RAILWAY PASSENGERS' ASSURANCE CO. (DEFENDANT) } APPELLANT;

AND

STANDARD LIFE ASSURANCE CO. (PLAINTIFF)..... } RESPONDENT.

1921

*Oct. 27, 28.
*Nov. 21.

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

Insurance—Fidelity bond—Untrue representations—Evasive and misleading—materiality—Affirmative or promissory warranties—Arts. 2485, 2486, 2487, 2490 CC.

The company appellant issued a policy guaranteeing the company respondent against loss, up to $3,000 through the dishonesty of Mr. Shortt, respondent's agent at Halifax, whose duties were, *inter alia*, to collect premiums due in that city and vicinity to deposit them in a bank and to remit same monthly to the respondent. The policy contained the usual agreement by the insured whereby the truth of its answers to questions by the insurer was made the basis of the contract. As to the respondent's supervision over the handling of the moneys collected by Shortt a certain number of questions were put to and answered by the respondent at the time of the application for the bond. To a question as to the inspection and checking of the bank book, the answer was : "We do not inspect the bank account." To a question as to how often Shortt's cash accounts were balanced and checked, the answer was : "monthly accounts." To a question as to any cash balance due then, the answer was: "only for receipts that are in his hands for collection". To the question: "How often does an audit take place", the answer was: "He remits monthly". To another question as to time of the last audit, the answer was : "His last remittance was received a few days ago". And to a last question: "Were all things found in order?"; the answer was: "Yes." At the time the insurance was effected, a sum of over $2,000 was owed by Short to respondent, which the latter alleged was not to its knowledge. There had never been any audit of Shortt's accounts on behalf of the respondent during his employment.

*PRESENT: Idington, Duff, Anglin and Mignault, JJ. and Bernier J. *ad hoc*.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Held, Duff and Bernier JJ. dissenting, that the respondent's answers, even if literally true, were evasive, misleading and framed in a way to give the impression that Shortt's accounts were audited monthly; and thus they did not "represent to the insurer fully and fairly every fact which shows the nature and extent of the risk" within the terms of art. 2485 C.C.

Per Duff and Bernier JJ. (dissenting):—The representations were not shown to be substantially untrue and it has not been established that there had been any material concealment or that the affirmative warranties had not been fulfilled.

Per Duff, J.—The respondent's declaration, as to the truth of his answers being the parts of the contract, is restricted in its application to representations and to warranties which are not promissory.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action:—

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

H. N. Chauvin K.C. and *Vipond K.C.* for the appellant. The respondent's answers were untrue representations. They were also misleading and the statements made by the respondent would rightly induce the appellant to think that Shortt's accounts were checked and audited monthly, when they were not.

Lafleur K.C. and *Phelan K.C.* for the respondent. The appellant is liable under the guarantee policy, as the statements made by the respondent were substantially true so far as they were within the knowledge of the respondent.

IDINGTON J.—This appeal arises out of an action brought by respondent upon a fidelity guarantee, dated the 2nd April 1914, given it by the appellant, which recited the employment by the respondent,

as agent at Halifax, N.S., of one Alfred Shortt, and its having delivered to appellant a proposal and declaration in writing stating (*inter alia*) the rules and conditions of the employment and the precautions observed by the employer in the management of, and the checks imposed upon, the employed, and which proposal the said employer has agreed shall be the basis of the contract (in question) and be considered as incorporated therein, and for the payment of $15.00 as the premium for such guarantee for twelve calendar months from the first day of April, 1914, and then proceeds as follows:—

> Now it is hereby agreed, that if at any time during the continuance of this agreement the employer shall sustain any loss, caused by the forgery, the embezzlement or fraud of the employed in connection with the employment hereinbefore mentioned which shall be committed after the above date, during his uninterrupted continuance in the said employment within the meaning of this agreement and the conditions hereto, which shall be discovered during the continuance of this agreement, and within three months after the death, dismissal or retirement of the employed or within three months after this agreement ceasing to exist, whichever of these events shall first happen then the company shall, subject to the conditions indorsed, make good and reimburse such loss to the employer to the extent of three thousand dollars but not further, after such loss, and the cause, nature and extent thereof shall have been proved to the satisfaction of the directors, and such reasonable verification of the statements in the above mentioned proposal as they shall require, and such information as is required hereby or by the conditions hereto shall have been furnished.
>
> Provided always, that this agreement and the guarantee hereby effected shall be subject to the several conditions hereupon indorsed which are to be deemed to be conditions precedent to any liability on the part of the company under this agreement.

The said Shortt had been for forty years in the said service when he died on the 26th October, 1916.

In the year 1910 it had been arranged between the respondent and him that an account should be opened in the Bank of Montreal at Halifax, in the name of respondent, and that moneys coming to the

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Idington J.

hands of Shortt in the course of his business as such agent and which it was entitled to after deducting his commission, medical fees, and some rent; and that he should have no power over moneys so deposited save by issuing from time to time cheques to respondent for such moneys.

