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*Mar. 12, 14.

*June 14.

MICHAEL JAMES JORDAN *et al.* (PLAINTIFFS) ..... APPELLANTS;

AND

THE PROVINCIAL PROVIDENT INSTITUTION (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance, life—Conditions and warranties—Indorsements on policy—Inaccurate statements — Misrepresentations — Latent disease—Material facts—Cancellation of policy—Return of premium—Statute, construction of—55 *V.* c. 39, s. 33, (*Ont.*)

The provisions of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.) limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true.

Venner v. *The Sun Life Insurance Company* (17 Can. S. C. R. 394) followed.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario, second division, affirming the judgment of Falconbridge J. in the High Court of Justice, which dismissed the plaintiffs' action with costs.

The Provincial Provident Institution, the respondent, was incorporated in 1884 by a declaration under the Ontario Benevolent Societies Act, (R. S. O. 1877, c. 167,) and in 1886 was registered under section 38 of the Insurance Act of Canada, (R. S. C. c. 124,) to transact with its members the business of life insurance on the co-operative or assessment plan.

On the 21st June, 1894, Maria Jordan made a proposal in writing to the respondent for an insurance upon her own life to the amount of $2,000, and thereby agreed that the proposal should form part of the contract and to undergo a medical examination, and that the examination paper should also form a part of the contract.

On the next day the applicant paid her entrance fee to the local agent of the respondent and submitted herself to the respondent's local medical examiner, and completed her proposal for insurance by subscribing her name, (in the presence of the examiner,) to the answers to the questions contained in her application for membership, and also to the medical examination paper and to the agreements and warranties therein set forth.

In a memorandum prefixed to the medical examination paper the examining physician is directed to obtain "a decisive answer to each question," and at the end of the medical examination paper the examining physician certifies as follows: "I have carefully asked all the questions on the first page, and noted the applicant's replies." The declaration and warranty contained in the medical examination paper and application for membership, are in the words follow-

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ing: "I hereby declare that I have given true answers to all questions put to me by the medical examiner, and that I am the person above described. And" * * "it is hereby covenanted, declared and agreed that all the agreements, covenants, statements and answers contained in my application and this medical examination for membership, shall together be the basis and form part of the contract between me and the Provincial Provident Institution, which statements and answers are hereby warranted to be complete and true, and any certificate which may be issued upon my application and this medical examination by said Institution shall be accepted upon the express condition that if any of the statements or answers herein are materially untrue, or if any violation of any covenant, condition or restriction of the said certificate shall occur, then the said certificate shall be null and void"

The proposal and medical examination papers so completed were forwarded to the respondent, and on the 28th June, 1894, the certificate or policy of the respondent for an insurance of $2,000 was issued to the applicant, setting forth that the respondent, "in consideration of the representations, agreements and warranties made to and with said Institution in the application and medical examination herefor, both of which are part of this contract, and the payment of," etc. * * * "doth issue this certificate to Maria Jordan." * * * "with the following agreements": "That upon the death of said member while this certificate is in force, she and the beneficiaries herein named having conformed to all the conditions hereto and hereon endorsed, and also to the by-laws of the Institution from time to time in force," there should be payable, within ninety days after proofs of death, to the beneficiaries, $2,000. Upon this policy or certificate was printed verbatim the declaration

and warranty contained in the applicant's proposal for the policy and in the medical examination paper.

The second of the conditions indorsed on the policy was in the words following: "2. The member having subscribed the application and medical examination papers furnished by the Institution, each of which is a part of the contract between him and the Institution, the withholding or non-communication of information or any fraudulent or misleading statements of a fact material to the contract in the application or medical examination shall render this certificate null and void."

On the 12th July, 1894, within two weeks after the policy issued the applicant in pursuance of the advice of a physician whom she had consulted professionally on the 1st, 4th and 11th days of June, 1894, underwent an operation for cancer of the uterus which while it could not cure her disease was advised by the surgeon in the hope of ameliorating her condition. The application and examination paper made no mention of the disease and it appeared that the insured made her answers in good faith and without any knowledge that she was affected with the disease.

