

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

D. L. McCarthy, K.C., and D. B. Sinclair, for the appellants.

T. H. Lennox, K.C., and R. Lieberman, for the plaintiff, respondent.

MASTEN, J., reading the judgment of the Court, said that by their amended statement of defence the defendants admitted that the plaintiff would be entitled to recover \$3,000 and interest, as claimed in the statement of claim, but for certain written representations in the application for the insurance, dated the 20th April, 1917, signed by Joseph Selick, which representations the defendants alleged to be false and fraudulent. These representations were made by Selick in the presence of the medical examiner of the defendants, in answer to questions 8 and 9 then propounded to him. Question 8 was, whether the applicant for insurance had ever suffered from any one of a number of specified diseases, and whether he had consulted a physician for any ailment or disease not included in those specified; and Selick answered "No" to the question as to each of specified diseases and to the question as to diseases not specified. Question 9 was, what physician or physicians the applicant had consulted or been treated by within 5 years before the application and for what illnesses or ailments; and Selick answered "None." It appeared from the evidence that on the 10th March, 1917, Selick, suffering from acute nephrosis, with a temperature as high as 103, was admitted to the Toronto General Hospital, where he received treatment until the 15th March, when he was discharged in an improved condition. Nephrosis was not one of the diseases specified.

At the trial questions were submitted to the jury, and they found: (1) that Selick answered "No" to the question, "Have you consulted a physician for any ailment or disease not included in your above answers;" (2) that that answer was untrue and was acted upon by the defendants, but was not material; (3) that Selick answered "None" to the question as to consulting or being treated by physicians; (4) that that answer was untrue and was acted upon by the defendants, but was not material; (5) that Selick was not guilty of fraud in answering the questions in the way he did.

After referring to sec. 156 of the Ontario Insurance Act, R.S.O. 1914 ch. 183, and to numerous cases, the learned Judge said that it was manifest, without any specific finding, that the answers of Selick, forming, as they did, part of the application, were made with the intention that they should be acted upon by the defendants; and it was also clear that Selick, at the time he made the