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Notice of Appeal and Grounds.

(Filed Oct. 4, 1923.)

New Jersey Supreme Court.

10

ELIZABETH LEVANDOSKI,
Plaintiff,

v.

EQUITABLE LIFE ASSURANCE
SOCIETY,
Defendant.

Action at Law.

To COLLINS & CORBIN, Esqrs., Attorneys for
Appellee.

20

TAKE NOTICE, that the appellant, Elizabeth Levandoski, appeals to the Court of Errors and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the following grounds:

1. Because, the trial Court erred in granting a motion of the defendant for a direction of verdict in favor of said defendant.

30

LAZARUS, BRENNER & VICKERS,
Attorneys for Appellant.

40

Circuit Court Record.

(Filed .)

NEW JERSEY SUPREME COURT

HUDSON COUNTY.

10

ELIZABETH LEVANDOSKI,
Plaintiff,*v.*EQUITABLE LIFE ASSURANCE
SOCIETY,
Defendant.

} Action at Law.

20

Equitable Life Assurance Society, the defendant in this cause, was summoned to answer unto Elizabeth Levandoski, the plaintiff herein, in an action at law upon the following complaint:

Plaintiff residing in the City of Bayonne, County of Hudson and State of New Jersey, says that,

1. The defendant is an insurance company incorporated under the laws of the State of New York with a certificate filed authorizing it to conduct business in the State of New Jersey.

30

2. As such Insurance Company, the defendant issued a policy of insurance on the life of one Stanislaw Goretski, which said policy was #2901057, under and by the terms of which policy of insurance provided that upon the death of said Stanislaw Goretski, payment would be made to the plaintiff as beneficiary of the amount for which said Stanislaw Goretski was insured.

40

3. Since the issuance of the said policy of insurance, the said Stanislaw Goretski has died,

Answer.

proof of such death having been delivered to the defendant, together with the original policy issued by it and demand for payment has been made by the said plaintiff, but the defendant has refused and still does refuse to make such payment to the plaintiff.

10

4. The original policy has been delivered to the defendant and has not been returned by it, making it impossible to annex a true copy thereof to this complaint, and demand is, therefore, made for the production thereof at the time of the hearing of this cause.

To the damage of the plaintiff \$2,000.

LAZARUS & BRENNER,
Attorneys of Plaintiff.

20

The defendant answered as follows:

Defendant, Equitable Life Assurance Society of the United States, a corporation of the State of New York, having its principal office in the City and State of New York, says that:

FIRST DEFENSE.

1. It admits the matters stated in the first paragraph of the complaint.

30

2. It admits the matters stated in the second paragraph of the complaint, but says that Stanislaw Goretski, whose life was insured by said policy of insurance, stated in his application to defendant therefor, that he had not consulted nor been treated by any physician or practitioner during a period of five years prior to February 7, 1922, that he did not have and had not been treated for any disease or disturbance of the throat or lungs, and that his

40

Answer.

10 health was not then impaired in any way. He agreed in writing with defendant that his said statements should become a part of said policy of insurance. Said statements, or some of them, were untrue and were known to said Stanislaw Goretski to be untrue, but were relied upon by defendant when it issued said policy of insurance. When defendant discovered that said statements were untrue it cancelled said policy of insurance and gave notice of the cancellation thereof to plaintiff, said Stanislaw Goretski being then dead.

3. It admits the matters stated in the third paragraph of the complaint, but denies that it is liable on said policy of insurance.

20 4. It admits that said policy of insurance has been delivered to it and that it now has the same as stated in the fourth paragraph of the complaint.

SECOND DEFENSE.

30 The policy of insurance mentioned in the complaint was obtained by said Stanislaw Goretski by misrepresentation and fraud on his part, in that he represented to defendant before said policy was issued, and as an inducement to defendant to issue the same, that he has not consulted nor been treated by any physician or practitioner during a period of five years prior to February 7, 1922, that he did not have and had not been treated for any disease or disturbance of the throat or lungs, and that his health was not impaired in any way, although he well knew that he had consulted and been treated by a physician or physicians at some time or times during said period, that he was then suffering from a disease of the lungs, and that his health was then impaired. Defendant did not

40

Reply.

know that such was the case and relied upon the aforesaid representations of said Stanislaw Goret-ski when it issued said policy of insurance.

THIRD DEFENSE.

1. Said Stanislaw Goret-ski agreed in writing with the defendant that the policy of insurance mentioned in the complaint should not take effect until the first premium thereon had been paid during his good health, which agreement is part of said policy of insurance. 10

2. The first premium on said policy of insurance was not paid during good health of said Stanislaw Goret-ski and, therefore, said policy of insurance was never in effect.

COLLINS & CORBIN,
Attorneys of Defendant. 20

The plaintiff replied as follows:

Plaintiff replying to the amended answer of the defendant says that,

1. She denies the allegations set forth in the second paragraph of the first defense.

2. She denies the allegations set forth in the second defense. 30

3. She denies the allegations set forth in paragraph 1 of the third defense.

4. She denies the allegations set forth in paragraph 2 of the third defense.

5. Plaintiff further replying says that the answers set forth in the application purporting to have been made by the assured and the answers set forth in the report of the physician purporting 40

Rejoinder.

10 to have been made by the assured to questions propounded to him were not in fact made by him, that the assured was illiterate and could neither speak, read nor write the English language; that the examination was conducted by the physician in perfunctory manner, and he had the assured sign the paper as a matter of form.

6. Plaintiff further replying also says that if the assured did make the answers set forth in the application and in the report of the physician, which are purported as having been made by him, that he did so without any intention of fraudulently misrepresenting the truth.

20 LAZARUS & BRENNER,
Attorneys of Plaintiff.

The defendant rejoined as follows:

Defendant, rejoining upon the reply of the plaintiff to the amended answer in above entitled action, says that:

FIRST REJOINDER.

30 It denies the truth of the matters stated in the fifth and sixth paragraphs of the reply to the amended answer.

SECOND REJOINDER.

40 The matters stated in the fifth and sixth paragraphs of the reply to the amended answer do not support or justify plaintiff's alleged cause of action as a matter of law, for the reason that the statements and representations of said Stanislaw Goretski, whose life was insured by the policy of insurance mentioned in the complaint, as set forth in the amended answer, were made by him in his application for said policy of insurance and to defendant's medical examiner before said policy of

Postea.

insurance was issued by defendant, and are a part thereof.

THIRD REJOINDER.

The matters stated in the fifth and sixth paragraphs of the reply to the amended answer do not support or justify plaintiff's alleged cause of action as a matter of law.

10

COLLINS & CORBIN,
Attorneys of Defendant.

Postea.

(Filed .)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

20

ELIZABETH LEVANDOSKI,
Plaintiff,

v.

EQUITABLE LIFE ASSURANCE
SOCIETY,
Defendant.

} Action at Law.

30

This case was tried before Honorable Luther A. Campbell, Judge of the Hudson Circuit, to whom the same had been referred by Honorable Francis J. Swayze, Justice of the Supreme Court, holding the Hudson Circuit, with a jury, at the Hudson Circuit on September 19, 1923.

By direction of the Court the jury rendered a general verdict against the plaintiff and in favor of the defendant.

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LUTHER A. CAMPBELL,
Circuit Court Judge.

Case.

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

10

<p style="text-align: center;">ELIZABETH LEVANDOSKI <i>v.</i> EQUITABLE LIFE ASSURANCE CO.</p>	}	At Law.
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APPEARANCES:

LAZARUS, BRENNER & VICKERS, Esqrs. (Mr. BRENNER), for Plaintiff.

COLLINS & CORBIN, Esqrs. (Mr. BAIN and Mr. NEWTON), for Defendant.

20

The above entitled case was tried at the Hudson Circuit, on Wednesday, September 19, 1923, before Hon. Luther A. Campbell, and a Jury.

Mr. Brenner opened the plaintiff's case to the jury.

Mr. Bain opened the defendant's case to the jury.

30

Mr. Brenner: I desire to offer in evidence, if the Court please, the original policy issued by the defendant company on February 14th, 1922, and ask that it be marked.

(Paper received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Brenner: As a part of that policy, I also desire to offer the application and the Medical Examiner's report.

40

(The papers are received in evidence and marked Plaintiff's Exhibit No. 1-A, consisting of 2 sheets, in evidence.)

Case.

Mr. Brenner: I also offer the proofs of death of Gurecki.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Brenner: There is no dispute about the fact that the man died? 10

Mr. Bain: No; that is admitted.

The Court: You admit the man did die?

Mr. Bain: We admit the death.

Mr. Brenner: And also admit that nothing has been paid under the policy?

Mr. Bain: We admit that nothing has been paid under the policy to the beneficiary.

Mr. Brenner: With that, if the Court please, we rest. 20

Mr. Bain: I ask that there be spread upon the record the stipulation counsel for plaintiff made this morning.

Mr. Brenner: That is agreeable.

Mr. Bain: Suppose I state the stipulations, as I understand them.

It is stipulated by counsel for the plaintiff that Stanislaw Gurecki, the insured, at the time of the application for the insurance policy upon which this suit is based, and at the time the policy was issued, and at all times from the time of the application until the death of Stanislaw Gurecki, was suffering from pulmonary tuberculosis, and that his death was caused by pulmonary tuberculosis, and that the first premium on the policy was paid at a time when he was suffering from pulmonary tuberculosis. 30

Mr. Brenner: Of course, with that I do not want it conceded and do not concede that at those times mentioned this man knew that he was suffering 40

James H. MacIvor, direct.

from that disease. I am simply making the bare admission that he was suffering.

10 The Court: He is not asking you to make that admission. He is merely stating those as the facts without in anywise suggesting, one way or the other, that the assured knew or did not know that he was suffering from that disease.

Mr. Brenner: I only suggest that, if the Court please, because I do not want any misconception of my admission.

Mr. Bain: Otherwise I understand the stipulation is made.

Mr. Brenner: Yes.

DEFENDANT'S CASE.

20 Mr. Bain: I will now read the deposition taken on Long Island.

Testimony of JAMES H. MACIVOR read by Mr. Bain as follows:

"Direct examination by Mr. Newton:

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

"Q. Licensed to practise where? A. In New York State.

30 "Q. How long have you practised in the State of New York? A. Since 1892.

"Q. How long have you been practising in and about Port Jefferson? A. Eleven years.

"Q. Were you consulted by a man named Stanley Gurecki?

"Mr. Brigadier: I object to that.

40 "A. In 1920 he was brought to see me by a friend of his.

"Q. When was it, Doctor? A. If I can refer back to a record—first on February 20, 1920.

James H. MacIvor, direct.

“Mr. Brigadier: Of course, I object to him testifying from the record.

“Q. At that time he appeared with Joseph Babsky? A. Yes, sir.

“Q. A friend of his. Where was Gurecki living at that time? A. He was living with Babsky, I believe. 10

“Q. Doing what sort of work? A. Why, I imagine farming.

“Q. Will you state what statements Gurecki made to you at that time? A. Statements were made through Babsky; he could not speak English.

“Q. Gurecki could not speak English? A. No.”

Mr. Brenner: Now, if the Court please, there is an objection at this point and I want to renew it now; that is as to statements purporting to come from Gurecki to the physician, and statements made by the physician to Gurecki through Babski, who was acting as interpreter. The doctor testifies later in his testimony that he did not understand a word of English and that Gurecki evidently did not understand him—or that the doctor did not understand a word of Polish and could not talk Polish, and that Gurecki did not talk English and could not understand English. Now, anything that was said between them must necessarily have been given through the interpreter, and the best evidence of what was said would be by the interpreter himself. Of course, the doctor cannot say what the interpreter told Gurecki, nor can he tell what Gurecki told the interpreter. 20
30
40

Mr. Bain: The deposition of the interpreter is also here, your Honor.

James H. MacIvor, direct.

Mr. Brenner: I think not. I think not. The interpreter was John Babski. The Babski you have here is Joseph Babski.

10

Mr. Bain: There is nothing to show it was Joseph Babski. In any event, whatever that particular Babski said will cure the alleged defect in the doctor's testimony if it appeared from the testimony of the Babski who did testify that it was he who went with Gurecki to the physician. Then I think there would be nothing in the objection.

20

Mr. Brenner: The objection would still be good because all that Babski could testify to would be what he had told the doctor and what the doctor had told him, and he had conveyed to this man.

The Court: Does this alleged interpreter's deposition go to that, Mr. Bain?

Mr. Bain: I understand it does. We tried to get all that happened at the time—

The Court: May not the portion of this physician's testimony be eliminated at this time?

30

Mr. Bain: What counsel is referring to now is a statement by his representative that he wanted to object to all this testimony. There is no particular objection there at all at this time. I suggest that we wait until we get the particular objection; then your Honor can rule upon it.

Mr. Brenner: I am making the objection now.

40

Mr. Bain: I think presumptively that testimony is admissible. Of course, they can dispute it.

James H. MacIvor, direct.

The Court: Just leave that one answer out temporarily. The next seems to be that he examined him.

“Q. Did you examine him? A. I did.

“Q. What was the result of your examination?

A. Do you just wish the conclusions arrived at? 10

“Q. State the extent of the examination. A. The upper and left side in the upper part of the chest there were a good many moist rales; there was a decided dullness; the same appeared on the right side, though not so extensive; there was rapid breathing and a temperature of 101 at the time. I made a possible diagnosis of tubercular infection there, and suggested his going to the hospital.

“Q. What hospital?” 20

Mr. Brenner: Now, I object to what Babski told him. It is not binding upon the dead man.

The Court: Well, leave that out temporarily, until we see what further there is that may not be objectionable. I think the point is well taken that it is through an interpreter.

Mr. Bain: As I said, the interpreter afterwards testified, and these things will be cured by his testimony. 30

Mr. Brenner: I think Mr. Bain is mistaken.

Mr. Bain: There was certainly a Babski there, and if another Babski comes along and testifies that he is the man who was there, I think that will answer the question. However, I will mark this out temporarily. 40

James H. MacIvor, direct.

Mr. Brenner: That is, just that one answer?

Mr. Bain: Yes.

10 "Q. Now, what was the result you arrived at; what conclusion did you arrive at as a result of your diagnosis? A. Well, that there was a tubercular infection in his chest.

"Q. Did you communicate that conclusion to Gurecki?"

Mr. Brenner: Now, I object to that.

Mr. Bain: I think the answer is all right. The answer is: "Only through Babsky."

20 The Court: It cannot hurt you, then; simply confirms that all he was getting in the way of conversation came through an interpreter.

Mr. Brenner: Yes, sir.

The Court: I do not see that you can find any fault with that, Mr. Brenner. Well, take it out for the present, Mr. Bain.

"Q. Well, can you recall what you told Babsky? A. I cannot give you the exact words, or anything of that sort.

30 "Q. Tell us the substance of what you told Babsky."

Mr. Brenner: Now, that I object to.

Mr. Bain: There is no objection on the record.

The Court: He may object at any time, may he not?

40 Mr. Brenner: I have no objection. I simply want to call the Court's attention, you having the document before you, that Mr. Bain is mistaken when he says there was

James H. MacIvor, direct.

no objection to that at the time the Master took the testimony. You will notice throughout here that Mr. Brigadier, who was there examining, objected to it. He said, "I want an objection noted to all this testimony."

The Court: Well, I cannot say that that means to the testimony that has gone by or whether it is to all that follows. But why spend the time discussing it? Mr. Bain will pass it for the present.

10

Mr. Brenner: I did not know he was.

The Court: Yes, he is.

Mr. Bain: Mark it out temporarily?

The Court: Yes.

"Q. And this hospital was where,"—

Mr. Brenner: I object to that.

20

The Court: That is all a part of that same subject, Mr. Bain, I take it. At the bottom of the page I think is the first question.

Mr. Bain: Now, Babski's suggestion at the time—at the bottom of page 5, isn't that admissible?

Mr. Brenner: What, Babski's suggestion?

Mr. Bain: Yes.

30

Mr. Brenner: The doctor could not understand anything Babski said in Polish, because he said he did not understand him.

Mr. Bain: I do not think there can be an inference that there was not a proper interpretation.

The Court: Suppose you examine your depositions, Mr. Bain, before you go any further, and if you find you have the wrong man I will give you a recess to get the proper person.

40

James H. MacIvor, direct.

10 Mr. Bain: Well, I find that the Joseph Babski who was examined, went with the insured to another doctor. So perhaps there is something in what counsel for the plaintiff suggests, unless it cannot be inferred that there was not a proper interpretation I do not think that we are bound to call the interpreter.

20 The Court: Well, I have not looked up the question, gentlemen. Of course, this could only be relevant as to one of the issues upon which this case may be tried. As to the second, if I may speak to that, it has no relation at all; because there it does not make any difference whether the man knew he was suffering with a disease or was not suffering with a disease. The sole question is whether or not he was. That is as I understand the law.

Mr. Bain: Suppose I go on and leave these out temporarily.

“Q. At what time of day did you examine him?”

30 A. I think he was examined some time between one and two; I could not be absolutely sure, for it was some years ago.

“Q. How long did the examination take? A. About twenty minutes or half an hour.

Q. And the examination took place where? A. At my office.

“Q. In Port Jefferson? A. Port Jefferson.

“Q. And present at the time were you and Babski and Gurecki? A. Yes.

“Q. Where is this hospital?”

40 The Court: You may leave that out for the present.

James H. MacIvor, direct.

“Q. You communicated the result to Babski and he interpreted it to Gurecki? A. Yes.”

Mr. Brenner: That is all right.

“Q. Did you suggest a sanitarium to Babski?”

Mr. Brenner: That is objected to.

10

The Court: Let it remain out for the present.

Mr. Bain: You also object to the next?

Mr. Brenner: Yes.

The Court: Well, of course, that would be relevant further on perhaps.

Mr. Bain: Do you object to the next answer as to the suggestion of the hospital or sanitarium?

Mr. Brenner: Yes.

20

“Q. Now, then, did you treat him after he consulted you? A. I did not.”

“Q. Did he consult you again? A. I saw him again on April 5th.

“Q. 1920? A. 1920.

“Q. State what happened at that time? A. Why—

“Q. Was he accompanied by Babsky?”

30

Mr. Brenner: Now, that I object to, if the Court please, for the same reason as stated previously: that he could only know that by communication received from Babski, not from this man. He is telling his suggestion.

The Court: Well, leave it out for the present.

Mr. Bain: I suppose also the next question?

40

James H. MacIvor, cross.

Mr. Brenner: Next question and next answer.

Mr. Bain: What about the next?

Mr. Brenner: That question I have no objection to.

10

Mr. Bain: Notwithstanding objection was made?

Mr. Brenner: Notwithstanding the objection was made.

"Q. Gurecki not speaking English, did you attempt to communicate by signs or in any other way? A. No, I did not.

"Q. Did Babsky understand English? A. I believe that he did.

20

"Q. How long did this examination take on this second occasion?"

Mr. Brenner: Now, that answer is objected to, as to what he told him.

Mr. Bain: I call your Honor's attention to the fact that there is no evidence at the present time that this man did not understand English.

The Court: Oh, yes, there is. The doctor himself says so.

30

"Q. Did he consult you again after that? A. No, sir.

