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\*June 1, 2.

\*Oct. 6.

DAME MABEL KIERNAN (PLAINTIFF) . . . . APPELLANT;  
  
AND  
METROPOLITAN LIFE INSURANCE }  
~~a~~ COMPANY (DEFENDANT) } RESPONDENT.

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

*Insurance, Life—Application—Statements by insured—Non-disclosure—Materiality—Application attached to the policy—Arts. 7027 and 7028, ss. 1, 2 R.S.Q.—Arts. 992, 2485, 2487, 2489 C.C.*

The late Dr. Bourgeois, the appellant's husband, was insured with the respondent company for \$20,460 upon two policies applied for on the 29th November, 1918. He was operated on for cancer of the throat in March, 1919, and died of it on the 22nd December, 1919. His widow sued to enforce the policies. The respondent contested her claim on

\*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

grounds of concealment and misrepresentation by the assured. Dr. Bourgeois suffered from early in 1918 from persistent laryngitis accompanied by hoarseness and, at times, extinction of voice. He visited three doctors who were his friends. He was given treatments with nitrate of silver by one of these doctors upon the advice of another of them. In question 2 of part B of the application for insurance, the insured was required to answer whether he had ever suffered from any of some 47 specified complaints, one of them being "debilitation de la voix," although no mention was made of laryngitis. To this question, he answered "No." By question 8, the applicant was asked: Have you had any other complaint than that already mentioned? and he also answered "No." By question 4, he was asked to give the name and address of his regular (habituel) doctor and he answered "none." By question 9, he was asked: Have you consulted or have you been attended by any other doctor than the one above mentioned? If yes, when and what for? To this question, he replied with a dash.

*Held* that, in the circumstances of this case, the laryngitis, the extinction of voice and the hoarseness from which the insured was suffering, his visits to different doctors and his treatments with nitrate of silver were material facts which the insured was bound to disclose. Mignault and Rinfret JJ. dissenting.

*Held*, also, that, not only would disclosure of the facts so concealed have prevented the undertaking of the risk, but their suppression, however innocent, having regard to the questions propounded to the applicant, constituted misrepresentation which actually induced the insurer to enter into the contract. Mignault and Rinfret JJ. dissenting.

A photographic copy of the application, which contained the answers made by the insured and which was declared to form part of the contract had been attached by glue or paste to one of the inside pages of each of the policies sued upon.

*Held* that such attachment is a substantial compliance with the statutory requirement contained in s.s. 1 of art. 7028 R.S.Q. which enacts that all the terms or conditions of a contract of insurance shall be set forth in full on the face or back of the policy. Mignault and Rinfret JJ. expressing no opinion.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, at Three Rivers and dismissing the appellant's action to recover amounts of two policies of insurance issued by the respondent company on the life of appellant's husband.

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

*Laflamme K.C.* for the appellant.

*Claxton K.C.* and *St. Laurent K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff and Newcombe JJ.) was delivered by

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ANGLIN C.J.C.—The late Dr. Bourgeois was insured with the defendant-respondent company for \$20,460 upon two policies applied for on the 29th of November, 1918, and issued on the 11th of December, 1918. He died of cancer of the throat on the 22nd of December, 1919. His widow sues to enforce these policies. Her claim is contested on grounds of misrepresentation and concealment by the assured:—(a) as to a prior application for insurance with the Canada Life Assurance Co., upon which a policy did not issue; (b) as to his health and medical history; and (c) as to previous medical attendance.

That these misrepresentations were of a fraudulent nature was averred. The charge of fraud, however, unanimously rejected in the provincial courts, was not pressed at bar. We find it unnecessary further to consider it.

If there was a prior application or proposal for insurance to the Canada Life Assurance Co., within the meaning of the questions put to the insured, the learned Chief Justice of Quebec was of the opinion that any misrepresentation or concealment in this connection was of such minor importance that it may be disregarded. In the view we take as to the other misrepresentations or concealments charged and their effect, we find it unnecessary to deal with this aspect of the case.

The question for decision may, therefore, be stated in these terms: Was there any misrepresentation, or concealment, by the insured in regard to his health, medical history or previous medical attendance, which, though made merely in error, was of a nature to diminish the appreciation of the risk and operated to induce the insurer to enter into the contract?

