1889 WILLIAM VENNER.....APPELLANT;

*Nov. 14, 15. AND

1890 SUN LIFE INSURANCE COMPANY, RESPONDENT.

*Mar. 10. ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Life Insurance—Unconditional Policy—Misrepresentations—Effect of—Indication of payment—Return of premium—Additional parties to a suit—R.S.C., ch. 124, secs. 27 and 28—Arts. 2487, 2488, 2585 C. C.

An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company, then in such a case the premiums paid would become forfeited and the policy be null and void. Upon the death of the assured the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that insured's was a life not insurable.

Hetd, 1st, that the policy was thereby made void *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable and was not obliged to return any part of the premium paid.

2nd, That the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of secs. 27 and 28 R.S.C., ch. 134, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, which point it was not necessary to decide.

3rd, That the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; Art. 1174 C. C., and the provisions contained in Art. 1180 C.C. are not applicable in such a case.

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*PRESENT:—Sir W. J. Ritchie C. J., and Strong, Taschereau Gwynne and Patterson J J.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the cause.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), reversing a judgment of the Superior Court, which condemned the respondent company to pay to the appellant $2,000, amount of a policy.

This was an action brought by the appellant Venner against the respondent, the Sun Life Insurance Company, claiming to recover $2,000, the amount of a policy on the life of Jean Langlois, an advocate of Quebec, alleged to have been effected by Langlois for the benefit of his creditor Venner, the appellant, as his interest might appear.

The policy, dated the 19th of January, 1886, was issued "without conditions." Langlois died the 8th March, 1886, and the present action was instituted on the 24th day of August, 1886.

The pleas were: 1st, a general denial; 2nd, an exception alleging fraud and misrepresentation in obtaining the policy. At the trial the misrepresentations proved to have been practised to obtain the policy were, that Langlois' answers to the questions put to him were untrue, especially as regards his state of health and his having applied to other insurance offices to procure a policy; that the answers as given were consistent with Langlois' life being a first-class life whilst Dr. Lemieux, a witness, and Langlois' own medical attendant, stated that Langlois was not a life insurable as the term is generally understood.

Amyot Q.C. and *Geoffrion* Q.C. for appellant.

This was an unconditional policy issued since the Dominion statute ch. 124, sec. 27, came into force. If this Statute is *intra vires* of the Dominion Parliament then all the precedents contrary to the new law and all

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the commentators of the laws of other countries are not applicable. Henceforth no policy can be impaired for reasons other than those printed on the policy itself.

Under art. 2480 C.C. once the policy is issued it becomes the contract between the parties and in this case the contract which is binding is the policy issued by the company in favour of the appellant, and not the application of Langlois. See also art. 2587 C.C.

The company in this case have accepted the appellant as their creditor and under art. 1180 C.C., they cannot now oppose to him the exceptions which they might have set up against Langlois. If a policy without conditions is made payable *ab initio* to a third party in good faith it cannot afterwards be annulled by reason of the false and fraudulent statements of the person whose life is insured. Clark Law of Insurance (1), Roscoe's Digest of Law of Evidence (2); and moreover, the company, perfectly knowing by its officers Langlois' state of health, cannot take advantage of false statements which he made in regard to it. Bigelow (3).

We also contend that in accepting the premium from its agent when fully knowing Langlois' state of health, the company has waived all objection as to Langlois' health.

Porter (4); Angell (5); Herbault, Assurances sur la vie (6); Samson Digest Law of Insurance (7); Bigelow (8).

A policy cannot be annulled against a third party, in good faith, to whom it has been made payable *ab initio*. Clark, Law of Insurance (9). Roscoe's digest of law of evidence (10). And in *Wheelton* v. *Hardisty* (11)

(1) P. 209.
(2) 4th ed., p. 413.
(3) 5th vol., p. 458.
(4) P. 86.
(5) P. 410.
(6) P. 252-3.
(7) P. 683.
(8) 1st vol., 327, 375, 497.
(9) Page 209.
(10) P. 410.
(11) 8 E. & B. 232.

it was held by the Exchequer Chamber that the false and fraudulent statements of the person whose life is insured and of the medical referee will not vitiate the policy, as against an innocent person who effected insurance, there being no condition that the untruth of the statement contained in the policy should avoid the policy.

To decide otherwise would be an act against the common law and the principles of a most elementary justice.

