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*Nov. 15, 16.

*Dec. 15.

THE CONFEDERATION LIFE ASSOCIATION (DEFENDANTS) ..... } APPELLANTS;

AND

MARY ELEANOR MILLER AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Life Insurance—Application for policy—Declaration by assured—Basis of Contract—Warranty—Misdirection.*

An application for a life insurance policy contained the following declaration after the applicant's answers to the questions submitted:—"I, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any mis-statements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized

*PRESENT.—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

agent of the association, during my lifetime and good health. I, (the party in whose favor the assurance is granted), do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

*Held*,—affirming the judgment of the court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to "the best of my knowledge and belief."

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, their verdict should be for the plaintiffs.

*Held*, a proper direction.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the decision of the Queen's Bench Division (2) by which a verdict for the plaintiffs was sustained and a new trial refused.

The action in this case was upon a policy of insurance effected by George Miller deceased for $10,000. Payment was resisted by the company on the ground of the policy and the application, which was made a part of the contract, containing untrue statements, and suppressing material facts.

To the questions answered in the application, the insured made this declaration:—

"I, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all of which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any mis-statements or suppression of facts made in the answers to the question aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all

(1) 14 Ont. App. R. 218. (2) 11 O. R. 120.

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payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized agent of the association during my life time and good health. I, (the party in whose favor the assurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association. Dated at Markham this 5th day of December, 1883."

He was examined by the Medical Officer, who sends in his report containing answers to seventeen questions which he gives after his examination of the applicant.

At the foot of his report is written, "I hereby certify that I have made true, full and complete answers to the questions propounded to me by the examining physician, and I agree to accept the policy when issued on the terms mentioned in the application, and to pay the association the premium thereon.

(Sd.) GEORGE MILLER,
*Applicant.*

WITNESS: J. R. TABOR, Examining Physician.

The witness to this declaration, Mr. Tabor, died before the action, and there is no evidence of his examination of the applicant.

It was contended by the company that this declaration was an absolute warranty of the truth of the statements in the application and the policy, and if any of such statements were untrue in fact the policy was void.

Among the statements made by the insured were the following:—

(*a.*) That none of his brothers or sisters ever had pulmonary or any other constitutional disease.

(*b.*) That he had no serious illness, local disease or personal injury, except a broken leg in childhood and

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an illness of three days from cold.

(*c.*) That his usual medical attendant was Dr. Tabor and that he had been attended by him for a cold, and that he had not required the services of a physician, except as aforesaid, for the past seven years or for any serious illness during that period.

(*d.*) That he had not consulted any other medical man except one Dr. Aikins, who examined him while suffering from the cold.

(*e.*) That no material fact bearing upon his physical condition or family history had been omitted in the foregoing questions and the answers thereto.

As to (*a.*) It was contended that two of the brothers of the insured had pulmonary disease as the evidence showed that they had been troubled with spitting of blood, though neither of them was proved to have died from the cause which produced it.

As to (*b*) the evidence showed that the deceased had been injured by being thrown from a load of hay some four years before the insurance for which he had brought an action and received $200 in settlement.

As to (*c*) and (*d*) it appeared that the deceased had at one time consulted Dr. Aikins, of Toronto, who said there was nothing the matter with him, but gave him some medicine.

At the trial the jury were directed to consider whether or not the statements by the deceased were wilfully false, and made to induce the company to grant the policy, or if he was guilty of wilful misrepresentation or concealment, in which case they should find for the defendants; but if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, they should give a verdict for the plaintiffs. A verdict was given for the plaintiffs.

Shortly after the trial the company obtained further evidence, in the shape of declarations made by the

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applicant himself early in the spring of 1884, showing that at that time and for some months previous he was suffering from congestion of the lungs. The declarations were made by the applicant in order to obtain an extension of time within which to perform homestead duties upon certain lands pre-empted by him in Manitoba, and were obtained by the company from the Department of the Interior.

