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TESTIMONY FOR PLAINTIFF.

REBUTTAL.

TESTIMONY FOR DEFENDANT.

SUR-REBUTTAL.

Notice and Grounds of Appeal.

Suit No. 1.

Filed January 23, 1917.

New Jersey Supreme Court.

GIOVANNINA GUARRAIA, *Plaintiff-Appellee,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY, *Defendant-Appellant.*	*On Contract.* *Suit No. 1.* *On Appeal from Elizabeth District Court.* *Notice of Appeal from Judgment of Supreme Court.*

SIR:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause by the New Jersey Supreme Court, on the 11th day of January, 1917, to the Court of Errors and Appeals, the last resort in all causes, on the following grounds:

First. The said Supreme Court should have reversed the judgment of the District Court of the City of Elizabeth brought up on appeal to the said Supreme Court, and not have affirmed it.

Second. The trial judge at the trial of the case in the Elizabeth District Court committed error of law in the following particulars:

1. The trial judge should have granted the defendant's motion for non-suit at the close of the plaintiff's case.

2. The trial judge should have granted the defendant's motion for the direction of a verdict at the conclusion of the entire case.

3. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 2 for identification.

4. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 3 for identification.

5. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 4 for identification.

6. The trial judge permitted the plaintiff to offer in evidence Exhibit P. 8 for identification, which was marked Exhibit P. 8.

7. The trial judge overruled the defendant's offer of Exhibits D. 8 and D. 9 for identification.

8. The trial judge erred in his charge to the jury in charging them as follows:

> "Now the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his beneficiary may not recover should he die at a later date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease.

9. The trial judge erred in his charge to the jury in charging them as follows:

> "In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption and he had that disease in May, 1914, and without any lengthy reference to the testimony, you will recall that the physician who examined him at

that time says he had it and the bacteriologist who examined his sputum gave his opinion that he had consumption at that time. You will say from the evidence whether the insured himself knew that he had that disease. You will recall the testimony that he spoke only Italian and the testimony that the physician who examined him did not speak Italian. You will also recall the testimony as to whom he gave the information and the fact, so far as the testimony goes, that there was some interpretation of what he said, but you will decide, as a matter of fact, whether decedent knew he had tuberculosis, and if he did not know, the fact that he did not make any statement to the effect that he had tuberculosis, would not defeat recovery under this policy, because the law says that a declaration of this kind that an applicant never had such a disease (concerning which the insured should know, and the applicant could not have certain knowledge except as he might be told by a physician or other expert), is properly construed as to what we term a warranty only of the *bona fide* belief and opinion of the applicant. In other words, the applicant, if he is acting in good faith, and doesn't make a statement of a disease which it is afterwards found he had, or which was known at the time that he had, so long as he doesn't know it and is making his statement under a *bona fide* and honest belief, if his statement is not true, then that is not such a warranty as would defeat recovery in this case."

10. Because the trial judge erred in his charge to the jury in charging them as follows:

"To my recollection there isn't any definite proof in the case as to whether or not the doctor could talk the Italian language, but you will

have a right to consider his name and have a right to consider the fact that he was in the employ of the company, and you also have a right to consider the fact that he is not produced as a witness in the case."

11. Because the trial judge erred in his charge to the jury in charging them as follows:

"I think it is my duty to call your attention to the fact that in these applications bearing now on the question as to whether there were misrepresentations made by the applicant, that these applications are signed by a cross mark; and call your attention to the fact that the claim in this case is not made that the answers state affirmatively something that is not true, but the claim is made that the printed part of the application which says—I had better read you the language—'where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.' In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception."

Yours respectfully,

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

To John J. Stamler, Esq.,
Attorney of Plaintiff-Appellee.

Notice and Grounds of Appeal.

Suit No. 2.

Filed January 23, 1917.

NEW JERSEY SUPREME COURT.

GIOVANNINA GUARRAIA, *Plaintiff-Appellee,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY, *Defendant-Appellant.*	*On Contract. Suit No. 2.* *On Appeal from Elizabeth District Court.* *Notice of Appeal from Judgment of Supreme Court.*

SIR:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause by the New Jersey Supreme Court, on the eleventh day of January, 1917, to the Court of Errors and Appeals, the last resort in all causes, on the following grounds:

First. The said Supreme Court should have reversed the judgment of the District Court of the City of Elizabeth brought up on appeal to the said Supreme Court, and not have affirmed it.

Second. The trial judge at the trial of the case in the Elizabeth District Court committed error of law in the following particulars:

1. The trial judge should have granted the defendant's motion for non-suit at the close of the plaintiff's case.

2. The trial judge should have granted the defendant's motion for the direction of a verdict at the conclusion of the entire case.

3. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 2 for identification.

4. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 3 for identification.

5. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 4 for identification.

6. The trial judge permitted the plaintiff to offer in evidence Exhibit P. 8 for identification, which was marked Exhibit P. 8.

7. The trial judge overruled the defendant's offer of Exhibits D. 8 and D. 9 for identification.

8. The trial judge erred in his charge to the jury in charging them as follows:

> "Now the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his beneficiary may not recover should he die at a later date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease."

9. The trial judge erred in his charge to the jury in charging them as follows:

> "In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption and he had that disease in May, 1914, and without any lengthy reference to the testimony, you will recall that the physician who examined him at that time says he had it and the bac-

teriologist who examined his sputum gave his opinion that he had consumption at that time. You will say from the evidence whether the insured himself knew that he had that disease. You will recall the testimony that he spoke only Italian and the testimony that the physician who examined him did not speak Italian. You will also recall the testimony as to whom he gave the information and the fact, so far as the testimony goes, that there was some interpretation of what he said, but you will decide, as a matter of fact, whether decedent knew he had tuberculosis, and if he did not know, the fact that he did not make any statement to the effect that he had tuberculosis, would not defeat recovery under this policy, because the law says that a declaration of this kind that an applicant never had such a disease (concerning which the insured should know, and the application could not have certain knowledge except as he might be told by a physician or other expert), is properly construed as to what we term a warranty only of the *bona fide* belief and opinion of the applicant. In other words, the applicant, if he is acting in good faith, and doesn't make a statement of a disease which it is afterwards found he had, or which was known at the time that he had, so long as he doesn't know it and is making his statement under a *bona fide* and honest belief, if his statement is not true, then that is not such a warranty as would defeat recovery in this case."

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will have a right to consider his name and have a right to consider the fact that he was in the employ of the company, and you also have a right to consider the fact that he is not produced as a witness in the case."

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"I think it is my duty to call your attention to the fact that in these applications bearing now on the question as to whether there were misrepresentations made by the applicant, that these applications are signed by a cross mark; and call your attention to the fact that the claim in this case is not made that the answers state affirmatively something that is not true, but the claim is made that the printed part of the application which says—I had better read you the language—'where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.' In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception."

Yours respectfully,

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

To John J. Stamler, Esq.,
Attorney of Plaintiff-Appellee.

Notice of Appeal.

Filed December 1, 1915.

Elizabeth District Court.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract.* *Suit No. 1.*

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NOTICE OF APPEAL.

SIR:

TAKE NOTICE that the defendant Metropolitan Life Insurance Company hereby appeals to the New Jersey Supreme Court from the judgment of the Elizabeth District Court, rendered in the above stated action on the 22nd day of November, nineteen hundred and fifteen.

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McCARTER & ENGLISH,
Attorneys of Defendant.

To JOHN J. STAMLER, ESQ.,
Attorney of Plaintiff.

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Notice of Appeal.

Filed December 1, 1915.

ELIZABETH DISTRICT COURT.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract. Suit No. 2.*

NOTICE OF APPEAL.

SIR:

TAKE NOTICE that the defendant Metropolitan Life Insurance Company hereby appeals to the New Jersey Supreme Court from the judgment of the Elizabeth District Court, rendered in the above stated action on the 22nd day of November, nineteen hundred and fifteen.

McCARTER & ENGLISH,
Attorneys of Defendant.

TO JOHN J. STAMLER, ESQ.,
Attorney of Plaintiff.

Complaint No. 1.

Filed October 20, 1915.

ELIZABETH DISTRICT COURT.

GIOVANNINA GUARRAIA, *Plaintiff,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY. *Defendant.*	*Action at Law.* *Complaint No. 1.*

The plaintiff residing in the City of Newark, County of Essex, and State of New Jersey, says:

1. The defendant is a life insurance company organized under and by virtue of the laws of the State of New York, and incorporated as a stock company by the State of New York, and has a branch office in the City of Elizabeth, County of Union, and State of New Jersey: that said Metropolitan Life Insurance Company was such an insurance company on the fifth day of October, nineteen hundred and fourteen, and has remained such until the present time.

2. That on or about the fifth day of October, nineteen hundred and fourteen, in consideration of the payment to the defendant by one Luciano Guarraia, now deceased, late of the City of Newark, County of Essex, and State of New Jersey, of the premium of seven dollars and forty cents ($7.40), and of a like sum to be paid to it by him quarter annually thereafter until his death, the defendant, by its policy of insurance in writing dated the fifth day of October, nineteen hundred and fourteen, which policy is known as policy No. 1,906,765 C, Ordinary Life, Intermediate Class, a copy of which policy is hereto

annexed and made a part thereof, thereby insured the life of the said Luciano Guarraia in the sum of five hundred dollars, which sum was to be paid to the plaintiff as a beneficiary under said policy.

3. That on the second day of January, nineteen hundred and fifteen, the said Luciano Guarraia, died, and that his death was not due to or the result of any cause excepted in said policy of insurance or the application thereto annexed.

4. That the policy of insurance contained a clause wherein the Metropolitan Life Insurance Company promised to pay, at the home office of the company in the City of New York, upon the receipt at said home office of due proof of the death of Luciano Guarraia, the sum of five hundred dollars less any indebtedness due to the company for the current policy year upon surrender of this policy properly receipted to Giovannina Guarraia, plaintiff herein, and wife of the insured and beneficiary thereunder. That the plaintiff herein is the beneficiary named in the said policy of insurance and has remained such from the date of the execution of the same until the present time.

5. That the said Giovannina Guarraia has duly performed all the conditions of the said contract of insurance on her part to be performed.

6. That the plaintiff has made proof of the death of the said Luciano Guarraia to the defendant in accordance with the requirements of said policy and otherwise performed all the conditions of said policy and the contract of insurance on her part to be performed.

7. That the said Metropolitan Life Insurance Company has refused to pay the amount so due upon the said policy and that the sum of five hundred dollars together with interest thereon from the second

day of January, nineteen hundred and fifteen, is now due and owing to the said plaintiff from the said defendant at this time.

8. The plaintiff waives the excess over the jurisdictional amount of this court.

Plaintiff demands damages in the sum of five hundred ($500) dollars.

JOHN J. STAMLER,
Attorney of Plaintiff.

Complaint in Suit No. 2 is identical except policy is dated November 25, 1914, and is numbered 1,926,-894-C.

Specification of Defences.
Suit No. 1.

Filed October 28, 1915.

ELIZABETH DISTRICT COURT.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract.* *Suit No. 1.*

SPECIFICATION OF DEFENCES.

The following is a written specification of the defences intended to be made in the above entitled cause.

1. The said policy of insurance was induced by the fraud of the said Luciano Guarraia in that he fraudulently represented, contrary to the fact and to his knowledge, that he had never had, prior to the signing of his application for said policy:

a. The disease of bronchitis.

b. The disease of asthma.

c. The disease of consumption.

d. A disease of the lungs.

e. A hemorrhage.

f. An habitual cough.

g. That he had never been attended by a physician.

h. That he had never been under the care of any physician within two years.

Whereas in fact he had had the said diseases above specified, one or more, and had been attended by a physician, one Dr. Ludwig Mancusi-Ungaro, Dr. Wil-

liam H. McKenzie, and Dr. Clarence Rostow, and had been under the care of physicians within two years, namely Dr. Ludwig Mancusi-Ungaro, Dr. William H. McKenzie, and Dr. Clarence Rostow.

2. Said policy of insurance was issued upon a certain application in writing signed by the said Luciano Guarraia, Part A thereof being dated September 24, 1914, and Part B thereof being dated October 4, 1914, wherein the said Luciana Guarraia warranted as true the statements contained in said application, which said warranties were false in fact as follows:

a. That he had never had bronchitis.

b. That he had never had asthma.

c. That he had never had consumption.

d. That he had never had a disease of the lungs.

e. That he had never had a hemorrhage.

f. That he had never had an habitual cough.

g. That he had never been attended by a physician.

h. That he had not been under the care of a physician within two years.

Whereas in fact he had had said diseases, one or more, and had been attended by a physician, namely Dr. Ludwig Mancusi-Ungaro, Dr. William H. McKenzie, and Dr. Clarence Rostow, and had been under the care of a physician within two years, namely Dr. Ludwig Mancusi-Ungaro, Dr. William H. McKenzie, and Dr. Clarence Rostow.

3. There is a former suit pending on account of the same policy of insurance as is mentioned in the complaint herein; said suit being between the same plaintiff and the same defendant, and pending in the Union County Circuit Court.

McCARTER & ENGLISH,

Attorneys of Defendant.

Complaint No. 2.

Filed October 20, 1915.

ELIZABETH DISTRICT COURT.

GIOVANNINA GUARRAIA, *Plaintiff,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY. *Defendant.*	*Action at Law.* *Complaint No. 2.*

Complaint in Suit No. 2 is identical with that in Suit No. 1, except policy is dated November 25, 1914, and is numbered 1,926,894-C.

Specification of Defences.
Suit No. 2.

Filed October 28, 1915.

ELIZABETH DISTRICT COURT.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract.* *Suit No. 2.*

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The following is a written specification of the defences intended to be made in the above entitled cause.

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g. That he had never been attended by a physician.

h. That he had never been under the care of any physician within two years.

Whereas in fact he had had the said diseases above specified, one or more, and had been attended by a physician, one Dr. Ludwig Mancusi-Ungaro, Dr. William H. McKenzie, and Dr. Clarence Rostow, and had

been under the care of physicians within two years, namely Dr. Ludwig Mancusi-Ungaro and Dr. Clarence Rostow, and Dr. William H. McKenzie.

2. Said policy of insurance was issued upon a certain application in writing signed by the said Luciano Guarraia, Part A thereof being dated November 11th, 1914, and Part B thereof being dated November 22nd, 1914, wherein the said Luciano Guarraia warranted as true the statements contained in said application, which said warranties were false in fact as follows:

a. That he had never had bronchitis.

b. That he had never had asthma.

c. That he had never had consumption.

d. That he had never had a disease of the lungs.

e. That he had never had a hemorrhage.

f. That he had never had an habitual cough.

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Whereas in fact he had had said diseases, one or more, and had been attended by a physician, namely, Dr. Ludwig Mancusi-Ungaro, Dr. William H. McKenzie, and Dr. Clarence Rostow, and had been under the care of a physician within two years, namely Dr. Ludwig Mancusi-Ungaro and Dr. Clarence Rostow, and Dr. William H. McKenzie.

3. There is a former suit pending on account of the same policy of insurance as is mentioned in the complaint herein; said suit being between the same plaintiff and the same defendant, and pending in the Union County Circuit Court.

McCARTER & ENGLISH,
Attorneys of Defendant.

ELIZABETH DISTRICT COURT.

GIOVANNIA GUARRAIA,
Plaintiff,
vs.
METROPOLITAN LIFE INSURANCE COMPANY,
Defendant.

Testimony.
Two Causes.

Transcript of testimony taken in the above entitled causes before Hon. Abe J. Davis, Judge and a Jury on October 28, 1915, at Elizabeth, New Jersey, at 11.30 A. M.

APPEARANCES:

John J. Stamler, Esq., for the plaintiff.

Conover English, Esq., for the defendant.

Mr. Stamler. I offer in evidence the policy of the Metropolitan Life Insurance Company, No. 1906765-C, dated the 5th day of October, 1914, for the sum of $500.00 on the life of Luciana Guarraia and the beneficiary under the policy is Giovannia Guarraia, wife of the insured, the plaintiff in this suit, and ask that it be marked Exhibit 1.

Mr. English. I suppose there goes with that—

Mr. Stamler. Everything to it.

Mr. English. There is annexed to that the copy of the application. I have the original application here and if it is conceded the original application was signed by the insured, as I understand it was, I make no objection.

Mr. Stamler. I am going to offer it in evidence.

Mr. English. Then I object until the policy is proven. It is an incomplete paper as it now is without that proof. I object until the application which accompanies the policy is made a part of it.

Mr. Stamler. I will call Mr. English.

CONOVER ENGLISH, a witness being duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Stamler.

Q Mr. English, you are the attorney of the Metropolitan Life Insurance Company? A Well, I am a member of the firm of attorneys that represents the defendant.

Q I show you a paper and ask you what it is? A I have never seen that before excepting it was an exhibit in the previous trial of the case.

Q I ask you what that paper is? A I haven't any personal knowledge at all. It looks like a policy of insurance, but I have never seen the signature to it, and I never saw this original until in a previous trial of this same case in the Union County Circuit Court.

Q In that case, the paper was in evidence? A I forget whether it was marked in evidence. Yes, I think it was marked in evidence.

Q It went in evidence as what? A I assume that it went in evidence for what it purported to show itself to be.

Q What is it? A It was offered as a policy of insurance.

Q Of what company? A Of the Metropolitan Life Insurance Company.

Q Are you acquainted with the signature to this policy? A I am not.

Q That is all.

Mr. English. I am willing to admit it if the application goes with it.

The Court. I understand counsel is willing that the application go with the policy.

Mr. English. I produce here the original application which accompanied that policy.

Mr. Stamler. I am perfectly agreeable to have it go in. I will put them together as one exhibit.

The Court. The original application and the policy No. 1906765-C, dated October 5, 1914, will be marked Exhibit P. 1.

Paper received in evidence, marked Exhibit P. 1.

Mr. Stamler. I offer in evidence policy issued by the defendant company No. 1926894-C, dated November 25, 1914, to the same insured and the same beneficiary, and with the original application thereto attached, and ask that it be marked Exhibit P. 2.

Paper above referred to received in evidence and marked Exhibit P. 2.

Mr. Stamler. I offer in evidence a certified copy of the death certificate of the insured dated Sept. 16, 1915.

The Court. Any objection?

Mr. English. No.

Paper above referred to received in evidence and marked Exhibit P. 3.

Mr. Stamler. I offer in evidence a letter dated April 1, 1915, addressed to Thomas F. Huston, relative to the two policies in question from the defendant company.

Mr. English. I have no objection.

Paper above referred to received in evidence and marked Exhibit P. 4.

Mr. Stamler. The certificate of death, marked Exhibit P. 3, is dated Sept. 16, 1915, showing the death of the insured on the second day of January, 1915.

PLAINTIFF RESTS.

Mr. English. I move for a non-suit, because there is no proof of death in the case, and on the further ground that it appears, from the plaintiff's own proof, namely, the letter which he read, that the policy was induced by the misrepresentations of the insured.

MOTION DENIED.

Mr. English. Your Honor will note my exception?

The Court. Yes.

Whereupon the defendant, by his counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

CLARENCE ROSTOW, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q Doctor, you are a physician? A Yes, sir.

Q And where is your office? A 655 High street, Newark, New Jersey.

Q How long have you been a physician? A Seventeen years.

Q Did you know Lucianna Guarraia in his lifetime? A Yes, sir.

Q Do you know the family? A Yes, sir.

Q Do you know the plaintiff in this case, Giovannia Guarraia? or whatever her name is, the lady sitting there? (indicating lady sitting in court room). A Yes, sir.

Q And the young man who sits beside her, you know him? A Yes.

Q He is her son? A I think so.

Q Were this family patients of yours? A They were not patients of mine until I was called in the first time there.

Q When you were called to attend? A Yes.

Q Were you ever called to attend the father, Luciannia Guarraia? A Yes, sir.

Q When was it you were first called to attend him? A If I recall right it was in the middle of May, 1914.

Q And from what did you find him suffering when you got there? A He suffered with a hemorrhage of the lungs.

Q Did you treat him at that time? A Yes, sir.

Q For how long did you continue to treat him? A I treated him for about four or five days that week and then I saw him again in November.

Q Just confine yourself to May for the moment. You say he had hemorrhage of the lungs? A Yes.

Q How did you know that? A From the symptoms of bleeding.

Q Was he bleeding when you got there? A Yes.

Q From the mouth? A From the mouth.

Q Did you make any tests or anything to ascertain where the blood came from? A I did.

Q What did you do? A I listened to his chest and I could hear the oscillation and knew from that there was bleeding going on in the lungs and the blood that came looked like blood from the lungs.

Q Bright? A It looked bright with air.

Q What else, if anything, did you find to confirm your diagnosis that the blood coming from his mouth came from his lungs? A I had an examination of the sputum made.

Q Anything else? A And I found the sputum—

Mr. Stamler. I object to what you found.

Q You had an examination made, and did you do anything else? A By the usual course of examination of the chest I found that the bleeding came from the lungs.

Q Did you make a record at the time or times you saw this man? A Yes.

Q Have you got it with you? A Yes.

Q Produce it please.

(Record produced.)

Q Where did he live? A 54 Fairview avenue.

Q Newark? A Newark.

Q About how old a man was he? A A man around fifty-five or sixty, I guess.

Q You produce here a card. Is that in your handwriting? (showing witness card). A Yes, sir.

Q Just read the top. A The name is Charles Guarraia, fifty-seven years old, 54 Fairview avenue.

Q Does it give a date? A May 16, 1914.

Q Does it give the complaint for which you attended him? A It says here hemophthysis.

Q In plain language what is hemophthysis? A Bleeding from the lungs.

Q What kind of a disease does that indicate? A It may indicate different conditions.

Q What did it indicate in his case? A I had it down here as tuberculosis.

Q Did you make a note on your card? A Yes.

Q That was your diagnosis? A Yes.

Q Tuberculosis? A Yes.

Q I see some reference here to blood pressure? A I examined his blood pressure to see whether there was anything wrong with his heart. I have here a record, it says, systolic 25 and disastolic 95.

Q In this case what did that indicate with reference to the source of the blood which you found him giving out of his mouth? A I thought a pressure of that kind indicated a very good blood pressure in a man of his age, not too high or too low.

