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SUMMONS.

(Filed August 30, 1926.)

The State of New Jersey:

To General Accident, Fire and Life Assurance Corporation, Limited, of Perth, Scotland:

You are summoned to answer the annexed complaint of Walter I. Clayton, in an action at law in the New Jersey Supreme Court.

And take notice that unless you file your answer to said complaint with the clerk of the said New Jersey Supreme Court, at Trenton, within twenty (20) days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the New Jersey Supreme Court, at Trenton, this 18th day of August, nineteen hundred and twenty-six.

Edward J. Kelleher,
Clerk.

Edwards & Smith,
Attorneys.

To the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days.

Edwards & Smith,
Attorneys of Plaintiff.

COMPLAINT.

(Filed August 30, 1927.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

WALTER I. CLAYTON, *Plaintiff*, v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, *Defendant*.	Action at Law. Complaint.

Plaintiff, residing at Bergenfield, Bergen County, New Jersey, complains against defendant as follows:

1. Defendant is a foreign corporation engaged in the business of insurance and is authorized to transact the business of insurance in the State of New Jersey.

2. On or about December 30, 1925, defendant, in consideration of a certain premium, to wit, the sum of five hundred twenty ($520.00) dollars to it paid by plaintiff, issued to plaintiff a certain contract or policy of insurance known as a "Complete Disability Policy," numbered C. D. 661202, whereby it insured plaintiff against disease for twelve (12) months beginning at noon, Standard Time, at Englewood, New Jersey, on December 30, 1925, and agreed to pay plaintiff the sum of two hundred ($200.00) dollars per week of total disability from disease contracted during the term of said policy (which total disability is defined in said policy as such disability which continuously and wholly disables and prevents the insured from performing any and every kind of duty pertaining to his occupation), and, in addition thereto, to pay to plaintiff the sum of eight hundred ($800.00) dollars for surgical operation for appendicitis in case such became necessary by reason of disease. Annexed hereto and made a part hereof is a copy of said policy, to which plaintiff refers.

3. During the term of such policy, and on or about April 6, 1926, or shortly prior thereto, plaintiff contracted a disease or illness which was, or became, appendicitis, and which disease, from said April 6, 1926, continuously and wholly disabled plaintiff and prevented him from performing any and every kind of duty pertaining to his occupation, and caused him to so remain for a period of ten (10) weeks.

4. Due written notice of such sickness or illness was given defendant.

5. During the course of said illness or disease, it became necessary for plaintiff to undergo an operation for appendicitis and such operation was duly performed upon him by a legally qualified physician and surgeon, while in the hospital, as aforesaid, and within ninety (90) days from the date of the contraction of said illness or disease.

6. Plaintiff has fully performed all requirements of said policy to be by him performed.

7. Because of the matters above set forth, plaintiff became and is entitled to have and receive of and from defendant the sum of two hundred ($200.00) dollars per week for ten (10) weeks, making a total of two thousand ($2,000.00) dollars, together with the sum of eight hundred ($800.00) dollars for surgical operation as aforesaid.

8. Plaintiff has duly demanded said sum of two thousand eight hundred dollars ($2,800.00), of defendant, which defendant has refused, and still refuses, to pay.

Plaintiff demands of defendant the sum of $2,800.00, besides interest and costs of suit.

EDWARDS & SMITH,
Attorneys of Plaintiff.

THIS POLICY PROVIDES INDEMNITY FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS, AND FOR DISABILITY FROM DISEASE, AS HEREIN LIMITED AND PROVIDED.

GENERAL ACCIDENT
FIRE AND LIFE
ASSURANCE CORPORATION, LTD.
OF PERTH, SCOTLAND.

Frederick Richardson, United States Manager
United States Offices, Fourth and Walnut Streets,
Philadelphia, Pa.

(Hereinafter called the corporation)

IN CONSIDERATION of the statements in the application for this Policy, a copy of which application is endorsed hereon and made a part hereof, and of Five Hundred Twenty and no/100 ($520.00) Dollars premium, DOES HEREBY INSURE WALTER I. CLAYTON, of 61 Bencler Place, Bergenfield, New Jersey, herein called the Insured, by occupation a broker and classified by the Corporation as a select risk, for twelve months, beginning at noon, standard time, at the place of countersignature hereof, on the 30th day of December, 1925, subject to the provisions and limitations hereinafter expressed, (a) against loss resulting solely from BODILY INJURIES, effected directly and independently of all other causes, through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), and (b) against loss from DISEASE, as herein provided.

ACCIDENT SCHEDULE.

Part 1. DEATH, DISMEMBERMENT AND LOSS OF SIGHT.

The principal sum of this Policy is $30,000.

If such injuries shall wholly and continuously disable the Insured from date of accident from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability shall result, independently and exclusively of all other causes in any one of the losses enumerated in this part, or within ninety days from the date of the accident, irrespective of total disability, result in like manner in any one of such losses, the Corporation will pay the sum set opposite such loss and in addition weekly indemnity as provided in Part II. A to the date of death, dismemberment or loss of sight; but only one of the amounts so specified and the additional weekly indemnity will be paid for injuriese resulting from one accident.

PAYMENTS IN ONE SUM FOR LOSS OF

Life. ..... The Principal Sum.
Both Hands by severance at or above the wrist..... The Principal Sum.
Both Feet by severance at or above the ankle..... The Principal Sum.
One Hand at or above the wrist and One Foot at or above the ankle (by severance).. The Principal Sum.
Entire Sight of Both Eyes if irrecoverably lost ..... The Principal Sum.
Either Hand by severance at or above the wrist and Entire Sight of one eye if irrecoverably lost ..... The Principal Sum.
Either Foot by severance at or above the ankle and entire sight of one eye if irrecoverably lost ..... The Principal Sum.
Either Hand by severance at or above the wrist..... ½ of Principal Sum.

Either Foot by severance at or above the ankle ..... ½ of Principal Sum.
Entire Sight of One Eye if irrecoverably lost ..... ½ of Principal Sum.
Thumb and Index Finger of either hand by severance at or above metacarpophalangeal joints ..... ⅓ of Principal Sum.

The Payment of any one such loss shall end this Policy.

Part II. WEEKLY INDEMNITY.

The Weekly Indemnity for Total Disability is $200.00.

Total Disability. A. Or, if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable and prevent the Insured from date of accident from performing any and every kind of duty pertaining to his occupation, the Corporation will pay the weekly indemnity above specified for the entire period of such total disability.

Partial Disability. B. Or, if such injuries, independently and exclusively of all other causes, shall continuously partially disable the Insured from date of accident or from termination of total disability as above defined, the Corporation will pay weekly indemnity not exceeding 52 consecutive weeks as follows:

For the period during which the Insured is totally and continuously disabled for three-quarters of his business time, weekly indemnity at the rate of three-quarters of the amount payable for total disability.

For the period during which the Insured is wholly and continuously disabled from performing one or more important daily duties pertaining to his occupation, weekly indemnity at the rate of one-half of the amount payable for total disability.

No recovery may be had under more than one of the preceding clauses for any one portion of the period of 52 weeks.

No payment of Weekly Indemnity shall be made in case of any loss enumerated in Part I., except as therein provided.

Part III. DOUBLE INDEMNITY.

Any amount which may become payable under Parts I. and II. shall be double the amount specified therein if such injuries are sustained (1) while the Insured is a passenger and is in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps or running-board of railway or street railway cars); (2) or, while the Insured is a passenger within a passenger elevator (mine elevator excepted); (3) or, in consequence of being struck by lightning; (4) or, by the burning of a building providing the Insured is therein at the commencement of the fire; (5) or, in consequence of the collapse of the outer walls of a building while the Insured is therein; (6) or, caused by the explosion of a steam boiler; (7) or, caused by cyclone or tornado.

Part IV. OPTIONAL FIXED INDEMNITIES.

The Insured, if he so elect in writing within twenty days from date of accident, may take, in lieu of the weekly indemnity hereinbefore provided for

total and/or partial disability, indemnity in one sum according to the Schedule of Fixed Indemnity, if the injury is one set forth in such schedule, but not more than one fixed indemnity shall be paid for injuries resulting from one accident. When the Insured is entitled to double indemnity, the fixed indemnity shall be doubled in like manner.

SCHEDULE OF FIXED INDEMNITY

If the single weekly indemnity payable under Part II. of this Policy for "Total Disability" is $25.00 the following amounts will be paid. If said weekly indemnity is greater or less than $25.00 the amounts to be paid shall be increased or decreased proportionately.

For the Complete Fracture of Bones

Of the skull, both tables	$325.00
Of the lower jaw	75.00
Of the collar bone	150.00
Of the pelvis	250.00
Of the thigh	300.00
Of the leg	200.00
Of the kneecap	200.00
Of the arm, between elbow and shoulder	300.00
Of the arm, between wrist and elbow	150.00
Of two or more ribs	100.00
Of the foot other than toes	125.00
Of the hand other than fingers	125.00
Of two or more toes	100.00
Of two or more fingers	100.00

For Loss

Of one or more fingers, at least one entire phalanx	$150.00
Of one or more entire toes	200.00

For a Complete Dislocation

Of the shoulder	$100.00
Of the elbow	100.00

Of the wrist..... 125.00
Of the hip..... 300.00
Of the knee..... 150.00
Of any bones of the foot other than toes..... 150.00
Of the ankle..... 150.00
Of two or more toes..... 50.00
Of two or more fingers..... 50.00

Part V. SURGEON'S BILL FOR NON-DISABLING INJURIES

If such injuries do not result in a loss specified herein, but require treatment by a physician, the Corporation, upon satisfactory proof from the physician in attendance, will reimburse the Insured for the cost thereof, not to exceed One Week's Single Indemnity as provided under Part II. for total disability.

Part VI. FREEZING, HYDROPHOBIA, ASPHYXIATION

Freezing, hydrophobia or asphyxiation, suffered through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) shall be deemed "Bodily Injuries" within the meaning of this policy.

Part VII. BLOOD POISONING OR SEPTIC INFECTION

Pyogenic infection occurring simultaneously with and through an accidental cut or wound is declared to be "Bodily Injuries," within the meaning and intent of the policy.

ILLNESS SCHEDULE

Part VIII. WEEKLY INDEMNITY.

Total Disability

A. If disease contracted during the term of this policy and not hereinafter excepted shall, beginning during said term continuously and wholly disable and prevent the Insured from performing any and every kind of duty pertaining to his occupation, the Corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified in Part II. for total disability.

Partial Disability

B. If such disease immediately following the termination of a period of total disability shall wholly and continuously prevent the Insured from performing at least one-half of the essential daily duties of his occupation, the Corporation will pay during the period of such continuous Partial disability but within the limits herein stated, a weekly indemnity of one-half the amount specified in Part II. for total disability.

Weekly indemnity for total or partial disability, singly or combined, as provided in this Part shall not be payable for a period exceeding 52 consecutive weeks.

Permanent Disability From Loss of Use of Limbs or Sight.

C. If such disease shall result in the entire and irrecoverable loss of (a) the use of both hands or both feet, or of one hand and one foot, or (b) the sight of both eyes during a period for which the Insured is entitled to indemnity under Paragraph "A" of this Part, the Corporation will continue to pay in lieu of all other indemnity, except surgical or hospital indemnity, the weekly indemnity provided in Part II. for total disability during such period as the Insured shall independently of all other causes be thereby wholly and continuously disabled and prevented from engaging in any oc-

cupation or employment for wage or profit, but the combined period of payment under Paragraphs "A" and "C" of this Part shall not exceed one hundred (100) consecutive weeks.

Payment shall not be made for any disability resulting from disease for which the Insured is not treated by a legally qualified physician.

Part IX. SURGICAL OPERATIONS

If a bodily injury or a disease, for which indemnity is payable under this policy, shall necessitate a surgical operation named in the Schedule of Operations set forth herein, and such operation is performed by a surgeon within ninety days from date of accident or contraction of disease, the Corporation will pay the surgical fee specified in the schedule for such operation in addition to any other indemnity to which the Insured may be entitled, but payment shall not be made for more than one operation resulting from any one accident or one disease. If more than one such operation shall be performed on account of injury sustained in one accident, or on account of one disease, the Insured shall receive the largest surgical fee specified in the schedule for any one of the operations so performed.

SCHEDULE OF OPERATIONS.

If the single weekly indemnity of this policy is $25.00 the following amounts will be paid. If said weekly indemnity is greater or less than $25.00 the amounts to be paid shall be increased or decreased proportionately.

ABSCESS OR BOIL	$5.00
ABDOMEN. Cutting into abdominal cavity for diagnosis or treatment of organs therein	100.00

AMPUTATION OF	
Foot, hand or forearm	25.00
Leg or arm	50.00
Thigh	75.00
Finger or fingers	10.00
APPENDICITIS (See abdomen)	100.00
BLADDER. Operation for removal of stone by cutting	75.00
Operation by crushing	35.00
BONE. Injuries to or disease of.	
Removal of diseased portion of bone	25.00
CARBUNCLE. Incision and treatment	5.00
CHEST. Incision into thoracic cavity (exclusive of tapping) for diagnosis or treatment of organs within, except the lungs	25.00
DISLOCATION. Reduction of hip or knee (patella excepted)	35.00
Patella	5.00
Wrist, shoulder, elbow or ankle	25.00
Lower jaw	15.00
Thumb	10.00
Fingers	5.00
EAR, NOSE OR THROAT. Any cutting operation	10.00
ESOPHAGOTOMY for stricture or other cause	100.00
EXCISION OF Shoulder, hip or knee joint	100.00
Elbow, wrist or ankle joint	50.00
Toe or toes	10.00
EYE. Removal	50.00
Cataract	25.00
Any other cutting operation	15.00
FRACTURES. Reduction of Lower jaw, collar bone or shoulder blade	25.00
Breastbone, rib or ribs	10.00

Nose	5.00
Upper Arm	35.00
Forearm (one or both bones)	25.00
Wrist or hand	15.00
Fingers	10.00
Bones of the pelvis except coccyx	75.00
Coccyx	10.00
Thigh	75.00
Kneecap or leg bones (one or both)	50.00
Bones of foot	15.00
Toes	10.00
GUNSHOT WOUNDS. Treatment not necessitating amputation or cutting operation into abdominal cavity	15.00
HYDROCELE. Incision or excision of sac.	25.00
HYDROPHOBIA. Pasteur treatment	50.00
INGROWING TOE-NAIL. Removal	10.00
INTESTINAL OBSTRUCTION (See abdomen)	100.00
KIDNEY (See abdomen)	100.00
LOCKJAW. Injection of antitoxin into skull	100.00
Injection of antitoxin into spinal canal	50.00
MASTOIDITIS. Operation for mastoid. Abscess or removal of diseased bone	50.00
NERVE. Cutting operation for stretching	25.00
RECTUM. Operation for hemorrhoids:	
External	15.00
Internal	25.00
Prolapsed	25.00
Fistula in Ano, Incision	20.00
Fistula in Ano, Curettement	20.00
Malignant Disease of Rectum	100.00
SKULL. Operation for fracture or other cause	100.00
SPINE OR SPINAL CORD. Operation thereon	100.00

TAPPING OF abdomen	25.00
Bladder	15.00
Chest	15.00
Ear-drum	10.00
Hydrocele	10.00
Joints	10.00
TRACHEA. Cutting operation for any cause	35.00
TUMORS. Benign	15.00
Malignant (except when specifically covered elsewhere in this schedule)	50.00
VARICOCELE. Acupressure, ligation or excision	25.00
VARICOSE VEINS. Ligation or excision	25.00
WOUNDS. Suturing	5.00

Part X. HOSPITAL EXPENSES, ACCIDENT OR ILLNESS.

If the Insured shall, solely by reason of disease or injuries for which weekly indemnity is payable, be confined in a hospital within ninety days from date of accident or contraction of disease and provided no claim is made under Part IX. for Surgical Operations, the Corporation will pay in addition to the weekly indemnity, the amount expended weekly by him for hospital charges but not in excess of the single weekly indemnity provided in Part 11. for total disability, nor for a period of more than 10 consecutive weeks.

Part X1. REIMBURSEMENT FOR GRADUATE NURSE.

In lieu of any sum payable for Hospital Expenses or for Surgical Operations, the Corporation, in addition to the indemnity otherwise payable, will pay the amount expended each week for Graduate Nurse, not exceeding the single weekly indemnity provided in Part 11 for total disability, nor for more than 10 consecutive weeks.

Part XII. REGISTRATION AND IDENTIFICATION.

If the Insured shall, by reason of injury or disease, during the time this policy is in force, be physically unable to communicate with friends, the Corporation will, upon receipt of any message, giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expense necessary to put the Insured in the care of friends, but the Corporation's liability therefor shall not exceed the sum of One Hundred Dollars ($100.00).

STANDARD PROVISIONS.

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Corporation's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the Corporation as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Corporation will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Corporation for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean

only such as have been last filed by the Corporation in accordance with such law, but if such filing is not required by such law, then they shall mean the Corporation's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Corporation is liable.

2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Corporation and such approval be endorsed herein.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Corporation or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Corporation within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Corporation.

5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Corporation at Fourth and Walnut Streets, Philadelphia, Pa., or to any authorized agent of the Corporation, with particulars sufficient to identify the insured, shall be deemed to be notice to the Corporation. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall

be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Corporation upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Corporation at its said office in case of claim for loss of time from disabiliy within ninety days after the termination of the period for which the Corporation is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

8. The Corporation shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

10. Upon request of the insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Corporation is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

12. If the Insured shall at any time change his occupation to one classified by the Corporation as less hazardous than that stated in the policy, the Corporation, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

16. The Corporation may cancel this policy at any time by written notice delivered to the insured or mailed to his last address, as shown by the records of the Corporation, together with cash or the Corporation's check for the unearned portion of the premiums actually paid by the insured, and such

cancellation shall be without prejudice to any claim originating prior thereto.

20. The insurance under this policy shall not cover any person under the age of eighteen years nor over the age of sixty years. Any premium paid to the Corporation for any period not covered by this policy will be returned upon request.

OTHER PROVISIONS.

21. No assignment of interest under this policy shall bind the Corporation unless consent thereto is formally endorsed hereon by an executive officer of the Corporation. A copy of any assignment must be given, within thirty days, to the Corporation, which shall not be responsible for its validity.

22. This policy does not cover "Bodily Injuries" sustained or "Disease" contracted in Alaska or the Insular possessions of the United States or outside the limits of the United States, Canada and Europe, or while engaged in military service in time of war.

23. The copy of application endorsed hereon is hereby made a part of this contract. No provision of the charter or by-laws of the Corporation shall be used in defense of any claims arising under this policy. Full compliance on the part of the Insured and Beneficiary with all the provisions of this policy is a condition precedent to recovery hereunder, and any failure in this respect shall forfeit to the Corporation all the right to any indemnity.

24. Parts I., II. and IV. of this policy shall not cover accident, injury, death or loss caused or contributed to directly or indirectly, wholly or partly by bodily or mental infirmity, ptomaines, bacterial infections (except Pyogenic infections which shall occur simultaneously with and through an accidental cut or wound), or by any other kind of disease; nor shall it cover bodily injuries, death or loss caused

by war or acts of countries at war, or while engaged in military or naval service in time of war; nor shall it cover any injury, fatal or non-fatal, sustained by the Insured while in or on any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith or while operating or handling any such vehicle or device.

25. This policy is issued for the term stated in the insuring clause, but may be renewed subject to all the conditions of the policy from term to term with the consent of the Corporation and upon the advanced payment of the then required premium.

IN WITNESS WHEREOF, the General Accident, Fire and Life Assurance Corporation, Limited, has caused this policy to be signed by its United States Manager, but the same shall not be binding upon the Corporation until countersigned by a duly authorized representative of the Corporation.

Countersigned at Englewood, New Jersey. ML.
By W. A. SCHILLING this 30th day of December, 1925.

FREDERICK W. RICHARDSON
United States Manager.

Form C-2279.

Copy of "Application to
GENERAL ACCIDENT FIRE and LIFE
ASSURANCE CORPORATION, Ltd.
Philadelphia, Pa.

1. What is your full name? Walter I. Clayton.
2. When were you born? 19 day of September, 1891. Where? New York City, N. Y.
3. What is your age? 34. Race? White. Height? 5 ft. 8 in. Weight? 155 lbs.
4. Where do you reside? No. 61 Bencler Place, City of Bergenfield, County of Bergen, State of New Jersey.

5. Of what firm are you a member or employee? Jacquelin & DeCoppet.
6. Kind of business? Brokerage.
   Address? 43 Broad Street, New York City, N. Y.
7. What is your occupation and the full duties thereof? Broker—Buying and Selling of Stocks.
8. Have you in contemplation any special journey or hazardous undertaking? No.
9. Do you own or operate an automobile? No.
10. Do you ever engage in motorcycling or aeronautics? No.
11. To whom shall policy be payable in case of death? Name? Mrs. Emily A. Clayton. Wife. 32. Address? 61 Bencler Place, Bergenfield, New Jersey.
12. Do your average weekly earnings from the above stated occupation exceed the single weekly indemnity under all policies carried by you including that herein applied for? Yes.
13. Have you any other accident or health insurance in this Corporation? No.
    Have you any other accident or health insurance in any company or association? No.
    Have you ever made application for accident or health insurance upon which you have not been notified of the action thereon? No.
14. Have you ever been declined or postponed for life, accident or health insurance? No.
    Has any life, accident or health policy issued to you been cancelled or renewal refused by this or any other company or association? No.
15. Have you ever received indemnity for any injury or illness? No.
16. Have you ever had, or ever been advised to have, a surgical operation? No.
    Have any of your relatives ever been insane or had tuberculosis? No.

17. Are your habits temperate? Yes. Are you maimed or deformed? No. Is your sight or hearing impaired? No. Have you ever had a Hernia or worn a truss? No. Have you ever had any of the following: Epilepsy or Vertigo? No. Diabetes? No. Syphilis? No. Neurasthenia? No. Tuberculosis? No. Appendicitis? No. Mental Disorder? No. Disease of Heart or Nervous System? No. Disease of Tonsils, Nose or Throat? No.
18. Have you been exposed during the last ten days to any contagious or infectious disease? No.
19. Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years? Yes.

Month and Year.	Nature of Disease or Injury.	Duration	Result.
May, 1922	Pneumonia.	3 weeks	Regained health, no effects.

20. Last physician consulted? Dr. Dillion, 69th Street, Lexington Avenue, N. Y. C.
21. Do you agree that the falsity of any statement in this application shall bar the right to recovery, if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes.
    Policy applied for this 30th day of December, 1925.

Signature of Applicant."

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, Limited of Perth, Scotland

United States Offices
FOURTH AND WALNUT STREETS
PHILADELPHIA, PA.

"COMPLETE"
DISABILITY POLICY

THIS POLICY PROVIDES INDEMNITY FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS AND FOR DISABILITY FROM DISEASE, AS HEREIN LIMITED AND PROVIDED.

Original Principal Sum
$30,000.00
Premium—$520.00
Date 12-30-25 Term 1 year.
Number C. D. 661202
Issued to
WALTER I. CLAYTON
Form C-2279

AFFIDAVIT OF MERITS.

(Filed August 27, 1926.)

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

F. M. WALTERS, being duly sworn according to law, upon his oath deposes and says:

That he is superintendent of the accident and health claims department of the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, and is authorized to make this affidavit in behalf of said company. Deponent says that he believes that the said General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, the defendant in this action, has a just and legal defense to the action on the merits of the case.

F. M. WALTERS.

Sworn to and subscribed before me this 26 day of August, 1926.

DAVID G. KRATZOK,
(Seal) *Notary Public.*

My commission expires March 12, 1927.

ANSWER.

(Filed September 13, 1926.)

Defendant, the General Accident, Fire and Life Assurance Corporation, Limited, of Perth, Scotland, a foreign corporation engaged in the business of insurance and authorized to transact the business of insurance in the State of New Jersey, says:

1. Paragraph one of the complaint is admitted.

2. Paragraph two of the complaint is denied.

3. Defendant denies the issuance or existence of the policy mentioned and referred to in paragraph three of the complaint; as to the other matters alleged in paragraph three of the complaint, it has no knowledge or information sufficient to form a belief and leaves plaintiff to make proof thereof.