"Q. That is the last you saw of him? A. That is the last I saw of him."

"Cross examination by Mr. Brigadier," read by Mr. Brenner to the jury as follows:

40

"Q. The first time, Doctor, that you say you saw Gurecki, did he send for you? A. He was brought to me by Babsky, or, that is, he was brought to my office by Babsky.

James H. MacIvor, redirect.

"Q. He was there with Babsky? A. Yes.

"Q. At any time on the number of times that you saw him, did you ever speak in the English language with Gurecki? A. No, I did not.

"Q. In fact, you never said one word to Gurecki?
A. No.

"Q. All you said was to Babsky? A. Yes. 10

"Q. So far as you know then, you cannot say that Babsky did communicate what you told him to Gurecki? A. I cannot.

"Q. How long ago did you say you made these examinations? A. One on February 20, 1920, and the other, he came in to see me, I didn't make any examination of him, on the 5th of April of the same year.

"Q. Do you recall very well all the facts in this case? A. I do from refreshing my memory from the history of the case. 20

"Q. You have looked at your records? A. Surely; it is pretty hard to remember without.

"Q. Then, as far as you know, you could not say that Gurecki knew that he was suffering from a tubercular condition? A. I could not of my own knowledge, no."

"Redirect examination by Mr. Newton," read to the jury by Mr. Bain as follows: 30

"Q. This condition that you observed in his illness, can you state as to its length, how long that had been existing? A. Well, I could not.

"Q. Can you describe his appearance on the first visit? A. Why, he looked rather a sick man.

"Q. Thin? A. Yes, rather.

"Q. How about flesh? A. He was thin, he apparently lost a good deal of flesh. 40

"Q. Did you strip him for the examination? A. Right on down to his undershirt.

Frederic L. McCrea, direct.

"Q. Did you tap his chest? A. I did.

"Q. What was his attitude during the examination? A. Why, as many of those patients do, he was apparently rather more or less indifferent, he wanted to get well, probably, at the same time he did not express much.

10

"Q. You say he complained of what?"

Mr. Brenner: That is objected to.

The Court: Of course, that must have come through the interpreter.

Mr. Brenner: Yes.

"Q. How did he communicate that complaint?"

Mr. Brenner: That is objected to.

20

The Court: Well, let us have it, because he says he got all his statements backward and forward through the interpreter Babsky.

Mr. Bain: Mark it out temporarily?

The Court: Yes.

"Recross examination by Mr. Brigadier," read to the jury by Mr. Brenner, as follows:

30

"Q. Then, so far as you know, Mr. Gurecki did not at any time state to you that he was suffering from tuberculosis? A. Only through Mr. Babsky.

"Q. But he never himself stated it to you? A. No, he did not."

Testimony of FREDERIC L. McCREA, taken on the 4th day of May, 1923, before trial, was read to the jury by Mr. Bain as follows:

"Direct examination by Mr. Newton:

40

"Q. You are a physician and surgeon? A. Yes, sir.

"Q. Licensed to practise in the State of New York? A. The State of New York; yes, sir.

Frederic L. McCrea, direct.

"Q. How long have you practised in the State of New York? A. Since 1907.

"Q. Where do you practise now? A. In Port Jefferson.

"Q. How long have you practised there? A. Since 1908.

"Q. Connected with any hospitals? A. Medford Sanitarium. 10

"Q. Where is that? A. Medford, New York.

"Q. What sort of hospital is it? A. Tuberculosis.

"Q. How long have you been connected with it? A. Six or seven years; six years.

"Q. Connected with it at the present time? A. Yes.

"Q. Did you treat a man named Stanley Gurecki? Prior to February, 1922? A. Yes; February, 1922? 20

"Q. Prior to that time. A. Yes.

"Q. How long prior to that time? A. To the best of my recollection, in the Fall of 1921.

"Q. The Fall of 1921? A. Yes.

"Q. Where did you treat him? A. In my office.

"Q. Who accompanied him? A. To the best of my recollection, he was alone.

"Q. Will you state what happened at that time? A. The man came in, he could not speak any English, but he gave me to understand that he was ill, and I attempted to get a history out of him, but I was very unsuccessful, he could not speak a word of English; I heard him cough and the general impression I formed of him was that there was something the matter with his chest, so I started in going over his chest. 30

"Q. Did he strip? A. I stripped him to his waist.

"Q. You examined his chest? A. Yes.

"Q. What did you find? A. I don't remember the exact findings of his chest, that is as to location, 40

Frederic L. McCrea, direct.

but I know I found sufficient there to lead me to a diagnosis. I have no record of this; I am talking from memory only.

“Q. What was his general condition? A. Emaciated.

10 “Q. How do you fix this date, Doctor, the Fall of 1921? A. I fix the date by the condition in the office and the weather. We had not yet started the fire and the house was cold, and I recollect that I questioned whether it was advisable to strip him then and there, or to provide some method of heating, but I went on and did it.

“Q. What time of day did the examination happen? A. Between one and two.

20 “Q. Do you recall his temperature? A. No; I don't know whether I ever took his temperature; I started in on his chest first.

“Q. After you started in to— A. I did take his temperature.

“Q. You did take his temperature? A. Yes, I remember I did.

“Q. Do you recall what it was? A. No; I don't recall; but he had a temperature.

30 “Q. What other examination did you make besides the chest? A. Why, practically all, I possibly ran my hand over his abdomen, I don't remember whether I did or not; probably I didn't.

“Q. Did you find any lesions? A. In his chest?

“Q. Yes. A. Yes.

“Q. How many? A. Well, his chest was pretty well filled with rales, as I recall it, and dullness; now, I cannot remember from memory the location of those points specifically.

40 “Q. Any other conditions, did you observe? A. Of the disease?

“Q. Yes. A. Only his cough, as a symptom.

Frederic L. McCrea, direct.

"Q. Yes; any other symptoms? A. His cough, and his emaciation, general weakness.

"Q. As a result of your examination, what conclusion did you reach? A. I concluded he was tubercular.

"Q. How far advanced? A. Second stage.

"Q. Now, what did you tell him after you reached that conclusion? A. I told him so. 10

"Q. Well, how did you communicate the fact to him? A. In plain English.

"Q. What did he say? A. Why, he didn't say anything much; I don't believe he comprehended what I told him.

"Q. What did you advise? A. I told him that the proper place for him was in an institution for the cure of his complaint. 20

"Q. Did you recommend any particular institution? A. Yes.

"Q. What did you recommend? A. I told him he had better go to Holtsville, and if he could not go there I would see if I could make some arrangements to take care of him at Medford.

"Q. On how many occasions did he consult you? A. Only once.

Q. Did you see him again after that? A. Never living. 30

"Q. You saw him dead? A. Yes.

"Q. He died when? A. The 27th of June, 1922.

"Q. How did you come to see him after his death? A. I was at the office of the Deputy Health Officer.

"Q. Who notified you of his death? A. The undertaker.

"Q. And you went where to see him? A. No; I inquired the circumstances of his death; the undertaker could not find anybody in town who 40

Frederic L. McCrea, direct.

could render a specific, what I consirered was a satisfactory death certificate, so I called the Coroner.

“Q. And what did you tell the Coroner? A. I told him the man was dead without medical attendance.

10 “Q. Where was he when you saw him? A. South Setaucket.

“Q. In what; in a house? A. Yes, in a house.

“Q. In whose house? A. I don't know whose house it was; I know the woman when I see her.

“Q. Where was the house located? A. Norwood is the name of the place. I was thinking of it in reference to what we call the Five Points; it was North of a point we call the Five Points.

20 “Q. Who lives in that house? A. I don't know who lived in that house.

“Q. Who did you see there beside the dead man? A. Oh, several people; there was a woman there who did most of the talking.

“Q. Polish? A. Polish, yes; she spoke pretty good English.

“Q. Did you recognize him as the man that you treated? A. Yes, I did, that I had seen before.

30 “Q. Did you make any examination of the dead man to determine the cause of his death? A. No, I didn't at that time.

“Q. Well, did you make it at any other time? A. No.

“Q. Did you communicate his history to the Coroner? A. Yes.

“Q. What did you tell him? A. Well, I identified the man as the man that I had previously seen and I made that diagnosis.

40 “Q. You told this to Doctor Gibson? A. Yes.

“Q. What did you tell him as to what diagnosis

Frédéric L. McCrea, cross.

you made when he had previously consulted you?
A. That I had made a diagnosis of tuberculosis.

“Q. Were there any indications, any objective indications, or any surface indications, as to what was the cause of death? A. Only from what they said there, the hemorrhage.

“Q. Go ahead. A. They told us that he died of a hemorrhage, and described the hemorrhage as coming from his mouth.

“Q. Any evidence of blood around the mouth? A. No; because the undertaker had been there.

“Q. And that was in June, 1922? A. The 27th of June, 1922.

“Q. And you had treated him how long before that? A. I think, in the Fall, previously; in the Fall.

“Q. Of 1921? A. Of 1921, that I saw him; I wouldn't say I treated him.

“Q. You are sure nobody was with him when he came to see you? A. I am quite positive of that; I know I had him in the office alone; if anybody came with him they remained outside; my dealings were with him alone; I don't think I made any statement to anybody else.

“Q. How long did your examination of him take? A. Probably half an hour, or twenty-five minutes, or thereabouts.

“Q. What was your diagnosis of his death? A. Of his death?

“Q. Yes. A. I didn't make any.

“*Cross examination by Mr. Brigadier,*” read to the jury by Mr. Brenner, as follows:

“Q. You testified that when he came to visit you the first time he came alone? A. I think he did; he only came once.

Frederic L. McCrea, redirect.

"Q. You attempted to speak to him in English?

A. Yes.

"Q. And he never made any replies in any language? A. Why, I guess he attempted to talk in Polish, which I could not understand.

10

"Q. You were not able to speak to him in Polish to make the questions intelligently understood, and, so far as you know, you really communicated nothing to him as to the nature of his disease?

A. I don't know whether he understood it or not; I could not tell from his actions.

"Q. Did you put any questions to him at all in English? A. Yes.

"Q. And did he make any replies? A. Yes.

20

"Q. In what language? A. Polish, I suppose; I could not understand it; I doubt if he knew what I said.

"Q. So far as you know, he practically did not understand at all what you were talking to him about? A. Apparently.

"Q. Have you made any records of this case? A. No.

"Q. You are testifying purely from memory? A. Yes.

30

"Q. Do you remember all the facts of the case? A. Yes.

"Q. Did you make any examination of his sputum for tuberculosis? A. No.

"Q. Isn't that customary? A. I referred him to places where that would be done.

"Q. But you don't know whether he understood you at the time? A. I didn't know what he understood.

40

"Redirect examination by Mr. Newton," read to the jury by Mr. Bain, as follows:

"Q. Did he indicate by signs that he had any

William B. Gibson, direct.

complaint to make of any pain? A. No pain, no; sick, that is about all; he did say sick, or some such—that was the word.

“Q. He said sick? A. Sick; leaving me to go on with the rest of it.

“Q. Did he point to any part of his body when he said sick? A. No.”

10

Testimony of WILLIAM B. GIBSON, taken before trial, read to the jury by Mr. Bain, as follows:

“WILLIAM B. GIBSON, being first duly sworn according to law, on his oath deposes and says:

“*Direct examination by Mr. Newton:*

“Q. You are a physician and surgeon, licensed to practice in the State of New York? A. I am.

20

“Q. And how long have you been practicing in the State of New York? A. Since 1889 in the State of New York.

“Q. You practice where now? A. Huntington.

“Q. How long have you been practicing in Huntington? A. Since 1891.

“Q. Huntington is how far from Port Jefferson? A. About 30 miles; or 28 miles.

“Q. In June, 1922, did you hold any official position in the Commonwealth of New York? A. I did.

30

“Q. What was the position? A. Coroner of Suffolk County.

“Q. Do you recall on June 27th, 1922, being called to view the body of Stanislaw Gurecki? A. I do.

“Q. State where the body was? A. I came to Port Jefferson, and Doctor McCrea took me to a respectable looking house.

40

“Q. Doctor McCrea is the gentleman who just

William B. Gibson, direct.

testified? A. He just testified. Out in the country; he said it was Norwood, I don't know the names of these local positions; and I found there a man died; going over the history of the case—

10 “Q. With whom? A. With Doctor McCrea, and there were some people in that house talked English, because they told me he had been bleeding from the mouth—

“Q. Yes. A. And that he died very suddenly, the hemorrhage was very profuse, they said.

20 “Q. Yes. A. And in view of the fact that Doctor McCrea told me of his physical findings of this man, whom he had seen at least once, or twice, and that in his opinion—he was then acting as Coroner's Physician—he died from pulmonary hemorrhage.

“Q. Did you file a certificate of death? A. I did.

“Q. I show you a verified transcript from the Register of Deaths, signed under seal by Walter I. Jones, Town Clerk of the Town of Brook Haven, County of Suffolk, State of New York, and ask you if that is a copy of the certificate of death you filed at that time? A. It is.”

30 Mr. Bain: Have you any objection to that?

Mr. Brenner: Well, I do not know. I will decide that later on.

Mr. Bain: Will it go for the present?

Mr. Brenner: Yes.

40 “Q. What did you give as the chief cause of death? A. Pulmonary tuberculosis, the immediate cause being pulmonary hemorrhage, the chief cause of death is acute pulmonary tuberculosis.

“Q. Yes. A. And the immediate cause was pulmonary tuberculosis.”

Frank Powell, direct.

Testimony of FRANK POWELL, taken before trial, was read to the jury by Mr. Bain as follows:

"FRANK POWELL, being first duly sworn according to law, on his oath deposes and says:

"Direct examination by Mr. Newton:

"Q. Where do you live, Frank? A. Port Jefferson Station. 10

"Q. How long have you lived here? A. Five years.

"Q. What is your business? A. Farmer.

"Q. Your farm is in Port Jefferson? A. Port Jefferson Station, yes.

"Q. How long have you been farming here? A. Five years.

Q. What kind of a farm? A. Potato and cauliflower. 20

"Q. In 1921 did you employ a man named Stanislaw Gurecki? A. Yes.

"Q. How did you come to employ him? A. Because I knew him around here, he was looking for a job and I took him to work.

"Q. How long had you known him before you took him to work? A. Oh, about two years more.

"Q. Who had he been working for prior to coming with you? A. Been working first for John W. Babsky one year, and the next year he has been working for Joseph Moszewski. 30

"Q. How long did he work for you in 1921? A. Ten months.

"Q. What time of the year did he come to you in 1921? A. Around in February.

"Q. When did he quit? A. He quit, it was nearly in November. 40

"Q. Where did he go after he left you? A. He went to Bayonne.

Frank Powell, direct.

"Q. How do you know he went to Bayonne? A. Because he told me.

"Q. Is that his home; did he tell you that was his home, in Bayonne? A. No, it was his sister.

10 "Q. Who is his sister? His sister's home was in Bayonne? A. Yes.

"Q. Did he tell you that? A. Yes.

"Q. Did he tell you who he lived with in Bayonne? A. No.

"Q. Well, when he left you, did he tell you where he was going? A. Why, he said, he told me he was going to spend the winter time down in Bayonne with his sister.

"Q. With whom? A. With his sister.

20 "Q. In 1921, did he tell you that he had been to see any doctor? A. No.

"Q. Well, when did he come back to you, after leaving you in 1921? A. 1922.

"Q. What time of the year? A. Around March, about the middle of March.

"Q. What was his appearance at that time? A. Oh, about the same as the year before, only kind of thin.

"Q. Did he have any cough? A. Yes, once in awhile; I heard him cough, before, too.

30 "Q. You heard him cough in 1921? A. Yes.

"Q. How long did he work for you in 1922? A. Around five weeks, I guess.

40 "Q. Why did he leave you? A. I told him, he was kind of sick and tired; he says he has been to see the doctor down in Jersey, he says the doctor told him to stop working and rest himself, have good meals, you know, and he wants to stay with me, see, for a little time, a few months, to take a rest; I told him I had no room to keep any

Frank Powell, direct.

boarders, because I hired another man and I need the place.

“Q. Go ahead. A. And another thing I says, ‘Maybe you are sick, and I don’t want to have you with the children here, you had better go and look for another people to give you room,’ and he went to John Babsky down at Norwood.

10

“Q. He left you and went to John Babsky? A. Yes.

“Q. Did you see him after that? A. No. I seen him maybe three or four days after that, but after I don’t see him.

“Q. Did he tell you what these doctors in Jersey told him? A. Yes; he don’t tell me right, no; when I ask him what kind of sickness he got he says, tired out, he says something inside, he don’t tell me nothing else.

20

“Q. Did he tell you what the doctor told him to do? A. Yes.

“Q. What did he tell you? A. Drink plenty milk and some eggs.

“Q. Did he tell you when he had been to see the doctor in Jersey? A. No.

“Q. Did he tell you whether or not he had been to see the doctor in Port Jefferson? A. No; I never asked him and he never told me.

30

“Q. Why did you send him to John Babsky? A. Well, because I have not room enough, and another thing, I was afraid maybe he got some kind of sickness and somebody in the family can catch that.

“Q. You have a family, have you? A. Yes.

“Q. Who lives with you? A. My family.

“Q. How many in your family? A. Three children and the wife.

40

“Q. You were afraid that they might get some disease from him? A. Yes.

Frank Powell, cross.

"Q. Did you have any idea what the disease was? A. I certainly did.

"Q. What was it? A. It was like inside sickness.

"Q. He worked for you about five weeks? A. Yes.

10 "Q. What sort of a worker was he? A. He worked pretty good to the last day.

"Q. Well, were you satisfied with his work? A. Yes.

"Q. Why did you tell him to go? A. I don't tell him to go; I told him on that point to go, because he stayed with me without working, see.

20 "Q. He wanted to stay with you without working? A. Yes; he said he would pay me board and everything; I said, 'No, I have no room for you.'

"Q. Well, why did he say he wanted to simply board with you and not to work? A. Because the doctor told him to do that.

"Q. What doctor? A. Some doctor down in Jersey."

"*Cross examination by Mr. Brigadier,*" read to the jury by Mr. Brenner, as follows:

30 "Q. He never told you that he was suffering with tuberculosis, did he? A. No.

"Q. He never used that word tuberculosis? A. No.

"Q. What nationality are you? A. Polish.

"Q. What is the Polish word for tuberculosis? A. (No answer.)

"Q. Did he ever use the Polish word for consumption; when he spoke to you did he ever use the Polish word for consumption? A. No.

40 "Q. So he didn't tell you, either in English or Polish, that he was suffering from consumption? A. No; but I asked him about that and he says no.

Joseph Babski, direct.

"Q. When you asked him whether he was suffering from tuberculosis, he said no? A. No."

"*Redirect examination by Mr. Newton,*" read to the jury by Mr. Bain, as follows:

"Q. He told you in Polish that he had been treated by doctors? A. Yes. 10

"Q. In Jersey? A. Yes.

"Q. And that he had something the matter with him on the inside? A. Yes."

Testimony of JOSEPH BABSKI, taken before trial, was read to the jury by Mr. Bain as follows:

"JOSEPH BABSKI, being first duly sworn according to law, on his oath deposes and says: 20

"*Direct examination by Mr. Newton:*

"Q. Where do you live, Mr. Babski? A. Port Jefferson.

