that he had the disease of abscess or open sore prior to the application, but that there was a simple sore about 20 years before the application, when Dr. Maclean treated him for a dislocation of the hip. And so finding, it follows, as they also find, that its existence was something not material to be stated by deceased in answer to the questions. And the other allegations of the defence are covered by the last answer of the jury, that deceased did not suppress or withhold any information respecting his past or present physical condition which was material for the insurance company to know. The contract of insurance having been entered into in 1891, the provisions of sec. 5 of the Act 52 Vict. ch. 32 (O.) applied to it. By virtue of this section, no term, condition, . . . for avoiding the contract by reason of any statement in the application therefor or inducing the entering into of the contract by the company is valid unless limited to cases in which the statement is material to the contract, and the contract is not to be avoided by reason of the inaccuracy of any such statement unless it is material to the contract. This provision now forms part of sec. 144 of R. S. O. 1897 ch. 203. The effect is, to reduce all such statements virtually to the level of representations. And whether or not a representation was material was always a question for a jury, if there was one. And by sec. 33 (2) of 55 Vict. ch. 39 (O.), now sec. 144 (3) of R. S. O. ch. 203, it is expressly provided that the question of materiality in any contract of insurance shall be a question of fact for the jury or the Court if there be no jury.

It was contended that the findings of the jury were contrary to the evidence and the weight of evidence. But there was evidence upon which the jury might come to the conclusions that they did. As to the existence of the disease defendants were obliged to rest largely upon testimony . . . which carries the case no further than the existence of a sore on the leg. . . .

Defendants, in order to succeed in their defence, were obliged to convince the jury, first, of the existence of the disease of abscess or open sores, secondly, that the answers given in relation thereto were material to the contract, and lastly, that they were untrue. The findings of the jury are not in their favour on any of these points, and the defences therefore fail. . . .

Appeal dismissed with costs.