to costs: that appellants, not having tendered with their plea costs accrued up to and inclusive of its production, should pay to the respondent the costs incurred in the court of first instance.

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* PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), whereby the judgment of the Superior Court sitting at *Montreal*, in favor of appellants, was reversed, and appellants held as to an insurance of $2,000 on a policy which they claim issued by error for $2,000 instead of for $1,000.

The following special case was agreed to for the opinion of the court:—

"The action is founded upon an endowment participating policy, issued by the appellants, dated the thirteenth of October, eighteen hundred and sixty-six, whereby it is declared that the appellants, in consideration of an annual premium of one hundred and sixty-three dollars and forty-four cents, assured the respondent's life in the amount of two thousand dollars, until eight years from the date of the policy.

"The policy stipulates that the company shall pay the said sum of two thousand dollars to the respondent, his executors, administrators or assigns, within ninety days after due notice of the death of him, the respondent, or if the respondent should survive eight years, then the amount insured should be paid to him.

"The policy entitled respondent to participation in the profits and dividends accruing to persons holding endowment policies in the company.

"The premiums were paid on the half note system; under which the respondent during the eight years following the thirteenth day of October, eighteen hundred and sixty-six, paid half of the premiums in cash, and gave notes for the remaining half, inclusive of interest at six per cent.

"Having survived, the respondent, at the termination of the eight years, claimed upon the company for the sum of two thousand dollars, and such dividends and profits as had accrued in his favor.

"The company resisted payment for the reasons stated below. Thereupon the respondent entered the present action, whereby he prays that appellants be condemned to pay him the sum of two thousand dollars with interest from the thirteenth of October, eighteen hundred and seventy-four, and to render him a true and faithful account of his share and proportion of the profits and dividends made and declared by the company within the said period of eight years, and to pay over to the respondent his share and proportion of said profits, and in default of said account, to pay and satisfy to the plaintiff the further sum of five hundred dollars.

"The appellants plead that they never insured the respondent for two thousand dollars. That the policy issued in error for the sum of two thousand dollars instead of one thousand dollars, for which latter amount alone it is claimed the respondent was insured. The plea sets out the alleged circumstances under which this alleged error occurred. It further set out a tender of the ninth of December, eighteen hundred and seventy-four. With the plea were deposited the following sums: Eight hundred and thirty-two dollars and ninety-seven cents, the result of the statement on the protest of the ninth of December; one dollar and fifty-three cents for interest, and twenty-five dollars and fifteen cents, alleged amount of costs due up to, but not including return.

"The respondent answered specially, alleging that he had always repudiated the pretensions of the tender of the thirteenth day of October, eighteen hundred and sixty-nine, setting out the protest of the day following, and declaring the tender made by the plea insufficient.

"There is a concurrence as to the following facts:

"The receipt for the first premium is contained in the policy.

"The receipt issued by the company for the premium

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

paid on the thirteenth of October, eighteen hundred and sixty-seven, is as follows:—

"ÆTNA LIFE INSURANCE OF HARTFORD, CT.

"Assets, Jan. 1st, 1867, $4,401,833.86.

"*Hartford*, 13th Oct., 1867.

"Received from *W. Brodie*, one hundred sixty-three $\frac{44}{100}$ dollars, premium due Oct. 13, 1867, on policy No. 26,863, insuring $2,000 for 12 months ending on the 13th day of October, 1868, at noon.

"Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal, Ca.*

"Premium $163.44.

"(Signed,) *S. Pedlar & Co.*, "(Signed,) *T. O. Enders*,
"Agents." "Secretary."

A like receipt was given on the thirteenth of October, eighteen hundred and sixty-eight.

The subsequent five receipts are in form following:

"*Hartford*, 13th Oct., 1869.

"Received from *W. Brodie*, one hundred sixty-three $\frac{44}{100}$ dollars, premium due Oct. 13, 1869, on policy No. 26,863, insuring $1,000 for 12 months ending on the 13th day of October, 1870, at noon.

"Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal, Ca.*

"Premium $163.44.

"(Signed) *S Pedlar & Co.*, "(Signed) *T. O. Enders*,
"Agents." "Secretary."

"On the twelfth October, eighteen hundred and sixty-nine, the company, through *W. F. Lighthall*, N.P., served a notarial protest on respondent, alleging that by an oversight and by inadvertence a policy was issued to him by the company for the sum of two thousand dollars instead of one thousand dollars, and that the error had only very recently been discovered; and the protest further demanded the return of this policy, and tendered another for the sum of one thousand dollars.

The respondent claims that the one so offered was in any event incomplete, through its not being countersigned by the local agents, a formality, according to respondent's pretensions, rigorously required by its terms as a condition precedent of effectiveness.

"On the thirteenth October, eighteen hundred and sixty-nine, the day following the above protest, respondent, by a counter and answering protest served upon the company, maintained his right to an insurance and policy of two thousand dollars, and tendered the premium due on that date; by this protest respondent further declared that he would deposit the premium for the benefit of the company in some chartered bank, in the event of a refusal to receive it, and further that he would hold the policy in full force and effect.

From this date to the maturing of the policy on the thirteenth October, eighteen hundred and seventy-four, the respondent continued to pay, and the appellants to receive, the annual payments, without prejudice to, and under reserve of all rights on either side. A letter to this effect passed from the company to the respondent, as follows:

"Ætna Life Insurance Company,
"Canada Branch Office,
"20, Great St. James St.
"*S. Pedlar & Co*,
"Managers.

"*Montreal*, 13*th Oct.*, 1869.

"*W. Brodie*, Esq., *Montreal.*

"DEAR SIR,—We beg to acknowledge the receipt from you of one hundred and one $\frac{33}{100}$ dollars in cash, and a premium note of $81.72. We herewith hand you the company's receipt, keeping your policy No. 26,863 in force, the company however claiming to be liable thereunder only to the extent of one thousand dollars, for the reasons stated in their tender and protest by

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

J. H. Isaacson, N. P., of the 12th instant—you, on the other hand, claiming to hold said policy for the full amount of two thousand dollars for the reasons stated in your tender and protest by Mr. *Lighthall*, N. P., of 13th October—this day—the present payment of premium and all future similar payments not in any manner to affect the rights and pretensions of the parties respectively in regard to the amount for which the policy should be held.

"Very truly yours,

"(Signed) *S. Pedlar & Co.*

"Managers."

"This letter was assented to and acted upon by both parties.

"The policy matured on the thirteenth of October, eighteen hundred and seventy-four. Respondent filed his claim for principal and profits as due on a two thousand dollar policy, and on the twenty-sixth of November following, instituted the present action, returnable on the tenth of December.