The misrepresentations or concealments relied upon are answers to questions contained in the declaration made by the appellant's husband on his medical examination, which is designated as Part B of the application for insurance. A photographic copy of the application, including this declaration, is attached by glue or paste to one of the inside pages of each of the policies sued upon. At the foot of Part B and immediately above the signature of the insured, is the following clause:

En outre, il est convenu et consenti que les déclarations et les réponses qui précèdent ainsi que les réponses données au médecin examinateur

sont rigoureusement correctes et entièrement vraies et qu'elles serviront de base du contrat d'assurance si une police est émise.

The policy itself contains on its second page the following provision:

Cette police et l'application en constituent le contrat complet entre les parties \* \* \* Toutes déclarations faites par l'assuré, en l'absence de fraude, seront considérées comme des représentations et non pas comme garanties et telle déclaration n'annulera cette police ni ne servira de défense à une réclamation en vertu de cette police, à moins qu'elle ne se trouve dans l'application écrite dont copie est ci jointe parfaitement collée pour en faire partie, lors de l'émission.

Art. 7027 R.S.Q. directs that contracts of insurance shall be construed according to the law of the province.

Subsection 2 of Art. 7028 R.S.Q. enacts that nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract. In our opinion, if the application of the assured be not excluded from its operation by this provision, the attachment of a photographic copy of it to the policy is a sufficient compliance with s.s. 1 of Art. 7028 R.S.Q., which makes it a condition of their validity and admissibility in evidence against the insured that all the terms or conditions of any contract of insurance evidenced by a written instrument shall be set forth on the face or back of such instrument. There was substantial compliance with this statutory requirement. But, if not, s.s. 2 would seem to preclude its application to statements made in the proposal or application of the insured. While such statements cannot in this case be regarded as warranties, they must be "considered with the contract" as representations of the insured contained in a document which the parties have agreed shall form an integral part of that contract.

Subsection 2 of Art. 7028 R.S.Q. further provides: and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentations contained in the said application or proposal. With the foregoing statutory provisions must be read Arts. 992, 2485, 2487, and 2489 of the Civil Code, which are as follows:

992. Error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is the object of the contract, or in some thing which is a principal consideration for making it.

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. Misrepresentation or concealment, either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the

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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.

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.

Such appear to be the relevant provisions of the Quebec law upon the interpretation and application of which the disposition of this action depends. (Art. 7027 R.S.Q.)

The insurance was applied for on the 29th of November, 1918. In the spring of that year Dr. Bourgeois had developed a condition of laryngitis which produced marked hoarseness and, at times, extinction of voice. His wife testifies that owing to hoarseness he was unable to deliver a lecture early in 1918. In May he told his friend Dr. Dupont that he had suffered from extinction of voice while on a fishing trip to Lake Masketsy. His wife says that his hoarseness continued at intervals throughout that summer and autumn.

In June, Dr. MacTaggart, medical examiner for the Canada Life Assurance Co., met Dr. Bourgeois in the University Club, in Montreal, of which both were members, and then found him "remarkably hoarse." Being told by Dr. Bourgeois that he would shortly call upon him for medical examination in connection with an application for insurance in the Canada Life, Dr. MacTaggart advised him not to present himself for such examination until his laryngitis had disappeared.

Dr. Dupont met Dr. Bourgeois about this time en route to New York and says "il avait alors cette extinction de voix." Dr. Dupont again saw him in July in Montreal when, he says, "il avait une extinction de voix," and he then advised him "de ne plus fumer."

Dr. Lasalle, a throat specialist in Montreal, and a friend of Dr. Bourgeois, examined his throat early in June. He ordered him not to smoke and to refrain from talking. Dr. Bourgeois then complained of laryngitis. Dr. Lasalle appears to have seen him again later in June, or early in July, and found his condition much the same. He again saw the insured in September. On this occasion he once more examined his throat, renewed his advice against smoking and talking and recommended treatments with a solution of nitrate of silver to be administered with a stylet by a throat specialist, Dr. Panneton

