ANNETTE GAUVREMONT (PLAINTIFF) ..... APPELLANT;

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (DEFENDANT) ..... RESPONDENT.

1940

* Nov. 6, 7.
* Dec. 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance (Life)—Nullity of policy—Written application—Medical "questionnaire"—Answers to questions by assured—Alleged failure to disclose facts as to his true medical history—Whether answers are representations or warranties according to terms of policy—Whether such misrepresentation or concealment of facts by assured is "of a nature to diminish the appreciation of risk."—Arts. 2485, 2487, 2488, 2489, 2490, 2491, 2588 C.C.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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The appellant's husband, holder of an insurance policy issued by the respondent company, died, and, by the terms of his will, the appellant was made universal legatee and as such became entitled to the benefit of the insurance policy. On an action by the appellant claiming the payment thereof, the respondent pleaded that the policy was issued upon the written application of the insured, including a "questionnaire" and a medical examination attached to and forming part of the policy in question; that the statements and answers of the insured in the application and the medical "questionnaire" constituted warranties on the truth and accuracy of which the validity of the contract depended; that the insured failed to disclose to the medical examiner his true medical history, notwithstanding the fact that the questions put to him called for such disclosure; that his answers were untrue, inaccurate and misleading and as such were a cause of nullity of the contract of insurance; that, in any event, the insured, in giving his answers, was guilty of misrepresentation and concealment of a nature to affect the appreciation of the risk by the respondent, and consequently, whether made by him in error or by design, they were a cause of nullity of the contract, and there never was any contract of insurance binding on the respondent. The respondent prayed for a declaration that the policy was null and void and that it had no binding effect.

The General Clauses which were at the back of the policy contained the following clause (translated): "This policy, with the application of which copy is attached, contains and constitutes the integral contract intervened between the parties to the said contract, and all the declarations made by the assured shall, in the absence of fraud, be considered as "déclarations" and not as "affirmations" and no declaration shall annul the policy nor shall serve as a basis of contestation of a claim based on this contract, unless this declaration be contained in the application of the policy and unless a copy of this application be endorsed on the policy or be attached to it at the time of its issue." The trial judge maintained the appellant's action, but that judgment was reversed by the appellate court.

Held, Davis and Hudson JJ. dissenting, that the appeal to this Court should be allowed and the judgment of the trial judge restored. The answers, or statements, made by the assured in his proposal, must, in the absence of fraud (and the trial judge found no fraud), be considered only as representations, and not as warranties. As a copy of the proposal has been attached to the policy and the proposal formed part thereof, these answers and statements may be used by the respondent for the purpose of contesting the claim of the appellant, and they may result in avoiding the policy; but they always remain representations, and they do not become warranties, notwithstanding the fact that a copy thereof has been attached to the policy and that they formed part of the contract. [In other words, by force of the clause above quoted, the parties have agreed to submit their contract purely and simply to the provisions of the Civil Code with regard respectively to warranties and representations.] Upon the evidence, and applying these provisions of the law of Quebec, the alleged misrepresentations by the assured, invoked by the respondent company, and specially the alleged failure by the assured to disclose the facts that he had consulted doctors and had gone to a sanatorium, are not shown to have had any influence upon

the respondent company in its appreciation of the risk; and it is also impossible on a fair consideration of the evidence to come to the conclusion that disclosure of the matters concealed or misrepresented would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. *Mutual Life Insurance Company* v. *Ontario Products Company* ([1925] A.C. 344) foll. As to the clause of the policy quoted in the head-note, the word "déclarations," used therein four times, must of necessity, except on the first occasion, be understood to mean "représentations"; while the word "affirmations," in that same clause, must be given the meaning of warranties.

Per Davis and Hudson JJ. (dissenting)—Even assuming, without deciding the point, that the answers to the questions were, by virtue of certain language in the policy, representations and not warranties, there is sufficient evidence to conclude that, if these facts as they existed had been disclosed by the insured, special mention of the facts would have been made to the respondent company by any medical examiner and a more careful and serious examination would have been ordered by the company. Such concealment of the facts was "of a nature to diminish the appreciation of the risk," and therefore "is a cause of nullity," according to the provisions of article 2487 C.C.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Langlois J., and dismissing the appellant's action based on a policy of insurance issued by the respondent company upon the life of the appellant's deceased husband, for an amount of $5,000.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Antoine Rivard K.C. and *Jules Savard* for the appellant.

J. P. A. Gravelle K.C. for the respondent.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—The appellant's husband, the late Clifford Huot, holder of an insurance policy issued by the respondent, died in Quebec on January 20th, 1938.

By the terms of his will, the appellant was made universal legatee of her late husband, and as such became entitled to the benefit of the insurance policy. She claimed the payment thereof from the respondent, which pleaded that the policy was issued upon the written application of the insured, including a "questionnaire" and a medical examination attached to and forming part of the policy

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in question; that the statements and answers of the insured in the application and the medical "questionnaire" constituted warranties on the truth and accuracy of which the validity of the contract depended; that the insured failed to disclose to the medical examiner his true medical history, notwithstanding the fact that the questions put to him called for such disclosure; that his answers were untrue, inaccurate and misleading and as such were a cause of nullity of the contract of insurance; that, in any event, the insured, in giving his answers, was guilty of misrepresentation and concealment of a nature to affect the appreciation of the risk by the respondent, and consequently, whether made by him in error or by design, they were a cause of nullity of the contract, and there never was any contract of insurance binding on the respondent. The respondent tendered with its plea the amount of $73.55, representing the premium paid in respect of the policy and, by its conclusions, prayed for a declaration that the policy was null and void, that it had no binding effect and that the appellant's action be dismissed.