It had also been arranged long before the said guarantee was given that on the first of each month the respondent whose head office was in Montreal, should send Shortt a list of premiums due by those insured by it through his agency along with notices to be given each of the parties so owing and receipts for him to deliver to the respective parties so concerned upon payment of the premium due.

It was understood, however, that each party so insured had thirty days grace in which to pay his or her premium.

That might extend the time for remittance that much beyond the due date and hence extend the time for the agent Shortt reporting to the head office, and sending therewith the cheque on the local agency of the Bank of Montreal.

It was stated by counsel for the respondent on the argument before us that the list of accounts so transmitted by it to Shortt should be returned to the head office as soon as possible after the expiration of that month and thirty days' grace and shew thereon what were paid and return the receipts sent him for premiums but which had not been paid.

It is necessary to observe the foregoing facts as to the course of business in order to appreciate the full significance of the answers made by the respondent and the exact measure of the risk the appellant had to run and how it came about that it could undertake same for so small a premium.

The proposal and declaration referred to in the above stated recital seems to have consisted of an application made to appellant by Shortt and brought to the respondent's notice by the following letter:—

Toronto, Ont., Mar. 31, 1914.

Sir:—

Mr. Alfred Shortt of Halifax, N.S., having applied to this Company for a guarantee in your favour of $3,000.00, I have to request that you will be good enough to reply as fully as possible to the annexed questions, as your answers and the declaration appended will form the basis of the contract between you and the Company.

I am, Sir,

Your obedient servant,

F. H. Russell,
Manager and Attorney

To the Standard Life Assurance Co.,
Montreal, Que.

The response thereto consists of answers to nearly thirty questions, one or two not having been directly answered.

Of these I think the following may be considered herein:—

10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:—

A. In what capacity or office will the applicant be engaged and where? Agent for Halifax.

B. In what way will moneys pass through his hands? Collections and new business.

C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthly.

D. Is he allowed to pay out of the cash in his hands any amounts on your accounts? If so ,state nature and extent. A. Yes, commission, doctors' fees, etc.

E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

F. Are moneys to be paid into the bank by applicant? If so, how often will the bank book be inspected and checked? We do not inspect the bank account.

G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully. A. Monthly accounts.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Idington J.

H. Will the balance on his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so, give particulars. A. Only for receipts that are in his hands for collection.

13. Have you a separate banking account into which all moneys are paid by the applicant on your behalf when received? Yes, in Bank of Montreal.

14. Are cheques countersigned? If so, by whom? No.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

21. Has any person holding the same or similar situation as that to be held by the applicant been detected in any defalcations? If so, please state particulars? No.

Of these for our present purpose I think question 11 and the answer thereto is all that need be considered.

The others are instructive and illuminative of what is really meant thereby.

And in light thereof and the evidence the answer is untrue.

It is apparently found by several of the learned judges in the Court of King's Bench that over two thousand dollars of old debt was then due and that for moneys which could not fall within the words

(11) only for receipts that are in his hands for collection.

The said learned judges, however, take a different view from what I do as to the legal result thereof.

I have read the evidence of all the witnesses in an effort to see if this statement of fact in the answers so made could be verified.

I fail to find any such statement can be supported and I am led to suspect, though I do not herein rest thereupon, that the facts were even worse against the respondent. And what I do find is quite inconsistent with the answers to questions E. G. and H. of question 10.

With great respect I cannot agree with the reasoning of the learned judges below who seem to think these assurances of monthly rendering of accounts and requiring payment thereof ineffective and hence of no consequence herein.

I think when the answer to question 11 is considered in light thereof and of the proven facts as existent at the time when the answer was made that such an answer is fatal to the claim of the respondent.

Again the answers to questions 16 and 17 should never have been made.

No use applying needlessly harsh adjectives but when, if ever, the slightest attention is paid to the facts disclosed by the system which I have outlined above, relative to the sending out of accounts and receiving them in return such an answer, as implying that all things were found in order, is quite unjustifiable.

And so far as I hold it so its erroneous statement falls within the latter part of the third condition indorsed on the guarantee, which is as follows

3. every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding that on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the Guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred to is or are untrue in any respect, or if there be any material fact affecting the nature of the risk whether in relation to the occupation of the employed or otherwise, omitted therefrom, or if there be any misrepresentation, suppression or untrue averment at the time of payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all premiums paid in respect thereof shall be forfeited to the company,

and renders the agreement sued on void.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Idington J.

How could any one compare the lists of moneys to be collected monthly with the actual facts disclosed in many monthly returns, much less the then last, and find all things in order?

There is much confusion in the evidence in the case and otherwise which prevents me from dealing as effectively as I had wished with the point made by appellant's counsel as to the amount paid into the bank in the months of August, September and October of 1916, being the months for which recovery herein is sought.

It is attempted to be answered by an argument of counsel for the respondent that though there was money enough deposited by Shortt during that period to cover all the defaults for the months claimed, yet that had been rightfully applied to cover old deficiencies.