In March, 1895, the respondent became aware for the first time of the misrepresentations made in the proposal for insurance and in her answers to the questions in the medical examination paper, and on the 14th of that month, gave written notice to the applicant that the policy was cancelled on account of untruthful representations, and returned the total amount paid by her to the respondent but she, through her solicitors, refused to consider the policy at an end.

On the 18th of April, 1895, the applicant died, the cause of her death being cancer of the uterus, and on the 10th of October, 1895, proofs of death were presented to the respondent on behalf the beneficiaries,

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who on the 14th January, 1896, brought action against the respondent to recover on the policy.

At the trial, before Falconbridge J., and a jury, certain questions were submitted to the jury, and by their answers to such questions the jury found that the applicant's answers to thirteen of the questions submitted to her in the proposal for insurance were untrue, that these thirteen questions and answers were all material to the contract, but that the applicant did not wilfully or fraudulently give the false answers or conceal any fact known to her which she should reasonably have considered material for the defendant to have been made aware of, and that she had no intention to mislead or prevent the defendant from knowing her condition if she failed to mention her visits to physicians for medical advice prior to her application.

Upon these findings judgment was rendered dismissing the plaintiff's action with costs. On appeal to the Court of Appeal for Ontario this judgment was affirmed by the unanimous decision of the second division of that court from which the present appeal was taken by the plaintiffs.

Reeve Q.C. and *Day* for the appellants. If the statements alleged to have been made by the deceased in her examination upon effecting the insurance form part of the contract and are warranties, then the appellants cannot succeed; if, however, these statements are not warranties, and have been made in good faith, and there is absence of all fraud, then they are entitled to succeed. The medical examination cannot be construed as and does not form part of the contract, nor are the statements therein warranties, by reason of the fact that the defendant has failed to comply with the statutory provisions in not having them set out or made to appear on the face or back of the policy,

and in not having accurately and fully set out conditions and provisions relating thereto, and of which they form a part. R. S. C. ch. 124, secs. 27, 28; 52 Vict. ch. 32, (Ont.) secs. 4, 5; 55 Vict. ch. 39, (Ont.) sec. 33, s.s. 1, 2, 3; 58 Vict. ch. 34, (Ont.) sec. 5, s.s. 10 (1). The jury found that the applicant's answers to the following two questions were untrue:

"33. Have you had any serious illness or injury?" "No."

"90. Have you ever had a miscarriage; if so, how often and how recently?" "No."

The illness referred to was a cold contracted after childbirth some twenty odd years before. It could not for a moment be suggested that the woman had any possible object in answering these questions untruthfully; the idea would be altogether foreign to her mind that an illness resulting from a cold contrected under the circumstances stated would in any way affect her application for insurance; the same may be said as regards her answers to the other question—a miscarriage which had occurred many years before. It is evident that the answers given under such circumstances must have been the result of some misunderstanding, forgetfulness or mistake, or that some mistake occurred in recording the answers. Every reasonable protection should be afforded against the grave results of mistakes made in good faith, and of a strict construction of and compliance with any provisions which has that object in view.

The warranty, provisos and agreements contained in the contract are confined to material statements; the statements warranted are all statements and answers in the application and medical examination, and the proviso and agreement is, that if any of the statements or answers are materially untrue, then the

(1) At page 196 of Statutes.