"On the day previous to the return, appellants, by a notarial tender and protest, served on respondent, set out the details of the profits and of the amounts loaned from their point of view, and tendered respondent the sum of eight hundred and thirty-two dollars and ninety-seven cents, as the balance thus shewn to be due, together with the further sum of one dollar and fifty-three cents for interest.

"It also asserted the appellants' readiness to pay costs incurred.

"The endorsement on the original application was for two thousand dollars; at the time the appellants allege they discovered the alleged mistake, this was altered to one thousand dollars.

"In the Court of Queen's Bench doubts existed in the minds of the Judges as to the exact amount due re-

spondent for profits under either view of the case. To obviate a return of the record to the Court below for the purpose of obtaining more definite evidence on this point, the parties filed the following admissions :—

" 1st. That the amount due by appellant to respondents, and to be deducted from any sums payable under said policy, is six hundred and fifty-three dollars and seventy-six cents.

" 2nd. That the profits on said policy, regarding it as a two thousand dollar policy, would, under the system of distribution of profits followed by said company at the date of the issue of said policy, amount to four hundred and eighty-six dollars and seventy-three cents, respondents claiming that they were under no obligation to continue said plan.

" 3rd. That under the system introduced and adopted by the said Company in the year eighteen hundred and seventy-one, but which appellant protests he never assented to, no profits are divisible in respect of said policy, if it be regarded as for two thousand dollars.

" 4th. That if said policy is held to be a one thousand dollar policy, the profits upon it under either of said systems would amount to four hundred and eighty-six dollars and seventy-three cents.

" The foregoing admissions are under the reserve of the right of respondent to appeal from any judgment rendered on the basis that said policy is to be held a policy for two thousand dollars.

" By the judgment in the Court of Queen's Bench, the judgment of the Superior Court was reversed and the company condemned to pay respondent the sum of one thousand eight hundred and thirty-two dollars and ninety-seven cents with interest from the twenty-sixth of November, eighteen hundred and seventy-four, and also the costs of suit in the Superior Court, and Court

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

of Queen's Bench. *Dorion*, C. J., and *Tessier*, J., dissented.

"From the pleadings, admissions, papers and evidence of record, the following question results: Is respondent entitled to recover as upon a policy of two thousand dollars or not, and to receive the amount awarded for profits by the Court of Queen's Bench?

"It is agreed that the original record is to be transmitted to the Supreme Court with right to either party to refer to it."

Mr. *Bethune*, Q. C., and Mr. *Trenholme* for appellants:

Our first proposition is that appellants ought not to be condemned as for an insurance of $2,000 on a policy which they claim it is clearly established issued purely by error for $2,000 instead of for $1,000, and is not in accordance with the antecedent proposal and bargain for insurance as understood by both parties; certainly as understood by appellants, and as it ought to have been understood by respondent.

The company never intended to give more than a $1,000 policy for a yearly premium of $163.44. Although the memorandum of amount of terms in the margin of the application does not alone override the policy, yet it is part of the contract, and that, supported as it is by parol evidence, by the premium paid, the published rates of the company, the contemporaneous entry made by the agent in this register of the correct amount, and other facts and circumstances, entitles the appellants to succeed. *Philipps* on insurance sec. 68, and 2 *Arnould* 588, show the margin notes are to be taken as part of the contract.

The present case stands on a very different footing from that of an insurance company seeking to turn the loss on the assured after irreparable loss has occurred. It is the case of a company, before loss and while the parties can be practically replaced in their former

rights, being compelled to perform a contract it never intended and never did really assent to. The respondent is not contending *de damno vitando* but *de lucro captando*. He seeks to obtain $1,000 at the expense of appellants, for which he never gave any consideration, and to profit to that extent by the inadvertence or innocent mistake of the agent who filled up his application at his request. All the equities are on the side of appellants.

Courts will not compel a party to specifically perform a contract which he never intended to enter into, or which he would not have entered into had its true nature and effect been understood; and will act on purely parol evidence.

Kerr on Fraud and Mistake (1); *Principal of Harris* v. *Pepperell* (2); *Webster* v. *Cecil* (3); *Wood* v. *Scarth* (4); *Calverley* v. *Williams* (5); *Brown* v. *Blackwell* (6).

If appellants reasonably understood the original proposal and bargain for insurance to be for $1,000, and respondent for $2,000, there is error *in corpore* and no contract for want of *consensus in idem*; *Trigge* v. *Lavallée* (in the Privy Council) (7); *Fowler* v. *Scottish Eq. Ass. Society* (8).

The principle of relief against one's own mistake is recognized in every portion of the Civil Code of *Quebec*, which goes further than the English law, and relieves against the negligence implied by ignorance of law.

See Articles 1047—1052; 1245; 2258.

Vide Leprohon v. *The Mayor of Montreal* (9); *Whitney* v. *Clark* (10).

(1) Pp. 411, 418 Am. ed., pp. 343, 349 Eng. ed., and authorities there.
(2) L. R. 5 Eq. 1.
(3) 30 Beav. 64.
(4) 2 K. & J. 33.
(5) 1 Ves. Jr. 210.
(6) 35 U. C. Q. B. 239.
(7) 7 L. C. J. 85.
(8) 28 L. J. Ch. 228.
(9) 2 L. C. R. 180.
(10) 3 L. C. Jur. 89 & 318.

1879

THE ÆTNA LIFE INS. CO. v. BRODIE.

Mr. *Laflamme*, Q. C., and Mr. *C. P. Davidson*, Q. C. for respondent:

There is a point as to costs. The action was returned on the 10th Dec., 1874. On the 9th, defendants made a formal offer of $834.50, being $832.97 for insurance, and $1.50 for interest. No sum of money was tendered for costs.

There is an effort made by the plea to conceal this fatal defect. Breaking completely away from the actual contents of the notarial document, it alleges that, in addition to the principal sum, there was by it "also tendered the costs then due, to-wit: $25,15, which said tender of debt and costs the said defendants hereby repeat."

It would, therefore, appear to be incontrovertible that the plea ought to have tendered costs accrued up to and inclusive of its production. These amounted to $50.15 and not $25.15.

No sufficient tender was, as a consequence, ever made to respondent, and it is respectfully submitted that whatever the result of the issues between the parties, the judgment of the Superior Court discloses a manifest error in adjudging costs since plea pleaded against said plaintiff.

On the merits, the only evidence of error is the amount of premium written in the marginal note. Now I challenge the learned counsel for appellants to cite any authority to show that a marginal note not signed or initialed can alter the contents of a signed document. See arts. 294, C. P. C. and Journal du Palais *Verbo* "Renvoi" (1).