I cannot satisfactorily trace the evidence relied thereon in support of the argument. Nor can I accept the argument as satisfactory for it lands respondent, if correct, hopelessly, I fear, on another horn of the dilemma presented to it here as it often is at every angle of this case.

That deficiency, so far as I can see, was part of an extended chain of fact loaded with more monthly defaults than the respondent can explain away and yet maintain its assurance to the appellant in anwering question 11.

It seems clear that the unfortunate deceased was by circumstances driven to resort to the expediency of extending the time for making his final returns and thus get more room for hiding his shortages when due attention to the facts thus disclosed and a stern hand guiding respondent might have saved both him and it.

It is not herein at all a question of what any particular officer acting on respondent's behalf thought or believed.

As I understand the law it is what the actual facts were and which the respondent was bound to know before representing otherwise any view of the facts.

The contract is expressly based by mutual consent upon the facts as ultimately found and represented and I take it abolutely binding respondent to abide thereby no matter how honestly mistaken its officers may have been.

By no means do I mean to suggest that he was wilfully false, or, on the other hand, that he was quite excusable.

There is another ground taken and that is the basis of the conclusion reached by Mr. Justice Dorion in the court below resting upon the answers given by the respondent in the following terms when asked the question put shortly after the renewal for 1915, as follows:—

The letter dated 25th May, 1915, of the request is as follows:—

Dear Sir,—

We beg to enclose herewith the customary annual audit statement in connection with the accounts of Mr. A. Shortt, your agent at Halifax, N.S., and in connection with his bond for $3,000. We shall be glad if your will kindly sign same and return to this office.

Yours faithfully,

and signed by appellant's manager, is answered by the following:—

This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Idington J.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1915.

D. M. McGOUN,
Manager for Canada.

accompanied by a letter of same date, as follows:—

We have your letter of the 25th instant, enclosing audit statement in connection with accounts of Mr. A. Shortt, our Agent at Halifax. We return herewith form duly completed.

And the following year a like certificate was given on the like request though not so complete yet objectionable.

Each was untrue in fact tending to deceive the appellant's auditor and hence quite unjustifiable.

It is said these were not asked before renewals, for the respective years in question.

I may point out that the original declaration on the application for the guarantee contained the following at its close:—

I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

I think these certificates were further statements such as contemplated and it mattered not whether made in relation to renewals or not though quite likely they were.

The respondent had, by the express terms of the guarantee, the right to cancel it at any time and had a perfect right to ask such a question and be guided by the answer, or refusal to answer.

And that answer should have been honest as neither of these were or are excusable in law however otherwise possibly so in a degree.

The answers brought into operation and effect the terms of the conditions already quoted and rendered the policy void.

Moreover alternatively these are cogent evidence in the way of debarring the respondent from applying moneys paid in by the deceased in the months for which claim is made from applying same to cover up early defalcations.

The insurance is only against forgery, fraud or embezzlement.

In my opinion this appeal should be allowed with costs throughout and the respondent's action dismissed with costs.

DUFF J. (dissenting).—The questions raised by this appeal mainly concern the interpretation and effect of the answers given by the insured in a proposal for insurance. They have given rise to differences of opinion. I concur with the view of the majority of the Court of Appeal that the representations were not shewn to be substantially untrue and that there was any material concealment or that the affirmative warranties were not fulfilled is not established. It is convenient perhaps to first deal with the point argued by the appellant to the effect that the proposal contained promises as to the course of dealing which constituted essential conditions of the policy. This is a view of the policy which I think cannot be supported. The declaration with which the proposal concludes is in the following words:—

> I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Duff J.

This declaration is obviously restricted in its application to representations and to warranties which are not promissory. The policy recites that the insured

> has delivered to the company a proposal and declaration in writing signed by or on behalf of the employer, stating (*inter alia*) the rules and conditions of the employment, and the precautions observed by the employer in the management of, and the check imposed upon the employed, and which proposal the said employer has agreed shall be the bais of this contract, and be considered as incorporated herein.

The fair meaning of this recital is that the proposal is to be incorporated with the policy according to the terms of the proposal itself. In other words, it is only those answers which profess to state matters of fact, (representations and affirmative warranties) which are incorporated in the policy. As against the insured it would be a departure from the long settled rule requiring the provisions of insurance contracts framed by the insurer and expressed in terms capable of more than one construction to be read according to that construction which is the most favourable to the insured. We are therefore concerned on this appeal only with representations of fact and warranties as to fact as distinguished from promissory warranties expressed in the respondent's proposal.

Is there in fact misrepresentation or concealment in respect of the matters complained of? The argument principally turned upon three alleged cases of misrepresentation or concealment. 1st. The representation "he remits monthly" is alleged to be misleading. 2nd. The answers to two questions are said to imply an affirmation that Shortt's accounts had been audited, and 3rd. there is said to be an implied representation that on the occasion of the last remittance his accounts had been investigated and found to be in order.