In Michaelmas Term, 1885, the defendants obtained an order *nisi* to set aside the verdict and to enter a verdict for the company or for a new trial, upon the grounds briefly of misdirection and discovery of new evidence.

The motion to make absolute the order *nisi* was argued in the same term, before the Chief Justice Wilson and Mr. Justice Armour, and judgment was delivered in the following Hilary Term. The Chief Justice was of opinion that there should be a new trial, while Mr. Justice Armour was of opinion that the verdict should stand; and the court being divided the order *nisi* was discharged with costs.

An appeal from this judgment to the Court of Appeal was dismissed with costs. The company then appealed to the Supreme Court of Canada.

*S. H. Blake* Q. C. and *Beaty* Q. C. for the appellants.

The company has the right to have true answers to all the questions put. It is no answer to say that this can only apply to material questions, for the insurers have a right to fix the standard of materiality for themselves, and aver that the questions in the application are material by requiring them to be answered.

The courts below have not construed the contract between the insurers and the insured, but have made a new contract by saying that, to avoid the policy, the mis-statements or suppressions must be wilfully and knowingly made. The company can make any con-

tract they see fit, and have a right to insist on its performance.

*Anderson* v. *Fitzgerald* (1) is a leading case on this subject. The judgments of their lordships in that case put forward the principles we are contending for here, and the correctness of which cannot be disputed.

In the case of *Fowkes* v. *Manchester &c. Ass. Ass.* (2), the declaration was very different. The test there was whether or not there was fraudulent concealment, or a designedly untrue statement, those words being used in the declaration signed by the assured, and the court held that the company had made that the basis of the contract.

In the *London Assurance* v. *Mansel* (3) the policy was declared void. In answer to the usual question as to other applications for insurance, the applicant said that he was already insured in two other offices suppressing the fact that he had made application elsewhere and had been refused.

We would refer also to *Canning* v. *Farquhar* (4); *Thomson* v. *Weems* (5); *Huckman* v. *Fernie* (6); *Geach* v. *Ingall* (7); *Phoenix Life Ins. Co.* v. *Raddin*, (8); *Cazenove* v. *British Equitable Ass. Co.* (9).

*Dr. McMichael* Q. C. and *McCarthy* Q. C. for the respondents.

There is a distinction between a suppression and an omission. The former implies an intention to conceal something which the party considers of importance, but a party seeking insurance must be at liberty to exercise a discrimination as to omissions in answering so general a question as that relating to serious injury in this case. If he is bound to state every injury he

(1) 4 H. L. Cas. 484.
(2) 3 B. & S. 917.
(3) 11 Ch. D. 363.
(4) 16 Q. B. D. 727.
(5) 9 App. Cas. 671.
(6) 3 M. & W. 505.
(7) 14 M. & W. 95.
(8) 120 U. S. R. 183.
(9) 6 C. B. N. S. 437.

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has ever received, no doubt the policy is forfeited; but if he can discriminate, it is for the jury to say whether the discrimination was properly exercised or not.

In the case of the *Connecticut Mutual* v. *Moore* (1), the insured had received several severe injuries of which he made no mention in his application, but the policy was not held void.

A new trial is asked on the ground of discovery of new evidence. The evidence in question was known to the defendants before the trial, and they had made efforts to get it, but they did not ask for a postponement of the trial. That a new trial will not be granted in such a case, see *McDermott* v. *Ireson* (2), following *Scott* v. *Scott* (3); *Fawcett* v. *Mothersell* (4); *The Queen* v. *McIlroy* (5); *Murray* v. *Canada Central* (6).

That absence of witnesses is not ground for a new trial, where post-ponement is not asked for, see *Edwards* v. *Dignam* (7); *Turquand* v. *Dawson* (8).

As to the objection that the verdict was against the weight of evidence, see *Metropolitan Ry. Co.* v. *Wright* (9), explaining *Solomon* v. *Bitton* (10).