In discussing the question of mistake, we contend: First.—The mistake has to be shown by incontrovertible evidence, and must have been mutual. Second.—If a man manifests an intention to another party so as

(1) 11 Vol. p. 298, Nos. 11 and 13.

to induce him to contract, he will be estopped from denying that the intention manifested by him was his real intention. Third.—There has been such acquiescence and *laches* on the part of the appellants, as to prevent them from effectively pleading mistake, even had it existed at the creation of the policy. The evidence of record as to what took place between *Brodie* and *Orr*, at the interview which brought about an agreement to insure, is of the most unsatisfactory kind.

The admissions by *Orr* as to what *Brodie* believed estops him. Meaning one thing and asserting another is not a mistake to be remedied.

The mistake of either party in expressing his intention, or in his motives, of which the other party has no knowledge, cannot affect an agreement. *Kerr* on Mistake and Fraud (1); *Bordman* v. *Davidson* (2).

The appellants have not presented or proved, with sufficient distinctness, the amount due by them for dividends and profits. By the percentage plan of distribution in force at the date of the insurance, the premium, irrespective of amount of policy, or its time of maturity, was the only basis on which profits were calculated, and, as a consequence, respondent's share could not be diminished by any increase in his policy.

But admitting error had been proved, this formal contract could not be rescinded, amended, or disturbed without special conclusions to that effect. To affirm the principle in the words used by appellants' counsel in another case, where a similar point of procedure was under discussion, "as the defendants did not pray for its cancellation, it must stand under the pleas uncancelled."

The learned counsel referred to *Laurent* (3); and *Smith* v. *Hughes* (4).

(1) P. 341.
(2) 7 Abbott's Prt. R. 439.
(3) Vol. 15, p. 561, No. 487.
(4) L. R. 6 Q. B. 597.

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

RITCHIE, C. J.:—

I think the judgment of the Superior Court was, as to the amount, right, and should not have been reversed.

The application, dated 13th October, 1866, states the desire of *Wm. Brodie* to effect an insurance with the *Ætna Insurance Company* in the sum of $2,000, the only reference in the body of the application as to premium being in these words:

> And I further agree that the assurance hereby proposed shall not be binding on said company until the amount of premium as stated therein shall be received by the said company, or by an accredited agent thereof, in the lifetime of the said *Wm. Brodie*.

In the margin is the following:

> What kind of policy is desired?
> Endowment at 30 with profits.
> Amount, $1,000—Premium at age 22, $163.44.

Orr, the agent of the defendants through whom this insurance was effected, states the time, place and circumstances under which this application was written by him and signed by plaintiff thus:

> The time was on the thirteenth day of October, eighteen hundred and sixty-six; the place was at Mr. *Brodie's* store, corner of Bleury and Craig streets. About a month or so previously, I had spoken to Mr. *Brodie* about taking a policy, at which time he informed me that he would not apply again and risk being rejected as he had been a short time previously by an English company. I did not press him strongly when I learned he had been rejected; for, looking at his size, I felt it would be useless. I called a number of times at his store to try and insure his partner, Mr. *Parkyn*, but I do not remember seeing Mr. *Brodie* again after the first interview until the thirteenth day of October above mentioned. On that day I was pressing Mr. *Parkyn* hard to insure, when he positively refused to do so, but added: "Here is a man that will insure, talk to him." He alluded to Mr. *Brodie*, then sitting at the rear of the front office. I then addressed Mr. *Brodie*, saying to him that I had thought over his case, and believed I could insure him on the endowment plan, so that he could draw the money at the age of forty, if then living, or at previous death. He replied: "That would suit me," or words to

that effect, "come in here," and, so saying, he went into the back office. I followed and explained to him that two thousand dollars, the amount he had applied for to the other company, would cost him about ninety-five dollars the first year, in cash, the gross premium at his age $179.32, payable half in cash, with six per cent. on the balance. He liked this plan of insurance, and authorized me to write up his application therefor.

This I proceeded to do, but while doing so, began to fear that my labour would be in vain with so heavy a man, on so long a term as eighteen years. Mr. *Brodie* was at that time about three hundred pounds weight, and only five feet nine in height. In the course of the writing he assured me again that he would not apply under any consideration, if there was the slightest doubt in my mind of his being accepted. Under these circumstances I told him it would be better to apply on a shorter term, namely, eight years instead of eighteen. He replied that he would rather have it for only eight years, and asked what it would cost. I answered that it would cost him about one hundred and seventy-three dollars in cash the first year, the full premium being $336.88 for two thousand dollars, payable at the age of thirty, his age at that time being twenty-two. He said that that was too much to pay. "Well," I said, "take one thousand on the eight year plan, so as to make sure of being accepted, and then there will be a chance of your being insured again; but if rejected now, there would be no use in applying to any company afterwards." At this time I had written the whole of the application, except the answers to the questions found along the side. Mr. *Brodie* having agreed to take the one thousand dollars on the eight-year term, I struck out the letters "een" which formed part of the word "eighteen" in the fifth line from the top of the application, so as to make it read, term of eight years." I should have also changed the word "two" found at the beginning of the third line, to the word "one," but neglected to do so inadvertently. I then answered the printed questions in the margin, in accordance with the desire of Mr. *Brodie*, to read as follows: "What kind of policy is desired?" Endowment at thirty with profits. Amount $1,000. Premium at the age of twenty-two, $163.44." This completed the application; whereupon I turned it round to Mr. *Brodie*, and he signed it in the two places, at the bottom and near the top, and I signed my name at the lower left hand corner. I then took the application to Dr. Bessey, the examiner of the company, whose report was favorable, and the result was the issue of a policy, which was delivered to Mr. *Brodie*, and the premium was collected by a clerk in the office named Christmas.

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

I am positive that the figures $1,000 after the word "amount" in the margin of the said application were written in the presence of the said *Brodie*, at the same time that the application was made out.

The amount of premiums paid by *Brodie* during the eight years term was in cash $653.76, and in promissory notes $653.76, making a total sum of $1,307.52.

