

N. J. Court of Errors and Appeals.

ANNIE McTAGUE, Plaintiff in Error, vs. THE STATE, (THE METROPOLITAN LIFE INSURANCE COMPANY, Pros.) Defendant in Error.	In Error to Supreme Court.	10
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BRIEF FOR PLAINTIFF IN ERROR.

1. The statements in the revival application (Ex. 2, p. 11,) are not warranties.

The law is well settled that representations in an application do not become warranties unless they are referred to in the policy and are *expressly made a part of it*.

It must *clearly* appear that *both parties* intended that the statements should be construed as warranties. 20

Williams v. New England M. F. Ins. Co.,
31 Me. 219.

Phoenix Life Ins. Co. v. Raddin, 120 U. S.
189, and cases cited.

National Bank v. Ins. Co., 95 U. S. 673.

Daniels v. Hudson River, &c., Ins. Co., 12
Cush. 46.

Wilson v. Conway F. Ins. Co., 4 R. I. 141.

Even a declaration in the policy that the insurance is in consideration of the representations in the application will not elevate them to the importance of warranties. 30

American Pop. L. Ins. Co. v. Day, 10 Vr. 89.

The legal effect of the revival application and the *approval* thereof by the company was to renew the policy upon the same terms *only*.

There was no *new contract*.

In a very similar case, *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293, STRONG, J., says: "If the company had intended to insist upon any other terms than those which governed the original insurance, *they should and probably would have issued a new policy*. By continuing the exist- 40

ing one with the representations accompanying it, they *clearly* indicated an intention to resume their previous contract, *not to make a new one.*

There was *no consideration* for a new contract.

No increase of premium or insurance.

The arrears of premiums were due under the original policy.

The payment of the arrears was a condition precedent to the revival of the policy; but not the consideration
10 for its continuance.

It is *doubtful* whether the company revived the policy on the faith of the representations made by the assured, or on the faith of the certificate made by the agent.

No consideration is expressed in the assent of the company to the revival.

No *stipulation* is contained in the assent of the company to the revival that the representations contained in the revival application shall constitute a part of the contract.

20 An agreement that representations shall be read as part of the contract, should be *mutual*.

Amer. Pop. L. Ins. Co. v. Day, supra.

It cannot be *implied* that such stipulation is included in ~~each~~ ^{*single*} assent; it must *expressly* appear.

The declaration: "It is further warranted that the statements * * * * are in all respects true; otherwise the insurance to be void," is insufficient of itself to elevate the mere representation into a warranty.

Very similar language in an original application was
30 likewise construed to be a representation only.

Phoenix Life Ins. Co. v. Raddin, supra.

II. If the statements aforesaid are construed to be warranties, *no breach is proved.*

Construction should be *liberal* to uphold the contract; and the words of the warranty must receive a *reasonable* interpretation.

May on Insurance, § 174.

Carson v. Jersey City Ins. Co., 14 Vr. 304.

40 *Home Mutual L. Asso. v. Gillespie, 110 Pa. St. 84.*

The statements that "the life insured * * * has not, since said policy was issued, *been sick, or afflicted with any disease, or met with any accident or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate,*" should be construed as dependent conditions, the one including the others, and interpreted together *as one condition*.

In this view, and looking to the general object and scope of these statements, the meaning is clear, that *the insured is in the same physical and mental state of health as he was at the time the policy issued.* 10

Each one of these clauses relates to a state of health.

Disease, accident, consulting a physician and obtaining a prescription, and intemperate habits, imply sickness.

The word "accident" must be construed with reference to the other provisions of the condition and the object thereof; it must be accident to the body, *i. e.*, physical injury.

Any other interpretation would lead to an absurd conclusion; for instance, losing one's hat in a gale of wind would be an accident, certainly not included in this representation. 20

Likewise, the language, "has not * * * consulted or been prescribed for by any physician," should be construed with reference to the other provisions of the condition, and thus necessarily refers to the physical or mental state of the insured, and avers a condition of health.

If one has not consulted or been prescribed for by any physician, the inference is that he has not been sick, or afflicted with any disease, or met with any accident. 30

If the insured had consulted a physician or obtained a prescription from a physician *for any other reason* than because he was sick, or had some disease, or had met with some accident, it is impossible to conceive of the relation of such consultation or prescription to the contract of insurance.

The words "prescribed for by a physician," should be interpreted to mean what they ordinarily signify, and that is, "*a written direction for medicine to be used by a sick* 40

person," this construction is reasonable, and is within the rule laid down in *Carson v. Jersey City, supra*.

The sickness relied upon by the company was a cold which the insured had in June, 1884, shortly after policy issued, (p. 5, l. 34, &c.)

A mere cold does not constitute sickness within the meaning of the condition.

Opinion Supreme Court, p. 24.

Peacock v. N. Y. Life Ins. Co., supra.

10 *Home Mutual L. Assoc. v. Gillespie, supra.*

As to the alleged breach, in that the insured "had been prescribed for by a physician:"

First. It is denied that there was any *determination* by the District Court Judge of *such fact*.

(*Case, pages 4, 5, 6.*)

Second. The evidence that *something* was given to the insured by a physician, *for a cold*, does not constitute a "prescribing for" within the meaning of the condition.

20 *Third.* Nothing less than an actual written prescription by a physician directing medical remedies for actual "sickness" or "disease" (using those terms as above interpreted) would constitute such "prescribing for."

Fourth. If the insured had not "been sick," or "afflicted with any disease," or "met with any accident," a prescription by a physician *for any other purpose* would not have been included within the condition and *could not have affected the risk*.

30 III. The facts proved show that the representations made by the assured were not false, within the meaning of the language used; consequently their materiality is not in question.

IV. The defendant company should be confined to the defence made in the district court, as stated by the Judge thereof.

(*Case, p. 5, l. 12-16.*)

FRANK E. BRADNER,
Of Counsel with Plaintiff in Error.

N. J. Court of Errors and Appeals.

THE METROPOLITAN LIFE IN-
SURANCE COMPANY,

Defendant in Error,
ads.

ANNIE McTAGUE,

Plaintiff in Error.

Error to
Supreme Court.

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Brief of Joseph A. Beecher, for Defendant in
Error.

The Facts.

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1. The original application for insurance was made on the 2d day of April, 1884, by Annie McTague, the plaintiff in the action, upon the life of her husband, John McTague, and the same was made part of the policy thereafter issued. (Printed Case, p. 7, Ex. 1.)

2. On the 14th day of April, 1884, the policy under which the said plaintiff claims, was issued by the defendant in the suit for the sum of \$150, payable to the said Annie McTague upon the death of the said John Mc-
Tague. (Case, p. 12, Ex. 3.)

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3. The said policy thereafter lapsed and became void for non-payment of premiums thereon, and so continued for a period of over six months immediately preceding and up to the 23d day of February, 1885. (Case, p. 5, line 48.)

4. Application was made by the said plaintiff, Annie McTague, on the 12th day of February, 1885, to the said defendant company for the revival of said policy. (Case, p. 11, Ex. 2.)

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5. The said policy was revived by the defendant on the 23d day of February, 1885, at its home office in New York city, upon the faith of the warranties contained in the said revival application. The insured died on the 16th day of September, 1885. (Case, p. 11, Ex. 2, and p. 12, at line 35.)

6. It is conceded that the warranty was made knowingly by the said plaintiff. The District Court Judge declares that the revival application was a warranty.
10 (Case, p. 5, lines 12 and 35.)

7. Dr. Hewlett was called upon or visited the deceased once in June, 1884, before the lapsing of the policy, and subsequent to the date thereof. (Case, p. 5, line 36.)

8. The plaintiff swears that Dr. Hewlett prescribed for deceased for a cold at the time the last mentioned call was made (Case, p. 5, line 38), and that he gave him something which he said would fix him all right. (Case, p. 6, line 2.)

20 9. On the 23d day of February, 1885, deceased consulted Dr. Duffy, who then advised him to be cautious of himself as he had lung trouble. (Case, p. 5, line 42.) This was the day of the date of the revival of the policy at its home office in New York city. (Case, p. 12, line 35.) Dr. Duffy then said he had consumption. (Case, p. 18, line 7.)

10. The policy was revived by the said defendant upon the faith of the warranties in the said application (Case, p. 11, Ex. 2), made by the said plaintiff,
30 in the following words: "The undersigned assured, "hereby declares and warrants that the life heretofore "insured under the above numbered policy has not, since "said policy was issued, been sick, or afflicted with any "disease, or met with any accident, or consulted or been "prescribed for by any physician, and that the habits of "said insured are sober and temperate. Said policy "having lapsed, the undersigned desires to renew the "same and herewith pays the premiums in arrears, with
40 "the understanding that no liability exists on the part

"of the company until said company, at its home office
 "in New York city, shall have assented to the revival of
 "said policy and so notified its agent first above named;
 "nor shall said policy be deemed to be in force unless
 "upon the date of its revival by the company at its
 "home office as aforesaid, the said insured shall be alive
 "and *in sound health*. It is further warranted that the
 "statements in this and the original application are in all
 "respects true; otherwise the insurance will be void and
 "all payments made will be forfeited to the company. 10
 "Dated at Newark this 12th day of February, 1885.
 "Annie (her X mark) McTague." (Case, p. 11, Ex. 2,
 lines 20 to 40.) This application was also signed by the
 company.

11. Since said policy was issued it appears by the
 printed case—

First. That deceased had been sick.

Second. That he had consulted a physician.

Third. That he had been prescribed for by a physi- 20
 cian.

Fourth. That he was not in sound health on the 23d
 day of February, 1885, the day of the revival of the
 policy by the company at its home office in New York
 city. (Case, p. 5, lines 35 to 50; p. 17, Ex. 4, lines 1 to
 20; p. 25, Ex. 5, lines 40 to 50, and p. 18, lines 1 to 25;
 also p. 7, line 37, and p. 14, line 28.)