Q Is it possible to bleed from the heart when bleeding from the mouth? A Yes.

Q Would a blood pressure of that kind, would that come from the heart? A That would be hard to say.

Q What was your diagnosis? A My diagnosis was bleeding from the lungs.

Mr. English. I will offer in evidence this card.

Mr. Stamler. Before you offer it I would like to have the opportunity to cross examine.

Cross examination by Mr. Stamler.

Q You prepared this card when? A It was when I treated the patient; the records were made right there.

Q You made a statement to the Insurance Company in this case after this man's death, is that so? A I believe so.

Q It was in writing, sir? A Yes, sir.

Q Did you say anything about visiting that man in May, 1914? A I don't recall it.

Q Whatever you said in that statement was true, is that right? A As much as I could recall at that time, and I wrote a certificate.

Q And you made an affidavit to that, you swore to that? A I don't think I swore to that.

Q You don't think so? A It was simply a certificate.

Q Would it make any difference, if you didn't swear to it? A No, sir.

Q Didn't you, in that certificate, state the first time you saw this man was on November first, 1914? A The first time?

Q Yes? A I don't think I stated the first time. I stated I saw him on November first. It was, at the time when I wrote the certificate, as much as I could recall. I couldn't look up my card at that time. If I recall right I believe the people reminded me I saw him at that time and I didn't look my card up.

Q Did you treat this man or treat some child in that house? A I treated that man and I treated some other children; not his children but somebody else's child.

Q Did you prescribe for this man at any time? A Yes.

Q Will your card say what you prescribed? A It doesn't say anything here.

Mr. English. I offer in evidence this card.

Mr. Stamler. I object on the ground that it can only be used for the purpose of refreshing his recollection.

Re-direct examination by Mr. English.

Q This was made up at the time—the date given? A Yes, sir.

Mr. English. I think it is proper.

The Court. I understand the rule to be that a man may use memoranda that he made at the time to refresh his memory, but I don't understand that it goes in evidence. His verbal testimony is all that goes in evidence and if he needs to refresh his memory with anything he made at the time he may do it.

Mr. English. I will withhold it for the moment.

Q You say you prescribed for this man? A Yes, sir.

Q I show you here a prescription apparently written on the letter paper, or whatever you doctors call it, bearing your name at the top, and initialed C. R., is that in your handwriting (handing paper to witness)? A Yes, sir.

Q Is that a prescription you wrote? A Yes.

Q For this man? A Yes.

Q And that was designed to meet what kind of complaint? A It was designed—

Mr. Stamler. I object to it.

The Court. To the question?

Mr. Stamler. And the use of that paper unless they can connect it with the deceased.

The Court. I will allow the question on the same theory as the card, that this witness may

testify what he prescribed for the decedent at that time, and if he doesn't remember, without using his prescription blank, what he prescribed, he may use that to refresh his recollection.

Q (Question repeated as follows): And that was designed to meet what kind of complaint? A In order to put him in condition that he shouldn't bleed so much.

Q To check his bleeding, is that it? A To check his bleeding.

Mr. English. I ask that this paper be marked for identification.

Mr. Stamler. I still object to those questions and answers.

The Court. I will allow the questions and answers to stand.

Mr. Stamler. Exception.

Whereupon the plaintiff, by her counsel, files a bill of exceptions, which is hereby sealed and allowed accordingly.

Judge.

Paper above referred to marked Exhibit D. 1 for identification.

Q I show you another prescription, written on the same kind of paper, initialed C. R., is that your prescription? A Yes, sir.

Q And for whom was that prescribed? A I don't know, there is no name on that.

Q What kind of complaint was that designed to meet? A As a rule a prescription like that is to act upon his bowels, to have his bowels moved.

Paper above referred to marked Exhibit D. 2 for identification.

Q I show you another prescription of the same character, also initialed C. R., is that in your writing? A Yes.

Q For whom was that prescribed? A I don't know.

Q What kind of complaint is that designed to meet? A That is to quiet a cough.

Paper above referred to marked Exhibit D. 3, for identification.

Q I show you still a fourth one, the printed part being torn off, apparently a blank piece of paper. Is that your handwriting? A Yes, sir.

Q Do you know for whom that was prescribed? A I don't know.

Q What kind of a complaint was that designed to meet? A This is a tonic.

Paper above referred to marked Exhibit D. 4 for identification.

Q Now, you made some reference in your testimony to the fact that you had sent a specimen of his sputum to be examined, where did you send it? A The Board of Health.

Q Of what city? A Newark.

Q Is there any form or blank used for that purpose? A Yes, sir.

Q I show you a paper blank, headed "To the Board of Health, Bacteriology Laboratory," is there any of that in your handwriting? A All the part in ink is mine.

Q And signed by you? A Yes.

Q Giving your address? A Yes.

Q What was with that paper after you filled it out? A That was in a wooden box and the wooden box contained the specimens of sputum of the patient and that is to go to one of the health stations and is supposed to be sent to the Board of Health and they examined it.

Q Were the box with the sputum and that paper sent by you to the Board of Health in that matter? A Yes.

Q And that was the original paper you sent along with it? (Indicating paper.) A Yes, in my handwriting.

Q Don't tell us what it was, but did you afterwards get a report from the Board of Health? A Yes.

Q Did you keep that report or not? A I didn't keep the original, but I have made a report on my card.

Q On this card which you produced here? A I have another card.

Mr. English. Before we get that far, let me have marked for identification the paper sent the Board of Health.

Paper above referred to marked Exhibit D. 5 for identification.

Q What other card do you produce now? A I have a card where they keep a record of all sputum examined by the Board of Health.

Q I see you have that headed "phtysis?" A Yes, sir.

Q Does the name of this insured, Lucianna Guarraia, appear there? A Yes, sir.

Re-cross examination by Mr. Stamler.

Q Before you use that paper, I would like to know when you made it up? A It was made up at the time when I got the report from them about this case.

Q This whole card? A Various reports are here of the different cases.

Q That is a continuous card? A It is a continuous card.

Re-direct examination by Mr. English.

Q Just read the entry which you have with reference to this man? A 5/24/14.

Q Fifth month, twenty-fourth day, nineteen fourteen? A Yes, sir.

Q May 24, 1914? A "Mr. Guarraia, fifty-seven years old, fifty-four Fairview Avenue, phtysis."

Q You made that entry after you got the report from the Board of Health? A Yes, sir.

Mr. English. I think I would like to have marked for identification the two cards which the witness produced.

Papers above referred to marked Exhibits D. 6 and D. 7 for identification.

Q This seems to be your record of phthisis cases. What is phthisis to the ordinary lay mind? A Why, consumption.

Q When you were attending this man in May, 1914, did you tell him what was the matter with him?

Mr. Stamler. I object to it.

The Court. What is the ground?

Mr. Stamler. The declarations between himself and the patient are not admissible unless they form part of the *res gestate* in this case.

The Court. I will allow the question on the theory that while it does not prove that at the time the statement was made the decedent had knowledge of his ailment, it would tend toward that by showing that six months previous to that time he received such information from the physician who examined him.

Mr. Stamler. I object on another ground that the conversation between patient and physician is confidential and a privilege of the patient and not that of the physician to disclose, and I object because he has no right to testify to it.

The Court. I will overrule the objection and allow an exception.

Whereupon the plaintiff, by her counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Question repeated as follows: When you were attending this man in May, 1914, did you tell him what was the matter with him?

The Witness. I would like, your honor, to be set perfectly straight on that, to know whether I am supposed to answer questions of this kind or not?

The Court. The question you are now asked is, did you tell him what was the matter with him? You have not been asked what you told him.

The Witness. Shall I answer this question?

The Court. I have overruled the objection of counsel to the question.

A I didn't speak to the man directly, because the man was talking Italian. I spoke to the family.

Q Was it apparently interpreted in your presence? A It looked that way to me.

Q What was it you told the family to be interpreted to the insured?

Mr. Stamler. I object.

The Court. I will allow the objection.

Q Do you know who acted as interpreter? A There were some members of the family there, a lot of people in the place, and I cannot recall the persons who were there—the immediate members of the family.

Q Do you remember whether the plaintiff, Mrs. Guarraia was there? A She doesn't speak English either.

Q I didn't ask you that, I want to know whether she was there? A I believe so.

Q And the son, Peter, was he there? A Yes.

Q Did Peter act as interpreter? A Either Peter or his sister, I don't recall.

Q Was this man in bed or up and around when you got there? A The first time?

Q Yes. A I found him in bed.

Q How long, to your knowledge, did he stay in bed?

The Court. Counsel says, "the first time." I take it you are now conducting your examination as to May?

Q When you say "the first time" you refer to your visit on May 16, 1914? A Yes.

Q How long did he continue in bed after May 16, 1914? A I had a slip here that stated it with notes that I made, didn't I?

Q Here it is (handing paper to witness). A It says May 16, 17, 18, 23, 26.

Q Was he in bed all the time? A I believe he was in bed the first two or three days and then he was in the room.

Q Around the house? A Around the house.

Q How many dates does your record show you called on him? A Five calls at his house at that time.

Q Did he afterwards come to your office? A Then I didn't see the man any more until on the first of November.

Q What year? A 1914.

Q He came to you then? A Yes, sir.

Q Or you went to him, which? A The record says he came to my office.

Q What was the matter with him then? A It was an entirely different thing then.

Q What was it? A He had a little skin rash on the body.

Q But he came and consulted you at your office about it? A About the skin rash?

Q Yes. A Yes.

Re-cross examination by Mr.

Q Doctor, I show you a couple of photographs and ask you whether you know who the persons are in those photographs (handing photographs to wit-

ness). A I think that is the Guarraia couple, Mr. Guarraia and his wife.

Q Do you know that? A Yes, sir, as much as they told me about it, I recognize the man.

Q You recognize the man? A Yes, sir.

Q Did he look any different than he looks on those photographs when you treated him in May, 1914? A About like that.

Q Like that? A About, I don't know whether it was a few years younger. He looks a little bit younger in this picture than what he was then.

Q He looked to be a stocky man? A A middle sized man.

Q Heavy build? A No, medium.

Q Medium build? A Yes.

Q What height would you say he was? A He must have been a man about five feet four or five, something like that.

Q And his weight was around 150? A 140, around there.

Q The size and height of a person have some indications as to health? A Some.

Q A man being about five foot four, weighing about 140 pounds is one of the elements you physicians take into account as to his health? A Yes, sir.

Q That in itself would not show a man was sick, would it? A It wouldn't show either way.

Q Wouldn't it show he was a healthy man, weighing 140 pounds? A No, that would be no indication whatsoever.

Q When you consider that the man was suffering from consumption, wouldn't the weight enter into the matter? A No, sir.

Q It seems, doctor, you are a very careful person, you made memorandas of all your calls? A I do with all my patients.

Q And have you got a record as to his pulse when you saw him? A No, sir.

Q Did you make a record of everything you did that day in order to determine the health of that man? A I examined him the way I usually examine patients of that kind and only make a record of anything that is out of the ordinary, but this was a case that happens often and I didn't see any necessity to write down the pulse.

Q Or temperature, such things? A I satisfied myself at the time I did it and I wrote my prescription accordingly.

Q You recognize, you say, one prescription in this case? A Several.

Q But you don't know for whom they were all written? A I couldn't say that.

Q You couldn't say a single one? A As much as I recall I wrote those prescriptions for that man.

Q But you are not positive of that, it might have been for some other person? A I don't know.

Q You have a very large practice, haven't you, doctor? A Fairly large.

Q You make a number of calls a day? A Yes, sir.

Q And if I were to show you ten prescriptions, you couldn't pick out which was for one or which was for the other? A If you told me the instance of the case I might recall better. You don't see patients bleeding from the lungs every day.

Q You don't see that every day? A No, sir.

Q You saw this case and you are sure this man was bleeding from the lungs? A That is what I was convinced of at the time.

Q Did you actually see blood flowing? A I did see it, yes, he coughed up.

Q You are sure of that, doctor? A I am.

Q Did you know this man's occupation? A I think he was a laboring man, that is all.

Q Laboring or mason? A A laboring man.

Q Do you know whether he worked between May and November? A Between May and November?

Q Of 1914? A I know he didn't work for quite a while after I saw him.

Q How do you know that, doctor? A In fact, I ordered him not to.

Q You ordered him not to work, that is, during the time you treated him? A Yes.

Q Three or four days in the month of May? A About six days.

Q And you didn't see this man until the first of November, 1914, after that? A No, sir.

Q And you never treated him afterward? A No.

Q Or prior to that time? A No, sir.

Q In speaking to him you always spoke through an interpreter? A Yes, sir.

Q You say, doctor, you took his blood pressure, or made a test of his blood pressure, is that it? A Yes, sir.

Q Did I understand you to say you found it all right? A Yes, sir.

Q You found it normal? A Yes, sir.

Q All on that day, on the 26th of May? A That was taken subsequently, when he came to the office.

Q He was fast improving then? A He was getting along nicely.

Q I show you a photograph and ask you whether you recognize that photograph (handing photograph to witness). A I believe it looks a little bit differen from the original handwriting, but I think it is the certificate.

Q It is your certificate? A It is my writing.

Q It is your writing? A Yes.

Mr. Stamler. Have you got the original of that, Mr. English, this doctor's statement to you?

Mr. English. Yes.

(Certificate handed to counsel.)

Q This is the paper you certified to the company? A Yes, sir.

Mr. Stamler. I ask that that be marked for identification.

Paper above referred to marked Exhibit P. 5 for identification.

Mr. Stamler. And I offer the photograph in evidence.

Photograph above referred to received in evidence and marked Exhibit P. 6.

Re-direct examination by Mr. English.

Q Doctor, were you called to attend him at the time of his death? A No, sir.

Q I didn't mean to say were you there when he died, but were you sent for? A I don't know whether I was or not.

Q Were you there at all? A As much as I have records of, the last time I saw him was on November 1st.

Q On this paper which you have identified you have as the cause of death, pulmonary hemorrhage? A Yes.

Q What was your knowledge about that? A I treated that man from the 16th of May on for that condition.

Q And your conclusion was that he died of that? A That is my presumption, that he died from that.

Q Did you hear he had a hemorrhage just before his death?

Mr. Stamler. I object to what he heard.

The Court. Question overruled.

Q Did you ever talk with the plaintiff after his death, this lady? A They came to my office just for the very purpose of making that certificate.

Q Who came? A I don't recall whether it was the brother or the sister, I think it was the sister who came there.

Q Did they tell you anything about the details of their father's death?

Mr. Stamler. I object.

The Court. I will allow the question as to whether they did.

Q Answer yes or no? A They came to ask me for the death certificate, to sign.

Q In the conversation with you did they tell you anything about the details of their father's death? A They did, some, in a general way.

Q No, did they tell you anything which led you to conclude, with your previous knowledge of his case, that he died with a pulmonary hemorrhage?

Mr. Stamler. I object.

The Court. Question overruled.

Mr. English. Exception.

Whereupon the defendant by its counsel files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Q They came to get this paper to submit to the company? A Yes, sir.

Mr. English. I say, "this paper." I mean Exhibit P. 5 for identification.

Re-cross examination by Mr.

Q Was there a representative of the Metropolitan Life Insurance Company with them? A No, the folks came to me and asked me to give them that certificate, because they wanted to send it into the company.

Q Was there a man from the Metropolitan Life Insurance Company with them at that time? A I don't think so, I don't recall that.

SAMUEL LEVIGNE, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q Mr. Levigne, where do you live? A 461 Hunterdon street.

Q Newark? A Newark.

Q What is your business? A Druggist.

Q How long have you been a druggist? A Since 1905.

Q Have you got a drug store? A Yes.

Q Where is it? A 461 Hunterdon street, Newark.

Q Did you know Mr. Guarraia in his lifetime? A I know him from coming into the store.

Q He did come into your store? A Yes, once in a while.

Q Do you know his wife? A No.

Q Do you recognize her sitting here in court (indicating)? A I don't know.

Q Do you know her son, Peter? A Yes.

Q Peter had been in the store? A Yes.

Q Were any prescriptions ever brought to your store for medicine for Mr. Guarraia, the insured? A Yes, sir.

Q I show you—

Mr. Stamler. I probably am late in making the objection, but I ask that the question and answer be stricken out on the grounds that the question and answer do not connect this insured.

The Court. Which question?

Mr. Stamler. The last question.

(Question and answer repeated.)

The Court. There wasn't any disposition to hurry the answer and under the rule of evidence, the objection must be made before the answer goes in. I can't strike it out.

Mr. Stamler. There is still another objection to it, because the answer does not connect the insured with it. The question says, "Mr. Guarraia."

The Court. (Question repeated.) I will allow the question.

Q I show you a paper which has been marked D. 1 for identification, which Doctor Rostow has identified as a prescription in his handwriting. Was that a prescription which was filled at your drug store? A Yes, sir.

Q And for whom was the medicine made up?

Mr. Stamler. I object unless he knows of his own knowledge.

Q Do you know? A Yes.

Q Whom was it for? A For Mr. Guarraia.

Q I show you a paper marked D. 2 for identification which Doctor Rostow has identified. Was that a prescription filled at your store? A Yes.

Q For whom was it filled? A For the same man.

Q This Mr. Guarraia, the insured? A Yes.

Q Before I go further, let me call your attention to Exhibit D. 1 for identification, what was the date when that prescription was turned in? A May 16, 1914.

Q What was the date when Exhibit D. 2 was turned in? A May 18, 1914.

Q I show you Exhibit D. 3 for identification, another prescription of Doctor Rostow's; was that filled by you? A Yes, sir.

Q For whom? A For the same party.

Q I see the name "Guarraia," written there. Is that your handwriting? A Yes, it was May 20, 1914.

Q I show you D. 4 for identification. Was that a prescription filled by you? A Yes, sir.

Q And for whom? A For the same party.

Mr. English. Now, I think it is proper to offer these in evidence.

Mr. Stamler. I object until I have an opportunity to cross examine.

The Court. When the offer is made, they had better be offered separately.

Mr. English. I offer in evidence D. 1 for identification, which was the first prescription, written by Dr. Rostow and now proven by this witness to be for the insured.

Mr. Stamler. I object until I have an opportunity to cross examine.

The Court. You may cross examine.

Cross examination by Mr. Stamler.

Q Who brought, Mr. Levigne, this prescription to your store? A It was either this gentleman, Pete, or his sister. Either one of them would bring the prescriptions to me.

Q You don't know of your own knowledge for whom this prescription was? A Yes, I asked them.

Q Whom did you ask? A The party who brought it into the store.

Q The person who brought it into the store. A Exactly.

Q Was that the person who died? A I don't understand.

Q Was that the person who died who brought the prescription to your store? A No, I told you it was either Peter or his sister that brought the prescriptions to my store.

Q The person who died never brought any of these prescriptions to your place? A No.

Q Did you know him at all? A Yes.

Q But he never brought any prescriptions to your place? A No.

Mr. Stamler. I object to that prescription going in evidence.

The Court. I will allow D. 1 to go in evidence.

Mr. Stamler.

Whereupon the plaintiff by her counsel files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Prescription above referred to received in evidence and marked Exhibit D. 1.

Mr. English. I offer in evidence Exhibit D. 2 for identification.

Mr. Stamler. I object.

The Court. I overrule the offer.

Mr. English. Exception.

Whereupon the defendant by its counsel files a bill of exception which is hereby allowed and sealed accordingly.

Judge.

The Court. That is on the ground that none of the other prescriptions offered for identification was testified to by the physician as being prescriptions given to the decedent.

Mr. English. I offer in evidence Exhibit D. 3 for identification and also Exhibit D. 4 for identification.

The Court. I overrule those prescriptions.

Mr. English. Exception.

Whereupon the defendant, by its counsel files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Re-direct examination by Mr. English.

Q How long have you known Mr. Guarraia, the insured? A Well, I can't say how long I have known him. I have known him for the time he was living in the neighborhood.

Q Where did he live, Fairview avenue? A Yes, 54 Fairview avenue.

Q And you remember his family living there, do you? A Yes.

Q Was he ever in your drug store, the insured? A Yes, he was in my place.

Q Did he ever ask you anything about his condition of health, or anything that could be done for him? A No.

Q Did he give any evidence in your presence of being sick?

Mr. Stamler. I object to that.

Mr. English. That is rather a vague question.

Q Did you ever hear him cough? A No.

Mr. Stamler. I object to that.

The Court. I will allow it.

Mr. Stamler. It is leading.

Mr. English. He says no.

Mr. Stamler. If your honor please, we might as well know where we are going to stand on the proofs in the case. The objection might as well be raised, rather than to have the plaintiff put his proof in before the jury and then have the court instruct the jury on the evidence in the case, and I therefore, move, your honor, to strike out the testimony of the last two witnesses on the ground that even if what they say were true, that wouldn't constitute a false representation under the policy, because the deceased didn't make any representation as to his state of health, according to the application of insurance when the insurance was written.

The Court. At this time I will reserve decision on that motion, because I can't tell what the proof is going to be in this case at this time.

Mr. Stamler. Here is evidence being put in.

The Court. The same thing happens in almost every case. You can only make certain proof at one time. You can't put it all in at one time, and it may be that the order in which the case is being proven and the witnesses sworn do not suit counsel for the plaintiff, but it may serve the interests of the defendant to swear them in this order. I have nothing to do with that because the whole case can't go in at one time, and it looks now as though it might be relevant testimony. If it isn't, at the proper time it will be stricken out.

HAROLD A. TARBELL, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q Mr. Tarbell, you live in Newark? A Yes, sir.

Q You are a physician? A Yes.

Q How long have you been a physician? A Fifteen years.

Q Have you any connection with the Newark City Hospital? A With the Board of Health, not the hospital.

Q With the Newark Board of Health? A Yes.

Q What is your connection with the Board of Health? A Assistant City Bacteriologist.

Q To a layman, what does bacteriologist mean? A A study of bacteria and microbes.

Q In connection with the development of disease? A Yes.

The Witness. Am I here as a witness or as an expert?

The Court. I don't know, I am sure. You will have to ask that of counsel.

The Witness. Then I will ask counsel.

Mr. English. Well, doctor, you can answer the questions as they are asked. I suppose you are an expert so far as expert knowledge goes. I suppose any physician is called as an expert in that sense.

