1955 *Present :* **Gratiaen, J., and Fernando, J.**

MARIYA UMMA, Appellant, *and* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD., Respondent

S. C. 278—D. C. Colombo, 23,590

Insurance—Contract of life insurance—Repudiation of liability by insurer—Vagueness of allegations against deceased insured—Framing of issues —Duty of Court to clarify issues—Civil Procedure Code, ss. 77, 146—Proposal Form—Questions appearing therein—Truth of answers—Tests to ascertain it.

(i) The insurer in a contract of life insurance, on being sued for the recovery of Rs. 30,000 due under the policy of insurance, filed answer repudiating liability in general terms alleging that the insured had withheld material information concerning the state of his health. Although the answer was defective for want of precise information as to the grounds on which liability was repudiated, it was not returned for amendment under Section 77 of the Civil Procedure Code. At the same time, the plaintiff, who was the administratrix of the estate of the deceased insured, failed to serve interrogatories on the insurer for the purpose of obtaining clarification of the allegations made against the deceased.

Held, that in the circumstances Section 146 of the Civil Procedure Code imposed a special duty on the Judge himself to order the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself " the propositions of fact or of law " upon which the parties were at variance.

(ii) In the absence of provision to the contrary expressed in the clearest possible terms, a person making a proposal for life insurance is entitled to assume that insurance Companies do not require information frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake. Therefore, in a country like Ceylon where perfectly healthy persons occasionally " suffer " from slight indispositions of brief duration, loosely described as " influenza ", an applicant for insurance cannot be deemed to have given untrue or incorrect information if, although he had once had a mild attack of " influenza " which was speedily cured by a few doses of mixture, he answered in the negative the following questions addressed to him in the proposal form :—

" 1. Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever ?

2. Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house ? If so, give details and state names and addresses of medical men consulted. "

If the words of a question appearing in the proposal form are ambiguous, they must be construed *contra proferentes* and in favour of the assured.

(iii) One ground on which the insurance Company repudiated liability on the policy was that the insured had given untrue and incorrect answers to the printed questions in the proposal form when those answers would form the " basis of the contract ". The printed questions were, however, addressed

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to the deceased in the English language which he could not understand. They were interpreted by the Company's agent in Malayalam, and the answers given in Malayalam were then translated into English by the Company's agent.

Held, that in the circumstances the Company could not succeed without proof that the questions and the impugned answers were correctly interpreted and recorded by the Company's agent.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *N. Nadarasa*, *S. Sharvananda* and *T. Parathalingam*, for the plaintiff appellant.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, *S. J. Kadirgamar* and *J. de Saram*, for the defendant respondent.

Cur. adv. vult.

August 3, 1955. GRATIAEN, J.—

The administratrix of the estate of K. Ahamed sued the defendant Company, whose head office is in Bombay, for the recovery of Rs. 30,000 under a policy of insurance payable on his death.

On 30th November 1947 the deceased, who was the proprietor of Pilawoos Hotel, had submitted to the Company's branch office in Colombo a proposal (D1) for the insurance of his life. The business was introduced to the Company's Inspector Sivasubramaniam by a canvassing agent Nair who gave evidence at the trial in support of the plaintiff's claim. The printed proposal form, drafted by the Company in the English language, contained a number of questions which the applicant for insurance was required to answer "fully and distinctly in his own handwriting". A similar requirement appears with regard to the questions in the "Personal Statement" which was to be answered before his examination by a Medical Referee nominated by the Company.

The deceased could sign his name in English, but was otherwise illiterate in that language. The questions in the proposal form and the Personal Statement were therefore interpreted to him in Malayalam by Sivasubramaniam who also translated his answers into English. At the foot of the proposal form is a declaration printed in English and signed by him in both languages purporting *inter alia* to agree that his statements in the documents "shall be the basis of the contract". A further declaration, also printed in English in somewhat different terms, was signed by him in both languages in the presence of the Medical Referee, Dr. Sivapragasam, after the medical examination.

Dr. Sivapragasam's report P4 pronounced that, after a detailed medical examination, he considered the deceased a "first class life", that is to say, "a life in perfect health and of sound constitution with good personal and family history and with prospects of longevity as good as those of healthy persons generally of the same age". The Company accepted the proposal on the 15th December 1947 and the terms of the contract are contained in the policy dated 12th January 1948. There is no evidence as to when the policy was forwarded to the deceased.

The deceased died at Cannanore in South India on 21st March 1948, and payment under the policy was claimed shortly afterwards on behalf of his estate. On 8th August 1950, i.e., more than two years later, the Company repudiated liability on the grounds specified in its letter P2. It was alleged, *inter alia*, (1) that the deceased had "withheld material information at the time of effecting the assurance" and (2) that the Company had "indisputable proof to show that the deceased had for some months before he submitted the proposal and even till the date of issue of the Acceptance Letter been suffering from heart trouble and its complications and that he had also been suffering from piles and hernia". Upon receipt of this letter, the plaintiff instituted the present action in October 1950.

Paragraph 6 of the Company's answer is to the following effect :—

"6. The defendant Company states that after the death of the said Kalingal Ahamed deceased, it was discovered that he had failed to disclose facts regarding the state of his health and/or about ailments which he had been suffering from at or about the date of the said Personal Statement and of the proposal for insurance, at or about the date of the letter of acceptance or at or about the date of issue of the Policy of Assurance, and that the deceased had either fraudulently or wilfully given false answers or information in the said Personal Statement and/or Proposal for Assurance in regard to his health or ailments or had either fraudulently or wilfully concealed or withheld material information from the defendant Company in regard to his health or ailments. The defendant Company therefore avers that the said policy of insurance effected thereunder ceased and determined and all monies paid thereunder have become forfeited to the defendant Company and the defendant Company is under no liability whatsoever to pay the sum of Rs. 30,000 or any sum whatsoever."