4. Paragraph four of the complaint is denied.

5. Paragraph five of the complaint is denied.

6. Paragraph six of the complaint is denied.

7. Paragraph seven of the complaint is denied.

8. Defendant admits that it has refused and still refuses to pay to the said plaintiff the sum of $2,800.00 or any other sum for the reason that there is nothing due and owing from the said defendant to the said plaintiff, and defendant says that it denies all the other matters alleged in paragraph eight of the complaint.

9. Defendant denies that the plaintiff is entitled to damage against it in the sum of $2,800.00 or in any other sum.

First Separate Defense.

Defendant, without admitting that it issued a policy of health insurance to Walter I. Clayton in the manner averred in the complaint, says that if such policy was issued to the said Walter I. Clayton, it was issued under certain terms and conditions contained therein, one of which was as follows: "In consideration of the statements in the application for this policy, a copy of which application is endorsed hereon and made a part hereof * * *." The application, therein referred to, required certain answers of the applicant, and it was provided on page two of the application: "That the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the corporation." The applicant is required to answer the questions in the application including questions which deal with the condition of the health of the aplpicant at the time of making the application and also for a period of at least five years prior to the date of making the application. The application was signed by the said Walter I. Clayton in which he answered questions therein contained. Material statements in the application, which application is referred to in said policy, and which statements of facts were thereby agreed to be the basis of the is-

suance of any insurance, were untrue. At the time of the making and delivering of said application by the said plaintiff, Walter I. Clayton, to the said defendant, the said plaintiff answered and stated that he had received no other medical or surgical attention or advice during the five years prior to the making of said application, except during the month of May, 1922, at which time he had been ill of pneumonia for a period of three weeks, and had been treated by Dr. Dillion, who resides at 69th Street, Lexington Avenue, New York City, and that the last physician consulted by the said plaintiff prior to the making and delivering by him of said application to the defendant was the said Dr. Dillion, who had treated the said plaintiff in May, 1922. Whereas, and in fact the said plaintiff had been treated by Dr. Grimes of Dumont, New Jersey, during the months of November and December, 1925, and prior to the date of the making and delivering of said application by the plaintiff to the defendant, which latter date was December 28, 1925, for grippe and intestinal disturbances and attacks of indigestion, all of which constituted the onset of the illness or disease of appendicitis for which plaintiff was subsequently operated upon and which operation and consequent illness is the basis of the plaintiff's complaint. These misrepresentations and misstatements made by the said plaintiff in his application were made with the purpose and intent of deceiving the said defendant and of causing it to issue a policy of health insurance to the said plaintiff, and did in fact deceive the said defendant and cause it to issue a policy of health insurance to the said plaintiff, and these misrepresentations and misstatements were material and affected both the acceptance of the risk and the hazard assumed by the defendant corporation. Furthermore, said plaintiff at the time

of making said application was afflicted with diseases and disorders not stated in his application and which tended to affect materially both the acceptance of the risk and the hazard assumed by the corporation.

Because of the said fraudulent misrepresentations and misstatements made by the said plaintiff, he is not entitled to recover in this action.

Second Separate Defense.

The defendant, without admitting that it issued a policy of health insurance to Walter I. Clayton in the manner averred in the complaint, says that if the said Walter I. Clayton did receive a policy of health insurance, it was given to him for the purpose of insuring him against loss from "disease contracted during the term of this policy and not hereinafter excepted * * *." Defendant says that if the said plaintiff contracted any disease or illness which was or became appendicitis as alleged in the complaint herein, and which disease continuously and wholly disabled plaintiff and prevented him from performing any and every kind of duty pertaining to his occupation, said disease or illness was not contracted during the term of said policy, but was contracted prior to the beginning of the term covered by said policy.

Third Separate Defense.

The defendant, without admitting that it issued a policy of health insurance to Walter I. Clayton in the manner averred in the complaint, says that on

July 19, 1926, and again on August 30, 1926, it did tender to the plaintiff the sum of $520.00, being the premium named and mentioned in the policy referred to in the complaint herein, and demanded of plaintiff that he deliver up for cancellation to the defendant the said policy of health insurance which the said plaintiff has continuously refused to do and still refuses to do. Defendant now herewith again formally tenders to the plaintiff and offers to deliver and pay over to the said plaintiff the sum of $520.00, being the premium mentioned in the policy of health insurance referred to in the complaint, upon the said plaintiff delivering up to the said defendant for cancellation the said policy of health insurance.

EDWARD L. KATZENBACH,
Attorney for Defendant.

REPLY.

(Filed October 15, 1926.)

Plaintiff, by way of reply to the answer filed herein, says that he denies all affirmative matters set up in said answer.

EDWARDS & SMITH,
Attorneys of Plaintiff.

[ENDORSED]

I consent to the filing of the within reply as of time. Oct. 12, 1926.
Edward L. Katzenbach,
Attorney of Defendant.

POSTEA.

(Filed June 22, 1927.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

WALTER I. CLAYTON, *Plaintiff,* v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, *Defendant.*	Action at Law. Postea.

This case was tried at the Hudson Circuit before Honorable Henry E. Ackerson, Jr., and a jury, on June 15th and 16th, 1927. The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of two thousand three hundred forty-one dollars and ninety cents ($2,341.90).
Dated, June 20th, 1927.

HENRY E. ACKERSON, JR.,
Judge.

JUDGMENT.

(Filed June 22, 1927.)

This case was tried at the Hudson Circuit before Honorable Henry E. Ackerson, Jr., and a jury, on June 15th and 16th, 1927. The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of two thousand three hundred forty-one dollars and ninety cents ($2,341.90).

Whereupon, it is adjudged that the plaintiff, Walter I. Clayton, do recover of the said defendant, General Accident Fire and Life Assurance Corporation, Limited, of Perth, Scotland, the sum of two thousand three hundred and forty-one dollars and ninety cents damages, together with his costs which have been taxed at the sum of sixty-two dollars and ninety cents making in the whole the sum of two thousand four hundred and four dollars and eighty cents.

Damages	$2,341.90
Costs	62.90
	$2,404.80

NOTICE OF APPEAL.

(Filed June 27, 1927.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

WALTER I. CLAYTON, *Plaintiff*, v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, *Defendant*.	Action at Law. Notice of Appeal.

To Edwards & Smith, Esquires, Attorneys for the Plaintiff:

Take notice, that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause in favor of the plaintiff, Walter I. Clayton, and against the defendant, General Accident, Fire and Life Assurance Corporation, Limited, of Perth, Scotland.

Dated, June 23, 1927.

EDWARD L. KATZENBACH,
Attorney for Defendant.

Service of the within notice is hereby acknowledged this 28th day of June, 1927.

EDWARDS & SMITH,
Attorneys for Plaintiff.

GROUNDS OF APPEAL.

(Filed July 11, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WALTER I. CLAYTON, *Plaintiff*, v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, *Defendant.*	Action at Law. Grounds of Appeal.

Defendant-appellant, General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in favor of Walter I. Clayton, in the above entitled cause:

1. Because the trial Judge refused to direct a verdict for the defendant upon the conclusion of the introduction of all the testimony upon the trial of the case.

2. Because the verdict in favor of the plaintiff is contrary to law.

3. Because the trial Judge permitted the witness, Emily A. Clayton, over objection, to answer the question, "Do you know what he gave your husband?"

4. Because the trial Judge, in his charge to the jury, erroneously charged the jury as follows:

> "Now gentlemen, you will notice the positions of the answers to the questions, and the manner in which the questions are asked and the answers that are given to them, and I might say here now that the rule is that if there is any question and answer concerning which there is any ambiguity, that is to be resolved against the company in determining whether or not the answers are false."

5. Because the trial Judge, in his charge to the jury, erroneously charged the jury as follows:

> "But if you find the defendant has met that burden of proof, there could be no recovery under this policy. Your verdict would be for the defendant and against this plaintiff, a verdict of 'No cause of action,' but if you find that they were false, these answers, but not intended to deceive, then you must determine whether or not the statements materially affected either the acceptance of the risk or hazard assumed by the defendant, because if they did, then there could be no recovery under this policy, and the burden too rests upon the defendant of proving this to your satisfaction by a fair preponderance of the evidence."

6. Because the trial Judge, in his charge to the jury, erroneously charged the jury as follows:

"That is a sort of guide that has been laid down by our courts, when you come to the question of materiality as to what would be material here because there have been, on some phases of this case, conflicting questions of fact which makes it necessary for me to leave this question which I am now doing, for you to determine and apply the rules of law to the facts as you find them."

7. Because the trial Judge erred in leaving to the jury the question as to whether the false statements of the plaintiff in his application for the policy of insurance in suit was material to the risk and hazard assumed.

EDWARD L. KATZENBACH,
Attorney for Defendant-Appellant.

Service of the within grounds of appeal is hereby acknowledged this 8th day of July, 1927.

EDWARDS & SMITH,
Attorney for Plaintiff-Appellee.

TESTIMONY.

NEW JERSEY SUPREME COURT.
HUDSON COUNTY CIRCUIT.

WALTER I. CLAYTON,
v.
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, OF PERTH, SCOTLAND,

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Before HON. HENRY E. ACKERSON, JR., Judge; and a jury.

Jersey City, N. J.,
June 15, 1927.

APPEARANCES:
EDWARDS & SMITH, ESQRS., for the plaintiff, by EDWIN SMITH, ESQ.
EDWARD L. KATZENBACH, ESQ., for the defendant, by LOUIS RUDNER, ESQ.

(A jury was duly empanelled; being found satisfactory, they were sworn.)

(Counsel opened to the jury.)

Mr. Smith: I offer certain interrogatories which have been submitted to the defendant, and the stipulation as to those interrogatories, signed by the attorney of the defendant.

(Accepted and marked Plaintiff's Exhibits respectively, P1 and P2, reading as follows):

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

WALTER I. CLAYTON, Plaintiff, vs. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, Defendant.	ACTION AT LAW. INTERROGATORIES.

TO THE ABOVE-NAMED DEFENDANT, or ITS ATTORNEY:

TAKE NOTICE that the plaintiff in the above stated cause requires answers under oath from the defendant herein, to the following interrogatories proposed in the above cause, within seven days after service thereof upon you.

1. Did the defendant company under date of December 30, 1925, issue to Walter I. Clayton, 61 Beneler Place, Bergenfield, New Jersey, a "Complete" Disability Policy No. C. D. 661202, in the original principal sum of $30,000, for the premium of $520.00, for a period of twelve months?

2. Is a true copy of said policy annexed to the complaint filed herein?

3. On or prior to December 30, 1925, was W. A. Schilling a duly authorized representative of the General Accident, Fire and Life Assurance Corporation, Ltd., to countersign policies of assurance issued by the said company at Englewood, N. J.?

4. On December 30, 1925, did the said W. A. Schilling, at Englewood, N. J., countersign a "Complete" Disability Policy No. C. D. 661202 issued by the General Accident, Fire and Life Assurance Corporation, Ltd., to Walter I. Clayton, 61 Beneler Place, Bergenfield, N. J., in the original principal sum of $30,000 for the premium of $520.00, and for a period of twelve months?

5. Did the General Accident, Fire and Life Assurance Corporation, Ltd., by itself, or through its agent, accept of the said Walter I. Clayton the sum of $520.00 as payment of the premium for the said policy issued to him?

Dated: September 22, 1926.

Respectfully,
Edwards & Smith,
Attorneys of Plaintiff.

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

WALTER I. CLAYTON, Plaintiff,
vs.
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND, Defendant.

Action at Law.
STIPULATION ON INTERROGATORIES OF PLAINTIFF.

Having reference to the Interrogatories submitted by plaintiff to defendant in this cause and dated September 22, 1926, defendant, without admitting and liability upon its part upon the policy of insurance sued upon in this cause, it being the contention of defendant that said policy of insurance was and has been null and void from the date of its issuance, because of misrepresentations made by the plaintiff in his application for insurance, and without in anywise waiving the defenses contained in the Answer filed by defendant in this cause, stipulates that the Answers to said Interrogatories are as follows:

1. Yes.
2. Yes.
3. Yes.
4. Yes.
5. Said premium was received by defendant through its agent without knowledge of the misrepresentations made by plaintiff which induced the issurance of the policy or insurance.

Edward L. Katzenbach
Attorney for Defendant.

Mr. Smith: I offer in evidence the policy of insurance which is referred to in the interrogatories.

(Accepted and marked as Plaintiff's Exhibit P3 of this date.)

Walter I. Clayton, called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Clayton, where do you live?
A. 61 Beucler Place, Bergenfield, N. J.
Q. Did you live there in 1925?
A. Yes, sir.
Q. What is your business?
A. Stock broker.
Q. In New York?
A. Yes, sir.
Q. Do you know Mr. Jackson?
A. Yes, sir.
Q. What is Mr. Jackson's business?
A. Insurance broker.
Q. Now, I show you a policy of insurance and ask you if you received that policy from Mr. Jackson, the agent or man in the insurance business, as you say?
A. Yes, sir.
Q. And did you pay the premium of $520?
A. Yes, sir.
Q. Now, in April, 1926, did you become ill?
A. I did.

Q. What did you do?
A. April 5th, I felt pain, that was Easter Sunday, and on Monday went to Dr. Miner.
Q. Where did you feel pain?
A. Right here, across my stomach.
Q. You went to the doctor?
A. Dr. Miner.
Q. You had a consultation with him?
A. Yes, sir.
Q. After that, did you go to see any other doctor?
A. I came home that night. Next morning, we called in Dr. Kitz.
Q. Dr. Miner is in Jersey City?
A. Yes, sir.
Q. Dr. Donald Miner?
A. Dr. Donald Miner.
Q. You went to see Dr. Kilts?
A. Yes, sir.
Q. Where is he?
A. Teaneck.
Q. That is Bergen County?
A. Yes, sir.
Q. You consulted him?
A. Yes, sir.
Q. Were you advised by him to undergo an operation?
A. Yes, sir.
Q. Did you, under his advice, go to the hospital?
A. Yes, sir.
Q. What hospital?
A. Holy Name Hospital?
Q. When did you go?
A. April 6th.
Q. When were you operated upon?
A. April 7th.

The Court: What year?

The Witness: 1926.

Q. The operation was on what part of the body?
A. Appendix, right here. (Indicating.)
Q. An operation for appendicitis?
A. Yes, sir.
Q. How long were you in the hospital?
A. Twelve days.
Q. After that, where did you go?
A. Went home.
Q. How long were you home?
A. Ten weeks.
Q. During that ten weeks, were you able to do any work at all?
A. No, sir; none whatsoever.
Q. After the ten weeks, what did you do?
A. I went back to work.
Q. Who treated you at your house after you came back from the hospital?
A. Dr. Kilts.
Q. Did he treat you for the operation?
A. The after effects of it, bandaging it up.
Q. After you came home, did you make a claim to the company?
A. I did.
Q. Did you give them written notice of your illness?
A. I did.

Mr. Smith: I call upon the defendant to produce the letter of April 13th, 1926.

Mr. Rudner: Mr. Clayton submitted the formal notice. (Producing paper.)

(Accepted and marked as Plaintiff's Exhibit P4 of this date.)

Q. This letter is written by your wife?
A. Yes, sir.
Q. Your wife is Emily Clayton?
A. Yes, sir.
Q. Now, Mr. Clayton, you presented to them a claim, or made a claim on them under the policy?
A. I did.
Q. I show you a letter dated July 18th, 1926, and ask you if you got that letter from the Company?
A. I did.

Mr. Smith: I offer the letter.

(Accepted and marked as Plaintiff's Exhibit P5 of this date.)

Q. Now, Mr. Clayton, that check they sent to you, you returned, did you not?
A. Yes, sir.
Q. Have they paid you anything under your policy at all?
A. No, sir.

Cross-examination.

By Mr. Rudner:

Q. Mr. Clayton, I show you check No. 5203 of the General Accident, Fire and Life Assurance Corporation in the sum of $250 dated July 17, 1923, and ask you whether this check is the check which was inclosed in the letter which has just been read in evidence and marked in evidence,P5?
A. Correct.

Mr. Rudner: I offer it for identification.

(Accepted and marked as Defendant's Exhibit D1 of this date.)

Q. I show you a form of application and ask you whether that is signed by you in your handwriting?
A. Yes, sir.
Q. Are the contents of the application also in your own handwriting?
A. Yes, sir.
Q. You filled the whole thing in, did you not?
A. Yes, that is all my handwriting.

Mr. Rudner: I ask to have that marked for identification.

(Marked D2 for identification of this date.)

Q. You write and read English?
A. Yes, sir.
Q. You were born in this country?
A. Yes, sir.
Q. You gave your work as that of stockbroker?
A. Yes, sir.
Q. What is your business as such?
A. To operate on the floor of the Stock Exchange.
Q. The sum of $520 was also offered to you in cash?
A. Yes, sir.
Q. You refused to accept it?
A. Yes, sir.
Q. That $520 was the amount of the premium which you paid?
A. Yes, sir.
Q. Now, Mr. Clayton, when did you first feel these pains?
A. Easter Sunday.

Q. Sure about that?
A. Yes, sir.
Q. Listen to this very carefully: didn't you tell Dr. Lynch, the chief interne of the Holy Name Hospital, that, on April 6th, 1926, you had had recurrent attacks of acute abdominal pain in the right lower quadrant, accompanied by nausea and vomiting, for a period of eighteen months prior to that date?
A. I didn't, no.
Q. You say you did not?
A. No, I didn't.
Q. Did any of the doctors, Dr. Miner, Dr. Kilts or Dr. Lynch, ask you for any history of your case in diagnosing your case as appendicitis?
A. Only I told him the first pain was April 4th, Easter Sunday.
Q. Did any of them ask you about having prior difficulty; did any of them ask you?
A. No.
Q. Sure about that?
A. Yes, sir.
Q. They asked you no questions whatever about any prior sensation or experience?
A. Yes, sir.
Q. You are sure about that?
A. Yes, sir.
Q. Do you know this gentleman on my right, Mr. Bernhard?
A. Yes, sir.
Q. Did he ever call to see you?
A. He did, down on the Stock Exchange.
Q. Did you not tell Mr. Bernhard on or about April 23rd that following your attack of grippe in November 1925, that is, during the course of the month of December 1925, up to the time of your

operation in 1926, you suffered frequent attacks of indigestion which were quite severe, and that you treated them as best possible with home remedies?
A. Mr. Bernhard?
Q. Yes?
A. Not that I recall.
Q. I would like you to answer that question yes or no; did you or did you not?
A. No.
Q. You are sure about that, too?
A. Yes, sir.
Q. Did Mr. Bernhard see you at your home?
A. He did.
Q. That was prior to the time of seeing you in the Stock Exchange?
A. April 23rd was when he saw me at my home.
Q. You were home at that time?
A. Yes, sir.
Q. You went to the hospital what date?
A. April 6th.
Q. You remained how long?
A. Until the 17th.

The Court: What is the date of the policy?

The Witness: December 30th, 1925.

Q. That is a period of eleven days?
A. Eleven or twelve days, yes sir.
Q. Did you go directly home thereafter?
A. Yes, sir.
Q. Wound healing nicely?
A. Yes sir.
Q. No trouble at all with it?
A. No.
Q. How long did you remain at home after leaving the hospital?

A. Yes, sir.
Q. Are you a graduate of medical college?
A. I am.
Q. What college?
A. Harvard Medical College.
Q. Do you know Mr. Walter I. Clayton, the gentleman on my right?
A. I do.
Q. When did you see him last in reference to medical treatment and advice?
A. November 24th, 1925.
Q. Under what circumstances and how did it come about that you came to see him?
A. Well, I saw him the day before, November 23rd; he was ill then.
Q. Where did you see him?
A. At his home.
Q. How did you happen to go to his home?
A. Somebody called me; I don't know who.
Q. After someone telephoned you to call, you went to his house?
A. I did.
Q. That was where, Doctor?
A. 61 Bencler Place, Bergenfield.
Q. That was November 23rd, 1925?
A. It was.
Q. What did you find his condition to be?
A. He came home ill, had a temperature of 102, headache,, I think general muscular pains. I don't quite remember it.
Q. Did you prescribe for him that day?
A. I did, about six o'clock at night.
Q. You prescribed some medicine for him?
A. I did.
Q. Did you see him again thereafter?
A. Saw him about ten o'clock next morning.

Q. Where was that?
A. At his home.
Q. Was he in bed?
A. I don't remember.
Q. Did you prescribe any medicine for him at that time?
A. I don't recall whether I continued the same thing, or gave him something else.
Q. Was that the last time you saw him?
A. It was.
Q. You didn't see him thereafter?
A. No.
Q. This gentleman, Mr. Clayton, the gentleman for whom you prescribed and visited in November, 1925, the 23rd and 24th, at his home?
A. Yes, sir.
Q. What would you say was the nature of his illness?
A. I called it a grippe attack; that is what I called it.

Mr. Smith: Called it what?

(Answer read as follows: I called it a grippe attack; that is what I called it.)

Cross-examination.

By Mr. Smith:

Q. That is really what we call a cold, wasn't it?
A. Well, you don't get much fever with a cold ordinarily.
Q. He had a fever of 102?
A. Yes, sir.
Q. You gave him some castor oil?

A. I don't remember.
Q. Don't you know you gave him a dose of castor oil?
A. I don't remember.
Q. You came back next morning?
A. Yes, sir.
Q. He was all right?
A. He wasn't all right. He had some fever still.
Q. What was his fever?
A. I think 99½; somewhere around that.
Q. Ordinarily between 98 and 100 is normal?
A. I don't call it so.
Q. Don't you call it so?
A. No.
Q. Isn't that generally accepted as normal?
A. I don't think so.
Q. What do you call normal?
A. Nothing over 99½; anything over that I call abnormal.
Q. Anything over 99½ you would call abnormal?
A. Yes, sir.
Q. When you came there on the next morning, he had 99½.
A. Around that; I would not say exactly.
Q. You left him then?
A. I didn't see him afterwards.
Q. You never saw him afterwards professionally?
A. No.
Q. What he had was just what you call temporary indisposition?
A. A grippy cold, I call it.

Mr. Rudner: I now offer in evidence Exhibits D1 and D2 marked for identification.

(Exhibits D1 and D2 for identification now marked in evidence.)

Dr. Winfield S. Kilts, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Dr. Kilts, where do you live?
A. Teaneck, New Jersey.
Q. You are licensed to practice in the State of New Jersey?
A. Yes, sir.
Q. Have been so licensed how long?
A. Two years New Jersey; about fifteen in New York.
Q. You are a graduate of medical college?
A. Yes, sir.
Q. What college?
A. Albany.
Q. You said you practiced in New Jersey how long?
A. Two years; a little over two years.
Q. Prior to that in New York City?
A. In New York State; up in New York State.
Q. Do you know Mr. Clayton, the gentleman to my right?
A. Yes, sir.
Q. How long have you known Mr. Clayton?
A. About two years or a little over.
Q. Do you recall treating him for his ailment of appendicitis?
A. Yes, sir.
Q. When was that?
A. April, 1926.

Q. Did he come to your office?
A. No, he did not.
Q. Did you go to his home.
A. Yes, sir.
Q. What condition did you find?
A. I found him with pain in the abdomen and tender over the appendix.
Q. At that time and later you diagnosed his illness?
A. Yes, sir.
Q. In making your diagnosis, you took into consideration more than one element; you take into consideration some things that appear at the time of the examination, also the history of the case, as furnished you by the patient; is that so?
A. Well, somewhat, yes, sir.
Q. Now, in the instance of Mr. Clayton, was your diagnosis based upon these two elements?
A. Yes, it was.
Q. Now, did he give you a history of his case?
A. Did he give me a history?
Q. Yes.
A. Well, I think he said he had some gas and a little indigestion occasionally.
Q. Commencing when, do you recall?
A. I don't recall.

The Court: When was this statement made?

The Witness: I think it was April 6th, if I remember rightly, April 5th or 6th, 1926.

Q. I am just going to show you this little notice written by you, for the purpose of refreshing your recollection. Will you tell me, when, if any there were, any prior attacks prior to the time you saw him?