of Three Rivers. Dr. Lasalle says that on each occasion when he saw Dr. Bourgeois "il avait la voix enrouée." Dr. Panneton, also a friend of the deceased, tells of having treated his throat with a solution of nitrate of silver several times during the summer and autumn of 1918 at irregular intervals. During this period Dr. Panneton made no examination of the insured's throat, understanding that he was merely carrying out treatment prescribed for Dr. Bourgeois by Dr. Lasalle. Late in the autumn, or about the beginning of the winter, however, Dr. Panneton did examine Dr. Bourgeois' throat. He found it in bad condition with a considerable growth on one of the vocal chords. It presented a very serious aspect. He advised that the treatments with a solution of nitrate of silver be discontinued as useless and that there should be a serious examination of Dr. Bourgeois' throat by another doctor. Dr. Panneton says that the condition of the insured's throat had not at all improved under the treatment he had administered. Unfortunately Dr. Panneton is very indefinite as to the date when he made the examination which disclosed the serious condition which he describes. The further examination which he then recommended was deferred by Dr. Bourgeois for "plusieurs semaines." It took place late in February, or early in March, and disclosed a cancer of the larynx so well developed that an immediate operation was ordered. Of the seriousness of the condition which Dr. Panneton's examination had revealed he leaves no doubt. He adds that it could not have arisen in one night, or one week—it might have taken either weeks or months of development to reach the stage at which he found it.

Dr. Hamilton, a throat specialist of 28 years' experience and a lecturer at McGill University, tells us that treatment with nitrate of silver is not usual in cases of acute or simple laryngitis, that it is one of the strong solutions used in cases of long duration that resist everything else.

He says a tumorous condition of the larynx is frequently mistakenly diagnosed as a mere laryngitis; that hoarseness may be the only symptom for months. He inclines to the view that the cancerous condition of Dr. Bourgeois' throat had been incipient before May, 1918. Dr. Cross, a partner of Dr. Bourgeois, says that no medical examiner allows a

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detail such as the possibility of cancer in a case of hoarseness to escape his notice, and that obstinate hoarseness is the most terrible symptom of a cancer of the throat. He concedes the wisdom of the Home Office, or a Medical Board, in suspending an applicant for insurance who has laryngitis.

The evidence leaves no doubt that from early in 1918 Dr. Bourgeois constantly suffered from a serious laryngitis accompanied by a marked hoarseness and, at times, by an extinction of voice; a laryngitis so persistent that it did not yield to treatment, but, on the contrary, led Dr. Panneton, who had considered it his duty merely to carry out the treatment recommended by Dr. Lasalle, eventually to make an independent examination which disclosed the existence of a condition of some standing which, on further examination, proved to be cancerous.

It is perhaps not sufficiently proven that this cancerous condition actually existed on the 29th of November, 1918, although, personally, I think the proper inference from the evidence would be that it did. But, in the view we take, it is not necessary to proceed on this footing (Art. 2487 C.C.) and we treat that fact as not established.

In question 2 of Part B of the application, the insured was required to answer whether he had ever suffered from any of some 47 specified complaints, one of them being "débilitation de la voix." To this question he answered: "Non." The evidence establishes beyond question that he suffered for some time previous to his examination from continued hoarseness accompanied at intervals with extinction of the voice. While laryngitis was not one of the complaints specified in question no. 2, by question no. 8 the applicant was asked: "Avez-vous eu d'autre maladie que celle ci-dessus mentionnée?" To this question he also answered: "Non." By question no. 4 he was asked to give the name and address of his regular (habituel) doctor, to which he answered, no doubt truthfully: "Aucun." But, by the 9th question, he was asked:

Avez-vous consulté ou avez-vous été soigné par un autre médecin que celui mentionné ci-dessus? Si oui, quand et pourquoi?

To this question he replied with a dash (—). While it is true that Drs. Dupont, Lasalle and Panneton seem to have regarded Dr. Bourgeois' visits rather as those of a

friend than as those of a patient, while they made no entry of any charge against him and kept no record of consultations or treatments, since Dr. Bourgeois was a friend and fellow-practitioner of these physicians we find nothing in these circumstances to justify his failure to disclose the facts above detailed in answer to the questions propounded in part B of his application for insurance.

In our opinion the persistent laryngitis, the recurrent extinction of voice, the constant hoarseness from which Dr. Bourgeois suffered, his visits to Drs. Dupont and Lasalle and his treatments by Dr. Panneton with nitrate of silver on the advice of Dr. Lasalle, were matters which the insured was bound to disclose. They were facts which bore upon the nature and extent of the risk to be undertaken by the insurer; their concealment tended to diminish the appreciation of that risk. The facts were not substantially as represented; the suppression amounted to material concealment. (Arts. 2485, 2487, 2489 C.C.) The result was error on the part of the insurer in regard to something which was a principal consideration for making the contract. (Art. 992 C.C.) The importance from the insurer's point of view of the disclosure of any laryngitis from which the applicant for insurance is suffering, or has recently suffered, admits of no doubt, so often is it the forerunner, a premonitory symptom or danger signal, of serious, if not fatal, throat affection. The testimony of Drs. MacTaggart, Thompson, Coolidge, Ricard, Hamilton, Cross and Lasalle, puts this beyond question; and their evidence is uncontroverted.