These allegations (so Counsel appearing for the Company informed us during the argument) were later slightly modified to the extent that the Company did not consider it necessary to pursue the earlier imputation of an express fraud. The modified grounds of repudiation are set out in issues 3 and 4 which (as amended during the trial) read as follows :—

"3. Had the deceased failed to disclose facts regarding the state of his health and/or about the ailments that he had been suffering

from on or about the date of the personal statement D1, or date of proposal, acceptance of the proposal or date of issue of the policy of Insurance ?

4. Had the deceased given untrue or incorrect answers and information in the personal statement and proposal for insurance in regard to any one or more of the following particulars :—

(*a*) Date of birth and age—Cage 3 of page 1 of D1.

(*b*) In regard to the question in cage 14 of page 1 of D1.

(*c*) In respect of the personal statement at page 2 of D1, in regard to the answers to questions 3A (1), 3A (2), 3A (3), 3A (4) of page 2 of D1 and 3c, 3D (1, 2) and 9A and 9B ?

Issue 4 (*a*) was withdrawn at an early stage of the trial, and we were informed that the Company did not invite even an incidental finding that the deceased's age in fact exceeded 46 in November, 1947.

Issue 3 raises the question whether the deceased had in fact withheld material information concerning the state of his health, and thus disregarded the duty imposed by law on any person proposing to take out a policy of life insurance. As to issue 4, the Company took up the alternative position that the validity of the policy was by mutual agreement made conditional upon the " truth " and/or " accuracy " of the deceased's answers to the specific questions put to him in the proposal and the Personal Statement. It is common ground that the burden of proving that the contract was either voidable for the reasons alleged in issue 3 or void *ab initio* for the reasons alleged in issue 4 was on the Company.

Issue 3 was framed in terms of the utmost generality, and gave no indication of the ailments from which the deceased allegedly suffered at the relevant dates. Counsel for the plaintiff therefore asked at the commencement of the trial for particulars of these allegations. He claimed that the Company's defence on this issue should be restricted to the grounds of complaint specified in its letter of repudiation P2. The learned Judge over-ruled the objection and said :—

" The answer is no doubt couched in general terms, and in my view should have specifically referred to the various items in the proposal for insurance and the Personal Statement which are alleged to have been made by the deceased. But at the same time one cannot lose sight of the fact that by interrogatories the plaintiff could have clarified the position. This has not been done. I allow the issues. "

The Company's pleadings were certainly defective for want of precise information as to the grounds on which liability was repudiated. The answer should therefore have been returned for amendment under Section 77 of the Civil Procedure Code. I also take the view that, although the plaintiff would have been better advised to serve interrogatories on the

Company for the purpose of obtaining clarification of allegations made against the deceased, the learned Judge took far too narrow a view of his own powers and duties in such a situation.

No express provision is made in our Code for the salutary machinery of "summons for directions" as in England or for pre-trial proceedings as in America. Nevertheless, and indeed for this very reason, Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when the precise nature of the dispute is not clarified before the evidence is recorded. The defendant's pleadings were defective, and the plaintiff (let it be conceded) had not been as vigilant as she should have been to protect herself against surprise. But it was still the Judge's duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself "the propositions of fact or of law" upon which the parties were at variance. This was especially necessary where the administratrix of an estate was confronted with serious allegations against a person who had never had an opportunity, when alive, to answer personally to the charges.

The same observations apply to issue 4. Each printed question in the Personal Statement refers to a formidable catalogue of "ailments", and, if the Company intended to rely on other charges than those specified in its earlier letter of repudiation (namely heart disease, hernia and piles) it should certainly have specified the additional "ailments" in respect of which the deceased was alleged to have given untrue or incorrect answers.

The trial commenced upon issues which were left far too vague, and, as the learned Judge himself points out in the closing paragraph of his judgment, the proceedings were unduly protracted for a variety of reasons. The advantage which this experienced Judge of first instance enjoyed of seeing and hearing the witnesses was therefore "perhaps not so great" as it would have been if the dates of trial had been less widely separated each from the other.

I now pass on to review some of the facts which came to light in the course of the trial. The Company was clearly entitled to view with some suspicion the fact that a man who was pronounced a "first class life" in November 1947 should have died of heart failure (according to the certificate of death) in March 1948. Indeed, the mystery deepened when this certificate, which originally gave his age as "55" and the name of his last medical attendant as "Dr. L. S. Shenoy.", was subsequently amended, first by altering his age to "46" and, at a later date, the name of the medical attendant to "Dr. M. Narayanan".

Dr. Narayanan, a medical practitioner of Tillichery in South India, reported to the Company that he treated the deceased for coronary thrombosis from about 14th March 1948 until he died—first at the residence of the patient's wife's family in the village of Eddakat, and later at Cannanore. He said that he had known the deceased quite well since

about 1944, and that the deceased had been in good health until the date of his last illness. Dr. Narayanan categorically denied that Dr. Shenoy was consulted at any stage of the deceased's last illness, and his version, if true, left no room for the complaint that the deceased had been guilty in November 1947 of non-disclosure of any material facts concerning the state of his health.

When Dr. Shenoy was contacted by the Company, he wrote a letter (D2) of 5th February 1949 giving a completely different history of the last illness. He said that it was he alone who had been in charge of the patient, first at Eddakat from the middle of February 1948 until about 5th March, and later at Cannanore until he died 16 days later. He also claimed to have called a Dr. Miller (then Civil Surgeon at Sholapur) in consultation on two occasions. According to him, the deceased died of cerebral oedema, and had been suffering for a considerable time from chronic myocarditis, unguinal hernia on both sides, and external piles. These details were elaborated in a further letter to the Company (D3) of 8th June 1949 and clearly forms the basis of the letter of repudiation P2 of October 1950. If Dr. Shenoy's version was substantially correct, the facts would without doubt have established that the deceased, when he was virtually a dying man, had fraudulently, and with the connivance of others, induced the Company to insure his life upon a completely false hypothesis.