According to the established rates of the company, $163.44 would be the premium on $1,000 on the plan on which plaintiff's policy was issued, and the premium for a $2,000 policy on this same plan would, according to the evidence of *Orr*, have been just double, and this witness also states, what would seem to be a self-evident proposition, that it is not possible for an insurance company to do business without incurring serious loss on every policy on the plan of granting a $2,000 policy payable in the terms of plaintiff's policy for the annual premium therein mentioned, the insured being of the age of 22 at the time of the insurance, and therefore *a fortiori*, there could by no possibility be profits which the endowment plan contemplated accruing due. The witness thus states the principle on which the rate of premium is based:

It is a general principle in life insurance as to endowment policies, which are always for fixed periods, and not for life—that the total amount of premiums to be collected should be sufficient to pay policy at maturity, after defraying all probable losses by death falling to the share of that policy during the term, and an equitable share of all the expenses, together with some considerable margin for possible contingencies, such as extraordinary death losses, losses by investments, or by agents or employees, as well as a failure to receive the rate of interest upon which insurance transactions are based. When the policy entitles the holder to profits the rates are usually from ten to twenty or twenty-five per cent. higher than when a definite contract is made for so much money on so much insurance.

Another witness, *Pedlar*, speaks in these terms of the premium:

Question. Do you know what the premium would be on a thousand dollar policy in your company, issued at the time the plaintiff's

policy in this cause (October, 1866), on the eight year and downward (endowment) plan, and payable in terms of plaintiff's policy, the party insured being 22 years of age at the time of the insurance?

Answer. Yes, $163,44 annual premium.

Question. Could any insurance company issue two thousand dollars (policy) for that premium on the similar plan, payable in the same way, on the terms of plaintiff's policy?

Answer. It could not.

Question. Would there be a loss on such an insurance?

Answer. There would be a loss equivalent to nearly a thousand dollars.

Question. That is, if a company were to issue a $2,000.00 policy payable on that basis of an annual premium of $163.44, and did business on that system, it would lose nearly $1,000.00 on each policy?

Answer. Yes.

Question. How do you make that out? Approximately?

Answer. Without going into the actuarial figures, showing it to a decimal calculation, I would estimate that the policy, making proper allowances for deaths and reasonable expenses, that there would be barely a sufficient premium to guarantee a profit to the company that would undertake the risk for $1,000.00.

Question. What are the funds that a company has, in case of such insurance as that, available?

Answer. A company would only have available the amount of the premiums and interest thereon, less the expenses, including commissions and loss by death. The average deductions for expenses in insurance companies is about 20 p.c. In the case of the company defendant it is lower than the average, say about 15 p.c.

And Mr. *Webster*, Superintendent of Life Insurance Agencies in *Hartford, U. S. A.*, for the defendants, says:

The proper annual premium for a thousand dollar policy issued to a person, in October, eighteen hundred and sixty-six, at the age of twenty-two, payable in eight years, or sooner in case of death, that is, for such a policy as plaintiff's, was one hundred and sixty-three dollars and forty-four cents. This was the established rates of the company, and in no case would or did the company depart from them, unless by error. No insurance company could issue such policies for two thousand dollars each for the above annual premium and remain solvent.

Referring to the policy sued on in this cause, plaintiff's Exhibit No. 1, I can say, without hesitation, that there is an error therein, in

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

that the policy was issued for two thousand dollars, whereas the premium charged therein is only the premium for one thousand dollars; of this there is no doubt.

Had the above error been discovered, I can say the policy in question would never have left the office of the company.

Orr shows how the mistake was first discovered by him, and communicated to the company thus:

It was with the aid of Mr. *Brodie* that the mistake was discovered, from conversation that I had with him one day. The mistake was discovered by me, by the amount of the policy being mentioned as two thousand dollars by him in the course of a conversation at his store. I was congratulating him on his good health, and he said, yes, he was going to live to draw that two thousand dollars himself. I said, "Two thousand! you mean one thousand?" Having a rate table in my pocket, I took it out to make sure that I was correct. I then declared again that it was only for one thousand, and asked him to show his policy, saying that if it was as he said, there was some mistake. The policy was not in the store, and so I promised to call next day, when Mr. *Brodie* said that he would have it there for examination. I called the next day and found it, as he said, written out for two thousand dollars, but with the premium due on a one thousand dollar policy only. I then wrote to the company for a copy of the application in order to discover how the mistake had occurred. So soon as I saw the copy of the application the whole circumstance of my writing the original and the circumstances connected with it came up fresh in my memory. On discovering how the error occurred, the state of the case was communicated to the company, and I was directed to tender the corrected policy, which was done by notarial tender and protest filed.

It is true the witness *Orr* states that he has no doubt, and had not then any, when the discussion as to the policy took place, but Mr *Brodie* believed that he was insured for $2,000. There was no appearance on the part of the plaintiff of wishing to withhold communication of it from him; and he adds:—

I have no doubt that the plaintiff always believed that he was insured for two thousand dollars, or certainly so until the mistake was brought to his knowledge. He has never admitted since then that he was wrong. I believe him to be perfectly honest in his belief, and do not think that plaintiff ever had any intention of defrauding or wronging the company.

This is certainly rather irreconcilable with the fact, if, as stated by *Orr*, that on his suggesting to *Brodie* "to take $1,000 on the 8 year plan" and *Brodie*, as he says, "having agreed to take the $1,000 on the 8 year term," he (witness) altered the application, and then answered the printed question in the margin, in accordance with the desire of Mr. *Brodie*, to read as follows:

What kind of policy is desired? Endowment at 30 with profits, amount $1,000, premium at age 22, $163.44.

It is only reconcilable with the idea that *Brodie*, having been very anxious to have a $2,000 policy, may have forgotten that a $1,000 policy had been finally agreed upon. However this may be, and notwithstanding this apparent discrepancy I cannot avoid the conclusion that there was on the part of the Insurance Company a mistake, that they never could have intended to insure plaintiff for 8 years, for a yearly premium of $163,44, in the sum of $2,000 payable with profits if plaintiff lived.

The policy says:

And the said Company do hereby promise and agree, to and with the said assured, his executors, administrators and assigns, well and truly to pay or cause to be paid the said sum insured, in the same currency in which the premium is paid, to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said *William Brodie*, or if the said *William Brodie* shall survive eight years, then the amount insured shall be paid to him, and in either case all indebtedness of the party to the Company shall be deducted from the sum insured.

I cannot doubt the mistake arose in filling up the policy, and was caused by the amount in the application not having been altered when the terms of the application were finally settled between the agent *Orr* and *Brodie*.

Orr's evidence is corroborated by the entry he produces in his application register; he says:

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

The entry—the defendants Exhibit "A.B.C." filed at my cross-examination—is a folio taken from the application register of the company, defendants, and was used in the Company's office here at the time of taking plaintiff's application, and for some four or five years afterwards.

The entry in said exhibit opposite the date, 13th October, 1866, being the twentieth written line on the page, reads as follows, each separate item of the line being under its appropriate printed heading: "*William Brodie*," "himself," "22," "$1,000.00," "$163.44," and endowment indicated by marks followed by "30."

