INSURANCE AND MISREPRESENTATION: THE RIGHT TO A RETURN OF PREMIUM

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Unless there has been wilful or fraudulent misrepresentation or non-disclosure, the insured may be entitled to recover his premiums.[1]

Since the above quotation, citing passages from *Insurance Law*[2] by MacGillivray & Parkington as authority for the proposition, was the instigator of the research from which this article results it was felt that such would be a natural commencement point here. The interesting features of the quotation are three:

(a) The position of a 'non-wilful' as against a 'wilful' misrepresentation;
(b) The word 'may' [be entitled];
(c) The word 'entitled' itself.

If, for the sake of simplicity at this stage, use is made of the more common language of fraudulent and innocent misrepresentations the following statements can be made as corollaries of the initial quotation.

(i) In some cases of innocent misrepresentation the insured will be entitled to a refund of premium;
(ii) In some cases of innocent misrepresentation the insured will not be entitled to a refund of premium;
(iii) [Semble] In all cases of fraudulent misrepresentation the insured will not be entitled to a refund of premium.

It is intended to consider the general issue as to when an insured who

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1 Australian Law Reform Commission, *Discussion Paper No. 7: Insurance Contracts* (1979) para. 32.

2 MacGillivray and Parkington, *Insurance Law* 6th ed. (1975) paras 633 and 744, hereinafter cited as 'MacGillivray'. Other abbreviated citations adopted in the text are as follows:
'Ivamy'—Hardy Ivamy, *General Principles of Insurance Law* 3rd ed. (1975)
'Joske and Brooking'—Joske and Brooking, *Insurance Law in Australia and New Zealand* (1975)
'Halsbury'—*Halsbury's Laws of England* 4th ed. (1978) v. 25.
'Goff and Jones'—Goff and Jones, *The Law of Restitution* (1966).
Chitty—*Chitty on Contracts* 24th ed. by Guest (1977).

has been guilty of misrepresentation or non-disclosure in relation to the procuring of his contract of insurance may claim a return of premium following upon the insurer's repudiation of the contract such claim being upon the basis of that misrepresentation or non-disclosure. For the present purpose non-disclosure will be treated merely as a special case of misrepresentation, the two being thus compendiously described.

The Textual Authorities

Let us return to MacGillivray. After establishing that the policy is voidable at the option of the insurer following upon any type of misrepresentation[3] the author takes up the matter of the premium with these words: 'Unless there has been wilful or fraudulent concealment on the part of the assured, the premiums paid are returnable, but the basis for such recovery is not equitable restitution but quasi-contractual'.[4] No authority is cited for this statement. It will be noted that MacGillivray uses the definite statement 'are returnable' but does not explain the reason for the basis of recovery. However he then puts this matter to rest with a number of authorities cited to show that avoidance always is retroactive[5] and this paragraph also contains the following statement which commences with a quotation from Mackinnon J.:

> Avoidance of the policy, of course, results in it being set aside ab initio, the repayment of any losses and the return of any premiums paid under it. The premiums are recoverable only on the footing that the insurers have never been at risk under the void contract of insurance; the assured has a quasi-contractual action for money paid against a total failure of consideration.[6]

For this last point MacGillivray quotes *Feise* v. *Parkinson*[7] and *Anderson* v. *Thornton*.[8]

MacGillivray[9] goes on to distinguish the case of *Mackender* v. *Feldia A-G.*[10] in which Lord Denning, M. R. said: 'But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance'.[11] This decision is simply distinguished

3 MacGillivray, supra n.2, at para. 633.
4 Id. at para. 744.
5 Id. at para. 745.
6 Cornhill Insurance Company, Ltd v. L. & B. Assenheim (1937) 58 Ll. L. Rep. 27 at p. 31. Supported in MacGillivray by a Californian and a West Indies case—Standard Accident Insurance Co. v. Pratt (1955) 278 P. 2d. 489 and Mars v. First Federal Insurance Co. (1963) 6 W.I.R. 185.
7 (1812) 4 Taunt. 640, 128 E.R. 482.
8 (1853) 8 Ex. 425, 155 E.R. 1415.
9 MacGillivray, supra n.2, at para. 746.
10 [1966] 2 Lloyd's Rep. 449, [1966] 1 All E.R. 847.
11 Id. at 455 and 850 respectively.

upon its facts yet the learned author previously has used the same case to establish the proposition: 'The contract cannot therefore be said to be automatically avoided by non-disclosure; it remains in force until avoided by the insurer'.[12] This clearly is consistent with the basic proposition that the contract is voidable rather than void, yet, if once avoided the then voidance is claimed to be retroactive, there is an inherent nonsensical element in the language.

If one seeks help from Ivamy one finds: 'The assured may have been guilty of innocent misrepresentation or non-disclosure in consequence of which the policy is avoided as from its inception by the insurers and if they elect to avoid it, they must return the premium on the gound that the consideration for which it was paid has failed'.[13] Here authority for the statement as to return of premium is given as *Imperial Bank of Canada* v. *Royal Insurance Co.*[14] to which case we will return later. It is interesting to reflect that Ivamy says that avoidance of the policy operates ab initio although it may be that he leaves open the question of whether there could be two forms of avoidance available to the insurer—one retroactive, the other purely prospective. This is so since it need not follow on the above language that avoidance from its inception is a necessary consequence of innocent misrepresentation. In general, however, Ivamy supports MacGillivray, albeit using different authority.

