ROBERT E. FITZRANDOLPH (PLAINTIFF). ..... } APPELLANT.

AND

THE MUTUAL RELIEF SOCIETY OF NOVA SCOTIA (DEFENDANTS) } RESPONDENTS.

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*Feb. 20,21.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Application for—Reference to application in policy—Warranty—Mis-statement.

The bond of membership in an insurance society insured the member holding it "in consideration of statements made in the application herefor," &c., and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue.

Held, that the application was a part of the contract for insurance and incorporated with the bond.

The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to be answered was: "Have you ever had any of the following diseases? Answer opposite each, yes, or no." The names of the diseases were given in perpendicular columns and at the head of each column the applicant wrote "no," placing under it, and opposite the diseases named, marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application it was found that the applicant had had a disease opposite to which one of these marks was placed.

Held, affirming the judgment of the court below, that whether the applicant intended this mark to mean "no" and thus to deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial for the defendants.

The plaintiff is administrator of one Gibson, formerly

PRESENT—Sir W. J. Ritchie C. J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 21 N.S. Rep. 274.

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of Lawrencetown, N.S., and the action is upon a bond of membership, called in the pleadings a policy of life insurance, in the defendant company. The bond was expressed on its face to be made in consideration of statements made in the application therefor, and the application contained a declaration and warranty that the answers and statements therein were full, complete and true, and that such declaration and warranty formed the basis of the agreement between the insured and the society. The application was not, in terms, made a part of the policy, or bond, and nothing contained in it was in, or indorsed on, the bond.

The action was tried before Mr. Justice Ritchie without a jury, and judgment was given for the defendants on the ground that the assured had misrepresented a material fact, having stated in his application that he never had had certain diseases, and the learned judge holding that he had one of those diseases at the time. On appeal the Supreme Court affirmed this judgment and dismissed the appeal without costs which were refused because it appeared that the defendants set up a number of defences, many of which were speculative, and that the defence was framed to suit any evidence that might be fished up at the trial. Also, that defendants had only succeeded on one of the numerous defences set up.

From the judgment of the full court affirming the judgment of the trial judge the plaintiff appealed to the Supreme Court of Canada.

Borden for the appellant. This society holds a license from the Dominion Government under the Insurance Act, R.S.C. ch. 124, and is, therefore, subject to the provisions of that act. Then the benefit of the application cannot be claimed in this case, as it is not contained in, nor indorsed on, the policy as required by sections 27 and 28 of the statute. The following sec-

tions also bear on the case, namely, sections 2, 3, 29-31 and 36-43.

If the declaration and warranty in the application can be used as a defence it must be shown that the alleged misrepresentation was of a material fact and that it was untrue to the knowledge of the applicant. *Taylor* v. *Etna Ins. Co.* (1); *Fowkes* v. *Manchester & London Life Assurance Association* (2); *Jarvis* v. *Marine and General Life Insurance Co.* (3).

The learned counsel also argued that the misrepresentation was not proved.

Henry Q.C. for the respondent. If the Dominion Insurance Act applies to this company it cannot be held to repeal or abrogate the statute in Nova Scotia making the application a part of the policy.

As to the distribution of legislative powers for purposes of insurance see *Parsons* v *Queen Insurance Co.* (4).

The learned counsel argued at length the point raised on the evidence.

Sir W. J. RITCHIE C.J.—The learned judge who tried this case says in giving judgment:—

It is in evidence that the bond or policy in question in this case was issued on the application of the assured, in which he was required to answer certain questions. One of these was—Have you ever had any of the following diseases? answer opposite each "Yes" or "No." Then follows a list of diseases, arranged in seven columns; opposite the disease at the top of each column the word "No" is written, and below the word "No" opposite the names of the other diseases in each column, two marks are placed thus, —" — which marks are opposite the word "Syphilis."

As I interpret the application, these marks mean "no," and the meaning is the same as if that word had been written after the disease called syphilis. It has been proved to my satisfaction, and I find, that the assured was suffering from the disease of syphilis in 1883, and was

(1) 120 Mass. 254.
(2) 3 B. & S. 917.
(3) 5 Times L.R. 648.
(4) 4 Can. S.C.R. 215; 7 App. Cas. 96.

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treated for it by Dr. Bell. I find that the assured misrepresented that fact to the defendants at the time he applied for the bond or policy in question, and that such misrepresentation was material to the risk, and the fact that he had previously been suffering from the disease of syphilis should, in that view, have been communicated to the defendants at the time of the application for the policy. On these grounds I am of opinion that the plaintiff cannot succeed in this action.