A. Well, that was my impression, or my assumption.
Q. What was your impression?
A. My assumption was on account of his gas, or little distress.
Q. Commencing about when?
A. I don't think I could say when.
Q. Referring to that statement, could you tell me when?
A. No, I could not say that, because that is an assumption on my part; I would not say definitely when it had commenced.
Q. He did tell you of prior attacks?
A. Some indigestion attacks before; some indigestion and gas attacks, as I remember.
Q. Prior to the date he saw you?
A. Yes, sir.
Q. He did furnish you with that history of his case?
A. In that manner.
Q. Basing your diagnosis upon the history of the case as furnished by him, and all the symptoms as they displayed themselves, you diagnosed it as a case of appendicitis?
A. Yes, sir.
Q. And advised an operation?
A. Yes, sir.
Q. How often did you see Mr. Clayton after he left the hospital, do you recall?
A. I just saw him three or four times at his home; I don't just remember how long.
Q. It was the ordinary case of appendicitis?
A. At the time it was, as far as we knew at the time, it was.
Q. Within what period of time were these three or four visits after he left the hospital?

A. I think within three or four weeks after the hospital, at intervals.

Q. Thereafter you didn't see him at all?

A. No, not that I remember.

Mr. Smith: No cross-examination.

DR. MAURICE M. LYNCH, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Dr. Lynch, you are a duly licensed medical practitioner of this State?

A. Yes, sir.

Q. Where are you now located?

A. Holy Name Hospital, Teaneck, N. J.

Q. You have been there how long?

A. Since October 15th, 1925.

Q. You are a graduate of medical college?

A. Yes, sir.

Q. What college?

A. Medical College of Virginia, Richmond, Virginia.

Q. When you first went to Holy Name Hospital, what was your capacity?

A. I was interne October 15th, 1925, to October 15th, 1926.

Q. Serving as chief interne?

A. Yes, sir.

Q. You remained there at the Holy Name Hospital since that date?

A. Yes, sir.

Q. In what capacity?

A. I am resident there now.

Q. Resident physician?

A. Yes, sir.

Q. Do you know Mr. Clayton, who is on my right?

A. Yes, sir.

Q. Do you recall his being a patient at the Holy Name Hospital?

A. Yes, sir.

Q. Do you recall when he was a patient there?

A. According to the records, April 6th, 1926.

Q. Have you with you, Doctor, the original hospital records, having reference to the case of Mr. Clayton in April, 1926?

A. Yes, sir.

Q. Will you take this paper in your hands, please. Now, when Mr. Clayton was taken to the hospital, did you have charge of his case as interne?

A. Yes, I was to examine him and take the history.

Q. You examined Mr. Clayton?

A. Yes, sir.

Q. You took his history?

A. Yes, sir.

Q. In taking the history, did you jot down your notes on a sheet, the case history?

A. I took the history complete; gave the usual routine questions, covering the whole body; then immediately walked to the desk and recorded the whole history and physical examination.

Q. Did you make the record yourself?

A. Yes, sir.

Q. Did you have such a case history of Mr. Clayton?

A. Yes, sir.

Q. Do you have the original case history of Mr. Clayton with you?

A. Yes, sir; in my handwriting.

Q. Will you just read to the Court and jury, or if you want, refresh your recollection therefrom, and tell us what is contained in the case history?

Mr. Smith: I object to this. The doctor, if he says he has no recollection of what took place, if he needs it, to refresh his recollection, I have no objection to him using it.

Q. I am asking you, refreshing your recollection. You recall seeing Mr. Clayton?

A. I recall, but I don't remember anything that he told me, or anything that I asked him verbatim.

Q. You jotted down the facts in your case history after he told you?

A. Yes, sir.

Q. The sheet in front of you is the case history of his case, is it not?

A. Yes, sir.

Q. Refreshing your recollection from the case history you have before you, will you tell us what his history was, as furnished by him to you?

A. According to the records in my handwriting, he told me that he had recurrent attacks of abdominal pain, with nausea and vomiting for the past eighteen months. He had it off and on. I don't know how many times. It is not recorded.

Q. Off and on eighteen months prior to the date you saw him?

A. Yes, sir.

Q. What date did you take this history?

A. This was on April 6th, 1926.

Q. Did he tell you where these pains appeared in what part of the abdomen?

A. In the lower right part of the abdomen.

Q. That would be about perhaps here? (Indicating.)

A. Yes, sir.

Q. You, as a matter of fact, Doctor, asked Mr. Clayton these various questions for the purpose of preparing this form of case history which you have in the hospital?

A. Yes, sir.

Q. The records which you have are part of the records of the Holy Name Hospital?

A. Yes, sir.

Q. The records which you have are those you have taken under subpoena this morning from the records of the hospital?

A. Yes, sir.

Cross-examination.

By Mr. Smith:

Q. You haven't any memory of this thing at all?

A. None whatever except as I use the chart.

Q. You don't remember if Mr. Clayton ever used the word "recurrent?"

A. No, I don't mean to say that is verbatim what he told me. I took a case history. Then put it in my own handwriting, the history of the patient's case.

Q. So you have written up there a statement which is a conclusion you gathered from what you think a man stated to you?

A. Yes, it is a conclusion of the answers to the questions I put.

Q. There is such a thing as you being mistaken in some facts that are there, or some statement that you write?

A. Possibly.
Q. How many cases do you see a day?
A. You mean how many histories I take a day?
Q. Yes.
A. At that time—I am not taking histories now—at that time, I suppose I was taking three or four, I would say.
Q. You wrote these down in the office?
A. No, sir, wrote these down on the desk. Came in the patient's room, took the history, and walk right out and write out the history.
Q. Where is the desk, out in the corridor?
A. Out in the hall.
Q. There you sat and wrote?
A. Yes, sir.
Q. Did you write from notes or from your memory?
A. From my memory.
Q. So you think, from what you have on your paper, that Mr. Clayton said he had recurrent attacks?
A. I don't mean to say that this is verbatim what Mr. Clayton told me.
Q. Your statement there is a conclusion which you wrote?
A. Yes, sir.
Q. From your memory?
A. Of what he told me.
Q. Of what he said at that time?
A. Yes, sir.

Re-direct examination.

By Mr. Rudner:

Q. When you say that, you don't exactly mean the word "conclusion." You mean what you did

jot down in the case history is the substance of the answers given to you by Mr. Clayton, is it not, Doctor?
A. Yes, sir.
Q. Whatever he did tell you, you put in the case history?
A. I didn't put it down word for word.
Q. But in your own words, the substance of what he told you, you have embodied in the case history which you have read to the Court and jury?
A. Yes, it is in my handwriting on the record.
Q. You noted down the substance of his answers to you, isn't that so?
A. Yes, sir, according to the records.
Q. He must have given you the information about the eighteen months and so on, otherwise you would not have jotted that down, would you?

Mr. Smith: I object to that.

Q. The fact of the matter is, what you have jotted down is the substance of the answers given to you by Mr. Clayton?
A. Yes, I presume so.
Q. He did in fact give you the history?
A. Yes, sir.
Q. And that appears in the record you have?
A. Yes, sir.

Re-cross examination.

By Mr. Smith:

Q. All I want to know, when you say it is the substance, it is as your memory was at the time, you say; isn't that a fact?

A. Yes, sir; the history was written probably five minutes after.

Q. About five minutes after?

A. Yes, sir.

Q. You went outside into the corridor and you sat down there and started to write?

A. Yes, sir.

Q. And used your own writing?

A. Yes, sir.

Q. And took what was in your own mind of what Mr. Clayton said?

A. Yes, sir.

Q. Your memory as to what Mr. Clayton said at the time?

A. Yes, sir.

Q. That is what you put there?

A. Yes, sir.

Re-direct examination.

By Mr. Rudner:

Q. The case history is a very important part and parcel of the records?

A. Yes, sir.

Q. Very important, aren't they?

A. Yes, sir.

Q. Very important to the surgeon who performs the operation?

A. Supposed to be.

Q. They are important for the attending physician?

A. Yes, sir.

Q. For that reason, you are usually careful and you were in this case, to jot down the case history from what Mr. Clayton had told you?

Mr. Smith: I object to that as directly leading.

The Court: Yes; don't lead him.

Mr. Rudner: I will reframe the question.

Q. Of course you recognized, as the chief interne at the time, the importance of the case history?

A. Yes, sir.

Q. Both for the purpose of the records of the hospital and for the purpose of the patient?

A. Yes, sir.

Q. You wrote this case history, in order to treat the patient properly, isn't that so?

A. Not necessarily.

Q. You used it in part, in some measure?

A. You use it, yes sir; it is not necessary in the treatment.

Q. In any event, you did jot down the substance of what Mr. Clayton told you?

A. Yes, sir; it is in my handwriting here.

Re-cross examination.

By Mr. Smith:

Q. As a matter of fact, at that time you knew that Mr. Clayton came in for an operation?

A. No, I didn't know at the time.

Q. Didn't you know he was going to have an operation?

A. The patient comes in. We take his history, then call up the doctor and find out later what arrangement he has made, what he is going to do with him. The first thing you do, you have to see the patient and examine him before you call the doctor.

Q. You examine the patient before you call the doctor?
A. Yes, sir.
Q. In a case where the doctor sends the patient in?
A. Surely.
Q. Didn't you know this was an operation?
A. I don't know until after, until I called Dr. Kilts.
Q. Wasn't there some note brought?
A. I don't know; I didn't see any note.
Q. All you know is that, as interne, you saw this man in the hospital, and you proceeded to take what you call the history?
A. Yes, sir.
Q. That is what you do with all your patients when they come in the hospital?
A. Yes, sir.
Q. Whether they come for an operation or anything else?
A. Yes, sir.
Q. So what you did was take the history?
A. Yes, sir.
Q. As a matter of fact, histories, as you take them in the hospital, that way, are really what they call pro-forma, you just take them as a matter of course?
A. You take them as a matter of routine.

Re-direct examination.

By Mr. Rudner:

Q. You said, Doctor, that you had the case history taken as a matter of routine. What do you mean?

A. I mean for every patient that comes in.
Q. You don't mean you take it because it doesn't mean anything?
A. No, sir.
Q. It is because it does have some importance?
A. Yes, it has a place of importance.

Re-cross examination.

By Mr. Smith:

Q. It has a place of importance?
A. Yes, sir.

William Bernhard, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Bernhard: Where do you live?
A. Brooklyn, New York.
Q. What is your business?
A. Insurance.
Q. With what company?
A. General Accident, Fire and Life Assurance Corporation.
Q. How long have you been engaged in the insurance business for this company?
A. Fourteen years.
Q. Are you in charge of any branch?

A. I am in charge of the accident and health department of the company's business.

Q. In the New York office?

A. Yes, sir.

Q. During the course of your fourteen years experience with this insurance company, what part has been your duty?

A. The acceptance or declination of health and accident applications, settlement of claims, supervision, and the various details of these two departments.

Q. Being in charge of the accident and health department, did you pass upon the applications for health and accident insurance?

A. I do.

Q. How long have you been doing that?

A. About ten years.

Q. With the General Accident?

A. Yes, sir.

Q. Now, Mr. Bernhard, do you make medical examinations on the acceptance of accident policies in every instance?

A. Yes, I have the discretion.

Q. Ordinary applications submitted, do you require medical examinations on them?

A. No.

Q. On what do you base the allowing or declining of an application?

A. Dependent on the statements in the application.

Q. You depend absolutely on that?

A. Absolutely that is the only basis of acceptance or declination.

Q. Do you recall the application of Mr. Clayton being submitted to your company?

A. I do.

Q. Did that pass through your hands?

A. Yes, sir.

Q. Was that in the regular course of business of your company?

A. Yes, sir.

Q. By reason of the fact that you are the man in charge of the department?

A. Yes, that is right.

Q. When this application was submitted to you, you examined it as to the statements therein contained?

A. Yes, sir.

Q. Now, I show you the original application, which is Exhibit P2 and ask you whether that is the original application which Mr. Clayton has identified as having been signed by him?

A. It is.

Q. Was it in entire reliance upon the facts as set out in the application that the policy was allowed?

A. Absolutely.

Q. Suppose it had been disclosed in the application by Mr. Clayton that he had been treated for grippe two days in November, 1925, what would you have done?

A. Well, by reason of the recentness of the grippe attack in comparison to the date of the application submitted, I would have immediately looked into the situation to determine whether or not he was a fit subject for insurance. A policy of this size is quite a large amount of insurance, one of the largest we write. By reason of the amount of the insurance and by reason of the fact he had a recent illness, it would have been incumbent upon me to have a medical examination. Our policies are not accepted except after very careful examination, where the application is not one hundred per cent negative.

Q. Mr. Clayton is one of the class of men you regard as select risk?

A. Yes, sir.

Q. The nature of his employment, the fact that he was a man in that business, is in some measure helpful in granting a policy of that size?

A. That was one of the qualifications. We understand a stock exchange broker was eligible for $200 week insurance.

Q. Suppose the fact had appeared in the application that Mr. Clayton submitted, that he had suffered from intestinal disturbances, or disturbances of the intestinal tract, and that he had nausea and vomiting for any period prior to that?

A. I would have immediately required an examination. That indicates a very serious situation, one where, in view of the large amount of insurance involved. If these facts obtained, we usually require a medical examination.

Q. You would have required a medical examination if such facts had been disclosed?

A. Yes, surely.

Q. Were such facts as regards having been treated by Dr. Grimes in November, 1925, of importance to you in the placing of the application?

Mr. Smith: I object to that; that would be a question for the Court to determine.

(Motion argued and objection withdrawn.)

A. I say yes, as I explained before, by reason of the fact that this is a very, very large contract, and the recentness of the illness to the date of the application, made it quite important, made the necessity of investigation and that investigation including a medical examination.

Q. Was it important to your purpose in passing upon this application to have full information disclosed to you by the applicant, as to these recurrent or other attacks or disturbances of the digestive tract?

A. Absolutely.

Q. That was all for the purpose of passing upon the application?

A. That is right.

Q. Had you known of the facts, as set out in the application, and that Mr. Clayton had these intestinal disturbances, would an application of this kind been accepted and policy issued?

A. No, sir.

Q. Now, Mr. Bernhard, did you call to see Mr. Clayton at any time after his illness first started?

A. I called on him the first time at his home, I think several weeks after the illness had its inception.

Q. Did you speak to him there?

A. Yes, the usual course; I asked him to tell me in his own words, tell me how the trouble began, with the details in connection with it.

Q. What was his condition as you observed?

A. He was clothed; without collar; had on his shirt and trousers, shoes and stockings. He and I sat on the couch and talked about his sickness.

Q. What did he tell you in reference to his sickness?

A. He told me some time on Thanksgiving Day he took ill, with what he called an attack of grippe. He said he was laid up about a week. He said he saw Dr. Grimes several times. He said immediately following he had attacks of indigestion. He called that gas, and he said he treated himself with home remedies, bicarbonate of soda and so on.

Finally he said he was recommended to the stomach specialist, a doctor here in Jersey City. He consulted the doctor and found he had this abdominal trouble, which he called appendicitis. Then he saw another doctor, not the same doctor, and finally he went to still another doctor who was a surgeon and I think the last doctor referred to recommended that he have an operation. And then he had it, and was in the hospital a few days and then I saw him at his home.

Q. What did he say about these attacks?

A. He said he had pain before meal time and after satisfying his hunger he would have pain, immediately after meal time. These things were continuous, quite a nuisance and causing him a good lot of discomfort and so forth, and finally he went to Dr. Kilts and was operated on.

Q. Did he fix the time of these attacks?

A. He said he fixed the time by reason of Thanksgiving. I think it was some time around that time.

Q. What year, 1925?

A. 1925.

Q. Now, Mr. Bernhard, you read this letter inclosing check for Mr. Clayton?

A. Yes, that bears my signature.

Q. Did you make tender to him of the cash amount of the premium paid by him?

A. I did, subsequent to that letter, sometime in July or August.

Q. Where was that tender made?

A. On the main floor of the New York Stock Exchange.

Q. Did you make it personally?

A. I did.

Q. To Mr. Clayton?

A. I did.

Q. What exactly did you tender to him?

A. I think they were five $100 bills, one $20. I know we had the change made up in the least possible number of bills.

Q. What happened?

A. Mr. Clayton refused to accept the money.

Q. Now, Mr. Bernhard, are you still willing to return to Mr. Clayton the sum of $520, being the premium which he paid for this policy?

A. I am.

Q. In the event of the rendition of a verdict for the General Accident, are you still willing to return to him the sum of $520?

A. I am.

Q. You would still return that money?

A. Yes, sir.

Cross-examination.

By Mr. Smith:

Q. I suppose, on behalf of the General Accident Fire and Life you would be very glad to have him take the $520. in lieu of $2800?

A. It doesn't make any difference to me personally.

Q. On behalf of the company?

A. It doesn't make any difference to me personally.

Q. I am asking you, on behalf of the company; on behalf of the company you are working for?

A. I am employed by the company to do certain duties.

Q. I suppose this $520 was returned or attempted to be returned by you to Mr. Clayton on behalf of the company?

A. That is correct.

The Court: How much did you say you returned?

The Witness: The full premium, $520. was the full premium.

Q. That was the premium that he had paid you?
A. That is correct.
Q. Now, you say that you had some talk with Mr. Clayton at his home; can you give me the date?
A. Some time subsequent to the date he left the hospital, because the day before it, or that day, possibly, he left the hospital—I think somewhere about the 17th or 18th, April. I immediately left the hospital after I found he had left and I went to his home.
Q. That was after you had been notified of his illness?
A. That is correct.
Q. You knew, of course, under the terms of the policy, if the policy was good, he was entitled to certain payments?
A. I understood that, too.
Q. And so when you went there, you began to ask him questions as to his illness and his trouble? Is that right?
A. I asked him questions in order to determine the nature of his trouble and when it had its inception.
Q. Hadn't you before that had a report from the doctor?
A. No, sir; I don't believe so.
Q. Don't believe so?
A. I can tell you from the date of the doctor's report whether I had seen him before. It is possible I did.
Q. So then, while you were examining Mr. Clayton, he told you that he had the grippe, did he?

A. That is right.
Q. Didn't he tell you he had a cold?
A. Well, whether it was cold or grippe, it didn't make much difference.
Q. And then he began to talk about his indigestion?
A. I didn't talk about anything. I asked him to tell me what happened, to give me a history, as he did.
Q. He told you he had some indigestion and he would take bicarbonate of soda?
A. He said the usual home remedies.
Q. Mr. Bernhard, do you say, if you had known that Mr. Clayton had had a cold around Thanksgiving Day, you would not have issued the policy?
A. If Mr. Clayton had medical examination at that time, I would not have issued a policy; unless I had a medical examination.

Mr. Smith: I ask that that be stricken out.

The Court: Strike out. Yes or no.

The Witness: I would not, no.

Q. So then, if an application comes to you, and a man writes on it "yes, I had a cold a month ago," that debars him so far as you are concerned from obtaining a policy from your company?
A. I didn't say that.
Q. You would not have issued the policy?
A. Until I had made an investigation.
Q. If he put on the policy "I had a cold such and such a day," you would not have issued the policy?
A. Would not, until I had made an investigation.

Q. Is that so?

A. That is right.

Q. I call your attention to question 19: The question there is "Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years?" Right under that you have another, a tabulation, "Month and year, Nature of disease or injury, duration and result?" Do you call a cold a disease or injury?

A. I certainly would call it a disease.

Q. So then you think by reason of this, where you ask for the nature of disease or injury, that you expect a man to put down there every time he had a cold?

A. I certainly would.

Q. That is what you would expect?

A. I certainly would.

Q. That is your theory, that you should have all these things put in there?

A. In addition, the name of the doctor who treated him for cold.

Q. In that space?

A. He mentioned the name of the doctor who is supposed to be the last doctor.

Q. You would expect then, according to your idea, that in the application a man should go through the history of his life for five years and tell you every time he had a cold, or every time he took a dose of bicarbonate of soda, every time the doctor had said "Well, here is a dose of castor oil."

(Objected to, argued, and question withdrawn.)

Q. Did you say, Mr. Bernhard, that on every application of this kind, that it is your understanding from the reading of that, that the man should put down under that 19th question every time he had had a cold and the name of the doctor who had attended him for the cold and every time he had stomach ache; is that right?

A. Have you finished the question?

Q. Yes.

A. Yes, I would.

Q. You would expect him?

A. Yes, that is the only information we have to depend upon for the acceptance of the risk. It is the only thing we see is the application; we don't see the man. We see the application but don't see the man.

Q. You think that is of importance, as you call it, material to the risk?

A. Yes, I do.

Re-direct examination.

By Mr. Rudner:

Q. When these various facts are disclosed and set out in this application, you examine the facts as they are stated, and then either follows the investigation or the acceptance or rejection?

A. That is correct.

Q. They furnish to you the basis of your determination of either acceptance or rejection?

A. Yes, sir.

Q. And that is why you ask for this information?

A. Yes, sir.

Q. As a fact, had you had any nausea or vomiting or abdominal pains prior to the operation for appendicitis?

A. No, sir; I didn't.

Q. Now, Mr. Clayton, Mr. Bernhard says he saw you at your house after you came back from the hospital and that you told him that you had had indigestion and had taken some bicarbonate of soda and that you had had pain before and after your operation in the abdomen; did you tell him any such thing?

A. No, sir, I didn't.

The Court: Were you treated by Dr. Grimes in November 1925?

The Witness: Yes, your Honor.

The Court: How many times.

The Witness: Just that one night, the night I called him in at six o'clock.

The Court: And the next morning?

The Witness: My wife called him in; I wanted to get up.

The Court: Did he come next morning?

The Witness: On our volition; not of his own volition.

Q. Next morning, did he give you anything?

A. Not a thing.

Q. Did you get up next morning?

A. I got up right after he left.

Q. Was the indisposition you had at that time gone after the second day?

A. Yes, sir.

Cross-examination.

By Mr. Rudner:

Q. Dr. Grimes did see you on the second occasion?

A. Yes, sir.

Q. You still say, having heard Dr. Lynch testify, you gave Dr. Lynch no case history of your case?

A. No, sir; I didn't.

Q. You still say you didn't give him any history?

A. Yes, sir.

Q. Can you tell us where Dr. Lynch got his information, if not from you?

A. Well, I told him at the bedside; didn't tell him about eighteen months.

Q. You did give him some statement at the bedside?

A. I told him when I was attacked, that was that Sunday before I went to the hospital.

Q. Then you are incorrect when you say you gave none of the doctors a history of your case?

A. I told Dr. Lynch what he wanted to know, what my case was.

Q. You did give him a history of your case?

A. Yes, sir.

Q. You were incorrect when you said on cross-examination that you didn't give Dr. Lynch a history of your case?

A. I didn't refer to Dr. Lynch.

Q. I asked you on cross-examination whether you

gave any of these doctors a history of your case. Do you still say that is so, or do you want to change it?

A. If you refer to history, I referred to the day I had that attack, that Sunday.

Q. You did give Dr. Lynch a history of your case?

A. Yes, sir.

Q. He asked you questions while you were lying in bed, before you were operated on?

A. Correct.

Q. You answered his questions?

A. Yes, sir.

Re-direct examination.

By Mr. Smith:

Q. I ask you again, at that time, when he was asking you the questions, did you tell him you had had recurrent attacks of abdominal pains, that you had nausea and vomiting; did you?

A. I didn't dare tell him anything like that. He asked when did I first feel this, and I said Sunday morning I first felt it. I told him the fact that I had gas after I ate all day, but I went to work on Monday, and I did see Dr. Miner.

Q. You didn't tell him you had nausea?

A. No, I never did.

Re-cross examination.

By Mr. Rudner:

Q. You can't explain where Dr. Lynch got the information?

A. No, sir; I cannot.

Mrs. Emily A. Clayton, called as a witness for the defendant in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mrs. Clayton, you remember the time that Dr. Grimes came to see your husband?

A. Yes, sir, I do.

Q. You sent for him?

A. I sent for him.

Q. Do you know what he gave your husband?

A. What he ordered.

Mr. Rudner: I object to this as not proper testimony on the part of this witness; the best evidence is the physician himself and he has testified.

The Court: As to what he gave him?

Mr. Rudner: Yes.

The Court: She may know.

Mr. Rudner: The witness has not qualified herself to testify what the medicine was. I object as incompetent, irrelevant and immaterial, for the reason that the fact of attendance by a physician is sufficient of itself, regardless of the nature or description of the medicine.

The Court: Overrule the objection.

Mr. Rudner: Exception.

The Court: Not what was told you, but do you know of your own examination what it was?

The Witness: Dr. Grimes ordered my husband a dose of castor oil.

The Court: Strike that out; the jury will disregard it.

Q. Do you know what it was that the doctor gave your husband ?

The Court: Did you get the thing?