Q Is it part of your duties to make an analysis of sputum which is submitted by various local physicians in Newark? A Yes.

Q Where are those analyses made? A In the bacteriological laboratory in the City Hospital.

Q And you are in the habit of doing that? A Yes.

Q For how long have you been doing that? A Since 1904.

Q In what form do those applications come to the laboratory? A A small wooden box is sent to the laboratory enclosed in a tin box, and in the tin box, with the wooden box, is a paper filled out, presumably by the physician who sends in the specimen of sputum.

Q When that is received at the laboratory, what is done with it? A It is given a number.

Q What next? A The number is given on the box and also that same number is put on the corner of the paper and the date stamped with a rubber stamp, as a rule.

Q Then what? A And then the sputum is taken out of the box and some of the material is placed on a glass slide.

Q And it is analyzed? A Yes.

Q And from that are you able to determine whether or not the sputum contains tubercular bacilli? A Yes.

Q In case it does, what kind of an entry do you make? A We always write on the corner of the paper, if we find the germs, "T. B." which means it contains tubercular bacilli, and we write underneath whether it is a moderate number or in enormous num-

bers, and the character of the bacteria, some notation.

Q And you write that on the form the physician sends in? A Yes.

Q I show you a paper, D. 5 for identification, already identified by Doctor Rostow as the paper he sent to the laboratory. Does that contain any writing in your handwriting? A Yes, this in the corner.

Q The pencil notation in the corner? A Yes, sir.

Q And that indicates what, with reference to the analysis of this sputum—that it was made by you? A It indicates I did it.

Q Did you record there what you found? A I did.

Q Just read what you found? A "T. B."

Q What does that mean? A Turbercular bacilli, not numerous, all are stout and not beaded.

Q He had present in his system tubercular bacilli, is that what that means? A That means in that specimen of sputum that I examined I found it to be so, I don't know what he had.

Q Did your laboratory report the findings to Dr. Rostow? A I think we did.

Q That is the usual course? A Yes.

Mr. English. I now offer in evidence D. 5 for identification, identified by both Dr. Rostow and Dr. Tarbell.

Mr. Stamler. No objection.

Paper above referred to received in evidence and marked Exhibit D. 5.

Cross examination by Mr. Stamler.

Q Doctor, there are very few people who haven't tubercular germs in them, isn't that so? A I don't think I could answer that question. I think I would have to qualify as an expert to form any opinion on that.

Q You are, as a matter of fact, an expert in that, isn't that so? A I wouldn't like to say so.

Q Then I will try to qualify you as an expert. You are a doctor, are you? A I am.

Q When did you graduate?

Mr. English. Is this cross examination of the direct?

Mr. Stamler. It is admitted he is an expert in this case, practically.

The Court. While it is true that paper went in evidence without any objection, I understand that paper primarily was used, or it ought to have been, for the purpose of refreshing the memory of the witness, so that proof could be made in the sputum submitted by Dr. Rostow to this witness, that there were tubercular germs in it.

Q Isn't it a fact that every person, more or less, has tubercular germs in them? A I would say no.

Q How about the average person? A No.

Q Is a man necessarily sick who has tubercular germs in him? A Not necessarily, that is as to the evidence, as seen by a person's physical evidence, or even the thermometer sometimes will not tell us that a man has tuberculosis, although he may have it.

Q He may have it and may not. A He may have it and not show any symptoms early in the disease.

Q The weight of a person and his height have something to do with it? A Yes.

Q Say a man five foot four, weighing 140 pounds, and examining his sputum as you did on the 23rd day of May, 1914, would that indicate to you from that examination that a man was suffering from consumption? A If we find tubercular germs in the sputum it is positive evidence a man has pulmonary tuberculosis.

Q That is, it is one of the symptoms. Is that curable then if you find such facts? A Many men have been positively cured of tuberculosis even though they had germs in their sputum.

Re-direct examination by Mr. English.

Q Suppose in addition to the presence of tubercular bacilli, that you knew in a given case there was a hemorrhage of the lungs, what would be your opinion as to what that man had? A It would be just the same as it was before.

Q Namely, what? A Tuberculosis.

LUDWIG MANCUSI-UNGARO, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q Mr. Ungaro, you live in Newark? A Yes, sir.

Q And you are a physician? A Yes, sir.

Q And have been how long? A Eight years.

Mr. Stamler. I will admit his qualifications.

Q Did you know Mr. Guarraia, the insured, in his lifetime? A I knew him.

Q How long ago did you know him? A I knew him as far back as 1908.

Q Did you ever attend him professionally? A Yes, sir.

Q Where, at your office or his house? A At his house.

Q About when did you attend him professionally? A Spring of 1908.

Q For how long? A About two weeks.

Q You went to his house for that purpose? A Yes, sir.

Q Where did he live then? A Fairview avenue, 64, I think.

Q Do you know his wife, this woman sitting here (indicating)? A Yes.

Q You saw her at the house when you went there? A Yes.

Q Do you know his son, Peter? A I have seen him a couple of times.

Q What was Mr. Guarraia, the insured, suffering from at the time you attended him in the spring of 1908?

Mr. Stamler. I object. This was six years prior to the writing of the policy.

The Court. I will allow the testimony.

A He had chronic bronchitis.

Q And you treated him for how long? A I served him two or three times in three weeks, that is all.

Q Did you tell him what was the matter with him? A Yes, sir.

Q Did you tell him in your language—you speak Italian? A Yes.

Q You are a native born Italian? A Yes.

Q You told him in Italian, what? A That he had chronic bronchitis, which it would take a long time to cure.

Q Is there any connection between chronic bronchtis and tuberculosis? A Tuberculosis starts as bronchitis, usually.

Q Suppose you were told a man had chronic bronchtis and then had hemorrhage of the lungs and developed tubercular bacilli, would you think there was any connection between the two? A I think the bronchtis would start it, that is all.

Q Did you ever attend him professionally after you finished treating him in 1908? A No, sir, although I saw him many times, I never examined him any more.

Cross examination by Mr. Stamler.

Q Doctor, this man couldn't speak a word of English, could he? A Not that I know of.

Q You treated him some eight or nine years ago? A 1908.

Q Now, doctor, is there any cure for bronchitis? A Sure.

Q It isn't always a sign that a man is going to suffer from consumption because he suffers from bronchitis? A If you take bronchitis without the consequence and without the further history, why, no.

Mr. Stamler. I will ask you to produce the statement of Doctor Ungaro. I have the photograph and we might as well have the original. (Original statement produced.)

Q I show you a paper purporting to be a statement signed by you, is that in your handwriting? A Yes, sir.

Paper above referred to marked Exhibit P. 7 for identification.

JOHN J. MOHRBACKER, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q You are a physician in Newark, Mr. Mohrbacker? A Yes, sir.

Q Did you ever attend Mr. Guarraia, the insured? A No, sir.

Q Were you called in at the time of his death? A Yes, sir.

Q Where? A Fairview avenue.

Q 54 Fairview avenue? A Yes.

Q When you got there was he dead or alive? A Dead.

Q Did you view his remains? A Yes.

Q From the view which you took and from your knowledge as a physician, can you say whether or not he had a hemorrhage just before, shortly before his death? A No, sir.

Q You can't say? A No, sir.

Cross examination by Mr. Stamler.

Q You signed a certificate of death in this case? A No, sir.

Q You filled out a paper, though? A Yes, sir.

Q I show it to you and ask you whether you know what it is? A Yes.

Q This is what you signed (handing paper to witness)? A Yes.

Q That was your opinion at the time? A Yes, sir.

Q And it isn't changed any? A No.

Re-direct examination by Mr. English.

Q You must have based your opinion, then, on what somebody else told you, if you didn't see him when he died? A I based it on the history of what happened and I conferred with Dr. Wismar. We both thought the same.

Q You made up your opinion from the discussion you had with Dr. Wismar and others, not from your personal observations as a physician? A Yes, from all the evidence.

Q The evidence you speak of was what other people told you, is that right? A Not exactly, I mean the appearance of the body and the history.

Q And the history was that other people told you? A Yes.

Q The appearance of the body was what you saw? A Yes, sir.

Q Of course, you can't make a complete diagnosis that way? A No, sir.

DEFENDANT RESTS.

William F. Wismar, in rebuttal, direct, cross, re-direct and re-cross.

REBUTTAL.

WILLIAM F. WISMAR, a witness being duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr.

Q Mr. Wismar, you are a physician practicing in the city of Newark? A Yes, sir.

Q I show you a paper and ask you whether you ever saw that before? A I saw it, yes.

Q That is yours? A Yes, sir.

Q Your handwriting? A Yes, sir.

Mr. Stamler. I am going to offer that.

Mr. English. I object. I don't know on what ground it is offered.

Mr. Stamler. It is demanded from them and produced by them.

The Court. I can't see how the paper can be relevant. I can understand how the physician can use the paper to refresh his memory, but why what he wrote should be evidence, in preference to what he saw, I can't see.

Mr. Stamler. I will withdraw it.

Cross examination by Mr. English.

Q Were you there when this man died? A He was dead when I came.

Re-direct examination by Mr. Stamler.

Q What did you conclude this man died from? A As the paper states, cerebro apoplexy, hemorrhage of the brain, practically.

Q What was the secondary cause of his death? A His age, I don't know of any other cause.

Re-cross examination by Mr. English.

Q What did you form your diagnosis from, doctor? A Well, his general appearance. He seemed a well nourished man.

Q You couldn't think of anything else, so you said cerebro apoplexy? A I refuse to answer that question.

Q I will ask the court to rule on it.

The Court. That is all right.

A I didn't say it for that reason, no.

Q I asked you— A I say I didn't say it for that reason. I didn't make that statement because I couldn't think of anything else.

Q There isn't any external evidence of cerebro apoplexy when a man is dead—did you see any evidences of bleeding? A I did not.

Q When you got there, the man was dead? A Yes.

Q And what killed him, you don't know? A That was my opinion.

Q But you are not prepared to swear he died of that? A Only an autopsy would show that in any case.

Q So I say, you are not prepared to swear he died of that? A I am prepared to say that was my opinion at that time.

Q I understand that perfectly, but your opinion could be mistaken, could it not? A We are all apt to make mistakes.

Q Especially when you diagnose a case after death and without an autopsy, isn't that true? A Yes. No physician would attempt to swear to a case of cerebro hemorrhage.

Q Especially after death? A Yes.

Mr. Stamler. I offer in evidence the exhibits heretofore offered by me for identification for the purpose of contradicting the testimony of the physicians.

The Court. Let us take one at a time. The first is P. 5 for identification.

Mr. English. I have no objection to that.

Mr. Stamler. I don't want to offer that. P. 6 is in evidence. I offer Exhibit P. 7 for identification in evidence, Dr. Ungaro's statement.

Mr. English. No objection.

Paper above referred to received in evidence and marked Exhibit P. 7.

Mr. Stamler. I offer in evidence Exhibit P. 8, for identification.

Mr. English. I object to that. It isn't rebuttal. Besides, the doctor has been here and testified.

The Court. I will allow it to go in, and allow an exception.

Whereupon the defendant, by its counsel, files a bill of exceptions, which is hereby sealed and allowed accordingly.

Judge.

Paper above referred to received in evidence and marked Exhibit P. 8.

Mr. English. I think the plaintiff ought to be required to put in evidence Exhibit P. 5. He called on me to produce it and it was marked for identification and his primary offer was of all papers marked for identification.

Mr. Stamler. I will withdraw my objection and let it go in as an exhibit in the case. I have no objection to its going in, but I won't offer it in evidence.

The Court. You refuse to offer it in evidence?

Mr. Stamler. Yes.

The Court. I cannot compel counsel to offer it in evidence.

ANTONIO V. TISCORNIA, a witness being duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Stamler.

Q What connection have you with the Metropolitan Life Insurance Company? A I am an inspector.

Q How long have you been in their employ? A Twenty-two years.

Q And the main office in that big building at Madison avenue, New York? A Yes.

Q That is the largest building in the world? A I don't know about that.

Q You had in charge the examination of this whole case, did you not? A I did, after the papers were presented as a claim.

Q You are familiar with the applications for insurance in these cases and particularly with Exhibit No. 1 on the part of the plaintiff, that is the application, you saw that? A Yes.

Q Who was the physician that examined this applicant on Exhibit No. 1, what was his nime? A H. F. Widmer.

Q Do you know him? A I know him.

Q Do you know him personally? A Not personally, only in a business way.

Q You know him? A Yes.

Q You speak Italian? A Yes.

Q Does this doctor speak Italian? A I don't know.

Q You don't know whether he does or not? A I don't know.

Q His name is Doctor Widmer? A Yes, W-i-d-m-e-r.

Q And he was the company's physician at the time this policy was applied for? A Yes, sir.

Q I show you Exhibit P. 2 and you are familiar with that policy and application, and I would ask you who the physician was, who examined that man, the deceased, on the second policy? A H. F. Widmer.

Q The same physician? A Yes.
Q Did you interview him? A Who do you mean?
Q Dr. Widmer, relative to this case? A I did, yes.
Q You said you don't know whether he speaks Italian or not? A I do not.

PETER GUARRAIA, a witness being duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Stamler.

Q Do you know Dr. Widmer? A I saw him once.
Q Where? A At my house.
Q Did you speak to him? A He only came and visited my father.
Q He came and visited your father? A Yes.
Q Did you talk to Dr. Widmer? A No, sir.
Q Did you hear what Dr. Widmer said to your father? A No, sir.
Q Did you hear what was said by the doctor?

Mr. English. He said, no, he wasn't there.
The Witness. I was there.
Mr. English. He said he didn't hear.
The Witness. No, sir, I was eating my dinner at that time.

Q Do you know whether Dr. Widmer speaks Italian? A No, sir, I don't know if he speaks Italian or not.
Q Did your father speak any English at all? A No, sir, he couldn't talk English at all.
Q Did your father work? A Yes, sir.
Q During the year 1914? A Yes, sir.
Q At what kind of work? A Mason.
Q Mason work? A Yes, sir.
Q How long was he sick before he died? A He wasn't sick at all before he died.
Q He wasn't sick? A No, sir.

Q Did he work just before that time? A He worked about two weeks before he died. Two weeks before he died he was working.

Q Did he die in bed? A No, sir.

Q Where did he die, home or out on the street? A He died at the house.

Q Were you there? A No, sir. At the time I went upstairs, he wasn't dead then but he was dying.

Q Were you home just prior, though, to the time your father died? A No, sir.

Q You went upstairs, you said? A I was working at the time my father took sick, the last minute.

Q You weren't home at all when your father died? A No, sir.

Q I show you photographs here and ask you whether you know when they were taken? A They were taken about two or three weeks before my father died.

Q Two or three weeks before? A Yes, sir.

Q Who is the man represented in these pictures? A That is my father and mother.

Mr. Stamler. I offer them.

Mr. English. I object to them. They don't rebutt anything, besides, they are not proved as photographs.

The Court. There isn't any proof of them as photographs at all.

Mr. Stamler. I withdraw the offer.

Q I show you Exhibit No. 6, and ask you where that photograph was taken? A The same place as the other one.

Q When? A About two weeks before he died.

Cross examination by Mr. English.

Q Where were you working the day your father died? A 271 18th avenue.

Q Did they send for you? A They sent for me, yes, sir.

Q What time of the day was it? A What day, or what time?

Q What time of the day, morning or afternoon? A In the morning.

Q Who came for you? A My little sister.

Q What did she say? A She said, "Pete, come home, father don't feel very well."

Q Did you go right away? A No, sir, before I went home I telephoned for a doctor.

Q You telephoned for a doctor first? A Yes.

Q What doctor did you telephone for? A Dr. Wismar.

Q Anybody else? A And then I find Dr. Wismar didn't come quick enough for me, and I sent for Dr. Mohrbacker.

Q That was after you got home that you sent for Dr. Mohrbacker? A Yes.

Q Before you went home you sent for Dr. Wismer? A Yes.

Q When you got home he wasn't there? A No, and I telephoned before I went upstairs.

Q As soon as you got in the house and learned he wasn't there, you rushed out and telephoned for Dr. Mohrbacker? A Yes.

Q Did you telephone for Dr. Rostow, too? A No, sir.

Q You hadn't yet seen your father when you sent for Dr. Mohrbacker, is that right? A I saw my father after I sent for Dr. Mohrbacker.

Q After? A Yes.

Q Your father was still alive when you got upstairs? A He was breathing yet.

Q Lying on the bed? A No, sitting in the chair.

Q He had been bleeding, hadn't he? A No, sir.

Q Sure about that? A I didn't see no blood.

Q You didn't see it? A No, sir.

Q Your mother saw it?

Mr. Stamler. I object to what his mother saw.

The Court. Question overruled.

Q How long had he been sick before you got there? A He wasn't sick at all.

Q He was sick before your sister came for you, he was sick then? A It must be about a couple of minutes, because I left him good in the morning.

Q How far away were you from your house when you were sent for? A About two blocks.

Q You had to stop and telephone twice and go that distance? A I telephoned at the corner where I am working.

Q You didn't see any evidences of bleeding when you got there? A No, sir.

Q You don't want to swear he didn't bleed before he died? A I couldn't swear to that.

Q You wouldn't swear to that, would you?

Mr. Stamler. I object.

Q I am going to ask him whether he would. Are you willing to swear he didn't bleed, as a matter of fact, just shortly before he died?

Mr. Stamler. I object to it.

The Court. I will allow it.

A I didn't see, because I wasn't home.

Q You would say then it was all over when you got there, if it had been?

Mr. Stamler. I object.

The Court. Question allowed.

A I didn't see no blood when I went home.

SUR-REBUTTAL.

THOMAS F. HUSTON, a witness being duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. English.

Q You are an attorney at law, aren't you? A I am.

Q You formerly represented this same plaintiff, didn't you? A I did.

Q You brought a suit for her in the Union Circuit Court? A I did.

Q In connection with this suit, I served interrogatories, did I not? A You did.

Q And they were sworn to by the plaintiff before you as a Notary Public? A They were.

Q I show you a paper here purporting to be answers to the interrogatories bearing the mark of this plaintiff. That was sworn to before you? A It was.

Q You had the questions which are there answered propounded to her before they were answered and sworn to? A I did.

Q She stated to you what is there written down? A She did.

Q There is an answer there, No. 12, isn't there? A There is.

Q In answer to interrogatory No. 12? A There is.

Q And the answer was sworn to by her? A Yes, sir, it was.

Q After being explained by you? A Yes.

Mr. English. If your honor please, I offer in evidence the answer No. 12 sworn to by the plaintiff before this gentleman as Notary, and in that connection, the 12th interrogatory propounded in that matter.

Mr. Stamler. I object because it has no connection with this case at all and it is not sur-rebuttal.

The Court. I will rule them out because they do not contradict anything in the evidence and I will allow an exception.

Whereupon the defendant by its counsel files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Interrogatories above referred to marked Exhibits D. 8 and D. 9 for identification.

Adjournment was here taken until 2 P. M.

AFTER RECESS.

Mr. English. If you honor, please, I move that the Court direct a verdict for the defendant in each case, we are trying two cases, on the ground that there was misrepresentation in the making of the application, and secondly, the application was a misrepresentation which could be viewed as a breach of warranty, or as a material misrepresentation of fact. On either of those theories there should be a verdict directed for the defendant, and I would like to supplement that by adding the same ground which I did on the motion to non-suit, that no proper proof of death has been made in the case.

The Court. I will hold that the non-answering of questions referred to by counsel constituted a waiver of the right of the company at this time to insist that those questions be answered, and I will deny the motion for a direction of the verdict.

Mr. English. Your honor will allow me an exception?

Whereupon the defendant, by its counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Charge to the Jury.

The Court. Gentlemen of the Jury, you are sitting in judgment in two separate cases, which is the same as if you were only trying one. Your verdict will be two separate verdicts, one on each policy. One is policy No. 1906765-C dated October 5, 1914, and the other policy is No. 1926894-C, dated November 25, 1914, and without laying a great deal of stress or losing a whole lot of time in going over the evidence, you will recall that between the dates of these two policies, the deceased visited a physician, namely on November 1, 1914.

Now, gentlemen of the jury, you will try this case without any prejudice or without any sympathy, and you will decide from the evidence you have heard, and which I won't go over at any great length, under the rules of law I will try to lay down to you, whether or not the beneficiary is entitled to recover on the policy.

Now, an Insurance company, before writing a policy of insurance, has a certain system under which they find out facts from the person to be insured, and they have a right to have truthful answers to the inquiries that they make and they have a right to rely and must rely on the information that the insured gives them at the time they place their policy, because it is a matter of public knowledge that the premium rates are and must be fixed from the death rates, and so they have a right to know before they issue a policy or fix a premium rate, the questions which they propound to you, which are vital to the issuance of the policy. But all of that is also to be taken in connection with what the law says about these policies, and the effect of the policies after they are issued.

Now, the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his beneficiary may not recover should he die at a later

date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease.

In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption and he had that disease in May, 1914, and without any lengthy reference to the testimony, you will recall that the physician who examined him at that time says he had it and the bacteriologist who examined his sputum gave his opinion that he had consumption at that time. You will say from the evidence whether the insured himself knew that he had that disease. You will recall the testimony that he spoke only Italian and the testimony that the physician who examined him did not speak Italian. You will also recall the testimony as to whom he gave the information and the fact, so far as the testimony goes, that there was some interpretation of what he said, but you will decide, as a matter of fact, whether decedent himself knew he had tuberculosis, and if he did not know, the fact that he did not make any statement to the effect that he had tuberculosis, would not defeat recovery under this policy, because the law says that a declaration of this kind that an applicant never had such a disease (concerning which the insurer should know, and the applicant could not have certain knowledge except as he might be told by a physician or other expert), is properly construed as to what we term a warranty only of the *bona fide* belief and opinion of the applicant. In other words, the applicant, if he is acting in good faith, and doesn't make a statement of a disease which it is afterwards found he had, or which was known at the time that he had, so long as he doesn't know it and is making his statement under a *bona fide* and honest belief, if his statement is not true, then that is not such a warranty as would defeat recovery in this case.