12. Both of the physicians in their written state-
 ments, accompanying proofs of death, agree that the 30
 insured died on the 16th day of September, 1885, of
 chronic phthisis. Dr. Dougherty designates this as the
 remote cause, and thrombosis of the femoral vein as the
 proximate cause, the last mentioned disease being the
 final stage of the former. The duration of this disease
 is therein stated by Dr. Dougherty to have been "about
 sixteen months," and by Dr. Duffy "eight months," both
 of whom attended him in his last illness. (Case, p. 17,
 lines 1 to 20, and p. 17, lines 40 to 50, and p. 18, lines 1 to
 25.) These written statements were supplied by the 40

plaintiff in conformity with the contract. (Case, p. 14, line 25, and p. 17, line 25.)

13. The contract stipulates, in case of consumption, that should death occur during the first year, but half the amount which would otherwise be due will be payable. (Case, p. 21, line 46 to 50.)

14. The case was tried by the District Court Judge without a jury. (Case, p. 4, line 33.)

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The Law.

I. The exhibits referred to by the District Court Judge, (Case, p. 4, line 33,) were all offered on the part of the plaintiff in the action and admitted in evidence. They are numbered Exhibits 1 to 5 in the printed case, being the original application, (p. 7,) the revival application, (p. 11,) the policy, (p. 12,) and the physicians' statements accompanying proofs of death, of which last named Dr. Dougherty's appears on pages 16 and 17, and Dr. Duffy's on pages 17 and 18. This documentary evidence was necessary by the terms of the contract, (Case, p. 13, line 7; p. 14, line 26, and p. 17, line 25,) to the proof of the plaintiff's case, and in connection with the facts found by the District Court Judge, are conclusive against her right to recover.

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30 "In every case the *proofs* presented by or on behalf of the plaintiff operate at the trial as admissions against him."

These statements of the attending physicians, Doctors Dougherty and Duffy, were made at the request of the plaintiff, and by her agent prepared and delivered to the defendant company. The statements therein contained are her own and binding upon her. (Case, Ex. 4 and 5, pp. 17 and 18.)

Glutting v. Metropolitan Life Ins. Co., At. Rep. Vol. 13, No. 1, p. 4, Feb. Tr. 1888, N. J. S. C., DIXON, J.

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Walthers v. Mutual Life Ins. Co., 65 Cal. 417.

Insurance Co. v. Newton, 22 Wall. U. S. 32.

Bliss on Life Ins., 2d ed., close of Sec. 265,
p. 444.

"After a death has occurred the provisions of a policy as to presenting proof of that fact to the company must be complied with." "In whatever form such a requirement is contained in the policy, it is a condition precedent which must be strictly complied with." "A compliance with this condition will not be excused by anything less 10 than an act of God rendering compliance impossible."

Bliss on Life Ins., 2d ed., Sec. 257, p. 434.

II. The observations of the District Court Judge, that the plaintiff was an ignorant woman "who could neither read nor write," (Case, p. 5, line 20,) and that she "possibly had never had it [the revival application] read to her," should have no weight in the decision of this cause. There is no suggestion or claim that any fraud 20 was committed by the defendant company, or its agents, against her. And the Judge, after making these observations, "*concedes that the warranty was knowingly made by the plaintiff.*"

"A party suing on a contract in an action at law must be *conclusively* presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with." "A court of law can do nothing but enforce the contract as the parties have made it."

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Dwight v. Germania Ins. Co., 103 N. Y. 341
at 347.

Franklin Ins. Co. v. Martin, E. & A., 11 Vr. 568,
at pp. 578 and 581, DEPUE, J.

III. "Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon, or which they may consider necessary and proper to protect their interests, 40

and which, when made, must be construed and enforced like all other contracts, according to the expressed understanding and intent of the parties making them. If an insurance policy in plain and unambiguous language makes the observance of an apparently *immaterial* requirement the condition of a valid contract, neither courts nor juries have the right to disregard it, or to construct, by implication or otherwise, a new contract in place of that deliberately made by the parties."

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Glutting v. Metropolitan Life Ins. Co., At. Rep. Vol. 13, No. 1, p. 4.

Metropolitan Ins. Co. v. Schaffer, 21 Vr. 72.

Hudson v. Knickerbocker Life Ins. Co., 1 Stew. 167, at 168 and 9.

Ripley v. Aetna Ins. Co., 30 N. Y. 136, at 158.

Dwight v. Germania Life Ins. Co., 103 N. Y. 341. at 346.

Bliss on Life Ins., 2d ed., Sec. 34, p. 45, and Secs. 36, 37 and 100, p. 143.

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IV. The statements and conditions contained in the original application and in the revival application were each and all of them warranties, upon the *truth* and *fulfillment* of which the validity of the entire contract was made by the parties to depend, and by its express terms the applications were made a part thereof. (Case, p. 7, line 33, and p. 12, line 50.)

30 The policy had lapsed and so continued for a period of more than six months immediately prior to its revival. It was on this account the subject of suspicion, and the insurer therefore required the protection of these warranties, and upon the faith of them, and each of them, the new contract was made by which the policy was revived, and the original application, the revival application, and the policy all became parts of one whole and entire contract.

There were not less than six different and distinct express warranties in the revival application, and at least
40 four of them were false. Either being untrue would of

itself make the policy absolutely void. Deceased had (1) been sick ; (2) consulted a physician ; (3) been prescribed for by a physician, and (4) was not in sound health on the 23d of February, the day of the revival of the policy. (Case, p. 5, lines 35 to 50, and p. 6, lines 1 to 5.)

On that very day he was visited by Dr. Duffy for phthisis pulmonalis (consumption,) (Case, p. 18, line 6,) of which disease he died about six months thereafter, on September 16th, 1885, its duration having been about sixteen months, as Dr. Dougherty states, (Case, p. 17, line 12,) and Dr. Duffy says it was eight months. (Case, p. 18, line 19.) In either case the disease extended back to a date prior to the day of the revival of the policy. These statements of the physicians are the plaintiff's own evidence, and indisputably establish the fact that deceased was not in sound health on the 23d day of February, 1885. He was then afflicted with a fatal malady, of which the plaintiff, probably, knew when she made her revival application on the 12th of that month, and, therefore, sought to revive a policy, payments upon which for six months then last past had been discontinued, and the policy evidently abandoned. This was a fraud, as well as a breach of the warranty that made the policy void.

The District Court Judge quotes only a part of the warranty, and appears to have entirely disregarded the important evidence in the plaintiff's Exhibits 4 and 5, which are the physicians' statements.

"The validity of the entire contract depends upon the truth or fulfillment of the warranties and conditions expressed therein, and a non-compliance is an express breach of the contract, and of itself makes the contract void." In an otherwise immaterial matter the party contracting to insure makes it material by a specific inquiry, and the other party is bound.

"A warranty excludes all argument in regard to its reasonableness or the probable intent of the parties. No benefit can be derived from the policy unless the condition be literally performed ; and it is immaterial to what cause the non-compliance is attributable."

Deweese v. Man. Ins. Co., (DEPUE, J.), 5 Vr., 244, at 247.

Same case, 6 Vr. 366, at 370, (BEASLEY, Ch. J.)

Carson v. Jersey City Ins. Co., 14 Vr. 300, at 304 (DEPUE, J.)

Metropolitan Life Ins. Co. v. Schaffer, *supra*.

Glutting v. Metropolitan Life Ins. Co., *supra*.

Metropolitan Life Ins. Co. v. McTague, 20 Vr. 587, at 588.

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Cushman v. U. S. Life Ins. Co., 63 N. Y. 404.

Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183 at 189, and last par. of 190.

McDonald v. Law Union Ins. Co., L. R. 9 Q. B. 328.

Bliss on Life Ins., 2d Ed., Secs. 34 to 38, p. 45, and Sec. 100.

V. "Statements in an application for life insurance, upon the faith of which the policy is expressed to be made, with a stipulation that if they shall be found in any respect untrue the policy shall be void, are warranties, and if untrue, even in a matter immaterial to the risk, they avoid the policy;" and this is so whether such statement or concealment arise from accident or negligence and not from design.

Bliss on Life Ins., 2d Ed., Sec. 36, p. 48, and Sec. 66, p. 99.

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Miles v. Conn. Mut. Life Ins. Co., 3 Gray (Mass.) 580, at 582.

Vose v. Eagle Life Ins. Co., 6 Cush. (Mass.) 42, at 48.

Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, at 244.

Kelsey v. Universal Ins. Co., 35 Conn. 225 at 236.

Clinton v. Insurance Co., 51 N. Y. 647, at 650.

Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160 at 164 and 165.

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Lee v. Guardian Life Ins. Co., 5 Big. Ins. cases, 18, at 19 and 20.

VI. The evidence shows that the revival application was made on the 12th day of February, 1885; that the policy was revived on the 23d day of February, 1885; and that on the last named date Dr. Duffy was called to attend the deceased, the Judge of the District Court says for lung trouble; but plaintiff, by Dr. Duffy's statement to accompany the proofs of death, proves that it was for "phthisis pulmonalis." (Case, p. 18, line 15.) Also, same by Dr. Dougherty. (Case, p. 17, lines 5 to 10.)

"The obligation of the applicant to make a full disclosure continues down to the time of the *completion of the contract*; and, therefore, if after the representation is actually made a material change occurs before the contract was consummated, it is the duty of the parties to inform the company. In that case the party cannot be said to have made any false representation if his statement was true when he made it, but he is chargeable with a fatal concealment if he allows the policy to be issued without reporting the change.

"In *Trail v. Baring*, 10 Jur. N. S. 377, the Court lay down the law broadly, that if a person makes a representation which is calculated to induce another to assume a particular liability, and the circumstances were afterwards, before the liability is assumed, so altered to the knowledge of the person making the representation, that the alteration might affect the course of conduct of the person to whom the representation was made, it is the *imperative duty* of the person making the representation to communicate to the person to whom he made it the alteration of these circumstances, and a court of equity will not hold the person to whom he made the representations to be bound by any contract, entered into on the faith thereof, unless such a communication has been made.