A similar but not identical series of propositions is to be found in Halsbury: 'Where a policy is obtained by misrepresentation or non-disclosure of material facts it is a valid and binding contract unless and until the insurers discover the true facts and, on discovering them, elect to avoid it. If, where there has been no fraud, they elect to repudiate a continuing insurance they nullify the contract from the beginning and thereby sacrifice any premiums which they have collected'.[15] Authorities here quoted are *Thomson* v. *Weems*[16]; *Hemmings* v. *Sceptre Life Association Ltd*[17]; *Fowkes* v. *Manchester and London Assurance Association*[18] and *London Assurance* v. *Mansel.*[19] The paragraph continues: 'However in the case of renewable insurance each renewal is a new contract and the premium returnable is limited to that paid for the last renewal, as the risk has, in fact, been fully borne by the insurers

12 MacGillivray, supra n.2, at para. 744.
13 Ivamy, supra n.2, at 180 item 4.
14 (1906) 12 O.L.R. 519.
15 Halsbury, supra n.2, para. 467.
16 (1884) 9 App. Cas. 671.
17 [1905] 1 Ch. 365.
18 (1863) 3 B. & S.917, 122 E.R. 343.
19 (1879) 11 Ch. D. 363.

throughout all the earlier years. If there has been fraud on the part of the assured there is normally no right to a return of premium, as the assured cannot make his own fraud a basis of a claim'.[20] For this last statement about fraud Halsbury cites *Feise* v. *Parkinson,*[21] *Anderson* v. *Thornton,*[22] *Fowkes* v. *Manchester and London Assurance Association*[23] and *Rivaz* v. *Gerussi.*[24]

Chitty, however, takes a different view, placing much greater emphasis upon the most recent case: 'Non-disclosure or misrepresentation by one party entitles the other party to avoid the contract . . . However, claims paid are probably recoverable if after they are paid, a non-disclosure or misrepresentation comes to the notice of the insurer who then avoids the contract, though it seems that avoidance does not make the contract void ab initio but only void from the time of avoidance'.[25] Cases cited are *Morrison* v. *Universal Marine;*[26] *Holland* v. *Russell*[27] and *Mackender* v. *Feldia A-G.*[28]

One might also mention here that in a footnote to the paragraph Chitty states that 'the common law right to avoid contracts of insurance for breach of duty of the utmost good faith is distinct from the equitable remedy of rescission in other cases of misrepresentation . . .'.[29]

That four so eminent authorities should postulate such differing propositions supported by such a variety of cases is remarkable, the more so when the use to which the only common cases are put is noted.

As for Australian material, Brooking and Joske using *Maye* v. *Colonial Mutual Life Assurance Society,*[30] and *Dalgety* v. *Australian Mutual Provident Society*[31] state the case rather more cautiously:

> The generally accepted view is that premiums are not recoverable by an insured, who has been guilty of fraud, but that as a condition of active equitable interposition their return may be required. The effect of a misrepresentation, or of a warranty embodying a misrepresentation, or of a warranty embodying a misrepresentation, is prima facie that the policy shall be avoided as if it had never been

[20] Halsbury, supra n.2, para. 467.
[21] (1812) 4 Taunt. 640, 128 E.R. 482.
[22] (1853) 8 Ex. 425, 155 E.R. 1415.
[23] (1863) 3 B. & S.917, 122 E.R. 343.
[24] (1880) 6 Q.B.D. 222.
[25] Chitty, supra n.2, at 3930.
[26] (1872) L.R. 8 Ex. 197.
[27] (1863) 4 B. & S.14, 122 E.R. 365.
[28] [1966] 2 Lloyd's Rep. 449, [1966] 1 All E.R. 847.
[29] Chitty, supra n.2, at para. 3930 n. 7.
[30] (1924) 35 C.L.R. 14.
[31] [1908] V.L.R. 481.

> made, and that the premium can be recovered back, unless the insured has been fraudulent.[32]

It is implicit here, reinforced by way of reflection in following passages, that the reason for return of premium is a total failure of consideration but there is no clear statement as to the legal basis of recovery, i.e. whether it be in quasi-contract or equity. The first sentence, however, might give weight to the conclusion that it is equity based which would be clearly in conflict with MacGillivray, leaving Ivamy and Halsbury on the side lines remaining neutral.

If one now turns away from the insurance texts to the more general question of restitution after misrepresentation Goff and Jones state:

> A contract which is voidable for misrepresentation is intermediate between one which is void ab initio and one which is liable to be brought to an end; for a contract voidable for misrepresentation stands until some action is taken by the innocent party to bring it to an end, though once that action is successfully taken, the contract, is not simply determined but is avoided ab initio.[33]

The learned authors previously had emphasised the equitable nature of this relief: 'At common law, the victim of an innocent misrepresentation, not embodied in the contract had no remedy . . . But, since the middle of the nineteenth century, equity has been prepared to order rescission of a contract induced by innocent mis-representation'.[34] The pattern is then made complete by Goff and Jones with the explanation that restitutio in integrum is necessary[35] and thus the conclusion at which they would be forced to arrive is that for rescission of an insurance contract, return of premium is necessary. It may be significant that, although the learned authors deal with the insurance situation as a special featue of disclosure in misrepresentation[36] and as to return of premium in a totally void contract,[37] they do not distinguish insurance situations from those of general contracts on the question of return of premium for misrepresentation.

All of this textual confusion calls for a careful reconsideration of the basic issues and it is suggested that the following questions must be put and answered:

1. What actions are available following upon a misrepresentation? Those to be considered are:

32 Brooking and Joske, supra n.2, at 57.
33 Goff and Jones, supra n.2, at 103.
34 Id. at 102.
35 Id. at 114-116.
36 Id. at 108-11.
37 Id. at 279-80.

(a) Repudiation at common law;
(b) Rescission at equity.
(c) Lord Kennedy's case.

2. In terms of validity, what is the effect of avoidance procedures?
3. Is completed performance a total bar to avoidance following a misrepresentation?
4. Do contracts uberima fides differ in these respects from ordinary contracts?
5. Is a claim for return of premium based upon:
   (a) a proprietary interest following upon a void contract;
   (b) quasi-contract after a total failure of consideration; or
   (c) a judicial condition as part of equitable discretion?
6. Does a 'basis of contract' clause have any effect upon the question of avoidance for misrepresentation?
7. In the context of insurance contracts does the introduction of fraud alter the normal misrepresentation result?
8. Do special 'no recovery of premiums' clauses affect the question?

The Issues

Question 1. What actions are available upon a misrepresentation?