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certificate shall be null and void. The result of non-compliance with the legislative provision is that the statements and answers of the insured cannot be construed or relied on as warranties, nor is the contract of insurance liable to be defeated by merely proving their untruth, but the contract must be construed as freed from and unaffected by any stipulation, warranty or proviso modifying or impairing its effect. See 55 V. ch. 39, sec. 33, s.s. 1 (Ont.) The other printed conditions on the back of the policy in so far as they relate to the statements and answers of the insured, are open to the same objection that the Act has not been complied with by reason of their not being set out in full. They all are conditions of a like character and dealing with the same subject and consequently the contract must be either free from all conditions which deal with a like and common subject matter, or subject to all such conditions in their entirety. A contract cannot be construed in the light of and as subject to only a part of a number of conditions, all of which deal with and are applicable to the same subject matter, and subject to the whole of which it was intended the contract should be made. *Village of London West* v. *London Guarantee and Accident Company* (1); *Moore* v. *Connecticut Mutunl Life Insurance Company* (2); *The Life Association of Scotland* v. *Foster* (3) per Lord Deas. See also *Anderson* v. *Fitzgerald* (4); *Thomson* v. *Weems et al.* (5) at pages 683 and 689; *Wheelton* v. *Hardisty* (6) at page 273; *Gravel* v. *L'Union St. Thomas* (7); *Twycross* v. *Grant* (8) at pages 530-531. This case is clearly distinguished from the case of *Fitzrandolph* v. *The Mutual Relief Society of Nova Scotia* (9).

(1) 26 O. R. 520.
(2) 6 Can. S. C. R. 634 : 6 App. Cas. 644 ; 3 Ont. App. R. 230.
(3) 11 Court of Sess. Cas. (3 ser.) 351.
(4) 4 H. L. Cas. 484.
(5) 9 App. Cas. 671.
(6) 8 E. & B. 232.
(7) 24 O. R. 1.
(8) 2 C. P. D. 469.
(9) 17 Can. S. C. R. 333.

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Osler Q.C. and *McMurchy* for the respondent. The question of materiality is a question of fact for the jury; 55 Vic. c. 39, Ont., sec. 33, sub-sec. 3; Bunyon, Life Insurance (3 ed.) 46; Porter, Insurance, (2 ed.) 152; May, Insurance, (3 ed.) sec. 195. We make special reference to the words of Sir William Ritchie, C.J., in *FitzRandolph* v. *The Mutual Relief Society of Nova Scotia* (1) at page 336. Untrue statements, omissions or suppressions in the application and answers should avoid a policy. The application and policy must be construed together and together form the contract, and the truth of the representations and answers becomes a condition precedent to liability. See also *Boyce* v. *The Phœnix Mutual Life Insurance Company* (2) per Ritchie C.J. at page 728; *Fowkes* v. *The Manchester and London Life Assurance Association* (3); *Anderson* v. *Fitzgerald* (4) at page 504; *Dalglish* v. *Jarvie* (5) at page 243; *London Assurance* v. *Mansel* (6); *Newcastle Fire Insurance Company* v. *Macmorran & Co.* (7); *Weems et al.* v. *Standard Life Assurance Company* (8).

The like result follows in favour of the respondent, whether we consider the findings of the jury as establishing that the applicant made false representations material to the contract, or that there was a breach of warranty. If there has been misrepresentation it will avoid the policy if a statement of a material fact contained in the declaration is untrue, even though not to the knowledge of the assured; Porter, Insurance, (2 ed.) page 140; *Macdonald* v. *Law Union Fire and Life Insurance Company* (9); Bunyon, Life Insurance, p. 41; Cooke, Life Insurance, p. 35; *Duckett* v. *Williams* (10).

(1) 17 Can. S. C. R. 333.
(2) 14 Can. S. C. R. 363.
(3) 3 B. & S. 917.
(4) 4 H. L. Cas. 484.
(5) 2 M. & G. 231.
(6) 11 Ch. D. 363.
(7) 3 Dow 255.
(8) 21 Sc. L. R. 791.
(9) L. R. 9 Q. B. 328.
(10) 2 Cr. & M. 348; 4 Tyr. 240.

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This rule is equally applicable to warranties and to material representations; *Benham* v. *United Guarantie and Life Assurance Company* (1). The proper question is whether any particular circumstance was in fact material and not whether the party believed it to be so; *London Guarantee Company* v. *Fearnley* (2), at page 916; *Hambrough* v. *Mutual Life Insurance Company of New York* (3). The company must be protected against untruthful representations whether or not these representations are untrue to the knowledge of the party effecting the insurance. The policy is vitiated if the representation made as preliminary to the contract was not in fact true. In this case the fact was, that on three occasions shortly prior to her proposal for insurance the applicant consulted a Dr. Nevitt, who made a uterine examination and informed her that there was "some uterine trouble which it would be well to attend to"; but the only information she gave the company was that another physician had attended her nineteen years previously in child-birth.