"Q. How long have you lived here? A. I will be living here in Port Jefferson eight years.

"Q. What business are you in? A. Farming.

"Q. Do you know Stanislaw Gurecki? A. Yes, sir.

"Q. How long had you known him? A. Well, I knew him ever since he came out to Long Island. 30

"Q. When did he come to Long Island; how many years did you know him prior to his death? A. Well, from about 1918, I think.

"Q. From about 1918? A. Yes; I don't keep track of the years.

"Q. You have known him since 1917 or 1918? A. Yes, about.

"Q. Was he a good friend of yours? A. Yes, he was a pretty good fellow, yes. 40

"Q. Where did he live before you knew him? A. In Jersey somewhere.

Joseph Babski, direct.

"Q. Did he tell you that he lived in Jersey? A. Yes.

"Q. Did he ever complain to you of feeling sick? A. No.

10 "Q. Well, where did he work when he was out here? A. He worked for my brother first off, that is on this farm; my brother was running this farm.

"Q. This farm we are on now? A. Yes, sir.

"Q. What is your brother's name? A. John W. Babski.

"Q. How long did he work for him? A. He worked for him about two years, I think.

"Q. Did you see Stanislaw Gurecki in 1921? A. Yes.

20 "Q. Where was he working at that time? A. Frank Powell.

"Q. Did you or not go with him to any doctor during 1921? A. Yes, I think so.

"Q. How long before he died? A. The last time?

"Q. No; the first time. A. The first time, about 1921.

"Q. How did you come to go with him to the doctor? A. Because he asked me to.

30 "Q. What did he say when he asked you to go? A. Why, he says he feels run down and he, of course he tried these doctors around here, you see one of these doctors says he has not got the consumption, and the other one says he has got the consumption.

"Q. Yes. A. And that is the reason why he went to Doctor Smykowski.

"Q. So you went with him to what doctor? A. Doctor Smykowski.

40 "Q. Where is his office? A. He is on Barnum Avenue.

"Q. Where? A. Bridgeport, Connecticut.

Joseph Babski, direct.

"Q. You went with him to Smykowski in 1921?

A. About; I don't remember exactly.

"Q. Can you remember the month? A. You see, it is kind of hard to remember all these things correct.

"Q. Would you say it was November, 1920? Or some time in the winter of 1920? A. I will tell you, you got me on the month.

10

"Q. Would you say it was in the winter of 1920? A. The last part of 1920; I don't remember the month.

"Q. You are positive it was not in 1922? A. No.

"Q. It was not in 1922? A. It was not in 1922.

"Q. You think it was in the latter part of 1920? A. 1920, or the beginning of 1921, as nearly as I can remember.

20

"Q. Now then, you went over to Doctor Smykowski; tell us what happened when you got to Doctor Smykowski? A. Doctor Smykowski gave him a good examination, what I can call a good examination, he examined him all the way through.

"Q. Well, did he take any of his clothes off? A. He took his clothes off.

"Q. Yes. A. And he examined him all the way through, and he says all he needs is to rest, and good grub, and not to work too hard; that is what he told him.

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"Q. What language did Doctor Smykowski speak to him in? A. He told him in Polish.

"Q. Did Doctor Smykowski speak Polish? A. Yes; he spoke very good Polish.

"Q. How long did the examination take? A. Well, pretty near an hour; around, I will tell you, over half an hour, up to an hour.

40

"Q. Now, did Stanislaw Gurecki tell you that he

Joseph Babski, direct.

had been to see some other doctors before you took him to see Doctor Smykowski? A. Yes.

10 "Q. Well, did he state who those doctors were?
A. He says it was Doctor MacIvor and Doctor McCrea; you see, that is why he went to Doctor Smykowski, because Doctor MacIvor says that he has not got the consumption, he was run down, he said the same thing pretty near as Doctor Smykowski did, the way he told me afterwards.

20 "Q. Yes. A. And Doctor McCrea says he begin to get consumption; so he went to Doctor Smykowski to understand him better, because he has got a pretty good name, because some people from Bridgeport living out here and he said he is a pretty good doctor and he talked his language, that is, Stanislaw Gurecki didn't understand no American language, so I went with him to Doctor Smykowski, he didn't know the way, to have understand Doctor Smykowski better, because he talk good to him, he talk his language.

"Q. Yes. A. So he says that he did not have consumption, he says he was overworked.

"Q. In what language did you talk to Gurecki?
A. With the Polish. The only language he understood.

30 "Q. Did Doctor Smykowski prescribe any medicine for him? A. Yes.

"Q. Where did he have the prescription filled?
A. He had the prescription filled in one of the drug stores in Bridgeport, on Main Street.

40 "Q. Did Gurecki say whether or not he had been treated by a doctor, or consulted any other doctor besides those in Port Jefferson? A. Yes; he did say that he was over to see doctors, but I didn't ask him, you know, when, but not on account of the sickness like he had last, you know.

Joseph Babski, direct.

"Q. Yes. A. But he says he did see doctors in Jersey, during the winter, I don't know who, I never asked him.

"Q. When was this that he told you that he had consulted doctors in Jersey? A. Well—

"Q. Was it before or after you took him to Doctor Smykowski? A. That was before; it might have been a year, it might have been two, I never asked him. 10

"Q. Who took him to Doctor MacIvor? A. About that I didn't ask him.

"Q. Did you take him to any other doctor after Doctor Smykowski? A. Yes; then he came from Smykowski, then he worked here for Frank Powell.

"Q. Yes; how long did he work for Frank? A. He worked the whole summer, the whole year; then, I will tell you the truth, what Doctor Smykowski told him, if he only done that he would be all right and be probably living today, in my opinion, when he told him not to work, he came here and worked, and worked like a mule, and that ended him. 20

"Q. Then this other doctor that you took him to? A. Then when he began feeling sick again, then he wanted to go to the best doctor he could get. 30

"Q. Yes. A. But then we heard about this doctor from New Canaan, Connecticut, Doctor Brooks.

"Q. When was that? A. That was three or four weeks before he died.

"Q. Did Doctor Brooks speak Polish? A. No.

"Q. Did you go with him to Doctor Brooks? A. Yes.

"Q. When was that? A. Well, it is just what I have told you. 40

Joseph Babski, direct.

"Q. Three or four weeks before his death? A. Yes.

"Q. Did Doctor Brooks examine him? A. Yes.

"Q. Who did the talking? A. Well, I did the talking.

10 "Q. You spoke in English to Doctor Brooks? A. Yes.

"Q. What did Doctor Brooks tell you? A. First he examined him; that is, I will tell you from the beginning when we came there.

20 "Q. All right; tell us what happened when you got to Doctor Brooks? A. First, when we got there, why, he didn't make any appointment with Doctor Brooks, he is a very busy doctor there, and, of course, then he had the other patients like you see there waiting, and he got a couple of nurses there; I went to one of them nurses and I says, 'We came here from Long Island, here is a very sick man, he would like to have Doctor Brooks to give him an examination'; well, he was very busy, he couldn't do it very well, but I went over once again, I was in a hurry for him to examine that man; well, the other patients were waiting, and the people from far—

30 "Q. Yes. A. People probably from New England, see, and a few girls there was even away out from Boston.

40 "Q. Finally you got in to Doctor Brooks? A. Finally we got to the doctor; as soon as we opened the door, Doctor Brooks, you know, he is kind of, you know, quick tempered man, he says, I walk in and this man he wanted to go right after me, he says, 'Stop right in the door,' he says, 'Stop,' and this man had some kind of a medicine, he gave it to him from the doctor from Jersey.

"Q. Who is this man, Gurecki? A. Gurecki.

Joseph Babski, direct.

That was kind of a medicine that was given to him while he was in Jersey, that was in the winter time, he was over to see his sister, he stayed with his sister; just as soon as he smelled the medicine, you know, he says, 'Stop'; he stopped, you know, and he says, 'Put that medicine away'; I don't know, it was kind of a funny smelling medicine, you know, strong, I couldn't stand to stay right alongside of him before I got there.

10

"Q. What did he tell him to do with the medicine? A. He told him to put it away.

"Q. What did he tell him to do? A. Well, he told him, when he began to put the medicine away, this man he began to cough, you know; he says, 'Stop the coughing,' and he told him, see, in such a words that this man, you know, had to stop, so he stopped the coughing; then he gave him, first off he gave him some kind of pills, to stop the coughing, and after a while, then he began to examine him from his grandfathers—

20

"Q. Yes. A. How long they have been living, and so on.

"Q. He took his history? A. All his family life.

"Q. Yes. A. Then after he got through with that he gave him medicine to stop him, because he has been coughing like everything then, then he take him to the other room, there is room number two, he took him up there, another office upstairs, he took him upstairs and took his clothes off; of course he didn't take the clothes off himself, he told him to take the clothes off, and he examined him all the way through; when he did examine him all the way through and he gave him medicine, and that took about two hours, with that examination, when he gave him the medicine and everything, and I asked Doctor

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Joseph Babski, direct.

10 Brooks myself, I says if there is any hope for this man, he says something like four out of ten, I think, I think that is the way he said, and he says that—this man Gurecki wanted me to ask the doctor if the doctor could place him in his sanitarium, because he had placed people in the sanitarium, there is one building there, but the building was full of patients, you know, and he couldn't place him, but he says, 'If you do the way I want you to do,' he says, 'if you do the way I want you to do, you will do just as well over at your place as you do here.'

20 "Q. Yes. A. But another thing I asked him yet, I asked him—no, I didn't ask him then, he said it himself, he says, 'If you came here two or three months before,' he says, 'You would be all right, but you come here too late,' he says, 'You are too far gone;' that is the way he told me.

"Q. Now, did Stanislaw Gurecki ever tell you that he had taken out insurance? A. Yes.

"Q. When did he tell you that? A. He told me that while he was going.

"Q. Going where? A. Over to the doctor; and he told me before that.

30 "Q. What did he tell you when you were going to the doctor, about insurance? A. He says, 'I don't really believe that I got the consumption,' he says, 'because I would never have the insurance,' that is the way he says, and the reason why he didn't believe Doctor McCrea even that he had consumption, and he didn't believe any one of them doctors that he really did have consumption, because he could get the insurance out, he said, 'I got the insurance out.'

40 "Q. Now, did you see him after he died? A. Yes.

Joseph Babski, direct.

"Q. Where did he die? A. Over at my brother's, J. W. Babski.

"Q. Do you recall when he died? A. Around June.

"Q. June of what year? A. Last year.

"Q. 1922? A. Yes.

"Q. Did Doctor Brooks ask Gurecki where he got that medicine? A. Yes.

10

"Q. Well, did he ask Gurecki or ask you? A. Well, he asked me, but, you know, Gurecki could not talk English, and I had to ask him.

"Q. You would ask Gurecki? A. I asked Gurecki, of course, but I had to answer it for him.

"Q. What did Gurecki say? A. Gurecki said to me that he has got them medicines.

"Q. From whom? A. Some doctor from Jersey.

20

"Q. When did he say he got the medicine? A. While he was living with his sister.

"Q. When? A. That was in the winter time before.

"Q. The winter time before what? A. Before he came to work back again for Frank Powell.

"Q. When did he go to work for Frank Powell? A. In the spring.

"Q. In the spring of what year? A. 1922; he had been there a couple of months.

30

"Q. Did he give the name of the doctor? A. Yes, he did give a name.

"Q. Can you remember the name? A. I forgot; I couldn't remember the name.

Q. Was it a German name? A. A German name; some kind of a German name, from Jersey or Staten Island, that came from Europe.

"Q. A doctor with a German name that came from either Jersey or Staten Island? A. Jersey or Staten Island.

40

"Q. What did Doctor Brooks say about that

Joseph Babski, cross.

medicine? A. He says that that medicine, it was bad, he says, 'That medicine is enough to kill,' there was medicine enough to kill him."

"*Cross examination by Mr. Brigadier,*" read to the jury by Mr. Brenner, as follows:

10 "Q. What year was it that Gurecki told you he took out the insurance? A. I never asked him the year.

"Q. What time was it he told you, when he told you about it? A. He told me while he has been sick, before we went to the doctor.

"Q. That was in 1922, wasn't it? A. Yes.

"Q. When you went to see Doctor Brooks? A. Before, yes; before we went to see Doctor Brooks.

20 "Q. That is the time he told you about the insurance? A. Yes.

"Q. But at that time he told you he didn't believe he had consumption, is that right? A. He didn't believe he had consumption.

"Q. He didn't believe he had consumption? A. No.

30 "Q. Did Doctor Brooks tell him he had consumption, or did he say he had a cold in his chest? A. He says he has got consumption, and he gave him a prescription; I didn't ask the doctor what really he did have, consumption or what, but afterwards I see it on the prescription 'T. B.' so that means tuberculosis.

"Q. But the doctor never told you that he had consumption? A. No.

"Q. You never told Gurecki that the doctor told you he had consumption? A. No, no.

40 "Q. Now, when you went to Doctor Smykowski, you say Doctor Smykowski spoke to him alone; spoke to him in Polish; is that right? A. He spoke to him while I was there, too.

Joseph Babski, redirect.

“Q. Spoke to him in Polish? A. Yes.

“Q. He didn’t understand English at all, did he?

A. No.

“Q. Now, when he spoke to him in Polish, did he tell him that he had consumption, or T. B., or did he say he had a bad cold in the chest? A. A cold, and overworked, run down.

10

“Q. He didn’t use the word ‘consumption’? A. No, no.

“Q. He didn’t say anything to him about consumption? A. Nothing said about consumption at that time.

“Q. But he merely said he had a cold in the chest, he was rundown and was tired? A. Exactly, that is it; if he went down and done what Doctor Smykowski told him to do, and rest, he would have been all right.

20

“Q. Did you go with Gurecki to Doctor MacIvor? A. No.

“Q. Did you ever go with him to Doctor McCrea? A. No.

“Q. You never did? A. No, sir.

“Q. You are positive? A. Yes, sir.”

“*Redirect examination by Mr. Newton,*” read to the jury by Mr. Bain, as follows:

30

“Q. Do you know why Gurecki left Frank Powell? And went to work for John Bagski? A. Why, he never went to work for John Babski; he never left anybody; when he started in a place he never left it.

“Q. Where did he go after he left Frank Powell? A. Why, then he went to Doctor Brooks, and went to John Bagski, and he finished there.”

40

Mary Babski, direct.

Testimony of MARY BABSKI, taken before trial, was read to the jury by Mr. Bain, as follows:

"MARY BABSKI, being first duly sworn according to law, on her oath deposes and says:

"Direct examination by Mr. Newton:

10 "Q. You are the wife of Mr. Joseph Babski, who has just testified? A. Yes.

"Q. Did you know Stanislaw Gurecki? A. Yes, as long as my husband does; we both knew him together.

"Q. Do you recall the occasion when he went with your husband to Bridgeport? A. Yes, I do.

20 "Q. When was that? A. That was either the latter part of 1920, I am quite sure it must have been about the latter part of 1920, but it might have been the early part of 1921; I am not positive, but I think it was the last part of 1920, in that winter.

"Q. How did your husband come to go with Gurecki to Doctor Smykowski? A. Well, you see, Gurecki, he can't understand the American language, he can't talk at all.

30 "Q. Yes. A. Of course, he being sick, he wanted to go to a doctor that could understand him, because he had been to Doctor McCrea here, and he had been to Doctor McIvor, and one told him that he was in the first stages of consumption, I think.

"Q. How do you know that? A. Well, that is what he had said.

"Q. Who said that? A. Gurecki said that. Gurecki went with him, and he told him that he thought he was in the first stages of consumption.

40 "Q. Gurecki told you that this doctor, what was his name— A. McCrea

Mary Babski, direct.

“Q. Had told him what, that he was in— A. That he was in the beginning of consumption.

“Q. Did or did not Gurecki tell you that he had been to see Doctor McCrea? A. He did tell us; that is the reason he wanted to go, because he had seen Doctor MacIvor, also.

“Q. When was this that he had seen Doctor McCrea? A. Well, it was before he went to Doctor Smykowski. He had seen Doctor MacIvor and Doctor McCrea.

“Q. Can you tell us by the year? A. Why, it was in the same year that he went to see Doctor Smykowski.

“Q. That would be 1920? A. 1920; you see, he had been to see Doctor McCrea and Doctor MacIvor, and when he told him he was overworked, just as Doctor Smykowski, the other told him he was in the first stages of consumption, that is the reason he wanted to go to a doctor that could understand his own language.

“Q. After he got back from seeing Doctor Smykowski, did you see him after that any time? A. I just talked with him, I would see him later and he was much improved by Doctor Smykowski, using that medicine that Doctor Smykowski told him, he was improving, and he was actually getting along all right.

Q. Where did he stay after he went to Doctor Smykowski? A. For a little while he was with Moszewski, then I think he went to Frank Powell.

Q. Did you see him very often after that? A. Well, I didn't see him very often, but, of course, you know when I would go down there like I would not see him often, and there was times when I did see him.

“Q. Now then, do you recall the occasion in 1922

Mary Babski, direct.

when your husband went with him to New Canaan, Connecticut? A. Yes, sure I do.

10 "Q. How did he come to go to New Canaan, Connecticut? A. Well, because Gurecki, he was actually sick, he was so run down at that time, being the doctors here, one was telling him one thing and one was telling him another thing, and we heard of Doctor Brooks, as he was a specialist, so he says he didn't care how much it would cost, he wanted to find out what actually was the matter with him.

20 Because one doctor said he had consumption, and the other said he didn't have consumption, so he wanted actually to find out; then he said, 'I don't believe I have consumption because if I did have consumption I would not have been insured.'

"Q. Yes. A. He said he would not have been taken into the insurance.

"Q. What did he tell you about insurance? A. He didn't say nothing; all that he said, that is what he said, 'I don't believe I have consumption.'

30 "Q. Did he say where he had taken out this insurance? A. No, he didn't say, because we never questioned him about that, but that is the reason he said he didn't believe he had consumption.

"Q. Who was it that went with Gurecki to Doctor MacIvor? A. I don't know; I think it was Mrs. Moszewski; it was some of the insurance companies here, I think.

"Q. How do you know that Gurecki went to Doctor McCrea? A. He asked at that time if she would go to Doctor McCrea with him.

40 "Q. How do you know she went to Doctor McCrea with him? A. Because he said so.

"Q. Gurecki said so? A. Yes."

Elizabeth Levandoski, direct.

“*Cross examination by Mr. Brigadier,*” read to the jury by Mr. Brenner, as follows:

“Q. Did you say that Gurecki told you that he went with somebody to Doctor McCrea? A. Yes, he did.”

Defendant Rests.

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ELIZABETH LEVANDOSKI, a witness called on behalf of the plaintiff, being duly sworn, was examined in rebuttal and testified as follows:

Direct examination by Mr. Brenner:

Q. Mrs. Levandoski, where do you live? A. Bayonne, 520 Boulevard.

Q. And how long have you lived in Bayonne? A. 12 years.

20

Q. Did you have a brother who is now dead? A. Yes.

Q. And what was his name? A. Stanley Gurecki.

Q. And do you remember when he took out a policy of insurance? A. Yes.

Q. Do you remember when he took that out? A. After Christmas; after Christmas.

Q. After Christmas? A. Yes, 1922.

30

Q. It was in 1922? A. Yes.

Q. After Christmas? A. Yes.

The Court: I suppose she means by that, that it was after Christmas in 1921.