(a) Repudiation at Common Law.
   (i) There was no action for misrepresentation per se at common law.[38]
   (ii) If the statement complained of was made a condition of the contract then the injured party could reject the contract but he takes this as he finds it, and in particular:
      (A) There is no mutual return of property unless there has been a total failure of consideration,[39] although total failure of consideration sometimes is peculiarly interpreted, especially in cases involving title.[40]

[38] Behn v. Burness (1863) 3 B. & S.751. 1 22 E.R. 281; Lord Kennedy v. Panama, New Zealand and Australian Royal Mail Co. (1867) L.R. 2 Q.B. 580, [1861-73] All. E.R. Rep. (Extn) 2094.

[39] Hunt v. Silk (1804) 5 East 449, 102, E.R. 1142, [1803-13] All. E.R. Rep. 655; Sumpter v. Hedges [1898] 1 Q.B. 673; Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd [1943] A.C. 32 at 65 [1042] 2 All E.R. 122 at 137-8 per Lord Wright; McDonald v. Dennys Lascelles Ltd (1933) 48 C.L.R. 357 at 476-7 per Dixon J. (Rich J. agreeing) and 469-70 per Starke J.

[40] See Rowland v. Divall [1923] 2 K.B. 500, [1923] All E.R. Rep. 270; Karflex, Ltd v. Poole [1933] 2 K.B. 251, [1933] All E.R. Rep. 46; Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286, [1954] 2 All E.R. 694.

(B) In any case there will be no recovery of property by the plaintiff unless he too restores[41] or unless he is prevented from restoring by the very nature of the breach.[42]

(C) If, however, the innocent party does not seek a return of property he may retain any advantage and resist enforcement by the guilty party.[43]

(D) Further, however, where the plaintiff can restore but chooses not to do so he may be taken as having affirmed the contract and therefore be prevented from subsequently rejecting, being thereafter restricted to an action for damages.[44]

(iii) From the above propositions it is clear that there was at common law no absolute requirment for the return of property upon repudiation for breach nor was there any conclusion that a breach of condition necessarily resulted in a total failure of consideration.[45]

(b) Rescission at Equity. There is little difficulty for the present purposes in the question of equitable rescission. Equitable remedies in general being discretionary, judicial conditions were imposed so as to achieve an equitable result. A prerequisite to the granting of equitable assistance in escaping a contract induced by misrepresentation was the making of substantial restitution.[46] This, added to equity's ability to order accounts to be taken between the parties, gave the court of equity wide scope and meant, for example, that total failure of consideration per se was not a key factor in this particular area.

(c) *Lord Kennedy's* Case. The case of *Lord Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*[47] presents considerable difficulties of integration into an acceptable general proposition. The action was brought before the common law courts, the final decision being that of the Court of Queen's Bench. The facts are relatively simple in that without fraud a misrepresentation was made in

41 Towers v. Barrett (1786) 1 T.R. 133, 99 E.R. 1014; Baldry v. Marshall Ltd [1925] 1 K.B. 260, [1924] All E.R. Rep. 155.

42 Rowland v. Divall [1923] 2 K.B. 500, [1923] All E.R. Rep. 270.

43 Sumpter v. Hedges [1898] 1 Q.B. 673.

44 Hunt v. Silk (1804) 5 East 449, 102 E.R. 1142, [1803-13] All E.R. Rep. 655; Yeoman Credit, Ltd v. Apps [1962] 2 Q.B. 508, [1961] 2 All E.R. 281.

45 This matter will be the subject of further treatment at sub-item (c) infra.

46 Adam v. Newbiggin (1883) 13 App. Cas. 308, [1886-90] All E.R. Rep. 975 (esp. per Cotton and Bowen L. JJ. in the Court of Appeal); Alati v. Kruger (1955) 94 C.L.R. 216.

47 (1867) L.R. 2 Q.B. 580, [1861-73] All E.R. Rep. Extn 2094.

a propectus for shares but later the attempt by a shareholder to return his shares and to recover the purchase price was refused on the ground that the shares as issued were in fact what they purported to be, i.e. shares in the subject company, and were of economic worth. The court considered that rescission for innocent misrepresentation was possible but only if there was a total failure of consideration. In the course of the joint judgment the following remarks appear:

> There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.[48]

This passage has been the subject or various interpretations one of which is to regard what is referred to therein as rescission, as simply an application of voidness following upon an operative case of mistake.[49] Although this relieves the problem apropos misrepresentation it does, unfortunately, fly in the face of the actual language used. Interpreted another way the passage may in fact claim to indicate that an action for 'rescission' at common law was available upon two grounds—partial failure of consideration coupled with fraud and total failure of consideration simpliciter. That again would seem to be an anomalous way of expressing, at least, the remedy for fraud at common law. Lastly it may be that the court was making an attempt to develop its own doctrine of rescission for innocent misrepresentation and either thought that total failure of consideration was a current limitation in equity or else that it was an appropriate limitation in a court of common law. Whatever may be the true rationale of the decision, none of those suggested impinges upon the present consideration. If it is a mistake case, it is not relevant here; if an extended ground for rescission or a new rule as to misrepresentation at common law it seems to have been still

[48] Id. at 587 and 2098 respectively.

[49] E.G. Treitel, *The Law of Contract* 4th ed. (1975) 170 and 241; Cheshire & Fifoot, *Law of Contract* 3rd Aust. ed. (1974) 249.

born as a result of the equitable remedies being made uniformly available in 1873 following upon the Judicature Acts and lastly if a misinterpretation of the equitable rules as to misrepresentation it can be ignored. Therefore it is submitted that this case should not be allowed to confuse the present task.

Question 2. In terms of validity, what is the effect of avoidance procedures? Firstly it should be pointed out that whether the avoidance action is taken because of breach (i.e. at common law) or because of misrepresentation (i.e. in equity) it is the action of the rejecting party which is crucial to the future of the contract. This was clearly stated by Lord Atkinson in *Abram Steamship Co. Ltd* v. *Westville Steamship Co. Ltd* (with which the Earl of Birkenhead agreed):

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante*, and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished, but if the other party to the contract questions the right of the first to rescind, thus obliging the first party to bring an action at law to enforce the right he has secured for himself by his election, and the first party gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract.[50]

An interesting application of this rule is to be found in *Butterworth* v. *Kingsway Motors*[51] where in a lengthy chain of purchasers one only gave notice of rejection prior to title being cleared and those who were tardy were relegated to claims for damages.