I cannot say that there was not sufficient evidence to justify the learned judge in arriving at the conclusion that Dr. Bell had treated a person by the name of Gibson for syphilis and that the person so treated had at the time of such treatment that disease, nor can I reasonably doubt under the evidence that the person so treated was the insured. The question then simply is: Did the declaration of the applicant and the answers to the questions put to the insured form the basis of the contract? Were they expressly or impliedly incorporated with the policy, that is, did it form a part of the contract that any untrue statements, omissions or suppressions contained in the application and answers should avoid the policy? If so, the authorities clearly establish that the application and policy must be construed together and together form the contract, in which case the truth of the representations and answers becomes a condition precedent to the liability.

I cannot conceive that stronger language could be used to incorporate the application and make it part of the contract. The bond witnesseth that "the company in consideration of statements made in the application herefor, and the payment of $7 and the receipt thereof, etc.;" and the application provides that "all applications must be written plainly in ink. Before forwarding the application to the home office, agents should see that all questions have been properly answered." To which is added this declaration or statement:—

Declaration: It is hereby declared and warranted that the foregoing

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answers and statements are full, complete and true, and it is agreed that this declaration and warranty shall form the basis, and shall be a part of, the contract between the undersigned and the Mutual Relief Society of Nova Scotia, and are offered to said society as a consideration of the contract applied for and subject to all the limitations and requirements of the constitution and by-laws, all of which are hereby made part of the bond of membership, and if any of the statements, representations, or answers made herein are not true, full and complete, and if I or my representatives shall omit or neglect to make any payment as required by the conditions of said bond, then the bond to be issued hereon shall be null and void, and all the money paid thereon shall be forfeited to said society, and it is further agreed that the membership hereby applied for shall be subject to all the conditions and agreements contained in the bond of such membership.

I think the learned judge was right in reading the word "no" as applicable to all the questions even if it was necessary to go so far, because if the answers are not full and complete the bond is to be void. In the examination of the deceased by the medical officer, *inter alia*, one question to that officer is, "Have you carefully read the questions and answers thereto of the person applying for examination as recorded on the reverse side, and have you paid particular attention to any vague terms that may have been used therein?" To which the medical officer's answer is "Yes." To the second question, "Has the person now or has he ever had any of the following diseases or disorders? If yes, state disease, date, duration and severity." Answer, "None." This list includes syphilis, and to this the deceased signed his name, and the declaration signed by the applicant distinctly states that the foregoing answers and statements are full, complete and true, and in the certificate of the medical examiner he states that the applicant stated that the answers given to the questions put by him are correct. All these papers were transmitted to the company and on them he became a member and obtained the instrument on which he now sues. If this is so, any untrue repre-

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sentations, whether material or not, avoid the policy. See *Anderson* v. *Fitzgerald* (1).

The learned judge having found, and I think on sufficient evidence, that the deceased had had the disease syphilis, one of the diseases named, to which in his answer to the question "Have you ever had any of the following diseases (including syphilis)? answer opposite each Yes or no," I think he answered "No" or did not answer at all, in either of which cases if the answer was false or the question was not answered the policy or bond was rendered void; and the correctness of the answer having been warranted by the declaration whether the untrue statement was material or not is quite unimportant as the party must adhere to his warranty.

I therefore think the appeal should be dismissed.

FOURNIER J.—Concurred.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—(His Lordship referred at some length to the statutes incorporating the defendant company, passed in 1884, and particularly secs. 3, 9, 10 and 11. He then read the declaration in the application for membership (2) and the bond of membership issued thereon and after setting out the pleadings proceeded as follows)—

Now it cannot, I think, be doubted that the learned judge who tried the cause came to a correct conclusion when he found, as matter of fact, that the Alfred Gibson who made the application to the defendant society, upon which the bond of membership sued upon was issued, was the same Alfred Gibson who was proved before him to have had, in an aggravated form,

(1) 4 H. L. Cas. 484, p. 504. (2) See p. 336.