The said entry or line, and every item thereof is in my handwriting, and was made immediately after having taken Mr. *Brodie's* application, but it was evidently not made with the application before me as the date of birth is not inserted.

I swear positively that I made the entry of "$1,000.00" in said line under the head "amount of policy" at the time, and not later than a day or two at most after I took the application.

The "1,000" indicates and was an entry of the amount for which the policy was to be, and it refers to the same insurance as the application, defendants Exhibit No. 6.

I think it is impossible to doubt that such a transaction as insuring a party for $2,000, on the plan and on the terms contemplated, for the premium named, would, if presented to an insurer or insurance company, be looked on as utterly unreasonable and absurd, and such as no sane business man would, in the ordinary course of business, enter into. Where relief is sought against an instrument signed in due course of business as a legitimate business transaction, and where, from the nature of the transaction, it is obvious a fair *quid pro quo* must have been contemplated, and if the inadequacy of the consideration is so very gross indeed as to shock the conscience and understanding of any reasonable man, the Court, I think, ought to infer, from that alone, mistake, inadvertence, or fraud.

How can we, then, in a case of this kind, where we have positive evidence of the mistake, and a by no means unreasonable explanation of how it occurred, supported by an inference or presumption from the

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Ritchie, C.J.

transaction itself strong if not almost irresistible, reject that evidence and that presumption, and say we think the contract set out in the policy was that which the assurer and assured both understood, agreed on and intended to be the contract between them, and that there was no mistake.

I agree with Chief Justice *Dorion* that the judgment of the Court below should not have been interfered with, except as to costs, that the judgment of the Court of Appeal must be reversed, and the judgment of the Superior Court affirmed.

STRONG, J. :—

I concur with the Chief Justice that the judgment of the Court below ought to be reversed.

FOURNIER, J. :—

L'Intimé *Brodie*, demandeur en Cour inférieure, a poursuivi l'Appelante pour $2,000 sur une police d'assurance sur sa vie pour le terme de huit ans.

L'Appelante a plaidé à cette action que la somme de $2,000 a été insérée par erreur dans cette police, au lieu de celle de $1,000 pour laquelle l'assurance a été faite.

La défense allègue en outre qu'aussitôt que l'erreur a été découverte, la compagnie a offert à l'Intimé par protêt en date du 13 octobre 1869, une autre police pour la somme de $1,000, et que par un autre protêt en date du 9 décembre 1874, la dite compagnie a offert la somme de $832,97, montant qui serait dû sur une police d'assurance de $1,000 d'après le système de participation dans les profits, en même temps qu'une somme de $25.15 pour les frais de l'action que l'Intimé avait alors fait émaner sur sa police de $2,000. Ces deux sommes furent déposées en cour avec le plaidoyer.

La Cour Supérieure, à *Montréal*, qui a rendu le jugement en première instance, a été d'opinion que la preuve

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

établissait l'erreur alléguée. Elle a en conséquence déclaré les offres suffisantes et adjugé à l'Intimé le montant offert, en renvoyant sa demande pour le surplus avec dépens.

Ce jugement porté en appel à la Cour du Banc de la Reine, par *Brodie*, a été par le jugement de cette cour en date du 13 mars 1879 déclaré erronné, et la compagnie condamnée à payer à l'Intimé la somme de $1,832,97, sur le principe qu'il n'y avait pas eu d'erreur dans l'émission de la police pour $2,000. Les frais d'appel comme les frais de première instance furent adjugés contre la compagnie en faveur de *Brodie*.

C'est de ce dernier jugement qu'il y a appel à cette cour.

Il ne s'élève devant cette cour que les deux questions suivantes :

1o. Y a-t-il eu erreur en émettant une police de $2,000 au lieu de $1,000.

2o. Dans le cas où la police doit être considérée comme n'étant que de $1,000, les offres telles qu'elles ont été faites par le protêt du 9 décembre 1874, sont-elles suffisantes et conformes à la loi ?

Sur la première question, je suis d'opinion qu'il y a eu erreur. Elle me paraît expliquée d'une manière satisfaisante par le témoignage de *William Orr*, l'agent de la compagnie qui a reçu l'application de *Brodie* pour l assurance qui fait le sujet de la présente difficulté. Après avoir dit qu'il avait d'abord été question d'une assurance pour 18 ans, il donne de la manière suivante les raisons qui ont fait adopter le terme de huit ans (1).

On voit par l'application de *Brodie* produite dans la cause que le chiffre de $2,000 y est mentionné comme étant celui du montant d'assurance demandé,—mais à la marge on y trouve celui de $1,000, au sujet duquel l agent déclare :

(1) See extract of evidence p. 12.

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

I am positive that the figures $1,000 after the words " amount " in the margin of the said application were written in the presence of the said Brodie, at the same time that the application was made out.

Le montant de la prime y est porté comme fixé à $163.34. Ce montant d'après les taux fixés par la compagnie suivant lesquels elle fait généralement ses affaires, est précisément celui d'une assurance de $1,000 dans des conditions semblables à celle dont il s'agit. La preuve établit de plus, d'une manière certaine, qu'il serait impossible à la compagnie de faire des affaires en adoptant le taux que veut faire prévaloir l'Intimé, sans perdre-près de la moitié du montant de l'assurance sur chaque police. Pour faire voir qu'il a été adopté, dans ce cas, il faudrait au moins prouver que la compagnie, pour quelque raison de faveur particulière, a dérogé à ses taux ordinaires Au contraire, il paraît que *Brodie*, à cause de son poids excessif, n'était pas considéré comme un sujet favorable pour une assurance sur la vie. D'ailleurs pour déroger aux conditions ordinaires de la compagnie, il aurait fallu à l'agent un pouvoir spécial qu'il n'avait pas.

Cette application ayant été envoyée au bureau principal de la compagnie, la police fut émise conformément à la somme mentionnée dans le corps de la police, $2,000, au lieu de celle de $1,000 qui se trouvait en marge. Dans plusieurs entrées faites au bureau de la compagnie à *Montréal* concernant cette police, *Orr* l'agent, dit qu'elle y est mentionnée comme une police de $1,000. Ces circonstances me portent à croire qu'il y a eu erreur, et que le montant de $1,000 au lieu de $2,000 aurait dû être inséré dans cette police.