That there was material concealment—that it was of facts of a nature to diminish the appreciation of the risk—that not only would disclosure of the facts so concealed have prevented the undertaking of the risk, but that their suppression, however innocent, having regard to the questions propounded to the applicant on his medical examination, constituted misrepresentation which actually induced the insurer to enter into the contract, are conclusions which, we think, do not admit of serious controversy. Had the facts been disclosed, they must have led the company's officers as reasonable men to reject the risk, or at least to withhold the issue of the policies until the doubts as to the seriousness of the throat condition of Dr. Bourgeois,

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which knowledge of his persistent and continued laryngitis must have created, should have been entirely dispelled.

For these reasons we are of the opinion that the judgment of the Court of King's Bench dismissing this action was right and should be maintained.

The judgment of the dissenting judges (Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—This appeal is from a judgment of the Court of King's Bench, reversing, with two dissenting judges, the decision of the trial judge in an action taken by the appellant, the widow and universal legatee of the late Dr. Georges Bourgeois, in his lifetime physician and surgeon of Three Rivers, Que., against the respondent, a life insurance company, to recover \$20,460, the amount of two insurance policies on the life of her husband. In its plea, the respondent disputed its liability on the ground of false representations and false answers to questions put to Dr. Bourgeois at his medical examination, which took place on the 29th of November, 1918. It also alleged fraud and intent to deceive on the part of the deceased, but at the hearing its counsel frankly admitted that he could not contend under the evidence that Dr. Bourgeois had been guilty of any such fraud or intent to deceive. This is moreover entirely in accord with the finding of the learned trial judge and with the opinion expressed by the learned Chief Justice of Quebec in concurring in the judgment appealed from. The liability of the respondent must therefore depend on the reply to be made to the question whether these contracts of insurance were induced by misrepresentations in the answers given by the deceased at his medical examination, assuming these answers to have been made in good faith.

At the outset, the provisions of article 7028 of the Quebec Revised Statutes should be considered. This article, which apparently was overlooked in the courts below, is in paragraph 18 of chapter III of title XI of the Revised Statutes, which paragraph contains general provisions applicable to all companies or associations. It reads as follows:—

7028. 1. Where an insurance contract made by any company or association, is evidenced by a written instrument, the company or association shall set out all the terms or conditions of the contract in full on

the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the tenth day of February, 1909, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

2. Nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

3. A mutual benefit or charitable association may, however, instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein, by particular references, those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not inserted in the instrument of contract itself, and the association shall, at or before the delivery over of such instrument of contract, deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

Under the first paragraph of article 7028, no term or condition modifying the contract or impairing its effect can be invoked against the insured or beneficiary unless it be set out on the face or back of the instrument evidencing the contract. This rather sweeping enactment must however be read with the second paragraph of Art. 7028, which requires the court to consider the proposal or application of the insured with the contract in order to determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

In this case, fraud being eliminated, there remains only the fact that it is alleged that Dr. Bourgeois gave false answers to certain questions put to him at his medical examination, due regard being had of course to the test of materiality just quoted from the statute.

I will state the pertinent facts with all possible brevity.

Dr. Bourgeois was a physician and surgeon in very active practice in Three Rivers where he had established a private hospital to which he was, at the time of the insurance, adding a new wing. In the month of May, 1918, he contracted a cold at a fishing excursion, and in June was suffering from what has been described as acute laryngitis, or catarrhal laryngitis. In June, he came to Montreal and met one of his friends, Dr. MacTaggart, at the University Club. Dr. MacTaggart was an examiner for the Canada Life Assurance, and it appears that Dr. Bourgeois spoke to him about an insurance on his life for \$10,000 which he contemplated taking in that company. Dr. MacTaggart relates the incident as follows:—

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I was sitting in the club. Dr. Bourgeois came in, came over and sat down, and began to chat with me. Afterwards he said: "I want to come up for examination before you for life insurance." I remarked at the time that he was very hoarse, suffering evidently from laryngitis, and I told him. I asked him first of all: "What is the matter with your throat?" And he replied he had an attack of laryngitis. I told him to postpone that examination until the laryngitis disappeared.