The real issue, however, is whether, upon rejection, the destruction of the contract takes effect retroactively, i.e. *ab initio* or whether in fact its effect in terms of validity is present and future only, albeit with a condition for the return of considerations already passed. In the case of rejection following breach it is clear that the rejection operates in futuro but

[50] [1923] A.C. 773 at 781 and [1923] All E.R. Rep. 645 at 648-9.
[51] [1954] 1 W.L.R. 1286, [1954] 2 All E.R. 694.

perhaps surprisingly, precedents upon rescission for misrepresentation seem hard to discover, especially so if, as is the present intention, contracts *uberima fides* are reserved for later treatment.

In *Attorney-General* v. *Ray*[52] the Court of Appeal in Chancery declared a contract *void ab initio* but at least two problems arise when attempting to treat this case as a general precedent: (i) The contract was allegedly entered into under statutory authority but that authority failed for lack of satisfaction of the condition precedent and both James and Mellish L.JJ. referred to this aspect[53]; and (ii) The contract was, in any case, in the nature of insurance.

The quotation of Lord Atkinson in the *Abram Steamship* case given above might be taken as offering some support to the *ab initio* line but upon examination is equally consistent with the conditional de futuro proposition.

Lastly, the decision of the Judicial Committee of the Privy Council in *Mackenzie* v. *Royal Bank of Canada*[54], but no reasoning expressed therein, may support the retroactive proposition. There the court allowed rescission of a series of renewed guarantees on the ground of misrepresentation by the bank and did so *de novo*. Again, however, problems arise since the defendant bank conceded that the whole series must stand or fall together (one suspects that this may well have been prompted by considerations of public relations) and this therefore saved the court from any real consideration of the question.

Against these cases there lies the comment of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*:

> In *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd* Lord Sumner who has done so much in his judgments to elucidate the meaning and effect of frustration, contrasts rescission of a contract by one party on the ground of breach by the other party, which depends on election by the former, with frustration, which operates automatically apart from either party's election. He finds, however, a similarity in the respect that rights and wrongs which have come already into existence remain, though the contract is ended as regards obligations de futuro. But the contract is in neither case wiped out, or avoided ab initio. The right in such a case to claim repayment of money paid in advance must in principle, in my judgment, attach at the moment of dissolution.[55]

Support for this reasoning is to be found in the *Mackender* Case and

[52] (1874) L.R. 9 Ch. App. 397.
[53] Id. at 405, 407.
[54] [1934] A.C. 468.
[55] [1943] A.C. 32 at 65, [1942] 2 All E.R. 122 at 137-8.

the quotation from Lord Denning M.R. given earlier[56], but whilst that case clearly involved an insurance contract, dicta from Diplock L. J. equally clearly treats of the general rule:

> The fallacy in the argument to the contrary is that, when what is said to be a 'voidable' contract is said to be 'avoided', that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that on its ceasing there may then arise consequential rights in respect of things done in performance of it while it did exist, which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of *non est factum* which prevents a contract ever coming into existence at all. It is argued that innocent misrepresentation or, in the case of contracts of insurance, non-disclosure of material facts, vitiates consent and makes the apparent consent of the party misled, no consent at all; but this is specious. What is really meant is that the party did in fact consent, but would not have done so if he had then known what he knows now. Fraud may raise other considerations into which it is not necessary to go.[57]

It is submitted what when balanced out dicta or decisions in favour of the ab initio proposition can be shown to be either based upon special factors (*Ray's* Case and *Mackenzie's* Case) or equivocal (*Abram's* Case) whilst the two dicta against the proposition are both clear and unambiguous. The result, therefore, appears to be that the effect of avoidance procedures either at common law for breach or in equity for misrepresentation is the same—the contract is terminated de futuro but in some cases at common law and in all cases in equity the plaintiff/petitioner is required to restore property taken under the former contract as a condition of obtaining judicial assistance.

Question 3. Is completed performance a total bar to avoidance following a misrepresentation? In answer to question 1 it was pointed out that repudiation of the contract for breach of a condition was a separate point from the consequential right to recover property which had already passed and the proposition was offered that, subject to exceptions, the injured party could not claim a return of property unless he too could restore. Thus if it transpires that the innocent party has treated the goods received in such a way as to change their nature, e.g. having grown seed into plants[58] he will not be able to restore the goods

[56] See nn. 4 and 5.

[57] [1966] 2 Ll. Rep. 449 at 458, [1966] 3 All E.R. 847 at 853.

[58] Wallis, Son and Wells v. Pratt and Haynes [1911] A.C. 394, [1911-13] All E.R. Rep. 989.

received, i.e. the seed, and he will not be able to recover his purchase price (although his action for damages will remain). Thus it can be said that completed performance is not per se, a disqualifying factor in repudiation following upon a breach.

With the case of equitable misrepresentation, however, the infamous rule in *Seddon* v. *North Eastern Salt Co. Ltd*[59] must be considered. The doubts and objections which have been raised to this decision and whether in any case the decision of a single judge should be recognised as creating any significant precedental rule cannot be canvassed here but suffice it to say that even Joyce J. in that case limited his own proposition to contracts which had been completed by way of execution of a deed if his words are read in the proper context of the preliminary words of the judgment.[60]

As against *Seddon's* Case but not cited by Joyce J. therein there is *Rawlins* v. *Wickham*[61] in which a partnership deed was set aside four years after execution following upon an innocent misrepresentation and to make this decision more pointed, such rescission was allowed even though the petitioner had already sued both of his former partners (the present defendant and a third partner) for damages for misrepresentation and had in fact obtained damages against the third partner alone. This was a decision of the Court of Appeal in Chancery.