As to interfering with the discretion of a court below, see *Jones* v. *Tuck* (11); *Bickford* v. *Howard* (12); *Eureka Woolen Mill Co.* v. *Moss*, (13); *Connecticut Mutual Life Insurance Co.* v. *Moore* (14); *Black* v. *Walker* (15); where the authorities are collected in the judgment of Mr. Justice Taschereau.

The injuries and accidents contemplated by the question in the application must be such as would

(1) 6 App. Cas. 644.
(2) 38 U. C. Q. B. 1.
(3) 9 L. T. N. S. 454.
(4) 14 U. C. C. P. 104.
(5) 15 U. C. C. P. 116.
(6) 7 Ont. App. R. 646.
(7) 2 Dowl. 622.
(8) 1 C. M. & R. 709.
(9) 11 App. Cas. 152.
(10) 8 Q. D. B. 176.
(11) 11 Can. S. C. R. 197.
(12) Cassel's Dig. 163.
(13) 11 Can. S. C. R. 91.
(14) 6 App. Cas. 644.
(15) Cassels's Dig. 459.

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tend to shorten the applicant's life. The company do not desire information as to any trifling injury which does not effect the general health of the applicant. The case of *Insurance Co.* v. *Wilkinson* (1) is on all fours with the present case. To a question as to receiving serious injury, &c., in the same words as in the application here, the applicant answered no. On the trial of an action on the policy, evidence was given that the insured had fallen from a tree and received considerable injury. The jury were directed to find whether that fall had caused a permanent injury, or if all the effects of it had passed away, and it was held a proper direction.

Then as to the real point in the case, that of the construction of the contract.

I cannot agree with the proposition that knowledge and recollection are entirely distinct. I cannot be charged with knowledge of something which I may have once known, but have forgotten. *Kelly* v. *Solari*(2).

Ambiguous contracts are to be construed most strongly against the insurance companies. *Notman* v. *Anchor Insurance Co.* (3); *Anderson* v. *Fitzgerald* (4); *Fowkes* v. *Manchester* (5).

STRONG, FOURNIER and HENRY JJ. concurred in the judgment prepared by Mr. Justice Gwynne.

TASCHEREAU J.—I concur, but not without strong doubts as to one point, that is, as to the Scarborough accident, and the names of those doctors who attended Miller for it. That this was considered at the time by Miller to be a serious accident is unquestionable. Mr. Justice Armour says it was a severe accident, but not a serious one. Why not serious? Because three years

(1) 13 Wall. 222.
(2) 9 M. & W. 54.
(3) 4 Jur. N. S. 712.
(4) 4 H. L. Cas. 484.
(5) 3 B. & S. 920.

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later when he applied for this policy he thought he had fully recovered from it. But does it not happen that the consequences of an accident of that nature are felt sometimes in after life, and break out years later, and long after the party thought he had fully recovered from its effects? All the judges in the courts below are of opinion that Miller should have mentioned this accident. That he knew of it when he applied for this policy the jury could not but answer affirmatively if the question had been directly put to them. It is said that the jury have found that though he knew of it yet, to the best of his belief, he did not think it serious. But was the company not entitled to judge of that before issuing the policy? And does the evidence support the finding that this was not a serious accident? Can this be called a trifling ailment, like a tooth ache, a slight cold, that cannot be expected to be remembered or mentioned? Is one who applies for an insurance not bound to remember an accident of this kind?

If it was not for the case of *Moore* v. *The Connecticut Mutual* I would have dissented. And yet, perhaps, in that case, as I gather from the concluding remarks of the judgment, the Privy Council would have granted a new trial if it had been contended for in the courts below.

GWYNNE J.—This is an action upon a policy of insurance upon the life of one George Miller, the application for which, signed by the said George Miller, is made part of the policy. This application contained certain questions put to the applicant by the defendants, and his answers thereto, the truth of which is guaranteed in a clause prepared by the defendants themselves and inserted at the foot of the answers in the following terms:—

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I, the said George Miller, do hereby warrant and guarantee that the answers given to the above questions, (all which questions I hereby declare that I have read or heard read) are true *to the best of my knowledge and belief*, and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and *I further agree that any mis-statements, or suppression of facts, made in the answers to the questions aforesaid*, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application the same shall not be delivered or binding upon the association until the first premium shall be paid to a duly authorized agent of the association during my life and good health. I do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the association.