And, looking at this case from another phase that counsel has presented, if these statements which are complained about now are looked at in the light of representations, then you will also deside as a question of fact whether there was a misrepresentation made by the applicant, and in doing that you will bear in mind again that the applicant was an Italian, and you will take the proof as to whether the doctor could or could not speak the Italian language. You will recall what the proof was. There were some questions asked in that regard, and to my recollection there isn't any definite proof in the case as to whether or not the doctor could talk the Italian language, but you will have a right to consider his name and have a right to consider the fact that he was in the employ of the Company, and you also have a right to consider the fact that he is not produced as a witness in the case, and I think it is my duty to call your attention to the fact that in these applications bearing now on the question as to whether there were misrepresentations made by the applicant, that these applications are signed by a cross mark; and call your attention to the fact that the claim in this case is not made that the answers state affirmatively something that is not true, but the claim is made that the printed part of the application which says—I had better read you the language, "where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception." In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception.

Now, it will be your province to determine whether as a matter of fact the insured, in the application, made untruthful statements at that time.

Going back to the question as to whether these are warranties, I charge you that the law is, if the insurer

does not exact any positive or affirmative answers, that they waive on the issuance of the policy any insistment that these questions be answered in any other way than they are there. That, I charge you, as a matter of law, under the cases that I think I find in this state, and so, gentlemen, you will say, as a matter of fact, in your verdict, whether or not this fraud that the insurance company now sets up was practiced on them, and if this fraud were practiced, if the misrepresentations were made, they have a right now to come to court and say, "We issued these policies on your misrepresentations and fraudulent application, and therefore, nobody has a right to collect under them." If, however, you find no fraud has been established and no misrepresentations are established, then the insuring company is liable under each of these policies.

Under the policies, even if the company is liable, they are entitled to deduct for a proportionate amount of the premium for that current year, and in these cases, the figures, as nearly as I can make them, are these, that if you decide the plaintiff is entitled to recover on each policy, you will deduct from the face of each policy, which is $500.00, the sum of $22.20, the pro rata share, the unearned premium, and your verdict will be in each case for $477.80, plus interest from April 1, 1915, the date of the letter under which the company waived any formal proof, under the law, of death. So, if you find for the plaintiff under the law that I have tried to charge you, it will be for $477.80, with interest at the rate of si xper cent., from April 1, 1915, in each case, and in any event, the jurisdiction of this court being $500.00 your verdict may not exceed the sum of $500.00 in each case. The verdict will be separate in each case, one and two, both being tried together. The verdict in each case may not be over $500.00 and will be based on the rules of law as I have given you.

Mr. English. Now, if the court please, I would like to note an objection to that part of your honor's charge where you charge that the fact that an applicant may have a disease and does not make it known does not necessarily bar recovery—whatever your honor said about that.

Whereupon, the defendant by its counsel, files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Mr. English. Also, what your honor said with reference, to the effect that the question was whether he knew he had tuberculosis and that if he didn't know he did not defeat recovery—whatever your honor said about that.

Whereupon, the defendant, by its counsel, files a bill of exceptions which is hereby allowed and sealed accordingly.

Judge.

Mr. English. Also to that part of your honor's charge in which you said that the warranties here were not such warranties as would defeat recovery—whatever your honor said about that.

Whereupon, the defendant, by its counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Mr. English. Also that part of your honor's charge in which you commented on the fact that the jury could take into consideration that the examining physician, Mr. Widmar, was not called as a witness.

Whereupon, the defendant, by its counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Mr. English. Also where your honor said that the defense wasn't claiming that the answers were untruthful but was claiming on the fact that nothing had been written in the answer—whatever you said about that.

Whereupon, the defendant, by its counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Mr. English. Also to that part of your honor's charge in which your honor charged the jury that the insurance company, by virtue of the letter marked P. 4 had waived the proofs of death.

Whereupon, the defendant, by its counsel, files a bill of exceptions, which is hereby allowed and sealed accordingly.

Judge.

Certificate of the Court.

ELIZABETH DISTRICT COURT.

GIOVANNIA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*Two Suits.* *On Contract.* *Certificate.*

To the Honorable, the Chief Justice and the Justices of the Supreme Court.

I hereby certify as the state of the case the foregoing transcript of the testimony, and of the proceedings in the above stated causes (two suits) made by the stenographer designated by me and sworn, to be used on the hearing of the appeals herein.
Dated, Nov. 27, 1915.

ABE J. DAVID,
Judge.

Certificate of Stenographer.

I, Walter S. Hammell, the stenographer designated by the court and sworn, do hereby certify that the foregoing is a true transcript of my shorthand notes of the testimony and of the proceedings on the trial of the two suits of Giovannina Guarraia *vs.* Metropolitan Life Insurance Company, in the District Court of the City of Elizabeth, on the 28th day of October, 1915.
Dated November 29, 1915.

WALTER S. HAMMELL.

Exhibit P. 1.

EXHIBIT P. 1.

No. 1906765 C

Ordinary Life
Intermediate Class.
Age 55 Amount $500.
¼ Annual Premium $7.40

METROPOLITAN LIFE INSURANCE COMPANY, incorporated as a stock Company by the State of New York.

In consideration of the application for this policy, copy of which application is attached hereto and made part hereof and of the payment of the Quarter annual premium of Seven Dollars and Forty cents, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each Fifth day of October, January, April and July hereafter until the death of the Insured, promises to pay at the Home Office of the Company in the City of New York upon receipt at said Home Office of due proof of the death of Lucian Guarraia (herein called the insured) Five Hundred Dollars less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year upon surrender of this Policy, properly receipted, to Giovannina Guarraia, wife of the insured, beneficiary, with right of revocation.

* * * * * * * * *

INCONTESTABILITY.—This Policy (and the application therefor) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue, except for non-payment of premiums.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this Policy or be used in defense of a claim hereunder unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued.

Exhibit P. 1.

The Insured hereunder may engage in Military or Naval service in any State or Country without notice to the Company and without extra premium charge.

* * * * * * * * *

IN WITNESS WHEREOF, the METROPOLITAN LIFE INSURANCE COMPANY has caused this Policy to be executed this Fifth day of October 1914.

JAS. S. ROBERT *Secretary.* JNO. W. ZIMAN, *President.*

Part A. Application to the Metropolitan Life Insurance Company
(Incorporated by the State of New York, Stock Company)

To be signed by the applicant for insurance and proposed beneficiary.

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1. Full Name of Applicant—Luciano Guarraia.

2. Residence—Fairview Ave. No. 54—City Newark.

3. Where born (Name town, State and Country) Date of Birth. Petralia Soprana, Italy, June 24, 1859. Age *Nearest* Birthday—55.

4. Plan of Insurance—Non Participating—Whole Life.

5. Amount of Insurance, 5a.

Premium Payably $7.40 ~~Annually~~ ~~Semi annually~~ Quarterly

6. Occupation and by whom employed—Mason—Self.

6a. Place of Business—54 Fairview Ave. Newark, N. J.

7. Are you now directly or indirectly concerned in the manufacture or sale of any kind of alcoholic bev-

erages, or employed in any capacity in such business? No.

8. Have you ever been so engaged? (If yes, in what capacity, for what period and how long since?) —No.

9. Number of children living, and age, occupation and sex of each. 5 children—Boy 32—Girls—30-27-20-9.

10. Who is dependent on you for support and maintenance? Wife and some of the children.

11. State in full the sources of your income. From my work.

12. Do you propose to pay the premiums on the Policy applied for out of your own means? If not, who will pay them? Yes. Relationship to Life proposed.—

13. Single, Married, Widower or Widow? Divorced or Separated? Married.

14. Are you now insured in this Company? (If so, give particulars below) No. of Policy—No. Amount of Insurance—None. Premium—none.

15. Have you ever been insured in this Company? No.

15a. If so, give Policy Numbers. None.

15b. Have you ever availed yourself of the Company's Nursing System?

16. Are you now insured in any other Company, or Society, or Association? Yes. (If so, give names and amounts.) Prudential $108.00/100.

16a. Any other? no.

17. Is the insurance applied for to be an increase to the insurance in force? Yes.

17a. If not, what Policies are to be discontinued? none.

Exhibit P. 1.

18. Have you ever applied to any Life Insurance Company, Order or Association for insurance on your life without receiving exact kind and amount of insurance applied for? (If yes, give particulars.) No.

18a. Has any Company refused to restore a lapsed policy on your life? (If yes, give particulars.) No.

19. Whom do you designate to receive the proceeds of the Policy applied for in case of your death? Givannina Guarraia. His or Her relationship to you? Wife Age 51. Occupation—Housewife. P. O. Address—54 Fairview Ave., Newark, N. J.

20. Do you reserve the right to change the beneficiary at any time without the consent of beneficiary herein designated. Yes. If applicant is a woman.

21. Husband's name. Age. Occupation. Place of business.

22. Is he insured in your favor? If so, in what companies or Associations and for what amount? If insured in this company give Policy Numbers. If not so insured in your favor, state reason why not.

23. If applicant is a single woman, state occupation of father—mother.

24. Do you reside in a house where ale, beer, wine or liquor is sold, or is your husband, father or brother engaged in such business.

It Is Agreed that inasmuch as only the Officers at the home office of the Company in the City of New York have authority to determine whether or not a Policy shall issue upon the application, and as they act on the written statements, answer and agreements herein made, no statements, promises or information made or given by or to the person soliciting or taking this application for a Policy, or by or to any other person, shall be binding on the Company or in any manner affect its rights, unless such statements, promises or information be reduced to writing and pre-

Exhibit P. 1.

sented to the Officers of the Company at the Home Office.

And it is further declared and agreed that the foregoing statements and answers, and also the statements and answers to the Medical Examiner, are correct and wholly true, and that they shall form the basis of the contract of Insurance if one be issued.

It is further agreed that the Company shall incur no liability under this Application until it has been received, approved and the Policy issued and delivered and the full first premium stipulated in the Policy has actually been paid to and accepted by the Company during the lifetime of the Life proposed.

his
Luciano X Guarraia—Signature of Applicant.
mark

his
Giovannina X Guarraia, Signature of Beneficiary.
mark

Dated at Newark, New Jersey, September 24th, 1914.

Charles A. Williams—Witness to Signature.

B 1-11

Continuation of the Application—Statements made to the Medical Examiner.

To induce the Metropolitan Life Insurance Company to issue Policy, and as consideration therefor, I agree, on behalf of myself and of any other person who shall have or claim interest in any Policy issued under this Application, as follows:

Wherever Nothing is written in the following paragraphs it is agreed that the declaration is true without exception.

1. My occupation is Mason, and I have no other occupation, except—

2. I have never had any of the following complains or diseases: Apoplexy, Appendicitis, Asthma, Bronchitis, Cancer or other Tumor, Consumption, Diabetes,

Exhibit P. 1.

Disease of Brain, Disease of Heart, Disease of Kidneys, Disease of Liver, Disease of Lungs, Disease of Urinary Organs, Dropsy, Fistula, Fits or Convulsions, General Debility, Habitual Cough, Hemorrhage, Insanity, Intestinal or Hapatic Colic, Jaundice, Paralysis, Pleurisy, Pneumonia, Rheumatism, Scrofula, Spinal Disease, Spitting or Raising Blood Ulcer or Open Sores, Varicose Veins, except—

3. I am now in sound health. I am not blind, deaf or dumb, nor have I any physical or mental defect or infirmity of any kind, except—

4. 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—

5. I have not been under the care of any physician within two years, other than as stated in previous paragraph, except—

6. I have never been under treatment in any dispensary, hospital or asylum or been an inmate of any almshouse or other institution, except—

7. I am not in way connected with the manufacture or sale of ale, wine or liquor, except—

8. I have never been a pensioner, and no application for a pensioner to me is pending or contemplated, except as follows:

9. I have never met with any serious personal injury, nor ever been seriously ill, except as stated herein, and for the complaints named and no other, when I was attended by the following physicians, and no other:

10. No one of my parents, grandparents, brothers or sisters ever had consumption, or any pulmonary or scrofulous disease, except—

11. I have no insurance on my life, except in the following named companies and for the following

Exhibit P. 1.

amounts. And by the word "company" I mean any company, association, society or order granting life insurance. Prudential Ins.

12. No proposal or application to insured my life has ever been made to any company or agent upon which a Policy has not been issued of the amount applied for, except as follows. And by the word "company" I mean as defined in the previous statements.

13. My family history is as follows:

If living.

Age. Condition of Health of Each. (If not good, give details.)

		Father
		Mother
57	All well	How many Brothers?
8		3 Living
48		0 Dead
		How many Sisters?
47	Well	1 Living
		0 Dead

IF DEAD

Age	Cause of Death	How Long Sick	Place and year of Death (present instance)
70	Does not know	Dropped dead	Italy 3 yrs. ago.
80	Semlit		Italy 2 yrs. ago.

I HEREBY DECLARE, that the Application to the Metropolitan Life Insurance Company for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given to the Medical Examiner, and I hereby, declare that said answers are correctly recorded.

his

Signature of Applicant—Luciano X Guarraia.

mark

Every answer must be true or the Policy will be void.

Witness—H. K. Wasman, M.D.

Dated at Newark this 4 day of Oct. 1914.

After seeing the above application signed by the life proposed, Parts C and E on the next page are to be completed and signed by the Physician.

Exhibit P. 1.

REPORT OF EXAMINING PHYSICIAN ON LUCIANO GUARRAIA.

(Insert Full Name of Applicant.)

(No Part of Applicant's Declaration.)

C 1-11

1. Are you convinced of the identity of the person examined with the Life proposed? Yes.

2a. How long have you known applicant? At exam.

2b. Are you the attending physician of applicant or his family? No.

3. Where was examination made? At home.

4. Race. (White or ~~black?~~) Apparent age 55 years.

5a. Height and weight? 5 ft. 3 in 135 lbs.

5b. General appearance? Sound.

6a. Is the respiratory murmur clear and distinct over both lungs? Yes.

b. Is the character of the respiration full, easy and regular? Yes.

c. Respirations per minute? 18.

d. Are there any indications of disease of the organs of respiration? No.

7a. Is the character of the heart's action uniform, free and steady? Yes.

If heart is not normal state fully nature of trouble, and whether there is any dropsy, dyspnœa, palpitation or other conditions incident to heart disease.

b. Are its sound and rhythm regular and normal? Yes.

c. Are there any indications of disease of this organ, or of the blood vessels? No.

8a. State the rate and other qualities of the pulse. 70 strong.

Exhibit P. 1.

b. Does it intermit, or become irregular or unsteady at this examination? No.

9a. Is the person ruptured? No.

9b. If so, is well-fitting truss worn?

10a. Any atheroma, bleeding piles, varicose veins, skin eruption, sores or ulcers? No.

10b. Any suspicion of locomotor ataxia, goitre or aneurism? No.

11. To what daily extent does the Life use alcoholic stimulants? No.

12. Are you aware of intemperance, or any other circumstance connected with the Life proposed, not herein recorded, which the Company ought to know? No.

13. Is there any evidence or history of disease of the liver, stomach, intestines, or genito-urinary tract? No.

14. Anything unsanitary or hazardous in the occupation, or in the residence or place of business? No.

15. Having carefully read the statements made in the Application, is there anything of importance to be noted or any suspicion that the relationship of the proposed beneficiary is not correctly stated? No.

16a. If a female, when last pregnant?

b. Any miscarriages or difficulty in labor?

c. Are uterine functions now regular?

If extinct, give length of time this condition has existed.

d. Any tumor or disease of breast?

Exhibit P. 1.

5-14 D

SUPPLEMENTARY REPORT.

To be completed by the Examing Physician only when the amount of insurance, either applied for or together with the amount already held by the Life proposed in the Intermediate Branch or Ordinary Department (but not including Industrial), aggregates $1,000 or more. (See A, 5 and 14.)

This Supplementary Report also to be completed whenever the Life proposed is directly or indirectly connected with the liquor business, irrespective of amount of insurance applied for

1. Girth of chest—a. Under forced expiration?
   b. Under forced inspiration?
   c. Girth of abdomen at level of waistband?

2. Health Record. (Detail, in brief, clinical history of any affection experienced by the subject.)

AFFECTION	DATE	DURATION	SEVERITY	RESULTS
.....				
.....				
.....				
.....				

3. Results of Testing the Urine. (The Examiner must be present at the time of voidance and so know that the specimen is authentic.)

SPECIFIC GRAVITY ..... ALBUMIN ..... TESTS EMPLOYED .....

COLOR ..... SUGAR ..... TEST EMPLOYED .....

REACTION. Are you sending specimen to Home Office?

Mail specimen to Home Office whenever albumin or sugar is discovered, or where the specific gravity is above 1030 *or below* 1012, *or where the history or circumstances suggest the advisibility.*

Exhibit P. 1.

RECOMMENDATION OF EXAMINING PHYSICIAN.

E

I have this 4 day of Oct., 1914, PERSONALLY seen and EXAMINED the Life proposed for insurance; I saw the signature made on Part B to the Application on the preceding page, and am of the opinion that said Life is in .....good..... health

State whether good, indifferent or bad.

and that said Life's constitution is.....sound.....

State whether sound or impaired.

and I therefore recommend said Life to be accepted at 1st class rates.

Fill in "accepted," "postponed," or "rejected."

Fill in "first" or "second."

1ST CLASS should be unexceptionable lives.

2D CLASS, lives in which the unfavorable circumstances are very slight.

Physician's Signature, H. B. WIDMER.

REMARKS: The Examiner may use this space if that provided for answers above is insufficient or if he has any information or advice to give not elicited by the questions.

NOTE TO THE EXAMINER.—If any exceptions are to be noted it is important that full particulars be entered. Special care should be taken in this respect in statements B 4, 5, 11 and 12.

EXHIBIT P. 2.

Policy of Insurance is identical with Policy in Exhibit P. 1, except that it is dated Nov. 25, 1914, and numbered 1926894-C.

Part A.

Application to the Metropolitan Life Insurance Company.

(Incorporated by the State of New York, Stock Company)

To be signed by the applicant for insurance and proposed beneficiary.

2-12

1. Full name of Applicant—Luciano Guarraia.

2. Residence—Fairview Ave., No. 54—City, Newark.

3. Where born (Name town, State and Country) Date of Birth. Age *Nearest* Birthday—Petrolia Sopraun. Italy, June 24, 1859-55.

4. Plan of Insurance—Non Participating—Whole Life.

5. Amount of Insurance—$500.

5a. Premium Payable $7.40 ~~Annually~~ ~~Semi-Annually~~ Quarterly

6. Occupation and my whom employed—Mason—Self.

6a. Place of Business—54 Fairview Ave., Newark, N. J.

7. Are you now directly or indirectly concerned in the manufacture or sale of any kind of alcoholic bev-

erages or employed in any capacity in such business? No.

8. Have you ever been so engaged? (If yes, in what capacity, for what period and how long since?) No.

9. Number of children living, and age, occupation and sex of each. One boy—4 girls.

10. Who is dependent on you for support and maintenance? Self and family.

11. State in full the sources of your income. From my earnings.

12. Do you propose to pay the premiums on the Policy applied for out of your own means? If not, who will pay them? Yes. Relationship to Life proposed.

13. Single, Married, Widower or Widow? Divorced or Separated? Married.

14. Are you now insured in this Company? (If so, give particulars below). No. of Policy—1906765 C. Amount of Insurance $500. Premiums—$7.40 Quarterly.

15. Have you ever been insured in this Company?

15b. If so, give Policy Numbers. See ques. 14.

15b. Have you ever availed yourself of the Company's Nursing System.

16. Are you now insured in any other Company, or Society, or Association? (If so, give names and amounts.) Colonial Ins. Co.—$84.00.

16a. Any other? No.

17. Is the insurance applied for to be an increase to the insurance in force? Yes.

17a. If not, what policies are to be discontinued. None.

Exhibit P. 2.

18. Have you ever applied to any Life Insurance Company, Order or Association for insurance on your life without receiving exact kind and amount of insurance applied for? (If yes, give particulars). No.

18a. Has any Company refused to restore a lapsed policy on your life? (If yes, give particulars). No.

19. Whom do you designate to receive the proceeds of the Policy applied for in case of your death? Giovannina Guarraia His or her relationship to you—Wife. Age. Occupation—Housewife. P. O. Address —54 Fairview Ave., Newark, N. J.

20. Do you reserve the right to change the beneficiary at any time without the consent of beneficiary herein designated? Yes.

21. IF APPLICANT IS A WOMAN. Husbands name. Age. Occupation. Place of business.

22. Is he insured in your favor? If so, in what Companies or Associations, and for what amount? If insured in this Company, give Policy Numbers. If not so insured in your favor state reason why not.

23. If applicant is a single woman, state occupation of father—mother—

24. Do you reside in a house where ale, beer, wine or liquor is sold or is your husband or brother engaged in such business?

IT IS AGREED, that inasmuch as only Officers at the Home Office of the Company in the City of New York have authority to determine whether or not a Policy shall issue upon this Application, and as they act on the written statements, answers and agreements herein made, no statements, promises or information made or given by or to the person soliciting or taking this Application for a Policy, or by or to any other person, shall be binding on the Company or in any manner affect its rights, unless such statements, promises or information be reduced to writing and presented to the Officers of the Company at the Home Office.

Exhibit P. 2.

And it is further declared and agreed that the foregoing statements and answers, and also the statements and answers to the Medical Examiner, are correct and wholly true, and that they shall form the basis of the contract of insurance if one be issued.

It is further agreed that the Company shall incur no liability under this Application until it has been received, approved and the Policy issued and delivered and the full first premium stipulated in the Policy has actually been paid to and accepted by the Company during the lifetime of the Life proposed.

his
Luciano X Guarraia—Signature of Applicant.
mark

her
Giovannina X Guarraia—Signature of Beneficiary.
mark

Dated at Newark, N. J. November 11th, 1914.
Charles A. Williams—Witness to signature.

B 3-13

CONTINUATION OF THE APPLICATION

Statements made to the Medical Examiner.

To induce the Metropolitan Life Insurance Company to issue Policy, and as consideration therefor, I agree, on behalf of myself and of any other person who shall have or claim interest in any Policy issued under this Application, as follows:

Wherever nothing is written in the following paragraphs it is agreed that the declaration is true without exception.