I observe, first, that in construing such a document the answers are not to be read with pedantic strictness; they should be given the meaning which a business man of ordinary intelligence would ascribe to them. So reading these answers I not only find in them no affirmation, express or implied, that the practice was to audit Shortt's accounts but on the contrary answers which most certainly would convey the idea that such was not the practice. So as to the answer concerning the last remittance; that, when read in connection with the preceding answer does not imply that any extraordinary investigation had taken place but only that everything had been found to be in accordance with the usual course of business.

I am moreover unable to see that any substantial departure from the truth occurs from the statement "he remits monthly." I think that would not be an untruthful or misleading description of the practice by which the monies received for premiums due in any month were sent forward in a single remittance within such delay as might be considered reasonable by the parties having regard to the statutory allowance of days of grace and the contingencies of settlements with dilatory insurers.

I am unable to agree that the so called renewal certificates affect the rights of the respondent; they were sent forward in each case after the renewals had been effected. There is no allegation in the pleadings and there is no evidence to shew that the appellant company was influenced by these certificates in refraining from exercising its powers of cancellation. And in the absence of either allegation or proof it would be inconsistent with sound principle to proceed upon the assumption that they were so influenced.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Anglin J.

ANGLIN J.—Article 2487 of the Civil Code of Quebec 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.

Article 2485 provides that:—

The insured is obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk and which may prevent the undertaking of it or affect the rate of premium.

By article 2486 it is declared that:—

The insured is not * * * obliged to declare facts covered by warranties, express or implied, except in answer to inquiries made by the insurer.

The following recital and indorsed "condition precedent" are taken from the policy sued upon:

Whereas The Standard Life Assurance Company, Montreal, Quebec (hereinafter referred to as "the employer") employs or intends to employ as agent at Halifax, N.S., Alfred Shortt, (hereinafter referred to as "the employed") and desires to effect a guarantee with The Railway Passengers Assurance Company (hereinafter referred to as "the company") and has delivered to the company a proposal and declaration in writing, signed by or on behalf of the employer, stating (*inter alia*) the rules and conditions of the employment, and the precautions observed by the employer in the management of, and the check imposed upon the employed, and which proposal the said employer has agreed shall be the basis of this contract, and be considered as incorporated herein.

* * *

3. Every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding and on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred to is or are untrue in any respect, or if there be any material fact affecting the nature of the risk, whether in relation to the occupation of the employed or otherwise, omitted therefrom, or if there be any

misrepresentation, suppression or untrue averment at the time of the payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all premiums paid in respect thereof shall be forfeited to the company.

The proposal or application by the plaintiff for the insurance contains the following questions and answers:

10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:

C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthly.

E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully? Monthly accounts.

H. Will the balance on his hands if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so, give particulars. Only for receipts that are in his hands for collection.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

It concludes as follows:—

I declare that the above statements are true and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

The facts were that the agent Shortt, although his accounts as rendered did not disclose it, had stolen upwards of $2,000 collected in premiums at the time the insurance was effected and that this defalcation continued and increased throughout the duration of the policy so that it amounted to more than $5,000 when he died; that there never was any audit of his accounts, or any examination, counting or balancing of his cash on behalf of the plaintiffs; that any thorough audit, any effective balancing of the cash accounts, any real checking of the "monies in his control or custody" or of "the funds on hand to balance

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Anglin J.

his accounts" would have revealed the embezzlement; and that, although it was twice stated that he remitted monthly, he was habitually permitted to hold moneys collected by him for premiums for periods of 80 and even of 90 days as this extract from the evidence of the plaintiff's accountant, Bowles, shews:—

Q. Did you ascertain when May, 1916, premiums were remitted? A. They were remitted for the week ending 5th of August.

By the Court:

Q. The June, 2nd of September, and July, the 30th of Sept. A. Yes.

By defendant's counsel:

Q. And April, the 30th June I think you said? A. Yes, the 30th of June.

Q. And March? A. 29th of May.

Q. February? A. The week ending 6th of May; they were received in Montreal really on the 1st of May as per our stamp; that is February, 1916, received on the 1st of May, 1916.

Q. January? A. On the 28th of March.

Q. December, 1915. A. On the 28th of February.

Q. November, 1915? A. On the 29th of January.

In fact the account rendered immediately prior to the application made for the policy on the first of April, 1914, which was sent in on the 20th of March, covered the premiums received in January leaving the whole of the February premiums and those received during the first 20 days of March unaccounted for. Whatever excuse the statutory provision for 30 days' grace on payment of premiums may have afforded for allowing the agent to retain the premiums collected during January until the 1st of March or even a day or two later, it cannot avail to cover withholding them until the 20th of March. It was also the fact that Shortt was never required when rendering his statements to account for or pay over all monies received by him up to the date of the accounting. Moneys received during the preceding 40 to 60 days were not included. Nevertheless the misleading statement is twice made that "he remits monthly".