Dr. Miller's name was disclosed by Dr. Shenoy in February 1949, but he was not contacted by the Company until about October or November 1951, i.e., after the action had commenced. He was unable at first to recollect the case, but, after his memory had been stimulated (I do not use the word in a sinister sense) by reference to the details of Dr. Shenoy's version, he agreed to give evidence to the effect that he had in fact been consulted in March 1948 concerning a patient answering to the description of the deceased, and that he remembered having agreed with Dr. Shenoy's diagnosis.

One can well appreciate the additional difficulties which the learned Judge encountered in a trial where medical men gave irreconcilable versions on questions of fact. He ultimately found it impossible to accept the evidence of either Dr. Shenoy or Dr. Narayanan "with any degree of confidence", and decided that the value of Dr. Miller's evidence was greatly reduced because, in attempting to reconstruct what had occurred 3½ years before the Company contacted him, he had been "much influenced" by what Dr. Shenoy had previously stated. The Judge finally concluded that "neither Dr. Shenoy nor Dr. Narayanan had spoken the whole truth", and that it was "perhaps right" to draw the inference that "both doctors had been called in, Shenoy at the last moment when the relations of the deceased became desperate".

The Company relied on the evidence of another witness called Kochchakan who had also been contacted for the first time after the trial commenced. His evidence, if true, strongly supported Dr. Shenoy's opinion that the deceased man must have been a "very sick man" in

November 1947. But he was disbelieved, and certain documents produced by him (alleged to have been written by the deceased during the relevant period) were not accepted as genuine.

As to the plaintiff's witnesses, the learned Judge was much impressed by the evidence of the Company's canvasser Nair who stated that the deceased was in excellent health in November 1947 and earlier. Acting on his evidence and on the medical report of Dr. Sivapragasam (who died on 17th May 1950 before the Company repudiated liability) the learned Judge said "I have no doubt that at that particular time (i.e., in November 1947) the deceased Ahamed was perfectly healthy". Issue 3 was accordingly answered in favour of the plaintiff.

With regard to issue 4, the Company again relied on the inferences drawn by Dr. Shenoy as to the probable state of the deceased's health in November 1947, and on the evidence of both Dr. Shenoy and Kochchakan as to what the deceased had himself told them in that connection. If this evidence had been accepted, the policy was clearly void because the deceased had given false answers to several questions in the proposal form and the Personal Statement. But here again the learned Judge was not prepared to place reliance on the statements of fact made by either witness, or on the inferences drawn by Dr. Shenoy from the symptoms which he claimed to have observed during the last illness. In the result, there was no evidence adverse to the deceased which the Judge found himself in a position to accept on controversial matters covered by issue 4 up to the stage when the case for the Company had been closed. Nevertheless, the extremely general form in which the issue was framed enabled the Company to rely on a matter incidentally mentioned by Dr. Narayanan when he was called to rebut Dr. Shenoy's version of the deceased's last illness. Let me explain how this anticlimax occurred.

According to Dr. Narayanan, the deceased had not suffered from any serious illness since about 1944, but he had had a mild attack, diagnosed as "influenza", early in 1945; and this indisposition was speedily cured by a few doses of mixture. Upon this isolated item of evidence given by a witness whom the learned Judge otherwise regarded as demonstrably unreliable, issue 4 was answered in favour of the Company—the reason being that the deceased had on 30th November 1947 answered in the negative (1) the question (in the proposal form) whether he had "consulted any medical man for any ailment" within the past five years and (2) the question (in the Personal Statement) whether he had "ever suffered from *any other illness*, accident or injury, *whether considered (by the deceased) to be important or not*".

It was conceded on behalf of the Company that in any view of the matter, influenza, having already been included specifically in an earlier question No. 3 (*a*) (3) of the Personal Statement, is not caught up by the words "any other illness" in question 3 (*c*). It was also conceded that the words "whether considered to be important or not" qualified the word "injury", but not necessarily the words preceding it. Mr. Perera argued, however, that the policy ought to have been declared void *ab initio* because question 3 (*a*) (3) was answered in the negative. This

submission was rejected by the learned trial Judge because in his opinion question 3 (*a*) (3) referred in this context only to ailments, including influenza," of a somewhat serious and severe character ".

For the reasons which follow, I have come to the conclusion that upon the learned Judge's findings of fact, the deceased has not been proved to have given an " untrue " or " incorrect " answer either to question 14 in the proposal form or to question 3 of the Personal Statement. The truth of the impugned answers was made the " basis of the contract ", and it must certainly be conceded that the question of their materiality to the insurance risk does not directly arise. *Dawson v. Bonnin* [1]. But were the answers in fact " untrue " ? As Lord Watson pointed out in *Thomson v. Weems* [2], " the subject matter of the warranty is a point to be determined in each case according to the just construction of the question and answer taken *per se*, and without reference to the warranty given . . . . If the words are ambiguous, they must be construed *contra proferentes* and in favour of the assured ".

An insurance Company is always entitled to stipulate that a policy is void even if the assured gives information which, upon extreme literalism, is incorrect on matters however trivial and immaterial ; but in that event the Company must have the commercial courage to communicate its intention to the other party in the clearest possible terms. " It is a weighty matter that the questions are framed by the insurer, and, if an answer is obtained which is, upon a fair construction, a true answer, it is not open to the insuring Company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. When an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question. Otherwise, the ambiguity will be a trap against which the insured should be protected by the Courts of law. " —per Lord Shaw in *Condogianis v. Guardian Assurance Co.* [3].