Mais si la compagnie ne voulait accorder qu'une police de $1,000 aux conditions ordinaires, et si de son côté l'Intimé ne voulait pas en prendre une de moins de $2,000, pour la même prime, parties n'ayant

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

point donné leur consentement sur le même objet, il ne devrait pas y avoir de contrat. C'est sans doute ce qui devrait être déclaré, si les parties après la découverte de cette erreur n'en était pas venu à un arrangement pour s'en rapporter aux tribunaux pour décider la question du montant d'assurance. Les protêts respectifs des parties en date des 12 et 13 octobre 1869, la lettre de la compagnie du 13 octobre 1869 accusant réception de la prime et déclarant que la police serait continuée sous la réserve en ces termes des droits de chaque partie : " the present premium and all future similar payments " not in any manner to affect the rights and pretentions " of the parties respectively in regard to the amount for " which the policy should be held." Ces termes démontrent de la part de la compagnie une intention d'exécuter un contrat. D'un autre côté, *Brodie* en payant la prime pendant cinq ans, après cette lettre avec l'espoir sans doute de faire maintenir la police pour $2,000 n'entendait certainement soumettre aux tribunaux que la question de savoir si la police devait être de 2,000 au lieu de 1,000 et non pas faire déclarer qu'en conséquence du malentendu existant entre l'agent et lui, il n'y avait eu aucune assurance. Je crois avec les deux cours qui ont déjà été appelées à se prononcer sur cette cause, qu'il y a eu un contrat d'assurance, bien qu'elles n'aient pas été d'accord sur le montant. D'ailleurs le *special case* contient à ce sujet une déclaration des parties qui ne laïsse pas de doute sur cette question.

En conséquence je suis d'avis qu'il y a eu un contrat d'assurance entre les parties, et que la preuve établit que le montant de ce contrat était de $1,000. Le jugement de la Cour Supérieure accordant $832.97, comme le montant revenant à l'Intimé sur une assurance de $1,000 d'après le système adopté, me paraît correct sur ce point. Mais il contient une erreur évidente quant aux offres réelles qui sont déclarées légales et suffisantes,

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

erreur qui a eu l'effet d'entraîner contre l'Intimé une condamnation à tous les dépens.

Cette erreur a sans doute été commise en prenant pour vraie l'allégation du plaidoyer qu'il avait été offert à l'Intimé $25.15 pour ses frais avant l'entrée de l'action, en même temps que la somme de $832.97 pour son assurance. Le dépôt de ces deux sommes accompagnait le plaidoyer. Si ce fait ainsi plaidé était prouvé, le jugement serait correct. Mais en référant au protêt en date du 9 décembre 1874, on y voit que la somme de $832.97 est offerte dans les formes voulues par l'art. 1163 C. C.; et les art. 538 *et seq.* C. P. C., mais quant aux frais, il n'en est pas ainsi. Le protêt ne contient que la déclaration que la compagnie est disposée à payer les frais encourus par le procureur de *Brodie*; elle est en ces termes: " and furthermore the said company are will-" ing to pay and hereby offer to pay the costs incurred " by the said *William Brodie* to his attorney, and which " costs the said company have already heretofore tend-" ered to the said *William Brodie.*" Le *special case* soumis par les deux parties contient à ce sujet la déclaration suivante: " It also asserted the Appellant's read-" iness to pay costs incurred." Ainsi il n'y a pas à se tromper sur la nature des offres concernant les frais. C'est une simple déclaration de la volonté de la compagnie de les payer. Mais cela n'est pas suffisant pour des offres légales quant aux frais. Pour que les offres réelles soient valables, suivant l'art. 1163 paragraphe 3, " Il faut qu'elles soient de la totalité de la somme exigible, des arrérages ou intérêts dus, *des frais liquidés, et d'une somme pour les frais non-liquidés, sauf à parfaire.*"

D'après cet article, pour que les offres fussent valables il était de rigueur de mentionner une somme déterminée comme offerte pour les frais, avec la déclaration *sauf à parfaire*—avec de plus description des espèces offertes afin de constater, comme pour la somme principale, que

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Fournier, J.

cette offre était faite en monnaies courantes et en espèces réglées par la loi.—Cela n'ayant pas été fait, les offres faites étaient insuffisantes et auraient dû être déclarées telles. Le jugement de la Cour Supérieure qui les a déclarées légales est en violation de l'art. 1163. Le jugement de la Cour du Banc de la Reine, les a déclarées insuffisantes, — mais comme cette Cour donnait gain de cause à *Brodie* principalement sur le principe que la police était de $2,000, elle n'est pas entrée dans l'examen de la question de la suffisance des offres quant aux frais. Elle se borne à les déclarer insuffisantes d'une manière générale ; mais cette déclaration portant aussi bien sur l'insuffisance des offres quant aux capital que par rapport aux frais, on doit en faire application aux frais, quoiqu'elle ne puisse l'être au capital, dont les offres, suivant mon opinion, auraient été suffisantes si celle des frais eût été légalement faite.

Etant d'avis qu'il y a eu erreur dans l'insertion de la somme de $2,000, au lieu de celle de $1,000, comme le montant de la police d'assurance, je crois que la Cour du Banc de la Reine aurait dû, en déclarant les offres insuffisantes, ne donner jugement toutefois que pour $832.97 avec les dépens dans les deux cours.

Je suis d'opinion que tel devrait être le jugement de cette Cour.

HENRY, J. :—

The action in this case is on a policy of the appellant company, dated the 13th of October, 1866, on the life of the respondent for eight years, for $2,000 payable to his personal representatives in case of his death before the expiration of the eight years, or, in case of his surviving for that period, to himself.

The defence is founded on a general denial and an allegation that the policy was, by mistake, issued for $2,000 instead of $1,000.

In the margin of the policy is written and printed the following:—"Endowment participating policy—annual premium $163.44. Note for half each year. Term 8 years, sum insured $2,000."

For two years the respondent paid the premiums and gave his notes as provided for by the policy, and receipts therefor were given him signed by the Secretary of the company at *Hartford*, and contersigned by *S. Pedlar & Co.*, agents.

They are dated at *Hartford* in 1867 and 1868. That for 1867 is as follows:—"Received from *W. Brodie* one hundred and sixty-three dollars and forty-four cents, premium due 13th Oct., 1867, on policy No. 26,863, insuring $2,000 for 12 months, ending on the 13th day of Oct., 1868, at noon. Not binding until countersigned by *S. Pedlar & Co.*, agents at *Montreal, Canada*: Premium, $163.44. *P. & Co.*." The receipt given in 1868 is the same as the previous one, except its date, and by it the insurance is extended to the 15th of Oct. 1869. Thus the company received, altogether, three annual premiums at the rate provided by the policy, and in the two receipts stated. It is shown, however, that the premium paid was that applicable to a policy for $1,000, and consequently only half of that payable for $2,000.