The trial judge maintained the action and condemned the respondent to pay to the appellant the sum of five thousand dollars ($5,000), being the amount of the policy; but the Court of King's Bench reversed that judgment by a majority of four judges to one and dismissed the action with costs.

The decision in this Court, as it did in the other courts, turns upon the effect to be given to certain answers contained in the "questionnaire" put to Mr. Huot, when he made his application to the insurance company.

The questions and the answers thereto were as follows:

6. A. Avez-vous jamais eu une maladie sérieuse? Non.

B. Recu une blessure grave? Non.

C. Eu une opération chirurgicale? Non.

D. Avez-vous jamais été dans un hôpital, sanatorium ou autre institution pour observation, diagnose, repos ou traitement? Non.

* * *

9. Avez-vous consulté ou été soigné par un médecin au cours des trois dernières années? Indiquez date, maladies, nom et adresse des médecins? Pour aucune.

* * *

10. A. Avez-vous jamais souffert de:

Asthme, toux habituelle, pleurésie, crachements de sang, ou tuberculose des poumons, ou de toute autre partie du corps? Non.

Vertigo, épilepsie, folie, évanouissement, paralysie, névralgie, maux de tête fréquents ou sévères? Non.

Dyspepsie, ulcère gastrique, ou duodénaux, calcul biliaire, ou colique, appendicite, diarrhée (chronique), maladie de l'anus ou du rectum, ou fistule? Non.

Hernie? Non.

Cancer ou tumeur? Non.

Maladie des reins, de la vessie ou prostate, colique rénale, ou calcul? Non.

Palpitation du cœur, essoufflement, douleur dans la poitrine ou maladie de cœur? Non.

Ecoulements d'oreilles? Non.

Goître? Non.

Ulcère sur une partie quelconque du corps? Non.

Rétrécissement? Non.

Syphilis? Non.

10. B. Les réponses intégrales aux questions 6, 7, 9 et 10A avec détails donnés à l'espace ci-dessous constituent-elles un relevé complet de toutes vos maladies, opérations chirurgicales et de tous vos séjours dans les hôpitaux, sanatoriums ou autre institutions? Oui.

Those are the answers which the respondent contends were untrue, inaccurate and misleading. In this it was sustained by the majority of the Court of King's Bench.

The evidence at the trial showed that Mr. Huot died "à la suite d'une hépatite aiguë."

The policy was issued on August 2nd, 1937. The death took place on January 20th, 1938.

The application was made on July 23rd, 1937.

The trial judge made a very careful analysis of the medical evidence adduced before him. He began by stating that the insured consulted Dr. Courchesne in 1932 and 1933 and, subsequently, in 1936 and 1937. In 1932, the assured consulted him "sur une question de vertige". The doctor advised and caused to be made an X-ray examination. He found "aucune lésion fonctionnelle". He simply ordered "quelques digestifs". In 1936, upon the recurrence of the stomach trouble he advised the assured to consult a specialist; and Mr. Huot then saw Dr. Langlois of Montreal.

Dr. Langlois is a neurologist in charge of the neurology department of Notre-Dame Hospital and of a private sanatorium. He says that Mr. Huot complained of dizzy spells, with a special character of the spells, with propulsion forward, with "bourdonnements d'oreilles". The doctor made a thorough examination in his office on January 16th, 1937. As he was of the opinion that it was a case

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of "vertige de Menière", he asked the patient to come to his sanatorium for a more complete examination, for a day or so. Mr. Huot went to the sanatorium on the 18th and stayed there for twenty-four hours. As a result, the doctor convinced himself that Mr. Huot was suffering of "vertige de Menière"; but he did not treat him at the sanatorium. He gave him a special diet to follow and certain pills ("pastilles") to take. He states that

from the beginning of the treatment, Mr. Huot never suffered again from any attack of "vertige";

and this is confirmed by Dr. Courchesne:

Aussitôt qu'il a suivi le régime, les indications du docteur Langlois, il s'est aussitôt amélioré et guéri; en 1937, il n'a jamais souffert de vertige de Menière.

Mr. Huot again saw Dr. Langlois on March 6th, May 14th and October 19th, 1937. He did not come to Montreal for the special purpose of seeing Dr. Langlois. His business brought him to Montreal and, on those occasions, he took the opportunity of seeing the doctor.

At the outset, Dr. Langlois had advised Huot not to drive his car, because, as he explained, if Huot had a sudden attack of dizziness or "vertige," it might lead to accidents. But afterwards the doctor gave Huot permission to drive his car, "because he had no more spells of dizziness." That was on the occasion when he saw him on March 6th, 1937. Further, on that occasion, the doctor advised Huot to continue the diet but to cease taking the "pastilles," because the "vertige" or "étourdissements" had ceased. When Dr. Langlois saw Huot on May 14th, he considered him as cured of his "vertige."

As to the nature of this "vertige de Menière," the specialist himself, Dr. Langlois, says that it is

une maladie banale du système nerveux localisée * * * pas dangereuse au point de vue organique * * * due à une petite lésion de son oreille.

He considered it as a "chose banale," and he was not of the opinion that any recurrence of it was possible.

Dr. Alphonse Giguère, also heard on behalf of the appellant, medical examiner for several insurance companies (Northern Life, Excelsior, Confederation Life, L'Union St-Joseph), describes the "vertige de Menière" as

un groupe de syndrômes, surtout du côté du système nerveux, qui se manifestent par des vertiges, étourdissements, quelquefois aussi par des

vomissements. C'est une maladie qui siège ordinairement dans l'oreille interne, au niveau des canaux qu'on appelle semi-circulaires, qui voient à l'équilibre de l'individu * * * Plusieurs causes peuvent produire le vertige de Menière, notamment les troubles digestifs, infection de l'oreille, corps étrangers dans l'oreille, intoxication; comme, par exemple, certains médicaments peuvent produire cela.