The 1180th article of the Civil Code of L.C. says :—

The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him, although at the time of the delegation he were ignorant of such exceptions.

Applied to this case, that article would read as follows: "The company consenting to be delegated to Venner, by making the policy payable to him, cannot oppose to Venner the exceptions which it might have set up against Langlois."

Then, finally, we contend that the court below declared the policy void because the legal representatives are not parties to this contestation.

Now that Langlois is dead, that Venner has no recourse against him, can the company plead its own act, its own error, to deprive him of a legitimate claim ? Be it in good or in bad faith, the company is responsible for its own deeds, arts. 1053, 1065 C.C. The company is bound to warrant Venner a third party in good faith and make good towards him the terms of its policy. Different it might be had the policy been made payable to Langlois and by him transferred to Venner.

Langelier Q.C. for respondents.

Upon the facts as proved there can be no doubt that a gross fraud had been committed in effecting this assurance. If so, that vitiates the policy, and Venner

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has no more rights than the legal representatives of the assured would have. R.S.C., ch. 124, has no application, because the policy itself declares it is issued upon the statements contained in the application, and the provisions of art. 1180 C.C. are only applicable when there is novation. Art. 1174 C.C. is the article which is applicable to the facts of this case.

As to return of premium. The case of *Parent* v. *N. Y. L. Ins.* (1) has settled the jurisprudence of our courts on this point, and if a policy is null on account of being obtained by fraud, such nullity may be invoked by the insurer without any return of premium paid. It is too late now to raise an objection as to whom should be parties to this contestation.

Sir W. J. RITCHIE C.J. and STRONG and PATTERSON JJ. concurred in dismissing the appeal.

TASCHEREAU J.—This is an appeal from the judgment of the Court of Queen's Bench, which reversing the judgment of the Superior Court, dismissed the appellant's action against the company.

The action is one claiming from this company the sum of $2,000, being the amount of a policy on the life of one Jean Langlois effected on 19th January, 1886, by said Langlois for the benefit of and made payable to his creditor, the present appellant, said Langlois having died on the 8th of March, 1886.

The company pleaded to this action that the said policy had been obtained by fraud and false representations, and the judgment appealed from dismissed the action on that plea.

As to the falsity of the representations made by Langlois in his answers on the most material particulars to the questions put to him on the application

(1) 3 Q. L. R. 163.

for this policy, the evidence leaves no room for doubt. The appellant himself could not but admit it, and concede that if the action had been instituted by Langlois' representatives it could clearly not have been maintained.

Now, this being so, how can the present plaintiff have more rights than Langlois himself or his representatives would have had? It is sound law (though not without exceptions to which I need not here refer) that, as a general rule *nemo plus juris transferre potest quam ipse habet.* Now, if, as conceded by the appellant, Langlois himself or his representatives could not have recovered upon this policy, it is because this policy, as held by the Court of Appeal, is null and void from its inception, or to be more correct, I should say, must be avoided with retroactive effect to its inception. It was agreed to by the company, in express words "sur les réprésentations, conventions et stipulations contenues dans la demande pour cette police." These representations being proved to have being utterly false in the most material particulars, it follows that the company never became bound under this policy. They agreed to pay to the present appellant the sum of $2,000 at Langlois' death, but upon the express condition that if Langlois' answers, on the application were later proved to have been false, the policy would then be null and void. Such are the express terms of the application signed by Langlois.

Nous, soussignés, déclarons que la personne dont l'assurance sur la vie est demandée, est à présent en bonne santé et n'est pas affligée d'aucune maladie ou maux internes; et que les réponses aux questions précédentes sont vraies et exactes. Il est de plus convenu et stipulé, que cette déclaration formera la base du contrat entre nous et la Compagnie d'Assurance Mutuelle sur la Vie, Le Soleil, de Montréal; et nous nous engageons aussi à payer la prime de la première année et à accepter la police quand elle sera émise par la dite compagnie; et si quelques fausses réprésentations ont été faites dans cette déclaration ou

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dans les réponses à être données au médecin examinateur en rapport avec la dite application, toutes les valeurs qui auront été données à la dite compagnie, pour le compte de l'assurance accordée, seront confisquées et la police deviendra nulle et sans effet.

