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THOMAS A. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF MARGARET R. KENNEY

v.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION.

Record 1044

FROM THE HUSTINGS COURT, PART TWO, OF THE CITY OF RICHMOND.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 16, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

139 Va 341

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

THOMAS A. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF MARGARET R. KENNEY

v.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Thomas A. Williams, administrator of the estate of Margaret R. Kenney, respectfully shows:

That he is aggrieved by the final judgment of the Hustings Court, Part II, of the City of Richmond, State of Virginia, entered on the 8th day of June, 1922, in a certain notice of motion for judgment then therein pending, in which your petitioner was plaintiff and the Metropolitan Life Insurance Company, a corporation, was defendant; by which judgment it was adjudged:

"Therefore it is considered by the Court that the Plaintiff take nothing * * *."

A transcript of the record of the proceedings in this case, duly authenticated, is herewith presented as a part of this petition.

It will be seen therefrom that your petitioner filed his notice of motion for judgment against the defendant on the 16th day of August, 1921. That the case was continued, by adjournment, until the 19th day of December, 1921; on which day trial was entered into. On the following day the jury reported to the court that it was unable to agree; whereupon, the court discharged the jury and the case was again con-

tinued, by adjournment, until the 15th day of May, 1922; at which time, after the evidence was introduced, the defendant interposed a demurrer; the jury bringing in the following verdict:

"Subject to the ruling of the Court upon the Defendant's demurrer to the evidence, we the jury, find for the plaintiff and assess his damages at One thousand and four Dollars ($1,004.00) with interest thereon from June 20th, 1921."

(Signed) "J. W. ROTHERT, JR., Foreman."

Whereupon, the jury was discharged and the defendant, by counsel, made the following motion:

"that the verdict of the jury be set aside on the ground that the said verdict was contrary to the law and the evidence."

Which motion, the court ordered docketed and continued. Thereafterwards, on the 8th day of June, 1922, the parties came again, by counsel, before the court, when the court sustained the motion and demurrer and set aside the said verdict on the ground that it "was contrary to the law and evidence", and, "that the matter shown in evidence to the jury is not sufficient in law to maintain the issue on the part of the plaintiff"; to which ruling of the court the plaintiff, by counsel, excepted.

Your petitioner now brings this petition asking a review of the record, and that this Honorable Court reverse the judgment of the lower court and enter up judgment for the plaintiff, or remand the case for a new trial.

STATEMENT OF THE CASE.

The record discloses the following facts:

Margaret R. Kenney, widow, resident of the City of Richmond, Virginia, made application, on the 21st day of June, 1920, to the Metropolitan Life Insurance Company, a corporation (organized under and by virtue of the laws of the State of New York and doing business in the State of Virginia), through its agent for two policies of industrial insurance; one payable sixty cents (60c.) per week and the other forty cents (40c.) per week. The sixty-cents-per-week policy was duly issued and offered to her by the company and accepted by

her; the forty-cents-per-week policy was not issued. The company did, however, issue and offer to her a twenty-five-cents-per-week policy and a fifteen-cents-per-week policy, both of which she accepted. She paid the premium on the said three policies of insurance—the sixty, twenty-five, and fifteen cents per week policies—in the manner and form required by the insurer, until the day of her death, January the 20th, 1921. Whereupon, proofs of death were duly executed and delivered to the insured on the forms furnished by it and in the manner and form required by it. The administrator of her estate, in addition to her only daughter and child, made demand upon the insurer for the amount due, as set forth in the three policies of insurance, totaling one thousand and four dollars ($1,004.00). The insurer denied liability; claiming that the insured had cancer prior to making applications to it for the three policies of insurance and that because she had stated in her application for them that she had never had cancer before she made application to it for the said three policies of insurance and because she had died of cancer, it would not pay the amount otherwise due under them, one thousand and four dollars ($1,004.00), or any part thereof.

The issue is thus squarely presented.

DID THE PLAINTIFF'S INTESTATE MAKE THREE APPLICATIONS FOR INSURANCE TO THE INSURER?

It will be noted (record, page 11) that the plaintiff's intestate made an offer to the insurer for a forty-cents-per-week policy, which was not accepted (record, page 12). The application for insurance marked at the top, "Exhibit Number 2", clearly discloses thereon that the insured made application to the defendant for a forty-cents-per-week policy. It is thereon, also, to be noted that there was a change by the defendant in the premium from a forty-cents-per-week premium to a twenty-five-cents-per-week premium and that on "Exhibit Number 3", application for insurance, there was no signing of the application by the plaintiff's intestate and no examination noted thereon by the insurer; in fact, there is no evidence in the record to show that the plaintiff's intestate ever saw or heard of the last named application. It therefore becomes apparent that the change in the application marked "Exhibit Number 2" from a forty-cents-per-week premium by the defendant was a material alteration of the application and thereby the plaintiff's intestate was not bound on the twenty-five-cents-per-week policy as to any statements that she had made in her application for a forty-cents-

per-week policy. As to the fifteen-cents-per-week application there was no signing by her nor was there any statements of any character whatsoever made by her in it, as shown by the application.