"When the by-laws of an insurance company were expressly made a part of the policy, and provided that if subsequent to the making of the application, any new fact should exist by a change of any fact disclosed in the application, or which increased the risk, or which it would have been necessary to state had it existed at the

time when the application was made, the policy should be void; unless notice was given and consent obtained, it was held that the insured was bound to the same degree of strictness in declaring the existence of new facts, whether material or not, as in disclosing the facts existing at the time of making the application."

Glutting v. Metropolitan Life Ins. Co., *supra*.

Franklin Ins. Co. v. Martin, E. & A. 1122, at 581.

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Dwight v. Germania Ins. Co., 103 N. Y. 341.

Piedmont Life Ins. Co. v. Ewing, 92 U. S. 377, at 381.

May on Insurance, Sec. 190, 2d Edn.

Bliss on Life Ins., 2d Ed., Sec. 66, p. 99; Sec. 95, p. 138, and Sec. 98, p. 141.

VII. The plaintiff contracted with the defendant that no liability should exist on the part of the company until, at its home office in New York city, it should have assented to the revival of said policy, and so notified its agent at Newark. (Case, p. 11, line 30.) The policy could not in the ordinary course of business have been delivered in Newark to the plaintiff before the next day after the date thereof, one day after Dr. Duffy's call of the 23d of February, 1885. The policy was, therefore, void for concealment of a material fact, of which plaintiff then had knowledge and was bound to disclose to the defendant on the delivery of the policy. Her neglect to do so was fatal to its validity.

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Canning v. Farquer, 16 Q. B. Div. 730, at 729.

Bissell v. American Life Ins. Co., 2 Big. Ins. cases, 150, at 153.

Bliss on Life Ins., 2d Ed., p. 137, Sec. 95.

May on Insurance, Sec. 190, 2d Ed.

VIII. The revival application refers to "the above numbered policy," No. 1,488,751, (Case, p. 11, line 21.) The policy before dead, and of no effect, is now revived,

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and is issued: "IN CONSIDERATION of the representations and agreements in the printed and written application for this policy respecting the person named in the schedule hereinafter contained, which said application is hereby referred to and made a part of this contract," &c. * * * "This policy is issued and accepted upon the following conditions," &c. (Case, p. 12, lines 45 to 50, and p. 13, lines 1 to 10.) The contract now consists of the revival application, the policy which is issued anew, upon the new application, and the first application. They are one and inseparable by their terms and the manifest intention of the parties to the contract. Each is incorporated into the other, so that together they make one entire contract, lawful in its character, entered into by competent parties, upon a new and sufficient consideration, and having a proper subject matter. The applicant, the undersigned assured, thereby declared and warranted, that the life heretofore insured under the above numbered policy had not, since said policy was issued, been sick, &c.; (Case, p. 11, line 20,) and, at line 33, the applicant, over her own signature, enters into this clear, strong and express warranty, viz.: "It is further warranted that the statements in this and the original application are in all respects true, otherwise the insurance will be void." If this does not constitute a warranty, then it would seem that the English language is incapable of supplying the material out of which to construct one, even when both parties sign the instrument, in addition to incorporating it into the contract by the express terms of the policy.

Upon an examination of the opinion of the learned Justice who delivered the decision of the Supreme Court in this case, we are led to a conclusion so plainly right that there seems to be no ground or reason whatever upon which to question or controvert it. Upon this point the Court say: (Case, pp. 22 and 23.)

"The contract thus made became forfeited by the failure to pay the weekly premiums as agreed. Afterward, and on February 12, 1885, Annie McTague signed and

delivered to the company a written application called a 'Revival application.' It described the forfeited policy, admitted that the weekly premiums had remained unpaid for thirty-one weeks, and contained the following, viz." (The warranty is here recited.) * * * The opinion continues :

10 "The company assented to the revival of the policy by an approval of the revival application annexed thereto and signed by one of its officers. It notified the agent referred to, and received the premiums in arrears, and those which subsequently fell due up to the death of John McTague, which occurred on September 9, 1885. It now disputes its liability upon the policy, on the ground that statements contained in the revival application were untrue.

"The question thus raised requires us to determine what contract existed between the parties after the policy was revived, and the relation to that contract of the revival application and its representations.

20 "The forfeiture of such a policy by non-payment of premiums may be waived ; and such a waiver will generally be inferred from a receipt of the premiums after forfeiture. Upon such a waiver the pre-existing contract doubtless becomes reinstated upon its original terms. Such a forfeited policy may also be expressly revived ; and in such case the revival may be upon such terms and conditions as the parties agree to. When an express revival is made upon the statements of the original application, it has been made a question whether the truth of
30 those statements is to be tried by the circumstances existing at the time of the original application or at the time of the revival. *Bliss, Life Ins.* § 194.

"Mr. May says that the authorities do not agree, some taking the view that a revival makes a new contract, and others that it merely continues the old one. He expresses his opinion that special circumstances seem to control the decision according as they indicate the intent of the parties. *May, Ins.* § 190.

40 "In like manner the parties may doubtless agree to revive the lapsed contract upon new terms and conditions,

or upon its original terms and conditions, with such additional terms as they mutually agree to incorporate therewith.

"Whether the parties merely reinstate the old and forfeited policy, or create a new contract on new terms, or revive the lapsed contract with additional terms, must be determined from the circumstances.

"In the case before us it is clear, in my judgment, that the intent of the parties was to revive the forfeited policy, with all its original terms, by a new contract which incorporated into it additional terms. This appears from the circumstances. The original policy was based upon a written application containing statements as to the insurability of the person whose life was to be insured. These statements were expressly incorporated into the contract and warranted to be true. When forfeiture had occurred the beneficiary in the lapsed contract applied in writing for its revival. The application contained statements as to the insurability of the person whose life was insured, covering the period between the issuing of the original policy and the date of the revival application. It further contained an agreement that the company's liability should only re-arise upon its assent to the application. It contained an express warranty of the truth of the representations then made, and an agreement that if they or the representations of the original application were not true, the contract should be void. This written application was assented to by the written approval of the company, and thereby a new contract between the parties was made reviving the old policy with all its terms, and incorporating into it the additional terms expressed in the revival application.

"By these means the representations contained in the revival application became part of the completed contract between the parties, and their truth was warranted. The falsity of any of them will avoid the contract."

Brady v. N. W. Ins. Co., 11 Mich. 424, at 444.

Bissel v. American Life Ins. Co., 2 Big. Ins. Cas., 150, at 153.

Day v. Mutual Ben. Life Ins. Co., 4 Big. Ins. Cas. 15, at 24.

Witherell v. Maine Ins. Co., 49 Me., p. 200, at 203.

Clinton v. Ins. Co., 51 N. Y. 647, at 650.

Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, at 244.

Kelsey v. Universal Ins. Co., 35 Conn. 225, at 236.

10 *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y., 160, at 164-5.

In *Brady v. N. W. Ins. Co.*, last above cited, the Court say: "We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration and was optional with both parties. * * * It was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party, and a renewal promise by the other, and an obligation revived or continued under such circumstances is an original obligation. * * * The determination of such party to renew an expired contract, if accepted by the other, makes an original contract." (*Brady v. N. W. Ins. Co.*, 11 Mich. 424, at 444.

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In *Bissell v. American Life Ins. Co.*, above cited, the Court say: "It follows then that, on the non-payment of the renewal premium within thirty days after it was due, the policy ceased to exist. It died of the negligence of the insured. If, then, this policy of insurance was so dead that a court of equity could not call it into life, to sustain this verdict something must have subsequently taken place between these parties that would amount to a new contract, and in making this new contract it must be conceded that the parties had a right to make it upon any condition not contrary to law or public policy. By the very terms of the contract itself they agreed with the company not to pay a premium to any agent unless he produced a receipt so signed. We have yet to learn that

30

40 a violation of an old contract makes a new one. * * * This

condition became part and parcel of the contract. * * *
The former contract was at an end."

Bissell v. American Life Ins. Co., 2 Big. Ins.
Cases, 150, at 153.

The Court also says in *Day v. Mut. Ben. Life Ins. Co.*,
above cited: "There can be no doubt but that the policy
and the representations upon which it is based, and the
renewal, are to be considered together. The renewal of
the contract necessarily imports a continuance of its
terms, and the stipulations of the renewal will therefore
have legal effect together with the terms of the original
policy." 10

Day v. Mutual Benefit Life Ins. Co., 4 Big. Ins.
Cases, 15, at 24.

The same doctrine is laid down with more or less di-
rectness in all the above cases cited under Point VIII. of
this brief, and it is respectfully submitted that no other
decision than that of the Supreme Court can be reached
in this case without doing violence to the plain terms of 20
the contract, and defeating the clear intention of the
parties to it at the time the revival application was ac-
cepted by the defendant company.

IX. There was a clear breach of the warranty which
forfeited and made void the policy. Regarding this the
Court say, (Case, p. 24, line 40): "The other statement
alleged to be proved false is that which averred that
John McTague had not, within the period between the 30
issuing of the policy and the date of the revival appli-
cation, consulted or been prescribed for by a physician.
The fact found by the District Court was that a phy-
sician had been called on by John McTague or had
visited him, and had prescribed for him for the cold.

"The Common Pleas, in the opinion before us, de-
clared that this fact did not show the representation to
have been false, because it did not appear what sort of a
prescription the doctor gave, whether one compounded
by a druggist or made up of some common remedy. But 40

it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application, that in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question, for, as we have seen, its truth is warranted. Its falsity appears from the fact found.

"The result is that the contract was avoided and the court below erred in rendering judgment thereon."

Metropolitan Life Ins. Co. v. McTague, 20 Vr. 587.

20 A case exactly in point has just been decided by the Supreme Court of Pennsylvania, viz: *The Mutual Aid Society v. O'Hara*, reported in No. 8, Vol. 13 of At. Rep. June 13th, 1888, page 932, at 934. The Court say: "The eighth interrogatory in the application is, Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of doctor in full." The Court say: "If the assured falsely answer that he had no medical attendance, he is not entitled to recover."