1. My occupation is mason and I have no other occupation, except

2. I have never had any of the following complaints of diseases: Apoplexy, Appendicitis, Asthma, Bronchitis, Cancer or other Tumor, Consumption, Diabetes, Disease of Brain, Disease of Heart, Disease

of Kidneys, Disease of Liver, Disease of Lungs, Disease of Urinary Organs, Dropsy, Fistula, Fits or Convulsions, General Debility, Habitual Cough, Hemorrhage, Insanity, Intestinal or Hepatic Colic, Jaundice, Paralysis, Pleurisy, Pneumonia, Rheumatism, Scofula, Spinal Disease, Spitting or Raising Blood, Ulcer or Open Sores, Varicose Veins, except

3. I am now in sound health. I am not blind, deaf or dumb, nor have I any physical or mental defect or infirmity of any kind, except

4. 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:

5. I have not been under the care of any physician within two years, other than as stated in previous paragraph, except

6. I have never been under treatment in any dispensary, hospital or asylum, nor have been an inmate of any almshouse or other institution, except

7. I am not in any way connected with the manufacture or sale of ale, wine or liquor, except

8. I have never been a pensioner, and no application for a pension to me is pending or contemplated, except as follows:

9. I have never met with any serious personal injury, nor been seriously ill, except as stated herein, and for the complaints named and no other, when I was attended by the following named physicians, and no other:

10. Neither I nor any member of my family (including grandparents, parents, brothers, sisters, husband or wife) has ever had consumption or any pulmonary disease or scrofula, except

11. I have no insurance on my life, except in the following named companies and for the following amounts:

Exhibit P. 2.

And by the word "company" I mean any company, association, society or order granting life insurance. Met. Ins.

12. No proposal or application to insure my life has ever been made to any company or agent upon which a Policy has not been issued of the amount applied for, except as follows:

And by the word "company" I mean as defined in the previous statements.

13. My family history is as follows:

Age		IF LIVING Condition of Health of Each (If not good, give details)
38		How many brothers?
40	All well.	2 Living.
		0 Dead.
36	Well.	How many sisters?
		1 Living.
		0 Dead.

IF DEAD

	Age	Cause of death	How long sick	Place and year of Death (except infants)
(Father)	80	dropped dead	Sudden	Italy 3 yrs. ago.
(Mother)	82	does no know		Italy 2 yrs. ago.

I hereby declare that the Application to the Metropolitan Life Insurance Company for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given to the Medical Examiner, and I hereby declare that said answers are correctly recorded.

his

Signature of Applicant—Luciano X Guarraia

mark

Witness—H. K. Wismar, M. D.

Dated at Newark this 27 day of Nov. 1914.

After seeing the above application signed by the Life proposed Parts C and E on the next page are to be completed and signed by the Physician.

NOTE TO THE EXAMINER.—If any exceptions are to be noted it is important that full particulars be entered. Special care should be taken in this respect in statements B4.5, 11 and 12.

Exhibit P. 2.

REPORT OF EXAMINING PHYSICIAN ON LUCIANO GUARRAIA.

(Insert Full Name of Applicant.)
(No Part of Applicant's Declaration.)

C 1-11

1. Are you convinced of the identity of the person examined with the Life proposed? Yes.

2a. How long have you known applicant? At exam.

2b. Are you the attending physician of applicant or his family? No.

3. Where was examination made. No.

4. Race. (White or ~~black?~~) Apparent age 55 years.

5a. Height and weight? 5 ft. 3½ to 4 in. 135 lbs.

5b. General appearance? Sound.

6a. Is the respiratory murmur clear and distinct over both lungs? Yes.

b. Is the character of the respiration full, easy and regular? Yes.

c. Respirations per minute? 18.

d. Are there any indications of disease of the organs of respiration? No.

7a. Is the character of the heart's action uniform, free and steady? Yes.

If heart is not normal state fully nature of trouble, and whether there is any dropsy, dyspnœa, palpitation or other conditions incident to heart disease.

b. Are its sound and rhythm regular and normal? Yes.

c. Are there any indications of disease of this organ, or of the blood vessels? No.

8a. State the rate and other qualities of the pulse. 72 strong.

Exhibit P. 2.

b. Does it intermit, or become irregular or unsteady at this examination? No.

9a. Is the person ruptured? No.

9b. If so, is well-fitting truss worn?

10a. Any atheroma, bleeding piles, varicose veins, skin eruption, sores or ulcers? No.

10b. Any suspicion of locomotor ataxia, goitre or aneurism? No.

11. To what daily extent does the Life use alcoholic stimulants?

12. Are you aware of intemperance, or any other circumstance connected with the Life proposed, not herein recorded, which the Company ought to know? No.

13. Is there any evidence or history of disease of the liver, stomach, intestines, or genito-urinary tract? No.

14. Anything unsanitary or hazardous in the occupation, or in the residence or place of business? No.

15. Having carefully read the statements made in the Application, is there anything of importance to be noted or any suspicion that the relationship of the proposed beneficiary is not correctly stated? No.

16a. If a female, when last pregnant?

b. Any miscarriages or difficulty in labor?

c. Are uterine functions now regular?
If extinct, give length of time this condition has existed.

d. Any tumor or disease of breast?

Exhibit P. 2.

5-14 D

SUPPLEMENTARY REPORT.

To be completed by the Examing Physician only when the amount of insurance, either applied for or together with the amount already held by the Life proposed in the Intermediate Branch or Ordinary Department (but not including Industrial), aggregates $1,000 or more. (See A, 5 and 14.)

This Supplementary Report also to be completed whenever the Life proposed is directly or indirectly connected with the liquor business, irrespective of amount of insurance applied for

1. Girth of chest—a. Under forced expiration? 32.

b. Under forced inspiration? 36.

c. Girth of abdomen at level of waistband? 33.

2. Health Record. (Detail, in brief, clinical history of any affection experienced by the subject.)

AFFECTION DATE DURATION SEVERITY RESULTS

No illness.

. . . . . .

. . . . . .

. . . . . .

3. Results of Testing the Urine. (The Examiner must be present at the time of voidance and so know that the specimen is authentic.)

SPECIFIC GRAVITY, 1018. ALBUMIN, No.

TESTS EMPLOYED, Heat, & acid.

COLOR, Amber. SUGAR, No. TEST EMPLOYED, Fehlings.

REACTION, Acid. Are you sending specimen to Home Office?

Exhibit P. 2.

Mail specimen to Home Office whenever albumin or sugar is discovered, or where the specific gravity is above 1030 *or below* 1012, *or where the history or circumstances suggest the advisibility.*

RECOMMENDATION OF EXAMINING PHYSICIAN.

E

I have this 22 day of Nov., 1914, PERSONALLY seen and EXAMINED the Life proposed for insurance; I saw the signature made on Part B to the Application on the preceding page, and am of the opinion that said Life is in .....good..... health

State whether good, indifferent or bad.

and that said Life's constitution is.....sound.....

State whether sound or impaired.

and I therefore recommend said Life to be accepted at 1st class rates.

Fill in "accepted," "postponed," or "rejected."

Fill in "first" or "second."

1ST CLASS should be unexceptionable lives.

2D CLASS, lives in which the unfavorable circumstances are very slight.

Physician's Signature, H. B. WIDMER.

REMARKS: The Examiner may use this space if that provided for answers above is insufficient or if he has any information or advice to give not elicited by the questions.

EXHIBIT P. 3.

CITY OF NEWARK.

Essex County, State of New Jersey.
(SEAL)
United States of America

I, ALEXANDER ARCHIBALD, City Clerk, of the City of Newark, Essex County, State of New Jersey, do hereby certify that the following is a true and correct transcript from the Record of Deaths in my office:

Place of death—No. 54 Fairview Ave. St.

Full name of deceased—Lusiano Guarraia.

Personal and Statistical particulars

Sex—Male.

Color or race—White.

Married—Married.

Date of birth—1859.

Month Day Year

Age—55 yrs, 5 mos, 22ds.

If less than 1 day,——hrs. or——min.?

Occupation—Mason.

Birthplace—Italy.

Parents

Name of Father—Galogers Guarraia

Birthplace of Father—Italy.

Maiden name of Mother—Maria Anna Ippolito.

Birthplace of Mother—Italy.

Medical certificate of death

Date of death—January 2, 1915.

Month Day Year

I hereby certify, that I attended the deceased from Jan. 2, 1915, to Jan. 2, 1915, the cause of death was as follows: Cerebral apoplexy.

Contributory—Age.

Secondary

Signed—Wm. F. Wismar, M. D.

Former or usual residence of deceased—54 Fairview Ave.

Exhibits P. 3 and P. 4.

Place of burial or removal—C. H. S.
Date of burial—Jan. 4, 1915.
Undertaker—M. A. Megaro.
In witness whereof, I have hereunto set my hand and affixed the seal of said city this 16th day of September, A. D. 1915.

A. ARCHIBALD,
(SEAL) *City Clerk.*

EXHIBIT P. 4.

METROPOLITAN LIFE INSURANCE COMPANY

(Incorporated by the State of New York)
Claim Division
D. L. Buckman, Manager
Edw. O. Wieters, Ass't Manager

New York, April 1, 1915.

In re Policies No. 1906765-C—No. 1926894-C—Luciano Guarraia.

Mr. Thomas F. Houston, Attorney,
207 Broad St.,
Elizabeth, N. J.

Dear Sir:—

Your favor of March 26th is received and in reply I would say that we have not paid the claim made under these two policies, but on the contrary have notified the claimant through our Superintendent in your city that the claim has been rejected; this on account of the misrepresentations made in the applications on which the insurance was secured.

Yours truly,

D. L. BUCKMAN,
Manager, Claim Division.

B.JS
Ex P. 4 Oct 28-15
GJS

Exhibits P. 7 and P. 8.

EXHIBIT P. 7.

STATEMENT OF DR. MANCUSI UNGARO.

States that he attended the insured during the month of April, 1908, for bronchitis and that the duration of the decease was a couple of months, and that the insured was afflicted with chronic bronchitis.

EXHIBIT P. 8.

STATEMENT OF DR. JOHN J. MOHRBACHER.

States that he attended the insured January 2, 1915, for cerebral apoplexy and that the chief or primary cause of insured's death was cerebral apoplexy, and that the contributing or secondary cause was age.

Docket Entries—Judgment.

Suit No. 1.

IN THE DISTRICT COURT OF THE CITY OF ELIZABETH.

STATE OF NEW JERSEY, COUNTY OF UNION. } *ss.*

GIOVANNINA GUARRAIA, *Plaintiff,*
vs.
METROPOLITAN LIFE INSURANCE CO., *Defendant.*

In an Action Upon Contract.

Demand, $500.

Attorney of Plaintiff, J. J. Stamler.

Attorney of Defendant, McCarter & English.

A Summons was issued in the above stated cause October 20, A. D. 1915, returnable October 28, A. D. 1915, at 10 o'clock A. M., and was returned by the Constable as follows:

I served the within Summons October 21, 1915, on the defendant by reading it to Francis B. Ott in charge of their office in Elizabeth and giving him a copy.

O. CONLEN, *Constable.*

The said defendant not being found, I served the within Summons 191 , by leaving a copy thereof at residence with a member of family above the age of 14 years, informing of its contents.

.....

Constable.

Complaint filed October 20. Jury ordered by plaintiff October 21, 1915. Venire issued October 25, and returned October 28, 1915. Specification of defenses filed October 28, 1915. Walter S. Hammer was sworn as stenographer, Conover English, William F. Wismar, Peter Guarraia and Antoni Tiscorina were sworn for the plaintiff. I. N. Heller, Joseph Jacobus, John J. Klug, Harry Levenson, Frank Rossi, Joseph Schwartzbach, Charles Stein, William Townley, John Tillie, Edwin VanDewater, Henry Whyman and William Summerton were sworn as jurors. Exhibits P. 1, 2, 3, 4, 6, 7 and 8 were put in evidence by the plaintiff.

Clarence Rostow, Samuel Levigne, Harold A. Tarbell, L. Mancuso Mangaro, John J. Mohrbacher and Thomas F. Hueston were sworn for the defendant. Exhibits D. 1 and 5 were put in evidence by the defendant. Counsels summed up, Court charge jury. Jury retired and returned with a verdict in favor of the plaintiff for four hundred ninety-two dollars and thirteen cents. Court gave judgment in favor of the said plaintiff and against the said defendant in the sum of four hundred ninety-two dollars and thirteen cents and costs. Rule to show cause filed November 5, 1915, motion to set verdict aside made November 18, 1915. Order dismissing Rule to Show Cause filed November 22, 1915.

The above Judgment entered by order of the Court as of November 22, 1915.

Bond and Notice of Appeal filed December 1, 1915.

Docket Entries—Judgment.
Suit No. 2.

IN THE DISTRICT COURT OF THE CITY OF ELIZABETH.

STATE OF NEW JERSEY, COUNTY OF UNION. } *ss.*

GIOVANNINA GUARRAIA, *Plaintiff,* *vs.* METROPOLITAN LIFE INSURANCE CO., *Defendant.*	*In an Action Upon Contract.*

Demand, $500.

Attorney of Plaintiff, J. J. Stamler.

Attorney of Defendant, McCarter & English.

A Summons was issued in the above stated cause October 20, A. D. 1915, returnable October 28, A. D. 1915, at 10 o'clock A. M., and was returned by the Constable as follows:

I served the within Summons October 21, 1915, on the defendant by reading it to Francis B. Ott in charge of said Co. at their office in Elizabeth and giving him a copy.

O. CONLEN, *Constable.*

The said defendant not being found, I served the within Summons 191 , by leaving a copy thereof at residence with a member of family above the age of 14 years, informing of its contents.

.....

Constable.

Docket Entries—Judgment, Suit No. 2.

Complaint filed October 28, 1915. Jury ordered by plaintiff October 21, 1915. Venire issued October 25, and returned October 28, 1915. Specification of defenses filed October 28. I. N. Heller, Joseph Jacobus, John J. Klug, Harry Levenson, Frank Rossi, Joseph Schwartzbach, Charles Stein, William Townley, John Tillie, Edwin Dewater, Henry Whyman and William Summerton were sworn as jurors. Walter S. Hammer was sworn as stenographer. Conover English, William F. Wismar, Peter Guarraia and Antonia Tiscorina were sworn for the plaintiff. Exhibits P. 1, 2, 3, 4, 6, 7 and 8 were put in evidence by the plaintiff. Clarence Rostow, Samuel Levigne, Harold A. Tarbell, L. Mancuso Mangaro, John J. Mohrbacher and Thomas F. Hueston were sworn for the defendant. Exhibits D. 1 and 5 were put in evidence for the defendant. Counsels summed up. Court charged Jury. Jury retired and returned with a verdict in favor of the plaintiff for four hundred ninety-two dollars and thirteen cents. Court gave judgment in favor of the plaintiff and against the defendant in the sum of four hundred ninety-two dollars and thirteen cents and costs. $492.13. Rule to Show Cause filed November 5, 1915. Motion to Set Verdict Aside made November 18, 1915. Order Dismissing Rule to Show Cause filed November 22, 1915.

The above Judgment entered by order of the Court as of November 22, 1915.

Bond and Notice of Appeal filed December 1, 1915.

Reasons.
Suit No. 1.

Filed December 1, 1915.

NEW JERSEY SUPREME COURT.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract. On Appeal from Elizabeth District Court. Suit No. 1.*

SPECIFICATION OF POINTS OF LAW.

The defendant hereby specifies the determinations or directions of the District Court with respect to which it is dissatisfied in point of law:

1. The trial judge should have granted the defendant's motion for non-suit at the close of the plaintiff's case.

2. The trial judge should have granted the defendant's motion for the direction of a verdict at the conclusion of the entire case.

3. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 2 for identification.

4. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 3 for identification.

5. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 4 for identification.

6. The trial judge permitted the plaintiff to offer in evidence Exhibit P. 8 for identification, which was marked Exhibit P. 8.

7. The trial judge overruled the defendant's offer of Exhibits D. 8 and D. 9 for identification.

8. The trial judge erred in his charge to the jury in charging them as follows:

"Now the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his beneficiary may not recover should he die at a later date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease."

9. The trial judge erred in his charge to the jury in charging them as follows:

"In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption and he had that disease in May, 1914, and without any lengthy reference to the testimony, you will recall that the physician who examined him at that time says he had it and the bacteriologist who examined his sputum gave his opinion that he had consumption at that time. You will say from the evidence whether the insured himself knew that he had that disease. You will recall the testimony that he spoke only Italian and the testimony that the physician who examined him did not speak Italian. You will also recall the testimony as to whom he gave the information and the fact, so far as the testimony goes, that there was some interpretation of what he said, but you will decide, as a matter of fact, whether decedent himself knew he had tuberculosis, and if he did not know, the fact that he did not make any statement to the effect that he had tuberculosis, would not defeat recovery under this policy, because the law says that a declaration of this kind that an applicant never had such a disease (concerning which the insured should know, and the applicant could not have certain knowledge except as he might be told by a physician or other expert), is properly construed as to what we term a warranty

only of the *bona fide* belief and opinion of the applicant. In other words, the applicant, if he is acting in good faith, and doesn't make a statement of a disease which it is afterwards found he had, or which was known at the time that he had, so long as he doesn't know it and is making his statement under a *bona fide* and honest belief, if his statement is not true, then that is not such a warranty as would defeat recovery in this case."

10. Because the trial judge erred in his charge to the jury in charging them as follows:

"To my recollection there isn't any definite proof in the case as to whether or not the doctor could talk the Italian language, but you will have a right to consider his name and have a right to consider the fact that he was in the employ of the Company, and you also have a right to consider the fact that he is not produced as a witness in the case."

11. Because the trial judge erred in his charge to the jury in charging them as follows:

"I think it is my duty to call your attention to the fact that in these applications bearing now on the question as to whether there were misrepresentations made by the applicant, that these applications are signed by a cross mark; and call your attention to the fact that the claim in this case is not made that the answers state affirmatively something that is not true, but the claim is made that the printed part of the application which says,—I had better read you the language, 'where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.' In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception."

McCARTER & ENGLISH,
Attorneys of Defendant.

Reasons.
Suit No. 2.

Filed December 1, 1915.

NEW JERSEY SUPREME COURT.

GIOVANNINA GUARRAIA, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.	*On Contract.* *On Appeal from Elizabeth District Court.* *Suit No. 2.*

SPECIFICATION OF POINTS OF LAW.

The defendant hereby specifies the determinations or directions of the District Court with respect to which it is dissatisfied in point of law:

1. The trial judge should have granted the defendant's motion for non-suit at the close of the plaintiff's case.

2. The trial judge should have granted the defendant's motion for the direction of a verdict at the conclusion of the entire case.

3. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 2 for identification.

4. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 3 for identification.

5. The trial judge refused to permit the defendant to offer in evidence Exhibit D. 4 for identification.

6. The trial judge permitted the plaintiff to offer in evidence Exhibit P. 8 for identification, which was marked Exhibit P. 8.

7. The trial judge overruled the defendant's offer of Exhibits D. 8 and D. 9 for identification.

8. The trial judge erred in his charge to the jury in charging them as follows:

"Now the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his beneficiary may not recover should he die at a later date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease."

9. The trial judge erred in his charge to the jury in charging them as follows:

"In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption and he had that disease in May, 1914, and without any lengthy reference to the testimony, you will recall that the physician who examined him at that time says he had it and the bacteriologist who examined his sputum gave his opinion that he had consumption at that time. You will say from the evidence whether the insured himself knew that he had that disease. You will recall the testimony that he spoke only Italian and the testimony that the physician who examined him did not speak Italian. You will also recall the testimony as to whom he gave the information and the fact, so far as the testimony goes, that there was some interpretation of what he said, but you will decide, as a matter of fact, whether decedent himself knew he had tuberculosis, and if he did not know, the fact that he did not make any statement to the effect that he had tuberculosis, would not defeat recovery under this policy, because the law says that a declaration of this kind that an applicant never had such a disease (concerning which the insurer should know, and the applicant could not have certain knowledge except as he might

be told by a physician or other expert), is properly construed as to what we term a warranty only of the *bona fide* belief and opinion of the applicant. In other words, the applicant, if he is acting in good faith, and doesn't make a statement of a disease which it is afterwards found he had, or which was known at the time that he had, so long as he dosen't know it and is making his statement under a *bona fide* and honest belief, if his statement is not true, then that is not such a warranty as would defeat recovery in this case."

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11. Because the trial judge erred in his charge to the jury in charging them as follows:

"I think it is my duty to call your attention to the fact that in these applications bearing now on the question as to whether there were misrepresentations made by the applicant, that these applications are signed by a cross mark; and call your attention to the fact that the claim in this case is not made that the answers state affirmatively something that is not true, but the claim is made that the printed part of the application which says, I had better read you the language, 'where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.' In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception."

McCARTER & ENGLISH,
Attorneys of Defendant.

Per Curiam.

NEW JERSEY SUPREME COURT.

February Term, 1916.

GIOVANNINA GUARRAIA,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

On reinstatement of appeal, new motion to dismiss, and hearing of appeal on merits.

Before Justices Parker, Minturn and Kalisch.

Per Curiam:

In this case we dismissed the appeal on the ground that the printed case did not set forth the rules to show cause why a new trial should not be granted in the District Court, and especially whether such rules reserved the points of law taken at the trial; the statute requiring that there be such a reservation to support an appeal. C. S., 2017, 213f. The petition for re-hearing sets up that such reservation was made, and on June 26 we heard counsel, and the cases were re-instated so far as omission of the rules to show cause and reservations are concerned; but there remained the motion to dismiss the appeal made on the further ground that the state of the case was not filed within the fifteen days specified in the statute.

If this point is resolved against respondent, then we consider the merits of the appeal.

We think the failure to file the transcript within fifteen days after judgment was waived by the ser-

vice and acceptance of the printed state of the case and the limitations of objection thereto that certain documentary evidence had not been printed which was afterwards supplied. Taking this view, the application to dismiss falls, and we are brought to a consideration of the merits.