All insurance officers are entitled to the opportunity of consulting with the medical man who has been last in attendance on the assured, *Morrison* v. *Muspratt et al.* (4). And where the reference was made to a person who had been the ordinary adviser, but no mention was made of the person attending at the time of the insurance, the policy was vacated; *Everett* v. *Desborough* (5); *Huckmen* v. *Fernie* (6). See also Joyce, Insurance, sec. 2070, referring to *Cazenove* v. *British Equitable Assurance Company.* (7). Where there was a question in the application "By what physician were you last attended?" the applicant was held to have been

(1) 7 Ex. 744.
(2) 5 App. Cas. 911.
(3) 72 L. T. 140.
(4) 4 Bing. 60.
(5) 5 Bing. 503.
(6) 3 M. & W. 505.
(7) 29 L. J. C. P. 160; 28 L. J. C. P. 259; 6 C. B. N. S. 437.

attended by a physician, within the meaning of that question, where it appeared that he had called upon a physician and submitted to an examination by him and had subsequently called upon the same physician and consulted him professionally, *White* v. *Provident Savings Life Assurance Society* (1).

The policy in question is expressed to be made "in "consideration of the representations, agreements and "warranties made to and with said Institution in the "application and medical examination made herefor, "both of which are a part of this contract," thus incorporating the proposal as part of the contract. *Venner* v. *Sun Life Insurance Company* (2). This is sufficient compliance with section 27 of the Insurance Act of Canada, inasmuch as the policy referred in express terms to the representations, agreements and warranties contained in the application. The question having arisen whether the provision of the Ontario statute (55 Vict. ch. 39) required anything more than such a distinct reference to the proposal, the Legislature by 58 Vict. c. 34, sec. 5, subsection 10, added a declaratory clause to subsection 1 of section 33 of that Act to the effect that nothing herein contained should exclude the proposal or application of the assured from being considered with the contract, and that the court should determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the application or proposal.

By rescinding the policy, during the lifetime of the applicant, immediately upon becoming aware of the untrue representations, and at the same time returning to the applicant the total amount of premium paid by her, the respondents placed themselves in a strong equitable position within the intent of *Fenn* v. *Craig*

(1) 163 Mass. 108.

(2) 17 Can. S. C. R. 394.

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(1). We also refer to the decisions in *Confederation Life Association* v. *Miller* (2); *Mason* v. *Agricultural Assur. Assoc.* (3); *Mahon* v. *Pacific Mutual Life Insurance Company* (4); *Gardner* v. *Lucas* (5) at page 603.

The judgment of the court was delivered by

SEDGEWICK J.—We have been unable to find any error in the judgment appealed from. We consider that the Ontario Insurance Act of 1892, section 33, subsection 1, was complied with in the present case, following, as we do, the decision in the case of *Venner* v. *The Sun Life Insurance Company* (6).

As to the objection, relied upon by the appellants, that the insurance company failed to comply with the requirements of subsection two of section thirty-three, just mentioned, we are of opinion that that section must be read with and qualified by the following subsection, which shows that it is for the jury to determine whether or not a misrepresentation made in an application for insurance is material. If they find such misrepresentation immaterial, these clauses save the policy although it would otherwise have been vitated. In other words, notwithstanding any convention between the parties to an insurance policy upon the effect of misrepresentation, only that species of misrepresentation will void the policy which may subsequently be judicially found to be material and would have affected the basis of the contract.

Appeal dismissed with costs.

Solicitors for the appellants: *Reeve & Day.*

Solicitors for the respondent: *McDougall & Robertson.*

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(1) 3 Y. & C. Ex. 216.
(2) 14 Can. S. C. R. 330.
(3) 18 U. C. C. P. 19.
(4) 144 Pa. 409.
(5) 3 App. Cas. 582.
(6) 17 Can. S. C. R. 394.