Q. Did he ever call upon you again? Answer: No.

Elsewhere he says that he gathered from the statement made by Dr. Bourgeois that he had just an ordinary attack of laryngitis.

It was probably during this visit to Montreal—he was then leaving for New York with his wife on an automobile trip—that Dr. Bourgeois went to see Dr. Albert Lasalle, one of his intimate friends. Dr. Lasalle says that Dr. Bourgeois complained of hoarseness and of acute laryngitis, and he thinks he examined his throat with a small mirror. He advised him not to smoke (he was a cigarette smoker) and not to talk. His diagnostic was "une laryngite catarrhale aiguë," and not chronic laryngitis. He says he discovered no symptom which could indicate the presence or approach of any serious disease (*affection grave*). He saw Dr. Bourgeois again on his return from New York, found his condition about the same, and advised him, when at home, to have his throat treated with a solution of nitrate of silver by one of his friends, Dr. Panneton, of Three Rivers. He states that Dr. Bourgeois' general condition of health was good.

In July, 1918, Dr. Bourgeois visited in Montreal another of his intimate friends, Dr. Georges Dupont, who found that he had "une extinction de voix." He advised him not to smoke, but made no examination of his throat. Dr. Bourgeois appears to have called on both Dr. Lasalle and Dr. Dupont as friends, rather than as medical advisers, and probably considered that he had not been treated medically by them. I may add that in January, 1919, Dr. Dupont examined Dr. Bourgeois' blood, and he states that the result was negative.

Dr. Lasalle, as I have just said, advised Dr. Bourgeois, on his return to Three Rivers, to have another of his medical friends, Dr. Panneton, a specialist in throat diseases, treat his throat with nitrate of silver. Dr. Bourgeois followed this advice and Dr. Panneton says that, during the summer, he administered this remedy merely as a friend

and not as a medical adviser. His testimony as to the condition in which Dr. Bourgeois then was is extremely vague. He says he did not examine his throat at that time; he merely acted upon what Dr. Bourgeois told him as to Dr. Lasalle's diagnosis, that it was "une légère laryngite." Elsewhere he states:

Je me suis défendu d'y penser, d'autant plus qu'un confrère de plus d'expérience que moi avait déjà examiné le docteur.

There is evidently but little assistance to be derived from this testimony with respect to Dr. Bourgeois' condition during the summer months.

Another statement of Dr. Panneton's must however be noted. He examined Dr. Bourgeois' throat at a later period, and he says: "J'ai constaté que sa gorge n'était pas en bon état." He adds elsewhere:

ce qui m'a fait peur, c'est qu'il y avait une masse sur une des cordes vocales qui présentait un aspect très sérieux.

If the date of this examination could be fixed, it would have a very important bearing on the question we have to decide, but Dr. Panneton cannot state when it occurred. He says .

à l'automne, peut-être au commencement de l'hiver, très tard dans la neige,

and then adds: "je ne me rappelle pas la date du tout." In cross-examination, he hazards the statement: "ça devait être dans les environs du Jour de l'An": "je me rappelle de cela que c'était en hiver."

He advised Dr. Bourgeois to have his throat examined by another physician,

un médecin qui le verrait non pas comme un ami, comme je l'ai vu toujours, mais qui le verrait sérieusement.

Dr. Bourgeois followed this advice and, in February or March 1919, went to Montreal and had his throat examined by Dr. Lasalle and by Dr. Roy at the Hôtel-Dieu. It was then that a malignant tumour of an apparently cancerous character was first discovered. This was two or three months after the medical examination in connection with this insurance.

The rest of the story can be briefly told. Dr. Lasalle accompanied Dr. Bourgeois to New York in March, 1919, when an operation was performed by a specialist and the tumour removed. Nothing much is said of the following months. Evidently the cancerous growth returned, for Dr. Bourgeois died of cancer in the larynx on the 22nd of

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December, 1919. The medical evidence seems to show that this tumour was of very rapid growth, but it is not established that it existed at the time of the application for insurance.

The respondent bases its defence on certain answers made by Dr. Bourgeois in the application for insurance and the medical examination. It is to be observed that the application is divided into three parts:—1. The application proper called “partie A”; the medical examination proper, termed “partie B”; and the report of the medical examiner, or “partie C”. The answers in the first two parts are in Dr. Bourgeois’ handwriting. The blanks in part C are filled in by the medical examiner, Dr. Godin.