A policy having been issued upon this application, and the assured having died, this action was brought to recover the amount insured by the policy to which, the defendants pleaded a defence relying upon the alleged untruth of several of the answers to the questions in the application. It is only necessary to refer to a few of these questions and answers.

1st. To a question:—

How many brothers have you had—how many are living—what are their ages—what is the state of their health—how many are dead—and at what age and of what disease did they die?

The applicant answered the last part of the question by saying that:—

A brother had died at 17 years of age, but of what disease he had died he could not say—that he was overgrown.

The alleged breach of warranty relied upon as regards this answer in the defendants statement of defence, is

That his "(the applicant's)" said brother who died at 17 years of age, did, in fact, die of *consumption or some other pulmonary disease as said George Miller well knew and concealed from the defendants.*

2nd. To a question:—

Have you ever been addicted to the excessive or intemperate use of alcoholic or other stimulants—tobacco, opium, chloroform or other narcotics?

The applicant answered

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No.

And 3rd, to a question:—

Are you now affected with any disease, disorder or ailment, or are you aware of any symptoms of any ?

He answered:—

No, except a cold.

In their statement of defence the defendants, by way of alleged breach of warranty contained in the answers to these two questions, say that

The said George Miller was, in fact, when he made said application, suffering from constitutional ailment of the lungs, and had suffered from hemorrhage—was of dissipated habits, and addicted to the immoderate use of intoxicants, *all of which he concealed and caused the medical examiner to conceal from the defendants.*

4th. To a question:

Have you had any serious illness, local disease or personal injury ?

The applicant answered:—

Broken leg in childhood—confined to bed three days from a cold.

By way of a breach of warranty in this answer, the defendants allege

That it was untrue, and that prior to said application for insurance and in or about the spring of 1880, the said George Miller fell from a load of hay and seriously injured himself, for which he sued the corporation of the Township of Scarborough and they paid him several hundred dollars damages.

The defendants conclude their statement of defence with the following averment:—

The mis-statements and suppressions of fact as aforesaid, and the irregular habits and the impaired state of health of the said George Miller, were material to the risk undertaken by the defendants, and were material to be known by the defendants upon the negotiation for the said policy, and by reason of such misstatements and suppressions of facts the said policy was and is and should be declared to be null and void.

The contention of the appellants is, that however qualified the first sentence in the warranty may be by reason of the use of the words:

To the best of my knowledge and belief;

The subsequent words, namely:

And I further agree that any mis-statements, or suppressions of facts made in the answers to the questions aforesaid, &c., &c., shall

render null and void the policy,

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are absolute and have the effect of avoiding the policy if there be anything stated in the answers not absolutely according to the fact however ignorantly and unintentionally such erroneous statement should be made, or if anything should be omitted which ought to have been stated however ignorantly and unintentionally such omission should occur, notwithstanding in fact that the applicant might have believed all his answers to have been strictly true in every particular; the contention being that the qualification, that his answers were true *according to the best of his knowledge and belief*, is not imported into the latter sentence in the warranty. The question is raised as a ground of objection to the learned judge's charge in directing the jury, that if they thought there was anything in the answers which was calculated to mislead the defendants, and induce them to enter into the contract when they otherwise would not have done it, then their verdict should be for the defendants, but that if on the other hand they should think the answers reasonably fair and truthful to the best of the knowledge and belief of the man, their verdict should be for the plaintiffs.

The question before us is really reduced to the fourth of the above questions, for as to the other answers the defendants in their statement of defence allege them to have been wilfully false with intent to deceive the defendants, and there can be no objection successfully taken to a judge's charge which submits the issue to the jury in the manner and form in which it is framed by the defendants themselves. Moreover, there was, in truth, no evidence in support of the positive averments made by the defendants in their statement of defence, upon which averments they rested their contention, as to the absence of truth in the applicant's answers to the 1st, 2nd and 3rd questions above extracted.