The defense was breach of warranty, misrepresentation and concealment of facts, and the errors relate to the refusal of the court to direct a verdict and also instructions to the jury. Among the statements subscribed by insured in the application were declarations that he had not had bronchitis, and whether he had been attended by a doctor within a certain period. These statements were for the most part printed and stated that he had not had the various diseases catalogued therein "except"—(and here follows a blank for a statement of the exceptions). No exceptions were stated and the claim is that this amounted to a definite statement on his part that he had not had any of the diseases mentioned. On the other hand it is urged that they were simply incomplete answers which were accepted by the company without any insistence upon completion. The trial court so held in denying a motion to direct. We do not take this view, but on the contrary think that the silence with respect to the exception should properly be taken as a statement that there is no exception; and consequently if the insured had in fact had one or another of the diseases there was a false statement with respect to that fact. The question then is with reference to the effect of the statement. If it was a warranty the policy falls; if it was only a misrepresentation the question of intentional falsehood becomes material. The policy says: "All statements by the insured shall, in the absence of fraud, be deemed representations and not warranties." The result of this seems to be that they are

made the legal equivalent of representations in any case and we must look for fraud in order to vitiate the policy. Here we are met by the fact that the insured was an Italian, apparently not well acquainted with the English language, confronted with an English speaking doctor, who probably conducted the examination in the usual more or less perfunctory manner and had the insured sign the paper more or less as a matter of form. The judge left it to the jury to say whether there had been intentional misrepresentation. We are inclined to think that this course was right. There is little doubt that the deceased had consumption, or that he probably had chronic bronchitis and probably other diseases, but the terms of the policy require the company to show that he had intentionally misrepresented these matters and we do not think that this was shown as a court question. This disposes of the motion to direct.

The next point is that the plaintiff failed to show any proof of death. There was no formal proof of it, but the plaintiff relied on a letter of the insurance company declining to pay the policy because it had been procured in fraud or misrepresentation, and claimed that this was a waiver of the proof of death. This is attacked on the authority of an unreported opinion of a justice in this court which is quoted in the brief. We do not know the facts in that case and cannot tell whether it covers the present situation but are inclined to say that under the terms of this policy such a letter may be considered a waiver. The policy fixes no time in which the proofs of death are to be submitted, so that they could be presented within any reasonable time; and consequently when some three months after the death, the lawyer wrote to the company asking whether the claim was going to be paid and the company said, "No, we don't propose to pay be-

cause the policy was procured in fraud" it should not be held necessary for the claimant thereafter to put in proofs which would be entirely nugatory.

The next point is that the judge erred in charging the jury in effect that in order to vitiate the policy it must appear that the deceased was knowingly stating a falsehood to the company. This is in line with what has been said. Finally it is stated that there was error in excluding certain prescriptions. These, if evidential would have tended to show that the deceased had in fact consumption or bronchitis or what not. In the view we take of the case it may be assumed that he did, and on that assumption the error would become harmless.

These views lead to an affirmance of the judgment.

Rule on Affirmance of Judgment.

Suit No. 1.

Filed January 11, 1917.

NEW JERSEY SUPREME COURT.

GIOVANNINA GUARRAIA, *Appellee,* vs. METROPOLITAN LIFE INSURANCE COMPANY, *Appellant.*	*Suit No. 1. On Appeal. Rule on Affirmance of Judgment and Remittitur.*

This cause having been argued at the February Term, 1916, of this Court, by Messrs. McCarter & English, Attorneys for the Appellant, and John J. Stamler, of Counsel with the Appellee, and the Court having considered said argument and dismissed said appeal on the 12th day of June, 1916; and it further appearing to the Court that the appellant petitioned this court for a rehearing of said cause, and on June 26th, 1916, said cause was reinstated and further argument had upon the proceedings in this appeal and on the merits of the case, and the Court having considered the same and find no error in the record or proceedings in the District Court of the City of Elizabeth;

It is thereupon ORDERED and ADJUDGED that the judgment of the District Court of the City of Elizabeth, brought upon appeal as aforesaid, be affirmed with costs; and that the record be remitted to the District Court of the City of Elizabeth to be proceeded with in accordance with this judgment and the practice of said Court.

Rule entered January 11, 1917.

On motion of

JOHN J. STAMLER,
Attorney for Appellee.

Rule on Affirmance of Judgment.

Suit No. 2.

Filed January 11, 1917.

NEW JERSEY SUPREME COURT.

GIOVANNINA GUARRAIA, *Appellee,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY, *Appellant.*	*Suit No. 2. On Appeal. Rule on Affirmance of Judgment and Remittitur.*

This cause having been argued at the February Term, 1916, of this Court, by Messrs. McCarter & English, Attorneys for the Appellant, and John J. Stamler, of Counsel with the Appellee, and the Court having considered said argument and dismissed said appeal on the 12th day of June, 1916; and it further appearing to the Court that the appellant petitioned this Court for a rehearing of said cause, and on June 26th, 1916, said cause was reinstated and further argument had upon the proceedings in this appeal and on the merits of the case, and the Court having considered the same and find no error in the record or proceedings in the District Court of the City of Elizabeth;

It is thereupon ORDERED and ADJUDGED that the judgment of the District Court of the City of Elizabeth, brought up on appeal as aforesaid, be affirmed with costs; and that the record be remitted to the District Court of the City of Elizabeth to be proceeded with in accordance with this judgment and the practice of said Court.

Rule entered January 11, 1917.

On motion of

JOHN J. STAMLER,
Attorney for Appellee.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

GIOVANNINA GUARRAIA, *Plaintiff-Appellee,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY, *Defendant-Appellant.*	SUIT No. 1. *On Appeal from Supreme Court.*
GIOVANNINA GUARRAIA, *Plaintiff-Appellee,* *vs.* METROPOLITAN LIFE INSURANCE COMPANY, *Defendant-Appellant.*	SUIT No. 2. *On Appeal from Supreme Court.*

Brief for Defendant-Appellant.

These are two appeals and bring up two cases. Suits were brought on two separate policies of insurance in the Elizabeth District Court, and were tried together by the Court and a jury.

A verdict was returned for the plaintiff in each case and the defendant appealed to the Supreme Court. The Supreme Court affirmed the judgment in each case; hence these appeals to this Court.

The first policy was numbered 1906765-C and was dated October 5, 1914 (p. 61, l. 9). The second policy was numbered 1926894-C and was dated November 25, 1914 (p. 67, l. 10). The policies are identical in terms. Each was for

$500. The jury rendered a verdict for the full amount in each case (p. 77, l. 20; p. 79, l. 26).

The policies were issued upon the faith of certain applications signed by the insured, setting forth, among other things, his medical history (p. 64, l. 26 through p. 66, and p. 70, l. 25, through page 72).

Each policy by its terms provided (p. 60, l. 35): "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this policy or be used in defense of any claim hereunder unless it is contained in the written application therefor and a copy of such application is securely attached to this policy when issued."

These policies are capable of two distinct defenses, one, the defense of fraud in the fraudulent representation, or concealment, of material facts in the making of the application; and the other, of a breach of warranty provided the fact of fraud is first established.

The defenses filed (pp. 6-7 and 9-10) set forth both of those grounds of defense, and were, that the insured had fraudulently represented that he had never had bronchitis, consumption, a disease of the lungs, or a hemorrhage, and had never been attended by a physician or been under the care of a physician within two years. The falseness of his representations in these respects was abundantly proved.

a. He had had bronchitis, consumption and a hemorrhage prior to making the application for both policies.

The application in each case required him to answer the following question (p. 64, l. 38):

"2. I have never had any of the following complaints or diseases: ***bronchitis, ***con-

sumption, ***disease of lungs, ***hemorrnage, ***spitting or raising blood, ***except—." Also page 70, l. 37.

The proof was conclusive that he had had all of these complaints.

Dr. Mancusi-Ungaro treated him for chronic bronchitis in the spring of 1908, for a period of several weeks, and told him in his own native Italian language that he had that disease (pp. 39-41).

Dr. Rostow attended him for some ten days in May, 1914 (a few months before the policies were issued) for consumption. This was proved by the doctor's own testimony (p. 15). He attended him from May 16 to May 26 (p. 24, l. 16), during a part of which time the insured was sick in bed (p. 24, l. 17). The insured was suffering from a hemorrhage of the lungs (p. 15, l. 9, l. 26; p. 26, l. 35). The doctor prescribed to check this bleeding (p. 19, l. 10) and the prescription was produced by the druggist and offered in evidence (p. 31, ll. 10-20). Moreover, his sputum was analyzed by the Newark Board of Health and found to contain tubercular germs. Dr. Tarbell, the assistant bacteriologist, who made the analysis, testified to this (pp. 35-39), described that he had found tubercular germs in his sputum and so officially reported (p. 37, ll. 3-20), and said further (p. 38, l. 33): "If we find tubercular germs in the sputum it is positive evidence a man has tuberculosis."

So complete was the proof of consumption that the judge in his charge to the jury said (p. 54, l. 4): "In this case I think it is not contradicted that, as a matter of fact, the decedent did have what is ordinarily known as consumption, and he had that disease in May, 1914."

The Supreme Court, in their opinion said (p. 88, l. 15):

> "There is little doubt that the deceased had consumption, or that he probably had chronic bronchitis and probably other diseases."

b. The insured had been attended by physicians, and also had been under the care of a physician within two years prior to making the application (p. 65, ll. 13-20; p. 71, ll. 13-20).

This was abundantly proved by the testimony of both Dr. Mancusi, and also Dr. Rostow, who produced his records to substantiate his statement that he had attended the insured for consumption during May, 1914, and he gave the dates May 16, 17, 18, 23 and 26 (p. 24, l. 16). He attended him at his own home and he was sick in bed (p. 24, l. 18). Between the making of the application for the first policy in October, and the second policy in November, the insured again was treated by Dr. Rostow, this time at his office on November 1st, 1914 (p. 24, l. 23). The application for the second policy was signed less than four weeks later (p. 72, l. 33).

The insured was an Italian, who spoke the Italian language, and did not understand the English language. Nevertheless he knew, or must have known, that he had bronchitis in 1908, for Dr. Mancusi-Ungaro, himself a native Italian, told him so in his native language (p. 40, ll. 13-20), and told him that he had chronic bronchitis, which it would take a long time to cure. He certainly knew he was being attended by Dr. Mancusi.

While it is conceivable that he may not have known that he had consumption, he must have known that he was being attended by Dr. Rostow, for the doctor called on him on five separate

dates, and part of that time he was sick in bed (p. 24, l. 17). Moreover, he must have known that he had something the matter with him, for he coughed and spit blood (p. 26, l. 35), and at the doctor's request he coughed into a bottle to be sent to the Board of Health for analysis (p. 20, l. 30), and he took medicine which the doctor gave him to check his bleeding (p. 19, l. 10). He must also have known that he had called upon Dr. Rostow in November less than four weeks before he signed the second application.

I.

The trial judge erred in refusing to direct a verdict for the defendant.

At the close of the case the defendant moved for the direction of a verdict in its favor in each suit (p. 52, l. 20). Objection was noted to the refusal to grant the motions and they are specified among the points of law upon which the appeal is argued (p. 80, l. 25; p. 83, l. 26).

One of the grounds urged was that there had been fraud in the making of the application.

The applications for the policies in each suit were signed by the insured. Counsel for the plaintiff introduced these applications in evidence as a part of his own case (p. 13, ll. 1-13). They are marked respectively Exhibits P. 1 and P. 2.

Each application contained this agreement: "Wherever nothing is written in the following paragraphs, it is agreed that the declaration is true without exception" (p. 64, l. 32; p. 70, l. 32).

Exhibit P. 1 (p. 64, l. 26, through page 66) contains no answers to the questions. The application for the second policy (Exhibit P. 2, page 70, l. 25, through page 72) also contains no answers to the questions, except the question

relating to previous insurance on the insured's life, and as to that answer there is written in the words, "Met. Ins." (p. 72, l. 3), very evidently referring to the first policy now in suit, which ante-dated the second policy. While it appeared that the insured was an Italian, who did not speak or understand the English language, there was no evidence one way or the other as to whether Dr. Widmer, the company's examining physician, spoke Italian. Two witnesses were called by the plaintiff as to that, but neither knew (p. 46, l. 30; page 47, l. 30).

The situation, therefore, was that the plaintiff offered in evidence two applications, one for each policy, signed by the insured. Inasmuch as they were offered as a part of the plaintiff's case, the plaintiff was bound by them. Every presumption of regularity exists in favor of those applications, signed by the insured. Presumably he understood what he was signing. There is no suggestion in the pleadings or otherwise that the applications were not the voluntary and understood act of the insured. There is no evidence, one way or the other, that the examining physician could not speak Italian. There is internal evidence in the papers themselves that the insured understood what he was doing, for in the answer to the eleventh question, with reference to any previous insurance on his life, he specified the Metropolitan Insurance Co., which already had a policy on his life (p. 72, l. 3).

The motion to direct was predicated upon two grounds, well known to insurance law: (1) Breach of Warranty; and (2) Fraud.

(1) As to the Breach of Warranty:

For cases dealing with this defense, see *Carson* v. *Jersey City,* 14 Vr. 300.

Hanrahan v. *Metropolitan Life Ins. Co.*, 43 Vr. 504.

Fish v. *Metropolitan Life Ins. Co.*, 44 Vr. 619.

Brunjes v. *Metropolitan Life Ins. Co.*, 54 Vr. 296.

Dimock v. *Metropolitan Life Ins. Co.*, 38 Vr. 367.

Under the terms of these policies, if there was fraud in the making of the application, then the false statement constituted in law a breach of warranty. And the Supreme Court seems to have been of this view also (p. 87, l. 36, etc.).

Let us assume, in discussing this point, that there was fraud: what then? The answer is—the policies were avoided; for the falseness in fact of the answers given is settled beyond dispute.

It was contended below that the defendant company had accepted incomplete answers by which it was bound; but the Supreme Court held otherwise (p. 87, ll. 20-30), and properly.

The application, by its terms contained this agreement: "Wherever nothing is written in the following paragraphs, it is agreed that the declaration is true without exception" (p. 64, l. 32; p. 70, l. 32).

No answers whatever were given to the application for the first policy, and only one answer was given to the application for the second policy, in answer to the question which inquired as to any previous insurance.

This is not a case where the insurance company accepts an uncompleted answer. In such a case it may be said that the insurer cannot afterwards avoid the policy on the ground that the answers were not full.

Hanrahan v. *Metropolitan Life Ins. Co.*, 43 Vr. 504, p. 507.

Because the acceptance of the incomplete answer is a waiver of a better answer.

Owen v. *Metropolitan Life Ins. Co.*, 45 Vr. 770, p. 773.

But here there was no answer given at all. There was, therefore, no incomplete answer to accept, or the acceptance of which would work a waiver.

The case is exactly like that of *Fish* v. *Metropolitan Life Ins. Co.*, 44 Vr. 619. There this court pointed out that the application contained language identical to that here, and said (p. 620):

> "The word 'except,' which is printed in the blank at the end of paragraph 6, might cause some hesitation, in view of the anxiety of the courts to avoid a forfeiture of the policy, were it not for the express provision of the application that 'wherever nothing is written in the following paragraphs it is agreed that the warranty is true without exception.' If any exception was to be made, it was the duty of the applicant to state it.
>
> The proof, in our judgment, showed a breach of the warranty pleaded, and a verdict should have been directed for the defendant."

This Fish case was followed by the same court in *Silcox* v. *Grant Fraternity*, 50 Vr. 502, p. 506.

In *Brunjes* v. *Metropolitan Life Ins. Co.*, 54 Vr. 296, the Supreme Court, by Chief Justice Gummere, dealt with a policy, the application for which contained the same identical language (p. 297). In the answer to paragraph 5 of that application nothing was written. The Court followed the Fish case and said (p. 298).

> "In the case of Fish *v.* Metropolitan Life Insurance Co., 44 Vroom 619, the application

for the policy sued upon contained statements practically identical with those which have heretofore been recited. At the end of paragraph 4 was written: 'Typhoid fever. Jan., 1893. Dr. Braymer.' The proofs showed that one Dr. Jarret had attended the assured during the latter part of September and early part of October, in the year 1901, for rheumatism in the shoulder, this being within the two years prior to the date of making the application. It was held, by the Court of Errors and Appeals, that this proof showed a breach of the warranty contained in paragraph 5. The case is identical with that now under consideration, except that it may be assumed, from the use of the word 'attended,' that the physician visited the patient at the latter's home; whereas, in this case, the medical treatment was afforded at the office of the physician. But this variance, we think, is entirely immaterial. The warranty in the fifth paragraph is that the applicant has not been under the care of any physician, and this term is broad enough to include not only the attendance of the physician at the residence of the patient, but the treatment of the latter at the physician's office.

The breach of the warranty relied upon having been proved, and there being no denial of it, the defendant was entitled to the direction of a verdict, and because of the refusal of the trial court to so deal with the case at the close of the testimony, the rule to show cause must be made absolute."

These authorities apply with full force to the situation here. The applicant agreed that where nothing was written in the application, the warranty was true, without exception. If there was

any exception to be made, it was his duty to have made it. He made no exception. The insurance company had the right to rely on his representation. The facts cannot be disputed.

The trial judge in answer to the defendant's motion to direct a verdict at the conclusion of the case, said (p. 52, l. 29):

> "I will hold that the non-answering of questions referred to by counsel constituted a waiver of the right of the company at this time to insist that those questions be answered, and I will deny the motion for a direction of a verdict."

In so holding the trial judge ran directly counter to the Fish case and the other authorities above cited. The motion should have been granted on the ground of a breach of warranty, if the fraud was in fact established.

The fraud was established beyond a contradiction or a doubt.

(2) As to the Fraud:

Fraud which avoids a policy of insurance, is fraud which misleads the insurer, and properly so, for the facts are all in the possession of the applicant, and he must be held to the utmost of good faith and fair dealing.

See *Franklin Fire Ins. Co.* v. *Martin,* 11 Vr., 568;

Vicar v. *Knights of Pythias,* 23 Vr. 455;

McVeigh v. *Order United Workmen,* 24 Vr. 17.

Holland v. *Chosen Friends,* 25 Vr. 490.

Hoagland v. *Royal Arcanum,* 4 Robb. 607.

Where the defense is fraud, or fraudulent misrepresentation, the gist of the defense is the fraud by which the insurer was mislead.

Thus in *Franklin Insurance Co.* v. *Martin,* Judge Depue said (p. 573):

> "Where the defense is that a representation collateral to the contract, was false, and was fraudulently made, the gist of the defense is the fraud of the plaintiff by which the insurer was mislead and induced to make the contract of insurance."

The trial judge held in answer to the motion for a direction (p. 52, l. 29):

> "That the non-answering of questions referred to by counsel constituted a waiver of the right of the company at this time to insist that those questions be answered."

On the contrary, "the non-answering" of the questions did not constitute a waiver to any defense predicated upon the breach of warranty, as has already been shown, and as the Supreme Court held.

Nor did "the non-answering" of the questions constitute a waiver of a defense of fraud in the making of the contract whereby the insurance company was deceived. The fundamental point is that the ground of the defense of fraud is deceit, and it makes no difference how the deceit is practiced so long as the company is in fact mislead. The insured can deceive as easily by leaving questions unanswered, as by making statements contrary to the fact.

This view was evidently present to the mind of Justice Swayze, speaking for the Court of Errors, in the Hanrahan case, where he said (43 Vr., at page 507), in speaking of an incomplete answer in an application:

> "In such a case the failure to state a fact may amount to a fraudulent concealment, but there can be no breach of warranty where the insurer chooses to accept an in-

complete statement, and the statement is true so far as it goes."

Our contention here is that there was a fradulent concealment, amounting to a fraud on the insurance company.

The Supreme Court appears to have agreed with us as to the abstract fact; but did not think it had been shown as a court question (p. 88, l. 19). In so holding, we say the Supreme Court fell into error. There can be no jury questions where the facts are not in dispute, or where the facts are such that reasonable minds cannot differ about them.

The fact of the fraud was settled beyond dispute. The question of the insured's knowledge of consumption may be left out of the discussion as creating a jury question, under the case of *Henn* v. *Metropolitan Life Ins. Co.*, 38 Vr. 310. There was no jury question, however, as to the fact whether the insured had had bronchitis and knew that he had had it.

Dr. Mancusi-Ungaro told him so in his native Italian language (p. 40, l. 1):

"Q What was Mr. Guarraia, the insured, suffering from at the time you attended him in the spring of 1908?

Mr. Stamler. I object. This was six years prior to the writing of the policy.

The Court. I will allow the testimony.

A He had chronic bronchitis.

Q And you treated him for how long? A I served him two or three times in three weeks, that is all.

Q Did you tell him what the matter with him? A Yes, sir.

Q Did you tell him in your language—your speak Italian? A Yes.

Q You are a native born Italian? A Yes.

Q You told him in Italian, what? A That he had chronic bronchitis, which it would take a long time to cure."

Nor is there any doubt that he had been sick in bed, attended by a physician in May, and knew that he had been thus sick and attended, or that he had called at the physician's office in November.

Dr. Rostow testified (p. 15, ll. 2-20):

"Q Were you ever called to attend the father, Luciannia Guarraia? A Yes, sir.

Q When was it you were first called to attend him? A If I recall right it was in the middle of May, 1914.

Q And from what did you find him suffering when you got there? A He suffered with a hemorrhage of the lungs.

Q Did you treat him at that time? A Yes, sir.

Q For how long did you continue to treat him? A I treated him for about four or five days that week and then I saw him again in November."

And again (p. 24, ll. 1-29):

"Q Yes. A I found him in bed.

Q How long, to your knowledge, did he stay in bed?

The Court. Counsel says, 'the first time.' I take it you are now conducting your examination as to May?

Q When you say 'the first time' you refer to your visit on May 16, 1914? A Yes.

Q How long did he continue in bed after May 16, 1914? A I had a slip here that stated it with notes that I made, didn't I?

Q Here it is (handing paper to witness). A It says May 16, 17, 18, 23, 26.

Q Was he in bed all the time? A I believe he was in bed the first two or three days and then he was in the room.

Q Around the house? A Around the house.

Q How many dates does your record show you called on him? A Five calls at his house at that time.

Q Did he afterwards come to your office? A Then I didn't see the man any more until on the first of November.

Q What year? A 1914.

Q He came to you then? A Yes, sir.

Q Or you went to him, which? A The record says he came to my office."

These were all matters of which he must have had knowledge.

It can hardly be open to dispute that he knew he had had a hemorrhage, but certainly he knew he had spit blood.