Ce n'est pas une maladie à proprement parler, c'est un groupement de syndrômes, lorsque des causes d'intoxication se produisent; lorsque les causes disparaissent, ordinairement le malade guérit; excepté s'il y a eu lésion de l'oreille interne, infection des tissus osseux, le vertige de Menière est supposé réapparaître par périodes à mesure que l'infection se manifeste, enfin par recrudescence.

* * *

Avec un régime déconstipant, tout entre dans l'ordre.

Dr. James Stevenson, heard on behalf of the respondent, describes the " vertige de Menière " as

a disease of the nervous system * * * having to do with the mechanism of the internal ear and the balancing centres of the brain. True Menière's disease symptoms are dizziness or vertige and disturbance of the balancing centres in the nervous system, and usually noises in the ear and in the brain as well * * * It is a symptom rather than a disease.

As for Dr. Armand Rioux, the physician who proceeded to the medical examination attached to the application for the insurance policy, he says:

ce vertige de Menière, c'est un vertige qui donne des troubles, évidemment d'instabilité, et qui est souvent en rapport avec des troubles d'oreille * * * Il est d'origine digestive surtout.

A little later, in his deposition, he adds:

C'est une maladie nerveuse en rapport avec des troubles d'estomac, mauvaise digestion, trouble digestif * * * Si la digestion s'améliore, évidemment la conséquence qui est le vertige, peut s'améliorer également. * * * Il peut guérir sûrement.

Dr. Rioux says that if he had known that Mr. Huot had already suffered of " vertige de Menière,"

J'aurais simplement conseillé à la Compagnie de lui faire faire certains examens spéciaux pour préciser la question.

If he had discovered it, he would have made a mention of it in his medical report, and this would have led to " un examen plus précis du tube digestif."

The above is substantially the evidence of the medical practitioners on the nature of the " vertige de Menière," and the extent to which Mr. Huot was affected by it in the years preceding his application for the policy.

Turning now to that application, it contains a certain number of questions addressed to the applicant in connec-

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tion with his name, his occupation, the nature of his work and other matters which it is not necessary to state in detail, since they are not made a subject of complaint by the respondent. Then comes the following declaration made by Mr. Huot:

> Je déclare par la présente que toutes les déclarations et réponses faites aux questions ci-dessus sont complètes et vraies, que je consens que ce qui précède ainsi que cette déclaration et les déclarations faites ou à faire au médecin examinateur de la compagnie * * * ou dans mes déclarations au lieu d'examen médical, forment l'ensemble de la proposition et fassent partie du contrat d'assurance proposé par la présente.

That is followed by a report from the agent of the company, and then by the answers made to the medical examiner, of which it is stated that they form part of the proposal for the insurance made to the respondent on the life of Mr. Huot.

I have already stated the answers which, in that part of the application, are alleged by the respondent to have been erroneous, untrue and misleading. There follows afterwards a confidential report from the medical examiner; and this completes the several documents comprised in the proposal.

The policy proper begins by stating:

> En considération de la proposition qui lui a été faite de cette Police, Proposition qui, par la présente, est constituée partie intégrante de ce contrat et dont copie est ci-jointe, * * * etc.

Then comes the respective obligations of the insured and of the insurer, followed by "Dispositions générales," among which is the following clause, on which the respondent laid special stress:

> Contrat Intégralement Contenu Dans Cette Police—Cette Police, avec la Proposition dont copie est ci-jointe, contient et constitue le contrat intégral passé entre les parties dudit contrat, et toutes les déclarations faites par l'Assuré seront, en l'absence de fraude, considérées comme des déclarations et non comme des affirmations, et aucune déclaration n'annulera la Police, ni ne sera employée pour contester une réclamation basée sur ce contrat, à moins que cette déclaration ne soit contenue dans la Proposition de la Police, et qu'une copie de cette Proposition ne soit endossée sur la Police ou n'y soit jointe lors de son émission.

The remainder of the policy, which is rather a bulky document, need not be referred to, as the parties do not rely on any of its provisions.

With regard to the clause just quoted, however, some observations might be made as to its wording. It must be noticed that the word "déclarations" is there used

four times; and it seems to be clear from the context that when it is first used, it has not the same meaning as on the three other occasions. The first word "déclarations" is evidently used to refer generally to the answers or statements made by the insured in the "questionnaire" put to him, either by the agent or by the medical examiner, while on the three other occasions, it is intended to have the meaning of "représentations"; and, in fact, such is the word used and the meaning given to it in articles 2485 and 2489 of the Civil Code.

On the other hand, the word "affirmations," in that same clause, must of necessity be given the meaning of warranties. That follows necessarily from the distinction therein made between the "déclarations" and the "affirmations." In the clause, the "déclarations" are opposed to the "affirmations" in the same way as in the Code the representations are opposed to the warranties and the former are distinguished from the latter. Unless these words are understood as we have just stated, the clause does not make sense.

The analysis of the policy, including the several documents forming part of the proposal, therefore, shows that the proposal forms an integral part of the contract; and, moreover, it should be stated that it was attached to the policy in accordance with the requirements of sec. 214 of ch. 243 of the Revised Statutes of Quebec (1925), being the *Insurance Act* of Quebec.

Further, the answers, or statements, made by the assured in his proposal, must, in the absence of fraud, be considered only as representations, and not as warranties. As a copy of the proposal has been attached to the policy and the proposal forms part thereof, these answers and statements may be used by the respondent for the purpose of contesting the claim of the appellant, and they may result in avoiding the policy; but they always remain representations, and they do not become warranties notwithstanding the fact that a copy thereof has been attached to the policy and that they form part of the contract. In other words, by force of the clause above quoted, the parties have agreed to submit their contract purely and simply to the provisions of the Civil Code with regard respectively to warranties and representations.