Let us consider in the first instance the case of an applicant for insurance who was a person of good education and perfectly conversant with the language in which the following questions were addressed to him :—

(1) " Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever ? "

(2) " Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house ? If so, give details and state names and addresses of medical men consulted ".

How would a reasonable man making a proposal for life insurance fairly read these two questions if he assumed (as he is entitled to assume) that reasonable insurance Companies do not require information

[1] *(1922) A. C. 413.*
[2] *(1884) 9 App. Cas. 671 at 687.*
[3] *(1921) 2 A. C. 125.*

frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake ? In my opinion, the question as to " influenza " is " one which the Company could hardly reasonably have expected to be answered with strict and literal truth " in a country where perfectly healthy persons occasionally " suffer " from slight indispositions of brief duration, loosely described as " influenza ". It must therefore be read " with some limitation and qualification to make it reasonable ". *Connecticut Mutual Life Insurance Co. v. Moore* [1].

" Influenza " was classified in the Personal Statement as an " ailment " and (leaving aside " Kala-azar " which conveyed no meaning to any of us who heard or argued the appeal) was included in a group of diseases notoriously calculated to reduce longevity. That the term catches up a serious attack of " influenza " which might well be attended by consequences impairing a man's general health is clear enough. But, can it fairly be read as having been intended also to include what a layman would describe colloquially as a " touch of flu " ? One cannot imagine that a reasonable insurance Company negotiating with a person residing in Ceylon would seriously wish to know whether he had never in his life had a slight indisposition of that kind. I therefore agree with the learned Judge's view of what " influenza " meant in the context of question 3 (*a*) (3).

As to question 14 appearing in the proposal form, the purpose of the insurance Company in asking whether the deceased had ever " consulted " any medical man for " any ailment " was to obtain the " means of testing his other answers by reference to the medical gentlemen who had been consulted during the past five years ". *Mutual Life Insurance Co. v. Ontario Metal Products Co.* [2]. But there remains the question as to how the terms " consult " and " ailment " should be construed in the context in which they appear. In the decision of the Judicial Committee to which I have just referred, a similar question required the names of " every physician or practitioner who has *prescribed for* or *treated* you or whom you have *consulted* in the past five years ". This indicates that the three terms are not synonymous in the minds of all insurance Companies. In that particular case, the assured had on several occasions obtained from a doctor a tonic when he was " feeling overworked and run down ". The Judicial Committee considered that the doctor had " prescribed for him " or " treated him ", but did not go so far as to hold that the doctor had also been " consulted ".

It cannot at any rate be said that there is no ambiguity in question 14, and I am not convinced that a person who, when slightly indisposed, was given an influenza mixture on an isolated occasion by his wife's family doctor would be guilty of untruthfulness or even of substantial inaccuracy if he denied that he " consulted " the gentleman concerned " for an ailment ". A reasonable applicant for insurance might well assume that the Company was concerned only to obtain information

[1] *(1881) 6 App. Cas. 644.* [2] *(1925) A. C. 344.*

as to whether he had during the relevant period sought the professional advice of a medical man in connection with some ailment (real or imagined) of a serious nature. "The question *what medical men have you consulted?* involves some necessary explanation, and some limit to this question must have been intended". *Joel v. Law Union and Crown Assurance Co.* [1].

This brings me to another reason for holding that the Company has not discharged the burden of proving that the "basis of the contract" was destroyed on grounds covered by issue 4. The printed questions were addressed to the deceased in a language which (to the knowledge of the Company's agent Sivasubramaniam who attended to the preliminary negotiations) he could not understand. They were interpreted by Sivasubramaniam in Malayalam, and the answers given in Malayalam were then translated into English by Sivasubramaniam. In these circumstances, proof of the accuracy of the translations was, I think, essential to the success of the Company's defence. Moreover, the Medical Referee was himself specially directed to "read over carefully" the answers in the Personal Statement before examining the deceased, and to obtain "fuller information such as will explain the meaning of ambiguous terms like fever, cough, &c.". There is no evidence as to what was said, or what explanations given, at that stage.

Finally there are the declarations signed by the deceased at the foot of the proposal form and of the Personal Statement. How were these English terms explained in Malayalam to the deceased? Consider, for instance, the phrase "the foregoing statements are true". The Muslim hotel-keeper was entitled to elucidation from the Indian insurance agent as to what precisely the Company meant by "truth". Did Sivasubramaniam explain that, as far as the Company was concerned, the term included "any inaccuracy unaccompanied by moral guilt"? Did he also say that the policy would be void even if statements of honest opinion were subsequently found to be incorrect? The deceased had no doubt added a statement in Malayalam that what Sivasubramaniam had put down as representing his answers was "written to (his) dictation" and that he "understands the contents". This does not mean that he pretended to understand anything other than what had been explained to him in the only language with which he was conversant.

Even when the trial was in progress, Sivasubramaniam continued to be entrusted by the Company with responsible duties, but he was not called by the Company. Indeed, strenuous attempts were made to procure his attendance as a witness on the plaintiff's behalf, but they were frustrated because, in the learned Judge's opinion, which I am unable to reject, the Company "kept him out of the witness box". In those circumstances, we cannot assume that the interpretation which Sivasubramaniam gave to the relevant questions coincided with the meaning for which the Company now contends. And I do not agree that when Counsel for the plaintiff admitted at the commencement of the trial that the deceased had "submitted" the Personal Statement and the proposal for insurance to the Company, he could reasonably

[1] *(1908) 2 K. B. 863.*

have been understood to concede the accuracy of Sivasubramaniam's translation. This admission was recorded long before the points at issue which later assumed so much importance were brought to the plaintiff's notice.