To similar effect is the decision of Farwell J. in *Whittington . Seale-Hayne*[62] also not cited in *Seddon's* Case. There an executed lease was set aside for innocent misrepresentation.

Adam v. *Newbigging*[63] was cited in *Seddon's* Case but no treatment of it appears in the judgment of Joyce J. In *Adam's* Case, again, a partnership was set aside, although here it appears that execution was only by way of three linked simple contracts.

Cases subsequent to *Seddon's* Case have varied in their results. In England it has been distinguished on the grounds of breach of fiduciary duty[64] and on facts apparently identical with Adam's Case where the partnership was put into effect by way of a simple contract.[65]

59 [1905] 1 Ch. 326, [1904-7] All E.R. Rep. 817.

60 Additionally the present writer finds it impossible to ascribe a reasonable meaning and purpose to the quotation by Joyce, J. of the words of the Court of Queen's Bench in Lord Kennedy's Case—essentially the quotation supplied supra herein at question 1, sub-item (c).

61 (1858) 3 De G. & J. 304, 44 E.R. 1285.

62 (1900) 82 L.T. 49.

63 (1888) 13 App. Cas. 308, [1886-90] All E.R. Rep. 975.

64 Armstrong v. Jackson [1917] 2 K.B. 822, [1916-17] All E.R. Rep. 1 117 (McCardie J.).

65 Senanayake v. Cheng [1965] 3 All E.R. 296 (P.C. on appeal from Malaysia).

Cases which support the *Seddon* rule in the area of executed conveyances are *Angel* v. *Jay*[66] and *Edler* v. *Auerbach*[67] but against this was a spate of judicial criticism of the *Seddon* rule in so far as it was claimed to apply to cases not involving the execution of deeds or perhaps to cases not involving title to land.[68]

The Australian cases which have either followed or at least acknowledged this rule seem all to have involved executed transfers of land title.[69]

Whatever, then, the future holds for *Seddon's* Case it does seem that it can properly be said that here and now the denial of rescission only applies following an executed deed and perhaps may apply only to executed conveyances of real property title. Outside of that, completed performance per se is no bar to equitable rescission.

In the realm of insurance contracts, although there is little if any direct dicta on the point, the numerous successful cases clearly indicate that the issuing of the policy whether under seal or not has been no bar to recovery and therefore it would seem that the rule is *Seddon's* Case has no application to the insurance contract per se.

Question 4. Do contracts uberima fides differ in these respects from ordinary contracts? The difficulty which the student faces on this point is magnified by the confused judicial language which is met. What does one make, for example, of the following?:

> In the result, I have come to the conclusion that the defendant is entitled to say that it never undertook this risk, and that the contract to do so is voidable, and the repudiation having been made properly, that it can defend an action without actually getting the contract set aside.[70]

The crucial question is whether the concept of utmost good faith producing a need to disclose unsought information only makes silence into a misrepresentation or whether it destroys the consensus ad idem

66 [1911] 1 K.B. 66, [1908-10] All E.R. Rep. 470. (Darling and Bucknill JJ.)

67 [1950] 1 K.B. 359, [1949] 2 All E.R. 692 (Devlin J.)

68 By Scrutton, L.J. in Bell v. Lever Bros Ltd [1931] 1 K.B. 557 at 588 and by the Court of Appeal in Solle v. Butcher [1950] 1 K.B. 671, [1949] 2 All E.R. 1107 and in Leaf v. International Galleries [1950] 2 K.B. 86, [1950] 1 All E.R. 693; also note the comments of that court in Long v. Lloyd [1958] 2 All E.R. 402. One also notices the specific rejection of Seddon's Case by Riley J. (Alberta Supreme Court) in Bevan v. Anderson (1958) 12 D.L.R. (2d) 69.

69 Svanosio v. McNamara (1956) 96 C.L.R. 186 (High Ct); Kramer v. Duggan (1955) 55 S.R. (NSW) 385 (McLelland, J.) and Dean v. Gibson (1958) 4 L.G.R.A. 214. (Monahan J.)

70 per Cussen, J. in Dalgety v. Australian Mutual Provident Society [1908] V.L.R. 481 at 513.

altogether and produces a void result. In relation to marine insurance there is some suggestion that voidness results:

> [The] concealment . . . would have avoided the policy if an action upon it had been defended on that ground. But the whole effect of that concealment is to avoid the policy . . . An action might indeed have been brought against the defendant by his principal for want of skill in effecting a policy which turned out to be void.[71]

This comment was purely obiter since the action there involved the reclaiming of a marine insurance loss payment from the agent who had transacted the business but the learned Chief Justice's comments were directed to the proposition that had the insurer sued the proper defendant i.e. the insured, the action would have been successful.

Prior to this case, the Court of Exchequer Chamber when dealing with a life assurance policy had drawn a distinction between life and marine policies with the suggestion that even without a basis of contract clause marine policies are void in the case of untrue representations.[72]

To the contrary is the decision in *Morrison* v. *Universal Marine Insurance Co.*[73] and in any case, in so far as marine insurance is concerned, the matter seems to have been put to rest by section 26 of the *Marine Insurance Act*, 1909 which declares the contract to be voidable. Any historical doubt, therefore simply strengthens the conclusion that for non-marine insurance the concept of uberrima fides does not affect the conceptual result of misrepresentation and the contract is voidable.

Question 5. Is a claim for return of premium based upon:

(a) a proprietary interest following upon a void contract?
(b) quasi-contract after a total failure of consideration? or
(c) a judicial condition as part of equitable discretion?

(a) Void contract/proprietary interest. The early case of *Jacques* v. *Golightly*[74] might be claimed to support this argument but there, without misrepresentation, the insurance was effected to cover illegal gambling winnings and this illegality is at least sufficient to justify a conclusion of voidness.

Similarly the statutory conditions precedent involved in *Attorney-General* v. *Ray*[75] are sufficient to set that case apart.