"All things" would not have been "found in order", a few days before the policy was applied for if any proper audit or investigation, such as the answer to question 17 implied, had in fact taken place. In my opinion the answers to questions 16 and 17 fairly read together, as they must be, were false and misleading; the answers to questions 10 (C) and 10 (E) were calculated to "diminish the appreciation of the risk" to be undertaken; on the answers as a whole the facts were not substantially as represented (Art. 2489 C.C.) and the risk which the defendants were induced to undertake was materially different from and greater than the statements in the application would indicate. I cannot find anything in that document which limits the responsibility of the applicants for the truth of the answers made to matters within their own knowledge. On the contrary, there is an express declaration of the truth of the representations and they are made the basis of the contract. *Thomson* v. *Weems* (1). Viewed as warranties (Art. 2491 C.C.) the untruth of the answers in the application, whether taken singly or as a whole, avoids the policy whether known or unknown to the warrantor (Art. 2490 C.C. *Joel* v. *Law Union and Crown Ins. Co.* (2); viewed as misrepresentations or concealments of existing facts it is immaterial whether there was merely error or design to deceive on the part of the applicant (Art. 2487 C.C.); viewed as undertakings in regard to the course of dealing to be pursued by the assured with its agent during the currency of the policy, having been incorporated with it as the basis of the contract their non-fulfilment is equally fatal. Art. 2490 C.C. The case falls within the principle of the decision of this court in *Anrprior* v. *United States Fidelity and Guarantee Ins. Co.* (3).

(1) 9 App. Cas. 671.
(2) [1908] 2 K.B. 863 at pp. 885-6.
(3) 51 Can. S.C.R. 94.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Anglin J.

Moreover, in connection with each of the two renewals of the policy a certificate was required from the assured. The two certificates, obtained respectively in 1915 and 1916, read as follows:—

This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1916.

D. M. McGOUN,
Manager for Canada.

This is to certify that the books and accounts of Mr. Alfred Shortt, as rendered by him, were examined by us from time to time in the regular course of business and we found it correct in every respect, all monies or property in his control or custody being accounted for, and he is not now in default.

He has performed all his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 9th day of May, 1916.

Standard Life Ass. Co.,

J. R. EAKIN,
Secretary for Canada.

The words "as rendered by him" in the 1916 certificate were inserted in ink. They obviously refer only to the "accounts" of the agent. Books are not "rendered". In these certificates we find these three positive statements, (a) that Shortt's books had been examined from time to time by his employers; (b) that all moneys in his control or custody had been accounted for; and in 1915 (c) that he had "proper securities and funds on hand to balance his accounts". All three statements were absolutely untrue and one, if not two of them, must have been untrue to the knowledge of the officials of the assured. But I find nothing

to restrict the statements made in these certificates to matters within their knowledge, or otherwise to qualify them. Nor, in view of the provision entitling the company to cancel the policy at any time, is it of vital moment that the sending in of those certificates was delayed until after the renewal premiums had actually been paid. The power to cancel was not exercised and the policy was kept on foot on the faith of them—at least that must be assumed as against the insured. On this ground, as well as for substantial misrepresentations and concealments of fact in the original proposal of a nature to diminish the insurer's appreciation of the risk, the policy sued upon was in my opinion avoided. Indeed if some of the answers to the questions which are expressly incorporated in and made the basis of the policy should be regarded as merely evasions there is good authority for holding that the insurance was thereby avoided. *Fitzrandolph* v. *The Mutual Relief Society of N.S.* (1). *Moens* v. *Heyworth* (2).

Insurance companies should undoubtedly be held to strict compliance with their obligations and defences on their part lacking in merit and substance should be discouraged. On the other hand the fact that the contract of insurance is *uberrimæ fidei* (*Brownlie* v. *Campbell* (3), must never be lost sight of and an insured cannot be permitted to recover on a policy which he has obtained by making particular statements in regard to material matters which are only half truths—often more misleading than actual falsehoods—*London Assurance Co.* v. *Mansel* (4)—or by putting

(1) 17 Can. S.C.R. 333, at p. 338;
(2) 10 M. & W. 147 at pp. 157-6.
(3) 5 App. Cas. 925 at p. 954.
(4) 11 Ch. D. 363, at p. 371;

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Anglin J.

in an application which, taken as a whole, is palpably calculated to create a false impression as to the nature and extent of the risk to be undertaken by the insurer.

I would for these reasons, with respect, allow this appeal and direct judgment dismissing this action with costs throughout.

MIGNAULT J.—The question here is whether the appellant is liable, under a guarantee policy issued by it in favour of the respondent, to make good a defalcation committed by one Alfred Shortt who was the agent of the respondent at Halifax. On the latter's death it was discovered, the respondent alleges, that he was short in his accounts to the extent of $5,197.90, and the respondent sued to recover the full amount of the policy, $3,000.00. It succeeded in the Superior Court for the entire amount of its demand, but, in the Court of King's Bench, the judgment was reduced by the sum of $584.36 which the respondent owed to Shortt's estate on a life insurance policy which was payable to his executors. The respondent acquiesced in this reduction, and the appellant claims that the conditions of the policy were violated and that the action should have been dismissed.