Mr. Brenner: That is right.

Q. Were you there at the time that your brother signed the application for this insurance? A. Yes.

Q. And who came to him to get that signed? A. Who came? The agent, Friedman.

40

Q. Agent Friedman? A. Yes.

Elizabeth Levandoski, direct.

Q. And did he talk to your brother about taking out insurance? A. No. Mr. Friedman came all the time to my store, asking Stanley, "Take policy, take policy," about ten or fifteen times.

Q. About ten or fifteen times he came to your place? A. All the time.

10 Q. He asked him to take a policy? A. Yes. He lives here, too, now, next door.

Q. He lived next door to you? A. Next door to my house.

Q. That is, the agent? A. Agent.

Q. And when he asked Stanley to take out the policy, what did Stanley do?

Mr. Bain: I object. There is nothing to prove this woman was present at the time.

20 Q. Were you there present at the time the agent came? A. Yes, all the time.

Q. All the time? A. Yes.

Q. And when the agent asked him to take out insurance, did he say all right? A. No; he said—

Mr. Bain: I object. What took place before the application is all immaterial. I object to what went on before the application. It is all immaterial.

30 The Court: Well, I understood this was at the time that the application was signed.

Mr. Brenner: At the time and previous to.

The Court: What is the relevancy of it?

Mr. Brenner: I won't press it if there is any objection.

40 Q. Then your brother took the policy, did he?
A. He no want it. After he take.

Elizabeth Levandoski, direct.

Q. He didn't want it, and afterward he took it. Did he sign a paper for the agent? A. Yes.

Q. Now, when he signed the paper for the agent, did the agent read the paper to him?

Mr. Bain: Well, I object. There is nothing to show the woman was there at the time. 10

Mr. Brenner: She testified she was.

The Court: What is the question?

Q. (Repeated by the stenographer:) "Now, when he signed the paper for the agent, did the agent read the paper to him?" A. No.

The Court: One minute. Were you there at the time he signed the paper? Were you there at the time he signed the paper? 20

The Witness: Yes, yes. He make a cross.

Q. You were there when he made the cross. Could your brother sign his name? A. No, he can't; he make a cross.

Q. Could your brother read English? A. No.

Q. Could he write English? A. No.

Q. Did he understand English? A. No.

Q. How did you always talk to him and he talk to you? A. I said everything. 30

Q. You told him everything? A. Yes.

Q. In what language did you talk to him? What language did you talk to him in, English or in Polish? A. In English.

Q. Did you talk— A. No, with the agent in Polish.

Q. Now, I am talking of between you and your brother, when you and your brother spoke in the house. A. The agent is Jewish. 40

Q. I am not talking about the agent. In the

Elizabeth Levandoski, direct.

house when you talked to your brother, what language did you talk? A. Polish.

Q. Did you talk English to your brother? A. No.

10 Q. When the agent got him to put his cross on the paper, did the agent ask him any questions?
A. Yes.

Mr. Bain: Now, I object, if your Honor please. The policy expressly provides that nothing can be waived by an agent. What the agent said is entirely immaterial.

The Court: What is the purpose?

20 Mr. Brenner: To show that nothing was said by the agent to him regarding the contents of this document that he was asked to sign; that it was never explained to him.

The Court: Take your exception, Mr. Bain. I will overrule the objection.

Q. Now, you can answer it. A. He say: "How old are you? How old is your mother? How old is your father? How old is Stanley Gurecki?"

Q. Did he ask anything else? A. That is all.

30 Q. That is all. Did he ask that before or after he told your brother to make his mark? A. Yes, before.

Q. Was it before or after? A. Before.

Q. After your brother made the mark did he say anything else? A. Before?

Q. After. A. After, no. He takes paper and he take \$2.00 deposit and gone.

Q. Took \$2.00 deposit and then went? A. Yes.

40 Q. Did anyone afterwards come from the company? A. No. My brother?

Q. To your brother? Was there a doctor came?
A. A doctor came after.

Elizabeth Levandoski, direct.

Q. I see. Do you know who the doctor was?
A. I don't know. That is old man.

Q. An old man? A. An old man.

Q. And when the doctor came there, were you home? A. Yes.

Q. And did the doctor talk to you? A. Yes. He say, "Your brother there?" I say, "Yes."

10

Q. He asked if your brother was there, and you said yes? A. Yes. He said, "Stanley Gurecki there?" I said, "That is my brother," and after I take the doctor inside and sat down.

Q. Did you stay there with the doctor or with your brother? A. Yes.

Q. You sat down there with them? A. Yes.

Q. Did your brother sit down? A. Yes.

Q. Did the doctor sit down? A. Yes.

20

Q. What did the doctor say? A. He said, "What is your name? How old?" How old my brother, how old my father, how long live there, and I said, "My mother died 42 years, and the grandfather"—

Mr. Bain: I object to what this woman said. It is entirely incompetent.

Mr. Brenner: I will follow that up and show it is relevant.

Mr. Bain: It is not a conversation between the doctor and her.

30

Q. Did the doctor talk any English, or did he talk in Polish? A. English.

Q. And whom did the doctor talk to, you or your brother? A. Me. I talk to the doctor.

Q. You talked for your brother? A. Yes.

Q. Did the doctor say anything to your brother in English? A. Yes; he said to my brother; he can't talk.

40

Q. Who said he couldn't talk? A. My brother.

Elizabeth Levandoski, direct.

Q. Your brother said, "Can't talk"? A. Yes; I say he can't talk.

Q. You said he can't talk? A. Yes.

Q. And what did the doctor do then? A. Well, I say for him; I say for my brother.

10 Q. That you should say for your brother? A. Yes.

Q. And when the doctor asked you about Stanley's father and mother and his grandfather— A. I say everything, because I know everything.

Q. Wait a minute. Did you say to your brother what the doctor was saying to you, or did you answer yourself? A. Myself.

Q. You answered yourself? A. Yes.

20 Q. Did the doctor say anything to you about whether your brother had gone to other doctors before? A. No.

Mr. Bain: Just a moment. I object to this testimony, if your Honor please.

The Court: What is the relevancy of it, Judge?

Mr. Brenner: On the same situation, if your Honor please.

30 The Court: What do you mean by the same situation?

Mr. Brenner: On the question of whether this is part of this contract of insurance, because of the fact that what this man had included or what was purported, to have been signed by him was not stated to him or by him and made a part of the contract. In the application itself there is nothing said about good health or anything else.

40 Q. (Repeated by the stenographer.) "Did the doctor say anything to you about whether your brother had gone to other doctors before?" A. No.

Elizabeth Levandoski, direct.

The Court: Take your exception, Mr. Bain.

Q. Did he ask your brother anything about whether he was sick or whether he was well— A. No.

Q. Did he ask your brother anything about his being in good health— 10

The Court: Now, how can you answer before you hear the question?

Q. Did he ask your brother anything about his being in good health? A. No.

Q. Everything that he did ask, he just asked you and you told him; isn't that right? A. That is all.

Q. Did he ask your brother anything of whether he ever had tuberculosis? A. No—yes—no; after he take— 20

Q. I am not asking what he took. I am asking you did he ask him anything about tuberculosis? A. I couldn't say.

Q. Tuberculosis or consumption? A. No.

Q. Did he ask anything about his throat or his chest or his stomach? A. No.

Q. Or his head? A. No.

Q. How long did the doctor ask these questions? A. About five or six minutes. 30

Q. Five or six minutes? A. Yes.

Q. And after he asked these questions that you told us, about how old your brother was, and about his father and mother and grandfather and grandmother, what did the doctor do then? A. After he said, "Take shirt and everything off."

Q. Did he say that in English or in Polish? A. In English. I say— 40

Elizabeth Levandoski, direct.

Q. Whom did he say it to, you or your brother?

A. I.

Q. To you? A. Yes.

Q. And what did you say then? A. I said, "Take off everything."

10

Q. You told your brother that? A. Yes.

Q. Did your brother take his shirt off? A. Yes, just right down.

Q. And what did the doctor do then? A. He take some iron and put it in the ear and something in the chest.

Q. Some iron in the ear and something on the chest A. Yes.

Q. And how long was that thing that he had? A. Examination maybe 15 minutes.

20

Q. No, I don't mean the examination. How long was this instrument he used A. Just like that (indicating).

Mr. Brenner: Witness indicates about 18 inches.

Q. And you say he put it in his ears and what else? A. On his chest.

Q. On whose chest? A. My brother's chest.

30

Q. Where else besides the chest did he put it? A. In the back.

Q. And after that what did you do? A. He said, "Bring the water."

Q. Told whom to bring his water? A. I. I give him bottle to my brother and he bring me back the water.

Q. Bring him his water? A. Yes.

Q. And you gave your brother the bottle to bring his water? A. Yes.

40

Q. Did the doctor do anything else? A. The doctor took it and that was all.

Elizabeth Levandoski, direct.

Q. Did your brother sign the paper for the doctor? A. Yes; make a cross.

Q. Did he sign it before the doctor examined him or after that? A. No, after.

Q. After he got through examining him? A. Yes.

Q. Did the doctor leave the paper with your brother? A. No.

Q. Did he tell him what was in the paper? A. No.

Q. Did he tell you what was in the paper? A. No.

Q. Did he read the paper to you? A. No, because I can't read English.

Q. But did the doctor read the paper to you? A. No.

Q. Did the doctor read it to you? A. No.

Q. Did the doctor give you the paper to look at? A. No.

Q. Did he give it to your brother to look at? A. No.

Q. How long did the doctor make the examination of the chest? A. About 15 minutes.

Q. About 15 minutes? A. Yes.

Q. How long after that did your brother get the policy, do you know? A. Five months, I guess.

Q. How long after did your brother get the policy? After the doctor was there how long after that did your— A. Three weeks, I guess; three weeks.

Q. Three weeks after he first went in, or three weeks after the doctor was there? A. After the doctor was there.

Q. After the doctor was there, three weeks after? A. Yes; and after come another man and asked

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Elizabeth Levandoski, cross.

some questions and bring the policy; the agent bring the policy.

Q. Were you there when the agent brought the policy? A. Yes; the agent brought the policy.

Q. When did your brother pay the agent the money? A. When he brought the policy.

10 Q. When he brought the policy? A. Yes.

Q. Paid him \$2.00 when the application was signed? A. Yes, and after paid him the rest.

Q. And afterwards paid him the rest? A. Yes.

Q. Was there more than one doctor that came from the insurance company, or only one doctor? A. What?

Q. Did more than one doctor come from the insurance company, or only one doctor? A. No, one.

20 Q. Only one? A. One, and one comes inspector.

Q. What? A. Inspector.

Q. An inspector came after? A. Some man.

Q. How long after did the inspector come? A. About a week.

Q. About a week after? A. Yes.

Mr. Brenner: Take the witness.

Cross examination by Mr. Bain:

30 Q. Have you any other brothers? A. What did you say?

Q. Did you have any other brothers besides Stanley? A. That was all.

Q. Was he the only brother? A. Only brother.

Q. Who else lived in the house? A. Who else lived?

Q. Yes. A. In my house?

40 Q. In your house. Who else lived in your house besides your brother Stanley and yourself? A. Nobody; just my family.

Elizabeth Levandoski, cross.

Q. Your family? A. Yes.

Q. Have you any grown sons? A. Yes, little son.

Q. Is your husband living? A. Yes; and sleep my son, 13 years old.

Q. Your husband was with you at the time Stanley was examined by the doctor? A. My husband? No; he is in the store.

10

Q. What time of the day did the doctor examine Stanley, your brother? A. Well, I don't know; I don't remember what day.

Q. Was it in the morning or in the afternoon? A. In the afternoon.

Q. Was it two o'clock or three o'clock? A. Well, I can't tell you.

Q. What kind of a day was it, cloudy day? A. What?

20

Q. Was it a cloudy day or a clear day? A. I can't remember.

Q. You don't remember? A. Yes, I can't.

Q. You can't remember? A. I can't remember.

Q. Do you remember whether you had any company that day? A. No.

Q. Don't remember that, do you? A. No.

Q. Did you tell the doctor that your brother had ben sick? A. No.

30

Q. You never told the doctor that, did you? A. No; because he didn't ask me.

Q. But you didn't tell the doctor that? A. No.

Q. And your brother didn't say anything about his having been sick, did he, to the doctor? A. No.

Q. Now, when the doctor told your brother to take off his shirt, your brother started to take off his shirt before you spoke to him, didn't he? A. He take his shirt and the doctor examined him.

40

Elizabeth Levandoski, cross.

Q. But your brother started to take off his shirt when the doctor spoke to him, before you said anything to your brother about taking off his shirt, didn't he? A. Yes; I said, "Take your shirt off," and he took it off.

10 Q. But before you told him to take his shirt off he started to take it off, didn't he? A. Yes.

Q. That is right. Now, you knew your brother had been sick, didn't you, before? A. No, I didn't know; I didn't know nobody; because he work all summer and after come my house; then he all the time—all winter.

20 Q. Well, don't you know, while your brother was living with you in Bayonne, that he had gone to see a doctor? Didn't you know, while your brother was living with you in Bayonne, that he had gone to see a doctor? A. But he walk; he go all over; I don't know he is sick; I would not go with him for a doctor.

Q. Didn't you know that your brother went to see a doctor? A. No. One time I see him drink medicine. I don't know whether he was going to see the doctor or take it from drug store; I don't know.

30 Q. Before your brother made the application for this policy, how long did he live with you? A. About two months, I guess.

Q. Two months? A. Yes.

Q. And then he had been away for some time, but had lived with you before, hadn't he? A. All winter he lived in my house.

Q. All winter he lived in your house? A. Every winter.

40 Q. Every winter he lived at your house? A. Every winter.

Q. Now, during five years back of 1922, don't

Elizabeth Levandoski, cross.

you know that your brother had been to see doctors? A. No.

Q. Never knew it? A. I didn't know.

Q. But you did know he was sick, didn't you? A. I didn't know. He was working.

Q. But you knew he was taking medicine? A. I see one time he takes medicine, but I don't know whether he got it from the doctor or somebody; I don't know; or if some drug store.

10

Q. You knew when he took medicine that he was sick, didn't you? A. You know, some time I am sick, too, and I take medicine, too.

Q. You didn't think he was taking medicine if he was not sick, did you? A. No.

Q. So that you knew he was sick. Do you remember distinctly that the doctor asked who your mother was? A. What?

20

Q. Do you remember the doctor asked you who your mother was? A. Who, my mother?

Q. Yes. A. Yes. He said what sickness my mother died.

Q. Did he ask you for your mother's name? A. Yes.

Q. And did he ask you how long she had been in this country? A. Yes.

30

Q. He asked you that, did he? A. Yes.

Q. And did he ask you how old she was? A. Yes.

Q. Did he ask you when your father came to this country? A. My father old country, not live here.

Q. He didn't live here at all? A. No.

Q. Did he ask you where your father died? A. My father live now.

40

Q. Well, did he ask you about your father? A. He asked me about my father and mother. I told

Elizabeth Levandoski, cross.

him my father live and my mother died, and my grandfather he got 72 years.

Q. Did he ask you whether your brother was married? A. My brother not married.

The Court: Did the doctor ask you?

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Q. Did the doctor ask you that? A. Yes.

Q. Do you remember that? A. Yes. I say, "No," because I know.

Q. What makes you think that the doctor asked you whether your brother was married? A. I say, "No."

20

Q. You mean that you would have said no if he asked you; but you cannot say now that the doctor asked you whether your brother was married, can you? A. Yes; he asked me, and I said no, he was not married.

Q. Now, when the doctor asked you these questions, did you turn around and ask your brother the same questions? A. No; I am not asking my brother, because I know everything; that is, my brother; I know everything, and my brother sometimes tell me, I tell doctor.

30

Q. If the doctor asked you whether your brother was sick, you would have said no, wouldn't you? A. Well, he no ask; I know he is not sick; he not ask me for—

Q. But if the doctor had asked you whether your brother was sick, you would have told the doctor no, wouldn't you? A. He not asked me; he not asked me.

Mr. Brenner: I object.

The Court: I sustain the objection.

40

Recess until 2 o'clock.

Elizabeth Levandoski, redirect.

AFTER RECESS.

ELIZABETH LEVANDOSKI recalled.

Mr. Bain: I have nothing further.

Redirect examination by Mr. Brenner:

Q. When the agent was there—not the doctor, but the agent— A. Yes. 10

Q. —did he tell you to tell your brother that if he was not in good health when the policy was delivered, the policy would be no good? A. No.

Mr. Bain: I object to that on the ground that it is entirely immaterial. This man accepted the contract when the policy was delivered to him with an express agreement in it, an agreement that the policy should not become effective until the first premium was paid during good health. Now, what the agent may or may not have said at the time the application was made is immaterial. 20

The Court: What is the question?

Q. (Repeated by the stenographer:) “When the agent was there—not the doctor, but the agent—did he tell you to tell your brother that if he was not in good health when the policy was delivered, the policy would be no good?” 30

The Court: How is that relevant?

Mr. Brenner: Simply to show, if the Court please, on the same situation, that that provision of the application was not conveyed either directly by the agent or through others to the deceased. 40

The Court: I will overrule the objection, and Mr. Bain may have his exception.

Elizabeth Levandoski, redirect.

Q. Did the agent say anything about that paper?

Mr. Bain: I object.

The Court: "Yes" or "No" will answer that question.

A. Yes, he come; he bring the paper—

10

Mr. Bain: That is answered.

Q. What did he say about the paper?

Mr. Bain: Now, I object to that. The agent has no power to waive anything.

A. He bring the policy—

The Court: One minute.

Mr. Bain: The agent could not change anything.

20

Mr. Brenner: I am going to try to show a waiver.

The Court: What are you going to try to show?

Mr. Brenner: Simply what he said this paper was.

The Court: What are you going to use it for? What are you going to use it for if you are not going to use it for some such purpose as that?

30

Mr. Brenner: Suppose we are prepared to show, as in the McDonald case, that he represented it as something else.

The Court: I do not think it turns on the McDonald case at all. I do not think you can in any manner make out a case upon those lines at all. Upon the first theory of the defense here the only thing that this testimony would be available for would be to show that the assured if he made false representations or made representations

40

Defendant's Motion for Direction of Verdict.

which were untrue, did not do it knowingly or with the intention of deceiving; that is all. Upon the second theory of the defense here, as the Supreme Court has laid out the road for me, I do not see that it has any bearing on what he said, if anything, whether he knew he was in good health or bad health. It made no difference. There was in his contract the provision that it would not be effective unless it was delivered while he was in good health. I will sustain the objection. Take your exception.

10

Mr. Brenner: Your Honor will allow me an exception.

Plaintiff Rests.

20

—

Defendant's Motion for Direction of a Verdict.

Mr. Bain: I move for a direction of verdict in favor of the defendant, first, upon the ground that the undisputed evidence shows that the assured knowingly misrepresented at the time of his application for the policy, and at the time of the medical examination of him, that he did not have and had not been treated for any disease or disturbance of the throat or lungs incurred within five years of February 7th, 1922, and that his health was not then impaired in any way.