30 *Mutual Aid Society v. O'Hara*, At. Rep. p. 934, cited June 13, 1888, Vol. 13, No. 8.

And upon this subject see cases cited under Points IV. and V. of this brief.

It has not occurred to any of the courts below, or heretofore to counsel on the other side, that the revival application was not a part of the contract, or was other than a warranty expressed in the strongest terms. The District Court Judge and the Common Pleas Judges, 40 with the Justices of the Supreme Court, who heard and

decided the case, all expressed themselves regarding this instrument, and considered it a part of the contract and a warranty of the facts stated therein.

The defendant company has in force to-day nearly a million and three-quarters policies in its industrial branch. It does the largest business of the kind of any company in the world, with the single exception of the Great Prudential of London. Its system of doing business is the result of many years of labor, investigation and experience. Its plan is as nearly perfect as the best skill and ability of two countries could make it up to this time. 10

Every one of its contracts is part and parcel of a great system, requiring infinite detail, yet harmonious in its operations. It is certainly right for the courts to sustain and confirm that which has been developed and perfected at a great expenditure of time, labor and money, whenever this can be done without violating the rights of those who are entitled to the protection which the law affords, either on the one side or the other. The plaintiff would have this Court do that for her which would be injustice to many. It is consonant with public interest and policy, and no more than just to the defendant that its plan of reviving and issuing policies that have been lapsed and forfeited, should be sustained by this Honorable Court. Safety to the policy holders and stability to the company in the administration of its trust demand this. 20

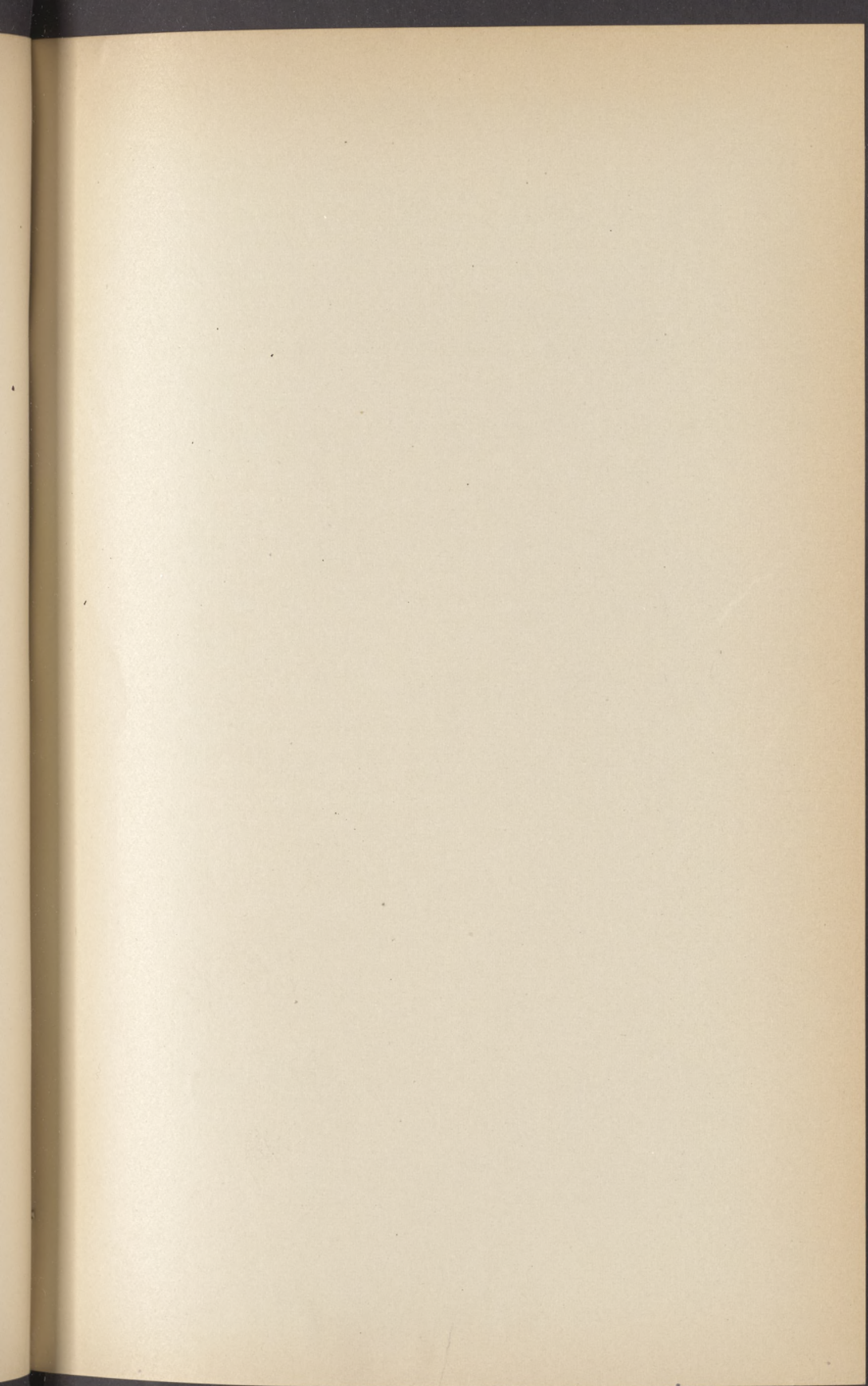
There are frequent lapses of policies owing to a great variety of causes, and whenever a forfeiture occurs by misfortune, neglect or otherwise, the present system affords a quick, easy and inexpensive mode of reinstating the policy upon its original terms, and incorporating into it the new terms of warranty. This protects the company from imposition and the insured from the loss of what has been paid, without the expense of a re-examination and the issue of a new policy. It secures to policy holders that to which true statements and honest disclosures entitle them. Without the protection of this warranty, gross injustice would be done against the honest and deserving insured, by those 40

who are willing to procure money from an insurance company upon unsound lives, which they have caused to be accepted on the faith of statements known by them to be false, or at least which they did not know to be true. It is to be noted that this is not a warranty of one who could not receive any personal benefit, but quite the contrary, and it is, therefore, not a case where the rule should be relaxed if it could be.

- 10 It can be asserted with the utmost fidelity to the truth, that there is not in this country any organization that is conferring greater social and pecuniary advantages upon the community than this defendant corporation. These benefits are diffused among the common people throughout the length and breadth of the land. It tends to develop in the insured care for others and self-dependence. The small sums of money appropriated to this purpose would largely be wasted but for the liability imposed. Industrial insurance has practically closed the
 20 potter's-field; it has induced greater providence in millions; it promotes care and forethought, and it tends to self-respect and manliness among all who share its blessings. It is right and of great importance that the decision of the Supreme Court in this case should be affirmed.

J. A. BEECHER,

Counsel for Deft. in Error.



New Jersey Court of Errors and Appeals.

10

ANNIE McTAGUE,	
PLFF. IN ERROR,	
<i>vs.</i>	
THE STATE OF NEW JERSEY.	<i>Writ of Error</i>
(THE METROPOLITAN LIFE	<i>to the</i>
INSURANCE COMPANY, <i>Pros.</i>),	<i>Supreme Court.</i> 20
DEF. IN ERROR.	

Returnable July, 30, 1887.

NEW JERSEY, to wit: The State of New Jersey to the Chief
Justice and other Justices of
our Supreme Court of Judicature. 30

L. S.

Greeting : _____

For as much as in the record and proceedings and also in
the giving of the judgment in a plaint which was
in our said Supreme Court before you, between the State of
New Jersey (The Metropolitan Life Insurance Company being
the prosecutor), and Annie McTague the defendant, on a
certiorari issued out of said Supreme Court to the Judges of 40
our Inferior Court of Common Pleas in and for the County of
Essex, directed, as is said manifest error hath intervened to the
great damage of the said Annie McTague, defendant, as afore-
said, as by her complaint we are informed; we being willing
that the error if any there be, should in due manner be cor-
rected, and full and speedy justice be done to the parties afore-
said in this behalf, do command you, that if judgment be
thereupon be given, then you send distinctly and openly under
your seal the record and proceeding and plaint aforesaid, with
all things touching and concerning the same to our Court of 50

Errors and Appeals before the Judges thereof on the thirtieth day of July instant, and this writ, and that the records and proceedings aforesaid being inspected we may cause to be further done thereupon what of right and according to law ought to be done.

Witness our Chancellor and President,
Judge of our said Court of Errors and
Appeals, at Trenton, the twelfth day
of July, in the year of our Lord, one
thousand eight hundred and eighty
seven.

10

FRANK E. BRADNER,
Attorney.

HENRY C. KELSEY,
Clerk.

20

The answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof mention is written, made with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed as within we are commanded.

MERCER BEASLEY,
Chief Justice.

New Jersey Supreme Court.

30

THE STATE, *ex rel*,
METROPOLITAN LIFE INSURANCE
COMPANY,

PROSECUTOR,

vs.

ANNIE McTAGUE,

40

DEFENDANT.

*Writ of certio-
rari to the Infer-
ior Court of Com-
mon Pleas in and
for the County of
Essex.*

Writ returnable third Tuesday in February, A. D. 1887.

J. A. BEECHER, *Attorney for Prosecutor.*

I allow this writ; let it be sealed on condition that argument be brought on at February Term, 1887.

50

Feb. 5, 1887.

DAVID A. DEPUE,
J. S. C.

NEW JERSEY, ss.