The Witness: I got castor oil.

The Court: You got it yourself?

The Witness: Yes, sir.

The Court: And gave it to him?

The Witness: I gave it to him.

Q. The next day when the doctor came did he do anything for your husband?
A. Nothing at all; he just took his temperature.
Q. After that did your husband get up?
A. Got up right after the doctor left.
Q. Was he continually up after that?
A. Yes, sir.

Cross-examination.

By Mr. Rudner:

Q. Dr. Grimes, however, did examine your husband on the second day?
A. He took his temperature.
Q. He made an examination and asked him questions?
A. Asked him how he felt and took his temperature.

Mr. Smith: Plaintiff rests.

Mr. Rudner: Defendant rests.

Mr. Rudner: I move for the direction of verdict on behalf of the defendant, on the first ground, because it has not been proved by the plaintiff as a condition precedent, that the disease of appendicitis was contracted during the term of this policy, beginning during said term and continuously and wholly disabling and preventing the assured from following his work.

The Court: Under what clauses.

Mr. Rudner: Part VIII, clause B and part IX, surgical operations. My second point: for the reason that Mr. Clayton failed to disclose in his application the fact tht he had been treated by Dr. Grimes in November, 1925. My third ground: that the evidence in this case is to the effect that if there

had been a departure from good health, other than of a grippe in the five years prior to the date of the application, in view of the testimony of Dr. Kilts himself that the plaintiff told Dr. Kilts in giving his history that he had gas pains prior to the time he saw him. The testimony of Dr. Lynch in the hospital records is to the effect that Mr. Clayton told him that he had these recurrent attacks, nausea and stomach trouble for a period of eighteen months. There is another point I wish to urge. We have the attendance of Dr. Grimes in November, and certainly a man has a departure from good health when he has a cold and a temperature of 102, and can't be said to be a well man. On these grounds I think we are entitled to a direction of verdict.

(Motion argued.)

The Court: I deny your motion and will allow you an exception.

Mr. Rudner: Exception. Thank you.

(Counsel summed up to the jury.)

CHARGE OF COURT.

June 15, 1927, 10 A. M.

The Court charged the jury as follows:

THE COURT: Gentlemen of the jury: On December 30th, 1925, the General Accident Fire and Life Assurance Corporation, Limited, of Perth,Scotland, in consideration of the premium of $520. paid to it by Walter L. Clayton, issued to him a policy of insurance whereby the Company insured Clayton, among other things, against disease contracted during the term of the policy, the insurance to continue for a period of twelve months beginning December 30th, 1925.

The company therein agreed to pay Clayton $200 per week not exceeding fifty-two weeks, during total disability from disease contracted during the term of the policy, which total disability is defined in the policy itself as such disability which "shall continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation" which was that of a stockbroker.

And in addition thereto, the company also agreed to pay Clayton the sum of $800 or what figured up the sum of $800 as indicated in the schedule in the policy for surgical attention for appendicitis, if such became necessary by reason of disease contracted during the term of the policy.

Now, Mr. Clayton claims that on or about April 6, 1926, or shortly before that date, he contracted the

disease or illness which is generally denominated appendicitis, which he claims, from April 6, 1925, continuously and wholly disabled the plaintiff and prevented him from performing any and every kind of duty pertaining to his occupation and caused him to remain so for a period of ten weeks, and that during the course of this disease or illness it became necessary for him to undergo an operation for the appendicitis which was performed upon him by a duly qualified surgeon within ninety days, so it is claimed, from the date of the contraction of the illness or disease.

Clayton claims to have given due notice of the claim to this company, and I understand that that is not disputed, and he also claims that nothing has been paid him under the policy, which I understand is also not disputed.

He therefore brings this suit as plaintiff against this insurance company as defendant in an attempt to recover the sum of eight hundred dollars for the operation which he underwent, and the sum of two hundred dollars per week during the period he claims he was continuously and wholly disabled from performing any and every kind of duty pertaining to his occupation, and of course he asks interest on the sums, on the eight hundred dollars from the date of the operation—you will recall when it was—and interest at six per cent upon the weekly payment provided for by the policy. That is to say, six per cent on two hundred dollars a week for the length of time that may run, if you find that there was time during which he was wholly and totally disabled from performing each and every duty pertaining to his occupation. And then regarding the payment, the payment to bear interest.

Now that is the claim of the plaintiff. The duty rests upon the plaintiff of proving his case to your

satisfaction by a fair preponderance of the evidence, and that includes, gentlemen, proving that the disease of appendicitis was contracted during the term of the policy, that is, that it was contracted after the policy began to run.

If it was not thus contracted, that would end your deliberations, gentlemen, and you would find a verdict for the defendant.

The plaintiff must also prove that the operation was performed within ninety days from the date the disease was contracted before he can recover the amount provided for in the schedule in any event, and of course, as I have already told you, if that proof has not been made, why then of course the defendant would be entitled to a verdict against the plaintiff, a verdict of "no cause of action."

Of course, I do not wish by stressing what I have just now said to you, to say that those are the only things that have to be proven, because I have said that these other things I have mentioned, for example, that there was a total disability here which prevented this man from performing each and every duty pertaining to his employment, in the words of the statute which I will read to you. That must be proven also because it follows as a matter of fact, that even though the plaintiff could recover under this policy, nevertheless, if he could have gone back to work and performed some of the duties pertaining to his occupation, then under this particular clause of the policy upon which this action is brought, he would not be entitled to recover for the time that he could have gone to work and could have performed some of the duties pertaining to his occupation.

Now you will have the policy before you and you will see that the provisions which I have just now

specially directed your attention to are the following: I am quoting now from the policy:

"If disease contracted during the term of this policy and not hereinafter excepted shall, beginning during said term continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified in part II, for total disability," which is two hundred dollars per week. That is specified in part II.

And it is further provided in part IX:

"If a bodily injury or a disease, for which indemnity is payable under this policy, shall necessitate a surgical operation named in the schedule of operations set forth herein, and such operation is performed by a surgeon within ninety days from date of accident or contraction of disease, the corporation will pay the surgical fee specified in the schedule for such operation in addition to any other indemnity to which the insured may be entitled, but payment shall not be made for more than one operation resulting from any one accident or one disease. If more than one such operation shall be performed on account of injury sustained in one accident, or on account of one disease, the insured shall receive the largest surgical fee specified in the schedule for any one of the operations so performed."

And that schedule which is appended provides that an operation for appendicitis is one of the particular kinds of operation for which compensation shall be paid, and the rate therein provided is that "if the single weekly indemnity of this policy is $25.00, the following amounts will be paid: If said weekly indemnity is greater or less than $25.00 the amounts to be paid shall be increased or decreased proportionately."

So that it would mean in this case, in the event of an operation for appendicitis you will increase the amount here provided to read $800.00. That would be the amount for such an operation.

But even if you find, gentlemen, that the plaintiff contracted appendicitis during the term of the policy, and was operated upon for that trouble within ninety days from its contraction, nevertheless, the defendant insists by way of defense now, that plaintiff cannot recover because it is alleged that plaintiff made certain false and untrue statements or representations in his application for the insurance, which were made with the intent to deceive the defendant, or that they materially affect either the acceptance or the risk or hazard assumed by the defendant, that is the insurance company, and that would render this policy void, and bar the plaintiff's right to recovery under the following provision in the application which is made a part of the policy.

Now, that is the insistment here of the defendant. That provision, which is appended to the application, reads as follows:

"Do you agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the corporation?" And the answer is "Yes."

And the policy at the outset also provides "In consideration of the statements in the application for this policy, a copy of which application is endorsed hereon and made a part hereof, and of the five hundred and twenty dollars premium, does hereby insure Walter I. Clayton, herein called the in-

sured, by occupation a broker, and classified by the corporation as a select risk, for twelve months, beginning at noon, standard time, at the place of counter-signature hereof, on the 30th day of December, 1925."

So you see the application is itself made a part of and attached to the policy of insurance.

Now the first false statements which the defendant claims were intentionally made with intent to deceive, or materially affect the acceptance of the risk or the hazard assumed by the defendant were expressed in the following questions and answers. They are questions 19 and 20: Question 19 reads as follows:

"Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years?" And the answer is "Yes."

Then comes a form which follows this same question 19: "Month and year, nature of disease or injury, duration, result." These things are printed in the form under these questions, under the respective headings:

"Month and year: May, 1922.
Nature of disease or injury: Pneumonia.
Duration: Three weeks.
Result: Regained health. No effects."

Now, question 20 follows, namely, after what I have just now read to you, and it is this:

"Last physician consulted," and the answer is "Dr. Dillion, 69th Street and Lexington Avenue, N. Y. City."

Now it seems to be conceded, gentlemen, by both sides here, that in November of 1925, Dr. Grimes was called in to see plaintiff for what he termed a grippy cold, or a grip attack. You will remember of course,

what his testimony was, and I might say here, as applies throughout my charge and in reference to the fact, if the reference does not agree with your recollection of the testimony here, you should ignore the reference and rely entirely upon your own recollection and that applies to what counsel has said in summation here. You are the sole judges of the facts and it is your recollection, if that recollection differs from the statement made, which is to govern you. But as I recall, he says he attended the plaintiff for a grippy cold, grip attack, and found him with a temperature of 102, and that he either prescribed or directed that castor oil be administered, and that he came next morning and the temperature was down to almost normal. I think he said it was a little over 99. You will recall what that testimony was, however, and that that was the last time that this Dr. Grimes saw him, and the plaintiff says that he got up that day and was about.

Now this, you will note, was after Dr. Dillion, the physician named in the part of the answer to question 19, had treated the plaintiff for pneumonia, and these things conceded here on the stand, followed after the occurrence, when this plaintiff had pneumonia.

Now, gentlemen, you will notice the positions of the answers to the questions, and the manner in which the questions are asked and the answers that are given to them, and I might say here now that the rule is that if there is any question and answer concerning which there is any ambiguity, that is to be resolved against the company in determining whether or not the answers are false.

Now it is therefore, gentlemen, for you to say in the first place whether the statements which were made to these questions were falsely made with the

intent to deceive, and the burden of course rests upon the defendant to prove this by a fair preponderance of the evidence.

Now, gentlemen, that does not necessarily mean the greater number of witnesses on the one side, nor on the other, but it does mean the greater weight of the testimony. The reference is more particularly to the quality rather than the quantity of the proof.

But if you find the defendant has met that burden of proof, there could be no recovery under this policy. Your verdict would be for the defendant and against this plaintiff, a verdict of "No cause of action," but if you find that they were false, these answers, but not intended to deceive, then you must determine whether or not the statement materially affected either the acceptance of the risk or hazard assumed by the defendant, because if they did, then there could be no recovery under this policy, and the burden too rests upon the defendant of proving this to your satisfaction by a fair preponderance of the evidence.

Now, in insurance policies, every fact which is untruly stated or wrongfully suppressed must be regarded as material to the risk, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premiums.

That is a sort of guide that has been laid down by our courts, when you come to the question of materiality as to what would be material here because there have been, on some phases of this case, conflicting questions of fact which makes it necessary for me to leave this question, which I am now

doing, for you to determine and supply the rules of law to the facts as you find them.

Now, if the answers to the above questions were false and either intended to deceive the defendant or materially affect the acceptance of the risk or hazard assumed, no recovery can be had of this insurance company by this plaintiff, and you would bring in a verdict in favor of the defendant and against the plaintiff, a verdict of "No cause of action."

The defendant further contends, gentlemen, that the plaintiff was afflicted with recurrent attacks of acute abdominal pains accompained by nausea for eighteen months prior to April 6, 1925, that he failed to incorporate this in his answers to the question which is designated as number 19 on his application, and therefore he had experienced, so defendant claims, a departure from good health within five years from the date of the policy.

Plaintiff, of course, denies it. You have a sharp denial here upon this question. It is not like the situation with respect to the other questions which I have already told you about, that is about the calling in of Dr. Grimes in November, 1925, because the plaintiff here expressly and freely admits that such was the case.

But here you have a sharp question of fact, and the burden, of course, is on the defendant to prove by a preponderance of the evidence that this condition did exist, but, if, gentlemen, he has met that proof and you find that that condition did exist, so that there was a false statement made in response to the question number 19, under this heading of "Condition of Health," that would be so material as to void this policy and the plaintiff could not recover, and your verdict would be for the defendant and against the plaintiff, a verdict of "No cause of action."

Now, gentlemen, I feel that there is no further rules of law that I can give to help you in this situation.

If you find for the defendant you will express your verdict by saying "We find in favor of the defendant and against the plaintiff, a verdict of 'No cause of action.'"

If you find in favor of the plaintiff, and if you find that the plaintiff is entitled to recover for the surgical operation that would be the sum of eight hundred dollars with interest at six per cent from the date of the operation, which was about, as I recall, April 6, 1926, and if he is entitled to recover for the disability, remembering the wording of the policy particularly upon that subject, then the sum for that would be at the rate of two hundred dollars per week, and only during the time that plaintiff was wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation together with interest at six per cent on each installment found due when due.

Now I charge you especially with regard to the interest, unless counsel sees fit to relieve the situation by saying they will take interest, if they are entitled to a verdict at all, from the date of the last payment which would be due.

Mr. Smith: I do.

The Court: Counsel does that. Then, gentlemen, if you find that the plaintiff is entitled to your verdict at all, if you find under this heading of disability, then from the date that the payment should have ceased under the wording of this policy, this weekly sum of two hundred dollars, from that date you would figure six per cent interest in your verdict.

I request you, when you render a verdict, you render a verdict for principal and interest, because I want to see what you figure in the way of interest.

Now, before you retire I want to admonish you, gentlemen, that the mere fact that you are dealing here with an insurance company as a defendant does not mean that you must not be guided and governed by the proofs in this case. I know you are too intelligent and too experienced to allow sympathy or passion or prejudice to sway your verdict. Of course an insurance company is entitled to rely upon the contract which it makes, as does the assured, because after all an insurance policy such as this is a contract and the question before you is whether or not that contract has been broken in the parts that have been dealt with.

Now, if the plaintiff is not otherwise entitled to recover, you see how grossly unjust it would be merely because a man may have paid five hundred and twenty dollars for this insurance policy, that you should put your hands in the pockets of the insurance company, irrespective of liability and pay him. He must prove his case, as I have told you now, and must establish his case according to the rules that I have given you, and you must find your verdict upon the evidence in the case applying to the rules of law to the facts as you find them.

Now, I have been requested, gentlemen, to charge you two additional propositions.

The first I refuse to charge.

The second I refuse to charge, because it is too broad. I think I have charged it much more satisfactorily to the defendant in my main charge. Therefore I refuse to charge except as I have already charged.

Now you may take the case.

(The jury retired.)

The Court: Gentlemen: In one part of my charge, you will recall that I spoke of these alleged recurrent conditions of pain and nausea in the stomach, and I practically told you that if they had been proven by the defendant by a fair preponderance of the evidence, that those things existed, that they were falsely withheld, that that would be a material misrepresentation. But I didn't refer at that time to the condition which Dr. Grimes said he found in November, 1925, where he said that there was a condition of a grippy cold, or a grippe attack.

Now, of course, you are to consider that also, as to whether or not, in the connection in which I have used it, that was a departure from good health as set forth in question 19 in the application appended to the policy. In other words, not only the stomach question, but whether or not the condition of which Dr. Grimes spoke was a departure from good health.

Mr. Smith: I would like to have stated to the jury, in referring to these attacks, that a cold was not necessarily a departure from good health.

The Court: I haven't said it was.

Mr. Smith: Leaving it to the jury, my proposition being that as he has answered yes to the question about disease, it wasn't necessary for him to go any further.

Mr. Rudner: I except to that part of the charge, where your Honor charged that if any ambiguity exists in the policy, that such ambiguity should be resolved against the defendant.

I also take exception to that part of the charge where your Honor left to the jury the question of the materiality of the misrepresentations.

Also as to the fact that the policy is void only in the event that the misrepresentation affected the materiality of the risk and hazard assumed.

The Court: I don't get your point. Will you elaborate that?

Mr. Rudner: My thought was that it was a matter for the Court to decide and not the jury.

The Court: That is the same ground as in your first request to charge, isnt it?

Mr. Rudner: Yes, your Honor.

Then, I don't think your Honor left with the jury the question of grippe being a departure from good health. Your Honor referred to the recurrent attacks of nausea.

(The jury summoned by the Court to the court room.)

The Court: In reference to this last thing, not that it was a condition that existed, but the fact that it was either made with the intention to deceive or materially affected the risk.

(The jury retired.)

(The jury returned to the court room for further instructions.)

The Foreman of the Jury: In case we find a verdict for the plaintiff, will we have to give him the full amount that he is bringing suit for, or a compromise?

The Court: You could not compromise. You don't have to bring in a verdict for the plaintiff unless he has met the proof I have told you about with respect to the period of disability.

If you find he is entitled to your verdict, under the charge I have already given you, he is entitled to be compensated for this operation, that is $800, as fixed by the policy, as you will note when you come to read it.

The other provision is found in clause A to part VIII, that is, if the disease was contracted during the term of the policy, and "not hereinafter excepted, shall, beginning during said term continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified in part II for total disability."

So the question you have asked me is thus dissolved, providing you find that there was disability under that controlling clause. He says he was disabled for ten weeks. If you say, no, it did not take that length of time, well, for whatever length of time you find that he was disabled and incapacitated in accordance with the exact wording of the clause I have just read to you, you would give him $200 for each week, proportionately at $200 a week, for the period of disability, remembering of course that the disability has to be in accordance with the wording here, "wholly disabled" and prevented him from

performing every kind of duty pertaining to his occupation, the corporation will then pay during the period of such continuous total disability, the amount stated.

DEFENDANT'S REQUESTS TO CHARGE.

1. I charge you that as a matter of law the failure of Mr. Clayton to disclose in his application for the policy the fact that he had been treated by Dr. Grimes in November, 1925, was material to the risk, and having been made by him knowingly and wilfully, the policy in suit is null and void, and your verdict must be for the defendant.

*2. If you find that defendant suffered from intestinal disturbances, nausea and vomiting prior to the date of the application for the policy, your verdict must be for the defendant.

*(Note by stenographer: In Mr. Rudner's written requests the word defendant is used, although the intent that the word intended was plaintiff is obvious.)

EXHIBIT P3.

THIS POLICY PROVIDES INDEMNITY FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS, AND FOR DISABILITY FROM DISEASE, AS HEREIN LIMITED AND PROVIDED.

GENERAL ACCIDENT
FIRE AND LIFE
ASSURANCE CORPORATION, LTD.
OF PERTH, SCOTLAND.

Frederick Richardson, United States Manager
United States Offices, Fourth and Walnut Streets,
Philadelphia, Pa.

(Hereinafter called the corporation)

IN CONSIDERATION of the statements in the application for this Policy, a copy of which application is endorsed hereon and made a part hereof, and of Five Hundred Twenty and no/100 ($520.00) Dollars premium, DOES HEREBY INSURE WALTER I. CLAYTON, of 61 Bencler Place, Bergenfield, New Jersey, herein called the Insured, by occupation a broker and classified by the Corporation as a select risk, for twelve months, beginning at noon, standard time, at the place of countersignature hereof, on the 30th day of December, 1925, subject to the provisions and limitations hereinafter expressed, (a) against loss resulting solely from BODILY INJURIES, effected directly and independently of all other causes, through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), and (b) against loss from DISEASE, as herein provided.

ACCIDENT SCHEDULE.

Part 1. DEATH, DISMEMBERMENT AND LOSS OF SIGHT.

The principal sum of this Policy is $30,000.

If such injuries shall wholly and continuously disable the Insured from date of accident from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability shall result, independently and exclusively of all other causes in any one of the losses enumerated in this part, or within ninety days from the date of the accident, irrespective of total disability, result in like manner in any one of such losses, the Corporation will pay the sum set opposite such loss and in addition weekly indemnity as provided in Part II. A to the date of death, dismemberment or loss of sight; but only one of the amounts so specified and the additional weekly indemnity will be paid for injuries resulting from one accident.

PAYMENTS IN ONE SUM FOR LOSS OF

Life	The Principal Sum.
Both Hands by severance at or above the wrist	The Principal Sum.
Both Feet by severance at or above the ankle	The Principal Sum.
One Hand at or above the wrist and One Foot at or above the ankle (by severance)	The Principal Sum.
Entire Sight of Both Eyes if irrecoverably lost	The Principal Sum.
Either Hand by severance at or above the wrist and Entire Sight of one eye if irrecoverably lost	The Principal Sum.
Either Foot by severance at or above the ankle and entire sight of one eye if irrecoverably lost	The Principal Sum.
Either Hand by severance at or above the wrist	½ of Principal Sum.

Either Foot by severance at or above the ankle .....½ of Principal Sum.
Entire Sight of One Eye if irrecoverably lost .....½ of Principal Sum.
Thumb and Index Finger of either hand by severance at or above metacarpophalangeal joints .....⅓ of Principal Sum.

The Payment of any one such loss shall end this Policy.

Part II. WEEKLY INDEMNITY.

The Weekly Indemnity for Total Disability is $200.00.

Total Disability. A. Or, if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable and prevent the Insured from date of accident from performing any and every kind of duty pertaining to his occupation, the Corporation will pay the weekly indemnity above specified for the entire period of such total disability.

Partial Disability. B. Or, if such injuries, independently and exclusively of all other causes, shall continuously partially disable the Insured from date of accident or from termination of total disability as above defined, the Corporation will pay weekly indemnity not exceeding 52 consecutive weeks as follows:

For the period during which the Insured is totally and continuously disabled for three-quarters of his business time, weekly indemnity at the rate of three-quarters of the amount payable for total disability.

For the period during which the Insured is wholly and continuously disabled from performing one or more important daily duties pertaining to his occupation, weekly indemnity at the rate of one-half of the amount payable for total disability.

No recovery may be had under more than one of the preceding clauses for any one portion of the period of 52 weeks.

No payment of Weekly Indemnity shall be made in case of any loss enumerated in Part I., except as therein provided.

Part III. DOUBLE INDEMNITY.

Any amount which may become payable under Parts I. and II. shall be double the amount specified therein if such injuries are sustained (1) while the Insured is a passenger and is in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps or running-board of railway or street railway cars); (2) or, while the Insured is a passenger within a passenger elevator (mine elevator excepted); (3) or, in consequence of being struck by lightning; (4) or, by the burning of a building providing the Insured is therein at the commencement of the fire; (5) or, in consequence of the collapse of the outer walls of a building while the Insured is therein; (6) or, caused by the explosion of a steam boiler; (7) or, caused by cyclone or tornado.

Part IV. OPTIONAL FIXED INDEMNITIES.

The Insured, if he so elect in writing within twenty days from date of accident, may take, in lieu of the weekly indemnity hereinbefore provided for

total and/or partial disability, indemnity in one sum according to the Schedule of Fixed Indemnity, if the injury is one set forth in such schedule, but not more than one fixed indemnity shall be paid for injuries resulting from one accident. When the Insured is entitled to double indemnity, the fixed indemnity shall be doubled in like manner.

SCHEDULE OF FIXED INDEMNITY

If the single weekly indemnity payable under Part II. of this Policy for "Total Disability" is $25.00 the following amounts will be paid. If said weekly indemnity is greater or less than $25.00 the amounts to be paid shall be increased or decreased proportionately.

For the Complete Fracture of Bones

Of the skull, both tables	$325.00
Of the lower jaw	75.00
Of the collar bone	150.00
Of the pelvis	250.00
Of the thigh	300.00
Of the leg	200.00
Of the kneecap	200.00
Of the arm, between elbow and shoulder	300.00
Of the arm, between wrist and elbow	150.00
Of two or more ribs	100.00
Of the foot other than toes	125.00
Of the hand other than fingers	125.00
Of two or more toes	100.00
Of two or more fingers	100.00

For Loss

Of one or more fingers, at least one entire phalanx	$150.00
Of one or more entire toes	200.00

For a Complete Dislocation

Of the shoulder	$100.00
Of the elbow	100.00

Of the wrist	125.00
Of the hip	300.00
Of the knee	150.00
Of any bones of the foot other than toes	150.00
Of the ankle	150.00
Of two or more toes	50.00
Of two or more fingers	50.00

Part V. SURGEON'S BILL FOR NON-DISABLING INJURIES

If such injuries do not result in a loss specified herein, but require treatment by a physician, the Corporation, upon satisfactory proof from the physician in attendance, will reimburse the Insured for the cost thereof, not to exceed One Week's Single Indemnity as provided under Part II. for total disability.