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The material provisions of the Code which are pertinent in the premises are the following:

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 affect the rate of premium.

2487. Misrepresentations 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 cause 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 misrepresentation 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.

2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.

2490. Warranties and conditions are a part of the contract and must be true if affirmative and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.

Implied warranties will be designated in the following chapters relating to different kinds of 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 the 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 all infirmity or disorder.

As a result of the special agreement between the parties as contained in the clause of the policy already mentioned, the answers and statements of the assured are to be taken as representations, and not as warranties; and, incidentally, it would appear, with due respect, that the majority of the Court of King's Bench misdirected itself by regarding these answers and statements as warranties, for the sole reason that they were attached to the policy and formed part of the contract. On the contrary, the express stipulation was that these answers and statements, in the absence of fraud, were to be considered merely as representations, and not as warranties. As we have already stated, the reference in the clause to the condition that these answers or statements be contained in the application and that copy thereof be attached to the policy does not transform the representations into warranties. Its only effect is that, in such a case, they may be made use of by the respondent to con-

test the claim, as a result of which they may avoid the contract. But they remain representations and they do not become warranties.

The only declarations made by the insured in this case which may possibly be styled warranties are those with regard to age and with regard to "condition of health of the person." This would follow not from the policy itself, but from art. 2588 of the Civil Code. However, that article expressly enacts that, in the 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 all infirmity or disorder. No help can come to the respondent from the application of this provision of the law. The declarations made by the insured in respect of his age and of his health, on the date of the application, were proven to have been true. The evidence is clear that, on that date, his health was good and that he had no reason to suspect any impairment thereof. The medical examination, according to Dr. Rioux himself,

> indiquait qu'il était en excellente santé. Pression artérielle bonne. Bon sujet d'après l'examen du cœur * * * Poumons bons * * *

This, of course, bears out the statement of Dr. Courchesne that, as soon as Huot followed the régime prescribed by Dr. Langlois, "il a guéri"; and that he had no troubles in 1937. This is in accordance with what Dr. Langlois himself said that he found Huot in very good health, when he saw him on May 14th. He was then cured; he had no longer any "vertiges." And the medical evidence concurs with the testimony of the plaintiff, Huot's wife, that her husband was in good health, that he suffered no longer of his dizzy spells after the diet prescribed by Dr. Langlois, and that during the summer of 1937, "il n'avait plus rien du tout."

Huot was the manager of the Roofers' Supply Company; and it was stated that during the year 1937 "il n'a jamais perdu une heure; il ne connaissait pas beaucoup les médecins."

So that the respondent does not get any help from the application of art. 2588 of the Civil Code in respect of any warranty with regard to the correctness of Huot's declarations in the policy about his age and about the condition of his health when he made his application.

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The other answers or statements which he made, in the questionnaire forming part of the application, by the very terms of the policy itself, as we have seen, are not, in the absence of fraud, to be considered as warranties, but merely as representations.

That there was no fraud on the part of Mr. Huot, when he gave his answers to the questions put to him by the medical examiner, can hardly be disputed. The burden of proving fraud was, of course, upon the respondent. Far from having succeeded in that respect, the evidence is clearly to the contrary. The trial judge so held; and while that finding, not being based on credibility, is open to review, I have no hesitation in concurring in it.

The death did not result from the "vertige de Menière." That is abundantly established by the medical evidence; death had no connection with that "vertige." But, even "although the loss has not in any degree arisen from the fact misrepresented or concealed," the contract may nevertheless be annulled if the misrepresentation or concealment was "of a fact of a nature to diminish the appreciation of the risk or change the object of it" (C.C. 2487).

The misrepresentations invoked by the respondent are to be found in the answers 6 (*d*), 9 (*a*), 10 (*a*) and 10 (*b*) of the medical questionnaire.

Question 10 (*b*) may be discarded for the purpose of the present discussion. It only emphasizes, if that was necessary, the answers to questions 6 (*d*), 9 (*a*) and 10 (*a*). It states that the answers given to those questions constitute

> un relevé complet de toutes vos maladies, opérations chirurgicales et de tous vos séjours dans les hôpitaux, sanatoriums ou autres institutions.

It does not add any new facts to the questions and answers already made.

The untruthfulness in the answer to question 6 (*d*) is found in the fact that Mr. Huot was there asked whether he had ever been in a sanatorium, and he answered No, while, as we have seen, he spent twenty-four hours in the private sanatorium of Dr. Langlois in January, 1937.

Question 6 (*d*) is the fourth of a series of questions inquiring from the applicant if he has suffered (*a*) of a "maladie sérieuse," (*b*) of a "blessure grave," and (*c*) if he has undergone an "opération chirurgicale." The ques-

tion, as put, being only a subdivision of question 6, may well be understood to mean that the applicant was asked whether he has ever been in a hospital, a sanatorium, or another institution, for observation, diagnosis, rest or treatment, in connection with a "maladie sérieuse," a "blessure grave" or an "opération chirurgicale." That is, as we understand it, the interpretation put upon question 6 (*d*) both by the trial judge and by Mr. Justice Létourneau, the dissenting judge in the Court of King's Bench. To my mind, that interpretation is the more plausible. The least that can be said is that the question was susceptible of being understood in that way; and, as a result, that is sufficient to establish that the answer to it may not be pronounced untruthful by a court of justice.

But if it should be interpreted as being disconnected from the first three sub-questions, as forming a question by itself, then it must be admitted that, when Mr. Huot answered "No" to question 6 (*d*), he was not correct, since he had been for twenty-four hours in Dr. Langlois' sanatorium for the purpose of observation.