The principles laid down in *Joel's case* (supra) apply in a very special way when the meaning of questions to answers which form the "basis of the contract" has been explained to an illiterate "assured" by an insurance agent acting within the express or apparent scope of his authority. It was pointed out in *Anderson v. Fitzgerald* [1] that "a policy ought to be so framed that he that runs can read". How much greater is the obligation imposed on insurance Companies who have constructive knowledge that the applicant cannot read at all! No doubt an illiterate man, if left to construe the documents for himself, runs the risk of being misled by an interpretor of his own selection. But the position is quite different when the Company's agent volunteers the explanations and, as a step towards securing the business, fills up the form for a person who cannot fill it up for himself. *Keeling v. Pearl Insurance Co.*[2]. In such a situation, he is not "the mere amanuensis" of the illiterate person. Accordingly, the *prima facie* inaccuracy in the English language of an answer given in Malayalam does not avoid the policy unless it is established that the relevant questions were correctly interpreted and explained, and that the answers thereto were correctly inserted by the insurance agent.

This is a very different case from *Biggar v. Rock Life Insurance Co.* [3] and *Newsholme Bros. v. Road Transport and General Insurance Co.* [4], where an assured person, though literate and perfectly competent to understand the documents, was content to adopt, without reading them, answers invented or incorrectly inserted by a dishonest insurance canvasser. Obviously, the assured in those cases "could not escape the consequences of his own negligence", and the "very distinguished case" of *Bawden v. London, Edinburgh and Glasgow Assurance Co.* [5] did not therefore apply. I respectfully agree with the judgment of the High Court of Madras in *Kulla Ammal's case* [6] that in a situation such as has arisen in the present case, the Company cannot succeed without proof that the questions and the impugned answers were correctly interpreted and recorded by the Company's agent.

In this country, people are becoming increasingly aware of the advantages of making family provision through life insurance, and many honest persons proposing to avail themselves of these benefits are handicapped by their inability to read or write the language in which the preliminary documents are drafted by insurers. The legal relationship of the insurance agent *vis a vis* his employer on the one hand and the illiterate applicant for insurance on the other therefore becomes vitally important. The agent generally has no authority to conclude the contract of insurance, but the illiterate applicant is *prima facie* entitled to assume that the agent has authority at least to explain the meaning of the questions contained in the documents and to put the answers when given into

[1] *(1853) 4 H. L. C. 484.*
[2] *(1923) 129 L. T. 573.*
[3] *(1902) 1 K. B. 516.*
[4] *(1929) 2 K. B. 356.*
[5] *(1892) 2 Q. B. 534.*
[6] *A. I. R. (1954) Mad. 636.*

proper shape. *Macgillivray's Insurance Law* (4th ed.) paras 925 and 926. If the law does not protect the illiterate man to this extent, the *impar congressus*—condemned by Lord Dunedin in *Glicksman's case* [1]—between an insurance agent and "a wretched little (person) who could neither read nor write" would be fraught with danger to the latter.

In the present case, the completed documents, when received in Bombay, must have made it clear to the Company that the deceased did not understand the language in which the questions were addressed to him; it must have been equally apparent that their own agent in Ceylon was the person who interpreted the questions, reduced his answers into writing, and explained the stipulation that those answers would form the "basis of the contract". In these circumstances, the Court should refuse to declare the contract void in the absence of proof that the interpreting agent's functions had been properly discharged. I cannot agree with the argument that, in such a situation, the plaintiff's only remedy was to obtain a rescission of the contract on the basis of some misunderstanding, and to claim a refund of any premia previously paid under the policy. The correct analysis seems to be that the assured and the agent of the insurance Company were in truth *ad idem*, but we do not know what precisely they were *ad idem* about in relation to the special warranties relied on by the Company. Issue 4 must therefore be answered in favour of the plaintiff.

There remains the Company's final contention that we should reverse the learned Judge's conclusions of fact on issues 3 and 4, and to hold that Dr. Shenoy's evidence and Kochchakan's evidence ought to be believed—in which event the deceased's answers in the proposal form and Personal Statement must have been false to his knowledge in many respects. Mr. Nadesan, who argued this part of the Company's case, subjected the judgment under appeal to microscopic analysis. It is certainly a pity that the dates of trial were unduly spread out, and some of the reasons given for rejecting the evidence of Dr. Shenoy are perhaps less convincing than others. After all, no judgment, when meticulously dissected, will be found to be completely beyond criticism. But, generally speaking, I think it can fairly be said that the learned Judge's conclusions are not vitiated by substantial misdirection. Bearing in mind the well-known principles laid down by Lord Greene in *Yuill v. Yuill* [2] and by Lord Thankerton in *Watt v. Thomas* [3], I cannot accept the argument that the findings to which the Company takes exception were "so clearly wrong that the appellate tribunal's judgment of fact should be substituted for his". As to whether, if I had enjoyed the advantage of seeing and hearing the witnesses for myself, I would have taken a different view of the merits of the case, it is idle to speculate. But there is no reason for holding that the canvasser Nair, who made a favourable impression on the trial Judge, ought to have been disbelieved—particularly when Sivasubramaniam was not called to contradict him. The acceptance of Nair's evidence rules out the possibility that it was not the deceased but some healthy

[1] (1927) *A. C. 139.*

[2] (1945) *P. 15.*

[3] (1947) *A. C. 484.*

man, fraudulently impersonating him, who had been taken before Dr. Sivapragasam ; indeed the Company concedes that what purports to be the signature and handwriting of " K. Ahamed " in the relevant documents were in fact his. Why should one assume that Dr. Sivapragasam, who was specially directed to see that the declaration was made and signed in his presence, had failed in this duty ? Dr. Sivapragasam held a responsible position in the Government Medical Service in November 1947, and continued to enjoy the Company's confidence until he died. If his report was made after an honest medical examination, Dr. Shenoy's version cannot be accepted. There was no evidence to justify the assumption that Dr. Sivapragasam was the kind of man who would have performed his professional duties dishonestly or even lightly. It is not the plaintiff's fault that the Company's decision to repudiate liability was postponed for so long that Dr. Sivapragasam died in the interval. One cannot understand why Dr. Sivapragasam was not asked his views on Dr. Shenoy's version as soon as the letter D2 was received in February 1949.