C. T. Goodliff, agent for the insured, who whote the application or applications for this insurance, testifying for the defendant, says (record, page 11):

"Q. How many applications for insurance did you write?
A. Two.
Q. Who wrote the third one?
A. I have no idea. I wrote two.
Q. Look at these applications and see if they are not all three in your handwriting.
A. (Examining) No, sir; this 15c. one is not in my handwriting.
Q. Do you know whose handwriting it is in?
A. No, sir, I do not. Those two are in mine; this is not."

Continuing (record, page 12), this same witness testifies:

"Q. Did Mrs. Kenney sign that application?
A. This one?
Q. Yes.
A. No, sir."

Later (record, page 12), this witness continued:

"Q. Why did she get three policies when she only signed two applications?
A. I can't tell you that. Possibly it was done through the home office of the Company, possibly because they wouldn't issue that much on that plan, sixty and forty. I can only tell you the policies came down as three different policies; I delivered them as such and collected on them.
Q. You say that you swear that you didn't write that application?
A. Yes, sir."

W. J. Shillenberge, another witness for the defendant, manager of the Richmond Branch of the insurer, testifying on cross examination, said (record, page 42):

"Q. Are you familiar with Mr. Goodliff's handwriting?
A. I think so.

Q. Look at them and see if they are not all three in Mr. Goodliff's handwriting.

A. (Examining) I don't think so. I think that this one, as I said before, was a copy of that application made by some clerk in the home office, and also this notation in there and memorandum to show that two policies were issued for the same amount as one would have been had they issued that one policy."

Judicial Dictionary-Digest, Vol. 3, at page 2267, says:

"An application for insurance is a mere proposal, which the company can accept, reject or modify; and until the minds of the parties meet by an agreement upon all the terms, and all the conditions required are performed, no contract arises. *McCully* v. *Phoenix M. L. Ins. Co.*, 18 W. Va. 782."

It is therefore quite apparent that for two of the policies issued to the plaintiff's intestate—the twenty-five-cents-per-week policy and the fifteen-cents-per-week policy—the insurer never had applications from the plaintiff's intestate. In fact, the insurer issued these two policies without ever having had any application for them. This being true, it is not presumed that any of the rules of law pertaining to applications for insurance have any bearing, whatsoever, on these two policies, and that as to them the insurer has no defense to payment, whatsoever. It is perfectly obvious that she made no representations, statements or declarations as to these two last mentioned policies, for she never made or signed any applications for them. They were offered to her by the insurer without any promise, whatsoever, on her part and she accepted them. It then became the duty of the insurer to pay to the beneficiary the amounts named in them, upon the death of the insured.

If this view of the matter is accepted, that leaves only the sixty-cents-per-week policy to be disposed of; if it be not accepted, then what follows concerning the sixty-cents-per-week policy applies with equal force to the two others.

From the transcript of the evidence, the insured never knew that she had had cancer (and it is not admitted that she did) before she made application for the sixty-cents-per-week policy. Mrs. Helen Martin, plaintiff's witness, testifying on cross examination by Mr. Taylor, counsel for the defendant, says (record, page 3):

"Q. Mrs. Martin, did not your mother have a cancer, and was she not operated upon for it in the hospital?

A. Not to her knowledge."

In view of the fact that this petition is before this Honorable Court on a demurrer to the evidence interposed by the defendant, evidence in conflict with Mrs. Martin's (witness for the plaintiff) evidence must give way; and so it can be said that Mrs. Kenney, the plaintiff's intestate, never knew that she had cancer, even if she did have it. This is immaterial, however, except to show good faith on her part; for, if she did not so know and she had had cancer, and a statement was made by her to the prospective insurer that she had not had it, innocently and with no intention, whatsoever, to deceive the prospective insurer, nevertheless, there could be no recovery, if it is "clearly proven" by the insurer that the statement (if such there was, that she had not had cancer) was "material to the risk and untrue".

Three questions are then presented:

(1) Did the insurer ask the insured if she had ever had cancer?

(2) Did the insured state to the insurer that she had never had cancer?

(3) Did the insured ever have cancer?

These three questions will be discussed in the order named.

QUESTION I.—DID THE INSURER ASK THE INSURED IF SHE HAD EVER HAD CANCER?