The policy was issued in Montreal in 1914, and was twice renewed.

As it is usual in such cases, the truth of the answers of the insured to questions made on behalf of the insurer in the application for insurance, and of any further statements of the insured referring to the guarantee, is made the basis of the contract.

The questions and answers contained in the application for insurance and which are material to this inquiry are the following:—

10. C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthy.

10 E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

10 F. Are moneys to be paid into the bank by the applicant? If so, how often will the bank book be inspected and checked? We do not inspect the bank account.

10 G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully? Monthly accounts.

10. H. Will the balance in his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so give particulars.—Only for receipts that are in his hands for collection.

13. Have you a separate banking account into which all moneys are paid by the applicant on your behalf when received? Yes, in Bank of Montreal.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

The evidence clearly shews that some years before the policy Shortt had been guilty of a defalcation for a considerable amount, but, by reason of an inefficient system of control by the respondent, he succeeded in concealing it, and his defalcation, at the date of the policy, amounted to approximately $2,000.00. At his death the shortage had reached the figure of $5,197.90.

I have quoted the principal questions and answers contained in the application for insurance. As to these answers Mr. Justice Martin, in the Court of King's Bench, remarks:—

It will be observed from these answers that respondent persistently avoided making any direct answers as to any audit or checking the accuracy of Shortt's accounts. What they said amounts to this: we do not inspect the bank account: we do not make any audit: we do not balance his cash account or check their accuracy: we require him to render monthly accounts and pay over cash received monthly.

While the wisdom of accepting such incomplete answers and issuing a policy thereon may be doubted I think there was a full and fair disclosure of all facts showing the nature and extent of the risk and showing entire absence of any audit, inspection of the bank account or checking the accuracy of Shortt's monthly statements.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Mignault J.

With deference, I am of opinion that it is not enough to say that the appellant issued the policy on incomplete answers. If I am right in thinking that these answers were evasive and misleading, they certainly do not amount to a full disclosure of all facts showing the nature and extent of the risk.

And indeed, while it is true that the respondent stated that it did not inspect the bank account, some of these answers were framed in a way to give the impression that Shortt's cash accounts would be monthly balanced and their accuracy checked. To reply "monthly accounts" in answer to questions inquiring how the cash accounts would be balanced and checked, and the balance in Shortt's hands would be dealt with; to say "he remits monthly" when the point was "how often does an audit take place" and "his last remittance was received a few days ago" in reply to an inquiry "when were applicant's accounts last audited and by whom"; and to answer "yes" to the question whether all things were found in order; is in effect to assure the appellant that a monthly balancing, checking and auditing of Shortt's accounts would take place and that, at the last audit made, everything was found in order. The respondent says that the evasive and misleading answers it made were literally true. If so their truth was a species of half truth really quite as deceptive as a false answer. The whole truth was that Shortt's accounts were not balanced, checked and audited monthly for otherwise the defalcation could not have escaped detection.

This is shewn by the cross-examination of Mr. Bowles, the accountant whose duty it was to check Shortt's returns. The system was to send to Shortt the renewal receipts for the coming month, which the

insured could pay within thirty days from maturity, and for which Shortt had to account. Mr. Bowles states that, in 1896, the January premiums received by Shortt were remitted on the 28th of March, the February premiums on the 1st of May, the March premiums on the 29th of May, the April premiums on the 30th of June. This was, as admitted by Mr. Bowles, one month late, and the lax system prevailed during the preceding year, the length of the delay in remitting being somewhat less.

In my opinion the answers made by the respondent inplied a promise that Shortt's accounts would be balanced, checked and audited monthly, and this promise was not fulfilled when he was allowed to remain in arrears from month to month, thus permitting him to conceal or cover up up his defalcation.

In *Arnprior* v. *United States Fidelity and Guarantee Cl.* (1) the insured in answer to the question: "What means will you use to ascertain whether his accounts are correct? "replied: "auditors examine rolls and his vouchers from treasurer yearly". The rolls were never examined during the continuance of the policy and it was held that this was an untrue representation that avoided the contract. This case seems to me clearly applicable here.

The contract of insurance is one where the utmost good faith and sincerity must be observed by the insured. This is well stated by Fuzier-Herman, vo. Assurance, nos. 588 and 589:—

588. L'assurance étant un contrat de bonne foi et la sincérité en étant une condition nécessaire, l'assuré doit faire à l'assureur, au moment de la formation du contrat, des déclarations exactes et complètes sur ce que ce dernier a intérêt à savoir, l'éclairer sur l'objet de l'assurance et sur les risques.

(1) 51 Can. S.C.R. 94.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Mignault J.

589. Toutes les polices subordonnent l'existence du contrat à la sincérité et à l'exactitude des déclarations. C'est à juste titre: l'assureur doit nécessairement être éclairé sur la portée véritable de son engagement, sur l'étendue du risque qui lui est proposé; sinon, il n'y a plus accord de volontés sur la chose promise, le consentement n'existe pas et, par suite, le contrat est vicié dans son principe.