The respondent complains of the following answers to questions 15 and 16 of part A:—

Question 15. Avez-vous jamais postulé à aucune compagnie, ordre ou association sans recevoir le montant, ou le plan de l’assurance demandée, ou à votre âge véritable ou aux primes correspondantes?

The answer is “non.”

Then follow certain headings:—

Compagnie, ordre ou association. De quelle manière diffère-t-elle de la police demandée. Refusé ou ajourné. Si vous n’avez pas été informé, dites-le.

Under the first heading, Dr. Bourgeois wrote “Aucune.” There is nothing under the other headings.

Question 16. Avez-vous jamais fait application ou négocié, signé une application ou subi un examen médical pour l’assurance à quelque compagnie, ordre ou association, autres que celles déjà mentionnées dans les réponses? Si oui, donnez des détails.

The answer is “non.”

The respondent also complains of the following answers in part B:

Question 2. Avez-vous jamais souffert de: (Répondez oui ou non pour chaque maladie, n’employez pas la marque “d’ito” (*sic*).

Then follows a list of forty-seven diseases, opposite each of which Dr. Bourgeois wrote “non.” It is significant that among them there is no mention of laryngitis, either acute or chronic. The last of all is “débilitation de la voix, de l’ouïe ou de la vue,” whatever that may signify. “Débilitation de la voix” may mean hoarseness or “une extinction de voix,” as respondent contends, but if laryngitis was intended, it should certainly have been mentioned by its well known name.

Question 4. Nom et adresse de votre médecin habituel?

The answer is "aucun," and it is not shewn that Dr. Bourgeois ever had a "médecin habituel" before his last illness.

Question 5. A quelle époque et pour quelle maladie vous a-t-il donné des soins?

There is no answer to this, only a dash.

Question 6. Quand avez-vous été obligé de rester à la maison pour cause de maladie?

The answer is "mal de dents en 1916." There is no evidence that Dr. Bourgeois was ever confined to his house by sickness, outside the instance mentioned, up to the date of his medical examination. His laryngitis did not prevent him from being very actively engaged in the discharge of his professional duties, especially during the epidemic of Spanish flu in the fall of 1918.

Question 7. Donnez tous les détails de chaque maladie que vous avez eue depuis votre enfance, et le nom de chaque médecin qui vous a soigné ou donné des prescriptions?

Then there are the following headings with a space for the answer:

Affection. Nombre d'attaques. Date. Durée. Sévérité. Complications. Médecin consultant.

There is no answer to this question.

Question 8. Avez-vous eu d'autre maladie que celle ci-dessus mentionnée?

Answer: "Non."

Question 9. Avez-vous consulté ou avez-vous été soigné par un autre médecin que celui mentionné ci-dessus? Si oui, quand et pourquoi?

There is no answer, only a dash.

These are all the answers in part B of which the respondent complains.

Before dealing with them, some preliminary observations may be made.

In part A there is the general statement:

Il est convenu et consenti que les déclarations et les réponses qui précèdent, ainsi que les déclarations et réponses données au médecin examinateur, sont rigoureusement correctes et entièrement vraies, et qu'elles serviront de base du contrat d'assurance si une police est émise.

We also find in the policy the following condition:

Toutes déclarations faites par l'assuré, en l'absence de fraude, seront considérées comme des représentations et non pas comme garanties et telle déclaration n'annulera cette police ni ne servira de défense à une réclamation en vertu de cette police, à moins qu'elle ne se trouve dans l'application écrite dont copie est ci-jointe parfaitement collée pour en faire partie, lors de l'émission.

Reading these two clauses together, it does not seem possible in this case to give to the answers made by Dr. Bourgeois the effect of warranties; they are mere representa-

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tions and under the statute a mis-statement or a misrepresentation does not affect the validity of the policy unless it induced the insurer to enter into the contract, in other words unless it was as to a material fact.

There may be the further question whether a condition inserted in the application, even where as here a photographic copy of the application is attached or glued to the policy, is a sufficient compliance with the requirement of the statute that all the terms or conditions of the contract be set out on the face or back of the instrument forming or evidencing the contract. A decision on this point might have a far-reaching effect, and inasmuch as article 7028 was called to the attention of appellant's counsel by the court and not mentioned by him, I do not feel that the question has been sufficiently argued to warrant us in deciding it, unless it be absolutely necessary to do so in order to dispose of this case. As I read the two clauses, they do not make the strict accuracy of the answers of the insured a condition of validity of the policy unless these answers induced the contract. That is the real question we have to decide and it is unnecessary therefore to express any opinion on the point to which I have referred.