The State of New Jersey to our Judges of our Inferior Court of Common Pleas, in and for the County of Essex, Greeting :

[L. s.] We being willing, for certain reasons, to be certified of the judgment, order and proceedings given and made in our said Court of Common Pleas in a certain action brought by Annie McTague, plaintiff, against the Metropolitan Life Insurance Company, defendant, in a plea of debt, which said action was prosecuted in the said Court of Common Pleas upon an appeal from the First District Court of the City of Newark, upon which appeal said Metropolitan Life Insurance Company was appellant and Annie McTague was appellee. We command that you send under your seal to our Justices of our Supreme Court of Judicature, at Trenton, on the third Tuesday of February inst., the judgment, order and proceedings aforesaid, with all things touching and concerning the same as fully and entirely as they remain in our Court before you, by what means soever the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS: Mercer Beasley, Esquire, Chief Justice of Supreme Court at Trenton aforesaid, this fifth day of February, A. D. eighteen hundred and eighty:seven.

BENJ. F. LEE,

J. A. BEECHER, *Attorney.*

Clerk.

ESSEX COUNTY, ss.

The Judges of the Inferior Court of Common Pleas of the said County of Essex, by virtue of the within writ to us directed, do certify to the Supreme Court of Judicature of the State of New Jersey the judgment of the said Court, and the judgment and proceedings given and had in the First District Court of the City of Newark, wherein mention is made in said writ, with all things touching the same as we are therein commanded.

[L. s.] By order of the Court—Given under the seal of the Court this ninth day of February, A. D. 1887.

J. WARREN VANDERVEER,

Clerk.

Presented in open Court, and accepted this 5th day of February, 1887.

ANDREW KIRKPATRICK, J.

Essex County Pleas.

10	METROPOLITAN LIFE INSURANCE COMPANY, <i>Appellant,</i>	}	<i>In Debt.</i>
	AND		
	ANNIE McTAGUE, <i>Appellee.</i>		
20			

STATE OF THE CASE.

State of Case on Appeal from First District Court, City of Newark.

JOSEPH A. BEECHER, *for Appellant.*

FRANK E. BRADNER, *for Appellee.*

30 This case was tried before the Court without a jury on the twenty-first day of November, 1885.

There was a judgment for the plaintiff for \$151.50 and costs. From this judgment the defendant appealed.

The annexed papers were admitted in evidence.

In this case the Court filed the following opinion in the decision thereof, and as the same fully embraces the facts found and the law applied thereto, it is made a part thereof.

OPINION.

40 This is an action on a policy of insurance. The premiums were all paid up to death. The only defence in the case is breach of a warranty contained in a revival application made in this policy.

The insurance was taken out by the plaintiff on her husband's life April 14, 1884. There is no claim of fraudulent conduct or breach of any of the warranties in the original application. Some time after the original taking the plaintiff ceased to pay premiums, and the policy lapsed under the rules of the company. This lapsed state continued thirty-one weeks, until February 12, 1885, when the plaintiff applied for a revival of the
50 policy, and tendered the company, as required by its rules, all

back premiums unpaid. These were accepted, and on February 23, 1885, the company formally revived the policy.

The insured died Sept. 9, 1885. The following is the warranty claimed to have been violated, and upon the faith of which it is claimed the company revived the policy, viz:

"The undersigned, assured, hereby declares and warrants that the life heretofore insured under the above numbered policy, has not, since said policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate." 10

In three respects this warranty is claimed to have been untrue.

First.—In that the deceased had been sick.

Second.—In that he was afflicted with disease.

Third.—In that he had been prescribed for by a physician.

Forfeitures are not favored in law. The evidence in this case shows the plaintiff to be an honest but ignorant woman. All the papers show that she cannot write; her mark appears to them all, and she cannot, she says, either read or write. 20 These papers were all read to her by the agent of the defendant, whom the plaintiff swears did not read the renewal application to her, or ask her if her husband had had a physician since he was insured, or if he had been sick or prescribed for. That this is undoubtedly true as attested by a circumstance of the greatest strength. At the same time and upon the same paper that the plaintiff applied for a renewal of the policy, this certificate appears in the handwriting of the agent: "I hereby declare that I have collected the full arrears on the above policy, and that I have this 12th day of February, 1885, personally 30 seen the above life, heretofore insured; that said life appears in a good state of health, and I recommend this Company to revive the policy. (Signed), PHILIP J. FARMAN."

Conceding the warranty to have been made knowingly by the plaintiff, was it untrue? It appears in evidence Dr. Hewlett was called upon or visited the deceased once in June, 1884, before lapsing of the policy, and the wife says he prescribed for him. This the plaintiff says was for a cold. It is certain that from this time to February 23, 1885, the deceased consulted no one, and continued to work at his trade, that of a plumber. 40 On this last date he consulted Dr. Duffy at his office, who then advised him to be cautious of himself as he had lung trouble. Certainly the proof will not justify the Court in saying that this June ailment, whatever it may have been, was such "sickness" or "affliction with disease" as is contemplated by the warranty. The words "sickness" and "disease" must be given their dictionary meaning as here used, and this will not bear so light an interpretation as to make a simple cold or cough sufficient to be said to constitute a person "sick" or "afflicted with disease." Been prescribed for by any physician" is another one 50

of the clauses of this warranty. The plaintiff swears that Dr. Hewlett gave the deceased something which he said would fix him all right. Was it a prescription? was it taken to a druggist and prepared? or was it merely some simple remedy for cold and hoarseness? We are not favored with evidence on this point. It could not be successfully maintained, it seems to me, in a court of justice, that such a warranty as the one in question could be said to be broken by so trivial a cause of alleged sickness and physician's prescription as that stated in this case.

10 It is hardly probable that anyone would have remembered such a visit to a doctor as that made to Dr. Hewlett, as proven in this case. The most intelligent, in fact the insured himself, even if of ordinary business activity, would probably not think of such an ailment as here proven as being worthy of recital as "sickness" or "affliction with disease." What shall we say, then, of this ignorant woman, who possibly never had had it read to her. Such proof should not be held to establish a forfeiture to deprive her of the insurance money justly due, after all premiums are paid to the last penny.

20 The plaintiff is entitled to judgment for the amount of the policy with interest.

The plaintiff has judgment for \$151.50 and costs.

It being represented to the Court in writing, by the attorneys of the parties, that they are unable to agree upon a state of the case in the above cause on appeal, the foregoing is hereby stated pursuant to the statute,

WITNESS: J. Frank Fort, Esquire, Judge of the First District Court of the City of Newark, this twenty-seventh day of May, eighteen hundred and eighty-six.

30

[L. S.]

GEO. K. COLEMAN,
Clerk.

ESSEX COMMON PLEAS.

METROPOLITAN LIFE INSURANCE
COMPANY,

40

Appellant.

AND

ANNIE McTAGUE,

Appellee.

*Appeal from
First District
Court.*

50 This appeal having been heretofore argued befor the Court, by Counsel for the respective parties and the Court having re-

7
served decision. It is now ordered by the Court that the judgment of the First District Court of the City of Newark in this cause, be, and the same is hereby affirmed with costs of appeal, and the record is also remitted to said First District Court of the City of Newark for further proceedings in said cause.

Rule entered January 24th, 1887.

On motion of

FRANK E. BRADNER,
Attorney of Appellee.

10

EXHIBITS.

EXHIBIT No. 1.

20

FORM 2 (not to be filled by Agent).—District, Newark, N. J.; Ex'd, J. A.; Ex'd, N.; No. (not to be filled by Agent), 1488751.

Application to the Metropolitan Life Insurance Co., P. J. Farman, Agent at Newark; under A. A. C. Baxter, Assistant Superintendent.

The undersigned hereby declares and warrants that the representations and answers made below, and in the examination on the other side are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance (if one be issued), that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company unless upon the time of its delivery the insured be alive and in sound health. The undersigned further agrees to be governed by the rules and regulations of the Metropolitan Life Insurance Company as they now exist, or may hereafter be altered or amended. The provisions of Chap. 347 of the laws of New York, passed May 21, 1875, are hereby waived. Every answer must be true or the policy will be void.

Signature of applicant, not to be made until answers to all questions below are recorded and found correct by applicant.

her.
ANNIE X MCTAGUE.
mark.

Witness, P. J. Farman.

Dated at Newark, April 2d, 1884.

50

1. Full name of life proposed for insurance, John McTague; race: white or black? White; if adult, married or single? Married.
2. Residence, No. 83 Jay Street, Newark, N. J.; which floor of house? First; front.
3. Occupation of life proposed, if an adult? Plumber. Of parents, if life proposed is a child. Father? ———. Mother? ———.
- 10 4. Born, June 7th, 1851, in Newark, N. J.
5. Age next birthday, 33.
6. Amount of insurance, \$150.
7. Premium per week, 10 cents.
8. Premiums collected by agent in advance, 10 cents.
9. Name and relationship of person to whom benefit is to be paid (name), Annie McTague; (relation), wife.
10. If now insured in this company, give numbers of policies. If in other companies, give names and amounts. No.
- 20 11. Is father or mother living or dead? Father, if living, age, 65; condition of health, good; if dead, age——; cause of death, ———. Mother, if living, age 60; condition of health, good; if dead, age, ———; cause of death, ———.
12. (If adult) to what daily extent does life proposed use: tobacco, moderate; opium, no; alcoholic stimulants, moderate.
13. Has life proposed ever used them to point of intoxication, or had delirium tremens? No.
14. Been vaccinated? Yes.
- 30 15. When last sick? Never.
16. Of what disease? None.
17. Name of physician who last attended life proposed, and when? ———
18. Has life proposed now or ever had, (if so, give particulars), accident of any kind, asthma, bronchitis, bilious colic, cancer, consumption, diarrhœa, disease of the kidneys, disease of the liver, disease of the heart, disease of the lungs, dropsy, dysentery, dyspepsia, fits or convulsions, gout, rupture, paralysis, rheumatism, scrofula, spitting of blood, ulcer or open sores, 40 varicose veins, or been deaf, dumb, blind or insane?
19. Did parents, grandparents, brothers, sisters, uncles or aunts ever have consumption or any pulmonary, scrofulous or constitutional disease or insanity? No.
20. Ever been declined or postponed by any company or society for insurance or benefits? No.
21. Has applicant withheld any material fact about the life proposed? No.
- 50 22. Is said life now in sound health? Yes.

NOTE TO AGENT.—See other side. Write plainly.