30

On the further ground that the undisputed evidence shows that the insured knowingly misrepresented at the time of his application for the policy, and at the time of the medical examination of him, that he had not been treated by a physician or physicians at any time during the period of five years prior to February 7th, 1922, and that his health was not then impaired in any way.

40

Defendant's Motion for Direction of Verdict.

10 On the further ground that the undisputed evidence shows that the first premium on the policy was not paid during the good health of the insured; and so far as the last ground is concerned, I merely want to call attention to the fact that the policy expressly provides—that it is expressly provided as a part of the policy and agreement on the part of the insured that the policy issued on the application should not take effect until the first premium had been paid during his good health. That I conceive as an agreement, and under the decision in the Prahm case I consider, there being no dispute in the evidence as to whether or not the man was in good health when the first premium was paid, that we are entitled to a direction of verdict.

20 The Court: Before I hear Mr. Brenner, let me say to you, Mr. Bain, that on the first two reasons that you urge for a direction of verdict I should not direct a verdict because it is probably, very likely, a jury question.

30 (After hearing Mr. Brenner in opposition to the motion of the defendant for a direction of verdict, the Court directed a verdict in favor of the defendant and against the plaintiff, to which counsel for the plaintiff excepted.)

Equitable LIFE ASSURANCE SOCIETY



OF THE UNITED STATES

HENRY SALOMON HYGE FOUNDED JULY 24 1844

FACE
AMOUNT

1,000

HEREBY INSURES THE LIFE OF

(herein called the Insured)

AND AGREES TO PAY AT ITS HOME OFFICE IN THE CITY OF NEW YORK

--- \$100.00 ---
(the face of this policy)
TO

My sister Elizabeth Beneficiary
(with the right to the Insured to change the Beneficiary or assign this policy)
upon receipt of due proof of the death of the Insured, provided premiums have been
duly paid and this policy is then in force and is then surrendered properly released; and
IN EVENT OF DEATH FROM ACCIDENT THE SOCIETY AGREES TO INCREASE THE AMOUNT SO PAYABLE

to Two thousand dollars
upon due proof that the death of the Insured resulted solely from bodily injuries caused
directly, exclusively and independently of all other causes by external, violent and purely
accidental means, subject to the terms and conditions contained on the third page hereof.
AND FURTHER, IF THE INSURED BECOMES WHOLLY AND PERMANENTLY DISABLED BEFORE AGE 60
the Society will waive subsequent premiums and pay to the Insured a DISABILITY-ANNUITY of

subject to the terms and conditions contained on the third page hereof.
This insurance is granted in consideration of the payment in advance of

thirteen hundred and six dollars and of the payment
semi-annually thereafter of a like sum
upon each 15th day of August and February
and the death of the Insured. These payments include
a semi-annual premium of \$1.04 for the Double Indemnity and of 2.00
for the Total and Permanent Disability provision granted under this contract. Upon any anniversary of this policy said
Double Indemnity and Disability provisions may be discontinued by returning this policy to the Society for proper
endorsement, with a written request signed by the Insured (or assigns if any) and thereafter the payment of the
premiums for such provisions shall not be required.

The PRIVILEGES and CONDITIONS stated on the subsequent pages hereof form a part of this contract
as fully as if recited at length over the signatures hereto affixed.

Executed this fourteenth day of September, 1922, at the Home Office
of the Society in New York.

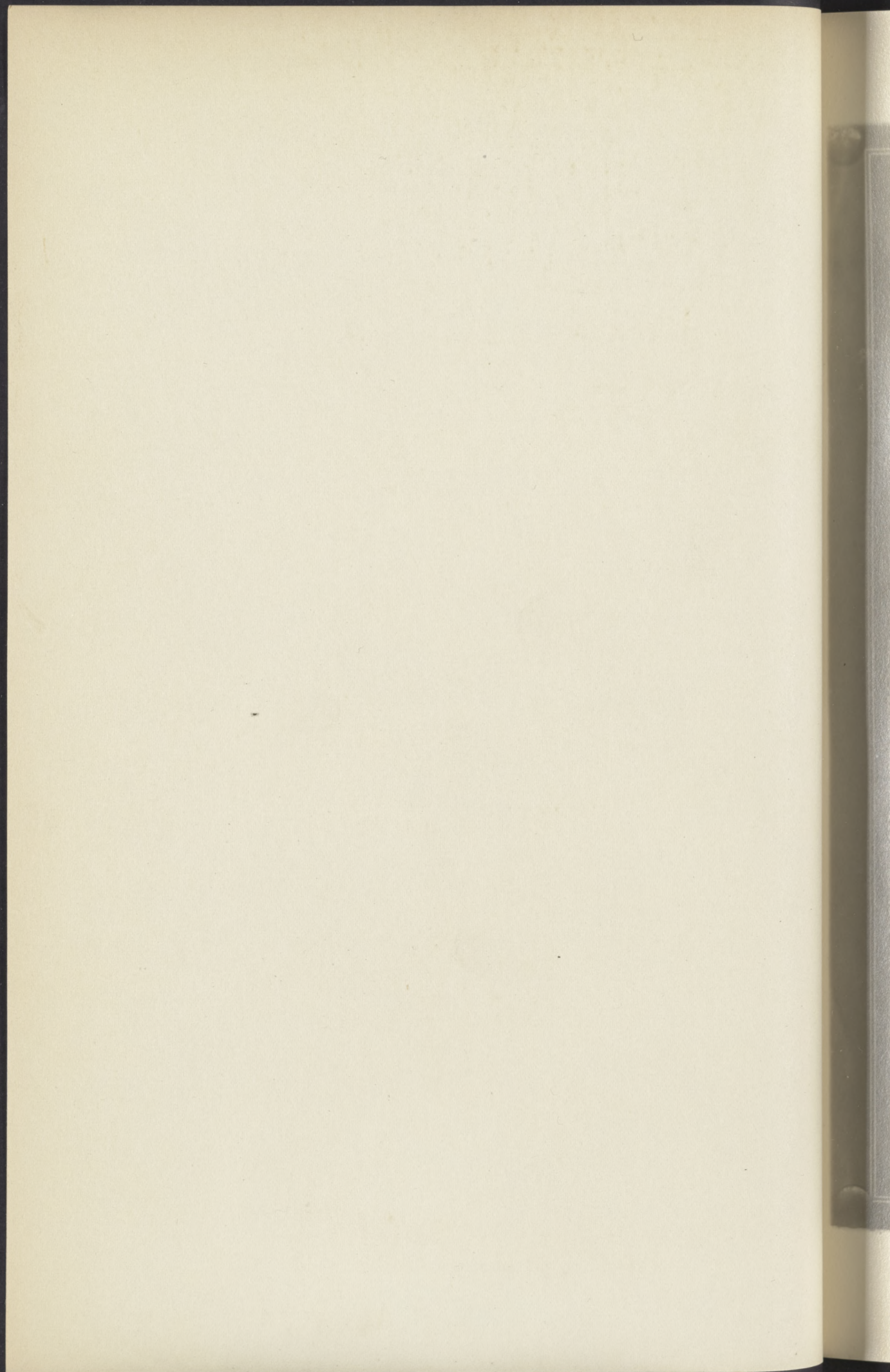
W. A. ... Secretary. H. A. Day President.
J. H. ... Registrar.

NYL 71 2
NEW YORK, N. Y.

INSURANCE PAYABLE AT DEATH
DOUBLE INDEMNITY FOR FATAL ACCIDENTS

TOTAL AND PERMANENT DISABILITY PROVISION
WAIVER OF PREMIUMS—MONTHLY DISABILITY-ANNUITY
WITHOUT DEDUCTION AT MATURITY

PREMIUMS PAYABLE DURING LIFE
ANNUAL DIVIDENDS



PRIVILEGES AND CONDITIONS.

THIS POLICY SHALL BE INCONTESTABLE

after one year from its date of issue, provided premiums have been duly paid, subject to the provisions as to age stated on the third page hereof.

THERE ARE NO RESTRICTIONS

under this policy, while in full force, on travel, residence, occupation, nor on military or naval service, except those relating to Double-Indemnity and Disability, on the third page hereof.

ANNUAL DIVIDENDS.

The proportion of divisible surplus accruing upon this policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter such surplus as shall have been apportioned by the Society to this policy shall at the option of the Insured (or assignee if any), be either—

1. Paid in Cash; or, 2. Applied toward the payment of premiums; or, 3. Applied to the purchase of paid-up Additional Insurance (without double indemnity or total and permanent disability benefits); or, 4. Left to accumulate at 3% interest, compounded annually. If a higher average annual rate is earned, this accumulation may be increased by an interest dividend as determined and apportioned by the Society. Such accumulations will be payable upon the maturity of this policy or on any anniversary of its register date.

Unless the Insured (or assignee if any) shall elect one of the foregoing options within three months after the mailing by the Society of a written notice requiring such election, the dividend shall be applied to the purchase of paid-up Additional Insurance (Option 4). This Additional Insurance may be surrendered by the Insured at any time for the cash value thereof, which shall not be less than the original Cash Dividend.

POST-MORTEM DIVIDEND.

In the event of the death of the Insured after the first policy year, and while this policy is in full force and effect, a cash dividend will be allowed for the fraction if any, of the then current policy year elapsed before such death.

PROVISIONS RELATING TO LOANS AND SURRENDER VALUES.

LOANS. At any time, while this policy is in full force, after three full years' premiums have been paid, the Society will advance to the Insured (or assignee if any), on proper assignment and delivery of this policy, and on the basis of the cash value hereof a sum which, with interest, shall not exceed the cash value at the end of the then current policy year (as stated in the opposite Table), less any indebtedness to the Society hereon, provided all premiums or installments of the same have been fully paid to the end of the then current policy year. Interest shall be at the rate of 6% per annum, and shall be calculated on the cash value of dividend additions credited to this policy. If the loan is for a purpose other than to pay premiums on policies of this Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. The Insured may repay such loan or to pay interest thereon shall not avoid this policy, unless the total indebtedness hereon shall equal the total loan value. All loans must be repaid one day after notice shall have been mailed to the Insured, or to the assignee of record if any, to their addresses last known to the Society.

OPTIONS ON SURRENDER OR LAPSE. After three full years' premiums have been paid hereon, upon any subsequent default in the payment of any premium or installment thereof, and within three months after such default, this policy may be surrendered by the Insured (or assignee if any), and may elect one of the following options:

1. To receive the Cash Surrender Value of this policy; or
 2. To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy, but without double indemnity or total and permanent disability benefits; or
 3. To continue the insurance for its face amount (and any outstanding unpaid installments) as paid-up extended term insurance for the period shown in the opposite Table, or for such further period, as the dividend additions may be purchased, but without future participation, or right to loans, or double indemnity or total and permanent disability benefits.
- In the event of default in the payment of any premium or installment of this policy after this policy has been in force three full years, if the Insured (or assignee if any) does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (3). If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately, and the extended term insurance shall be for the face amount of the policy less the indebtedness and for such period as the reduced cash value will purchase.
- The Insured's right to change, assign or terminate this policy shall extend only to paid-up insurance accruing hereunder.

BASIS OF COMPUTATION. The Reserve for which funds are to be held upon this policy shall be computed upon the American Experience Table of Mortality, with interest at 3% by the net level premium method. The values stated in the opposite Table are mathematical equivalents and each is equal to the full Reserve at the end of the then current policy year on the basis stated in the preceding paragraph, less a surrender charge of not more than 1 1/2% of the face of this policy until the completion of the tenth policy year, at which time and thereafter there is no deduction made as a surrender charge, except that fractions of a month and fractions of a dollar are not allowed.

PAYMENT OF SURRENDER VALUE. The granting of any surrender value under this policy may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor.

TABLE OF LOAN AND SURRENDER VALUES FOR EACH \$1,000 OF FACE AMOUNT OF THIS POLICY.

THE TERM FOR WHICH EXTENDED INSURANCE WILL BE GRANTED IS THE SAME WITHOUT REGARD TO THE AMOUNT OF THE POLICY.

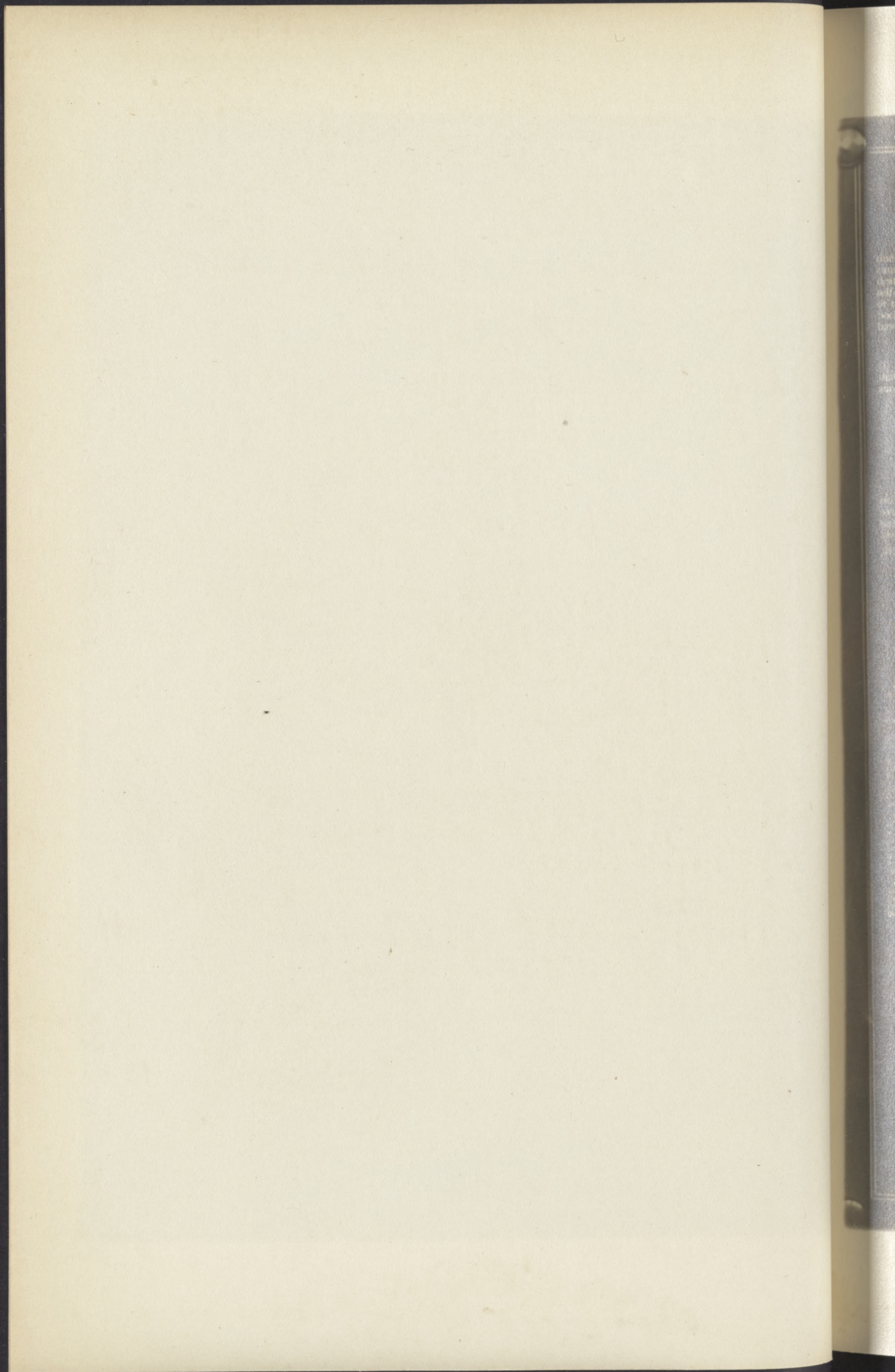
After policy has been in force	LOAN & CASH VALUE FOR EACH \$1,000 OF FACE AMOUNT OF POLICY. The Loan Value has interest in the ordinary way, unless otherwise stated.	PAID-UP LIFE INSURANCE FOR EACH \$1,000 OF FACE AMOUNT OF POLICY. Without Double Indemnity or Disability Benefits.	PAID-UP EXTENDED TERM INSURANCE Without Double Indemnity or Disability Benefits.	
			Years	Months
3 Years	\$ 300	\$ 50	3	0
4 "	275	35	4	0
5 "	250	20	5	0
6 "	225	5	6	0
7 "	200	0	7	0
8 "	175	0	8	0
9 "	150	0	9	0
10 "	125	0	10	0
11 "	100	0	11	0
12 "	75	0	12	0
13 "	50	0	13	0
14 "	25	0	14	0
15 "	0	0	15	0
16 "	0	0	16	0
17 "	0	0	17	0
18 "	0	0	18	0
19 "	0	0	19	0
20 "	0	0	20	0
21 "	0	0	21	0
22 "	0	0	22	0
23 "	0	0	23	0
24 "	0	0	24	0
25 "	0	0	25	0
30 "	0	0	30	0

The loan obtainable at the end of any given year may be secured during that year, if the premium for the entire year has been paid.

Loan and Surrender values for later years will be on the same basis, and will be furnished on request.

These values are exclusive of dividend additions, and are for completed policy years. Due allowance will be made for any fractional premium paid beyond completed policy years.

If there are any dividend additions to this policy, these values will be increased thereby. They will be reduced, if there is any indebtedness hereon.



PRIVILEGES AND CONDITIONS.

**SPECIAL PROVISIONS REGARDING
DOUBLE INDEMNITY AND TOTAL AND PERMANENT DISABILITY.
DOUBLE INDEMNITY IN CASE OF DEATH FROM ACCIDENT.**

The increased amount of insurance as stipulated on the face hereof, in case of accidental death shall be payable upon receipt of proof that the death of the Insured occurred while this policy was in full force and effect, and resulted solely from bodily injuries, caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, provided that death shall ensue within 90 days from the date of such injuries and shall not be the result of or be caused directly or indirectly by self-destruction, sane or insane, disease or illness of any kind, physical or mental infirmity, any violation of law by the Insured, military or naval service of any kind in time of war or by engaging as a passenger or otherwise in submarine or aeronautic expeditions. The Society, in order to determine whether death occurred within the meaning of this provision, shall, in the absence of legal restrictions, have the right and opportunity to make an autopsy.

TOTAL AND PERMANENT DISABILITY.

DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, and the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:—

- (A) **WAIVE PAYMENT OF ALL PREMIUMS** payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent Disability; and
- (B) **PAY TO THE INSURED A MONTHLY DISABILITY-ANNUITY** as stated on the face hereof; the first payment to be payable upon receipt of due proof of such Disability and subsequent payments monthly thereafter during the continuance of such total and permanent Disability.

(NOTE:—Any Premiums so waived and any Disability-Annuity so paid shall not be deducted from any amount payable in any settlement of this policy.)