Then also, although to a lesser degree, the same thing may be said of question 9 (*a*) and of the answer to it. It may well be understood by an applicant to whom the question is put as part of the "questionnaire" that, when he is asked whether he has consulted a doctor or been treated by a doctor during the last three years, and to indicate the date, the sickness, the name and the address of his doctors, the inquiry is in respect of a "maladie sérieuse," a "blessure grave," or an "opération chirurgicale" about which the previous questions were concerned. Under such circumstances, the answer made by Huot to question 9 (*a*): "Pour aucune," should be found to have been true.

If, however, in the same way as for question 6 (*d*), the answer should be more meticulously scrutinized, one would have to say that it was not strictly true that Huot had neither consulted a doctor, nor been treated by a doctor during the three years preceding his application. The application was made on July 23rd, 1937, and since July, 1934, he had consulted, or, at least, he had seen Dr. Courchesne in 1936, and he had consulted Dr. Langlois on January 16th and March 6th and on May 14th, 1937.

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Then, if we turn to question 10 (*a*), it inquires whether the applicant has ever suffered of a number of ailments or sicknesses, which are there enumerated, and in each case the answer is "No." But there is the fact that, as admitted by himself, the medical examiner never put that question to Huot. The examiner says that he read all the questions to the latter,

> excepté celles qui regardent le numéro 10 (*a*), où je simplifie en demandant simplement: Avez-vous consulté un médecin depuis trois ans et avez-vous souffert de quelque maladie quelconque? Il n'y a aucune maladie en cours?
>
> * * *
>
> Je lui demande s'il a souffert de quelque maladie quelconque et consulté un médecin depuis trois ans?

That is not the question as put in the "questionnaire"; and that is not the question which forms part of the application. As a result, it was never, in that form, attached to the policy and it does not, as such, form part of the contract between the parties. It is not necessary to decide whether, in such a case, although the real question which was put must be disregarded, yet the question as it appears in 10 (*a*) should still be considered as forming part of the application, because Huot signed the "questionnaire" after it had been filled. Of course, the respondent contends that, on the strength of such cases as *Biggar* v. *Rock Life Assurance Company* (1); *New York Life Insurance Company* v. *Fletcher* (2); *Newsholme* v. *Road Transport & General Insurance Company* (3); and *Dawsons* v. *Bonnin* (4), Mr. Huot must be held to the answer written down after question 10 (*a*) as it appears in the "questionnaire," because he signed the "questionnaire," and notwithstanding that the medical examiner himself states positively that he never put that question and that he put an altogether different question.

In the *Biggar* case (1), in the *New York Life Insurance case* (2) and in the *Newsholme* case (3), the question had been put, but the answer was falsely written down by the agent who was filling the "questionnaire" form. It was there held that notwithstanding that the falsity of the answer was due to the agent and not to the applicant, because the latter had signed the "questionnaire," and that

(1) [1902] 1 K.B.D. 516.
(2) (1886) 117 U.S. Rep. 519.
(3) [1929] 2 K.B.D. 356.
(4) [1922] 2 A.C. 413.

he should have read it as filled in by the agent before he signed it, he could not be relieved of the effect of his signature; and that, therefore, he was bound by the answer as it had been written down.

In the *Dawsons* case (1), decided by the House of Lords, the inaccurate answer had been made by inadvertance; but it was found that, apart from materiality, the answer was a condition of the liability of the insurers, and the policy was void.

I see a great difference between those cases and the present case, where admittedly question 10 (*a*) was never put to the applicant; another question was put instead; and the applicant thus being put under a wrong impression by the medical examiner, and while being under that impression, although he was imprudent perhaps in signing the "questionnaire" without reading it, yet, having faith in the medical examiner, he signed the "questionnaire" as it had been filled in by the latter. In my view, the present case may well be distinguished from the four cases relied on by the respondent.

As I have said, however, I do not find it necessary to discuss that point here, because, even assuming that the question as it appears in 10 (*a*) had been put to the applicant, his answer to it, to my mind, ought not to be allowed to affect the validity of the contract, in the circumstances.

That question has already been reproduced at the beginning of the present judgment. It will be noticed that, although it contains a very long enumeration of several distinct ailments or sicknesses, it does not include "vertige de Menière." The nearest approach to it is the word "vertigo." The respondent cannot ask the courts to take judicial notice of the fact that "vertigo" may be the same as "vertige de Menière." It may be that it is, although no evidence at the trial was specially directed to establish that fact. But what is sure is that the medical examiner never explained to Mr. Huot that, in medical phraseology, "vertigo" may be regarded as the equivalent of "vertige de Menière." It is impossible on the record to hold that they are one and the same trouble; and Mr. Huot, when he answered "No," even if the question had been put to him as appeared in 10 (*a*), would have been per-

(1) [1922] 2 A.C. 413.

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fectly justified to believe that "vertigo" was not the same as "vertige de Menière"; and that he was well warranted in answering that he never suffered of "vertigo."

It follows that question 10 (*a*) cannot enter into any consideration as to whether the representations made by Mr. Huot in giving, to the questions invoked by the respondent, the answers he gave, was guilty of concealment of a nature to diminish the appreciation of the risk or change the object of it.

We are left, therefore, with the misrepresentation in the answers given to questions 6 (*d*) and 9 (*a*), such misrepresentation consisting in the fact that Mr. Huot did not disclose that he had consulted or seen Dr. Courchesne in the year 1936, and that he had consulted Dr. Langlois in January, 1937, having gone to the latter's private sanatorium for observation for a period of twenty-four hours.