Part VI. FREEZING, HYDROPHOBIA, ASPHYXIATION

Freezing, hydrophobia or asphyxiation, suffered through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) shall be deemed "Bodily Injuries" within the meaning of this policy.

Part VII. BLOOD POISONING OR SEPTIC INFECTION

Pyogenic infection occurring simultaneously with and through an accidental cut or wound is declared to be "Bodily Injuries," within the meaning and intent of the policy.

ILLNESS SCHEDULE

Part VIII. WEEKLY INDEMNITY.

Total Disability — A. If disease contracted during the term of this policy and not hereinafter excepted shall, beginning during said term continuously and wholly disable and prevent the Insured from performing any

and every kind of duty pertaining to his occupation, the Corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified in Part II. for total disability.

Partial Disability

B. If such disease immediately following the termination of a period of total disability shall wholly and continuously prevent the Insured from performing at least one-half of the essential daily duties of his occupation, the Corporation will pay during the period of such continuous Partial disability but within the limits herein stated, a weekly indemnity of one-half the amount specified in Part II. for total disability.

Weekly indemnity for total or partial disability, singly or combined, as provided in this Part shall not be payable for a period exceeding 52 consecutive weeks.

Permanent Disability From Loss of Use of Limbs or Sight.

C. If such disease shall result in the entire and irrecoverable loss of (a) the use of both hands or both feet, or of one hand and one foot, or (b) the sight of both eyes during a period for which the Insured is entitled to indemnity under Paragraph "A" of this Part, the Corporation will continue to pay in lieu of all other indemnity, except surgical or hospital indemnity, the weekly indemnity provided in Part II. for total disability during such period as the Insured shall independently of all other causes be thereby wholly and continuously disabled and prevented from engaging in any occupation or employment for wage or profit, but the combined period of payment under Paragraphs "A" and "C" of this Part shall not exceed one hundred (100) consecutive weeks.

Payment shall not be made for any disability resulting from disease for which the Insured is not treated by a legally qualified physician.

Part IX. SURGICAL OPERATIONS

If a bodily injury or a disease, for which indemnity is payable under this policy, shall necessitate a surgical operation named in the Schedule of Operations set forth herein, and such operation is performed by a surgeon within ninety days from date of accident or contraction of disease, the Corporation will pay the surgical fee specified in the schedule for such operation in addition to any other indemnity to which the Insured may be entitled, but payment shall not be made for more than one operation resulting from any one accident or one disease. If more than one such operation shall be performed on account of injury sustained in one accident, or on account of one disease, the Insured shall receive the largest surgical fee specified in the schedule for any one of the operations so performed.

SCHEDULE OF OPERATIONS.

If the single weekly indemnity of this policy is $25.00 the following amounts will be paid. If said weekly indemnity is greater or less than $25.00 the amounts to be paid shall be increased or decreased proportionately.

ABSCESS OR BOIL..... $5.00

ABDOMEN. Cutting into abdominal cavity for diagnosis or treatment of organs therein. 100.00

AMPUTATION OF	
Foot, hand or forearm	25.00
Leg or arm	50.00
Thigh	75.00
Finger or fingers	10.00
APPENDICITIS (See abdomen)	100.00
BLADDER. Operation for removal of stone by cutting	75.00
Operation by crushing	35.00
BONE. Injuries to or disease of. Removal of diseased portion of bone	25.00
CARBUNCLE. Incision and treatment	5.00
CHEST. Incision into thoracic cavity (exclusive of tapping) for diagnosis or treatment of organs within, except the lungs	25.00
DISLOCATION. Reduction of hip or knee (patella excepted)	35.00
Patella	5.00
Wrist, shoulder, elbow or ankle	25.00
Lower jaw	15.00
Thumb	10.00
Fingers	5.00
EAR, NOSE OR THROAT. Any cutting operation	10.00
ESOPHAGOTOMY for stricture or other cause	100.00
EXCISION OF Shoulder, hip or knee joint	100.00
Elbow, wrist or ankle joint	50.00
Toe or toes	10.00
EYE. Removal	50.00
Cataract	25.00
Any other cutting operation	15.00
FRACTURES. Reduction of Lower jaw, collar bone or shoulder blade	25.00
Breastbone, rib or ribs	10.00

Nose	5.00
Upper Arm	35.00
Forearm (one or both bones)	25.00
Wrist or hand	15.00
Fingers	10.00
Bones of the pelvis except coccyx	75.00
Coccyx	10.00
Thigh	75.00
Kneecap or leg bones (one or both)	50.00
Bones of foot	15.00
Toes	10.00
GUNSHOT WOUNDS. Treatment not necessitating amputation or cutting operation into abdominal cavity	15.00
HYDROCELE. Incision or excision of sac.	25.00
HYDROPHOBIA. Pasteur treatment	50.00
INGROWING TOE-NAIL. Removal	10.00
INTESTINAL OBSTRUCTION (See abdomen)	100.00
KIDNEY (See abdomen)	100.00
LOCKJAW. Injection of antitoxin into skull	100.00
Injection of antitoxin into spinal canal	50.00
MASTOIDITIS. Operation for mastoid. Abscess or removal of diseased bone	50.00
NERVE. Cutting operation for stretching	25.00
RECTUM. Operation for hemorrhoids:	
External	15.00
Internal	25.00
Prolapsed	25.00
Fistula in Ano, Incision	20.00
Fistula in Ano, Curettement	20.00
Malignant Disease of Rectum	100.00
SKULL. Operation for fracture or other cause	100.00
SPINE OR SPINAL CORD. Operation thereon	100.00

TAPPING OF abdomen	25.00
Bladder	15.00
Chest	15.00
Ear-drum	10.00
Hydrocele	10.00
Joints	10.00
TRACHEA. Cutting operation for any cause	35.00
TUMORS. Benign	15.00
Malignant (except when specifically covered elsewhere in this schedule)	50.00
VARICOCELE. Acupressure, ligation or excision	25.00
VARICOSE VEINS. Ligation or excision	25.00
WOUNDS. Suturing	5.00

Part X. HOSPITAL EXPENSES, ACCIDENT OR ILLNESS.

If the Insured shall, solely by reason of disease or injuries for which weekly indemnity is payable, be confined in a hospital within ninety days from date of accident or contraction of disease and provided no claim is made under Part IX. for Surgical Operations, the Corporation will pay in addition to the weekly indemnity, the amount expended weekly by him for hospital charges but not in excess of the single weekly indemnity provided in Part II for total disability, nor for a period of more than 10 consecutive weeks.

Part X1. REIMBURSEMENT FOR GRADUATE NURSE.

In lieu of any sum payable for Hospital Expenses or for Surgical Operations, the Corporation, in addition to the indemnity otherwise payable, will pay the amount expended each week for Graduate Nurse, not exceeding the single weekly indemnity provided in Part II for total disability, nor for more than 10 consecutive weeks.

Part XII. REGISTRATION AND IDENTIFICATION.

If the Insured shall, by reason of injury or disease, during the time this policy is in force, be physically unable to communicate with friends, the Corporation will, upon receipt of any message, giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expense necessary to put the Insured in the care of friends, but the Corporation's liability therefor shall not exceed the sum of One Hundred Dollars ($100.00).

STANDARD PROVISIONS.

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Corporation's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the Corporation as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Corporation will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Corporation for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean

11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

12. If the Insured shall at any time change his occupation to one classified by the Corporation as less hazardous than that stated in the policy, the Corporation, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

16. The Corporation may cancel this policy at any time by written notice delivered to the insured or mailed to his last address, as shown by the records of the Corporation, together with cash or the Corporation's check for the unearned portion of the premiums actually paid by the insured, and such

cancellation shall be without prejudice to any claim originating prior thereto.

20. The insurance under this policy shall not cover any person under the age of eighteen years nor over the age of sixty years. Any premium paid to the Corporation for any period not covered by this policy will be returned upon request.

OTHER PROVISIONS.

21. No assignment of interest under this policy shall bind the Corporation unless consent thereto is formally endorsed hereon by an executive officer of the Corporation. A copy of any assignment must be given, within thirty days, to the Corporation, which shall not be responsible for its validity.

22. This policy does not cover "Bodily Injuries" sustained or "Disease" contracted in Alaska or the Insular possessions of the United States or outside the limits of the United States, Canada and Europe, or while engaged in military service in time of war.

23. The copy of application endorsed hereon is hereby made a part of this contract. No provision of the charter or by-laws of the Corporation shall be used in defense of any claims arising under this policy. Full compliance on the part of the Insured and Beneficiary with all the provisions of this policy is a condition precedent to recovery hereunder, and any failure in this respect shall forfeit to the Corporation all the right to any indemnity.

24. Parts I., II. and IV. of this policy shall not cover accident, injury, death or loss caused or contributed to directly or indirectly, wholly or partly by bodily or mental infirmity, ptomaines, bacterial infections (except Pyogenic infections which shall occur simultaneously with and through an accidental cut or wound), or by any other kind of disease; nor shall it cover bodily injuries, death or loss caused

by war or acts of countries at war, or while engaged in military or naval service in time of war; nor shall it cover any injury, fatal or non-fatal, sustained by the Insured while in or on any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith or while operating or handling any such vehicle or device.

25. This policy is issued for the term stated in the insuring clause, but may be renewed subject to all the conditions of the policy from term to term with the consent of the Corporation and upon the advanced payment of the then required premium.

IN WITNESS WHEREOF, the General Accident, Fire and Life Assurance Corporation, Limited, has caused this policy to be signed by its United States Manager, but the same shall not be binding upon the Corporation until countersigned by a duly authorized representative of the Corporation.

Countersigned at Englewood, New Jersey. ML.
By W. A. SCHILLING this 30th day of December, 1925.

(Authorized for the Purpose)
FREDERICK W. RICHARDSON
United States Manager.

Form C-2279.

Copy of "Application to
GENERAL ACCIDENT FIRE and LIFE
ASSURANCE CORPORATION, Ltd.
Philadelphia, Pa.

1. What is your full name? Walter I. Clayton.
2. When were you born? 19 day of September, 1891. Where? New York City, N. Y.
3. What is your age? 34. Race? White. Height? 5 ft. 8 in. Weight? 155 lbs.
4. Where do you reside? No. 61 Bencler Place, City of Bergenfield, County of Bergen, State of New Jersey.

5. Of what firm are you a member or employee? Jacquelin & DeCoppet.
6. Kind of business? Brokerage.
   Address? 43 Broad Street, New York City, N. Y.
7. What is your occupation and the full duties thereof? Broker—Buying and Selling of Stocks.
8. Have you in contemplation any special journey or hazardous undertaking? No.
9. Do you own or operate an automobile? No.
10. Do you ever engage in motorcycling or aeronautics? No.
11. To whom shall policy be payable in case of death? Name? Mrs. Emily A. Clayton. Wife. 32.
    (Relationship) (Age)
    Address? 61 Bencler Place, Bergenfield, New Jersey.
12. Do your average weekly earnings from the above stated occupation exceed the single weekly indemnity under all policies carried by you including that herein applied for? Yes.
13. Have you any other accident or health insurance in this Corporation? No.
    Have you any other accident or health insurance in any company or association? No.
    Have you ever made application for accident or health insurance upon which you have not been notified of the action thereon? No.
14. Have you ever been declined or postponed for life, accident or health insurance? No.
    Has any life, accident or health policy issued to you been cancelled or renewal refused by this or any other company or association? No.
15. Have you ever received indemnity for any injury or illness? No.
16. Have you ever had, or ever been advised to have, a surgical operation? No.
17. Have any of your relatives ever been insane or had tuberculosis? No.

Are your habits temperate? Yes. Are you maimed or deformed? No. Is your sight or hearing impaired? No. Have you ever had a Hernia or worn a truss? No. Have you ever had any of the following: Epilepsy or Vertigo? No. Diabetes? No. Syphilis? No. Neurasthenia? No. Tuberculosis? No. Appendicitis? No. Mental Disorder? No. Disease of Heart or Nervous System? No. Disease of Tonsils, Nose or Throat? No.

18. Have you been exposed during the last ten days to any contagious or infectious disease? No.

19. Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years? Yes.

Month and Year.	Nature of Disease or Injury.	Duration	Result.
May, 1922	Pneumonia.	3 weeks	Regained health, no effects.

20. Last physician consulted? Dr. Dillon, 69th (Name)
Street, Lexington Avenue, N. Y. C.
(Address)

21. Do you agree that the falsity of any statement in this application shall bar the right to recovery, if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes.

Policy applied for this 30th day of December, 1925.

Signature of Applicant."

GENERAL ACCIDENT, FIRE AND
LIFE ASSURANCE CORPORATION,
Limited, Perth, Scotland

United States Offices
FOURTH AND WALNUT STREETS
PHILADELPHIA, PA.

"COMPLETE"
DISABILITY POLICY

THIS POLICY PROVIDES INDEMNITY FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS AND FOR DISABILITY FROM DISEASE, AS HEREIN LIMITED AND PROVIDED.

Original Principal Sum
$30,000.00
Premium—$520.00
Date 12-30-25 Term 1 year.
Number C. D. 661202
Issued to
WALTER I. CLAYTON
Form C-2279

EXHIBIT P4.

In case of injury use other side
NOTICE OF SICKNESS
The Furnishing of This Blank is not to be Taken as a Waiver of Any Breach of Conditions of the Policy by the Assured.
This Notice, when completed, is to be *at once* returned to the Corporation or to the Agent from whom the blank was received
☞Full information is called for as to all particulars below mentioned.
TO THE
GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,
OF PERTH, SCOTLAND
Name in full Walter I. Clayton Age 34
Height 5′ 6½″ Weight 145 lb.
Policy No. 661202 Name of agent insuring you Not known
My occupation is Stock Broker
Date when taken sick April 2 1926 Loss of time began April 6 1926 10 o'clock A. M.
Place where taken sick Home
Nature of sickness Appendicitis
It has prevented me from attending to the following business duties Buying & Selling Stock
My present condition is as follows: Convalescing
Confinement within the house began April 5-1926
Ended not ended
I shall probably be disabled for ? weeks ? days from date of disability.
I was first attended by Dr. W. S. Kilts of Teaneck, N. J.

And am now being treated by Dr. Geo. Pitkin of Holy Name Hospital. Teaneck, N. J.
I have no other sickness insurance and have never claimed indemnity except as follows: None
Signed Emily A. Clayton
Residence 61 Beucler Pl.
Bergenfield, N. J.
Dated at Bergenfield State of New Jersey this 12th day of April 1926.
(Stamped on back)
RECEIVED
100 William St.
8.30
Apr 14 1926

EXHIBIT P5.

July 19th. 1926.

Walter I. Clayton,
61 Bencler Place,
Bergenfield, New Jersey
Dear Sir:—

Re:—Policy # 661202

Upon investigation of claim presented under the above numbered policy it develops that you have made misstatements in your application of this insurance constituting a breach of warranty. In view of this breach of warranty, your policy has been null and void from date of issue.

We herewith advise you of the rejection of your claim for this and other reasons.

We enclose herewith our check #5203 in the sum

of $520. covering full premium paid to this corporation.

Yours very truly,
GENERAL ACCIDENT F. & L. ASSUR. CORP.
PER. W. Bernhard.

W. Bernhard
AH.

EXHIBIT D1.

No. 5203

GENERAL ACCIDENT
FIRE AND LIFE
ASSURANCE CORPORATION, LTD.
New York Branch:
100 William St., New York

July 19, 1926.

(GA)
(Service that excels)
Pay to the order of Walter I. Clayton $520.00
The sum of The sum of $520 and 00 cts.
In payment of Return Premium pol 661202

John H. Grady
Branch Manager
Asst. Branch Manager

THE CHASE NATIONAL BANK
of the City of New York
1-74 Maiden Lane Branch
Countersigned
T. J. Raymond
Branch Cashier

The endorsement of this check by the payee constitutes a clear receipt in full settlement for the claim or account shown on the other side

EXHIBIT D2.

New York Br.
Agt. Douglas L. Elliman Brokerage Corp.

Index	Pol. Code	Rid. Code	Occ. Code
8	08		062

Kind of Policy	Form No.	Endorsements	Form No.
Comp Di	2279		

Principal Sum	Weekly Indemnity Accident	Health	Class
$30000	$200	$200	1

	Premium	Policy No.
Accident	$160	661202
Health	$360	
Rider	$...	Term 12 Mos.
Total	$520	Date 12/30 1925

APPLICATION TO
GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION, LTD.
PHILADELPHIA, PA.

1. What is your full name? Walter I. Clayton
2. When were you born 19 day of Sept., 1891
   Where? New York City, N. Y.
3. What is your age? 34 Race? White
   Height 5 ft. 8 in. Weight? 155 lbs.
4. Where do you reside? No. 61 Bencler Place Street, City of Bergenfield County of Bergen, State of N. J.
5. Of what firm are you a member or employee?
   Jackquelin & DeCappet
6. Kind of business? Brokerage
   Address 43 Broad St. N Y C
7. What is your occupation and the full duties thereof? Broker Buying & selling of stocks

8. Have you in contemplation any special journey or hazardous undertaking? No
9. Do you own or operate an automobile? No
10. Do you ever engage in motorcycling or aeronautics No
11. To whom shall policy be payable in case of death? Name? Mrs. Emily A Clayton Wife 32
((Relationship) (Age)
Address? 61 Bencler Place Bergenfield N J
12. Do your average weekly earnings from the above stated occupation exceed the single weekly indemnity under all policies carried by you including that herein applied for? Yes
13. Have you any other accident or health insurance in this Corporation? No
Have you any other accident or health insurance in any company or association? No.
Have you ever made application for accident or health insurance upon which you have not been notified of the action thereon? No
14. Have you ever been declined or postponed for life, accident or health insurance? No
Has any life, accident or health policy issued to you been cancelled or renewal refused by this or any other company or association? No
15. Have you ever received indemnity for any injury or illness? No
16. Have you ever had, or ever been advised to have, a surgical operation? No.
Have any of your relatives ever been insane or had tuberculosis? No
17. Are your habits temperate? Yes
Are you maimed or deformed? No
Is your sight or hearing impaired? No.
Have you ever had a Hernia or worn a truss? No
Have you ever had any of the following: Elipsepsy or Vertigo? No Diabetes? No Syphilis? No Neurasthenia? No Tuberculosis? No Appendicitis? No. Mental Disorder? No Disease of Heart or Nervous System? No Disease of Tonsils, Nose or Throat No

18. Have you been exposed during the last ten days to any contagious or infectious disease? No
19. Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years? Yes

Month and Year	Nature of Disease or Injury
May 1922	Pneumonia
Duration	Result
3 weeks	Regained Health no effects

20. Last physician consulted? Dr. Dillion
Name
69th St. Lexington Ave N Y C
Address
21. Do you agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes

Policy applied for this Dec day of 28, 1925

Signature of Applicant ☞ Walter I. Clayton

I personally solicited and recommend this risk and certify to the correctness of the statements made

.....
Broker, Solicitor, Agent or Sub-Agent

Full particulars must be given with answer to each question

(Stamped)
RECEIVED
DEC 31 1925
COMMERCIAL DEPT.
G. A. F. & L. A. C.
RE-INSURANCE

Portion	Company	Date
1/8	Ht Acc & Ind Co.	
1/8	Royal Ind Co.	1/20/26
1/8	Union Ind Co	
1/8	U S Cas Co	

REGISTERED
Dec 22 1925
REGISTRATION
DEPT.
FOR BUREAU CARDS ONLY.

State	Age	Occ.	Class	Pol. A.	Form H.	Orig. Ps
29	34	062	1	33	02	30,000

Orig. W. I.	Tr. in Mo	Premium		G. N. M. or F.
		Acc.	160.00	
200.00	12	Health	360.00	M.

New Jersey Court of Errors and Appeals

WALTER I. CLAYTON,
Plaintiff-Appellee,

vs.

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND,
Defendant-Appellant.

Action at Law.

On Appeal.

BRIEF FOR DEFENDANT-APPELLANT

FACTS

Plaintiff, Walter I. Clayton, recovered judgment in the sum of $2,404.80 (Record, page 32) against the defendant, General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, in the Supreme Court, Hudson County Circuit, upon an accident and health insurance policy.

The application for the policy is dated December 28, 1925. (Exhibit D-2, page 127, line 27). The applicant is designated in the application as a member of the stock brokerage firm of Jacquelin & DeCoppet and his duties were those which concerned the sale of stocks and bonds (Exhibit D-2, p. 125, ls. 32-37) on the floor of the New York Stock Exchange (p. 45, l. 25). The application was signed by Mr. Clayton and the contents and

answers to the questions therein contained were written in by him and are in his own handwriting (p. 45, ls. 3-11). Mr. Clayton is an American-born citizen and reads and writes English (p. 45, ls. 18-21).

The application so signed and filled in by Mr. Clayton contained, among others, the following questions and answers thereto, and provisions:

> "19. Have you been disabled, had any departure from good health, or have you received medical or surgical attention or advice during the past five years? Yes.

Month and Year	*Nature of Disease or Injury*	*Duration*	*Result*
May, 1922	Pneumonia	3 weeks	Regained health, no effects

> 20. Last physician consulted? Dr. Dillion, (Name)
> 69th Street, Lexington Avenue, N. Y. C. (Address)
> 21. Do you agree that the falsity of any statement in this application shall bar the right to recovery, if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes. (p. 127, ls. 21-26.)
> FULL PARTICULARS MUST BE GIVEN WITH ANSWER TO EACH QUESTION." (p. 128, l. 1.)

After the application was thus signed and submitted to the insurance corporation by Mr. Clayton, it was considered and passed upon by Mr. Bernhard, who is in charge of the accident and health department of the New York office of the General Accident Assurance Corporation (p. 68, ls. 1-3). Mr. Bernhard has had fourteen years' experience in the insurance business, his particular duties during the past ten years being to pass upon applications for health and accident insurance, in order to determine whether they should be accepted or rejected, or to take such follow-up steps as the facts disclosed in the applications required (p. 68, ls. 4-19). Medical examinations are not made upon applications for health and accident policies unless the answers of the applicants appearing in the applications disclose facts which would require such examinations. The acceptance or rejection of applications or the follow-up steps to be taken upon the applications depend entirely upon the answers given by the applicants in their applications for policies (p. 68, ls. 20-36).

The application of Mr. Clayton (Exhibit D-2, p. 125-128) in the instant case was submitted to Mr. Bernhard for his examination in order to determine whether it should be accepted or rejected, or in order to determine what follow-up steps should be taken by him by reason of the answers given by the applicant to the questions contained in the application. In reliance exclusively upon the answers and statements given and made by Mr. Clayton in his application, Mr. Bernhard approved of the risk and directed the insurance of a policy of health and accident insurance thereon to Mr. Clayton. It was in entire reliance upon the answers and statements written in the application by Mr. Clayton in his own handwriting that the policy in suit was issued. (p. 69, ls. 1-20.)

The policy in suit is dated December 30, 1925 (Exhibit P-3, p. 118, l. 20). It is a policy of health and accident insurance and contained the following clauses and provisions which are most pertinent for the consideration of the legal issues existing in this case:

> "IN CONSIDERATION of the statements in the application for this policy, a copy of which application is endorsed hereon and made a part hereof, and of Five Hundred Twenty and no/100 ($520.00) Dollars premium, DOES HEREBY INSURE WALTER I. CLAYTON * * * herein called the Insured, by occupation a broker and classified by the Corporation as a select risk, for twelve months, beginning * * * on the 30th day of December, 1925, subject to the provisions and limitations hereinafter expressed, (a) against loss resulting solely from BODILY INJURIES, effected directly and independently of all other causes, through accidental means * * *, and (b) against loss from DISEASE, as herein provided." (Exhibit P-3, p. 102, ls. 15-33.)

"Part VIII.—Total Disability.

WEEKLY INDEMNITY

A. If disease contracted during the term of this policy and not hereinafter excepted shall, beginning during said term continuously and wholly disable and prevent the Insured from performing any and every kind of duty pertaining to his occupation, the Corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified * * *." (Exhibit P-3, p. 107, ls. 30-36; p. 108, ls. 1-6.)

"Part IX.