(Page 15, ll. 18-20):

"Q Was he bleeding when you got there? A Yes.

Q From the mouth? A From the mouth."

And again (p. 26, ll. 34-37):

"Q Did you actually see blood flowing? A I did see it, yes, he coughed up.

Q You are sure of that, doctor? A I am."

These were material matters about which the insurance company was entitled to be informed.

In *Vivar* v. *Knights of Pythias,* 24 Vr. 455, p. 468, Judge Dixon said that the materiality of a representation will usually be inferred from

the fact that it was made pending negotiations in response to a specific inquiry by the insurer.

In *McVeigh* v. *Order of United Workmen,* 24 Vr. 17, Chief Justice Beasley said, in a case where the applicant had misrepresented certain facts as to his use of alcohol (p. 19):

> "The facts thus found by the court have not been, and could not be, disputed; and the judicial resolution was the necessary result from such premises. No one can doubt that if the truth had been told with respect to the particulars in question, the medical examiner would not have accredited the application, and that the society would have rejected so exceptionable a candidate."

In *Holland* v. *Chosen Friends,* 25 Vr. 490, Judge Depue said (p. 498):

> "Courts incline strongly in favor of a liberal construction of stipulations which save contracts of insurance from forfeiture, but the judicial inclination is equally strong against contracts procured by fraudulent practices."

In *Hoagland* v. *Royal Arcanum,* 4 Robb. 607, Vice-Chancellor Garrison pointed out that the tendency of modern decisions is to give but little weight to the characterization by the parties of the statements, whether warranties or representations (p. 614), and then said (p. 614):

> "Construing the contract in this way, the court refuses to avoid the policy because of the untruth of an immaterial statement, but if it finds that the statement was material, and was an inducing cause of the insurer making the contract, then it requires good faith in the applicant if the subject matter be one of which he cannot have absolute knowledge, and absolute knowledge if the

subject matter be one concerning which he either has or assumes to have such.

"There are certain matters concerning which the insurer requires an absolute assurance before entering into the contract. Without seeking to define or classify these matters, one of them certainly is the vital question of the presence of a fatal hereditary taint in the family of the applicant."

He concluded (p. 616) as follows:

"However righteous it may be to construe contracts of this description in the most liberal way, so as to give effect to what the courts find to have been the real intent of the parties, such liberality in favor of the insured must never lead the court to disregard the rights of the insurer with respect to so vital a matter as the one dealt with in this case.

"I therefore hold that because of the incorrect statements by the applicant concerning the cause of his mother's death and of the absence of consumption in his parents, this insurance contract is void and no recovery can be had thereon."

The situation at bar, therefore, is that the insured was interrogated as to certain material matters, concerning his previous condition of health and medical attendance, that he certified to these questions over his signature, and that by his silence in failing to answer the questions, he deceived the defendant company into issuing the policies in suit. The fact of the deception with reference to his knowledge of the bronchitis, the spitting of blood and the medical attendance was not open to dispute.

The observations of Chief Justice Gummere, speaking for this court, in *Lippincott* v. *Royal*

Arcanum, 35 Vr. 309, are absolutely in point. He said (p. 311):

> "The plaintiff, on the other hand, contends that the warranties under consideration were not absolute in their character, but were merely that the statements referred to were true to the best of the applicant's knowledge and belief. Anders *v.* Knights of Honor, 22 Vroom 175, is cited to support this contention.
>
> "The question argued, although an interesting one, is not involved in the decision of this case, for, if the decedent warranted only the honesty of his statements, the proofs showed a clear breach of that warranty. He must have known when he declared that he had never suffered from catarrh, that this was untrue, for he was then being treated by his physician for that disease. He likewise must have known that he was making a false statement when he declared that he had never undergone a surgical operation. The unimpeached testimony in the case is conclusive upon this point and a verdict for the plaintiff cannot be supported without disregarding it. This being so, it was the duty of the trial court to control the jury in its action and direct a verdict for the defendant. Baldwin *v.* Shannon, 14 Vroom 596; Crue *v.* Caldwell, 23 Id. 215; Haines *v.* Merrill Trust Co., 27 Id. 312."

See also *Henn* v. *Metropolitan Iife Insurance Co.,* 38 Vr. 310, p. 312, where Lippincott case was approved.

As appears from the trial judge's charge, he was disposed to think that a jury question arose out of the fact that the insured only

spoke and understood Italian, and that Dr. Widmer, the company's examining physician, had not been called as a witness (p. 55). But the complete answer to that was that the plaintiff put in the medical examinations of Dr. Widmer, and also the applications, signed by the insured, and made them a part of her own case, and until something was shown to the contrary to weaken their evidential force, they must necessarily stand as conclusive. The burden of proof was on the plaintiff, and it was for her to have shown that Dr. Widmer did not speak Italian. This she failed to do (p. 46, l. 29; p. 47, l. 27). That the insured did understand, is evidenced by the fact that he did specify the existence of the previous insurance when he came to sign the second application. That was a matter which the company had knowledge about, and he could not successfully deceive them as to it. He, therefore, specified it, but the company had no knowledge of his bad health record, and as to that he was quite willing to deceive them. The pertinent fact is—he knew what he was doing.

It is true that the risk was passed by the examining physician, Dr. Widmer, but it is obvious that the insured by his silence completely misled the doctor. The observation of Chief Justice Beasley in the McVey case (24 Vr., page 19) is pertinent here, where he said:

> "No one can doubt that if the truth had been told with respect to the particulars in question, the medical examiner would not have accredited the application, and that the society would have rejected so exceptionable a candidate."

The Supreme Court in the case at bar seems to have been of the opinion that the question of an intentional misrepresentation made a jury question, although apparently conceding that if the fraud was established beyond a jury question, the trial judge should have directed verdicts for the defendant as requested.

The language of the Supreme Court was (p. 88, l. 15):

> "There is little doubt that the deceased had consumption, or that he probably had chronic bronchitis, and probably other diseases, but the terms of the policy required the company to show that he had intentionally misrepresented these matters, and we do not think this was shown as a court question."

It would seem as though the Supreme Court had in its view of the case laid over-emphasis on the matter of intention as affecting the misrepresentation.

The policies by their terms contained this clause (p. 60, l. 34):

> "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim hereunder unless it is contained in the written application therefor and a copy of such application is securely attached to this policy when issued."

The applications which the insured signed recited (p. 69, l. 33), that the officers at the home office "act on the written statement, answers and agreements" contained in the application; and it was further declared and agreed that the statements and answers (p.

70, l. 3) "are correct and wholly true, and that they shall form the basis of the contract of insurance if one be issued."

At the conclusion of the paper, and following the statements made to the medical examiner, the insured over his signature, stated (p. 72, l. 22):

> "I hereby declare that the application to the Metropolitan Life Insurance Company for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given to the medical examiner, and I hereby declare that said answers are correctly recorded."

In view of this language can there be any other construction placed upon the contract than that the burden was on the applicant to correctly state the facts, and that any misstatement of fact would be presumed to be intentional.

In *Fish* v. *Metropolitan Life Insurance Co.*, 44 Vr. 619, this court, in dealing with exceptions to be set forth in answer to any question propounded, said:

> "If any exception was to be made, it was the duty of the applicant to state it."

In other words, this court cast upon the applicant the duty of stating accurately the entire situation, regardless of what his intentions might be.

In *Hoagland* v. *Royal Arcanum*, 4 Robb. 607, Vice-Chancellor Garrison said (p. 614) that "if it (the court) finds that the statement was material, and was an inducing cause of the insurer making the contract, then it requires * * * absolute knowledge if the subject

matter be one concerning which he has or assumes to have such (knowledge)."

The question of good intentions in the matter of statements set forth in applications for policies of insurance, relates only to statements concerning matters about which the applicant cannot be expected to have absolute knowledge, as the presence of some obscure disease. This doctrine was fully laid down by this court in *Henn* v. *Metropolitan Life Insurance Co.*, 38 Vr. 310.

But in those cases where the assured has absolute knowledge, such as the matter of attendance by a doctor, or of a disease about which he has been specifically informed by his physician, then under the doctrine of this court, as laid down in *Lippincott* v. *Royal Arcanum,* 35 Vr. 309, p. 311, he must be held to the strict truth of his statements regardless of his intentions.

The necessity of accuracy of statement without reference to the good intentions of the person making them, is illustrated in *Petow* v. *North British & Mercantile Insurance Co.,* 86 N. J. Law 384, where the action was upon a valued fire insurance policy, and the primary question to be determined was whether or not the property to be described in the policy was that which had been injured or destroyed in the fire. The subject matter were certain paintings and the dispute was whether they were genuine paintings of the old masters or not. The plaintiff sought to maintain the value which he fixed upon them on the ground that when he furnished the description he believed them to be what the description asserted them

to be. The Supreme Court, by Chief Justice Gummere, held (p. 386):

> "He cannot insure a chromo reproduction of a painting by Francisco Zurbaran as the product of that distinguished artist's brush for a sum which would fairly represent the value of the original painting, and then if the chromo burns up in a fire, recover for the destruction of a genuine work of that old master. And that is so even if, when he took out the policy of insurance, he mistakenly believed that the chromo was what he represented it to be; for what the company insured was, not a chromo lithographic copy of that artist's work, but an original production. In order to hold the company he must show that the very article described in the policy was so destroyed."

Adapting this language to the case at bar; what the defendant company intended to insure was a man who had not been attended by physicians, who had not had chronic bronchitis, and who had not spit blood. When the fact was established beyond dispute that the insured was not that kind of a man—the matters all being those of which he had absolute knowledge—there is no room to say, as the Supreme Court did in this case, that he did not intentionally misrepresent these matters.

The Supreme Court in its conclusions upon this case misapplied the doctrine of the Henn case. The evidence of the knowledge of the applicant of his having had chronic bronchitis, of his having been attended by a physician, and of his having spit blood, before he signed either of the applications, was unimpeached. A verdict for the plaintiff cannot be supported

without disregarding this evidence. This being so, it was error for either the trial court or the Supreme Court to have said that a jury question arose out of that unimpeached state of facts, as to whether or not the insured intended to misrepresent when he made statements of matters fully within his own knowledge and directly contrary to fact.

The applicant fully appreciated that he was called upon to state the facts in his applications. When it came to his second application he promptly stated the existence of the earlier policy (of which the company knew), although he carefully concealed the facts about his physical condition.

It should be noted, too, that the Supreme Court predicates its conclusions on matters not proved in the case (p. 88, ll. 3-20). They say the insured was confronted by an English-speaking doctor, but there is no evidence at all that he was not also an Italian-speaking doctor. There is no evidence as to that, one way or the other.

Again, the Supreme Court, says the doctor "probably conducted the examination in the usual more or less perfunctory manner, and had the insured sign the paper more or less as a matter of form" (p. 88, l. 8).

With all respect to the Supreme Court, why should it speculate about such a matter in the absence of evidence, and then decide the case on the result of their speculations? The medical examinations, which are in the record (pp. 66a-66d, and 72a-72d) give evidence of a very careful and painstaking examination by the doctor.

II.

The plaintiff failed to show that any proof of death had been made as required by the terms of the policy.

The policies which were identical in terms, appear on pages 60-61 and 67.

The policies by their terms provided as follows (p. 60, l. 9):

> "Metropolitan Life Insurance Company, incorporated as a stock company by the State of New York, in consideration of the application for this policy * * * and of payment of the quarter annual premium of $7.40 * * * promises to pay at the home office of the company in the City of New York, upon receipt at said home office of due proof of the death of Lucian Guarraia, herein called the insured, Five Hundred Dollars," etc.

By the terms of the policies, therefore, the submission of "due proof of death" was made a condition precedent to payment.

> *O'Reilly* v. *Guardian Mutual Life Insurance Co.*, 60 N. Y. 169.

The submitting of due proof of death was one of the elements necessary to be proved under the plaintiff's own complaints or states of demand. The complaints alleged (p. 4, l. 36): "6. That the plaintiff has made proof of the death of said Luciano Guarraia to the defendant in accordance with the requirements of said policy, and otherwise performed all the conditions of said policy and the contract of insurance on her part to be performed."

The complaints were identical in each suit (p. 8, l. 20).

When it came to the proof of the plaintiff's case, she put in evidence the policies, the applications upon which the policies were issued, the certificate of the City of Newark's Bureau of Vital Statistics, showing the death of the insured, and a letter from the defendant in reply to a letter of Thomas F. Hueston, Esquire, an attorney, who had represented the plaintiff (pp. 12 and 13). The letter which was offered in evidence in lieu of any proofs of death, was as follows (p. 74, l. 25):

"New York, April 1, 1915.

In re. Policies No. 1906765 C—No. 1926894 C—

Luciano Guarraia.

Mr. Thomas F. Hueston, Attorney,
207 Broad St.,
Elizabeth, N. J.

Dear Sir:—

Your favor of March 26th is received and in reply I would say that we have not paid the claim made under these two policies, but on the contrary have notified the claimant through our superintendent in your city that the claim has been rejected; this on account of the misrepresentations made in the applications on which the insurance was secured.

Yours truly,

D. L. BUCKMAN,
Manager, Claim Division."

Mr. Hueston's letter of March 26th was not put in. The plaintiff thereupon rested, and a motion for non-suit was made on the ground that there was no proof of death in the case. This motion was denied and proper objection noted (p. 14, ll. 1-15). At the conclusion of the entire case defendant moved for the direction of a verdict in its favor upon various

grounds stated, and in addition "that no proper proof of death has been made in the case" (p. 52, l. 27).

The trial judge treated the letter of April 1st, 1915, as a waiver on the part of the defendant of any proof of death under the policies, and in his charge to the jury referred to it as such, his language being (p. 56, l. 30) in speaking of this letter, as "the letter under which the company waived any formal proof under the law of death." The failure of the trial judge to non-suit and direct a verdict upon this ground, has been specified as among the determinations or directions of the district court with respect to which the defendant is dissatisfied in point of law (p. 80, ll. 23-27, p. 83, ll. 24-28), and this point was also considered and passed upon by the Supreme Court (p. 88, ll. 22, etc.).

Where policies, as those at bar, require "due proof" of the death of an insured, proof in the form of affidavits is contemplated.

In *O'Reilly* v. *Guardian Mutual Life Insurance Co.*, 60 N. Y. 169, it was objected that no proof of the death of the insured was made to the company. It was conceded that notice of the death had been given in the form of a letter from the plaintiff to the defendant. The court held that as a notice the letter was a full compliance with requirements of the policy and gave all the information the company could require under the condition that notice should be given (p. 171, bottom). The trial court held that it served the purpose of and was proof of the death of the insured, so as to otherwise sustain the cause of action. The Court of Appeals reversed on the ground that no proof of

death had been furnished, and said, among other things (p. 172):

> "A mere notice cannot supply the place of, or dispense with, the more formal proof provided for in the policy. The two are entirely distinct in their character, and are mentioned as two distinct acts to be performed by one who claims the benefit of the insurance. A notice may be and usually is, as in this case, an informal, unverified and uncorroborated assertion of the claimant, the party in interest. It is ordinarily given immediately after the happening of the event. There need be no delay in notifying the insurers, while the making of formal proofs may be a work of time. What the character of the 'proof' should be when not prescribed by the terms of the policy must depend very much upon the fact to be proved, and the evidence by which it is ordinarily established, or of which it is susceptible. But that proof, as that term is used, means something more than the unverified declaration of the party in interest, whether formal or informal, may be laid down as a self-evident proposition. Else why require 'proof' in addition to 'notice?' If 'notice,' information of advice by the party in interest is proof, the one word would have sufficed, and the second word has no place in the condition or office to perform. 'Proof,' as in addition to notice, must mean evidence in some form, such form as is usual and customary in such cases, or as is recognized by law, and is calculated to convince or persuade the mind of the truth of the fact alleged. The bare statement of one of known char-

> acter for truth, might convince one who knew him of the reality of the facts stated by him, but it would not be proof, in any proper sense. Proof is frequently used as the synonym of 'evidence' (1 Greenl. Ev., Sec. 1), and it was probably so used in this instance. The condition can only be performed by furnishing evidence in some form of the truth of the fact stated in the notice, and upon which the right of action depends."

The case of *Kustor* v. *Metropolitan Life Insurance Co.*, in the Supreme Court, not reported, but decided at the June Term, 1910, was upon a policy identical in this respect with those now in suit. No proof of death was made in that case, and of course, no proof of death was put in evidence at the trial. Instead, the plaintiff's counsel offered in evidence a letter from the company declining to pay the claim. There was also introduced in the case the certificate of the Bureau of Vital Statistics showing that the man had in fact died. The judgment for the plaintiff was reversed on appeal to the Supreme Court, and Judge Swayze speaking for the court said:

> "The policy as printed provides for the payment of the amount upon receipt at the home office of the company of due proof of the death of the assured. No proof of death was made, either at the home office of the company or elsewhere. The nearest approach to it was proof that the beneficiary after her husband's death gave the paper to a man named Cross, a superintendent of the insurance company in Perth Amboy. There was also proof that the attorney of the plaintiff had writ-

ten to the company, although his letter was not in evidence, and in reply the company simply declined to pay the claim. The trial judge left to the jury to say whether this was a waiver. He told the jury that what was due proof depended very largely upon circumstances; that if it was brought to the knowledge of the company through proper channels that the insured is dead, it would be sufficient proof. Clearly the letter of the company simply declining to pay the claim was not a waiver. That the trial judge was wrong in his view as to what constituted due proof is apparent, we think, from the language of the policy, which requires receipt of due proof at the home office of the company. This can have no meaning except that some sort of written proof should be furnished. A mere statement of the beneficiary or her attorney could hardly be regarded as proof. What the policy probably contemplates is proof in form of affidavits."

Inasmuch as the case is unreported we print the opinion in full as an addendum to this brief.

Reliance was had by the trial judge to sustain his rulings on the case of *Bohles* v. *Prudential Insurance Co.*, 54 Vr., 246, affirmed 55 Vr., 315, but that case has no applicability to the situation now at bar. In the Bohles case it appeared that three policies had been issued by the defendant company upon the life of the insured, and that the plaintiff had filed proofs of death upon two of those policies (54 Vr., 247), and those two policies were paid (55 Vr., 318). On that phase of the case the Court held that since the insured was the same in

all three policies, and none of the policies required separate proof of death, the proof of death given under any one of them was sufficient (55 Vr., 318). Such a situation has no bearing on that at bar because no other policies were issued upon the insured except those now in suit. There is another feature of the Bohles case which equally distinguishes it from the cases at bar. It appears that the defendant in the Bohles case claimed that the policy which was contested had lapsed for non-payment of premiums (54 Vr., p. 248). The attitude of the company as stated by Justice Kalisch (54 Vr., 249), was:

> "The company denied the legal validity of the policy. It claimed that the policy had lapsed. It refused to receive any premiums. After the time it refused to receive the June premium it treated the policy without any binding force. Having repudiated all liability under the policy, it follows as a logical sequence a proof of death thereunder would be of no avail."

So in pronouncing the opinion of the Court of Errors, Justice Trenchard said (55 Vr., p. 318):

> "Moreover, the company denied liability under the policy in suit upon the ground that there had been a forfeiture because of failure to pay the premium. That, we think, was a waiver of the condition as to furnishing of proof of death, for it was an indication to the insured that the furnishing of proofs would be useless."

Justice Kalisch cited *Knickerbocker Life Insurance Co.* v. *Pendleton,* 112 U. S. 696, as applicable upon the situation in the Bohles case. An examination of the Pendleton case shows not

only that it was applicable, but further emphasizes the distinction between those situations where the company has denied liability in the lifetime of the insured, as in the Bohles case, and those situations where the company denies liability after the death of the insured, as in the case at bar. In the Pendleton case, it appeared that the company claimed the policy had become forfeited by failure to pay premiums (112 U. S., p. 698), and the trial judge in his charge pointed out that the defense of the company was (p. 701) "that the condition for payment has been violated and the policy ceased before the death of Pendleton," and accordingly the Supreme Court upheld the charge of the trial judge that, if following notice of the death of the insured, "the agents of the company repudiated all liability and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file it cannot alter the case" (p. 709). In commenting upon this, Justice Bradley said (p. 709):

> "We think that there was no error in this instruction. The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss or death. It is equivalent to a declaration that they will not pay though the proof be furnished."

Citing cases.

This Pendleton case has been cited in subsequent cases as applicable to those situations where the defendant company claimed that the policy had ceased and determined before the death of the insured.

See *Iowa Life Insurance Co.* v. *Lewis,* 187 U. S., 335 (p. 337) and *Phoenix Insurance Co.* v. *Kerr,* 129 Fed. (C. C. A.), 723 (p. 727).

The Bohles case presented a totally different situation from the one at bar. Here there had been no repudiation of the policy during the lifetime of the insured. It was not until after the insured had died and the company had investigated and learned of the fraudulent misrepresentations and concealments upon which the policies had been issued, that the letter of April 1st, 1915, was written. The situation, therefore, is like that in the Kustor case where this Court said: "Clearly the letter of the company simply declining to pay the claim, was not a waiver."

The policies were in force up to the death of the insured. The company made no claim to the contrary. It was after the insured had died that the company questioned the validity of the policies upon the ground of fraud in the applications. The furnishing of proofs of death should have been proved; and if they showed deceit or fraud in fact, then the plaintiff ought not to have recovered.

The defendant company was entitled to insist that evidence of "due proof" from the claimant in the form of affidavits showing the facts, be put in. The letter of repudiation (Exhibit P. 4, p. 74), was not written until April 1st, 1915, three months after the death of the insured, which occurred on January 2nd, 1915. There had been no repudiation of the policy during the insured's lifetime. These cases, therefore, are completely distinguished from the Bohles case and the Federal authorities upon which it is founded. The ruling in the Kustor case applies with full force.

The Supreme Court reasons (p. 88, l. 35, etc.). (1) as though no proofs of death had been submitted before the letter was written, and (2) as though the letter had been written during the lifetime of the insured. Neither situation prevailed.

The insured died January 2, 1915. The letter was written April 1, 1915, not until after the death, and not in the lifetime of the insured.

Very evidently a claim had been made; the letter says so. It says, "We have not paid the claim made" (p. 74, l. 28).