Previous to the falling due of the fourth premium, the appellants, through their agent *Orr* (who was also agent when the policy was issued, being one of the firm of *S. Pedlar & Co.*,) objected to receive the premium as before, and insisted that, inasmuch as the premium paid was that applicable to a policy of but $1,000, they would receive the premium thereafter as for a policy for that amount only, that the insertion of $2,000 instead of $1,000 was a mistake, or error, and that the respondent only applied for,and was entitled to receive,a policy for $1,000. Protests were made on both sides, but it was finally agreed, at the suggestion of the company,

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

that the policy should remain, and that the respondent should continue to pay the same premium as previously, the question of the amount for which the company should be liable to be the subject of a future arrangement or legal decision.

The respondent paid up all the necessary premiums and the company received them under that arrangement.

It is, therefore, a question to be decided by the evidence, whether the application was for but $1,000, as alleged by the appellant, and *that both parties* so understood it. It might have been made a question whether a binding agreement had at all been entered into, for if one understood the agreement and arrangement to have been for $1,000, and the other for $2,000, the appellants by defending on that ground might, if the evidence so warranted, have avoided the contract altogether. That, however, is not their defence, nor could they possibly, after the understanding in 1869, have set it up. We have no reason to doubt that one of two mistakes was made, either as to the amount of the policy, or of the annual premium to be paid The appellants had the choice when putting in their defence to adopt either, but having made their selection they must prove the defence as alleged. Had the mistake been in reference to the amount of the premium, they could have so alleged either to cancel the policy or to get credit for the difference as a set off to the amount of the policy. That the premium charged was inapplicable to a policy for any amount beyond $1,000, alone proves but little.

If the respondent intended to have a policy for $2,000, and the agent, by mistake, told him and inserted in the papers but half the correct amount of the premiums, the policy would be good for the whole amount and binding, unless relieved from it in equity. If, however, an agreement was reached as to the amount of the policy

and the premiums, and a mistake in the policy was alleged, it would be a matter to be determined by evidence as the case might be. If the mistake, however, was as to the premium, there is no defence to the claims for the $2,000, for the plea only raises the issue as to the amount of the policy. It may be urged that it is hard upon the company to pay double for the amount of the premiums they received, but the mistake whatever it was, was theirs, and if they have chosen to put their defence upon an issue they have not proved, the legitimate legal consequences should result. The principles of law and evidence applicable to a procedure to reform a written contract are those to be applied in this case; and to set aside or vary such by parol testimony the most conclusive evidence is necessary, and it must be clearly shown to have been an error in the contract in reference to what both parties agreed to, and understood.

We are not to enquire, under the defence set up in this action, whether a definite contract was agreed upon, for it is admitted by the plea that such was the case, and our enquiry is therefore limited to the ascertaining what that contract was. The policy is sufficient evidence of it, and under the parol evidence we are to be satisfied, beyond every reasonable doubt, that not only the agent of the company, but the respondent, intended and agreed for a policy for $1,000, and not for $2,000 as stated in the policy. Had the written application been for $1,000 we would have had something reliable to guide us, but the body of that document over the signature of the respondent asks for a policy for $2,000. In the margin, however, it is stated to be for $1,000. That margin was filled in by *Orr*, as he says, in the presence of the respondent before he signed the application. There is however no evidence that the respondent knew what was there written, for *Orr* does not allege that the respondent either read it, or that he (*Orr*) read it to him

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

or told him of it; and when we consider *Orr's* evidence, we, I think, would be justified in concluding that if the respondent had known of it no insurance would have been effected, or the amount in the margin would have been altered. *Orr*, in the first place, states in most positive terms that the final arrangement was for a policy for $1,000 for 8 years. If that statement had not been refuted by what he said subsequently we might have been guided by it, but such a position is to my mind wholly inconsistent with other parts of his testimony. In his evidence, he makes this important statement:

> I have no doubt that the plaintiff always believed that he was insured for two thousand dollars, or *certainly so* until the mistake was brought to his knowledge. He has never admitted since then that he was wrong; I believe him to be perfectly honest in his belief, and do not think the plaintiff ever had any intention of defrauding or wronging the company.

Then again:

> I think Mr. *Brodie* said at that conversation (referring to the time when the application was signed) "that he would have nothing to do with anything but a $2,000 policy, or something to that effect. It certainly was two thousand dollars that he wanted.

It needs no logic to prove that, if the statements in those extracts be true, it is simply impossible that the respondent ever agreed to take an insurance for $1,000 only. So far there is evidence that he understood he was getting a policy for $2,000. But, even if the evidence does not necessarily go that far, the statements in the quoted evidence entirely neutralize the original one that he agreed to one for $1,000. *Orr* is the only witness to sustain the plea that such an agreement was entered into, by which we are asked to vary a solemn written document understood to be deliberately prepared, examined, signed and countersigned, and acted upon for nearly three years.

It must be remembered that this is not an application to vacate or cancel a contract on the ground of a

mistake of one of the parties. The rules and principles of law and equity applicable to such a case are very different from those applicable to this case. When, previous to the receipt of the fourth premium, after the alleged mistake was communicated to the respondent, the company, finding one of two mistakes had been made by their agent and others representing them, had it open to them to have the policy cancelled, and in that case proof of such a mistake on their part, independently of the respondent, would have enabled them to have the policy set aside or cancelled; but they could not get that done except on terms of such equitable relief as the respondent would have been entitled to. Here an attempt is made to avoid the consequences of the gross errors and culpable negligence of the officers and agent of the company without any of the legal consequences. The respondent, who must be presumed to have intended to get and to have agreed for a policy for $2,000, is to be deprived of his right to have the policy he wished and intended, and to have one fastened upon him which, as *Orr* himself says, he said he would not have. It is inequitable and unjust that the respondent should suffer through the mistake or negligence of the other parties, and that he should be kept about three years in the dark.

Orr says that he knew at once, as soon as the respondent said the policy was for $2,000, that there was a mistake; but that he could not tell where it was until he got back the application, and then the circumstances came to his mind. It is, to say the least, a little singular that he countersigned the policy having in the margin conspicuously placed in large figures, and quite near together, the amount of the policy and the annual premium. He also signed two receipts, both stating the policy at $2,000, and the annual premiums paid. One would certainly have thought that the first glance at the

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Henry, J.

margin of the policy or at the receipts which he signed would have shown that there was an error to one who, so soon after, was so immediately affected by the mention of the amount of the policy by the respondent. What, too, can be said of those at the head office? They issued and entered the policy, endorsed and filed away the application, marking it for $2,000 and the annual premium payable, and they filled up and forwarded receipts for two years as for a policy for that amount. I have no hesitation in saying there was culpable and gross negligence in repeating so often the mistake, whatever it was, and after which the company comes with a bad grace, to ask for rectification. When it was at last accidentally discovered that either the policy was too large, or the premium too small, the company, I think, were not justified by the evidence in the position they adopted. That position could only be sustained by clear satisfactory and unsuspicious evidence that both parties agreed for a policy for $1,000. To vary an agreement such evidence has always been considered necessary, and called for. I cannot find it in this case. It is more than doubtful, as I view it, and leaves the strong and irresistible impression that the respondent never agreed to accept a policy for less than $2,000; that both parties intended a policy for $2,000, but that *Orr*, by mistake, inserted the wrong amount of premium. If his statements, which I have quoted, are correct, and being made against his own and his company's interest we must so take them, no other than the conclusion I have drawn can legitimately be arrived at.