SURGICAL OPERATIONS

If a bodily injury or a disease, for which indemnity is payable under this policy, shall necessitate a surgical operation named in the Schedule of Operations set forth herein, and such operation is performed by a surgeon within ninety days from date of accident or contraction of disease, the Corporation will pay the surgical fee specified in the schedule for such operation * * *." (Exhibit P-3, p. 109, ls. 10-19.)

"23. The copy of application endorsed hereon is hereby made a part of this contract. * * * Full compliance on the part of the Insured and Beneficiary with all the provisions of this policy is a condition precedent to recovery hereunder, and any failure in this respect shall forfeit to the Corporation all the right to any indemnity." (p. 117, ls. 20-28.)

It appears that on November 23, 1925, (about one month prior to the date of the application for the policy in suit) Mr. Clayton was taken sick with a grippe attack and Dr. Grimes, a duly licensed physician of the State of New Jersey, was called in to treat him. Someone in Mr. Clayton's household sent for Dr. Grimes and he called to see Mr. Clayton at his home. Dr. Grimes found him suffering with a headache and general muscular pains and he had a temperature of 102. Dr. Grimes prescribed for him at that time (p. 52, ls. 9-35). On the following morning (November 24, 1925) Dr. Grimes called again to see Mr. Clayton at his home and found him in bed with a temperature of 99½ (p. 54, ls. 5-10). Dr. Grimes' diagnosis of his ill-

ness was that of a grippe attack. (p. 53, ls. 19 and 20).

In the suit at bar, the plaintiff, Mr. Clayton, sought to recover the weekly sums provided in said policy of health and accident insurance to be paid to him in the event he contracted any disease under the terms of the policy, and also sought to recover the operation fee therein provided to be paid to him in the event he underwent an operation under the terms of said policy. His contention was that on or about April 6, 1926, he contracted the illness or disease known as appendicitis which required an operation and which disabled him wholly and continuously from performing any and every kind of duty pertaining to his occupation.

Dr. Kilts, the physician in charge at the time of the operation and who advised the operation, testified that Mr. Clayton complained to him of having gas pains and indigestion pains prior to April, 1926 (p. 56, ls. 24 and 25; p. 57, ls. 14-18). Dr. Lynch, the chief interne at the Holy Name Hospital at Teaneck, N. J., the hospital at which Mr. Clayton was operated upon, testified as to the facts disclosed to him by the plaintiff when the latter's case history was taken down. Case histories are taken of every patient when he enters the hospital (p. 66, ls. 34-37; p. 67, l. 1). They are important records to the surgeon who is to operate and for the attending physician (p. 64, ls. 23-35; p. 67, ls. 5 and 6). When Mr. Clayton's case history was taken by Dr. Lynch, he did not know the nature of his ailment, and for what purpose he had come to the hospital (p. 65, ls. 28-32). Dr. Lynch wrote down on the case history sheet of the hospital the

facts given him by Clayton. Clayton told him that he had had attacks of abdominal pain in the lower right part of the abdomen for a period of eighteen months prior to the date of the operation (p. 60, ls. 22-37; p. 61, ls. 1-16). Mr. Bernhard, the representative of the defendant company, testified that upon a visit paid to Mr. Clayton at his home after he had left the hospital, Clayton had told him that he had had frequent attacks of indigestion and gas pains from a time commencing around Thanksgiving, 1925, which continued down to the time of the operation (p. 71, ls. 17-37; p. 72, ls. 1-23).

Immediately upon the defendant's being apprised of the fraudulent representations made by plaintiff in his application, the defendant made a tender to plaintiff of the amount of the premium paid upon the issuance of the policy, and defendant demanded the return of the policy. The tender was refused (Exhibit P-5, p. 123; Exhibit D-1, p. 124; p. 44, ls. 25-34; p. 45, ls. 27-33; p. 73, ls. 1-10).

At the close of the case, defendant moved that a verdict be directed for the defendant for the following reasons:

1. Because plaintiff had failed to prove that the disease of appendicitis was contracted during the term of the policy, and beginning during said term had continuously and wholly disabled and prevented the Insured from performing any and every kind of duty pertaining to his occupation.

2. Because plaintiff had failed to prove that his illness necessitated an operation, and that said operation was performed within ninety days from the date of contraction of the disease.

3. Because the statement made in answer to ques-

tion 19 as to whether the applicant had had any departure from good health during the five years prior to the date of the application was untrue, the applicant having suffered from the grippe or a grippe attack in November, 1925.

4. Because the statement made in answer to question 19 as to whether the applicant had had any departure from good health during the five years prior to the date of the application was untrue, the applicant having suffered from recurrent gas pains and indigestion prior to the date of the application for the policy.

5. Because the statement made in answer to question 19 as to whether the applicant had received medical or surgical attention or advice during the five years prior to the date of the application was untrue, the applicant having been treated for the grippe by Dr. Grimes in November, 1925 (p. 85 and 86).

6. Because the statement made in answer to question 20 as to the last physician consulted was untrue, the applicant having consulted Dr. Grimes in November, 1925 (p. 85 and 86).

The motion was denied by the Court and an exception to the Court's ruling duly taken (p. 86, ls. 19-22).

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT, BECAUSE

(A) The Statement Made In Answer To Question 19 As To Whether The Applicant Had Had Any Departure From Good Health During The Five Years Prior To The Date Of The Application

Was Untrue, The Applicant Having Suffered From The Grippe Or A Grippe Attack In November, 1925.

The application for the policy is dated December 28, 1925. (p. 127, l. 27.) The fact that Mr. Clayton suffered from a grippe attack on November 23 and 24, 1925, is uncontradicted; in fact, it is admitted by Mr. Clayton. Mr. Clayton did not attempt to deny the diagnosis of his ailment made by Dr. Grimes and testified to by him as being a grippe attack, but merely sought to show that he recovered from this ailment very speedily. Dr. Grimes found his temperature on November 23, 1925, to be 102, and on November 24, 1925, to be 99½ (p. 52, l. 28; p. 54, l. 9). Dr. Grimes testified further that he prescribed some medicine for Mr. Clayton on the occasion of his first visit (p. 52, ls. 32 and 33).

The application submitted by Mr. Clayton to the defendant company was for an accident and health policy for a period of one year. It is of the first importance in this case to recognize the fact that the policy in suit is not a life insurance policy but a health insurance policy. The distinction is of importance because of the different incidents attendant upon the issuance of such policies, and particularly because of the different methods used in passing upon applications for these several types of policies. We are all aware of the fact, and the Court will undoubtedly take judicial notice of the fact, that life insurance policies are issued only after a careful medical examination and test. The applicant is required to appear personally before a physician, and there, in addition to submitting himself to a physical examination, must answer nu-

merous questions relating not only to his own life, but also to the lives of the various members of his family. In the case of an application for health insurance, however, the policy is issued or not issued solely upon the basis of the answers given to the various questions contained in the application. If the answers are untrue, the insurance company is by that fact induced to refrain from making a physical examination or further inquiries upon matters which it has an absolute right to know before entering into a contract of insurance. The issuance of a policy to the applicant is not a matter of right in so far as he is concerned; the company may or may not assume the risk. Insurance companies assuming risks under health policies have an absolute right to know to the minutest detail what the medical history of an applicant is. It is not for the applicant to decide what is material or what is immaterial in answering questions appearing in application blanks. Things which may appear entirely immaterial or inconsequential to the applicant may be of the greatest importance to the insurance company. As the party choosing its risks, it should be placed, as a matter of public policy, in the position where it can exact all the information which is in the possession of the applicant. Health insurance policies are written for one year only. The danger of fraud against the insurance companies is so great under such policies that every safeguard should be thrown around them to protect insurance companies from the abuses which are today only in too many cases practiced. The language of Mr. Justice Pitney, speaking for the Court of Errors and Appeals in the case of Dimick vs. Metropolitan Life Insurance Company, 69 N. J. L.

384, on page 395, is most pertinent in referring to the importance of requiring applicants to answer questions contained in applications for insurance honestly and truthfully:

> "If persons seeking insurance and insurance companies are to be left free to enter into such contracts as they please, with reference to life insurance, it is difficult to find any ground on which we can ignore the force of such stipulations. If a similar question were raised concerning a contract relating to any other subject-matter, not the slightest doubt would be entertained with respect to the answer that should be given. But by reason of the extreme hardship that seems to result in certain instances from avoiding contracts of insurance for reasons such as are here presented, courts have sometimes sought to escape from the force and effect of the plain letter of the instrument by an appeal to a supposed public policy.
>
> "We are not aware of any public policy that prohibits such stipulations. Insurance companies have the right to say that they will not insure lives until they are made aware of the past history and present financial standing of the applicant by a written declaration signed by himself and made upon his own responsibility. If it is considered essential to inquire as to the amount of insurance outstanding upon his life, they have a right to insist upon a correct reply to such an inquiry as a condition precedent to the issuance of a policy. One who is largely insured may for that reason be more strongly tempted to end his own life, in case of being overcome by disasters in business. One largely insured may be more liable to assassination at the hands of those who are to receive the benefit upon his demise.

"And so with respect to the inquiry whether the applicant had ever been an inmate of an asylum or hospital. It may often be the case that this fact itself has no bearing upon the expectancy of life of the applicant. In the present case it appears that Dimick's treatment in the hospital was for the results of a not very serious accident, and that this accident had nothing to do with producing his death. But it is matter of common knowledge that while a patient is confined in a hospital he is subjected to rigid scrutiny by physicians and nurses, and that in some cases a record is kept of his general physical condition. Such a record might disclose important matters respecting the constitution of the patient, although not connected with the disease or injury for which he underwent treatment. It is therefore not unreasonable for insurance companies to require a full disclosure from applicants concerning any hospital treatment that they have undergone in the past, in order that a full investigation of everything relating to the expectancy of life may be conducted."

In the case at bar, the applicant was a man who is experienced in business and who was obviously familiar with the sanctity of contracts. He was a member of a stock brokerage firm and was engaged in his business on the floor of the New York Stock Exchange. He was an American-born citizen and read and wrote English well. We have the further fact in this case that he wrote the answers to the questions appearing in the application. All answers appear in his own handwriting.

It becomes at once apparent that the policy in suit is one for an unusually large amount—$200.00 per week. Mr. Bernhard, the representative of the

defendant company who passes upon applications of this nature before the issuance of policies, testified that a policy of the size of the one in suit is one of the largest policies written by the company (p. 69, ls. 29 and 30). He further testified that the size of the policy is one of the elements considered in passing upon the answers contained in applications for such policies; it obviously goes to the essence of the risk assumed by the company.

We have in this case the admitted fact that Mr. Clayton was taken sick on November 23, 1925, with a grippe attack; that he had a temperature of 102 on the first day and a temperature of 99½ on the second day; that he called in and was advised medically by Dr. Grimes on both of these days; and that Dr. Grimes prescribed for him. We have the further fact in this case that the applicant was a man of intelligence and business judgment who unquestionably understood the questions contained in question 19. Under the question are lines drawn horizontally and vertically in table form so as to indicate most strikingly and forcibly to the applicant that every illness suffered by him for the five years preceding the date of the application should be set out at length and in full (p. 127, ls. 12-16). The answer given by Mr. Clayton to this question was obviously false, and knowingly false. His only answer to the question was that he had been sick with pneumonia in May, 1922. The application is dated about one month subsequent to the date of his illness with the grippe. Such being the situation, the language of Mr. Justice Trenchard, speaking for the Court of Errors and Appeals in the case of Kerpchak vs. John Hancock Mutual

Life Insurance Company, 97 N. J. L. 196, on page 199, is most applicable:

> "* * * * The question put in the application was not ambiguous, and called for the statement of a fact, not the expression of an opinion. The false answer was made understandingly, knowingly and wilfully. The insured was a native of this country, intelligent, and understood English. The question put was in English, and her doctor was an English-speaking physician."

The uncontradicted testimony in this case by Mr. Bernhard was to the effect that had the fact of Mr. Clayton's attack of grippe in November, 1925, been disclosed in the application, he would not have accepted the application and issued the policy without a medical examination. In this connection, the questions asked of Mr. Bernhard and his answers thereto are as follows:

> "Q. Suppose it had been disclosed in the application by Mr. Clayton that he had been treated for grippe two days in November, 1925, what would you have done?
>
> "A. Well, by reason of the recentness of the grippe attack in comparison to the date of the application submitted, I would have immediately looked into the situation to determine whether or not he was a fit subject for insurance. A policy of this size is quite a large amount of insurance, one of the largest we write. By reason of the amount of the insurance and by reason of the fact he had a recent illness, it would have been incumbent upon me to have a medical examination. Our policies are not accepted except after very careful examination, where the application is not one hundred per cent. negative." (p. 69, ls. 21-37.)

> "Q. Were such facts as regards having been treated by Dr. Grimes in November, 1925, of importance to you in the placing of the application?
>
> "A. I say yes, as I explained before, by reason of the fact that this is a very, very large contract, and the recentness of the illness to the date of the application, made it quite important, made the necessity of investigation and that investigation including a medical examination." (p. 70, ls. 23-37).

Mr. Bernhard had further testified that it was in entire reliance upon the facts as set out in the application that the policy was issued to Mr. Clayton (p. 69, ls. 18-20). His testimony in this regard stands uncontradicted. He further testified most emphatically and logically in this connection as follows:

> "A. Yes, that is the only information we have to depend upon for the acceptance of the risk. It is the only thing we see is the application; we don't see the man. We see the application but don't see the man." (p. 77, ls. 9-14.)

Question 21 as contained in the application was to the following effect (p. 127, ls. 21-26):

> "Do you agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes."

We earnestly and sincerely urge and contend in this case that the answer given to question 19 of the application by Mr. Clayton was false; that it was material as a matter of law and materially affected the acceptance of the risk or the hazard assumed by

the Corporation. The uncontradicted testimony in the case is to the effect that had the fact been disclosed in the application that Mr. Clayton had been sick with grippe for two days in November—about one month prior to the date of the application—the company would not have issued the policy without a medical examination. This testimony was most convincing and logical and carried with it an absolute feeling of truth. The size of the application was unusual—one of the largest issued by the company. Then, again, the illness had existed only a short time prior to the date of the application. The answer was false; it was an answer to a material question, and we contend that as a matter of law the falsity of the statement affected the acceptance of the risk or the hazard assumed by the Corporation. Furthermore, being wilfully false, it was made with intent to deceive.

It has quite generally and uniformly been held by the Courts that the fact that the company makes a specific inquiry of the insured as to a particular matter establishes its materiality. 32 *Corpus Juris,* page 1289, Sec. 514.

In this connection, Mr. Justice Depue, speaking for the New Jersey Supreme Court in the case of *Dewees vs. Manhattan Insurance Company,* 34 N. J. L. 244, on page 247, said:

> "A misrepresentation in an immaterial matter, not fraudulently intended, will not avoid the policy unless made in reply to a specific inquiry, in which latter case the party contracting to insure, by making specific inquiry, implies that he considers the fact inquired into material, and the other party is bound by it as such * * *."

In the case of *Cobb vs. Covenant Mutual Benefit Association,* 153 Mass. 176, 26 N. E. 230, the following facts appeared: In the application the assured was asked, "Have you personally consulted a physician, been prescribed for, or professionally treated, within the past ten years?" Answer, "No." "If so, give dates, and for what diseases." Plaintiff had gone to a physician prior to the date of the application and consulted him, but not for a disease. The plaintiff contended that his answer was true and correct. The Court held that the answer was false and the policy was void. On page 179, the Court said as follows:

> "* * * It is upon the existence of this latter question that the plaintiff found an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he answered the question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

Virtually all the cases thus far decided in this State have been upon life insurance policies, where the legal rule of construction has been considerably influenced by statutes. The statutes apply solely to life insurance policies, but not to health and accident policies. The courts, in passing upon life policies, have, however, laid down certain rules which are most helpful in considering the case *sub*

judice. We have hereinabove pointed out the substantial difference between health and life insurance policies, and have suggested that it is most necessary and advisable that applicants should be compelled to give exact and full answers to the questions contained in the applications because in most cases the insurance corporation must decide entirely upon the statements made in the application as to whether it will accept the risk and issue a policy. We sincerely urge that this factor is of supreme and controlling importance in this case.

In the case of *Kerpchak vs. John Hancock Mutual Life Insurance Company,* 97 N. J. L. 196, 198, the Court of Errors and Appeals, speaking through Mr. Justice Trenchard, laid down several very helpful rules which can well be applied in the instant case. Mr. Justice Trenchard said as follows:

> "Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium.
>
> "A false statement in the application made a part of the contract that the applicant had not consulted or been attended or treated by a physician, is material to the risk, and, if made knowingly and wilfully, will avoid the policy." *Metropolitan Life Insurance Co. vs. McTague,* 49 N. J. L. 587.

In the case of *Metropolitan Life Insurance Co. vs. McTague, supra,* the insured was asked whether he had not, within the period between the issuing of the policy and the date of the revival application "consulted or been prescribed for by a physician."

The fact found by the lower court was that a physician had called on the assured or had been visited by him and had prescribed for him for a cold. Mr. Justice Magie said in the opinion of the Supreme Court (page 592):

> "The Common Pleas, in their opinion before us, declare that this fact did not show the representations to have been false, because it did not appear what sort of a prescription the doctor gave, whether one compounded by a druggist or made up of some common remedy. But it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. The representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application that, in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question, for, as we have seen, its truth is warranted. Its falsity appears from the fact found."

In the case of *Duff vs. Prudential Insurance Company,* 90 N. J. L. 646 (Court of Errors and Appeals), the facts were as follows: The suit was on an industrial life insurance policy. In the application for the policy of insurance, the insured stated that he had never suffered from consumption, that he was in good condition of health and

had no serious disease. The District Court found as a fact that his answer that he had not had consumption was a wilful untruth and held for the defendant. The Supreme Court reversed the judgment of the District Court on the ground that there was no proof that this misrepresentation was material, or that the company may have been aware of its falsity and issued the policy regardless of that fact. The Court of Errors and Appeals reversed the judgment of the Supreme Court and affirmed the judgment of the District Court, on the ground that a statement which is a wilful untruth in procuring the insurance policy renders it void on the ground of fraud.

A case squarely in point with the case at bar is the case of *Slatkin vs. Equitable Life Insurance Society of the United States,* 198 N. Y. Supp. 230. This was an action to recover sick benefits under a health insurance policy. Plaintiff stated in his application for insurance under date of February 6, 1922, that "within the past five years he had had no medical or surgical advice or treatment or any departures from good health." A recission of this policy was claimed by the insurance company on the basis of statements made by plaintiff to another insurance company in which he held a similar policy in an application for benefits thereunder. This application contained the following statement: "Exact nature of sickness—La Grippe." The Court held that the representations were materially false as a matter of law, and that the policy was therefore void. Here we have a situation similar to the one appearing in the case at bar and where the Court held as a matter of law that an applicant who had the grippe prior to the date of his application without disclosing that fact was chargeable with a material misrepresentation as a matter of law and the policy was therefore void. The *Slatkin Case* may also be taken as an authority for the legal proposition that having the grippe constitutes, as a matter of law, "a departure from good health" within the meaning of the terms of the application.

The following cases have to do with life insurance policies, but the facts appearing and the law enunciated therein are most helpful in considering the instant case:

Hanrahan vs. Metropolitan Life Insurance Co., 43 Vroom 504, 63 Atlantic 280: The insured was asked in the application: "The following is the name of the physician who last attended me, date of attendance and the name of the complaint for which he attended me." The answer was "15 years ago, pneumonia." The proof was that a little more than two years before the application he was sick in bed for about three weeks and attended twenty-nine times for nephritis. The Trial Judge directed a verdict for the defendant. The Court of Errors and Appeals affirmed the judgment entered upon the directed verdict.

Fish vs. Metropolitan Life Insurance Co., 73 N. J. L. 619, 64 Atlantic 109: The warranty in this case was contained in two clauses of the application which read as follows:

> "(5) The following is the name of the physician who last attended me, the date of the attendance and the name of the complaint for which he attended me: Typhoid fever, Jan., 1893; Dr. Braymer; (6) I have not been under the care of any physician within two years, unless as stated in previous line, except * * *."

Proof was that Dr. Jarrett had attended the assured for illness on September 25, 26, 28 and 30, and October 2, 3, 4 and 5 in 1901, and that the ailment which required the doctor's attendance was rheumatism in the shoulder. Held, that the facts showed a breach of the warranty that the assurred had not been under the care of a physician and that a verdict should have been directed for the defendant.

See also,
Silcox vs. Grand Fraternity, 76 Atl. 1018.
Finn vs. Metropolitan Life Insurance Co., 67 N. J. L. 17.
Prahm vs. Prudential Insurance Co., 97 N. J. L. 206.

The failure of Mr. Clayton to disclose in his application for insurance the fact that he had a grippe attack in November, 1925, was material as a matter of law and therefore vitiated the policy. The fact that he had a grippe attack constituted a departure from good health within the meaning of the terms of the application.

It may be argued by the plaintiff that question 19, in speaking of "disease" in the table immediately beneath the question had reference solely to diseases of a serious nature and did not include grippe. Or, it may be argued that the table, in speaking of "disease" had reference only to the diseases specifically listed in the previous questions. The latter suggestion is entirely impossible because it will at once be noticed that the great body of diseases of a most serious nature are not at all listed in the previous questions. Only a few of the diseases of a permanent or long-standing nature are listed. The question sought to elicit from the ap-

plicant every ailment suffered by him for a period of five years prior to the date of the application. It was not for the plaintiff to select such ailments as he may choose to mention and conceal those which he might care to conceal. The question was in absolute terms and was unequivocal and called for an absolute and unequivocal answer. Plaintiff attempted to cut down at the trial of this cause the testimony of Dr. Grimes that Mr. Clayton had a grippe attack when he visited him in November by suggesting that all he had was an ordinary or slight cold. Dr. Grimes, however, stated very frankly that Mr. Clayton had more than an ordinary cold for he had a temperature of 102. Dr. Grimes, in answer to the question as to whether Mr. Clayton's ailment was an ordinary cold, testified, "Well, you don't get much fever with a cold." (p. 53, ls. 31-34.)

In this connection, it is interesting to note that the policy issued insured Mr. Clayton against loss of time "If disease contracted during the term of this policy * * *." (p. 107, ls. 32-34.) The face of the policy provides that it protects the assured "(b) against loss from DISEASE, as herein provided." (p. 102, ls. 32 and 33.) The heading under question 19 of the application requires that the "disease" be listed. (p. 127, l. 13.) It therefore becomes pertinent to inquire whether Mr. Clayton would have sought such benefits under the policy in suit had he suffered a grippe attack during the term of the policy which wholly disabled and prevented him from performing the duties pertaining to his occupation. Or we may go further and inquire whether he would have sought such benefits under this policy had he suffered from a cold during

the term of the policy which wholly disabled and prevented him from performing the duties pertaining to his occupation. Most assuredly he would have sought these sick benefits and they would have been paid to him under the policy. If a cold or a grippe attack is a "disease" for the purpose of enabling the assured to receive sick benefits under a health policy, they constitute "diseases" when an insurance company inquires in its application as to all diseases suffered by the applicant for a period of five years prior to the date of the application.

Mr. Bernhard testified that had he known that Mr. Clayton suffered a grippe attack in November, 1925, he would not have issued the policy without ordering a medical examination, and this particularly because of the size of the policy. Dr. Lynch, the interne at the hospital who took Mr. Clayton's case history immediately prior to the operation for appendicitis, testified that Clayton told him he had recurrent attacks of abdominal pain for a period of eighteen months prior to the date of the operation, which took place on April 6, 1926. Mr. Bernhard testified that Clayton told him these abdominal attacks commenced with the grippe attack in November, 1925. It at once becomes obvious that had a medical examination been made of Mr. Clayton subsequent to the time of his submitting his application for a policy, these attacks would have become apparent to the examining physician or would have been brought to his attention in some manner. By concealing the fact of the grippe attack, Mr. Clayton put the insurance company in a position where it refrained from doing certain things which it would otherwise have done.

The failure of Mr. Clayton to disclose the fact of his having a grippe attack constituted a wilful concealment of a material fact thereby rendering the policy null and void.

B. The Statement Made In Answer To Question 19 As To Whether The Applicant Had Received Medical Or Surgical Attention Or Advice During The Five Years Prior To The Date Of The Application Was Untrue, The Applicant Having Been Treated For The Grippe By Dr. Grimes In November, 1925.