I would allow the appeal and order a decree to be entered in favour of the plaintiff as prayed for, with costs in both Courts.

FERNANDO, J.—

Counsel for the respondent Company at the appeal have argued quite insistently that the state of health of the assured had been proved to be such that the trial Judge should have held that the assured gave incorrect answers to the questions put in the following items in the personal statement D1 :—

3A. for the reason that he had suffered from swelling of the knees and joints shortly before the date of the proposal.

3D. for the reason that he did in fact suffer from hernia.

9A1 and 9A2. for the reason that to his own knowledge he suffered from various complaints in August and September 1947 and was under medical treatment in Ceylon and in India.

It was also argued that, quite apart from the consultation of Dr. Narayannen for influenza in 1944 or 1945, the treatment in 1947 should have been disclosed in cage 14 of the proposal form, and that the failure to do so entitled the Company to a finding that the answer given was incorrect. Counsel did not press for a finding in their favour upon the third issue framed at the trial, but only for the reason that the alleged non-disclosures relevant to that issue were the same as are relied upon to establish the incorrectness of the answers given in the items to which I have just referred.

Upon this part of the case, the criticism offered by Counsel for the Company is that the trial Judge failed to recognise the importance of two planks of the prosecution case, namely, (*a*) that it was Dr. Shenoy, *and not Dr. Narayannen*, who attended on the assured during the three weeks of his last illness, and (*b*) that during the months of August and September, 1947, the assured had written a number of letters from India to one Kochakan in Ceylon which disclosed that the assured was then suffering from various ailments and was then under medical treatment. We were invited to say that both these facts were conclusively proved at the trial, and that, considered together with certain other parts of the evidence, they established the incorrectness, if not also the deliberate falsity, of some of the answers in D1.

There was firstly Dr. Shenoy's own evidence that he treated the assured "from about the middle of February, *until his death*" on 21st March 1948, at first at Eddakat and later at Cannanore, visiting him daily, and being present at his bedside two hours before his death. During the entirety of this period Dr. Shenoy did not see Dr. Narayannen attend on the patient. There was then the evidence of Dr. Miller that he had been called in consultation by Dr. Shenoy and had examined the assured on the day of his death as well as on an occasion about 10 days before. The copy of the death registration entry (D17A) shows that the death was registered on 22nd March 1948 at the Cannanore Municipal office, that the name of the medical attendant was entered as "Dr. L. S. Shenoy" and that the age as furnished was 55 years, the same as that estimated by Dr. Shenoy according to his evidence; copies of this entry were attached to applications made by the widow of the assured to this Court in July 1948 and to the District Court in August 1948 in connection with the administration of the estate of the assured. The position taken by the appellant with regard to this entry is that there were two errors in it—the first (as to age) was corrected (D20) in July 1948 by the Stationary Sub-Magistrate of Cannanore upon application (D18) made by Andutty, the brother-in-law of the assured, and the second (as to the name of the medical attendant) was corrected by the same Magistrate (D22) in September 1948, upon the petition of the widow and Dr. Narayannen's name was substituted. The contention of the Company is that the corrections were sought only because Dr. Shenoy had (about a month after the death) declined to accede to a request by Andutty for a certificate informing the Company that coronary thrombosis was the cause of death, and that the need for a correction as to the name of the doctor became urgently apparent only when the Company had early in August 1948 (P25) called for an extract from the death register. It was argued for the Company, not only that the death registration entry confirmed the evidence of Dr. Shenoy of the fact that he attended, but also that the correction was a device employed to support the false position that Dr. Narayannen had been in attendance. With respect, the second part of the argument is difficult to appreciate. The Company relies upon the widow's application for the correction as being confirmation of Dr. Shenoy's evidence of the attempt to induce him to certify to an untrue statement as to the cause of the death of the assured. If there

were extrinsic circumstances suggesting an inference that the application to correct the entry was based upon false averments, then undoubtedly the making of such an improper application would be strong corroboration of Dr. Shenoy's evidence. But here the only available means by which we can test the propriety of the motive behind the application consists in the evidence of Dr. Shenoy himself. I thought at first that Counsel for the appellant justifiably complained that the trial Judge did not address his mind to the fact that the orders for correction were made by a judicial officer who, in one at least of the orders (as to age) stated "I have made inquiries and I was satisfied that the age of the deceased was 45 years", and who in making the later order which now turns out to be so important, must be presumed to have been judicially satisfied as to the facts which rendered his order necessary. It is significant that the petition by the widow (D21) contained this statement :—

> "Dr. L. S. Shenoy did not treat him. The Doctor who treated him was Dr. M. Narayannen of Tellichery. *If you verify this from the said Doctors*, they will testify the truth of this statement."

Counsel for the Company relied on section 35 of the Evidence Ordinance, but in my opinion the section gives greater support to the appellant. So far as the trial Judge was concerned, the entry that was relevant was the entry as corrected and he was quite entitled to assume by reason of the Magistrate's orders that what were relevant were the particulars in the *corrected entry*. So that on fuller consideration I have little doubt that the Judge realised that the original entry was of little or no avail to the Company as corroboration of Dr. Shenoy unless it could be shown *aliunde* that the Magistrate was actually misled by false misrepresentations.