Tested by _____.

Filed, 10, 1, '85.

Premium paid Bassett.

Accepted, Joseph F. Knapp.

Revived Feb. 23, 1885.

To be signed as designated at foot of adult's and child's certificates respectively.

Examination by Agent if insurance is \$200 or under on a white life Examination by physician if over \$200 on an adult white life; and of all colored lives irrespective of amount. Certificates A and C only to be filled when Agent examines. Certificates A, B and C when physician examines.

ADULT.

A.—1. Personal appearance? Healthy. Race, white or black? White. 2. Age given? 33. Apparent age (if person appears older than stated)? 33. 3. Height? 5 feet 7½ inches. Weight? 145 pounds. 4. Have you any reason to suspect intemperate habits or disease of any kind? No. 5. Has the person ever suffered from any of the diseases mentioned in question 18 on other side? (Question particularly.) No. 6. If question 5 is answered yes, have such diseases affected the constitution of the life proposed? No. 7. Has the person any physical defect or infirmity of any kind? No. 8. Are you aware of any circumstance connected with the life proposed, not herein recorded, which the company ought to know? No.

B.—1. Are the lungs and heart normal in every respect, and absolutely free from disease? If not, state particulars. 2. Have any or either of the person's brothers or sisters, parents, grandparents, aunts or uncles, died of consumption or any hereditary disease? If so, give particulars. 3. Is the person ruptured? If so, is well-fitting truss worn? 4. Has the person been successfully vaccinated? 5. Is the person's employment healthy, and is residence in healthful locality? 6. If the person is a female, please ascertain and state whether she has had children? *a.* How many? *b.* When last pregnant? *c.* Whether any miscarriages or difficulty in labor? *d.* If the uterine functions are now regular? 7. Name of last physician consulted, and what for?

I have this 2d day of April, 1884, personally seen and examined the life proposed for insurance, and am of the opinion that said life is in* good health that said life's constitution is† sound, and I therefore recommend said life to be accepted at‡ first-class rates.

*State whether good, indifferent or bad. †State whether sound or impaired. ‡Fill in first, second, third or fourth.

Signature of the life proposed for insurance, J. McTague.

(Not to be written until after answers to above questions are filled in.)

Agent's or Physician's signature, P. J. Farman.

(After satisfying himself of the identity of the proposed insured.)

10

CHILD.

To be filled in by Agent if life proposed is under 12, except if colored, then by Physician.

- C.—1. Name of child, ——. Race, white or black, ——. 2. Upon what date did you personally see and examine above? ———, 188 20 3. Is it healthy or diseased? ———. 4. Is it deformed? If so, how? ———. 5. What is its father's and mother's condition? (Father's) ———. (Mother's) ———. 8. Have any of its family or relatives by blood died of, or had consumption, or any hereditary disease? ———. 30 7. Do you recommend acceptance or rejection? ———.

Signature of the person applying for the child's insurance, ———.

(Not to be written until after answers to above questions are filled in.)

Agent's or Physician's signature, ——— ———.

40

(After satisfying himself of the identity of the proposed insured.)

- 1ST CLASS.—Should be unexceptionable lives. 2D CLASS.—Lives in which the unfavorable circumstances are very slight. 3D CLASS.—Lives in which the unfavorable circumstances are serious, and require a considerable reduction in the amount proposed, as an equivalent for the increased risk of the assurance. 4TH CLASS.—Lives where the objections are such as to 50 render it inexpedient to undertake the assurance.

EXHIBIT No. 2.

FORM 24.

Industrial Branch, Metropolitan Life Insurance Company.

REVIVAL APPLICATION.

Ex'd,—; agent's name, P. J. Farman; agency at Newark, N. J.; name of Superintendent, A. A. C. Baxter; Policy No. 1,488,751; date of Policy, 14th day of April, 1884. 10

On the life of John McTague; black or white, white. Residence of life insured, No. 17 Dey Street, Newark, N. J.; date of last payment, July 7th, 1884; weekly premium, 10 cents.

Arrears, 3 dollars, 10 cents; being 31 weeks up to and including Monday, 9th day of February, 1885.

Full name of agent by whom policy was lapsed, P. J. Farman; between Life Reg. totals, 1599 and 1606.

(This column not to be filled in by agent.) Occupation—; age, 33; amount of insurance, \$150; arrears, \$3.20. 20

The undersigned assured, hereby declares and warrants that the life heretofore insured under the above-numbered Policy has not, since said Policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate. Said Policy having lapsed, the undersigned desires to renew the same, and herewith pays the premiums in arrears with the understanding that no liability exists on the part of the Company, until said Company, at its Home Office in New York City, shall have assented to the revival of said Policy, and so notified its Agent first above-named; nor shall said Policy be deemed to be in force unless upon the date of its revival by the Company, at its Home Office as aforesaid, the said insured shall be alive and in sound health. It is further warranted that the statements in this and the original application, are in all respects true; otherwise the insurance will be void, and all payments made will be forfeited to the Company. 30

Dated at Newark, this 12th day of February, 1885. 40

Witness' signature, P. J. Farman. 40

Applicant's signature, ANNIE ^{her} X McTAGUE.
mark.

I hereby declare that I have collected the full arrears on the above Policy, and that I have this 12th day of February, 1885, personally seen the life heretofore insured; that said life appears in a good state of health, and I recommend the Company — to revive the Policy.

Signature of Agent, Philip J. Farman. 50

NOTE.—If the Life heretofore insured is COLORED, or the date of last payment is more than THIRTEEN WEEKS from the date this Revival Application is received at the Home Office and the amount of the Policy exceeds \$200, the following certificate must be obtained AT THE EXPENSE OF THE INSURED from one of the Company's regular Examiners.

MEDICAL EXAMINER'S CERTIFICATE.

10. The undersigned Medical Examiner has personally seen and examined the Life heretofore insured under the above-numbered Policy : said Life appears in a — state of health, and he recommends that the application for revival be —.

_____,
Signature Medical Examiner,

(Who must collect his fee at the time of examination directly from the Assured.)

20. Dated at —, this — day of —, 188—.

NOTE TO THE AGENT.—Should the Company revive the Policy, instructions will be sent to re-enter the same in the Life Policy Register, which will also be an authority to the Agent to collect the future premiums, but under no circumstances will he do either until officially advised by the Home Office. If the Policy be revived a Debit Note will be forwarded, instructing the Agent to include the arrears in the weekly account.

30. Approved at Home Office, Beverly C. Danbury.

(This line not to be refilled in by Agent.) Revived this 23d day of February, 1885.

Tested and approved by A. A. C. Baxter, Supt.

40. EXHIBIT No. 3.

FORMS 56-57.

INDUSTRIAL INSURANCE.

- Home Office, corner Park Place and Church Street, New York City. The Metropolitan Life Insurance Company IN CONSIDERATION of the representations and agreements in the printed and written Application for this Policy, respecting the person named in the Schedule hereinafter contained, which 50. said Application is hereby referred to and made a part of this

Contract ; and in consideration of the payment to said Company on or before the date hereof of the premium mentioned in said Schedule, and of a like weekly premium to be paid on or before each and every Monday subsequent to said date during the life of the person insured, **DOTH HEREBY AGREE** to pay to the person or persons designated in Condition Fifth herein, upon receipt of proofs, satisfactory to said Company, of the death of said insured, the sum of money stipulated in said Schedule, under the words "Amount of Insurance, etc."

This Policy is issued and accepted upon the following conditions : 10

First.—The person upon whose life this Policy is issued shall not engage in the manufacture of inflammable or explosive substances, or in military or naval service (except the militia when not in actual service), or be connected in any capacity with the ale, wine or liquor business, unless so specified in the Application heretofor referred to, or unless permission be given by permit, signed by the President or Secretary.

Second.—The liability of said Company shall not cover death by self-destruction, whether said life be sane or insane, nor death by the hands of justice, nor as a consequence of or while engaged in any illegal act. 20

Third.—This Policy shall be void if any other Policy on said life shall have been previously effected with this Company, and shall be in force at the date thereof, unless the previous Policy contains an endorsement, signed by the President or Secretary, that this Policy may also be in force at the same time. If said life be rated under twelve years of age, and is now or may hereafter become insured, while under said age, in this or any other company or society, and the aggregate premiums on such insurances shall exceed 5 cents per week, for ages of 5 and under, or 10 cents per week for ages between 6 and 11 inclusive, this Policy will thereupon become null and void. 30

Fourth.—This Policy, and the Receipt Book containing the entries of Premiums paid on the same, shall be exhibited to the officers or authorized employes of the Company at any time upon demand ; and before any payment can be claimed under this Policy, said Policy and Receipt Book must be surrendered to the Company.

Fifth.—The production by the Company of this Policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the Company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said Company under this Policy have been fully satisfied. 40

Sixth.—Agents are not authorized to make, alter or discharge contracts, or waive forfeitures, or receive premiums on 50

Policies in arrears after the time allowed by the regulations of the Company.

Seventh.—Should the death of the insured occur while this Policy is in arrears of weekly payments not exceeding four weeks, said Company's liability will be the same as if all premiums had been promptly paid.

Eighth.—If the representations above referred to, and upon which this Policy is granted, be not true, or if the conditions of said Policy be not in all respects observed, or if said Policy shall in any way be assigned, sold or mortgaged, or otherwise parted with, or if any erasure or alteration shall be made in said Policy, except by endorsement signed by the President or Secretary, or if the payment of the weekly premiums upon this Policy shall be in arrears more than four weeks, this Policy shall thereupon become void; and whenever, for any cause, this Policy shall terminate, all premiums previously paid shall be forfeited to the Company. No suit shall be brought nor action commenced against said Company under this Policy, until ten days shall have expired after the filing of proofs in its chief office, nor after six months from the date of death of the insured; it being understood and agreed that if any suit or action be commenced after said six months, the lapse of time shall be taken to be conclusive evidence against any claim, the provisions of any and all statutes of limitation to the contrary being hereby expressly waived. Proofs of death must be furnished upon the forms prescribed by the Company at the time of the maturity of this Policy. No obligation is assumed by the Company prior to the date thereof, nor unless, upon said date, the insured is alive and in sound health.