It is admitted by the plaintiff, Mr. Clayton, that Dr. Grimes did attend and prescribe for him on November 23 and 24, 1925. There is no dispute whatsoever about this fact. Question 19 is as clearly framed as any question can possibly be framed. The question is worded in the disjunctive and the section of the question now urged is "* * * have you received medical or surgical attention or advice during the last five years?" The application is dated December 28, 1925. Mr. Clayton had in fact received medical or surgical attention and advice about one month prior to the date of the application, which fact he wilfully concealed. The fact of his having called in Dr. Grimes must have been fresh in his memory and no other conclusion is possible except that this most material fact was wilfully concealed. By failing to disclose this fact the defendant company was put in the position where it refrained from consulting Dr. Grimes and doing other things which it might otherwise have done. At the risk of repetition, we cannot refrain from again adverting to the case of *Metropolitan Life Insurance Co. vs. McTague,* 49 N. J. L. 587, the law of which case has been referred to with

approval by the Court of Errors and Appeals in the case of *Kerpchak vs. John Hancock Mutual Life Insurance Co.,* 97 N. J. L. 196. In that case, the insured was asked whether he had not within the period between the issuing of the policy and the date of the revival application "consulted or been prescribed for by a physician." The fact found by the lower court was that a physician had called on the assured or had been visited by him and had prescribed for him for a cold. The Court in that case held the policy to be void because of the material misrepresentation as to this fact.

We again urge to sustain this point the arguments previously advanced in discussing the caption designated as I(A).

C. The Statement Made In Answer To Question 20 As To The Last Physician Consulted Was Untrue, The Applicant Having Consulted Dr. Grimes in November, 1925.

The answer given to this question was to the effect that Dr. Dillion, of New York City, was the last physician whom Mr. Clayton had consulted. Dr. Dillion had attended him while he was ill with pneumonia in 1922.

Questions 19 and 20 are separate and distinct. A heavy black line is drawn under the table forming part of question 19, thereby indicating in no uncertain manner that that question is separate and distinct from every other question contained in the application. It was a specific question and specifically asked. It is not ambiguous. It stands alone, and pointedly directs the applicant to state the name and address of the last physician whom he had consulted. The applicant chose to answer this question falsely. The last physician consulted

by him prior to the making of the application was Dr. Grimes and not Dr. Dillion. In this connection, the language of Mr. Justice Trenchard, speaking for the Court of Errors and Appeals in the case of *Kerpchak vs. John Hancock Mutual Life Insurance Co.,* 97 N. J. L. 196, on page 199, is most pertinent.

> "* * * The question put in the application was not ambiguous, and called for the statement of a fact, not the expression of an opinion. The false answer was made understandingly, knowingly and wilfully. The insured was a native of this country, intelligent, and understood English. * * *"

The question sought a specific answer which was material as a matter of law. The principle of law is well established that the fact that the company makes a specific inquiry of the insured as to a particular matter establishes its materiality.

> 32 *Corpus Juris,* p. 1289, Sec. 514.
> *Dewees vs. Manhattan Insurance Co.,* 34 N. J. L. 244.
> *Cobb vs. Covenant Mutual Benefit Association,* 153 Mass. 176; 26 N. E. 230.

We again urge to sustain this point the arguments previously advanced in discussing the caption designated as I(A).

It is respectfully submitted that the application of the principles enunciated in the above cases to the facts disclosed in the record of the case at bar necessitates a reversal of the judgment below. The Trial Judge should have directed a verdict for the defendant on any one or more of the grounds hereinabove suggested.

II. THE TRIAL JUDGE, IN HIS CHARGE TO THE JURY, COMMITTED PREJUDICIAL ERROR IN CHARGING THE JURY AS FOLLOWS: "NOW, GENTLEMAN, YOU WILL NOTICE THE POSITION OF THE ANSWERS, AND THE MANNER IN WHICH THE QUESTIONS ARE ASKED AND THE ANSWERS THAT ARE GIVEN TO THEM, AND I MIGHT SAY HERE NOW THAT THE RULE IS THAT IF THERE IS ANY QUESTION AND ANSWER CONCERNING WHICH THERE IS ANY AMBIGUITY, THAT IS TO BE RESOLVED AGAINST THE COMPANY IN DETERMINING WHETHER THE ANSWERS ARE FALSE." (Page 93, ls. 26-33).

An exception was duly taken to this portion of the learned Court's charge. (p. 99, ls. 1-4.)

It is unquestioned and settled law in this State that if in the questions and answers there is any ambiguity for which the company is responsible, it is to be resolved against the company in determining whether the answers are false. This principle of law can, however, be invoked only in the event that ambiguity of some nature appears from the form of the questions asked in the application. The mere fact that several questions appear in an application does not in and of itself create the situation where it may be urged that ambiguity exists. The vice of the portion of the learned Trial Judge's charge above set out at length is that it suggested to the jury that a possibility of ambiguity exists in the manner in which the questions are worded or in the order in which they are put, or in any other conceivable aspect which the jury might wish to consider in order to avoid a forfeiture of the policy. The questions appearing in the application are unambiguous. They are clear and do not lend themselves to more than one construction. Mr. Clayton

is an intelligent business man who deals in big business on the New York Stock Exchange. It is difficult to understand how a man of his intelligence and business affairs or anyone of less intelligence could fail to understand what information was sought to be elicited by the questions in the application. The questions are clearly worded and are couched in simple language. They are easily intelligible to anyone. There is not the slightest suggestion of ambiguity in the questions.

As heretofore indicated, the vice of the portion of the learned Trial Judge's charge objected to was that it permitted the jury to find ambiguity in a question which is perfectly clear and intelligible, and without the remotest suggestion of ambiguity. In creating this possible situation, the learned Trial Judge committed harmful and prejudicial error. The judgment in this case should, therefore, be reversed and a *venire de novo* awarded.

We respectfully submit that upon the grounds above argued the judgment in this case should be reversed and a *venire de novo* awarded on all the issues.

Respectfully submitted,

EDWARD L. KATZENBACH,
Attorney for and of counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

WALTER I. CLAYTON, *Plaintiff-Appellee,* *vs.* GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, *Defendant-Appellant.*	*At Law.* *On Appeal.*

BRIEF FOR PLAINTIFF-APPELLEE

STATEMENT

This case was tried at the Hudson Circuit before Judge Ackerson, and a jury. It resulted in a verdict for plaintiff in the sum of $2,341.90.

Defendant now appeals to this Court.

FACTS

Defendant is a foreign corporation engaged in the insurance business. It is authorized to transact business in the State of New Jersey.

On or about December 30, 1925, it issued to plaintiff a policy of insurance known as a "Complete Disability Policy" numbered CD. 661202 insuring plaintiff against injury and/or disease for twelve months beginning at Noon, Standard Time, at Englewood, N. J., and (for a proper premium, to wit, $520.00, agreed to pay him $200.00 per week of total disability from disease contracted during the term of the policy (which total disability is defined as such disability which continuously and wholly disables

and prevents the insured from performing any and every kind of duty pertaining to his occupation) and, in addition thereto, to pay to plaintiff the sum of $800.00 for surgical operation for appendicitis in case such became necessary by reason of disease.

Plaintiff brought suit upon the policy alleging that on or about, or shortly prior to, April 6, 1926, he contracted a disease, or illness, which was, or became, appendicitis, which continuously and wholly disabled him, and prevented him from performing any and every duty pertaining to his occupation from April 6, 1926 for ten weeks.

Due notice was given as required by the policy.

He further alleges that it became necessary during such illness for him to undergo a surgical operation for relief from the appendicitis from which he suffered.

He sets up full performance of all requirements of the policy.

He demands of defendant ten weeks disability at $200.00 per week and $800.00 surgical fee.

Defendant resisted the demand for payment under the policy and sets up several breaches of the policy, to wit:

(1) That the disease from which plaintiff suffered and which necessitated his operation (to wit, appendicitis) was not contracted withing the term of the policy.

(2) That plaintiff was guilty of misrepresentation in his answers to questions 19 and 20 contained in the application, and which were made a part of the policy.

THE POLICY

The pertinent paragraphs, or provisions, of the policy, involved in this appeal are as follows:

Illness Schedule—Weekly Indemnity

Part VIII.—Total Disability.

A. If disease contracted during the term of this policy and not hereinafter excepted shall, beginning during said term continuously and wholly disable and prevent the Insured from performing any and every kind of duty pertaining to his occupation, the Corporation will pay during the period of such continuous total disability but within the limits herein stated, the weekly indemnity specified in Part II. for total disability.

Partial Disability.

B. If such disease immediately following the tremination of a period of total disability shall wholly and continuously prevent the Insured from performing at least one-half of the essential daily duties of his occupation, the Corporation will pay during the period of such continuous Partial disability but within the limits herein stated, a weekly indemnity of one-half the amount specified in Part II. for total disability.

Weekly indemnity for total or partial disability, singly or combined, as provided in this Part shall not be payable for a period exceeding 52 consecutive weeks.

Permanent Disability from Loss of Use of Limbs or Sight.

C. If such disease shall result in the entire and irrecoverable loss of (a) the use of both hands or both feet, or of one hand and one foot,

or (b) the sight of both eyes during a period for which the Insured is entitled to indemnity under Paragraph "A" of this Part, the Corporation will continue to pay in lieu of all other indemnity, except surgical or hospital indemnity, the weekly indemnity provided in Part II. for total disability during such period as the Insured shall independently of all other causes be thereby wholly and continuously disabled and prevented from engaging in any occupation or employment for wage or profit, but the combined period of payment under Paragraphs "A" and "C" of this Part shall not exceed one hundred (100) consecutive weeks.

Payment shall not be made for any disability resulting from disease for which the Insured is not treated by a legally qualified physician.

Part IX.—Surgical Operations.

If a bodily injury or a disease, for which indemnity is payable under this policy, shall necessitate a surgical operation named in the Schedule of Operations set forth herein, and such operation is performed by a surgeon within ninety days from date of accident or contraction of disease, the Corporation will pay the surgical fee specified in the schedule for such operation in addition to any other indemnity to which the Insured may be entitled, but payment shall not be made for more than one operation resulting from any one accident or one disease. If more than one such operation shall be performed on account of injury sustained in one accident, or on account of one disease, the Insured shall receive the largest surgical fee specified in the schedule for any one of the operations so performed.

Schedule of Operations.

If the single weekly indemnity of this policy is $25.00 the following amounts will be paid. If said weekly indemnity is greater or less than $25.00, the amounts to be paid shall be increased or decreased proportionately.

Abscess or Boil	$5.00
Abdomen. Cutting into abdominal cavity for diagnosis or treatment of organs therein	100.00
Amputation of	
Foot, hand or forearm	25.00
Leg or arm	50.00
Thigh	75.00
Finger or fingers	10.00
Appendicitis (See abdomen)	100.00

APPLICATION

* * * * *

16. Have you ever had, or ever been advised to have, a surgical operation? No.

Have any of your relatives ever been insane or had tuberculosis? No.

17. Are your habits temperate? Yes.

Are you maimed or deformed? No.

Is your sight or hearing impaired? No.

Have you ever had a Hernia or worn a truss? No.

Have you ever had any of the following: Epilepsy or Vertigo? No. Diabetes? No. Syphilis? No. Neurasthenia? No. Tuberculosis? No. Appendicitis? No. Mental Disorder? No. Disease of Heart or Nervous System? Disease of Tonsils, Nose or Throat? No.

18. Have you been exposed during the last ten days to any contagious or infectious disease? No.

19. Have you been disabled, had any departure from good health, or have you received medical or

surgical attention or advice during the past five years? Yes.

Month and Year. May, 1922. Duration, 3 weeks.

Nature of Disease or Injury. Pneumonia. Result: Regained health. No effects.

20. Last physician consulted? Dr. Dillion, name. 69th St., Lexington Ave., N. Y. C., address.

21. Do you agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the Corporation? Yes.

GROUNDS OF APPEAL

1. Because the Trial Judge refused to direct a verdict for the defendant upon the conclusion of the introduction of all the testimony upon the trial of the case.

2. Because the verdict in favor of the plaintiff is contrary to law.

3. Because the Trial Judge permitted the witness, Emily A. Clayton, over objection, to answer the question, "Do you know what he gave your husband?"

4. Because the Trial Judge, in his charge to the jury, erroneously charged the jury as follows:

> "Now gentlemen, you will notice the positions of the answers to the questions, and the manner in which the questions are asked and the answers that are given to them, and I might say here now that the role is that if there is any question and answer concerning which there is any ambiguity, that is to be resolved against the company in determining whether or not the answers are false."

5. Because the Trial Judge, in his charge to the jury, erroneously charged the jury as follows:

> "But if you find the defendant has met that burden of proof, there could be no recovery under this policy. Your verdict would be for the defendant and against this plaintiff, a verdict of 'No cause of action,' but if you find that they were false, these answers, but not intended to deceive, then you must determine whether or not the statements materially affected either the acceptance of the risk or hazard assumed by the defendant, because if they did, then there could be no recovery under this policy, and the burden too rests upon the defendant of proving this to your satisfaction by a fair preponderance of the evidence."

6. Because the Trial Judge, in his charge to the jury, erroneously charged the jury as follows:

> "That is a sort of guide that has been laid down by our courts, when you come to the question of materiality as to what would be material here because there have been, on some phases of this case, conflicting questions of fact which makes it necessary for me to leave this question which I am now doing, for you to determine and apply the rules of law to the facts as you find them."

7. Because the Trial Judge erred in leaving to the jury the question as to whether the false statements of the plaintiff in his application for the policy of insurance in suit was material to the risk and hazard assumed.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT FOR DEFENDANT.

The facts necessary to establish plaintiff's case were practically admitted.

(a) The issuance of the policy under date of December 30, 1925, by defendant to plaintiff, and the premium paid therefor ($520.00) were admitted in answers to interrogatories (39-40).

(b) The illness of plaintiff on April 5th, 1926, and his operation for appendicitis in the Holy Name Hospital (42-43) is undenied.

(c) His detention in the hospital for twelve days, and his convalescing at home for ten weeks is not denied.

(d) The amount due for operation for appendicitis ($800.00) under the policy (if he is entitled to recover therefor) is admitted.

(e) The weekly indemnity ($200.00) for as many weeks as he was incapacitated (if he was entitled to recover therefor) is admitted.

The defendant, however, sets up that the Court should have directed a verdict for defendant upon the grounds:

(a) That plaintiff failed to prove that the appendicitis from which he suffered was contracted during the terms of the policy as required by Part VIII—Clauses A and B.

(b) Misrepresentations in answers to questions contained in the Schedule attached to the application alleging that such misrepresentations under the terms of the policy, avoided the same.

A.

THERE WAS AMPLE PROOF THAT THE DISEASE (APPENDICITIS) FROM WHICH PLAINTIFF SUFFERED, AND FOR WHICH HE WAS OPERATED ON, WAS CONTRACTED DURING THE TERM OF THIS POLICY. AT LEAST, THERE WAS A JURY QUESTION PRESENTED ON SUCH POINT.

The policy was issued December 30, 1925. Plaintiff states that on April 5, 1926 (Sunday), he felt pain across his stomach (42), and consulted a physician and then another physician, and under the advice of such physician went to a hospital and underwent an operation for appendicitis (43). To offset this testimony, defendant introduced the testimony of an interne at the hospital where plaintiff underwent his operation who testified from the history of the case given him by plaintiff (as he states) to the effect that plaintiff had stated to him that for about 18 months prior to April 6, 1926 (the date when the history was taken) he had had recurrent attacks of abdominal pain (lower right part of abdomen) with nausea and vomiting (60-61), and the testimony of one, Bernhard, in charge of the Accident Health Department of defendant at its New York Office (67-68) who stated that he called on plaintiff at his home (after his operation at the hospital), and that plaintiff told him he had had an attack of Grippe on Thanksgiving Day, and was laid up about a week and saw Dr. Grimes several times (71), and immediately following he had attacks of gas (which witness calls indigestion) and treated himself with home remedies, bicarbonate of soda and so on (71-72).

Plaintiff denied specifically that he had made the statement attributed to him by the interne at

the hospital (79), or that he had made the statements testified to by Mr. Bernhard (80).

Even though the story of the interne and the story of Bernhard were true, such would not establish that the abdominal pains and the gas plaintiff is alleged to have suffered during the 18 months as stated by the interne, and the grippe and gas pains as testified to by Bernhard, were the appendicitis which attacked him in April, 1926. No one says they were. No one even says they were symptoms of appendicitis. Plaintiff proves an attack of appendicitis commencing Aril 6, 1926. The burden of disproving such was on defendant.

At best, a jury question was presented, and, under such circumstances, the Court did not err in submitting the question to the jury.

B.

THERE WAS NO MISREPRESENTATION BY PLAINTIFF IN THE ANSWERS MADE BY HIM TO QUESTIONS CONTAINED IN THE APPLICATION, OR, AT LEAST, WHETHER THERE WAS SUCH MISREPRESENTATION, WAS A JURY QUESTION AND THE COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT.

(1) There was no misrepresentation in the answer to question No. 19.

Defendant set up as a defense that plaintiff had misrepresented the facts in his answers to questions Nos. 19 and 20.

These questions are as follows:

"19. Have you been disabled, had any departure from good health, or have you received

medical or surgical attention or advice during the past five years?

Month and Year. Nature of *disease or injury.*

Duration. Result.

"20. Last physician consulted?"

To question No. 19, plaintiff answered "Yes," and sets forth the *disease* from which he suffered and the date, the duration and the result as follows: Date: May, 1926; disease: pneumonia; duration: 3 weeks, and result: regained health, no effects.

To question No. 20, he answered: Dr. Dillion, 69th St. Lexington Ave., N. Y. C.

Defendant asserts these answers are misrepresentations because in November, 1925, plaintiff had a "cold," or a "grippy cold," and consulted a Dr. Grimes therefor, and did not set the same forth.

The testimony on this point is as follows:

Dr. Jesse R. Grimes, a physician, testifying for defendant, stated (p. 52) that he had seen plaintiff November 23, 1925, at his home, having been called on the telephone, and found he had a temperature of 102, headache and general muscular pains; that he gave plaintiff some medicine and called the next morning and not thereafter; that plaintiff had a grippe attack (53).

On cross examination, he states that he can't remember what he prescribed, but that when he returned the next morning, plaintiff's temperature was around 99½, and that anything over 99½ is abnormal (54); that plaintiff had a "grippy cold."

Plaintiff being recalled says that Dr. Grimes gave him a dose of castor oil (79) the night he called and nothing the next morning (80); that he arose right after the doctor left, and the indisposition was gone after that day (81).

Plaintiff's wife being called stated that she called Dr. Grimes (83) and that he ordered a dose of castor oil, which she got and gave to her husband (84), and the doctor called the next morning, took plaintiff's temperature and left; that immediately afterward her husband got up and was continually up after that (84).

In order that we may be placed in the position of plaintiff at the time he answered the questions let us examine the application.

"Question No. 17

Have any of your relatives ever been insane or had tuberculosis?

Are your habits temperate?

Are you maimed or deformed?

Is your sight or hearing impaired?

Have you ever had a Hernia or worn a truss?

Have you ever had any of the following: Epilepsy or Vertigo? Diabetes? Syphilis? Neurasthenia? Tuberculosis? Appendicitis? Mental Disorder? Disease of Heart or Nervous System? Disease of Tonsils, Nose or Throat?

"Question No. 18

Have you been exposed during the last ten days to any contagious or infectious disease?"

Then follow questions 19 and 20 above set forth.

It is clear that one reading the questions numbered 17 and 18, would naturally assume that defendant was seeking information relative to *diseases* and that when it states in question 19 that what it wants to know is the nature of the *disease* from which the applicant suffered (if he did so suffer), the date he suffered with the same, its duration and result, it was referring to a *disease* and not a mere

temporary illness or indisposition. That this is so, is clearly stated by the authorities.

In 14 Ruling Case Law, 1071, the rule is stated thus:

> "Mere temporary ailments or affections not of a serious or dangerous character which pass away and are likely to be forgotten because they leave no trace in the constitution, are not to be regarded as diseases within the meaning of a life insurance policy."

In 37 Corpus Juris, 458, the rule is thus stated:

> "Answers as to diseases, injuries or physical condition are not false so as to defeat the insurance unless the disease, injury or infirmity relied on is shown to have been such as to affect the general health or probably continuance of life or impair the constitution, and not in its nature simply transitory or a temporary indisposition."

and the following cases are cited:

U. S. Conn. Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 SCT 119, 28 L. Ed. 708; Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197, 26 L. Ed. 708; (Aff. 24 F. Cas. 14166); Caruthers v. Kansas Mut. L. Ins. Co., 108 Fed. 487; Phil. Fidelity Mut. L. Assoc. v. Miller, 92 Fed. 63, 34 CCA 211; Goucher v. North Western Traveling Men's Asso., 20 Fed. 596; Conver v. Phenix Mut. Life Insur. Co., 6 F. Cas. No. 3143; 3 Dill, 224; Holloman v. Life Insur. Co., 12 F. Cas. No. 6623; 1 Woods, 674.

Ala. Mass. Mut. Ins. Co. v. Crenshaw, 195 Ala. 263; 70 S. 768.

Ark. Mo. State Loan Ins. Co. v. Witt, 161 Ark. 148; 256 SW. 46; Des Moines Life Insur. Co. v. Clay, 89 Ark. 230, 116 SW. 232; Mut.

Reserve Fund Life Asso. v. Farmer, 65 Ark. 581, 47 SW. 850.

Cal. Poll v. Grand Circle W.W., 18 Cal. A. 457; 123 P. 349.

Ill. Peterson v. Man. L. Insur. Co., 244 Ill. 329; 91 NE. 466, 18 Ann. Cas. 96; Minnesota Mut. L. Ins. Co. v. Link, 230 Ill. 273; 82 NE 637 (aff. 131 Ill. A. 89); Ideal Electric Co. v. Penn. L. Ins. Co., 189 Ill. A. 331; Van Woomer v. Metro. L. Ins. Co., 188 Ill. A. 166.

Ind. North Western Mut. L. Insur. Co. v. Heimann, 93 Ind. 24; Prudential Life Insur. Co. v. Cellers, 94 Ind. A. 326, 102 NE 894.

Iowa. Peterson v. Des Moines L. Asso., 115 Iowa, 668, 87 NW 397.

Kan. North Western Mut. L. Insur. Co. v. Woods, 54 Kan. 663; 39 P. 189.

Ken. U. S. Health, Etc. Ins. Co. v. Bennett, 105 SSW. 443, 32 KyL. 235.

La. Cunningham v. Penn. Mut. Loan Insur. Co., 152 La. 1023; 95 S 110; Cole v. N. Y. Mutual L. Ins. Co., 129 La. 704, 711; 56 S 645; Ann. Cas. 1913 B, 748. (Cit. Cyc.)

Maine. Jeffrey v. United Order of Golden Cross, 97 Me. 176, 53 A 1102.

Md. Aetna Life Insur. Co. v. Millar, 113 Md. 686, 697, 78 A 483 (quot. Cyc.).

Mass. Hogan v. Metro. Life Insur. Co., 164 Mass. 448, 41 NE 663.

Mich. Hann v. Natl. Union, 97 Mich. 513, 56 NW 834, 37 AmSR 365; Pudritzky v. Supreme Lodge K. H., 76 Mich. 428, 43 NW 373; Brown v. Metro. L. Insur. Co., 65 Mich. 306, 32 NW 610, 8 AmSR 894.

Minne. Grunber v. German Roman C. Aid Soc., 113 Minn. 340, 129 NW 581.

Miss. Metr. Cas. Insur. Co. v. Kato, 113 Miss. 283, 74 S 114.

Mo. Singleton v. St. Louis Mut. Insur. Co., 66 Mo. 63, 27 AmR 321.