The only kind of a claim which under the policy could be made, and which the insurance company would be at all required to notice, was one made in accordance with the terms of the policy. The evidence clearly shows such a claim had been made. Papers to submit to the company were obtained by the insured's family, some of which were submitted, and were produced by the defendant's attorney at the trial, and used on cross examination of defendant's witnesses by the plaintiff's attorney. Photographic copies were even in the possession of the plaintiff's attorney.

See testimony (page 17, l. 10; p. 27, l. 30; p. 28, ll. 32-40; p. 29, l. 25; p. 41, l. 12; p. 42, ll. 4-8; p. 43, l. 12; p. 46, l. 15).

Moreover the Court will observe that the plaintiff—she being the person who was required to file the proof of death—did not take the stand. Undoubtedly she was kept off so that she could not be confronted with her sworn papers on cross-examination. The situation then is: A proof of death was filed, the claim was rejected as fraudulent, a suit was brought to enforce it, and the plaintiff is allowed to recover, without proving the essential condi-

tion precedent to any recovery, namely, a compliance with the terms of the contract in suit.

The plaintiff's course at the trial was ingenious, but it was unsound. Had she been required to prove her case she might have been non-suited. Having failed to prove her case, a verdict should have been directed against her.

We contend, therefore, that the trial judge erred in holding the letter of April 1st, 1915, to have been a waiver of the requirements of the policies; and the failure of the plaintiff to measure up to the conditions of the policies and the allegations of her own complaints should have resulted in the granting of the defendant's motions for a non-suit and direction of a verdict.

III.

The trial judge erred in his charge to the jury.

The trial judge evidently endeavored to keep in his mind the distinction between a breach of warranty and a fraudulent concealment or representation, and the different rules of law applicable to those two defenses, but a reading of his charge as a whole shows he signally failed in his effort.

Defendants urge the following specific errors:

(a) He charged the jury as follows (p. 53, l. 36, etc.):

> "Now, the mere fact that a man has a disease and that he doesn't make that fact known to the agent doesn't necessarily mean that he may not recover or his bene-

ficiary may not recover should he die at a later date, because a man may not know that he has a certain disease or he may not have in mind at the time he makes his statements, that he has a certain disease."

The judge evidently had in mind the rule in the Henn case, dealing with the *bona fides* of the applicant's belief as to some obscure disease; but when he charged the jury that it was no bar to a recovery that he had a disease, and in making his application to the company "may not have in mind at the time" that he made the statement that he had this disease, he was going far beyond the Henn case, or any other case dealing with such a subject. It is the duty of applicant for insurance to keep in mind everything which he knows, material to his physical condition, about which he is interrogated, and it would be an astonishing rule of law that an applicant for insurance, knowing that he had suffered from a certain disease, could be excused from setting it forth in his application simply because he did not have it in mind at the time he made his application. Such a rule of law would result in far too many absent-minded applicants for insurance, and would be an aid to fraudulent practices.

The Supreme Court took the same view of this phase of the case, as it did of the motion to direct (p. 89, l. 4, etc.); namely, that the question of intention was a factor. The Supreme Court held that "it must appear that the deceased was knowingly stating a falsehood to the company." The evidence and the cases and the argument have already been set forth under Point I. of this brief. But the trial judge in this language of his charge went beyond even the question of intention, as the rule is laid

down in the Henn case and other cases, and the Supreme Court evidently failed to observe the distinction.

(b) The trial judge also charged the jury as follows:

> He said he considered it his duty to (p. 55, l. 23) "call your attention to the fact that the claim in this case is not made that the answers are affirmatively something that is not true, but the claim is made that the printed part of the application which says (I had better read you the language), 'where nothing is written in the following paragraphs, it is agreed that the declaration is true without exception.' In other words, in this case the claim is made, not that the answers are untruthful affirmatively, but because something is not written in under that portion of the policy, it is agreed that the declaration is true without exception."

As appears from what he said at the top of page 55, the trial judge was dealing with the case on the basis of representations, as opposed to warranties. The claim of the defendant was not so much what the insured said in his application, as what he did not say. The defense was was not so much the representation by stating something "untruthful affirmatively," as it was a fraudulent concealment, failing to have stated anything. The trial judge evidently had in mind the Hanrahan and Owen cases, dealing with the effect of incomplete answers, or answers incomplete but not true as far as answered, in their bearing on the defense of a breach of warranty. He failed to comprehend the difference between that defense and the defense of fraud, where the gist of the defense is deceit, and where the deceit

may be just as effectively made by a fraudulent concealment as by any affirmative statement.

He seems to have overlooked the Fish case entirely.

IV.

The trial judge improperly excluded certain prescriptions offered in evidence by the defendant.

The defendant produced certain prescriptions which had been filled by the druggist Lavigne, and offered them in evidence. They were Exhibits D. 2, D. 3, and D. 4 (p. 33). They were all proved by Mr. Lavigne as having been filled at his drug store for "Mr. Guarraia, the insured" (p. 31, ll. 20-40). Dr. Rostow had written these prescriptions, but was unable to remember for whom they had been written (p. 19, l. 30, to p. 20, l. 16). Mr. Lavigne, however, supplied the proof in that respect, and said that they had been filled for the insured. These prescriptions, it seems to us, were evidential, and for the consideration of the jury under the defenses which were set up in the case, and should have been admitted in evidence.

The Supreme Court held that in the view they took of the case, these errors would become harmless (p. 89, l. 10, &c.).- The view of the Supreme Court, as already pointed out, laid overemphasis on the word "intentional" as applied to the false representations. If our contention is right, then the error in ruling out these prescriptions was very harmful, for the evidence was highly material.

But quite apart from the question of whether the Supreme Court was right in its view of the case, or not, and adopting its own theory, the re-

fusal to admit these prescriptions in evidence was not harmless. The case went to the jury; and under the trial judge's instructions, the jury could have found for the plaintiff if they had found as a fact that the insured did not even have in mind his diseases, medical attendance, etc., at the time he made his statements. Would he not have been more likely to have had them "in mind" if he had been taking medicine from these prescriptions? And with the prescriptions in evidence the jury could not well have found he had not taken the medicines.

We respectfully contend that the trial judge committed error harmful to the defendant, that the Supreme Court fell into error in affirming those judgments, and that the judgment of the Supreme Court should be reversed, and the judgments of the District Court set aside.

Respectfully submitted,

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

CONOVER ENGLISH,
Of Counsel.

ADDENDUM

NEW JERSEY SUPREME COURT.

June Term, 1910.

ANNA KUSTOR, *vs.* METROPOLITAN LIFE INSURANCE CO.	*Appeal from the Perth Amboy District Court.*

Before Justices Garrison, Swayze and Voorhees.

H. W. Kehoe for respondent.

McCarter & English for appellant.

SWAYZE, *J.*

This is a suit upon a policy of life insurance. At the trial the only proof that the policy was issued by the company was the testimony of a man named Cross, who had been an agent working for the company, that the policy was issued by his company, but on cross examination he admitted that he did not know the signatures to the policy; that he could not say, except from the fact that the paper was in the form of a policy issued by the defendant, that it was a policy. He went no farther than to say, "It looks like the usual form," but admitted that he did not know whether it was signed by the officers of the company. In response to the court he testified that that kind of policies came to him and that from his investigation of the policy and the looks of it it looked like a policy issued by the defendant. There was proof that a man named Salinski had received payment of premiums and had countersigned receipts, but these receipts on their face stated that they were not binding upon the com-

pany until countersigned by the company's cashier at its home office or the superintendent of the district in which payment was made; and there was no proof that Salinski was either cashier or district superintendent. If this testimony could possibly be held to be any proof of the fact that the policy was issued by the defendant company, it was at most evidence to be submitted to the jury. The judge, however, treated it as conclusive evidence and did not submit this vital question, so that there is no finding of the fact in that respect. The policy as printed provides for the payment of the amount upon receipt at the home office of the company of due proof of the death of the assured. No proof of death was made, either at the home office of the company or elsewhere. The nearest approach to it was proof that the beneficiary after her husband's death gave the paper to a man named Cross, a superintendent of the insurance company in Perth Amboy. There was also proof that the attorney of the plaintiff had written to the company, although his letter was not in evidence, and in reply the company simply declined to pay the claim. The trial judge left to the jury to say whether this was a waiver. He told the jury that what was due proof depended very largely upon circumstances; that if it was brought to the knowledge of the company through proper channels that the insured is dead, it would be sufficient proof. Clearly the letter of the company simply declining to pay the claim was not a waiver. That the trial judge was wrong in his view as to what constituted due proof is apparent, we think, from the language of the policy, which requires receipt of due proof at the home office of the company. This can have no meaning except that some sort of written proof should be furnished. A mere statement of the bene-

ficiary or her attorney could hardly be regarded as proof. What the policy probably contemplates is proof in form of affidavits.

For these manifest errors the judgment must be reversed in order that there may be a new trial in the district court.

NEW JERSEY

COURT OF ERRORS AND APPEALS

GIOVANNINA GUARRAIA, Plaintiff-Respondent, vs. METROPOLITAN LIFE INSURANCE COMPANY, Defendant-Appellant.	Suits Nos. 1 and 2. On Appeal from Supreme Court.

BRIEF FOR PLAINTIFF-RESPONDENT.

The present appeals bring before this Court two cases which were tried before the Elizabeth District Court and a jury, each case resulting in a verdict and judgment for the plaintiff for the sum of $492.13. The Metropolitan Life Insurance Company appealed from these judgments to the Supreme Court where the judgments were affirmed and is now further appealing to this Court for a reversal of the judgments of the District Court as affirmed by the Supreme Court.

The grounds urged by the appellant for reversal are, that the plaintiff should have been nonsuited and a verdict directed for the defendant and that the trial judge committed errors in his charge to the jury and improperly excluded evidence.

I. A nonsuit should not have been granted.

The sole ground for application for a nonsuit was that the plaintiff failed to offer evidence that proof of death was furnished to the defendant.

In this case the plaintiff proved the issuance of the policies, the death of the assured and a letter written by the defendant refusing to pay the claims on the ground that the policies were secured by misrepresentations made in the applications (C., p. 74). In this connection I desire to call your Honors attention to the fact that when this letter was offered in evidence Mr. English said "I have no objection" (C. p. 13, l. 28). In his brief on page 25 he says that Mr. Hueston's letter to the company was not put in evidence. He did not insist on that course at the trial, and in fact the letter of the company, Exhibit P-4, was offered in evidence with the tacit consent of the defendant's counsel.

The insurance Company now claims that the case here is controlled as far as the question of waiver of proof of death is concerned, by a former decision of the Supreme Court in the case of Kustor vs. Metropolitan Life Insurance Company.

A reading of that case will show that Mr. Justice Swayze there said: "Clearly the letter of the company *simply declining to pay* the claim was not a waiver." This is easily distinguishable from the language contained in the letter in this case, and that letter distinctly says that the reason of the refusal to pay is "on account of the misrepresentations made in the applications on which the insurance was secured."

There fore, it is respectfully insisted that this language brings the case within the ruling laid down by the United States Supreme Court in Knickerbocker Life Insurance Company vs. Pendleton, 112 U. S. 696, where that Court said:

> "If they refuse to pay at all and base their refusal upon some distinct ground without reference to want or defect of the preliminary proof, the occasion for it ceases and it will be deemed to be waived."

This Court in the case of *Bohles* v. *Prudential Insurance Company*, 84 N. J. L., 315, said:

> "The company denied liabilty under the policy in suit upon the ground that there had been a forfeiture because of failure to pay the premium. That, we think, was a waiver of the condition as to furnishing of proof of death, for it was an indication to the insured that the furnishing of proofs would be useless."

II. There was a jury question and therefore could not be a directed verdict.

By the express terms of the policy upon which the suit was based it was provided that "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim hereunder unless it is contained in the written application therefore, and a copy of such application is securely attached to this policy when issued."

The real defense made to the case was that there is a forfeiture under the policies issued by reason of a breach or breaches of warranty and it has been settled in this state by a long line of decisions that such forfeitures are not favored and will be avoided whenever possible.

Graham v. *Security Life Insurance Company*, 72 N. J. L., 298;
Henn v. *Metropolitan Life Insurance Company*, 67 N. J. L., 311;
Hampton v. *Hartford Life Insurance Company*, 65 N. J. L., 265.

From this agreement in the contract of insurance it must necessarily follow that unless there is the presence of fraud there can be no warranty and my learned adversary in his argument on this branch of the case instead of showing that there is that positive and conclusive evidence of fraud which is necessary to make the question a court question, starts out with the assumption that there was fraud. (See his brief at p. 7, second paragraph.)

There is no question but what if there were such evidence of fraud that was clear, conclusive and controlling and not disputed, that the trial Court would have probably been obliged to direct a verdict for the defendant on the ground that there was a breach of warranty. This much is conceded, but it is insisted that from the evidence in the case, the most that could have been determined as a court question was that statements in the application were untrue and as the Supreme Court held under the circumstances of the case, the question of the intent in the making of the statements was a jury question.

It must be apparent that in the cases cited by appellant, those policies by their terms made the particular statements warranties. See

Fish v. *Metropolitan Life Insurance Co.*, 44 Vr., 619;
Brunjes v. *Metropolitan Life Insurance Co.*, 54 Vr., 296;
Carson v. *Jersey City*, 14 Vr., 300;
Henn v. *Metropolitan Life Insurance Co.*, 38 Vr., 318.

There is a distinction between those cases and the case now at issue, and that is, by the very terms of the present policies the statements in question are made representations and not warranties (in the absence of fraud).

Now who is to determine the presence of fraud in the making of those statements—the court or the jury? In deciding whether this question of fraud is a court question or a jury question, the same rules governing trials in other cases must apply, and that there is a distinction between a representation which is merely false and one which is fraudulently made is clearly shown by the language adopted as the opinon of this Court in *Franklin Life Insurance Company* v. *Martin*, 40 N. J. L., 573:

> "A representation collateral to the contract will not avoid the policy though it be untrue unless it was fraudulently made.
>
> Where the defense is that a representation collateral to the contract was false and was fraudulently made, the gist of the defense is the fraud of the plaintiff by which the insurer was misled and induced to make the contract of insurance."

There are two particulars in which the decedent made mis-statements:

(*a*) As to the disease from which he had previously suffered; and

(*b*) That he had not been attended by a physician within two years.

As held by the Supreme Court, the declaration 2 was a declaration that he had not suffered from any of the diseases named (C., p. 64). Whether the same can be held in reference to questions or declarations 4 and 5 seems to be a matter somewhat different. The declaration 4 is not in the same form as any one of the other twelve declarations and a reading of it will show that it is in fact no declaration, but is in the nature of a question to

which the Insurance Company could have probably received an answer had they insisted, and it seems that the declaration 5 could in fact only be a declaration full and complete, if the preceding declaration 4 had been answered and therefore, as regards these two, 4 and 5 combined, we are in the same situation as if the company had accepted an incomplete answer and come within the rule laid down by this Court in the case of *Owen* v. *Metropolitan Life Insurance Co.*, 74 N. J. L., 770.

The facts produced in evidence disclose only one physician who attended the decedent within the two years prior to his death, and that was Dr. Rostow, who visited the decedent five times in the month of May and who was visted at his office by the decedent once in the month of November (C., pp. 15 and 24); and the evidence shows that the bronchitis from which the decedent had suffered was an illness which he had in 1908 (C., p. 40). The doctor's written statement shows that this disease was of the duration of a couple months (C., p. 74). There is no evidence in the case that the decedent knew that he was suffering from consumption or tuberculosis.

This man was examined by a regular physician of the Metropolitan Life Insurance Company on September 24th, 1914, and that physician after the examination which he made, certified to his company that the assured was sound and recommended him at first class rates (C., p. 66-D). The same physician, Dr. H. F. Widmer again examined the assured on November 11th, 1914, with the same finding and recommendation (C., p. 72-D).

This Court in the case of *Henn* v. *Metropolitan Life Insurance Company*, 67 N. J. L., 312, said:

> "If the question asked relates to a matter upon which the insurer should know that

> the insured could not have the knowledge to fully answer, the warranty will not be held to be more than a warranty in the fair sense of the question, namely, to the belief of the insured."

Now in the case at issue the assured's appearance was such that the physician was of the opinion that he was in good health; that his constitution was sound and his report as disclosed on page 66 a and b and again on 72 a and b, show this man to have been in exceptionally good condition. If this physician, who was working for and paid by the Metropolitan Life Insurance Company honestly believed as a physician that the man was in good health, where can there be any fraud in the man himself believing that he was in good health.

There is no evidence in the case that **Dr. Widmer** spoke or understood Italian, while the evidence in the case is clear, conclusive and convincing that the assured spoke and understood only Italian. Dr. Rostow says he didn't speak to the man directly because the man was talking Italian. (C. p. 23, l. 18.) Dr. Mancusi-Ungaro who attended him in 1908 and spoke Italian to him says:

Q. Doctor, this man couldn't speak a word of English, could he? A. Not that I know of (p. 40, l. 38).

Antonio v. *Tiscornina* testified that he was an inspector of the Metropolitan Life Insurance Company; that in a business way he knows Dr. H. F. Widmer; that the witness speaks Italian, but he does not know whether the doctor does (p. 46).

Peter Guarraia testified that his father couldn't talk English at all (C., p. 47, l. 32); that his father worked during the year 1914 as a mason (C. p. 47, l. 36); that his father worked about two weeks before he died (C. p. 48, l. 2).

Inspection of the applications for these two policies on pp. 64 and 70 respectively show that both the assured and the beneficiary signed by making their marks. Does not this silent testimony demonstrate the truth of the testimony above cited?

Here we have an Italian advanced in years, who cannot speak or understand English and makes his 'X' for his signature. He is asked questions by an English speaking doctor, who necessarily depends on his own examination of the patient-applicant. As against this, we have the fact that six years prior to the application, he was suffering from bronchitis from which he was apparently cured within a few months, and in May another physician visited him at his home for five days. Do all of these circumstances, taken together, prove conclusively that the application for these policies were made fraudulently and in such a way as to deceive the Insurance Company and its physician?

If this were an actual fraud the defendant would have been entitled to have a verdict directed in its favor; but inasmuch as this evidence is not so clear and convincing and inasmuch as when it was submitted to the jury, the jury determined that the application was bona fidely made, will this court now say that no jury should have come to a conclusion other than that there was active fraud?

In the absence of an intent to deceive and defraud, established by clear and convincing evidence, the question became a jury question, and having been determined by the jury, the finding of the jury should be permitted to stand.

III. The charge of the Trial Judge.

Exceptions taken by the appellant to the judge's charge on the ground that he left it to the jury to say whether a mis-statement was intentionally made by the assured, and this, under the language

of the policy in question, was very proper because declarations are by the very terms of the policy made statements and not warranties in the absence of fraud, and the judge in submitting this case to the jury as a question of fact, followed the doctrines established by this court in the numerous cases heretofore cited, and as I have before said, the vast and great distinction between the case at issue and the cases so strongly urged by my learned advisary is, that in those cases all the statements were, by the terms of the policy, made warranties while in the policy in this case the statements in order to become effective as warranties must be first found to have been fraudulently made.

A failure to remember a disease might or might not under the circumstances of each particular case constitute fraud and while in some cases it might not be fraud and in other cases it might be fraud it cannot be said that it is a question of law, but is as determined by the trial court, a question of fact.

Under subdivision "b" counsel again insists that the court was dealing with the case on the basis of representations as opposed to warranties and claims that a deceit may be just as effectively made by a fraudulent concealment as by any affirmative statement, yet in the case at issue, it does not appear that there was any request by counsel for the Insurance Company that the trial judge should charge the jury on the question of a fraudulent concealment.

It seems that the sole question to be submitted to the jury was whether the statements made in the application for these insurance policies by the decedent were not only untrue in fact, but were made with a fraudulent intent.

The jury had the right to determine whether a man who could speak and understand only Italian, being examined by a physician who could evidently not speak Italian was perpetrating a fraud on the

Insurance Company. Can it be assumed that if that were so, this man would twice submit himself to a physical examination by a physician of the same company within a period of a few months?

If there was any fraudulent intent in the mind of the assured when he made the application for the first policy, can it be said that he would be so brazen and so bold as to attempt the second application when he had the disease, the ravages of which were progressing so rapidly that he soon thereafter died? Is it not within human knowledge that when persons are suffering from tuberculosis that a part of the cure is to keep from them the knowledge of the disease which they have? All of these things are known to men who sit as juries and the jury had the right to consider whether this old Italian made mis-statements of the fact to the company's doctor, intending thereby to deceive the doctor and the company.

They had the right to take into consideration that this doctor was not produced as a witness. It seems very likely from the testimony of the inspector that Dr. Widmer was at the time of the trial still in the employ of the Metropolitan Life Insurance Company, because the inspector says that he had interviewed Dr. Widmer relative to the case (C., p. 47).

It is therefore respectfully insisted that the charge laid before the jury, the substantial question of fact which they were to decide, "was there fraud," and the jury decided "that there was no fraud."

IV. No evidence was improperly rejected.

On the examination of Dr. Rostow the defendant's counsel showed him several prescriptions; he identified the first one as being prescribed by him

for the man in question (p. 18, l. 31); he said as to the others he did not know for whom he prescribed them (pp. 19-20).

The witness Levigne, druggist, testified that he made up the prescriptions in question and that they were for Mr. Guarraia, the assured. On cross-examination he said he was told so by the party who brought them into the store (C., p. 32, l. 20). The court admitted in evidence the prescription which was identified by the doctor (C., p. 33, l. 10), but rejected the others (C., p. 33). If any of these prescriptions were admissible it was only the one identified by the physician as having been prescribed by him for the assured. There was no connection between the other prescriptions and the assured by legal evidence from the doctor or druggist. The doctor could not identify them and the druggist's identity was merely by hearsay.

It is insisted that there was therefore no error, but at any rate, if there was error in thus excluding these prescriptions which were not identified, what harm did it do? The doctor testified what the prescriptions were for and the druggist testified that he was told that they were for the assured.

In conclusion it is therefore respectfully submitted that if there was any evidence at all tending to show fraud it was not so clear and conclusive that the court must have necessarily directed a verdict in favor of the defendant.

The bona fides of the decedent's application for the insurance in question was passed upon by the jury and therefore the judgments below should be sustained with costs.

Respectfully submitted,

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