The Insured shall be deemed to be **TOTAL** when it is of such an extent that the Insured is prevented thereby from engaging in any business or performing any work for compensation of financial value, and such **TOTAL DISABILITY** shall be presumed to be **PERMANENT** when it is present and has existed continuously for not less than three months; and, further, the entire and irrevocable loss of one or both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and the opposite foot, will of themselves be considered as **TOTAL AND PERMANENT DISABILITY** within the meaning of this provision.

DISABILITY BENEFIT after age 60.

When the Insured after attaining age sixty, and while this policy is in full force and effect, becomes totally and permanently disabled as herein described, and furnishes due proof thereof, the Society, subject to the provisions above stated, will from each subsequent anniversary of the date of this policy during the continuance of such disability waive the payment of the premium, if any, for the ensuing policy year, whereupon the amount of insurance shall become reduced by the amount of premium so waived and subsequent premiums and loan and surrender values shall be reduced proportionately.

(III) RECOVERY FROM DISABILITY.

The Society shall have the right at any time or times during the first two years after receipt of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the Insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the Insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premium will be waived and no further Disability-Annuity payments will be made hereunder on account of such disability.

(IV) MILITARY OR NAVAL SERVICE. Disability resulting directly or indirectly from military or naval service in time of war is not a risk assumed by the Society.

ASSIGNMENT. If there is no written assignment of this policy in force and on the date of its issue, it shall be deemed to be assigned to the Society.

CHANGE OF BENEFICIARY. In the event of the death of the Insured, the beneficiary or beneficiaries named in this policy shall be deemed to be the beneficiary or beneficiaries of the insurance provided for in this policy, and the Society shall not be bound to pay the proceeds of this policy to any other person, unless such person is named as beneficiary in the policy or in a written assignment of this policy.

DEATH BENEFIT. In the event of the death of the Insured, the proceeds of this policy shall be payable to the beneficiary or beneficiaries named in this policy, or to the estate of the Insured, if no beneficiary is named in this policy, or to the estate of the Insured, if no beneficiary is named in this policy.

RENEWAL. This policy shall be renewed from year to year, unless it is terminated by the Insured or the Society, and the premium for each year shall be payable in advance on or before the date of its issue.

PREMIUMS. All premiums are payable in advance of the date of issue of this policy, and the Society shall not be bound to issue this policy unless the premium is paid in full.

LOAN. The Insured may borrow from the proceeds of this policy, and the amount of such loan shall be limited to the amount of the unexpired term of this policy.

Except as herein expressly provided, the payment of any premium or installment thereof shall not constitute this policy in force beyond the date when the succeeding premium or installment thereof becomes payable.

REINSTATEMENT. If this policy shall lapse in consequence of the non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums with interest at a rate named and upon the payment with interest of the reinstatement of any indebtedness to the Society account by this policy.

AGE. If the age of the Insured has been misstated, any amount payable under any of the provisions of this contract shall be that amount which the premium charged would have purchased of the Society's rates in use on the register date hereof for the Insured's correct age.

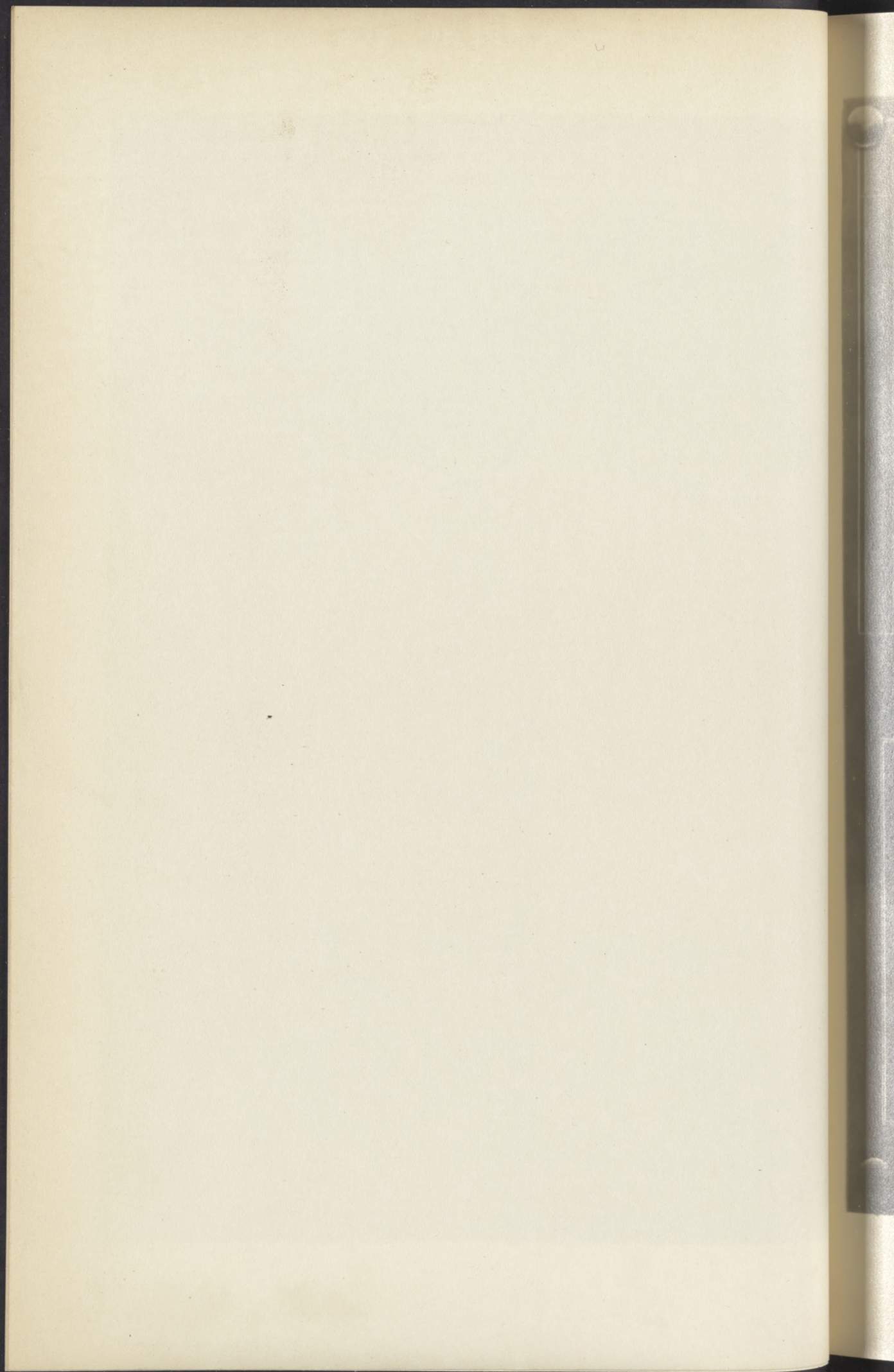
THE CONTRACT. This policy, and the application therefor, a copy of which is enclosed herewith and attached hereto, constitute the entire contract between the parties. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall nullify this policy or be used in defense of a claim thereunder unless contained in the written application therefor and a copy of such application is enclosed herewith or attached hereto, when issued.

Self-destruction, sane or insane, within one year from the date of issue hereof, is not assumed by the Society under this policy. In such an event the Society's liability shall be limited to an amount equal to the premium actually paid.

AGENTS are not authorized to modify or in any event of lapse, to reinstate this policy, or to extend the time for payment of any premium or installment thereof.

THE MODES OF SETTLEMENT available at the maturity of this policy are stated on the fourth page hereof and constitute a part of this contract.

W. A. Day President.



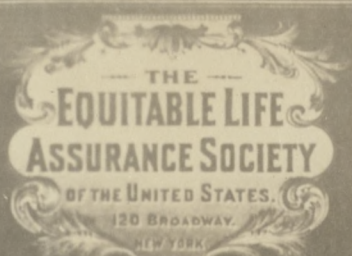
DATE ISSUED

BENEFICIARY

ENDORSED BY

NOTE—ENTRIES IN THIS REGISTER ARE TO BE MADE ONLY BY THE SOCIETY AT ITS HOME OFFICE IN NEW YORK. NO OTHER ENTRIES WILL BE RECOGNIZED.

CHANGE OF BENEFICIARY REGISTER.



Ordinary Life Policy.

No. 2,901,057 1550474

STANISLAW GORETZKI

FACE AMOUNT \$ 1,000

AGE 33

Genl-Annu. PREMIUM \$ 15.78

Including premium for

Double Ind. \$ 1.00 and Disability \$.06

Pay-11th February and August.

Register date: February 11th 1882

Insurance payable at death.
 Double indemnity for fatal accidents.
 Total and Permanent Disability Provision;
 Waiver of Premiums—Monthly Disability-Annuity
 without Deduction of Maturity.
 Premiums payable during life.
 Annual Dividends.

125 21 5
 The Equ. & Ins. Co.
 N. Y.

SERIES 62-2465-15

IT IS NOT NECESSARY TO EMPLOY ANY PERSON, FIRM, OR CORPORATION TO COLLECT THE INSURANCE OR SECURE ANY BENEFIT UNDER THIS POLICY. WRITE DIRECT TO THE SOCIETY, 120 BROADWAY, NEW YORK, OR COMMUNICATE WITH THE NEAREST AUTHORIZED AGENT OF THE SOCIETY WHOSE DUTY IT IS TO FACILITATE ALL SETTLEMENTS WITHOUT CHARGE.

FOURTH PAGE.

MODES OF SETTLEMENT AT MATURITY OF POLICY.

The Insured for the beneficiary after the Insured's death in case the Insured shall have made no election may, by written notice to the Society at its Home Office, elect to have the net sum due under this policy upon the death of the Insured, either paid in Cash; or,

OPTION 1. Left on deposit with the Society during the lifetime of the beneficiary, to be paid upon the death of the beneficiary, to the beneficiary's legal representatives or assigns. The Society guarantees to pay interest on this deposit during its continuance at the rate of 3%. If a higher average annual rate shall be earned by the Society, the amount may be increased by an interest dividend as determined and apportioned by the Society; or,

OPTION 2. Paid in a fixed number of Annual Instalments as set forth in the following table; or,

OPTION 3. Converted into a fixed Income to the beneficiary for life, consisting of the payment of a fixed amount as shown by the following table, annually for TWENTY years certain, and of the continuation of annual payments of like amount thereafter during the life of the beneficiary, provided that if this option be availed of, the Society will require satisfactory evidence of the age of the payee.

Under Options 2 and 3, the amounts payable are based upon an assumed rate of interest of 3%. If a higher average annual rate shall be earned by the Society, the amount of the instalments under Option 2 and of the first twenty instalments under Option 3 may be increased by an interest dividend as determined and apportioned by the Society.

None of the foregoing options is elected, this policy must be surrendered upon its maturity and a supplementary contract issued for the purpose of providing for said option; under Options 2 and 3 the supplementary contract is to be non-commutable, unless the Insured otherwise orders during lifetime. For further notice to the Society at its Home Office.

TABLE OF INSTALMENTS FOR EACH \$1000

OPTION 2. INSTALMENTS CERTAIN				OPTION 3. LIFE INCOME			
Number of Annual Instalments	Amount of each Instalment	Number of Annual Instalments	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment
5	\$212.00	25	\$36.70	17 or under	\$40.00	25, 26	\$47.00
				18, 19, 20, 21	\$41.00	27, 28	\$48.00
10	\$113.82	30	\$40.51	22, 23, 24	\$42.00	29, 30	\$49.00
				25, 26, 27	\$43.00	31	\$50.00
15	\$ 81.33	40	\$42.00	28, 29, 30	\$44.00	32, 33	\$51.00
				31, 32	\$45.00	34, 35	\$52.00
20	\$ 65.26	50	\$37.71	33, 34	\$46.00	35, 36	\$53.00
						37, 38	\$54.00
						39, 40	\$55.00
						41, 42	\$56.00
						43, 44	\$57.00
						45, 46	\$58.00
						47, 48	\$59.00
						49, 50	\$60.00
						51, 52	\$61.00
						53, 54	\$62.00
						55, 56	\$63.00
						57, 58	\$64.00
						59, 60	\$65.00
						61, 62	\$66.00
						63, 64	\$67.00
						65, 66	\$68.00
						67, 68	\$69.00
						69 or over	\$70.00

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

I hereby apply for a policy on my life for \$ 1000

(for the benefit of Elizabeth Leven doka Sister
503 Boulevard Bayonne N.J.
 1/4/59

If living at my death, otherwise as stated in policy, with right to change the beneficiary or assign the policy in my lifetime

The policy to be on the Life plan, with Premium, of \$ 10 payable annually in advance, and with **DOUBLE ACCOUNT** **DISABILITY BENEFIT** **DEAR PRIN WAIVER**

My full name is Stanislaw Gorzelski

My principle occupation is that of Farmer

My other occupations are _____

My residence is No. 503 Boulevard Bayonne N.J.

My insurance age at nearest birthday otherwise 33 years.

I declare upon oath that the above named beneficiary shall not take effect until the first premium has been paid during my good health; that no agent or other person other than the President, a Vice President, the Secretary, the Treasurer or a Registrar of the Society has power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements, and that no waiver shall be valid unless in writing and signed by one of the foregoing officers. All of the foregoing answers and all those made to the Society as a Medical Examiner, which are contained in part II hereof, are true and are offered to the Society as an inducement to issue the policy for which application is hereby made.

I have paid to _____ \$ 10 to cover the first annual premium on the policy applied for, in accordance with the provisions of the receipt of date and number appearing on this application, which I hereby accept, and agree to the conditions thereof.

ENTIRE HERE ANY SPECIAL INSTRUCTIONS _____

SIGNATURE OF APPLICANT Stanislaw Gorzelski

Agrees Charles J. Jorgis No. F. 550171

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES
 120 BROADWAY, NEW YORK

APPLICATION, PART II - STATEMENTS TO MEDICAL EXAMINER

1. a. Date of Birth 1/4/26 b. Race Polish c. Nationality Polish
 2. Married, single or widowed? Single
 3. How much insurance have you in force in this Society, not including policy now applied for?
 4. Have you ever been insured elsewhere? (If so, how much and in what companies?)
 5. Have you ever traveled or lived in tropical countries? (If so, where and when.)
 6. Have you ever changed your occupation or residence on account of your health?
 7. What is your occupation? (File and business.)
 8. How long have you been so engaged?
 9. Do you contemplate any change, temporary or permanent, in occupation?
 10. Have you ever changed your residence or occupation during last five years.

Family Grouped	Age at Death	Reason stated as cause of death	Age at Death	Cause of Death	How Long Ill	Year of Death	Details	Promoted
1	72	Heart	72	Heart	2	1958	Heart	Yes

11. Attained age of Father's Father? _____ Father's Mother's age at death? _____ Mother's Father? _____ Mother's Mother? _____
 12. Have any of these mentioned under Family Record or any one in your household ever had tuberculosis? (Give full details.)

Name and address of each physician	Date and details	Result
_____	_____	_____

I agree that the foregoing answers shall be part of my application, which shall consist of Parts I and II taken together, and that the foregoing answers shall also become part of any policy contract that may be issued on the strength thereof.

Dated at Bayonne County of Hudson State of New Jersey
 on the 4th day of January 1959
 Witness: Stanislaw Gorzelski Signature of Applicant Stanislaw Gorzelski
 M. D. (to be written in presence of Medical Examiner.)

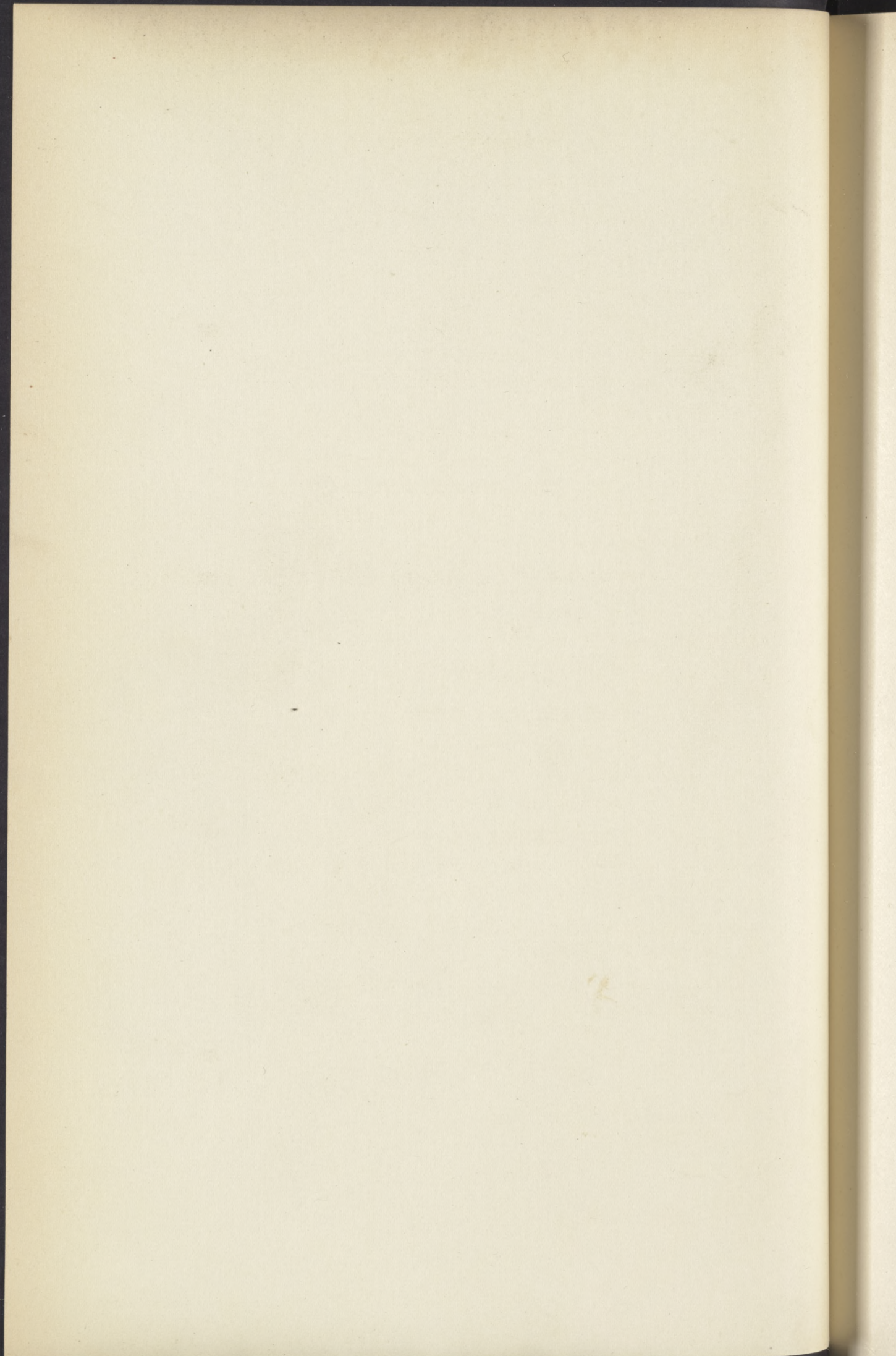


Exhibit 2.

PROOFS OF DEATH

CLAIMANT'S STATEMENT.