30 SCHEDULE ABOVE REFERRED TO.—Number of Policy, 1,488, 751; name of the person whose life is insured under this Policy, John McTague, age, 33; weekly premium, 10 cents.

Amount of insurance of above life is rated at or over 12 years of age, \$150.

STIPULATION (1) Immediate Benefit can be secured in case of death for one-third the above sum by payment to the Company of 13 weeks' premiums within 3 calendar months from date, provided said premiums are paid on or before the week or weeks, when due, and provided when paid in advance that the insured shall be alive and in sound health at the time of said payment. (2.) Upon the regular payment of premiums thereafter, according to the terms of this Policy, one-third only of said sum will be paid if death occurs after 3 and within 6 calendar months from date; two-thirds only if death occur after 6 and within 12 calendar months, and the full amount only if death occur after 1 year; except in case of consumption, when but half the amounts which would otherwise be due will be payable if death occur during the first year. (3.) If the first 13 weeks' premiums are not paid in advance as provided in section

first of this stipulation, but are paid week by week in the manner provided in this Policy, no benefits will be due or payable if death occur within 3 calendar months from date, but after said 3 months the sum due at death will be in accordance with section second of this Stipulation.

Amount of insurance if above life is rated under 12 years of age. Only the amount of Insurance provided for a weekly premium of 5 cents will be paid on a child under 6 years of age next birthday.

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Age next Birthday.	FOR 5 CENTS WEEKLY PREMIUM.										
	Amount payable provided death occur after 3 calendar months from date and after this Policy has been in force for the following periods, viz :										
	Under 1 year.	One year.	Two years.	Three years.	Four years.	Five years.	Six years.	Seven years.	Eight years.	Nine years.	Ten years.
2	14	19	24	28	31	35	40	50	60	70	90
3	19	24	28	31	35	40	50	60	70	90	123
4	24	28	31	35	40	50	60	70	90	123	
5	28	31	35	40	50	60	70	90	123		
6	31	35	40	50	60	70	90	123			
7	35	40	50	60	70	90	123				
8	40	50	60	70	90	123					
9	50	60	70	90	123						
10	60	70	90	123							
11	70	90	123								

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When the amount of Insurance, according to the terms of this Table, reaches \$123, it will continue at that sum during the life-time of the person insured, subject to the terms and conditions of this Policy.

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Age next Birthday.	FOR 10 CENTS WEEKLY PREMIUM.						
	Amount payable provided death occur after 3 calendar months from date and after this Policy has been in force for the following periods, viz.:						
	Under 1 year.	One year.	Two years.	Three years.	Four years.	Five years.	Six years.
6	62	70	80	100	120	140	180
7	70	80	100	120	140	180	246
8	80	100	120	140	180	246	
9	100	120	140	180	246		
10	120	140	180	246			
11	140	180	246				

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When the amount of Insurance according to the terms of this Table, reaches \$246, it will continue at that sum during the life-time of the person insured, subject to the terms and conditions of this Policy.

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In Witness Whereof, the said METROPOLITAN LIFE INSURANCE Co. has, by its President and Secretary signed and delivered this Policy 14th day of April, 1884.

JOSEPH F. KNAPP, *President.*

[Seal of the Metropolitan Life Insurance Company of New York.]

JNO. R. HEGEMAN, *Secretary.*

[E. D. 10, 6, 84.]

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NOTE — Please examine your Policy and return if incorrect. The neglect of a Collector to call will not be deemed an excuse for non-payment. If in arrears (within the days of grace), bring or send your premiums to the Home Office or to the Company's Agent. You will not pay the Doctor, or any other person, for examining the Life insured under this Policy, nor the Agent or other person attending to Proofs of Loss in case of death. All premiums are due in advance on Monday of each week. If you change your residence, immediately notify the Agent. Address all communications to the Home Office, corner Park Place and Church Street, New York City, and invariably give number of Policy and name of Agent. The provisions of Chap. 347, of the laws of New York, passed May 21, 1879, are waived in the Application for this Policy.

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EXHIBIT No. 4.

FORM 66.

30

Claim Department.

Industrial Branch, Metropolitan Life Insurance Company.

ATTENDING PHYSICIAN'S STATEMENT.

TO ACCOMPANY PROOFS OF DEATH.

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1. Full name of deceased? John McTague.
2. Residence? 19 Dey street.
3. Age? 34 years.
4. Race, white or colored? White.
5. Occupation? Plumber.
6. Upon what date did you first become professionally acquainted with deceased? Seventh day, ninth month, 1885.
7. Were you the attending Physician in deceased's last illness? Yes.
8. Upon what date were you first summoned for said last illness? Seventh day, ninth month, 1885.
9. Had you ever attended or prescribed for deceased before last illness? If so, please give dates. No.

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10. State nature of diseases for which you attended deceased prior to last illness? Thromboris femoral vein.

11. Did deceased have any other Physician or Physicians prior to, during, or subsequent to your attendance? If so, please specify names Dr. Duffy, 103 Summit street.

12. Was deceased afflicted with any chronic disease? Yes.

13. If so, of what nature, and for how long? Phthisis

14. What was the cause of death? (If from disease, please state its proximate and remote cause; if in any other manner, give the medical and other facts connected with the case.) Remote cause, phthisis; proximate cause, thromboris.

15. Duration of sickness? About sixteen months.

16. Date of death? Ninth month, sixteenth day, 1885.

17. Did deceased ever have phthisis pulmonalis, consumption, or any pulmonary trouble? If so, please specify. Yes.

18. Please state any other material facts relating to the sickness of deceased. —.

Signed, A. C. Dougherty, M. D.

Address, 4 West Park street, Newark, N. J.

Witness, E. A. Tompkins.

Date, September 18th, 1885.

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NOTE.—Claimants are bound to produce at their own expense such medical testimony as to cause of death, duration of disease, etc., as may be required by the Company. If an inquest be held, the Coroner's certificate and a copy of the evidence must be produced.

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EXHIBIT No. 3.

FORM 66.

Claim Department.

Industrial Branch, Metropolitan Life Insurance Company.

ATTENDING PHYSICIAN'S STATEMENT,

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TO ACCOMPANY PROOFS OF DEATH.

1. Full name of deceased? John McTague.
2. Residence? 15 Dey.
3. Age? 34.
4. Race? White.
5. Occupation? Plumber.
6. Upon what date did you first become professionally acquainted with deceased? Feb. 23d, 1885.

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7. Were you the attending physician in deceased's last illness? Yes.
8. Upon what date were you first summoned for said last illness? Sept. 8th, 1885.
9. Had you ever attended or prescribed for deceased before last illness? If so, please give dates. Yes, Feb. 23d.
10. State nature of disease for which you attended deceased prior to last illness? Phthisis Pulmonalis.
11. Did deceased have any other Physician or Physicians prior to, during, or subsequent to your attendance? If so, please specify names. I do not know.
12. Was deceased afflicted with any chronic disease? I do not know.
13. If so, of what nature, and for how long? —.
14. What was the cause of death? (If from disease, please state its proximate and remote cause; if any other manner, give the medical and other facts connected with the case.) Phthisis Pulmonalis.
15. Duration of sickness? 8 months.
- 20 16. Date of death? Wednesday, Sept. 16, 1885.
17. Did deceased ever have Phthisis Pulmonalis, Consumption, or any Pulmonary trouble? If so, please specify. Yes.
18. Please state any other material facts relating to the sickness of deceased. Nothing.

Signed, Charles J. Duffy, M. D.

Address, 103 Summit St.

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Witness, Annie F. ^{her} X ^{mark.} McTague.

Date, Newark, 21st day of Sept., 1885.

NOTE.—Claimants are bound to produce at their own expense such medical testimony as to cause of death, duration of disease, etc., as may be required by the Company. If an inquest be held, the Coroner's certificate and a copy of the evidence
40 must be produced.

New Jersey Supreme Court.

THE STATE, *ex rel.*,
METROPOLITAN LIFE INSURANCE
COMPANY.

vs.

ANNIE McTAGUE.

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*On certiorari to
the Inferior Court
of Common Pleas
of the County of
Essex.*

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REASONS.

The said Metropolitan Life Insurance Company by Joseph A. Beecher, its attorney, prays that the judgment, order and determination of the said Inferior Court of Common Pleas may be reversed, set aside and for nothing holden for the reasons following, to wit :

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First, Because the policy of insurance was issued by the said Metropolitan Life Insurance Company and accepted by the said Annie McTague, subject to the terms and conditions of the said policy, and the application therefor, and the revival application thereafter made ; and not otherwise.

Second, Because the said Court failed to give effect, according to their true intent and meaning, to the terms and conditions of said policy, which was issued by the said company and accepted by the said Annie McTague, in consideration of the representations and agreements in the printed and written application therefor, which applications were made a part of said policy.

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Third, Because said Court failed to give due and legal effect to the said contract of insurance, payment having been made thereunder, which provides that the said "assured hereby declares and warrants that the life heretofore insured under the

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said policy has not since said policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are temperate ;” although by the state of the case it appears that the said McTague, deceased, since said policy was issued, had been sick and had consulted and had been prescribed for by a physician.

- 10 *Fourth*, Because the said Court failed to give due and legal effect to the said contract of insurance, said policy having lapsed and thereafter having been revived, which said revival application provides as follows, to wit : “ The undersigned assured hereby declares and warrants that the life heretofore insured under the above numbered policy has not since said policy was issued been sick or afflicted with any disease, or met with any accident or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate. Said policy having lapsed the undersigned, desires to renew the same, and herewith pays the premiums in arrears with the understanding that no liability exists on the part of the company until said company at its home office in New York city shall have assented to the revival of said policy and so notified its agent first above-named. Nor shall said policy be deemed to be in force unless upon the date of its revival by the company, at its home office as aforesaid, the said insured shall be alive and in sound health. It is further warranted that the statements in this and the original application are in all respects true ; otherwise the insurance will be void, and all payments made will be forfeited to the company ;” notwithstanding that by the
- 20
- 30 state of the case it appears that the said McTague, deceased, since said policy was issued, had been sick, and had consulted and had been prescribed for by a physician and was not in sound health upon the date of the revival of said policy by the company at its home office in New York city.