It is this element of condition precedent which provides most of

[71] per Earle, C. J. in Holland v. Russell (1863) 4 B. & S. 14 at 16-17, 122 E.R. 365 and 355.
[72] Wheelton v. Hardisty (1858) 8 E. & B. 285, 120 E.R. 106.
[73] (1872) L.R. 8 Ex. 197.
[74] (1777) 2 Wm. Bl. 1073, 96 E.R. 632.
[75] (1874) L.R. 9 Ch. App. 397.

the supporting dicta for this line of reasoning. The well-known words of Lord Mansfield C.J. in *Tyre* v. *Fletcher*[76] apply to a case in which no contract of insurance ever arose since the normal specified conditions of cover never came into existence. In such a case there is no misrepresentation, no movement to avoid the contract and the logical claim for a return of premium cannot be refused. Of course, it is interesting that the learned Chief Justice explained the matter of return of premium on the basis of total failure of consideration but the full text of the judgment shows that he contemplated a case of failure of condition precedent.

(b) Total failure of consideration/quasi-contract. In *Aubert* v. *Walsh*[77] an illegal contract of insurance was prevented from running its course by the bankruptcy of the insurer and the insured was allowed to recover his premium due to this failure of consideration. Again the involvement of illegality is an unwelcome influence.

In *Morrison* v. *Universal Marine Insurance Co.*[78] the Court of Exchequer Chamber made no effort to disassociate itself from the direction to the jury of Blackburn J. at first instance where he emphasised the right of election of the insurer and said: 'He cannot keep the contract and get rid of it too. He has a right to say, "Take back your premium and make the contract a nullity". He also has the right to say, "You have done what has entitled me to get rid of the contract but I will keep the premium. and go on".'[79]

(c) Equitable discretion. Although a basis of contract clause existed in *London Assurance Co.* v. *Mansel*[80] the order made by Jessel M.R. was in the form 'The Plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the Plaintiffs of the Defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.'[81] It will be noted that the remedy here sought was the discretionary declaration.

Kekewich J. in *Hemmings* v. *Sceptre Life Assurance, Ltd.*[82] simi-

[76] (1777) 2 Cowp. 666 at 668, 98 E.R. 1297 at 1298, [1775-1802] All E.R. Rep. 497 at 498.

[77] (1810) 3 Taunt. 277, 128 E.R. 110, [1803-13] All E.R. Rep. 136.

[78] (1872) L.R. 8 Ex. 197.

[79] Id. at 200.

[80] (1879) 11 Ch. D. 363.

[81] Id. at 372.

[82] [1905] 1 Ch. 365 at 369. The decision of Boyd C.J. in the Ontario Supreme Court in Imperial Bank of Canada v. Royal Insurance Co. (1906) 12 O.L.R. 519 might also be noted to like effect but again in this case there was a statutory requirement and the actual legal effect of the statute is by no means clear from the report.

larly indicated that a condition of rejection of the policy would have been repayment of the premiums (again a basis of contract clause was operative).

(d) Overall review. It appears that no single answer is possible to the question as to the basis of a claim for return of premium. Different circumstances with different remedies sought bring into play different bases of claim. However, looking at the cases overall one usually finds either a bold statement as to return of premium without reasoning or a specific contractual clause requiring such return. In this vein one last case must be considered. The case is *Feise* v. *Parkinson* where Gibbs J. said:

> Where there is fraud there is no return of premium, but upon a mere representation without fraud, where the risk never attached, there must be a return of premium. . . I think it equally clear, that the Plaintiff is entitled to enter his verdict on the count for money had and received for the premium, but as the return of premium was not claimed at the trial, that cannot be done without the Defendant's consent.[83]

One notices that this was a case at common law and therefore in fact was not an action involving misrepresentation but rather breach of condition. If one then treats the case in its common law context it could find a repository only in either of sub-items (a) or (b) above. Some of the language seems to indicate a void/debt claim whilst other phrases would tend to support an unjust enrichment rationale and therefore the quasi-contract base. It seems quite possible that the learned judge felt no need for a conscious jurisprudential base since, although some years earlier it would have been necessary to differentiate between debt and money received to use,[84] at the time of the *Feise* Case both such claims could be brought under indebitatus as money had and received.

Question 6. Does a basis of contract clause have any effect upon the question of avoidance for misrepresentation? In *Wheelton* v. *Hardisty,* Mr Justice Cowder observed that: 'the defendants contend that one of those conditions was that, if the statement by the plaintiffs were untrue, the policy should be avoided. But the cases on which they relied were principally cases of marine policies; and none of the cases established that life policies are to be so construed unless they contain an express condition to that effect,[85]. This would indicate that at least in non-

[83] (1812) 4 Taunt. 640 at 641-2, 128 E.R. 482.
[84] See Martin v. Sitwell (1691) 1 Show. K.B. 156, 89 E.R. 509.4
[85] (1858) 8 E. & B. 285 at 298, 120 E.R. 106 at 111.

marine policies a basis of contract clause effectively changes representations into contractual conditions for breach of which the contract could be set aside, or perhaps that the truth of the representation is a condition precedent to the contract itself. Other judges in the same case used other forms of words. Martin B.[86] used similar words to those of Crowder J. and Channell B.[87] also used the concept of the breach [itself] avoiding the contract—all of which ought to indicate a void contract rather than one which is voidable. The matter was taken one explicit step further, however, by Willes J. when he said: 'The mere recital of such a statement in the policy would not alter the general law, or convert such a statement from a mere matter of representation into a condition precedent.'[88] Unfortunately, since the learned judge had only two sentences before referred to 'a condition precedent to the liability of the defendants upon the policy' it is still not entirely clear whether in the quotation he intended to refer to a condition precedent to the contract or one which absolves the defendant from liability upon it. What is made very clear by Bramwell B. is that the parties are entirely free to make the truth of the statements amount to the basis of the contract if they so wish, but not having done that, such truth is not the basis of the contract.[89]

Only five years later Blackburn J. exhorted us: 'We must remember that there is a difference between a warranty and a misrepresentation; that when the first is given the matter must be absolutely true, or the policy become void; while, when a misrepresentation is made, the contract is only vitiated by proof that the statement put forth was wilfully and designedly false . . .'.[90]