This is plain enough, it seems to me, and, as I have before remarked, this stipulation is in express terms referred to in the body of the policy, so that the appellant cannot invoke against the company section 27, chapter 124 R. S. C., assuming this enactment to be *intra vires* of Parliament and otherwise applicable, two points upon which it is not here necessary to pass.

The following are the articles of the code bearing on the case:—

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or effect the rate of premium.

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a case of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2488. Fraudulent misrepresentations or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favour of the innocent party.

2490. Warranties and conditions are a part of the contract, and must be true, if affirmative—otherwise the contract may be annulled, notwithstanding the good faith of the insured.

The foregoing general provisions are declared, by article 2585 to be applicable to life insurance:

2588. The declaration in the policy of the age and condition of health of the person upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends. Nevertheless, in absence of fraud the warranty that the person is in good health is to be construed liberally, and not as meaning that he is free from infirmity or disorder.

I refer to *Hartigan* v. *The International L. Ass -Society* (1), also to five cases in France (2), where it was held that:

(1) 8 L.C.J. 206. (2) Sirey, 80, 2, 225.

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Il y a lieu d'annuler le contrat d'assurance dans l'intéret de l'assureur lorsque l'assuré a, de mauvaise foi, par ses réticences ou fausses déclarations, dénaturé à son profit l'opinion du risque servant de base au contrat. Ainsi, il y a fausse déclaration de nature à rendre l'assurance annulable lorsque l'assuré a déclaré qu'aucune compagnie n'avait refusé de proprositions d'assurance sur sa vie, tandis que sur une demande d'assurance par lui faite antérieurement, il avait été répondu que l'affaire était ajournée, ce qu'il avait interprété lui-même comme un refus. Peu importe qu'en ne mentionnant pas cette circonstance, l'assuré n'ait fait que suivre le conseil d'un agent de la compagnie (1).

and note thereto, also note to report of same cases in Dalloz (2).

I refer also to Merger, Assurances (3); Blin, Assurances (4); Grün & Joliat (5) and Bédarride Dol. & Fraude (6). All of the last author's commentaries on art. 348 of the French Code de Commerce, on marine insurance, are clearly applicable with us to life insurance, as our code re-enacts in arts. 2485 to 2492 said art. 348 of the Code de Commerce and makes the rules as to misrepresentations or concealment applicable to all kinds of insurance. Arts. 2503, 2504, 2585.

It was urged for the appellant that the company should have, with their plea, offered to return him the premium they have received. But there are three conclusive answers to that contention. First, in the in the agreement I have cited signed by Langlois, at the foot of his application, it is expressly stipulated that if any of his answers to the questions put to him are false, the policy shall be null and all premiums paid shall be confiscated.

Secondly, in law even in the absence of such an agreement it has been held that—

En cas d'annulation du contrat d'assurance pour réticence ou fausse déclaration accomplie de mauvaise foi par l'assuré, l'assureur n'est pas tenu de restituer les primes payées, Paris, 1878. Sirey. 80, 2,225, *re Dominique.*

(1) Sirey 80, 2,225.
(2) 81, 2, 235.
(3) Nos. 101, 182 *seq.*
(4) 37.
(5) 405.
(6) Nos. 188, 192, 193, 225.

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Thirdly, the receipt for the premium is from Langlois himself, not from Venner. Venner, it is true, is proved to have actually paid it. But he, by doing so, lent so much to Langlois, or acted as his agent. So that this premium, should the company be bound to return it, must be returned, not to the appellant, but to Langlois' representatives.

Another objection involved by the appellant is that Langlois' legal representatives should have been made parties to this contestation. It would certainly have been more regular so to do. But what interest has the appellant to raise this point? Is not that invoking *jus tertii*? Then, what prevented him from himself calling in Langlois' heirs, either in the first instance, upon his action, or subsequently when the company fyled their plea? He never took this objection before the courts below. There is not even a word of it in his factum before this court. It is only at the last moment of the case, at its final hearing, that he raises it for the first time. He has fought this company before three courts, and, at the last moment complains of not having had the proper parties *en cause*. Now, this cannot be done. I refer to the cases of *Richer* v. *Voyer* (1) in the Privy Council, and *Guyon* v. *Lionais* (2) in the Superior Court which I cited in *Russell* v. *Lefrançois* (3) before this court on this point.

The appellant further contends that, though Langlois' representatives could have no action against the company yet he, the appellant is in a better position as the company cannot as against him invoke Langlois' fraud. In support of this contention the appellant relies on art. 1180 C.C. which enacts that

> The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him.