- Fifth*, Because the said Court failed to give due and legal effect to the stipulations, agreements and warranties in said contract of insurance whereby and wherein it was warranted in and by the said revival application that the statements therein and in the original application for said policy are in all respects true, otherwise the insurance will be void and all payments made will be forfeited to the Company, said state of the case showing that the same were not in all respects true.
- 40

- Sixth*, Because it appears on the state of the case that upon making application for and signing and delivering to said Company said revival application, the said assured made a payment on account of the same, and then and there took and retained
- 50 said Company's receipt for said payment, duly signed by its

agent, whereby the said defendant, Annie McTague, had notice that no obligation was incurred by said Company by reason of said payment, unless said application was accepted by said Company in accordance with the warranty, signed by said assured on the day and date of the giving of said receipt, nor unless the declarations and warrantee in said revival application were in all respects true; whereas the said warranties were false, and were not in all respects true.

Seventh, Because on the state of the case as sent to the said Court of Common Pleas by the said District Court, the defendant and appellant was entitled to judgment against the plaintiff and appellee. 10

Eighth, Because the said judgment of the said District Court should have been reversed and set aside.

Ninth, Because the said judgment is in divers other matters erroneous and contrary to law. 20

ESSEX COUNTY, ss.

The Metropolitan Life Insurance Company, puts in its place Joseph A. Beecher, its attorney, to prosecute the aforesaid certiorari.

J. A. BEECHER,

Attorney of Prosecutor. 30

OPINION OF SUPREME COURT.

MAGIE, J., delivered the opinion of the Court:

The action in the District Court was founded on a policy of life insurance, dated April 14, 1884, whereby the Metropolitan Life Insurance Company agreed, if certain premiums were paid, to pay to Annie McTague a certain sum on the death of John McTague, her husband. 40

The judgment of the District Court was in favor of Annie McTague and it was affirmed on appeal.

It appears by the state of the case that the policy in question originally issued upon the application of Annie McTague. It was averred in the policy that the contract was made in consideration of the representations contained in the application, which was therein "referred to and made part of this contract." The policy further stipulated that if the representations were not true, the contract should be void. 50

- By force of these stipulations, the application and the representations thereby made were incorporated into the completed contract of insurance and the truth of the representations was warranted. If false, although in immaterial particulars, the contract would be avoided. *Deweese v. Manhattan Ins. Co.* 5 Vroom, 244; *Carson v. J. City Ins. Co.* 14 Vroom, 300; *S. C.* 15 Vroom, 208; *Cushman v. U. S. Life Ins. Co.* 63 N. Y. 404; *Phoenix Mut. Life Ins. Co. v. Radden*, U. S. Sup. Ct. [Bk. 30, L. ed. 644]; *MacDonald v. Law Union Fire & Life Ins. Co.*
- 10 L. R. 9 Q. B. 328.

The contract thus made became forfeited by the failure to pay the weekly premiums as agreed. Afterward and on February 12, 1885, Annie McTague signed and delivered to the Company a written application, called a "Revival Application." It described the forfeited policy, admitted that the weekly premiums had remained unpaid for thirty-one weeks, and contained the following, viz.:

- "The undersigned assured hereby declares and warrants that the life heretofore insured under the above numbered policy, has not, since said policy was issued, been sick, or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician; and that the habits of said insured are sober and temperate. Said policy having lapsed, the undersigned desires to renew the same, and herewith pays the premiums in arrears with the understanding that no liability exists on the part of the Company, until said Company, at its home office in New York City, shall have assented to the revival of said policy, and so notified its agent first above named; nor shall said policy be deemed to be in force unless upon the date of its revival by the Company, at its home office as aforesaid, the said insured shall be alive and in sound health. It is further warranted that the statements in this and the original application, are in all respects true; otherwise, the insurance will be void, and all payments made will be forfeited to the Company."
- 20
- 30

Agent's or physician's signature, _____

(After satisfying himself of the identity of the proposed insured.)

- First Class: Should be unexceptionable lives. Second class:
- 40 Lives in which the unfavorable circumstances are very slight. Third class: Lives in which the unfavorable circumstances are serious, and require considerable reduction in the amount proposed, as an equivalent for the increased risk of the assurance. Fourth class: Lives where the objections are such as to render it inexpedient to undertake the assurance.

The Company assented to the revival of the policy by an approval of the revival application annexed thereto and signed by one of its officers. It notified the agent referred to, and received the premiums in arrears, and those which subsequently

50 fell due up to the death of John McTague which occurred Sep-

tember 9, 1885. It now disputes its liability upon the policy, on the ground that statements contained in the revival application were untrue.

The question thus raised requires us to determine what contract existed between the parties after the policy was revived, and the relation to that contract of the revival application and its representations.

The forfeiture of such a policy by nonpayment of premiums may be waived; and such waiver will generally be inferred from a receipt of the premiums after forfeiture. Upon such a waiver the pre-existing contract doubtless becomes reinstated upon its original terms. Such a forfeited policy may also be expressly revived; and in such case the revival may be upon such terms and conditions as the parties agree to. When an express revival is made upon the statements of the original application it has been made a question whether the truth of those statements is to be tried by the circumstances existing at the time of the original application or at the time of the revival. Bliss, Life Ins. § 194.

Mr. May says that the authorities do not agree, some taking the view that a revival makes a new contract, and others that it merely continues the old one. He expresses his opinion that special circumstances seem to control the decision according as they indicate the intent of the parties. May, Ins. § 190.

In like manner the parties may doubtless agree to revive the lapsed contract upon new terms and conditions, or upon its original terms and conditions, with such additional terms as they mutually agree to incorporate therewith.

Whether the parties merely reinstate the old and forfeited policy, or create a new contract on new terms, or revive the lapsed contract with additional terms, must be determined from the circumstances.

In the case before us it is clear, in my judgment, that the intent of the parties was to revive the forfeited policy, with all its original terms, by a new contract which incorporated into it additional terms. This appears from the circumstances. The original policy was based upon a written application containing statements as to the insurability of the person whose life was to be insured. These statements were expressly incorporated into the contract and warranted to be true. When forfeiture had occurred the beneficiary in the lapsed contract applied in writing for its revival. The application contained statements as to the insurability of the person whose life was insured, covering the period between the issuing of the original policy and the date of the revival application. It further contained an agreement that the Company's liability should only rearise upon its assent to the application. It contained an express warranty of the truth of the representations then made, and an agreement that if they or the representations of the original application were not true, the contract should be void. This written ap-

plication was assented to by the written approval of the Company, and thereby a new contract between the parties was made reviving the old policy with all its terms, and incorporating into it the additional terms expressed in the revival application.

By these means the representations contained in the revival application became part of the completed contract between the parties, and their truth was warranted. The falsity of any of them will avoid the contract.

- 10 Two representations in the revival application are alleged to have been false.

The first was that which averred that John McTague had not, since the policy was issued, been sick or afflicted with any disease. The District Court found as a fact that he had, during that period, had a cold. The Common Pleas held that the statement of the application was not thereby shown to be untrue. In this I think there was no error. There was nothing in the mere fact found that required the inference that the insured life had been afflicted by disease or even sick. These
20 terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness.

When a lapsed policy was revived on condition that the insured was in good health it was held that the phrase was not to be construed as meaning an absolute exemption from any physical ill; and as the policy had issued on an application showing the then state of health of the insured, it was further held that the condition was satisfied by the insured being in a state of health relatively like that represented in the original
30 application. *Peacock v. N. Y. Life Ins. Co.* 20 N. Y. 293. See also *Cushman v. U. S. Life Ins. Co.* 70 N. Y. 77.

Whether this view be approved or not, I am of opinion that in the absence of proof that the cold referred to produced disease or sickness, the courts below rightly held that the falsity of the statement in question was not shown. Nor do I think that the fact that the insured had been prescribed for by a physician necessarily required the inference that the cold produced either disease or sickness.

- 40 The other statement alleged to be proved false is that which averred that John McTague had not, within the period between the issuing of the policy and the date of the revival application, consulted or been prescribed for by a physician. The fact found by the District Court was that a physician had been called on by John McTague or had visited him and had prescribed for him, for the cold.

The Common Pleas, in the opinion before us, declared that this fact did not show the representation to have been false, be-
50 cause it did not appear what sort of a prescription the doctor

gave, whether one compounded by a druggist or made up of some common remedy. But it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem 10 to be to the contract proposed by the application, that in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question, for, as we have seen, its truth is warranted. Its falsity appears from the fact found.

The result is that the contract was avoided and the court below erred in rendering judgment thereon.

The judgment must be reversed.

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Owing to his engagements in Circuit Mr. JUSTICE PARKER took no part in this decision.

New Jersey Court of Errors and Appeals.

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ANNIE McTAGUE,

PLFF. IN ERROR,

vs.

THE STATE OF NEW JERSEY.

(THE METROPOLITAN LIFE

20

INSURANCE COMPANY, *Pros.*),

DEF. IN ERROR.

*In Error to
Supreme Court.*

*Assignment of
Errors.*

And now at this day the plaintiff in error assigns the following causes of error :

First, Because the Supreme Court decided that the statements contained in the revival application signed by the plaintiff in error, are warranties.

Second, Because the Supreme Court decided that there had been a breach of a warranty contained in said revival application in that the ~~ass~~ured had been prescribed for by a physician.

Third, Because the Supreme Court reversed the judgment of the Court of Common Pleas, when the said judgment should have been affirmed.

FRANK E. BRADNER,

Attorney for Plaintiff in Error.

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(Formal joinder in Error.)