The House of Lords in *Thomson* v. *Weems*[91] declared the contract to be 'null and void' following mis-statements coupled to a basis of contract clause and this attitude was adopted by the High Court of Australia in *Maye* v. *Colonial Mutual Life Assurance Society*[92] when it decided that the clause made the truth of the statement a condition pre-

86 Id. at 297 and 111 respectively.
87 Id. at 302 and 112 respectively.
88 Id. at 299 and 111 respectively.
89 Id. at 300 and 112 respectively.
90 Fowkes v. Manchester and London Assurance and Loan Association (1863) 8 L.T. 309 at 311, [1861-73] All E.R. Rep. (Extn) 1563 at 1566. The actual words found in the report 3 B. & S.917, 122 E.R. 343 differ slightly. One should note as did Channell B. in Wheelton v. Hardisty (1858) 8 E. & B. 285 at 302, 120 E.R. 106 at 112, that in the context of insurance contracts the term 'warranty' actually means contractual condition. A similar warning is given in Behn v. Burness (1863) 3 B. & S.751, 122 E.R. 281.
91 (1884) 9 App. Cas. 671,
92 (1924) 35 C.L.R. 14.

cedent to the assumption of risk and therefore no contract came into existence. Thus the settled position must now be that the basis of contract clause changes the representation into a condition precedent to contract rather that a condition of the contract which has been broken. In such cases, therefore, no remedy for avoidance need be sought since there is no contract to avoid.

An interesting application of this is to be found in *Cornhill Insurance Company Ltd.* v. *L. & B. Assenheim.*[93] This case involved a renewal of motor vehicle insurance which included a basis of contract clause, the answer to one proposal question having been rendered incorrect by activities subsequent to the original proposal but prior to the renewal. MacKinnon J. granted the declaration sought by the insurer as from the date of renewal. It is the presence of this basis of contract clause which removes the need to reconcile the learned judge's dictum 'avoidance of the policy, of course, results in it being set aside ab initio'[94] even though the word 'avoidance' is perhaps unhappily used.

Question 7. In the context of insurance contracts does the introduction of fraud alter the normal misrepresentation result? The quotation from *Feise* v. *Parkinson*[95] set out under question 5(d) above indicates only that in the case, as there, of the policy not containing a 'not return of premium clause, fraud would prevent the insured from obtaining a return of his premium. No reason for this is given by Gibbs J. in that case. A similar bald statement appears in *Anderson* v. *Thornton*[96] and this is reflected in some text-books.[97] Others distinguish between the fraudulent insured having no right at law to the return of premium and a directive to return made by a court of equity when equitable relief has been sought by the insurer.[98] If this latter approach is correct (and an examination of the authorities cited leads to the conclusion that it is based rather on inference than upon clear pronouncement) it leads to interesting conclusions. The texts cited for the adoption of the position of distinction between equity and common law suggest that the reason why the common law courts refused the return of premium was that they refused to allow the fraudulent party to profit from his own fraud.

[93] (1937) 58 Ll. L. Rep. 27.

[94] Id. at 31.

[95] (1812) 4 Taunt. 640, 128 E.R. 482.

[96] (1853) 8 Ex. 425 at 428, 155 E.R. 1415 at 1416 per Parke B.

[97] Ivamy, supra n.2, 185-6; Joske and Brooking, supra n.2, at 57 and 93.

[98] MacGillivray, supra n.2, para. 1098; Chitty, supra n.2, V. II para. 853; Halsbury, supra n.2, para. 469. It is interesting to notice in passing that the 4th ed. entry in Halsbury is written by Professor Ivamy and it essentially follows the earlier edition (3rd ed., v. 22 para. 457, by McNair and Chapman) but does not reflect the approach taken by Ivamy in his own book.

Logically it is not possible to suggest that recovering a premium is allowing the recoverer to benefit since all that is achieved is a return to the status quo without profit and that person may still be laible to pay damages in an action of deceit.

Viewed otherwise it may lead to the conclusion that the dislike of fraud in the courts of common law was stronger than in equity and that the equity courts followed strict legal reasoning more closely than did those at common law. A strange result. But review this question in the light of the treatment above as to 'innocent misrepresentation' and one sees that misrepresentation per se was not a common law ground of action and therefore, the injured party having been given no right of action how could one give such a right to the guilty fraudulent party to recover his premium? In this regard then at common law there would appear to be no significant difference between fraud and non-fraud misrepresentation situations.

Similarly rescission in equity was always discretionary and if the court felt it to be proper, an order for return of premiums could and should be made even in cases involving fraud, the latter being but one factor to be taken into account when deciding upon the terms of exercising the discretion.

Overall, then, one is led to the conclusion that without special contractual terms being present there was no essential difference as to return of premium whether fraud was in evidence or not.

Question 8. Do special 'no recovery of premiums' clauses effect the question? Clearly there can be no lesser answer than a cautious affirmative to this question. The parties being primarily free to determine their own terms,[99] if by agreement they select results or remedies which are not normally available then such results apply. The common format of such clauses is to list specified breaches which bring the clause into operation and then to declare that in such cases the policy shall be void and the premiums forfeited. Some courts have shown a degree of reluctance in allowing these clauses their full natural scope and have applied the two canons of interpretation 'contra proferentem' and 'expressio unius, exclusio alterius' so as to assist the insured. Thus a more limited clause in the policy itself was held to restrict the full meaning of an equivalent clause in the proposal form[100] and a clause forfeiting premiums where fraud was present was held to imply the obligation to

[99] See Anderson v. Fitzgerald (1853) IV H.L. Cas. 484 at 503, 10 E.R. 551 at 558-9 per Lord Cranworth.