(1) 5 Rev. Leg. 591. (2) 2 Rev. Leg. 333.
(3) 8 Can. S. C. R. 361.

This article, though not in the Code Napoleon in express terms, is the law in France to the present day. I refer for the jurisprudence to the cases cited Nos. 21, 25, under art. 1277 (1). The article however has no application to the present case. It applies only to a *délégation parfaite*, and no such delegation took place between Langlois, Venner and the company. There was no novation. Venner was not for the company "a new creditor," as required by article 1180. This article moreover does not apply to a conditional obligation, such as the company agreed to towards Venner. They agreed to pay Venner, as I have already remarked, upon the representations, conventions and stipulations contained in the application for the policy? These representations were false and fraudulent; there consequently has never existed a binding contract upon the company. It seems to be settled now in France by the *Cour de Cassation* that the stipulations by a insured that the insurance should be payable to a third party is nothing else but the stipulation for the benefit of a third party, mentioned in Art. 1029 of the Code (2). It had been likewise previously determined *in re Dominiqu* (3) that the nullity of a policy consequent upon false representations *est opposable au cessionnaire et à tous autres ayants droit comme elle le serait à l'assuré lui-même.* In the *Lesay* case also, (4) a policy was annulled as against an assignee for false representations by the insured.

The fact relied upon by the appellant that Langlois died from the consequence of a fall, and not from any previous disease, cannot affect the result of the case. for doubt. The commentators, in France, are not unanimous on this point, but with us, art. 2487 C. C. leaves

(1) 2 Sirey, Codes Annotés and in Dalloz Codes Annotés, under art. 1276.

(2) Dalloz 88, 1, 77; 88, 1, 193.

(3) Dalloz 78, 2, 58.

(4) Dalloz 81, 2, 236.

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no room. And even in France, in one of the most recent cases on the question, it was held that :

Doit être annulé pour réticence le contrat d'assurance dans lequel l'assuré a déclaré n'avoir jamais eu de maladie grave alors qu'il se savait atteint d'une maladie de la moelle épinière et qu'il avait été affecté de la syphilis ; peu importe que la maladie cachée par l'assuré ait influé ou non sur son décès, et peu importe aussi que le medecin délégué par l'assureur ait constaté la bonne santé de l'assuré (1).

I refer also to *re Syndic Lemoine* v. *La Caisse Paternelle* (2), where it was held that:

Le fait par l'assuré d'avoir répondu négativement à la question de savoir s'il avait eu une maladie assez grave pour nécessiter les soins d'un médecin, tandis qu'il avait été dans l'année précédente soigné par un médecin pour une fluxion de poitrine et pour une phlébite, est une cause de nullité du contrat surtout si la maladie derniére cause la mort de l'assuré, et se rattache pathologiquement aux maladies intérieures non déclarées. La dissimulation par l'assuré relativement à un fait de nature à modifier l'opinion du risque, est une cause de nullité alors même qu'elle a été commise par ignorance ou de bonne foi.

Under our code, by arts. 2487 and 2490, misrepresentation either by error or by design is expressly declared to be a cause of nullity. So that these decisions have a direct application to the present case.

I am of opinion to dismiss the appeal with costs.

GWYNNE J.—The appeal must, in my opinion, be dismissed. The policy is effected by Langlois and is expressly made " upon the representations, agreements and stipulations" contained in the application for policy signed by him. Divers of these representations are admitted to be absolutely false, so that if the personal representatives of Langlois, who was the assured, were the plaintiffs, they must have been declared to be void as obtained by the fraud and falsehood of the assured. The fact that by the policy the money payable thereunder is to be paid to Venner according to

(1) Dev. 78, 2, 337 and note thereto, also note on same case in Dalloz 77, 2, 126.

(2) Dev. 83, 2, 25.

his rights thereto as a creditor of Langlois does not make Venner to be the person with whom the contract contained in the policy was made. The contract is with Langlois, the assured, and Venner can claim in no other right than as his assignee and as in his right and as the personal representatives of Langlois could not recover by reason of Langlois' fraud attending the procuring of the policy, neither can Venner.

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Appeal dismissed with costs.

Solicitors for appellant: *Amyot, Pelletier & Fontaine.*

Solicitors for respondent: *Montambault, Langelier, Langelier & Taschereau.*