The civil Code of the Province of Quebec has adopted these principles in their utmost strictness:

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shews 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 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.

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

Measured by this test, the respondent cannot cercertainly contend that its replies represented to the assurer

fully and fairly every fact which shews the nature and extent of the risk.

Its answers were calculated to mislead, perhaps not deliberately, but none the less effectively. And it should not now be heard to defend these answers by saying that they were true as far as they went, or that they were incomplete and the appellant having chosen to issue the policy cannot complain of their incompleteness. It would seem to me contrary to the principles I have stated to allow the respondent, notwithstanding its misrepresentation, or failure to fully and fairly represent such material facts as the checking and auditing of Shortt's accounts, to recover on the policy a loss brought about by its own loose method of dealing with its agent.

The policy in question was twice renewed and after each renewal the respondent furnished the appellant with a certificate that Shortt's books and accounts had been examined by it from time to time in the regular course of business and were found correct in every respect. The evidence shows that this statement was not true, no such examination having been made, otherwise it is inconceivable that the defalcation would not have been discovered. The respondent claims that the appellant did not rely on these statements in renewing the policy, for they were subsequent to each renewal, but, being false, they deceived the appellant as to a material fact and induced it to maintain a policy which it could have cancelled. Moreover, if the answers to the questions in the original application amount to a representation that Shortt's books and accounts would be balanced, checked and audited monthly, and I think they do, this representation and the promise it implies has not been fulfilled. I am therefore of opinion that the respondent cannot recover on the policy.

The appeal should be allowed and the respondent's action dismissed with costs throughout.

BERNIER J. (dissenting).—Les parties en cause sont toutes deux des compagnies d'assurance.

L'intimée a obtenu de l'appelante le 1er avril 1914, une police de garantie sur la fidélité de son employé Alfred Shortt, au montant de $3,000; l'appelante s'est engagée dans la police à garantir l'intimée contre toute fraude, ou malversation criminelle, de son employé.

A la mort de ce dernier, vers le 25 octobre, 1916, il fut constaté qu'il était en déficit d'une somme d'au-delà de $5,000.00 envers l'intimée.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Bernier J.

Sur refus de l'appelante de rembourser l'intimée, celle-ci poursuivit l'appelante pour le montant de sa police, savoir $3,000.00. La Cour Supérieure a maintenu l'action; la Cour du Banc du Roi a confirmé le jugement, tout en le réduisant cependant à la somme de $2,415.64, sans frais de part ni d'autre en Cour du Banc du Roi mais avec les frais de la Cour Supérieure contre l'appelante.

Parmi ses moyens de défense à l'action, l'appelante allègue fausse représentation et reticence coupable, de la part de l'intimée; elle allègue également la fausseté des garanties affirmatives et la non-exécution des garanties promissoires, contenues dans les réponses de l'intimée, réponses incorporées dans la police ou en faisant partie par une énonciation à cet effet.

Ce premier moyen a-t-il été prouvé? Je suis d'opinion qu'il ne l'a pas été.

Les réponses à l'interrogatoire écrit de l'appelante et qui ont précédé naturellement l'émission de la police, ne sont pas toutes complètes; cependant elles ne sont pas vagues, et on ne peut y découvrir de traces de reticences, pas plus, du reste, que de fausses représentations.

Ainsi à la question 10 F, voici la réponse:

> Q. Are moneys to be paid into the bank by the applicant? If so, how often will the bank book be inspected and checked? R. We do not inspect the bank account.

Cette réponse n'est pas complète. Elle laisse entendre cependant que son employé dépose les argents à la banque, et en effet, il le dit en réponse à la 13ème question.

Mais la réponse devient importante, quand il s'agit de faire une revue générale de l'enquête, pour déterminer s'il y a eu inexécution des garanties promissoires de la police.

La réponse à la question 10 G n'est pas plus complète, car la question découlant de la précédente 10 F devait recevoir la même réponse, si l'appelante voulait bien se contenter de la première.

Même chose pour la réponse à la question H.

Question 11:

Is there any cash balance at present due to you from him? If so, give particulars. Only for receipts that are in his hands for collection.

Cette réponse a également son importance au point de vue de la garantie affirmative.

Mais que veut-elle dire de plus que ceci: il n'est pas à ma connaissance personnelle que mon employé me doive autre chose que les argents représentés par les reçus de prime que je lui ai transmis, reçus qu'il devra remettre aux assurés lorsqu'il sera, par ces derniers, payé de leurs primes de renouvellement?

L'appelante prétend qu'au moment où cette réponse était donnée, Shortt était déja défalcataire vis-à-vis de l'intimée. La chose est possible. S'il l'était, ce n'était certainement pas à la connaissance de l'intimée qui avait cet homme à son service depuis quarante ans, et dont la réputation était excellente.

Il n'y a pas lieu à appliquer ici aucune règle de garantie implicite, à l'effet que, si Shortt était à ce moment défalcataire hors la connaissance de l'intimée, la réponse de cette dernière serait une garantie fausse, et partant pourrait faire annuler la police.