Coming now to the merits of the appeal on the facts disclosed by the testimony, the misrepresentations relied on in connection with the answers given to questions 15 and 16 of part A, are in respect of an application for insurance which Dr. Bourgeois is said to have made in June, 1918, to the Canada Life Assurance Company. The application itself was not produced, but what is called an application data slip is in the record. Assuming that the respondent was entitled to adduce secondary evidence of this application—and it is strenuously contended that the loss of the original has not been satisfactorily proved, and that moreover no witness can state of his own knowledge that the application data slip was compared with the original application,—it does not appear, on a reasonable construction of questions 15 and 16, that any real misrepresentation by Dr. Bourgeois has been established. The evidence, if at all admissible, is that Dr. Bourgeois gave to an agent of the Canada Life Assurance Co. an application for \$10,000 of life insurance. A medical examination of the applicant by Dr. MacTaggart was to have followed,

but it never took place, Dr. MacTaggart explaining that he advised Dr. Bourgeois to wait until his laryngitis had disappeared. Questions 15 and 16, in my opinion, refer to an application which was at least considered, if not acted upon, by the insurance company. The alleged application was never considered, or acted upon by the Canada Life Assurance Co.; it was clearly incomplete, for it was accompanied by no medical examination, and it contained no statement by Dr. Bourgeois as to his condition of health. It may be conceded that the respondent had an interest to know whether Dr. Bourgeois had been refused insurance by another insurance company, but no such refusal has been established, and Dr. Bourgeois was entitled to assume that the application which he gave to the agent, if it be sufficiently proved that he gave such an application, did not come within the scope of the questions put to him. I would further think that no materiality within the intentment of article 7028 has been made out in respect of the answers to question 15 and 16 of part A.

Coming now to the answers given, or to the failure to answer certain questions, in part B of the application, the onus clearly was on the respondent to shew that Dr. Bourgeois misrepresented material facts. The misrepresentations relied on are that Dr. Bourgeois failed to disclose that he had suffered from laryngitis, and that he had consulted physicians and had been treated by them in connection therewith.

The learned trial judge found on the evidence that le docteur Bourgeois avait alors une laryngite et qu'il ne l'a pas mentionnée, mais que cette laryngite n'était qu'une laryngite simple, catarrhale ou banale, comme le déclarent les témoins entendus, n'ayant aucune gravité et n'affectant en aucune manière la santé du Docteur Bourgeois.

The learned trial judge also expressed the opinion that le docteur Bourgeois n'était tenu de déclarer que les maladies graves pouvant affecter son état de santé; que la laryngite qu'il avait alors n'exerçait aucune influence sur son état de santé, non plus que sur le risque en matière d'assurance, et que dans ces circonstances le docteur Bourgeois ne s'est pas rendu coupable de réticence ou de fausse déclaration en ne mentionnant pas ce fait banal.

The finding of the learned trial judge may be construed as meaning that Dr. Bourgeois had not misrepresented or concealed

a fact of a nature to diminish the appreciation of the risk or to change the object of it

(art. 2487 C.C.), or a fact which induced the insurer to enter into the contract.

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The *considérants* of the judgment of the Court of King's Bench shew that the plaintiff's action was dismissed because the answers given by Dr. Bourgeois to questions 15 and 16 of part A and to question 8 of part B were untrue "annulant les dites polices d'assurance." This is not satisfactory, for unless the answers were as to a material fact, their mere untruth would not be a reason to set aside the contract.

We are therefore forced to carefully examine all the evidence in order to determine whether there was, in the answers given in part B, a misrepresentation of a material fact. In other words, was the laryngitis from which Dr. Bourgeois undoubtedly suffered a material fact which he should have disclosed, the onus being on the respondent to establish that it was?

It is very extraordinary that the respondent, having called as its witness Dr. Godin, its medical examiner, who examined Dr. Bourgeois for this insurance, was content merely with having him state that Dr. Bourgeois made the answers and signed the application in question. A part of this application is part C which contains the declaration by Dr. Godin that in his opinion the chances of life of the applicant were excellent and that he recommended the risk. And not a single question was put by the respondent to Dr. Godin, who was still, at the date of the trial, one of its medical examiners, to challenge this statement.