In support of the proposition that Dr. Shenoy alone attended on the assured, it has been further submitted that the evidence of Dr. Narayannen as to his attendance on the assured is demonstrably false. In the certificate P5 which he issued on 15th August, 1948, Dr. Narayannen set down the cause of death as "coronary thrombosis", but he described the symptoms as "anaemia, palpitation and weakness", which latter, the Company argues, are not the characteristic symptoms of coronary thrombosis. Where further particulars were required, he referred (in P28 of 7th September, 1948) to the following symptoms :—

> "The blood pressure was very low (100mm) systolic and he was in a collapsed condition with pain over the chest, with dyspnoea nausea and vomiting. The patient was restless with a sensation of oppression. There was cynosis, skin cold with profuse sweating and the pulse was imperceptible.
>
> Dyspnoea was on the increase."

In his evidence in chief, the doctor omitted to mention some of the symptoms described in P28, and he made good the omission only in the course of cross-examination.

Dr. Narayannen admitted in evidence that he had consulted a medical text book and his diary before he wrote P28. The diary was apparently one kept for income tax purposes: his explanation that an entry as to fees is more readily accepted by the income tax authorities when supported by details of a patient's symptoms is scarcely credible; and the failure to produce the diary deprived the Court of the only reasonable means of testing so curious an explanation. He tried to account for the omission from P5 of important symptoms by stating that he wrote it without consulting his diary, and when pressed upon the matter said that he "thought anything was good enough for the Insurance Company".

Dr. Narayannen's need to consult a text book is not so difficult to appreciate: he has treated only a few cases of coronary thrombosis, each with the settled expectation that immediate or very early death was inevitable, and this particular case was no exception. Furthermore, although Dr. Narayannen observed that the assured was continuously screaming and writhing with pain, his personal convictions as to the fatal effects of morphia with heart patients, despite the contrary opinions of text book writers, prevented him from administering even small doses of that drug. He did not think fit to call in another doctor, even though such a practice was usual and though the family could well afford the cost of a second opinion. Although the doctor observed that the patient was semi-conscious during the whole period, he nevertheless consented, upon the patient's insistence, to his removal from Eddakat to Cannanore on 19th March at the risk of death during the journey.

These and other features of the evidence of Dr. Narayannen rendered it highly improbable, either that he could have made a correct diagnosis, or that he was aware of the correct treatment of thrombosis, even if fortuitously diagnosed; and they amply justify the view taken by the trial Judge that "it is utterly impossible to act upon his evidence with any degree of confidence". But considering that much of what is unsatisfactory in his evidence can be reasonably accounted to ignorance of or at least unfamiliarity with the subject of thrombosis, I am unable to agree with Counsel for the Company that the trial Judge should necessarily have concluded that the witness *did not ever* attend on the assured during the relevant period.

The learned Judge rejected the evidence of Dr. Shenoy in identical terms. It was argued that his evidence (unlike that of Dr. Narayannen) not being intrinsically false should not have been rejected "only upon a mere reading of it", and that the specific reason stated as the ground for its rejection was only that the condition of the patient in February and March as observed by Dr. Shenoy did not justify the inferences which he purported to make as to the state of health at the time of the proposal. While conceding to some degree that the Judge may have been justified in declining to accept Dr. Shenoy's opinions as to the patient's state of health in November, 1947, Counsel argued that a mere reading of his evidence did not demonstrate the falsity of two statements in the evidence of Dr. Shenoy, namely, (*a*) that he did attend on the

patient regularly during the last illness, and (*b*) that the patient made the admissions reported to the Company by Dr. Shenoy's letter D3 of 8th June, 1949 :—

> "That he had swelling of the legs for about three months prior to February, and that he got serious from Colombo, and therefore had to fly to Madras in a plane, and then to Eddakat by train. He had breathlessness, and there was difficulty in passing urine. The motions were scanty. He never reported to me the previous history of rheumatic fever. He told me that he had this swelling some six months previous to the recent illness and that he was treated by a native physician."

What we are asked by Counsel for the Company to say in appeal is that Dr. Shenoy must necessarily have been believed by the trial Judge when he stated that these admissions were made, and that these admissions, either by themselves or together with admissions alleged to have been made by the assured in certain letters alleged to have been written to the witness Kochakan, demonstrate the inaccuracy if not also the falsehood of various answers given in D1.

The learned Judge clearly appreciated that it would be a great advantage to ascertain which of the two doctors was the medical attendant during the relevant time. But he was faced with a situation where two professional men gave completely irreconcilable versions on a simple question of fact, so that to believe the one was to brand the other a perjurer. In other circumstances, it would have been his duty to choose between the two, however unreliable the evidence of both. In this case, however, what was important was the state of the assured's health at the time of the proposal, and there was other material upon which to form an opinion as to his health, namely, the evidence of the canvasser Nair and the report of the medical referee Dr. Sivapragasam made on 30th November 1947 in the proposal form. I feel quite unable to say in appeal that the Judge erred in acting upon that material and in ignoring completely the evidence of both the other doctors.

Dr. Shenoy's evidence was not rejected solely because he was contradicted by Dr. Narayannen ; a stronger reason was that acceptance of the truth of his evidence would necessarily have led to the inference that Dr. Sivapragasam was either a knave or the victim of a clever fraud practised by persons now unknown. Here again, having regard to Dr. Sivapragasam's standing in the medical profession in Ceylon and to the responsible office which he held in 1947, the Judge could not fairly have entertained any such inference unless he was forced to do so by reliable evidence as to the actual circumstances in which the medical examination of the assured was conducted. The failure of the Company to call its agent Sivasubramaniam made it obvious that the circumstances would not have supported such an inference.