N. J. Metro. Life Insur. Co. v. McTague, 49 N. J. L. 587, 9 A 766, 60 AmR 661.

N. Y. Toker v. Security Trust Co., 165 N. Y. 608, 58 NE 1093 (Aff. 26 App. Div. 372, 49 NYS 814); Hunter v. Amer. Pop. L. Insur. Co., 71 N. Y. 604; Cushman v. U. S. Life Insur. Co., 70 N. Y. 72; Barteau v. Phenix Mut. L. Insur. Co., 1 Hun. 340, 67 Barb. 354, 3 Thomps. & C. 576 (Aff in 67 N. Y. 595 Men); Fletcher v. Banker's Life Insur. Co., 62 Misc. 546, 116, NYS 1105 (Rev. on another ground 125 App. Div. 295, 119 N. Y. S. 801); Greisa v. Mass. Ben. Asso., 15 N. Y. S. 71 (aff 133 N. Y. 619 mem., 30 NE 1146 mem); McGrath v. Metro. L. Insur. Co., 6 N. Y. St. 376; Fitch v. Amer. Pop. L. Insur. Co., 11 AlbLJ, 91 (Rev. on other grounds, in 59 N. Y. 557, 17 AmR 372).

Ohio. Chever v. Union Cen. L. Insur. Co., 8 Oh. Dec. (reprint) 175, 6 CincLBul 196 (rev. on other grounds in 36 Oh. St. 201, 38 AmR 573); Ohio Mut. L. Asso. v. Draddy, 10 Oh. S & CP 591, 8 Oh. NP 140.

Okl. Natl. Council K L & S v. Owen 61 Okl. 256, 161 P 178; N. Y. Mut. L. Insur. Co. v. Morgan, 39 Okl. 205, 135 P 279; Eminent Household C. W. v. Prater, 24 Okl. 214, 103 P. 558, 23 LRANS 917, 20 Ann. Cas. 287.

Penn. March v. Metro. Co., 186 Penn. 629, 40 A 111, 65 AmSR 887, 43 WklyNC 7; Horne v. John Hancock Mut. L. Insur. Co., 53 Penn., Super. 330, Clemens v. N. Y. Metro. Life Insur. Co., 20 Penn. super. 567.

Tenn. Endowment Rank K. P. v. Cogbill, 99 Tenn. 28, 41 SW 340; Knights of P. v. Rosenfeld, 92 Tenn. 508; 22 SW 24.

Tex. N. Y. Mut. Lif. Insur. Co. v. Simpson, 88 Tex. 333, 31 SW 501, 53 AmSR 757, 28 LRA 765; Homestead v. Stapp (Civ. A.) 205 SW 743, 745 (cit. Cyc.); North Western L. Asso. v. Findley, 29 Tex. civ. A. 494, 68 SW 695.

Vermont. Fitzgerald v. Metro. L. Insur. Co., 90 Ver. 291, 98 A 498; Schofield v. Metro. L. Insur. Co., 79 Ver. 161, 64 A 1107, 8 Ann. Cas. 1152; Billings v. Metro. L. Insur. Co., 70 Ver. 477, 41 A 516.

Washington. Hoeland v. Western Union L. Insur. Co., 58 Wash. 100, 107 P. 866.

West Virginia. Myer v. N. Y. Mut. L. Insur. Co., 83 West V. 390, 98 SE 424.

Wisconsin. Cady v. Fidelity, etc. Co., 134 Wis. 322, 113 NW 967, 17 L.R.A.N.S. 260.

Eng. Watson v. Mainwaring, 4 Taunt. 763, 128 Reprint 530.

Canada. Nova Scotia Mut. Relief Soc. v. Webster, 16 Can. SC. 718; Moore v. Conn. Mut. L. Insur. Co., 6 Can. S.C. 634.

Ontario. Moore v. Conn. Mut. L. Insur. Co., 41 U.C.Q.B. 497.

Quebec. Prudential Insur. Co. v. Carrier, 43 Q. super. 97; Security L. Insur. Co. v. Power, 24 Q. K. B. 181; L'Ordre Independent des Forestiers v. Turmelle, 19 Q. K. B. 261.

In the case of Logan *v.* Provident Life Association, 57 W. Va., 384, it was held:

> "The term 'disease' does not mean a trifling illness, or an occasional physical disturbance resulting from accidental causes, not permanent in their effects, nor a temporary illness which readily yields to professional treatment and leaves no permanent injury or disorder calculated to, or having a tendency to shorten life."

Again it has been held that:

> "The term means more than a temporary disorder. It means serious illness which has impaired the constitution or has left behind it some organic or chronic effect."
>
> Illinois L. Insur. Co. v. Lindley, 110 Ill. A., 161.
>
> Peterson v. Modern Brotherhood of Amer. 125 Iowa, 562.
>
> Meyer v. Fidelity Co., 96 Iowa, 378.

In the cases of Metropolitan Life Insur. Co. *v.* Larson, 85 Ill., Ap. 143, and Genning *v.* Metropolitan Life Insur. Co., 60 App. Div., 424, 69 N. Y. S. 1041, it was held that consulting a physician for a "cold" is not a breach of a condition that assured had not been under the care of a physician for a certain length of time.

In the case of Metropolitan Life Insur. Co. *v.* Brubaker, 78 Kan. 146, 96 P. 62, the Court said:

> "It is the duty of a person applying for life insurance under an application such as was made by the insured in this case, to truthfully answer all questions therein contained to the best of his ability, but in answering a question calling for information concerning previous illnesses, or medical attendance, it is a matter of no importance whether or not the applicant, at some previous time may have had some temporary ailment or indisposition, not serious or substantial in its nature, but soon over with, such as headache, bellyache, cold, or any such

temporary disorder or disturbance of the physical health as would ordinarily yield to what is called 'home treatment.'"

In Smith *v.* Traveller's Insur. Co., 135 N. Y. S., 18, it is held that a warranty that insured has not been disabled within five years, does not refer to temporary illness resulting from influenza or tonsilitis, but has reference to serious disabilities.

In the case of McTague *v.* Metropolitan Life Insur. Co., 49 N. J. L. 587, the Court held that a statement in an application that applicant had not, during a certain period, been "sick or afflicted with disease," was not necessarily to be inferred to be false from the fact that insured had had a "cold."

In the McTague case the Court said:

"There is nothing in the mere fact found" (that applicant had had a cold) "that required the inference that the insured life had been 'afflicted by disease,' or even 'sick':

"These terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather freedom from such ailments as would ordinarily be called disease or sickness."

It would seem clear, therefore, that when plaintiff answered question No. 19, he naturally assumed defendant desired information relative to a *disease*, or, in other words, to "ailments that would ordinarily be called disease or sicknesses," and not to trifling ailments on temporary indispositions. He, therefore, answered that he *had* suffered with a disease, to wit, pneumonia, in May, 1922; that it lasted three weeks, and that he recovered and had no effects therefrom.

(2) There was no misrepresentation in the answer to question No. 20.

Defendant, however, puts more stress upon the alleged misrepresentation in the answer to question No. 20, than on the answer to question No. 19.

In 37 Corpus Juris, 464, the rule is laid down:

"In analogy with the rule as to disclosure of temporary or slight ailments, it has been held that medical consultation or attendance for merely slight or temporary dispositions need not be disclosed, insured being entitled to a liberal construction of the language of the application."

citing:

U. S. New York L. Ins. Co. v. Wertheimer, 272 Fed. 730; New York L. Ins. Co. v. Moats, 207 Fed. 481; 125 CCA 143; McClain v. Provident Sav. L. Assur. Soc. 110 Fed. 80, 49 CCA 31; Hubbard v. Mutual Reserve Fund Life Assoc. 100 Fed. 719; 40 CCA 665. But see New York Mut. L. Ins. Co. v. Hurni Packing Co. 260 Fed. 641, 171 CCA 405; (Aff. 263 U. S. 167, 44 SCT. 90; 31 A. L. R. 102), Caruthers v. Kansas Mut. Life Ins. Co., 108 Fed. 487 (both apparently to the contrary).

Ala. Mass. Mut. Lf. Insur. Co. v. Chenshaw, 195 Ala. 263, 70 S. 768, 771 (citation Cyc.).

Ark. N. Y. Mut. L. Insur. Co. v. Owen, 111 Ark. 554, 164 SW 720; Franklin L. Insur. Co. v Calligan, 71 Ark. 295; 73 SW 102; 100 Am. SR 73.

Ill. Delvaux v. Metro. Lf. Insur. Co., 172 Ill. A 537; Metro. L. Insur. Co. v. Larson, 85 Ill. A 143; Contra Conn. Mut. L. Insur. Co. v. Young, 75 Ill. A-440;

Ind. Prudential Life Insur. Co. v. Sellers, 54 Ind. A326; 102 NE 894.

La. Cunningham v. Pa. Mut. Life Insur. Co.

152 La. 1023; 95 S. 110. Lee v. N. Y. L. Ins. Co. 114 La. 445; 80 S. 652 and 655 (quot. Cyc.); Cole v. N. Y. Mut. L. Ins. Co, 129 La 704. 56 S. 645. Ann. cas. 1913 B. 748.

Md. N. Y. Mut. Lf. Insur. Co. v. Mullan, 107 Md. 457; 69 A 385; Phil. Mut. L. Assoc. v. Ficklin, 74 Md. 172; 21 A 680; 23 A 197.

Mich. Bullock v. N. Y. Mut. L. Ins. Co. 166 Mich. 240, 131 NW 574; Blumenthal v. Berkshire L. Insur. Co. 134 Mich. 216; 96 NW 17; 104 Am SR 604; Rhode v. Metro. Life Insur. Co. 132 Mich. 503; 93 NW 1076; Plumb v. Penn. Mut. Life Insur. Co. 108 Mich. 93; 65 NW 611; Hann v. Natl. Union, 97 Mich. 513; 56 NW 834; 37 Am. SR 356; Brown v. Metro. Life Insur. Co. 65 Mich. 316; 32 NW 610; 8 Am. SR. 894;

Miss. Mutual Reserve Assoc. v. Ogletree, 77 Miss. 7; 25 S 869;

N. Y. Valentini v. Metro. L. Insur. Co. 106 App. Div. 487; 94 N. Y. S. 758; Crosby v. Security Mutual L. Insur. Co. 86 App. Div. 89; 83 N. Y. S. 140; Contra Roche v. Supreme Lodge K. H., 21 App. Div. 599; 47 N. Y. S. 774; (App. Dism. 159 N. Y. 565 mem, 54 N. E. 1094 mem).

N. C. Bryant v. Metro. Co. 147 N. C. 181; 60 SE 983.

N. D. Plotner v. North West. Natl. L. Ins. Co., 48 N. D. 295; 183 NW 1000;

OKL. Sovereign Camp W. O. W. v. Brown, 94 Okl. 277; 221 P. 1017; N. Y. Mut. Co. v. Morgan, 39 Okl. 205; 135 P. 279;

Tenn. Woodward v. Iowa Life Insur. Co., 104 Tenn. 49; 56 SW 1020;

Tex. Homesteaders v. Stapp, (Civ. A) 205 SW 743; 745 (Cit. Cyc.).

Vermont. Billings v. Metro. Co., 70 Vt. 477; 41 A. 516.

Wash. Hoeland v. Western Union L. Co., 58 Wash. 100; 107 P. 866.

W. Va. Myers v. New York Mut. L. Ins. Co., 83 W. Va. 390, 98 SE 424.

Wis. Fishbeck v. New York L. Ins. Co., 179 Wis. 369, 192 NW 170 (Construing Oklahoma law).

The same work, however, (37 Corpus Juris, supra) states that there are decisions which apparently conflict with the rule above mentioned, and cites four cases, among them being the case of Metropolitan Life Insur. Co. v. McTague, 49 N. J. L. 587, supra.

In that case the question was whether applicant had within a certain period "consulted or been prescribed for by a physician," and he had answered that he had not. The answers to the questions contained in the application *were made warranties,* and is is upon *this* basis that the Court held that the false answer avoided the policy, although the Court did say that in its opinion the materiality of such a statement to the contract proposed, even though only a representation, seemed so great that its falsity, if knowingly made, would avoid the policy. Although this statement of the Court would seem to be obiter, for the Court says *"the materiality of the representation in this case is in question, for, as we have seen, its truth is warranted,"* yet the Court of Errors in Kerpchak *v.* John Hancock Life Ins. Co., 97 N. J. L. 196, cited the McTague case as authority for the propostion that a representation that one had not consulted or been prescribed for by a physician within a certain period is material, and its falsity, if knowingly

made, avoids the policy. This we will have to assume is the law in cases where it is shown that the applicant had suffered *with a disease or sickness* and had consulted or been prescribed for by a physician therefor.

We do not believe, however, that the Court of Errors has decided that *medical consultation or attendance for merely slight or temporary indispositions* must be disclosed by an applicant for insurance.

It would seem that the obiter statement in the McTague case was to the contrary for the medical consultation therein considered was for the "cold" from which applicant suffered. But as we have shown, such *was expressly declared* by the Court *to be obiter* and not the subject of its decision.

Such a holding would be clearly against the vast weight of authority (37 Corpus Juris, 464, and cases cited), and would seem to be clearly opposed to the rule that "*the insured is entitled* to a liberal construction of the language of the application." Ibid.

However, question No. 20 in the application in the case sub judice is not identical with, or similar to, the question in the McTague case. In that case, the question was clear and unmistakable, it was not confusing nor ambiguous, nor, for what appears, was the set up of the questions calculated to confuse one as to their purpose.

In the case sub judice the situation is different. Question No. 20 immediately follows, and really is a part of a series of questions dealing with diseases, and it is clear that an applicant in answering the same would naturally suppose the inquiry was directed to consultation with a physician relative to diseases from which he suffered, and when one realizes that the last question addressed to him

before question No. 20 distinctly states it sought information as to *diseases* from which he suffered, their duration and resultant effects, it is but natural that one would suppose question No. 20 referred to the last physician *consulted for such diseases.* Under such circumstances, how could the applicant be held to have known that defendant had ceased questioning him about *diseases,* and that he should not give the name of the physician whom he had last consulted for disease, but should give the name of a physician whom he had consulted for a temporary indisposition or ailment, for which he was given a dose of castor oil? The applicant is entitled to a "liberal construction of the language of the application." (37 Corpus Juris, 464.)

Defendant has, by its method of setting up the questions to be answered, led applicant to believe that the information desired was the name of the physician last consulted for *disease,* and he so answered. The question by its position in a list of questions relating to diseases is misleading and ambiguous. The ambiguity was the responsibility of the defendant.

Applicant answered to the best of his ability and according to his understanding of the nature of the information desired.

It is the rule as set forth by the Court of Errors and Appeals in Prahm *v.* Prudential Ins. Co., 97 N. J. L. 206 (and see Markiman *v.* Fidelity Co., 92 N. J. L. 29) that:

> "If in the questions and answers there is any ambiguity for which the Company is responsible, it is to be resolved against the Company in determining whether the answers are false."

Clearly, there is here no conclusive and unquestioned proof of the willful falsity of the answers,

and unless it does appear that there is such conclusive and unquestioned proof, the question is one for the jury. Prahm *v.* Prudential Ins. Co., *supra.*

And was said in this case:

> "There must exist no rational theory upon which the jury might find the truth or good faith of the answer of the insured before the Court can direct a verdict for the company."

Citing Henn *v.* Metropolitan Life Insurance Co., 67 N. J. L. 310; Duff *v.* Prudential Ins. Co., 90 N. J. L., 146.

Certainly in the case sub judice there existed a rational theory upon which the jury might so find.

If the jury believed that applicant was led to understand by the set up of the questions in the application that defendant was seeking the name of the last physician consulted by applicant for disease, and that applicant truthfully answered the questions upon such understanding, the jury would be entitled to find a verdict for plaintiff.

The evidence would permit such a finding.

The Court did not err in submitting the case to the jury.

POINT II.

THE COURT DID NOT ERR IN ADMITTING THE QUESTION ADDRESSED TO THE WITNESS, EMILY A. CLAYTON, WIFE OF PLAINTIFF, "DO YOU KNOW WHAT HE GAVE YOUR HUSBAND," TO BE ANSWERED (P. 83).

Defendant had raised the point that plaintiff had been guilty of misrepresentation because he had not set out in his answer to question No. 19 above referred to the fact that he had had a grippy cold in

November (about a month or so prior to the date of the policy). Plaintiff contended that since such grippy cold was a temporary indisposition, or ailment, it was not necessary to set it forth (see Argument above), and in order to assist in establishing such contention asked the question objected to. If our contention was correct, and we insist it was, then, of course, the fact that the physician gave (or advised giving) to plaintiff a simple remedy, and that plaintiff reacted favorably thereto, was relevant and the question was admissible.

However, the answer to the question was striken out (84) and was repeated, and no objection made thereto and was answered; so, the error, if any, was harmless.

POINT III.

THE COURT DID NOT ERR IN CHARGING THE JURY AS FOLLOWS:

> "Now gentlemen, you will notice the positions of the answers to the questions, and the manner in which the questions are asked and the answers that are given to them, and I might say here now that the rule is that if there is any question and answer concerning which there is any ambiguity, that is to be resolved against the company in determining whether or not the answers are false."

In Prahm *v.* Prudential Ins. Co., 97 N. J. L. 206, it was held:

> "If in the questions and answers there is any ambiguity for which the Company is responsible, it is to be resolved against the company in determining whether the answers are false."

See also Markiman *v.* Fidelity Co., 72 N. J. L. 29.

As we have shown heretofore, the Company (de-

fendant) had by its method of setting up the questions, led applicant to believe that the information desired related to diseases, and to the name of the physician last consulted for disease, and plaintiff had answered while under such belief and had answered truthfully.

The questions, combined with their set up, their sequence and the nature of their inquiry would naturally leave one in doubt as to how they should be answered.

They were clearly, under such circumstances, ambiguous, for which ambiguity the Company was responsible.

The charge of the Court was correct.

POINT IV.

THE COURT DID NO ERR IN CHARGING THE JURY AS FOLLOWS:

> "But if you find the defendant has met that burden of proof, there could be no recovery under this policy. Your verdict would be for the defendant and against this plaintiff, a verdict of 'No cause of action,' but if you find that they were false, these answers, but not intended to deceive, then you must determine whether or not the statments materially affected either the acceptance of the risk or hazard assumed by the defendant, because if they did, then there could be no recovery under this policy, and the burden too rests upon the defendant of proving this to your satisfaction by a fair preponderance of the evidence." (Fifth Ground of Appeal.) * * *
>
> "That is a sort of guide that has been laid down by our courts, when you come to the question of materiality as to what would be material here because there have been, on some phases of this case, conflicting questions of fact which makes it necessary for me to leave this question which I am now doing, for you to determine and apply the rules of law to the facts as you find them." (Sixth Ground of Appeal.)

In order that the continuity of the charge on this point may be preserved, we set forth the same. The Court said:

> "Now it is therefore, gentlemen, for you to say in the first place whether the statements which were made to these questions were falsely made with the intent to deceive, and the burden, of course, rests upon the defendant to prove this by a fair preponderance of the evidence.
>
> "Now, gentlemen, that does not necessarily mean the greater number of witnesses on the one side, nor on the other, but it does mean the greater weight of the testimony. The reference is more particularly to the quality rather than the quantity of the proof.
>
> "But if you find the defendant has met that burden of proof, there could be no recovery under this policy. Your verdict would be for the defendant and against this plaintiff, a verdict of 'No cause of action,' but if you find that they were false, these answers, but not intended to deceive, then you must determine whether or not the statement materially affected either the acceptance of the risk or hazard assumed by the defendant, because if they did, then there could be no recovery under this policy, and the burden too rests upon the defendant of proving this to your satisfaction by a fair preponderance of the evidence.

"Now, in insurance policies, every fact which is untruly stated or wrongfully suppressed must be regarded as material to the risk, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premiums.

"That is a sort of guide that has been laid down by our courts, when you come to the question of materiality as to what would be material here because there have been, on some phases of this case, conflicting questions of fact which makes it necessary for me to leave this question, which I am now doing, for you to determine and supply the rules of law to the facts as you find them."

Question No. 21 in the application reads as follows:

"Question 21. Do you agree that the falsity of any statement in this application shall bar the right to recovery if such false statement is made with intent to deceive, or materially affects either the acceptance of the risk or the hazard assumed by the corporation?"

Defendant asserts that the answers to questions were false, and were made with intent to deceive, and/or materially affected either the acceptance of the risk or the hazard assumed by the corporation. He further alleges that the question whether a false representation materially affects either the acceptance of the risk or the hazard assumed by the corporation is a Court question and not a jury question, and, therefore, the Court erred in its charge as above set out.

As to the first portion of the first proposition advanced in the last preceding paragraph, to wit, that the answers to questions Nos. 19 and 20 were false and made with intent to deceive, we submit the proof was to the contrary—they were neither false nor made with intent to deceive, but true and honestly made. (See Argument under A and B above). But plaintiff has no right to complain because, at best, he was entitled only to a submission of such questions to the jury, to wit, were the answers false and made with intent to deceive, and the Court so submitted them to the jury.

As to the second portion of the first proposition, to wit, that the falsity of the answers (assuming them to be false) materially affected either the acceptance of the risk or the hazard assumed by the corporation, we submit such false statements were not material to either.

For instance, the alleged falsity of the answer to question No. 19 consisted in that the plaintiff did not set forth in his answer that he had had a grippy cold in November preceding the issuance of the policy. Assuming it to be a fact that he did have such a grippy cold as alleged, and did not set such forth in his answer, and that to such extent the answer was, strictly speaking, false, yet the Courts have repeatedly held that the failure to set out such a fact—i. e., temporary ailments or indispositions—"is of no importance" (Metro. Life Insur. Co. *v.* Brubaker, supra) and "will not avoid the policy" (cases cited under B, supra). Certainly, if such *falsity* "is of no importance" and "will not avoid the policy," it cannot materially affect the acceptance of the risk or the hazard assumed by the insurer.

So, in regard to the alleged falsity of the answer to question No. 20. The rule according to the great weight of authority is that:

"In analogy with the rule as to disclosure of temporary or slight ailments, medical consultation or attendance for merely slight or temporary indispositions, need not be disclosed, insured being entitled to a liberal construction of the language of the application."

(See 37 Corpus Juris, supra and cases cited).

Clearly, if such be the fact, then the statement by plaintiff that the last physician he had *consulted* was Dr. Dillion (who he had consulted for the only disease he had had within five years) was not false within the meaning of the policy, although not, strictly speaking, true as matter of fact. Such falsity, therefore, being "of no importance" and not avoiding the policy could not be said to materially affect either the acceptance of the risk or the hazard assumed by the corporation.

Defendant insists, however, that the Court erred in leaving the question as to whether the falsity of the answers (if false), materially affected either the acceptance of the risk or the hazard assumed by the Company to the jury, claiming that such was a question of law and not a question of fact and should have been determined by the Court.

Upon the subject of whether the materiality of a representation is a question of law or fact, the Courts are not of unanimous opinion.

In 27 Corpus Juris, 75. it is stated that the Courts hold contrary views on the subject, some Court holding it is a question of law and others holding it is a question of fact.

In New Jersey there does not seem to be a direct statement on the subject, but it seems to be assumed that it is a question of law, because the Courts have held that representations of various kinds are material and avoid a policy where they are

knowingly falsely made, and that, under such circumstances, the Trial Court should direct a verdict. Kerpchak *v.* John Hancock L. Ins. Co., supra, and other cases.

Conceding the above to be the law and that the Court erred in submitting the question of the materiality of the representations to the jury, yet

THE DEFENDANT HAS NO JUST GROUND FOR COMPLAINT.

The error, if error there was, was not harmful to defendant, but rather a hardship upon plaintiff.

UNDER THE DECISIONS, THE REPRESENTATIONS DID NOT MATERIALLY AFFECT EITHER THE ACCEPTANCE OF THE RISK OR THE HAZARD ASSUMED BY THE COMPANY.

If then the Court had treated the question of materiality as one for the Court and not for the jury, the plaintiff would have been entitled to a direction of a verdict in his favor if such were the only points involved.

The Court was required, however, (assuming there existed disputed testimony) to submit the question as to whether the appendicitis from which plaintiff suffered and for which he was operated on, was contracted during the term of the policy to the jury. As to this defendant can have no complaint as we have above shown, and plaintiff raises no objection to such submission.

POINT V.

(Seventh Ground of Appeal)

BECAUSE THE TRIAL JUDGE ERRED IN LEAVING TO THE JURY THE QUESTION AS TO WHETHER THE FALSE STATEMENTS OF PLAINTIFF IN HIS APPLICATION FOR THE POLICY OF INSURANCE IN SUIT WAS MATERIAL TO THE RISK AND HAZARD ASSUMED.

The argument under Point IV suffices for answer to error alleged above.

The judgment should be affirmed.

Respectfully submitted,

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