If the laryngitis in question was a "fait banal," if it had no effect on the state of health of Dr. Bourgeois, as found by the trial judge, the test of materiality would not appear to be satisfied. Such a "fait banal," without effect on the state of health of the insured, would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium: *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* (1). The question now is whether this finding is justified by the evidence.

In my recital of the pertinent facts, I have sufficiently stated the effect of the evidence given by the medical witnesses, doctors Lasalle, Dupont and Panneton, called by the respondent to prove the laryngitis from which Dr.

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

Bourgeois is alleged to have suffered. This is the only evidence on which we can rely to determine what appears to be the issue on the testimony, whether or not, as found by the learned trial judge, this laryngitis was

un fait banal, n'ayant aucune gravité et n'affectant en aucune manière la santé du Dr. Bourgeois.

In my opinion, this evidence supports the finding at the trial, and there is no testimony to contradict it. Dr. Laisalle, who examined Dr. Bourgeois' throat in June, 1918, and subsequently in February or March, 1919, when a cancerous growth was discovered, is emphatic in declaring, as the result of his examination, that the condition he observed in June, 1918, had not brought about the condition he found in March, 1919. I quote from the closing part of his cross-examination:

Q. Alors, docteur, en résumé, vous n'avez établi aucun lien de parenté ou causalité entre ce que vous avez constaté au mois de juin, 1918, et ce que vous avez constaté au mois de mars, 1919?

R. Non.

That the hoarseness or "extinction de voix" of Dr. Bourgeois, in 1918, had no apparent effect on his general condition of health is also affirmed by the physicians who saw him, and is further stated by the witnesses called by the plaintiff in rebuttal: Dr. C. Ernest Cross, the associate of Dr. Bourgeois, in his hospital; Mr. C. R. Whitehead, manufacturer, of Three Rivers, who advised him to take this insurance; Miss Fernande Genest, his stenographer, who says that, in December, 1918, she spoke to Dr. Bourgeois over the telephone from Montreal, and understood him very well; and the plaintiff herself, who states that the hoarseness of her husband was occasional and intermittent. To this we must add the positive declaration of Dr. Godin, the respondent's medical examiner, in part C of the medical examination, that in his opinion Dr. Bourgeois' chances of life were excellent and that he recommended the risk. As I have said, not a question was put to Dr. Godin by the respondent, on whom the onus lay, to contradict or challenge this statement.

Under these circumstances, it would seem to me a rash proceeding to substitute our own opinions for those of all these witnesses, and for the finding of the learned trial judge, and to infer that the laryngitis in question was more serious than they imagined, and that it was a fact, material

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in its effect on the health of the insured, the non-disclosure of which induced the respondent to enter into the contract. If the laryngitis was more than "un fait banal," no one would have been more aware of it than Dr. Bourgeois, who specialized in these diseases, and he would have been guilty of fraud in concealing it. But the respondent's counsel frankly admitted at the hearing that no fraud on the part of Dr. Bourgeois had been established. One perhaps cannot help feeling some doubt in reading the medical evidence, and I have said that the testimony of Dr. Panneton is unsatisfactory and is possibly open to the suggestion that he closed his eyes to something which, had he observed it, might have assisted us in deciding this case. It is however the evidence adduced by the respondent, on whom the onus lay to prove material misrepresentation, and there is nothing in the circumstances of this case to shift the burden. To enable us to conclude that the laryngitis described by the witnesses was not "un fait banal," a trivial matter, there should at least be some evidence on which we could base such a conclusion, and there is none. I certainly would not assume that because a cancerous growth was discovered in March, 1919, cancer existed in November, 1918, at the date of the medical examination. There is so much unsolved mystery about the origin and cause of cancer, and its growth is often so rapid, that the existence of cancer at a stated period cannot be relied on to show that it was present three months before. The question of materiality is a question of fact to be established by the respondent, and after carefully reading the testimony of all the medical witnesses, I am not in a position to firmly conclude that the laryngitis of 1918 had any effect whatever on the health of the insured.

I cannot help thinking that the learned judges who formed the majority of the Court of King's Bench applied to this case a severer test, that of the absolute truth of the answers of the insured, than the statute calls for. Their decision possibly might have been different if the provisions of this statute had been called to their attention.

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

*Appeal dismissed with costs.*

Solicitors for the appellant: *Martel & Martel.*

Solicitors for the respondent: *Claxton & Claxton.*