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Now as to the answer to the 4th of the above questions. The question relates to matters which are more or less matters of opinion. A person may have been ill several times, indeed few persons grow up to manhood without being ill from several diseases to which childhood and youth are subject, and yet when grown up, be quite unable to say whether his illness, during his suffering under any of those diseases, was *serious*. So he may have received several personal injuries during his passage from childhood to manhood without knowing any of them to have been, and without any of them having, in fact, been *serious*. If the jury in the present case had been asked: Had the applicant as matter of fact received any *serious* personal injury? they should have been told that it would not be every personal injury which would be *serious*, and as regards the particular one pleaded by the defendants as having been received by the applicant, that if its effects had all passed away, leaving behind no trace injurious to health, it was not *serious* within the meaning of that term in the question. That it was not at all serious, the doctor who attended Miller while suffering under it gave most unequivocal testimony; it was, however, contended by the learned counsel for the defendants, that the jury should have been told that the applicant's own evidence in his action against the Township of Scarborough was *conclusive* evidence that the injury was a *serious* one within the meaning of that term in the question. No authority in support of this contention was cited, nor is there any foundation for it in reason, for whatever opinion the sufferer may have formed of the serious nature of the injury at the time it was received, his experience of four years more without suffering from any continuing ill effects, might well have satisfied him that it had not been serious, and that his first im-

pression had been erroneous.

Now upon this point the learned judge, in plain terms, drew the attention of the jury to the statement of the applicant, as made by him four years' before his application for the policy in his action against the Township of Scarborough, and added:—

You have also heard the evidence that was given by Dr. Lapsley as to the nature of the injury. It is true you have heard—and Mr. Blake urged that point very strongly—if a person makes a statement he cannot be surprised if that statement is used against him afterwards to its fullest extent. You have heard all the evidence as regards the injury.

And he directed them to say whether the answers given, in view of such evidence, can be said to be fairly true to the best of the man's knowledge and belief, or was the answer a wilful misrepresentation. The question had, I think, been better put in two questions, namely: 1st. Was the injury referred to in point of fact a *serious* injury in the sense involved in the question, namely, an injury the evil effects of which had not passed away and was injurious to the health of the applicant for insurance? If they should answer this question in the negative it would not be necessary to go further, but if in the affirmative then that they should say:

2nd. Whether the injury was in that sense *serious* to the knowledge and belief of the applicant? If the jury had adopted, as it is most probable they did, the evidence of Dr. Lapsley, who attended the applicant for the injury, they must have answered the first question in the negative. But I am of opinion that the learned judge rightly construed the warranty in holding that the subsequent clause relied upon by the defendants was qualified equally as the preceding one. In so far as personal injury is concerned, the answer in substance is:—

To the best of my knowledge and belief, I have had no serious personal injury other than a broken leg in childhood.

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Now this statement being qualified by the words "to the best of my knowledge and belief" can only be untrue, if the contrary to what is stated be the truth—namely, that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say, and the learned judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction is that the language of the warranty being framed by the defendants themselves the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect of the matters enquired into could have understood that notwithstanding that he should answer the questions put to him truly, according to the utmost of his knowledge and belief, he should nevertheless forfeit his policy if through ignorance the facts as stated by him should not prove to be absolutely true, apart altogether from his knowledge and belief. However, the evidence of Dr. Lapsley warranted the jury in finding, and this, I apprehend, is what they intended to find by their verdict, that in point of fact the injury spoken of and relied upon by the defendants was not a *serious* one whatever might have been Miller's opinion of it at the time he received it. The appeal must therefore, in my opinion, be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for appellants: *Beaty, Hamilton & Cassels.*

Solicitors for respondents: *McMichael, Hoskin and Ogden.*