NOTICE IS HEREBY GIVEN TO

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES

10

That Elezibeth Lavandorsky of Bayonne, N. J. Hudson County of Bayonne and State of New Jersey, has died; that said Stanislaw Goretzki was the same person whose life was insured by said Society by its polic No. 2,901,057. Dated Feb. 11 1922, for the sum of One Thousand Dollars; and in proof of claim under said Polic , the undersigned does answer as follows:

1. Name of decedent. Stanislaw Gurecki. 20
2. Residence. Port Jefferson, N. Y. 523, Boulevard, Bayonne, N. J.
3. Occupation. Farmer.
4. *a.* Date of birth. Jan. 2, 1889.
b. Place of birth. Poland.
c. Parents' names, giving mother's maiden name. John. Josie Praboleko.
5. Whence is the *date* of birth derived—from family record, certificate of birth or otherwise? Family record. 30
6. Place and date of death. Port Jefferson, N. Y., June 27th 1920.
7. How many years had you known the decedent? "All my life" is not an answer. Not known.

40

Exhibit 2.

8. State all facts regarding cause and circumstances of death. Died suddenly from pulmonary hemorrhage.

9. State the precise duration of the last illness of the decedent. A few minutes.

10. *a*—In what capacity, or by what title do you claim the Insurance? *a.* Mrs. Elezibeth Lavandorsky, sister of Beneficiary.

b—State your present age. 39. year.

c—State who has possession of the policy. *c.* I, Mrs. Elezibeth Lavandorsky.

11. Had the decedent any other life or accident insurance? If so, state in what companies and for what amounts, and the dates of the Policies, respectively. Prudential Life Ins. Co. for 500.00.

12. Unless the policy is on the Life Income, Bond or Non-commutable Instalment Plan, state settlement desired, whether Certificate of Deposit, Instalment, Life Income, Gold Bond or Cash. (*See various modes of settlement on back hereof.*) would like to get Cash.

Dated at Bayonne this 12th day of July, 1922.

30

ELZBIETA LAVANDORSKY

State of New Jersey }
County of Hudson }

On this 12 day of July 1922 personally appeared before me Elizibeth Lavandorsky to me known, and known to me, and made oath that the answers to the foregoing questions are true and full, to the best of her knowledge, recollection and belief.

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DAVID BEERMAN
Justice of the Peace

Exhibit 2.

INSTRUCTIONS.

The issuance of these blanks is not an admission of the existence of any insurance, and is without prejudice to the Society's legal rights in the premises.

Before forwarding proofs, see that all blanks are filled and every question answered, and that the instructions are strictly carried out, thus avoiding delay, and insuring prompt action on the claim. 10

EACH of the within Statements must be sworn to before an officer duly authorized to administer oaths, and the genuineness of his signature and authority attested by the Clerk of a Court of Records.

When a Policy is payable to the legal representatives of the insured, the statement must be made by the executor or administrator. 20

When a Policy is payable to a named beneficiary of full age, or has been assigned, the statement must be made by such beneficiary, or assignee; and the papers must clearly show that each and every claimant has attained majority.

When a Policy is payable to a minor, the statement must be made by his or her guardian.

When a Policy payable by its terms to one beneficiary if surviving, has, by the death of such beneficiary, become payable to another, proof of the death of such first beneficiary must be furnished by affidavit of a person well acquainted with such deceased beneficiary and the fact of his or her death. 30

When a Policy is payable to the children in general of a person or to any other class of persons, whose names are not separately mentioned in the Policy, proof must be furnished of how many chil- 40

Exhibit 2.

dren there are, or of how many the class consists, and their names and ages.

When the claimant's statement is made by an administrator, executor or guardian, a court certificate of their appointment must be furnished as evidence of their authority to act.

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When a Policy has been assigned, the original assignment, or a duplicate thereof, must be presented with proofs of death, unless previously filed with the Society.

If the Policy and all original assignments and releases be filed with the Society not later than with the completed proofs of death, it will materially simplify and facilitate the prompt payment of the claim; in fact such documents are required by the Society before issuance of any supplementary contract.

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It will facilitate the approval of the claim if there be furnished: a newspaper obituary article and death notice, and where possible Board of Health certificates of death and of birth. Such death certificate will render Undertaker's Statement unnecessary.

The intervention of a third person is not necessary for the collection of the claim, and payment to *any person* for pretended services in regard thereto is entirely unnecessary.

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ATTENDING PHYSICIAN'S STATEMENT

1. Name of decedent. Stanislaw Gurecki.
2. Occupation. Farmer.
3. Residence. Port Jefferson Station, N. Y., and Bayonne, N. J.

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Exhibit 2.

4. How long had you been acquainted with the decedent? Stranger.

5. Were you his medical attendant or adviser before his last illness? If so, for what disease, and when? No.

6. Date of first visit. None. 10

7. Date of death. June 27th, 1922.

8. State the disease of which the decedent died and any important medical facts connected therewith. (1) Pulmonary Hemorrhage. (2) Pulmonary Tuberculosis.

If an accident contributed, was it the direct or indirect cause of death?

Describe the injuries, stating whether there were any contusions or wounds. 20

9. Was an autopsy performed? If so, what were the findings? No.

10. Was the decedent strictly temperate? Believe so, but cannot state definitely.

11. Was there any special cause, proximate or remote, for the death, in the habits, occupation, residence, family history, personal constitution, or previous diseases of the decedent? Do not know. 30

12. State age of decedent, and basis of your knowledge. 33 years. His appearance & history.

13. Did you see the body of the decedent, and was it that of the same person described in the Policy or Policies of Insurance on which this claim is based? Saw the body, and have statement of his brothers & sisters as to identity. 40

14. Was death due directly or indirectly to dis-

Exhibit 2.

ease or injuries incurred as the result of the insured taking part in war? If so, kindly give details. No.

Dated at Huntington, this 8th day of July, 1922.

10 WILLIAM B. GIBSON, *Attending Physician,*
Coroner of Suffolk Co., N. Y.

State of New York }
County of Suffolk }

20 On this 8th day of July, 1922, before me came the above named William B. Gibson, to me known, and known to me, as a Physician in regular standing, and Coroner of Suffolk Co., N. Y., and made oath that the answers to the foregoing questions are true and full, to the best of his knowledge, recollection and belief.

HENRY A. MURPHY
Notary Public
Suffolk Co., N. Y.

UNDERTAKER'S STATEMENT.

NOTE—This is not required when official certificate of death is furnished.

- 30 1. Name of decedent: Stanislaw Gurecki.
2. Residence: Pt. Jefferson Station N. Y. & Bayonne, N. J.
3. Did you see and inter the body of said decedent, and do you know that it was the body of the person described in the accompanying statement of the claimant beyond a doubt? Yes.
- 40 4. Date of birth. (This blank is to be filled, if possible, from the family record.) May 8th, 1889.

Exhibit 2.

5. Place and date of interment. Mt. Calvary
Cem. Linden, N. J., June 30th, 1922.

Dated at Bayonne this Tenth day of July, 1922.

STANISLAW FRYCZYNSKI

County of Hudson	}	10
State of New Jersey		

On this 10th day of July, 1922, personally ap-
peared before me the above named Stanislaw
Fryczynski to me known, and known to me, and
made oath that the answers to the foregoing ques-
tions are true and full, to the best of his knowl-
edge, recollection and belief.

JOHN P. BROWNE	
Notary Public of	20
New Jersey	

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New Jersey Court of Errors and Appeals

ELIZABETH LEVANDOSKI, Plaintiff-Appellant, <i>v.</i> EQUITABLE LIFE ASSURANCE SO- CIETY, Defendant-Appellee.	}	On Appeal.
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BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

On February 14, 1922, the Equitable Life Assurance Society issued a policy of insurance to one Stanislaw Gurecki, under and by the terms of which it agreed on his death to pay to his sister, Elizabeth Levandoski, as beneficiary, the sum of \$1,000.

Gurecki died June 27, 1922, of pulmonary tuberculosis, and upon his death claim was made for the payment of the amount of insurance and proofs of death delivered to the defendant company.

Upon payment being refused, suit was instituted in the Supreme Court and trial had at the Hudson Circuit before the Honorable Luther A. Campbell and a jury on September 19, 1923.

At the close of the case, motion was made for direction of verdict (Case, pp. 63-64) upon 3 grounds, the first two of which were based on the claim that the undisputed evidence showed that willful misrepresentations were made by the deceased, which would invalidate the policy issued.

The motion based on these grounds was refused but was granted upon the further ground that there was a breach of a condition precedent in the policy, which provided that the policy should not take effect unless delivery was made and the first premium paid while the insured was in good health (Case, p. 64). To this ruling an objection was noted.

ARGUMENT.

POINT I.

The evidence showed that the deceased was an illiterate Pole who could not read, speak, nor understand the English language. Concerning this proven fact there is no dispute.

It is likewise in evidence and undisputed that at the time when the application for insurance was made by the now deceased, no questions were asked of him by the agent except as to his age, the ages of his mother and father; which questions were asked in his own language.

It appears by the testimony of the sister (Case, p. 50, lines 3-30) and she again particularly testifies (Case, p. 61) that the agent did not tell her brother, the insured, that the policy would not be valid if he was not in good health at the time the same was delivered to him.

It is also in evidence and undisputed that the deceased did not seek insurance but consented to apply for a policy only after much persuasion on the part of the agent representing the defendant society (Case, p. 48, line 49).

The plaintiff frankly conceded, as appears by the stipulation entered into (Case, p. 9, lines 27-40) that the deceased at and prior to the time when

the application was made, and at all times subsequent thereto, and until his death, was suffering from pulmonary tuberculosis, and that death resulted from this disease. This stipulation, however, must not be construed as conceding that the insured at any time knew or believed that he was suffering from tuberculosis.

On the contrary, the evidence shows that he did not believe he was suffering from this disease.

Dr. MacIvor, a defense witness, testified (Case, p. 13, lines 10-20) as to the condition which he found, which indicated a tubercular infection of the chest, but could not state that the knowledge of this had been conveyed to the deceased (Case, p. 19, lines 25-30). The doctor further testified (Case, p. 21, lines 29-30) that the assured came to him, that he, the doctor, attempted to get a history of the case, but was unsuccessful because this man could not speak a word of English. The physician says he determined that the assured was tubercular but that when he attempted to convey to him the result of the diagnosis, he did not seem to comprehend what was told him (Case, p. 23, lines 1-10).

From this testimony, it is quite evident that long prior to the issuance of the policy the deceased suffered from the disease in question but that knowledge of the existence thereof had not and could not have been communicated to him because of his lack of familiarity with the English language.

It is likewise apparent that he did not believe he was suffering from this disease, as is indicated by the testimony of the witness Powell (Case, p. 33, lines 1-2), and as corroborative of his lack of such belief is the testimony of the witness Babski (Case, p. 40, lines 30-40) who testified "He says" (referring to Gurecki) "I don't really believe that I got the consumption because I would never have the

insurance' that is the way he says, and the reason why he didn't believe Dr. McRea even that he had consumption, and he didn't believe any one of them doctors that he really did have consumption because he could get the insurance out. He said 'I got the insurance out.'

It has long been the established law of this State that "forfeitures are not favored and that if by any intendment a ground can be found to defeat them (forfeitures), the Court will apply it."

Henn v. Metropolitan Life Insurance Co.,
67 N. J. L., 310.

It cannot be controverted that in our own State as well as in other states, both the Legislature and the courts have attempted to obviate the pitfalls contained in intricate and complex policies of insurance by enacting statutes and liberally construing them in a manner favorable to the assured. New Jersey, in 1907, enacted a statute which provided that no policy of insurance should be issued or delivered within this State unless the same contained certain provisions, amongst the important of which is the following:

"Fourth: A provision that the policy shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writing unless the same are endorsed upon or attached to the policy when issued, and ALL STATEMENTS PURPORTING TO BE MADE BY THE INSURED SHALL, IN THE ABSENCE OF FRAUD, BE DEEMED REPRESENTATIONS AND NOT WARRANTIES. Any waiver of this provision shall be void." P. L. 1907, Chapter 72.

That this is remedial legislation is beyond dispute and that the remedy was directed against abuses by insurance companies is equally indisputable. The language used: "Any waiver of this

provision shall be void" clearly indicates that fact. That the courts, in the construction of this provision of the statute, likewise intended to protect the insured against abuses by insurance companies is clearly indicated by its decisions, especially in instances in which the insurance company was dealing with illiterate persons.

In what appears to be the latest case on this subject, decided by the Supreme Court, the following language was used:

"These representations, and unless fraudulently made, did not void the policy, but if willfully untrue, they were fraudulent and voided the policy." Citing

Duff v. Prudential Life Ins. Co., 90 N. J. L. 647; 101 Atl., 371.

"But in the present case there was question as to whether the examiner actually put these questions to the insured, and if that was done, whether he understood them.

"Insured was Polish, and while it is said that he could speak and understand English, it is fair to assume that his knowledge of the language was limited. If the questions were put to him and he understood them, then beyond question he was guilty of willful untruths, and his representations were fraudulent, and at least those as to his condition of health, etc., were material, and the policy was voided; and the motion to direct the verdict should have resulted in the direction in favor of the defendant."

Woynarowski v. Metropolitan Life Insurance Co., 130 Atl., 544.

This case was before the Court on application for a new trial permitting a review of the evidence. The Court held that even though it must be conceded that the insured died of tuberculosis,

that he was suffering from the disease and had been treated therefor by a physician before the application for the policy, and that the existence of the disease was known to him, the refusal to direct a verdict was proper.

In its determination, the Court cites as authority, *Guarraia v. Metropolitan Life Ins. Co.*, 90 N. J. L., 685; 101 A., 298, in which the defense was breach of warranty, misrepresentation and concealment of facts, in that the assured represented that he had not had bronchitis and had not been attended by a physician within a certain period; which representations were untrue.

In disposing of the contention that a verdict should have been directed, the Court said:

“The question then is with reference to the effect of the statement. If it was a warranty, the policy fails; if it was only a misrepresentation, the question of intentional falsehood becomes material.

“The policy says that 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 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.”

It is the contention, however, of counsel for the insurance company, that inasmuch as the provision of the policy sued upon is expressly made

a condition and not a warranty, the policy never came into existence, and that no recovery could, therefore, be had thereon.

The condition referred to appears on the application and is in the following language:

“I hereby agree that the policy issued herein shall not take effect until the first premium has been paid during my good health.”

It is, of course, true, as previously admitted, that the deceased had suffered from tuberculosis not only at the time that delivery of the policy was made, but long prior thereto, and it is apparent from a reading of the testimony that there was no noticeable change between the date when the application for the policy was made and the date of delivery thereof.

At the time of the trial, counsel for the insurance company urged—in support of the contention that the plaintiff acquired no right under the policy because of the violation of this so-called condition—the case of *Prahm v. Prudential Life Insurance Co.*, 122 Atl., 752.

In that case, the condition which was construed by the Court was to the effect that the policy should not take effect until it should be issued and delivered by the company and the first premium paid thereon in full while the health, habits and occupation of the applicant are the same as described in the application; and the Court, commenting upon the charge made by the Trial Court, stated the rule as follows:

“In other words, the validity of the policy depends not upon the knowledge of the insured and concealment by him with fraudulent intent, but upon the fact that he was in worse health at the time of the delivery of the policy than was the condition of his health as described in the application.”

The evident purpose of the insurance company in inserting a condition in its policy of insurance similar to the condition in the *Prahm* case is to prevent the rights of the insurance company from being jeopardized by a changed condition of health in the insured between the date when the application is made for the policy and the date of the issuance thereof.

The condition in the present policy under consideration, on the contrary, makes the policy absolutely void, although no change in condition existed and even though there was no knowledge on the part of the assured that the policy contained this provision. If the insurance company is permitted to take advantage of this provision of the policy as it contends it has the right to do, the intent and spirit of the legislative enactment passed for the purpose of protecting ignorant persons is entirely disregarded, by reason of the fact that by putting the answers of the assured to questions propounded in the form of conditions precedent instead of representations or warranties, a breach thereof would invalidate the policy, although no fraud was perpetrated.

For example: If the prospective assured is asked a question as to whether he has tuberculosis, bronchitis or even a trivial ailment and the answer is made that he has not, even though the answers are called warranties, the Court has held that, in the absence of fraud and in the absence of knowledge on his part that he is suffering therefrom, it will disregard the fact that the answers are called warranties and will hold that they are merely representations. On the other hand, if these same answers are given without knowledge on the part of the prospective insured that the same are untrue, and are placed in the policy in the form of a condition, the policy stating "that it shall not take

effect unless at the time of the delivery thereof the insured was not suffering from tuberculosis, bronchitis or even a trivial ailment, and shall be deemed invalid, if suffering from such ailment." Upon proof of the existence of either disease without further proof that the insured had knowledge of the existence thereof, the rights of his beneficiary would be defeated. By following this course, the insurance company may entirely overcome the effect of all legislation on this subject, and likewise overcome the desire of the Court to protect the ignorant insured by having no warranties and no representations in its policy, but by having a printed form making every disease known to mankind a printed portion of the policy as a condition. And the ignorant and illiterate assured would acquire no protection by the decisions of this Court which are thrown as a safeguard around him, and we refer particularly to the *Guarraia* case, where the Court says:

"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 PAPERS MORE OR LESS AS A MATTER OF FORM."

If that statement could be made regarding a physician, a man, acting in a professional capacity—although a paid representative of an insurance company—how much more can it be said of the usually glib insurance agent, who, having no thought whatsoever of the rights of the assured, but merely a desire to obtain his commission, certainly will not call to the attention of an illiterate Pole the fact that in small print (and we use the term "small print" advisedly, because an examina-

tion will show that the printing of this condition is much smaller than the printing above it) is a provision that will absolutely defeat a right of recovery on the part of his beneficiary even though he did not and could not have any knowledge of the existence thereof.

In view of the decisions in the *Guarraia* case and the *Wojnarski* case, we respectfully contend that, this so-called condition in the policy never having been called to the attention of the assured, and inasmuch as it is undisputed that he had absolutely no knowledge of the English language and had therefore, no means of becoming acquainted with the fact that the condition existed therein, the rights of his beneficiary in the policy are not defeated.

It seems to be the contention of the insurance company that a condition inserted in the application for the policy has a more stringent effect than if made in the form of a warranty, but this contention seems to run counter to the established law in this State.

In *Dimmick v. Metropolitan Life Insurance Co.*, 67 N. J. L., 367, at page 372, the Supreme Court said:

“In our court of last resort, warranties and conditions in such instruments are treated as synonymous terms—as indeed, they are.”

and cites, in support of this statement, the case of *American Popular Life Insurance Co. v. Day*, 10 Vroom, 89 and the further case of *Sonneborn v. Manufacturers' Insurance Co.*, 15 Vroom, 220-222, stating:

“It was declared in the same court (referring to the Court of Errors and Appeals) that a promissory warranty had the nature of a condition precedent. That every inducing

statement, made a warranty by a policy of life insurance, shall be true is plainly a condition precedent to the insurer's liability under such policy."

If this is a true statement of the rule as it exists at the present time, and we can find no authority in this State which declares to the contrary, or overrules the decisions in the cases cited, it naturally follows that the terms "warranty" and "condition" being synonymous there is absolutely no distinction between the two terms.