Question 15:

How often does an audit take place? He remits monthly.

La réponse, d'après la preuve qui a été faite, est vraie, mais elle n'est pas "ad rem".

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Bernier J.

Cependant, l'intimée avait déjà répondu à la question 10 F; "We do not inspect the bank account". Si l'intimée déclare qu'elle n'examine pas le compte de banque de son employé, on comprend qu'elle n'audite pas ses comptes.

Question 16:

When were applicant's accounts last audited and by whom? His last remittance was received a few days ago.

Cette dernière question, découlant de la précédente, devait recevoir une réponse dans le même ordre d'idées que la précédente réponse.

Elle n'est pas complète; mais on voit bien que l'intimée ne faisait aucune audition des comptes qu'elle avait avec son employé, et qu'elle n'entendait pas non plus en faire.

L'appelante a décidé de se contenter de ces réponses; elle a émis sa police.

Peut-elle aujourd'hui s'en plaindre? Je ne le crois pas.

L'enquête n'a pas revélé que l'intimée eût caché quoi que ce soit des agissements de son employé, rien dont la connaissance par l'appelante l'aurait empêchée d'assumer le risque, ou qui aurait pu influer sur le taux de la prime.

Pourquoi ne pas avoir requis l'intimée de faire à l'avenir des auditions des livres ou des comptes de son employé? Pourquoi ne pas l'avoir obligée à remplir à l'avenir certaines précautions que visiblement, par la formule de l'interrogatoire écrit et imprimé, elle avait l'habitude d'exiger de ses assurés?

Elle eût alors posé des garanties promissoires, dont le défaut d'accomplissement eût été une cause d'annulation de la police.

Les réponses données par l'intimée ont formé la base du contrat d'assurance entre les parties. La clause suivante accompagnait les réponses, à l'effet que telles réponses étaient vraies et qu'elles serviraient de base au contrat:

I declare that the above statements are true and I agree that these statements and any further statements referring to this guaranty signed by me shall be taken as the basis of the contract between me and the above named company.

Après l'émission de la police, savoir le 21 mai 1915, l'appelante transmit à l'intimée pour que celle-ci le signât un blanc de certificat au sujet de son employé; le même envoi fut fait l'année suivante, mais après le renouvellement de la police d'assurance, savoir, le 9 mai 1916.

Ces blancs sont des formules imprimées.

Ces certificats sur la conduite ou les agissements de Shortt ne sont pas autres choses que des déclarations au sens de l'article 2485 du code. Elles ne viennent rien ajouter aux clauses et conditions de la police, ni aux réponses de l'intimée qui ont fait la base du contrat.

Il semble que c'est l'habitude chez l'appelante de faire signer ces documents à ses assurés; mais, venant après que le contrat d'assurance a été rendu parfait, ils ne peuvent guère avoir d'influence sur ce contrat; je leur appliquerais ce principe des assurances sur le feu (Art. 2570 C.C.) et des assurances sur la vie (Art. 2585 C.C.)

Les déclarations qui ne sont pas insérées dans la police ou qui n'en font pas partie ne sont pas reçues pour en affecter le sens ou les effets.

Partant, ces certificats ne peuvent être reçus pour affecter le sens de ce qui a fait la base du contrat, savoir, les réponses de l'intimée à l'interrogatoire de l'appelante.

Sur les autres points de défense de l'appelante, je ne puis non plus concourir en sa faveur.

1921

RAILWAY PASSENGERS' ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

Bernier J.

Ainsi, elle a prétendu que lors de l'émission de la police d'assurance, son employé était en déficit; que ce fait non seulement n'a pas été déclaré par l'intimée, mais elle aurait affirmé le contraire.

D'abord est-il bien prouvé que Shortt était en déficit dans ses comptes avec l'intimée, en 1914? La chose est probable; cependant, on peut douter que la preuve soit formelle sur ce point, étant donnée la manière de Shortt de faire ses rapports mensuels à l'intimée, la possibilité qu'il y eut des retards chez les assurés à lui payer leurs primes d'assurance, et la possibilité qu'il eût des sommes d'argents qui auraient été déposées dans d'autres banques.

L'intimée n'avait qu'à garantir sa connaissance personnelle des faits de Shortt, au moment où elle faisait son application. J'ai donné plus haut mon opinion sur ce point.

L'appelante a soutenu qu'il n'était pas prouvé que le déficit, au sujet duquel l'intimée réclame le montant de la police, était pour les primes des mois de l'année spécifiés dans son action.

Dans mon opinion, et après avoir donné beaucoup d'attention à ce moyen, cette prétention ne peut être maintenue.

Quant au dernier moyen soulevé, à savoir, que tel déficit ne constituait pas une fraude prévue dans la police et pour laquelle l'appelante était responsable, je suis absolument de l'opinion contraire.

Je suis d'opinion de renvoyer l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Vipond & Vipond.*

Solicitors for the respondent: *Fleet, Falconer, Phelan & Bovey.*