It is useful in this connection to consider certain relevant dates. Notice of the death was given to the Company in June 1948 (P16) ; the claim

forms were furnished in July 1948, and Dr. Narayannen's certificate as to the cause of death in the same month (P5); the same doctor's explanatory letter (P28) was written in September 1948; thereafter no further queries or complaints whatever were made by the Company until they wrote the letter of repudiation (P2) in August 1950. The Company contacted Dr. Shenoy towards the end of 1948, and he stated to them on 5th February 1949 (D2) that he had attended on the assured and in June 1949 (D3) that the assured had made certain admissions as to his state of health. Although Dr. Sivapragasam was alive until July 1950, there is nothing to show that the Company made any inquiries of him during the 18 months which elapsed after Dr. Shenoy's first letter, inquiries which would have greatly assisted both the Company and the Court. Moreover, if the plaintiff had been informed earlier of the Company's intention to repudiate, her action might have been filed at a time when Dr. Sivapragasam would have been available as a witness. The Company had, at the latest in June 1949, all the information upon which it subsequently repudiated the claim in August 1950, but the claimant was given no inkling in the meantime of the difficulties in store for her. In these circumstances, it was quite pardonable for her counsel to suggest that the decision to repudiate was only taken after it was known that Dr. Sivapragasam was no longer alive to confirm the statements in his medical report.

Having regard to the evidence of the canvasser Nair which the learned Judge chose to believe, there were no suspicious circumstances attendant on the medical examination by Dr. Sivapragasam in November 1947, and doubt could only have been cast upon his evidence by the other eye-witness Subramaniam who was the Company's agent. The only explanation offered by the Company for the failure to call this agent was the bare allegation by counsel that there must have been a deception to which the agent also was a party and that he would therefore obviously have been an adverse witness. I feel quite unable to countenance this allegation against a person who, right up to the time of the termination of the trial in October 1953, continued to function as the Company's agent in this country. But even if the Company laboured under the misfortune that they were unable to rely upon the evidence of their own agent, it would be unreasonable to take a mere suggestion of his dishonesty into account to the prejudice of the plaintiff.

What the learned Judge was in substance invited by the Company to do upon Dr. Shenoy's evidence was to form seriously adverse inferences as to the conduct of two persons who are no longer alive to defend their interests. Dr. Sivapragasam would have been able to explain his conduct to the Company but for the failure to communicate with him when he was alive; he might have been able to explain his conduct to the Court but for the failure to repudiate this claim within a reasonable time. The Judge had no explanation before him for either failure and I think it a fair observation that the Company had only itself to blame if the Judge decided on the faith of Dr. Sivapragasam's certificate that the assured enjoyed perfect health in 1947 and that accordingly the story of contrary admissions to Dr. Shenoy had necessarily to be rejected.

The remaining evidence relied upon by the Company in proof of the assured's ill-health at the time of the proposal consisted of letters D6, D8, D9, D10 and D11 alleged to have been written to one Kochakan in Colombo by the assured from India. Kochakan had apparently been a close business friend of the assured before his death and had jointly purchased with him two houses of considerable value. But differences arose thereafter between Kochakan and the relatives of the assured, so much so that he was sued by the present plaintiff in the District Court of Colombo on a claim of Rs. 10,000 and judgment was entered against him. That action was fixed for trial on 11th October, 1951, and Kochakan's name came on the Company's list of witnesses in this case for the first time on the 19th October, 1951, together with the names of one Dr. T. Sivapragasam (not of course the medical referee) and ayurvedic Dr. Abdul Rahiman. It was still later that the Company listed the letters which Kochakan would produce. One of the letters (D8) referred (according to Kochakan) to this ayurvedic physician who was in India in August 1947 and his name was presumably placed on the list of witnesses in order to support the letter D8 and Kochakan's oral evidence that this physician had attended on the assured. But the Company did not ultimately call this physician or even Dr. Sivapragasam who according to Kochakan had attended on the assured. Another of the letters (D9) refers to a draft for Rs. 2,000 which according to Kochakan was sent to the assured in India through the Imperial Bank ; but despite the fact that the Exchange Control requires careful checks to be kept as to remittances abroad, no evidence was adduced at the trial to support Kochakan's bare word that he did post the draft.

Kochakan admittedly was not a careful business man, and had to admit that in a former case he professed that he had no proper place to keep *business* books and documents. That being so, it is strange that he should have retained from 1947, until late in 1951, inconsequential letters like those he produced. It is abundantly clear that at the lowest he was quite prepared to play the part of a sneak against the plaintiff in revenge for her suing him in an action which was ultimately successful, and indeed the Company's counsel quite rightly stated that his evidence was unworthy of credit without corroboration. Called as he was to corroborate Dr. Shenoy, the latter's evidence was no corroboration of Kochakan. Accordingly, the only element of corroboration consisted in the fact that certain of the statements in the letters did refer to events which actually took place at the time they were written ; but the plaintiff's very argument was that the introduction into the letters of factually correct statements was necessary to support the claim that they were genuine. The witness Mamoo, the brother of the plaintiff, was confident that the assured never signed his name on private letters in English and a glance at the actual signatures on these letters is sufficient to show that there is nothing characteristic about these signatures which would enable a person like Kochakan to identify them. In the face of the contradiction by Mamoo and in view of the suspicion with which Kochakan's evidence had necessarily to be regarded, the Company could not, without calling some expert witness, have reasonably expected the learned Judge to hold that the letters were actually written by the assured.

The considerations to which I have referred lead me to conclude that the learned District Judge rightly declined to hold in favour of the Company upon the alleged state of health of the assured at the time of the proposal and his alleged admissions as to ill-health and treatment in 1947. These same considerations would at the lowest prevent me from holding as a Judge of appeal that the District Judge should necessarily have found in favour of the Company on those matters.

There is nothing which I can usefully add to what my brother Gratiaen has written upon the important questions of law raised by the appellant. I respectfully agree with his judgment on those questions and with the order he proposes.

Appeal allowed.