Following this out to a logical conclusion, if "condition" is synonymous with "warranty," the insurance statute and the cases previously cited hold that a warranty, in the absence of fraud, is to be construed merely as a representation; and under the *Guarraia* and *Woynarski* cases—it being a known and undisputed fact that the assured was illiterate—it is for the jury and not for the Court to determine whether any fraud existed on his part which would vitiate the policy issued.

We, therefore, respectfully urge that this matter should have been left to the determination of the jury, and that it was error on the part of the Trial Court to direct a verdict.

POINT II.

Assuming, however, that the Court was justified in finding that the condition had a greater effect in defeating the rights of the insured than a misrepresentation or warranty would have had, we believe that the evidence would have justified the Court in finding that this condition had been waived, or at least that it should have been properly left to the jury to determine whether or not there had been a waiver.

The company did not rely on the answers given by the assured regarding his physical condition,

but had a physical examination made by a doctor in its employ. That this examination was carefully made cannot be doubted if the testimony of the sister is considered (Case, pp. 54, 55), and it must be borne in mind that such examination was made not more than three weeks prior to the issuance of the policy (Case, p. 55, line 35).

The doctor's report is not made a part of the policy. Nor was it offered in evidence by either side, but certainly it must be presumed that inasmuch as the testimony discloses that the deceased was suffering from tuberculosis long before the policy was applied for or issued and had not been cured at any time previous to the issuance thereof the physician must have found indications of the disease at the time that the examination was made; and he, having knowledge of the existence thereof—he being the agent of the company for the purpose of making the examination—the company would be chargeable with such knowledge whether the disease was reported by him or not.

Relative to notice, this Court, in the case of *Hanford v. Duchastel*, 93 Atl., 586, states the rule as follows:

“In order that the principal may be affected with constructive notice of matters known to the agent, the information constituting the notice must be obtained by or imparted to the agent while he is in fact acting as agent, while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent.”

The rule is again stated by this Court in *American Surety Co. v. Conway*, 102 Atl., 839, where the Court says:

“The rule, as there established (referring to the earlier case of *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. E., 387), is that the

knowledge of the agent is chargeable upon his principal, whenever the principal, if acting for himself, would have received notice of the matters known to the agent."

There can be no dispute concerning the fact that the physician was acting for the insurance company; that knowledge was obtained by him while acting as such agent, or certainly should have been obtained by him as the result of his examination of the existence of the disease in question, and it likewise cannot be disputed that if this company could, as an individual, make the examination—and the examination was properly made,—it would have actual notice of the existence of the disease; and under the rules as set forth in the cases cited, would certainly be chargeable with notice and knowledge.

If, therefore, the company had knowledge or notice of the facts which the physical examination would and must have disclosed, and notwithstanding that fact, accepted the payments of premium and issued the policy, it would certainly be estopped from asserting that the existence of the ailment in question would prevent the beneficiary from having a recovery.

It might be argued that the physical examination did not reveal any indication of disease, but it seems rather far-fetched to hold that the deceased was chargeable with the knowledge of the existence thereof, and excuse a competent physician from finding what must have been apparent.

In accordance with the established practice of the courts in refusing to favor forfeitures of policies of insurance where there is any indication that the insuring company has waived any of its rights, the policy of the courts has been not to bar the beneficiary of a right of recovery.

The rule is stated in *Graham v. Security Mutual Life Ins. Co.*, 72 N. J. L., 298, page 303, as follows:

“The correctness of this position as a general rule relating to forfeitures of policies, and which is held in the cases cited in this part of the brief of the plaintiff-in-error, will not be disputed.

“But the facts of this case preclude the application of this strict rule as to forfeiture to this case. The contention of the defendants-in-error is that there had been a waiver of the forfeiture clause in this policy, and that the question whether all the acts of the defendant and the insured, occurring at different times, did not go to make up a course of dealing respecting this contract from which the waiver of strict payment of the note and forfeiture might be inferred, and that this question was one which should be left to the consideration of the jury.

“IT HAS LONG BEEN A SETTLED RULE OF LAW THAT THE PROVISIONS OF A CONTRACT THAT ARE TO WORK A FORFEITURE ARE TO BE STRICTLY CONSTRUED. FORFEITURES ARE NEVER FAVORED IN THE LAW, AND ATTENTION WAS CALLED BY COUNSEL FOR DEFENDANTS-IN-ERROR TO THE FACT THAT THE AVERSION OF COURTS TO THE ENFORCING OF FORFEITURES IS EMPHASIZED IN CONTRACTS FOR INSURANCE FOR REASONS USUALLY EXISTING PECULIAR TO THOSE CONTRACTS.

“AN EXAMINATION OF THE CASES, AND NOTABLY THOSE UPON THE BRIEF OF THE DEFENDANTS-IN-ERROR, CLEARLY DEMONSTRATES THE CORRECTNESS OF THE PRINCIPLE ABOVE STATED.”

We, therefore, respectfully contend that considering all of the features of this case,—the illiteracy of the deceased, the fact that his attention was not called to the existence of the provision of the policy in question, that he had no means of knowing the existence thereof in the policy, and no means of learning the existence thereof, and the further fact that he submitted to an examination by

a physician of the company who either knew or should have known from his examination that the deceased was then suffering from tuberculosis, and that this knowledge, being imputable to the company that took the precaution of having the examination made, it cannot now urge the breach of this condition as the reason for refusing to make payment under the policy, and that upon this ground, as well as on the previous ground urged, the Court erred in granting the motion for direction.

POINT III.

Even though no weight be given to our previous argument, we still insist that there was error on the part of the Court in directing a verdict for the defendant. The undisputed proof shows that premiums were paid by the deceased which were not forfeited under any provision of the policy, and the beneficiary would, therefore, have the right to recover the amount of premiums so paid. A verdict of necessity must, therefore, have been granted to the plaintiff even though only for a recovery of the amount of premiums paid by the deceased and admittedly received by the insurance company.

For all reasons argued, we respectfully submit that the decision of the Trial Court and the judgment entered thereon should be reversed.

Respectfully submitted,

LAZARUS, BRENNER & VICKERS,
Attorneys and of Counsel with
Plaintiff-Appellant.

(Judgment entered Sept. 22, 1923)
NEW JERSEY SUPREME COURT

ELIZABETH LEVANDOSKI,
Plaintiff - Appellant

-vs-

EQUITABLE LIFE ASSURANCE
SOCIETY,
Defendant - Appellee.

Action at Law.

RULE FOR FINAL
JUDGMENT

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This case was tried before Honorable Luther A. Campbell, Judge of Hudson Circuit to whom the same had been referred by Honorable Francis J. Swayze, Justice of the Supreme Court holding the Hudson Circuit with a jury, at the Hudson Circuit on September, 19th 1923.

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By direction of the Court the jury rendered a general verdict against the plaintiff and in favor of the defendant,

Whereupon it is adjudged that the complaint be dismissed and that the defendant Equitable Life Assurance Society do recover of the said plaintiff Elizabeth Levandoski its costs which have been taxed at the sum of

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Rule Actually Entered
this 22nd day of September,
1923 on the motion of

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COLLINS & CORBIN
Attorneys of Defendant

New Jersey Court of Errors and Appeals

ELIZABETH LEVANDOSKI,
Plaintiff-Appellant,

vs.

EQUITABLE LIFE ASSURANCE
SOCIETY,
Defendant-Respondent.

On Appeal
from
Supreme
Court.

BRIEF FOR RESPONDENT.

The appeal in this case is from a judgment of the Supreme Court entered on a verdict directed for respondent upon a trial in the Hudson Circuit before Hon. Luther A. Campbell, Judge, and a jury.

The suit was on a policy of insurance for \$1,000 issued by respondent upon the life of Stanislaw Goretski, who died on June 27, 1922, the appellant being the beneficiary.

This policy, which was issued on February 14, 1922, contained the following provisions (Case: pp. 64-65):

“THE CONTRACT. This policy, and the
“application therefor, a copy of which is
“endorsed hereon or attached hereto, con-
“stitute the entire contract between the
“parties. All statements made by the in-
“sured shall, in the absence of fraud, be
“deemed representations and not warran-
“ties, and no such statement shall avoid

“this policy or be used in defense of a claim
 “thereunder unless contained in the written
 “application therefor and a copy of such
 “application is endorsed hereon or attached
 “hereto when issued.”

“*Agents* are not authorized to modify, or
 “in event of lapse, to reinstate this policy,
 “or to extend the time for payment of any
 “premium or instalment thereof.”

The application for the policy, which was incorporated therein, contains the following provision:

“I hereby agree that the policy issued
 “hereon shall not take effect until the first
 “premium has been paid during my good
 “health; that no agent or other person ex-
 “cept the president, a vice-president, the
 “secretary, the treasurer, or a registrar of
 “the Society has power to make or modify
 “any contract on behalf of the Society or
 “to waive any of the Society’s rights or
 “requirements, and that no waiver shall be
 “valid unless in writing and signed by one
 “of the foregoing officers. All of the fore-
 “going answers and all those made to the
 “Society’s medical examiner, which are
 “contained in part II hereof, are true, and
 “are offered to the Society as an induce-
 “ment to issue the policy for which appli-
 “cation is hereby made.”

The following questions and answers appear in the application:—

“6. State every physician or practi-
 “tioner whom you have consulted or who
 “has treated you during the past five years.
 “None.

“7. Have you ever had or been treated
 “for any disease or disturbance of

“B. The throat or lungs. No.

“8. Have you ever had gout, rheuma-
 “tism, tuberculosis or syphilis. No.”

Several physicians testified that the insured suffered from tuberculosis for over a year prior to his application for the policy and that he died therefrom. At the trial, appellant's counsel stipulated that the insured, at the time of the application for the policy, at the time the policy was issued and at all times from the time of the application until his death, was suffering from pulmonary tuberculosis; that his death was caused thereby; and that the first premium on the policy was paid at a time when he was suffering from that disease (Case; p. 9, 11, 27-39).

After the testimony had been concluded a motion was made in behalf of respondent for direction of a verdict in its favor on the following grounds (Case; pp. 63-64).

1. The undisputed evidence showed that the insured knowingly misrepresented at the time of his application for the policy and at the time of the medical examination of him, that he did not have and had not been treated for any disease or disturbance of the throat or lungs incurred within five years prior to February 7, 1922, and that his health was not then impaired in any way.

2. The undisputed evidence showed that the insured knowingly misrepresented at the time of his application for the policy and at the time of the medical examination of him, that he had not been treated by a physician or physicians at any time during the period of five years prior to February 7th, 1922, and that his health was not then impaired in any way.

3. The undisputed evidence showed that the first premium on the policy was not paid during the good health of the insured.

The trial Judge refused to direct a verdict on the first two grounds but did so on the third.

I.

Assuming that the insured was illiterate and could not read, speak nor understand the English language, he was bound by the condition of the policy.

For the purpose of avoiding the consequences of the false answers with respect to the health of the insured contained in the application for the policy, it is argued in behalf of appellant that the insured was illiterate and did not understand what he had been told by several physicians as to his condition of health prior to his application for the policy; that he did not know or believe that he was suffering from tuberculosis; and that he was not questioned as to his health by respondent's agent when he applied for the policy.

The question whether the representations as to the health of the insured contained in the application were fraudulent is relatively unimportant. There was a provision in the application that the policy issued thereon should not take effect until the first premium was paid during the good health of the insured.

The effect of a provision of this character was stated in the opinion of this Court in the case of *Prahm v. Prudential Insurance Co.*, 99 N. J. L. 288, as follows:—

“Appellant argues that where a policy of
“insurance provides that all statements
“made by the insured shall, in the absence
“of fraud, be deemed representations and
“not warranties, as required by the insur-
“ance laws of New Jersey, the provision
“extends to every statement made in the

“application for the policy. That may be
 “conceded, and yet the observation of the
 “Supreme Court that where the applicator
 “(which was expressly made a part of the
 “contract) provided that the policy should
 “not take effect until it should be issued
 “and delivered by the company and the
 “first premium paid thereon in full, while
 “the health, habits and occupation of the
 “applicant are the same as described in the
 “application, there can be no recovery upon
 “it (unless the condition be waived) if it
 “appears at the trial that the insured was
 “in worse health when the policy was issued
 “and delivered, than as described in the
 “application is well founded; and it is im-
 “material that any changed condition is
 “known to him and concealed from the
 “company with fraudulent intent. In other
 “words, the validity of the policy depends
 “not upon the knowledge of the insured and
 “concealment by him with fraudulent in-
 “tent, but upon the fact that he was in
 “worse health at the time of the delivery
 “of the policy than was the condition of
 “his health as described in the applica-
 “tion.”

The Court of Appeals of New York has also held that such provision constituted a condition. In the case of *Drilling v. New York Life Insurance Co.*, 234 N. Y. 234; 137 N. E. 314, the agreement was that the policy should not take effect unless the first premium was paid and the policy delivered and received during the lifetime and good health of the insured. It was found in that case that the first premium was paid while the insured was suffering from erysipelas and, the agreement not having been complied with, the right of recovery was denied.

The Supreme Judicial Court of Massachusetts has expressed a similar opinion. In the

case of *Barker v. Metropolitan Life Ins. Co.*, 188 Mass. 542; 74 N. E. 945, the provision in the policy was that no obligation was assumed by the company until the first premium was paid prior to its date nor unless upon that date the assured was alive and in sound health. In that case the following was quoted from the opinion in the case of *Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, with approval:

“The court mixed the law as to the condition in the policy with the law applicable to answers to interrogatories in the application, and thereby committed an error. False answers to interrogatories are governed by section 3625 of the Revised Statutes of 1892, but that section has no application to conditions contained in the policy itself.”

Cooley in his *Briefs on the Law of Insurance*, Vol. I, page 469, says:

“Where an application for a life insurance policy, or the policy itself, or both the application and the policy, contain a provision to the effect that the policy shall not become operative until the first premium thereon has been actually paid to the company or to an authorized agent during the good health of the applicant, actual payment of the first premium while insured is in good health is a condition precedent to the liability of the insurer, unless waived.”

Many cases are cited in support of this doctrine, including *McClave v. Mutual Reserve Fund Life Ass'n.*, 55 N. J. L. 187, and *Langstaff v. Metropolitan Life Ins. Co.*, 69 N. J. L. 54.

It has been well settled, therefore, that, under the provision of the policy in the present case,

the payment of the first premium thereon during the good health of the insured was a condition precedent to the effectiveness of the policy.

Appellant contends that this condition was not binding because it was not specifically called to the attention of the insured, and, being illiterate, he did not know of it.

The cases of *Guarraia v. Metropolitan Life Ins. Co.*, 90 N. J. L. 682, 685; 101 Atl. 298, and *Woynarowski v. Metropolitan Life Ins. Co.*, 130 Atl., 544, cited in the brief for appellant, dealt with representations of several insured with respect to their health in answers to interrogatories in applications for policies and not with a condition such as exists in the present case. They have no bearing thereon.

The radical difference between such representations and condition was pointed out in the case of *Prahm v. Prudential Insurance Co.*, *supra*, and the other cases cited in this brief.

It is stated in *Cooley's Briefs on the Law of Insurance*, Vol. II, p. 1151, that

“The distinction between warranties and conditions precedent is well pointed out in *Redman v. Aetna Ins. Co.*, 49 Wis., 431, 4 N. W. 591, where the court says that a condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed on and before the contract shall take effect. A warranty lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or act be done after the agreement is made and before it shall take effect as a contract.”

Assuming, therefore, that ignorance of an insured as to the questions in an application for an insurance policy may excuse false answers

thereto, a condition of the policy cannot be avoided by ignorance.

In *Corpus Juris*, Vol. 13, p. 372, it is stated that

“A party’s mere ignorance, occasioned
 “by his limited intelligence and understand-
 “ing of the language and of the contents of
 “the contract which he voluntarily executes,
 “is not, in the absence of fraud, a ground
 “for avoiding it, although it is different
 “from what he supposed. So where a per-
 “son cannot read the language in which a
 “contract is written, it is ordinarily as
 “much his duty to procure some person to
 “read and explain it to him before he signs
 “it as it would be to read it before he
 “signed it if he were able to do so, and his
 “failure to obtain a reading and an ex-
 “planation of it is such gross negligence
 “as will estop him from avoiding it on the
 “ground that he was ignorant of its con-
 “tents.”

Appellant does not charge respondent with fraud in having obtained the application of the insured for the policy. If she did, and proved the fraud, she would be entitled to have the policy cancelled, provided she properly represented the insured, but could not recover upon it. It is idle for her to claim that, because of the ignorance of the insured, the condition of the policy should be ignored and its beneficial provisions sustained.

II.

It is also argued in behalf of appellant that the condition of the policy as to the payment of the first premium thereon during the good health of the insured was waived by respondent because an examination of the insured by respondent’s physician must have disclosed that

the insured had tuberculosis and respondent was bound by such finding whether reported to it or not.

The suggestion that respondent's examining physician should have found that the insured was suffering from tuberculosis is beside the mark. There is no evidence that he so found nor that respondent knew that such was the case, and respondent could not have waived something unknown to it.

In any event, the application for the policy, which was made a part thereof, expressly provided that no agent or other person except the president, a vice president, the secretary, the treasurer, or a registrar of respondent had power to make or modify any contract on behalf of respondent or to waive any of its rights or requirements, and that no waiver should be valid unless in writing and signed by one of the officers mentioned.

The condition was that the first premium on the policy should be paid during the good health of the insured and there was no waiver by respondent of that condition in accordance with the provisions of the policy.

Drilling v. New York Life Insurance Co., supra.

What is meant by the term "good health" as used in the condition of the policy? Quoting *Cooley's Briefs on the Law of Insurance* (Vol. 1, p. 470):

"In the leading case of *Barnes v. Fidelity National Life Ass'n.*, 191 Pa. 618; 43 Atl. 341; 45 L. R. A. 264, it is said that good health does not mean absolute perfection, but is comparative, and if insured enjoys

“such health and strength as to justify the
 “reasonable belief that he is free from
 “derangement of organic functions, or free
 “from symptoms calculated to cause a
 “reasonable apprehension of such derange-
 “ment, and to ordinary observation and
 “outward appearance his health is reason-
 “ably such that he might with ordinary
 “safety be insured and upon ordinary
 “terms, the requirement of good health is
 “satisfied.”

It is common knowledge that pulmonary tuberculosis, or consumption as it has often been called, causes a derangement of the organic function of the lungs, and, in view of the undisputed fact that the insured in the present case suffered from that disease at the time the first premium on the policy was paid, he was plainly not then in good health and the policy did not go into effect. The trial Judge was, therefore, justified in directing a verdict for respondent.

III.

The final argument in behalf of appellant is that the verdict was erroneously directed for respondent because, if appellant could not recover the death benefit provided by the policy, she should have been permitted to recover the premium paid thereon. There is no disposition on the part of respondent to keep the premium but the claim now made by appellant was not stated in the complaint and was not made at the trial. It was not in issue and the trial Judge had no opportunity to pass upon it. Appellant cannot make it now.

I respectfully submit that the judgment of the Supreme Court should be affirmed.

ROBERT J. BAIN,
 Of Counsel with Respondent.