one of the diseases mentioned in the application of a very serious nature and which, in his application, he had declared and warranted that he never had had, and that this constituted a breach of warranty in a very material point. I am of opinion, also, that the learned judge might well have held upon the evidence that Gibson had falsely declared and warranted that no proposal to insure his life had ever previously been made by him, for it was expressly proved that there had been, and that he had been medically examined upon his application to another company, and that no policy had issued thereon; so, likewise, that he had falsely warranted that he was in good health when he made his application to the defendant company. I can see no reason to doubt the evidence of Mr. Gates because of his being a member of the defendant society and one of their agents, and his evidence leads, I think, to the conclusion that when Gibson applied for membership in the defendant society he was, and that as he well knew, in bad health and remained so in and from the month of July, 1886, until his death. Between the 6th and 9th August, two days after the execution of the bond of membership, he worked for Mr Gates off and on until the 19th of August, 1886. Mr. Gates says that when he first went to work for him, on the 7th of August, he complained very much of pain in his back and side and loss of appetite, and that he got some medicine from Mr. Gates. On the 12th and 13th of August he worked for him again, and then complained of same trouble; on the 19th he complained of feeling very unwell, and looked so—he seemed to be in great pain and distress—Mr. Gates wanted him to go to bed. He objected, and was afraid he would die; however, they got him to bed and he got up before night. After he got round, he told Mr. Gates, as he says he thinks, that he had been subject to this kind

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of spells, but not so bad, before. He told Mr. Gates that he had been treated by doctors in Yarmouth and Digby, but that they did not seem to know what was the matter with him and Mr. Gates says that he did not look like a man in good health. Upon the whole there can, I think, be no doubt that the learned judge who tried the case, in the judgment which he rendered for the defendants, came to a sound conclusion.

As to the rectification asked for in the statement of claim no foundation is laid for it, nor in point of fact does any appear to exist. We see that the claim for "rectification" as it is called is rested upon ch. 124 of the Revised Statutes of Canada, but the 3rd section of that act enacts that the provisions of the act shall not apply to any company incorporated by act of the legislature of any Province forming part of Canada which carries on the business of insurance wholly within the limits of that Province by the legislature of which it was incorporated and which is within the exclusive control of the legislature of such Province, but such company carrying on the business of life insurance may, by leave of the Governor in Council, *avail itself of the provisions of this act, and if it so avails itself the provisions of this act shall thereafter apply to it*, and such company shall have the power of transacting its business of insurance throughout Canada; and by the 43rd section it is enacted that:—

Nothing in this act contained shall apply to any society or association of persons for fraternal, benevolent, industrial or religious purposes among which purposes is the insurance of the lives of the members thereof exclusively, or to any association for the purpose of life assurance formed in connection with such society or organisation and exclusively from its members and which insures the lives of such members exclusively.

2. Any society or association which is declared by this section to be exempt from the application of this act may nevertheless apply to the Minister to be allowed to avail itself of the provisions of the seven sections next preceding, and upon such application being assented to such

society or association shall cease to be so exempt by virtue of this section.

The seven next preceding sections here referred to are sections relating to life insurances, by "Mutual or Assessment Life Insurance Companies." Now whether the 3rd section of this act as above extracted applies to any companies other than those incorporated simply for the purpose of carrying on the ordinary business of life insurance, and whether this 43rd section applies at all to fraternal, benevolent, industrial and religious societies incorporated by the legislature of one of the provinces of the Dominion, and if it does, what is the effect of any such company obtaining the allowance of the Minister to its availing itself of the provisions of the seven sections next preceding the 43rd, and whether such allowance would have the effect of doing away with the provisions contained in the local act even within the limits of the Province by the legislature of which the company is incorporated, are matters not necessary to be determined in the present case, for although it appears in evidence that the defendant company, incorporated by an act of the legislature of Nova Scotia, did make application under the above 43rd section of the Dominion act to be allowed to avail itself of the provisions mentioned in that section, yet no allowance to that effect was effectually granted until the assent of the Minister was published in the *Canada Gazette* of the 7th August, 1886, nor was it communicated to the defendant society otherwise than by such publication in the *Gazette*; so that until then it was not competent for the defendant society to avail itself of the provisions of the act referred to in the said 43rd section and the bond of membership now sued upon, having been issued, and the contract therein contained made, upon the 4th of said month of August cannot be subject to the.

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provisions of the Dominion act. It is unnecessary for the like reason to consider the point raised in relation to the 27th and 28th sections of the Dominion act, the former of which, however, has application only to conditions subsequent such as those mentioned in the conditions set out on the face of the bond of membership and not to a warranty of the truth of matters upon the faith of which the contract is based; and as to the 28th section, if it applied in the present case, it is obvious that the untrue statements which are relied upon as breaches of the warranty were material to the contract. Upon the whole I am of opinion that the appeal must be dismissed.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Ritchie & Ritchie.*

Solicitor for respondent: *Jas. Wentworth Bingay.*