Assuming, merely for the purpose of meeting the argument of the respondent and not forgetting what has already been said that these two questions may well be interpreted, as they have been by the trial judge and Mr. Justice Létourneau, as having to do only with a "maladie sérieuse," a "blessure grave," or an "opération chirurgicale," it is impossible, on the evidence, to come to the conclusion that the mere disclosure of that fact by Mr. Huot would have made the slightest difference in the appreciation of the risk by the respondent and that, if the respondent had known such a fact, it would either have prevented from undertaking the risk or it would have affected the rate of premium.

Dr. Rioux, who made the medical examination for the application, states in his evidence that if he had known that Mr. Huot had already suffered of "vertige de Menière,"

j'aurais simplement conseillé à la compagnie de lui faire faire certains examens spéciaux pour préciser la question.

He adds that if he had discovered it, he would have mentioned it in his medical report. He does not, however, go the length of saying that it would have affected the risk:

Tout aurait dépendu du rapport sur l'examen spécial—un examen plus précis du tube digestif.

But he says that, although a note of it must be made in the medical report:

Il n'y a pas de raison spéciale de refuser celui qui en aurait déjà souffert;

and that, upon finding that he was cured, he would have accepted the risk. The evidence, both from Dr. Courchesne and from Dr. Langlois, is that when Mr. Huot made his application he was cured.

Dr. Courchesne, who was heard on behalf of the respondent, states that the mere fact that Mr. Huot had, at one time, suffered of "vertige de Menière" was no reason to refuse his application and that, for himself, as soon as Huot was cured, he would have accepted the risk. He says it was the usual practice to mention the "vertige de Menière" in medical examinations, so that the examination may be complete, but that, so far as he was concerned, as he knew that Mr. Huot was cured, he would have accepted him.

Dr. Stevenson says that he would not consider as a "first class risk" a man who had suffered from "vertige de Menière," although he adds that "a good deal depends upon what the applicant was applying for." He states that "vertige of any nature is a symptom rather than a disease," but that it is a symptom of sufficient importance to be mentioned, because vertige would affect the risk in other ways. As an instance of what he had in mind when making that statement, he refers to his practical experience of

> a man who suffered from vertige and during an attack of vertige fell off a train or ran his automobile into an obstruction.

What he means, therefore, is that it may be a cause of accident and

> it adds to the natural hazard of death to which healthy persons are exposed.

Those are the very words of Dr. Stevenson; and it would follow that his views have no particular reference to Mr. Huot and that he would hold to them even with regard to a healthy person who might occasionally be subject to vertige.

Dr. Stevenson's statement, however, is merely that of a physician who came to give expert evidence on a medical question. Dr. Courchesne had had the advantage of seeing Mr. Huot in person; and, of course, the evidence most to be relied on, in view of the closer relation which he had with Mr. Huot, is that of Dr. Langlois. The latter says that Mr. Huot "souffrait de troubles nerveux d'aucune

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gravité" and that, when he saw him again in May, 1937, he was cured. After having had him under observation at his sanatorium for twenty-four hours, he did not treat him in any special way, but merely prescribed a diet and gave him some pills. He had, however, for the same reason as mentioned by Dr. Stevenson, advised him not to drive his car. In that connection, he says that, if called upon to make a medical examination for an insurance application, he would mention "vertige de Menière," not because he considers it a serious disease, but because of the possibility of an accident on the street. He calls it, "Une maladie banale * * * pas dangereuse au point de vue organique." In May, 1937, all vertige had disappeared. He found Mr. Huot "très bien et guéri." He permitted him again to drive his car, and he adds that, upon the condition and the state of health found in May, he would have recommended the risk to an insurance company. He then said to Mr. Huot: "Je crois que vous n'en aurez plus jamais"; and adds that Huot was certainly put by him under the impression that the ailment was not serious, and left him "rassuré."

Can it be said that, under the circumstances, even if it had been mentioned in the medical report that Mr. Huot had at one time suffered from "vertige de Menière," this would have influenced a reasonable insurer to have refused the risk or to have stipulated for a higher premium?

It ought to be pointed out that none of the officers, agents or representatives of the respondent has ventured to offer evidence to that effect in the present case. The Court is left to decide for itself and to surmise what might have taken place if the exact and precise fact had been disclosed, even if we assume that the question for that purpose had properly been put to the applicant.

The answer must be that upon the information given by the doctors who were heard at the trial and which is the only one upon which the Court is asked to pronounce, the conclusion reached by the trial judge and by Mr. Justice Létourneau in the Court of King's Bench is the right one and that the so-called misrepresentations could not possibly have had any effect on the assumption of the risk by the respondent.

That conclusion, as a matter of fact, follows almost forcibly from the evidence of Dr. Giguère, the medical

examiner for the four insurance companies already mentioned at the beginning of this judgment. He says that, in his experience, "vertige de Menière," which is not a maladie but a "groupement de syndrômes," gradually disappears, after which a man who has had it is nevertheless considered as a first class risk. He does say that it is customary to mention it in the medical report; but he shows the unimportance of a mention of that kind by stating that, even if a man has suffered from toothache ("affection de dents"), the medical examiner is supposed to make a note of it in his report. In a case of "vertige de Menière" having already existed, he says that a new special examination might be asked by the insurance company; but he has no doubt that, in the present case, this new examination would have shown that Mr. Huot was cured and that he would have been accepted.

Comme dans le cas qui nous intéresse, voici un malade qui a eu tous ses examens, sa pression artérielle est normale, son sang est normal aussi; il n'y a pas de raison de ne pas le passer.

This case is in the same category as *Fidelity & Casualty Ins. Co.* v. *Mitchell* (1); and more particularly *Mutual Life Insurance Company* v. *Ontario Products Company* (2), where the Privy Council, confirming this Court, dismissed the appeal of the insurance company and found that the so-called misrepresentations would not have influenced a reasonable insurer to refuse the risk or demand a higher premium, and accordingly held the policy valid and compelled the insurance company to abide by its contract.