If, as *Orr* stated, "the plaintiff always believed he was insured for $2,000," and "that he has never admitted since then that he was wrong;" that he believed him to be perfectly honest in his belief, and that he did not think he ever had the intention of defraud-

ing the company, or wronging the company, and that when effecting the insurance he said "that he would have nothing to do with anything but a $2,000 policy," and that "it certainly was $2,000 that he wanted, and that he has always since contended for it," how can any one conclude that he agreed to a policy for $1,000? If that be the true position, where, then, under the pleading, is the defence to the respondent's claim? I must say I can see none. Besides, the respondent was examined as a witness on the part of the appellants, but his evidence was put aside by them, a fact which should have some weight, when he and *Orr* were alone present at the time of the application. The company took the risk of examining him, and must submit to the reasonable construction to be put upon their excluding his evidence—a matter in itself not, perhaps, of much weight, but significant, when considering the very doubtful and suspicious position created by *Orr's* testimony and the other circumstances in evidence. *Orr* says he (the respondent) always, in good faith, considered himself insured for $2,000, and if so, it is not difficult to divine what his evidence was on that point. If the case otherwise were clear as to the amount of the policy, the rejection of the evidence would, of course, have little weight; but, under the circumstances, I think it is entitled to some consideration. Independently, however, of that consideration, I think the evidence is altogether too suspicious, contradictory and defective to sustain the defence set up by the pleas. I think the appeal should be dismissed, and the judgment of the Court of Queen's Bench affirmed, with costs.

GWYNNE, J.:—

If when the mistake which the appellants insist there was in the amount stated in the policy was first dis-

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Gwynne, J.

covered, and the appellants caused to be offered to the respondents an identical policy for $1,000, instead of for $2,000, and the respondent refused to accept such policy, the appellants had then taken proceedings calling upon the respondent to exercise an option to have the whole contract annulled, or to have the policy for $1,000 in substitution for the one for $2,000, and if upon such proceedings the appellants had satisfied the court that the mistake which they insisted upon did in fact exist, although it may have been unilateral only, that is the mistake of the appellants and their officers only, both upon principle and upon the authority of *Garrard* v. *Frankel* (1) and of *Harris* v. *Pepperell* (2) the appellants would have been entitled to succeed.

When upon the 13th October, 1869, appellants agents, *Pedlar & Co.*, sent to the respondent the letter of that date, wherein they say: "We herewith hand you the company's receipt, keeping your policy No. 26,863 in force, the company however claiming to be liable thereunder only to the extent of one thousand dollars for the reasons stated in their tender and protest by *J. H. Isaacson*, N. P. of the 12th instant, you, on the other hand, claiming to hold said policy for the full amount of two thousand dollars, for the reasons stated in your tender and protest by Mr. *Lighthall*, N. P., of 13th October, this day, the present payment of premiums and all future similar payments not in any manner to affect the rights and pretensions of the parties respectively in regard to the amount for which the policy should be held;" and when this letter was assented to by the respondent, and was acted upon by both parties, we must, in order to give precise effect to this agreement, hold that the parties have assented that the policy shall be treated as a policy for $1,000, if

(1) 30 Beav. 445. (2) L. R. 5 Eq. 1.

the appellants should succeed in satisfying the court that the policy was issued by them by mistake for $2,000, and the same question is now open notwithstanding the additional lapse of time, and notwithstanding that the respondent is plaintiff in an action seeking to enforce the policy as one for $2,000, as if proceedings had been taken in 1869 by the appellants as plaintiffs calling upon the respondent to exercise the option of accepting a substitutionary policy for $1,000, or of wholly avoiding the contract. For the reasons stated by the Chief Justice of the Court of Queen's Bench, sitting in appeal, I think it clearly established that the policy was issued by mistake for $2,000, when one for $1,000 was all that was really intended to have been given for the consideration agreed to be paid. The statement in the margin, which is positively sworn to have been there inserted before the respondent signed the application, is wholly inconsistent with the amount being intended to be for $2,000, as stated in the body, and I can see nothing in the evidence to contradict this statement, for I must say, I attach no weight to the evidence of Mr. *King*. It was argued that the reading the matter in the margin so as to affect what was in the body of the application was a violation of the principle that a marginal note upon an instrument, which marginal note was, as was contended, not signed, could not override the instrument which was signed. But this principle has no application here, for that there was a mistake in inserting the $2,000 in the policy and in the body of the application also, is a fact which the appellants may establish by any evidence they can adduce, parol or otherwise, and the variance between the amount mentioned in the margin and in the body of the application is only referred to as a piece of evidence to assist in establishing the mistake insisted upon; and assuming that marginal entry to have

1880

THE ÆTNA LIFE INS. CO. v. BRODIE.

Gwynne, J.

been, as it is sworn to have been, made before the respondent signed the application, it is certainly a very strong piece of evidence. But independently of this, the witness *Orr* clearly establishes the mistake, if his evidence is to be relied upon; and, to my mind, the fact, which seems clearly established, that if the policy was sustained as one for $2,000, it would amount to the gift of about $1,000, for which the company (appellants) received no consideration whatever, seems strongly to support *Orr's* evidence. There are other points which also seem to support that evidence. It is, indeed, as it seems to me, uncontradicted in any material point.

I am of opinion, therefore, that the appellants were entitled to the relief sought had they taken proceedings for that purpose in 1869; that they are entitled to the same relief now; and that, therefore, the judgment on appeal should be reversed, and the judgment of the Superior Court restored, except as to the costs, which will follow the judgment delivered by His Lordship the Chief Justice of this Court.

Appeal allowed with costs to plaintiff in the Superior Court, no costs to either party in the Court of Queen's Bench, and costs to appellants in this Court.

Solicitors for appellants: *Trenholme & Maclaren.*

Solicitors for respondents: *Davidson, Monk & Cross.*