[100] Fowkes v. Manchester and London Assurance and Loan Association (1863) 3 B. & S.917, 122 E.R. 343, [1861-73] All E.R. Rep. (Ext.) 1563; Hemmings v. Sceptre Life Association Ltd [1905] 1 Ch. 365.

repay premiums in non-fraud situations.[101] An interesting third alternative appeared in *Dalgety* v. *Australian Mutual Provident Society*[102] in which the proposal form contained a basis of contract clause but the forfeiture of premiums clause first appeared in the policy itself. As it transpired in that case nothing turned upon this difference as the insurer volunteered the return of the premium but it would seem doubtful that a 'policy terms overrides proposal terms' attitude would have found judicial favour in circumstances where that would give the advantage to the insurer and this may well have been one factor in leading the insurer to offer to return the premium. On the other hand the occasional case fails to reflect this policy of protecting the insured. One such is *Sparenborg* v. *Edinborough Life Assurance Co.*[103] In that case the insured agreed to the need to obtain permission from the insurer before going outside of the geographical limits imposed upon the policy, the stated contractual result of a breach thereof being voidness of policy and forfeiture of premiums. Inadvertently the insured did so breach this term, at a time some three years after the policy was taken out. About fourteen years later still the insured realised his transgression and notified the insurer who promptly rejected the policy upon the contractual terms. A subsequent attempt by the insured to recover premiums failed even as to premiums paid after the breach. This decision of Bray J. it is submitted, is open to question since if the clause is given its proper effect the policy became void as at breach, not just voidable and there being no effective policy thereafter it is most doubtful that the forfeiture clause alone could be said to have survived to attach to subsequent renewal premiums. Certainly the decision is not illustrative of the 'contra proferentem' philosophy.

Propositional Conclusions

From all of this material it is suggested that the following summary can be composed.

1. Avoidance of an insurance contract as a result of mis-statements by the insured can operate in one of three ways:

(a) Through breach of a contractural condition precedent to the creation of the contract;
(b) through a breach of a contractual condition at the election of the insurer;

101 Maye v. Colonial Mutual Life (1924) 35 C.L.R. 14.
102 [1908] V.L.R. 481.
103 [1912] 1 K.B. 195.

(c) through equitable rescission on the ground of misrepresentation.

2. In the case of failure of condition precedent the premium is returnable because it remains the property of the intending insured. This is otherwise, but improperly, described as total failure of consideration. It is, of course, total failure of contract.

3. In the case of a breach of contractual condition there is generally no obligation to return the premium unless there has resulted a total failure of consideration or unless the contract itself so specifies. It may be that such a contractual term also operates to provide a total failure of consideration situation. At the very least a 'basis of contract' clause turns relevant representations into contractual conditions and special clauses denying a return of premium may be read contra proferentem and give a right to return in circumstances alternative to those specified for forfeiture.

4. With misrepresentations outside of the scope of a 'basis of contract' clause (in modern practice seldom to be satisfied except where no such clause exists) equitable action for rescission can be brought. A normal requirement for success in this action is that premiums should be returned but this rule is subject to discretion and in some cases, especially where the misrepresentation is coupled with fraud, return will not always be ordered.

5. Also, although insurers seem not to have availed themselves of this form of remedy, perhaps because of market forces or for altruistic reason, a 'basis of contract' clause coupled with terms as to forfeiture of premiums and claims already paid could be drafted so as to:

(a) give a purely contractually agreed remedy, thus avoiding the need for rescission;
(b) deny any void ab initio effect thus avoiding a total failure of consideration;
(c) refrain from making any or all statements conditions precedent to contract.

If this were done, and provided a 'contra proferentem' judicial eye was not allowed scope for employment, there would seem to be no basis at all for a claim for return of premium by the guilty insured.

If the reader has by now concluded that a very long journey has been made of a short distance it can only be said in defence that the fault lies not with the 'bus driver' but with a succession of judicial traffic controllers.

To turn the matter full circle, in the light of these conclusions one must now reassess the initial quotation. In so far as that quotation actually makes any positive statement as to the state of the law it is largely unexceptional, its primary defect being that it fails to differentiate between different circumstances and differing remedies. It may well be that such nebulous statements are defendable on the realisation of the ambivalance of the authorities but it is submitted that such statements no matter how justified only serve to continue the confusion and to deny assistance to those in need.

The Future

Finally, it is intended to look at what all this may bring in light of future changes. The Australian Law Reform Commission Discussion Paper (No. 7) contains preliminary suggestions for considerable reform in the law relating to insurance contracts. One of the more major of these is the neutralisation of 'basis of contract' clauses coupled to the abolition of the doctrine of uberrima fide[104] . Without the most careful and detailed control mechanism this would result in:

(a) An assessment of the importance (not simply the materiality) of information specifically sought in the proposal form thus differentiating between contractual conditions and warranties.
(b) Argument as to the effect of information given other than as a result of the specific question (i.e. whether or not it amounted to a misrepresentation).
(c) Perhaps the denial of a return of premium where such right to return was found only in a contra proferentem interpretation.

It is submitted that the inevitable result of such changes is a greater degree of uncertainty: 'in all mercantile transactions, certainty is of much more consequence than which way the point is decided; and more especially so in the case of policies of insurance . . .'[105]

As a corollary of this, the cost of insurance must also rise and when due emphasis is placed upon the lack of a general common law rule requiring return of premium in cases of breach of condition it may well give rise to unexpected additional loss of a right to return of premium. One way for the insurere to react to this situation would be to insert the type of wider forfeiture clause foreshaddowed above so that premium return is denied in cases of failure of condition precedent or at least to

[104] See paras 35 to 37 inclusive.
[105] Tyrie v. Fletcher (1877) 2 Cowp. 666 at 668, 98 E.R. 1297, [1775-1802] All E.R. Rep. 497 per Lord Mansfield.

ensure that in future all such situations are contractually classified as breaches of conditions rather than conditions precedent to contract.

All this emphasises the need for clarity of understanding of one's present condition before contemplating change.[106]

[106] Since the above was written little enthusiasm has been shown by the Federal Government for implementing the Law Reform Commission's thoughts (most of which have not been forumulated as formal recommendations). Also time has seen the publication of Professor Sutton's book *Insurance Law in Australia and New Zealand* (1980). This text is too important to be ignored and readers are particularly referred to paras 3.2-3.5 and 7.43 thereof.