My conclusion, therefore, is that the appeal should be allowed and the judgment at the trial should be restored with costs throughout.

DAVIS J. (dissenting)—This appeal arises out of an action by the appellant to recover upon a policy of insurance issued by the respondent company upon the life of her deceased husband (hereinafter for convenience called "the insured").

The policy was dated August 2nd, 1937, and the insured died within six months, on January 28th, 1938. The policy was not only what is called a life policy, for the sum of $5,000, but contained special benefits in the event of disability.

(1) [1917] A.C. 592. (2) [1925] A.C. 344.

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The defence to the action is based upon certain answers made to questions put to the insured by the medical examiner; the questions and answers are not only attached to the policy but are stated in the policy to form a part of the contract.

There is little if any conflict of evidence on the facts. In 1932 the insured, who resided in Quebec City, had consulted his own local physician, Dr. Courchesne, and again in 1933, as to spells of dizziness from which he had been suffering—a feeling of falling forward and buzzing in the ears. Upon the recurrence of the trouble in 1936 the insured again consulted Dr. Courchesne, who advised him to consult a named specialist in Montreal, Dr. Langlois. Dr. Langlois is a neurologist in charge of the neurological department of the Notre Dame Hospital and has a private sanatorium. The insured consulted Dr. Langlois in his office on January 16th, 1937. Dr. Langlois was of the opinion that it was a case of "vertige de Menière," and advised the insured to go into his sanatorium for a more complete examination. The insured did so on January 18th, 1937, and remained in the sanatorium for observation for twenty-four hours. Dr. Langlois was then convinced that the insured was suffering from "vertige de Menière"; he gave the patient a special diet to follow and certain medicine to take. The insured again consulted Dr. Langlois in Montreal on March 6th, May 14th and October 19th, 1937.

On July 23rd, 1937, the insured made application to the respondent company for the policy in question; $5,000 life insurance and certain benefits in the event of disability. The policy in question was issued August 2nd, 1937. At the time of his medical examination on the said July 23rd, 1937, certain written questions were submitted to the insured to which he gave written answers and these questions and answers were, as I have said, made a part of the policy.

The insured as applicant for the policy was amongst other questions asked if he ever had a serious illness (une maladie sérieuse), to which he answered, No, and specifically if he had had "vertigo," to which his answer was No. He was asked further if he had consulted a doctor during the past three years, and he answered, No. He was asked if he had ever been in a sanatorium for observation and he answered, No.

The insurance contract was made in the province of Quebec. I shall assume, without deciding the point, that the answers to the questions were, by virtue of certain language in the policy, representations and not warranties. Article 2487 of the Civil Code provides:

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 cause 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.

The evidence satisfies me that if the facts as they existed had been disclosed by the insured, special mention of the facts would have been made to the company by any medical examiner and a more careful and serious examination would have been ordered by the company. The concealment of the facts was in my opinion "of a nature" to diminish the appreciation of the risk. Dr. Langlois forbade the insured to drive his motor car though later on, in his visit in May or possibly in October, 1937 (the exact date is not clearly fixed), he was allowed again to use his car. In this connection it is important to observe that the policy applied for carried disability benefits. *Mutual Life Insurance Company* v. *Ontario Products Company* (1), relied upon by the appellant, was decided upon its own facts. I cannot hold that the appellant is entitled to recover on the policy. That was the conclusion of the majority of the Court of King's Bench (appeal side) of the province of Quebec—Sir Mathias Tellier, C.J., Bernier, Hall and Galipeault JJ. (Létourneau J. dissenting) and I should therefore dismiss the appeal with costs.

KERWIN J.—The facts in the present case are set out in the judgment of Mr. Justice Rinfret and need not be repeated. I am clearly of opinion that the answers to questions 6D, 9A, 10A and 10B in the medical questionnaire are representations and not warranties or conditions under article 2490 of the Quebec Civil Code. The policy is not in the same form as that which was in question in *Dawsons* v. *Bonnin* (2). In the present case, the following clause appears under the heading "Dispositions Générales":—

Contrat intégralement contenu dans cette police.—Cette Police, avec la Proposition, dont copie est ci-jointe, contient et constitue le contrat

(1) [1925] A.C. 344. (2) [1922] 2 A.C. 413.

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intégral passé entre les parties dudit contrat, et toutes les déclarations faites par l'Assuré seront, en l'absence de fraude, considérées comme des déclarations et non comme des affirmations, et aucune déclaration n'annulera la Police ni ne sera employée pour contester une réclamation basée sur ce contrat à moins que cette déclaration ne soit contenue dans la Proposition de la Police et qu'une copie de cette Proposition ne soit endossée sur la Police ou n'y soit jointe lors de son émission.

Kerwin J.

I agree with what my brother Rinfret has said with reference to this clause.

As to the answers to the various questions mentioned above, that given to 10B may be disregarded as it is merely a general clause adding nothing to the effect of the answers to the others. The answer to 6D was clearly inaccurate and I can read the answer to 9A in no way that would render it correct. According to the evidence detailed in the judgment of my brother Rinfret, the answer to 10A, wherein Vertigo is mentioned but not Vertige de Menière, is correct as Huot never suffered from vertigo and we are not entitled to assume that the two mean the same thing. I desire to make it clear, however, that I am assuming and not deciding that the appellant is bound by Huot's answer to question 10A even though it was not read or explained to him by the medical examiner.

The answers to 6D and 9A being inaccurate, the question is whether article 2487 of the Civil Code applies. That article reads as follows:

> 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 cause 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.

It is beside the point that Huot did not die either from vertigo or vertige de Menière; but were the inaccuracies of a nature to diminish the appreciation of the risk or change the object of it? The criterion, I apprehend, that is to be followed is the same as that set forth by the Privy Council in *Mutual Life Insurance Company* v. *Ontario Metal Products Company* (1), i.e., whether if the matters concealed or misrepresented had been truly disclosed they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. There is no evi-

(1) [1925] A.C. 344.

dence in the present case that the Company would have done either of these things nor is there anything in the record from which either may be presumed.

Fraud, of course, would prevent the appellant succeeding. The trial judge found no fraud. This conclusion not being based upon the credibility of witnesses is open to review by an appellate court but in my view the evidence is overwhelmingly against making any finding of fraud.

I would allow the appeal and restore the judgment at the trial, with costs throughout.

HUDSON J. (dissenting)—This action was brought on an insurance policy which provided for benefits in case of (*a*) death, (*b*) permanent disability which included the loss of one or both eyes, one or both hands, one or both legs, "causée par maladie ou par lésion, contusion ou blessure corporelle". It also provided:

> Les dispositions d'invalidité dans cette Police, sont accordées sans qu'une surprime spécifique soit exigée pour elles, mais le coût en est inclus dans la prime pour cette Police.

When making his application for this policy, the deceased, in answer to the questions put to him by the medical examiner of the company, gave the following replies:

> 6. (*d*) Avez-vous jamais eu une maladie sérieuse? Non.
>
> 9 (*a*) Avez-vous consulté ou été soigné par un médecin au cours des trois dernières années? Indiquez date, maladies, nom et adresse des médecins? Pour aucune.
>
> 10. (*a*) Avez-vous jamais souffert de: vertigo, épilepsie, folie, évanouissement, paralysie, névralgie, maux de tête fréquents ou sévères? Non.

These answers were untrue.

If the answers thus given amount to a warranty or if they were made in bad faith, they would vitiate the policy, and further article 2487 of the Civil Code provides:

> 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 cause 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.

The learned trial judge took the view that the above statements were not in the nature of warranties, that there

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was no bad faith on the part of the deceased and that the misrepresentation did not diminish the appreciation of the risk.

A majority of the Court of King's Bench in Appeal, consisting of Chief Justice Tellier, Mr. Justice Bernier, Mr. Justice Hall and Mr. Justice Galipeault, took a contrary view on each of these points.

The question of whether the answers amounted to a warranty is debatable and on the question of a good faith, in view of the finding of the trial judge, I do not express an opinion although there is much to be said on the position taken in the Court of Appeal.

There is no question as to the misrepresentations. What has to be decided is whether or not these misrepresentations were, in the language of article 2487, " of a nature to diminish the appreciation of the risk."

Briefly, the facts are that the deceased had suffered from occasional spells of dizziness onwards from the year 1932 and had consulted and had been treated by the family physician for this illness. In the month of January, 1936, at the suggestion of the family doctor, he went to consult a neurologist, Doctor Langlois of Montreal. He was put in that doctor's sanatorium twenty-four hours for examination and then Doctor Langlois diagnosed his trouble as being " vertige de Menière " and prescribed some medicines and a diet, and forbade him to drive his automobile.

The deceased afterwards consulted Doctor Langlois in the months of March and May and October. Apparently, outside of the vertige de Menière he was in good general health and he did not suffer any relapses of the " vertige " after having taken the doctor's treatment for some months. Doctor Langlois states:

Q. Au mois de mars, il a constaté lui-même, comme vous qu'il était considérablement amélioré?

R. Non seulement amélioré, mais au mois de mars il m'a dit qu'il n'avait aucun vertige.

Q. Est-ce qu'il pouvait penser qu'il était absolument guéri?

R. Je peux répondre ce que j'ai pensé.

Q. Qu'est-ce que vous lui avez dit?

R. Je lui ai dit que j'étais encouragé mais que c'était un peu trop tôt pour lui dire que j'étais guéri (sic) mais au mois de mai, avec la continuation de la diète, je l'ai considéré à peu près sûrement guéri.

However, Doctor Langlois was evidently not absolutely sure that he was cured, because he told him to come in

again when he was in Montreal and, as a result of this request, he returned in October. It was in July in the interim that he applied for the life insurance and gave the answers above mentioned. At the same time, it is not quite clear when he was given permission to again drive his automobile. Doctor Langlois:

Q. Vous lui avez dit au mois de mars ou au mois de mai qu'il pouvait conduire son automobile?

R. Je peux pas dire exactement si c'est en mai ou octobre, je ne peux pas dire quand je lui ai permis, mais je me rappelle bien lui avoir dit: "Ca fait plusieurs mois que vous n'avez pas de vertige, je suis certain que vous pouvez conduire votre automobile." Je ne peux pas dire si c'est en mai ou octobre.

It appears from the medical evidence that the "vertige de Menière" is not a disease which is likely to result in death, other than through accident. I think also from the evidence that it is a disease which may recur. The fact that, although the deceased had been consulting Doctor Langlois from January until May, the latter still thought it wise to have him come back, is some evidence of a fear on the part of the doctor of recurrence of the trouble.

The medical evidence is to the effect that the condition of the deceased was such that if true answers had been given, a further thorough medical examination would have been required before an insurance company would have decided to issue the policy. In view of the fact that there was the possibility of the recurrence of this dizziness and that the policy covered disability from accidents as well as death, I find it very difficult to hold that the failure to answer these questions truly did not "diminish the appreciation of the risk" insured against, particularly in view of the fact that the additional provisions for benefits in case of invalidity were provided without any special addition to the premium. On this ground, I agree with the majority in the Court of Appeal and would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Jules Savard.*

Solicitors for the respondent: *Gravel, Thomson & Gravel.*