It will be noted on the application for insurance at the top of which is the number 61,860,245, corresponding to the policy issued under that same number, under Section "C" of the second page, in the blank space following statement "2", reading:

"I have never had any of the following complaints or diseases: Apoplexy, Asthma, Bronchitis, Cancer or other Tumor, Consumption, Disease of Brain, Disease of Heart, Disease of Kidneys, Disease of Liver, Disease of Lungs, Disease of Urinary Organs, Dropsy, Fistula, Fits or Convulsions, General Debility, Habitual Cough, Hemorrhage, Insanity, Jaundice, Paralysis, Pleurisy, Pneumonia, Rheumatism,

⊕ Company waives the answer

Scrofula, Spinal Disease, Spitting or Raising Blood, Ulcer or Open Sores, Varicose Veins, except"

that the examining physician of the defendant, who wrote down the statements for the plaintiff's intestate (Record, page 33), placed nothing therein; thereby creating the inference that the plaintiff's intestate had stated to him that she had never had cancer.

This Honorable Court will please examine the blank space following statement number "2", in the sixty-cents-per-week application, where it will be seen that nothing, whatsoever, was placed therein by the examining physician, the agent of the insurer. On this point Vance on Insurance, page 258, says:

⊕ "Where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial."

Connecticut Mut. Life Ins. Co. v. *Luchs,* 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; *Hall* v. *Insurance Co.,* 6 Gray (Mass.) 185; *Lorillard Fire Ins. Co.* v. *McCullough,* 21 Ohio St. 176, 8 Am. Rep. 52; *American Life Ins. Co.* v. *Mahone,* 56 Miss. 180; *Carson* v. *Insurance Co.,* 43 N. J. Law 300, 39 Am. Rep. 584; *Jersey City Ins. Co.* v. *Carson,* 44 N. J. Law 210; *Lebanon Mut. Ins. Co.* v. *Kepler,* 106 Pa. 28.

The examining physician, agent for the insurer, should have written "none". That would have been final, if plaintiff's intestate did state that she had not had cancer. On page 46 of the record appears a "note"—evidence, reading as follows:

"At the second trial of this cause on May 15, 1922, it is agreed by and between counsel that Mrs. Martin would further testify that at the time Dr. Williams was examining her mother she was close by and heard all that passed between the doctor and her mother, and that the doctor did not ask her mother a question as to cancer, and that no mention whatever was made of cancer by either party in the examination."

It is therefore quite evident that this evidence of Mrs. Helen Martin, daughter of the plaintiff's intestate and witness for the plaintiff, must govern in this matter and is to

the effect that the insured never asked the plaintiff's intestate if she had ever had cancer. This proposition is so perfectly plain that it is not deemed needful or necessary to encumber the record further on this point; other than to say that the defendant's examining physician was advised by the plaintiff's intestate as he wrote down in "4" of the application that she had had diseases of "urinary organs", and yet with this fact before him he did not place in "2" that exception. The defendant's examining physician, also, has the same data in "11", in section "D", on the third page of this application; so *it is obvious that the examining physician of the insurer did know that she had trouble with these organs, and yet he did not set it forth as an exception in "2".*

If the insurer through its agent, the examining physician, did not ask the prospective policy-holder about these matters it certainly cannot complain that she did not answer them, for the application was written by the examining physician of the insurer (record, page 33).

Incidentally, the fact that the defendant's agent wrote the statements for the plaintiff's intestate must be consrued most strongly against it and the benefit of any doubt thereby created given to your petitioner.

As was said in *Modern Woodmen* vs. *Lawson,* 110 Virginia 81, at page 89:

" 'Where, however, a medical examiner, acting as agent for an order, assumes to write out the answers to questions in an application for insurance upon his own knowledge of the facts rather than from the answers given by the applicant, the order is not in position to claim that the answers are untrue.' Citing, among other cases, *Shotliff* v. *Modern Woodmen of Am.,* 100 Mo. App. 138, 73 S. W. 326."

This is evidently what this examining physician for the defendant company did, for the reason that the "note"—evidence, on page 46 of the record, distinctly states that the examining physician never asked the plaintiff's intestate any questions whatsoever concerning cancer. And there can be no denial of this, for the reason that this case is on demurrer to the evidence interposed by the defendant.

What is said in Judicial Dictionary-Digest, Vol. 3, at page 2266, about policies applies with equal force to applications therefor. It reads:

"Courts, in construing policies of insurance, do not look for grounds of forfeiture, and, furthermore, will construe the language of policies strictly against the insurer and liberally in favor of the insured. *North British & Mercantile Ins. Co.* v. *Edmundson,* 104 Va. 487, 52 S. E. 350.

Where the language of a policy of insurance may be understood in more senses than one, it is to be interpreted in the sense which is most favorable to the insured. *Thompson* v. *Phoenix Ins. Co.,* 136 U. S. 287, 297; *Virginia Fire & Marine Ins. Co.* v. *Vaughan,* 88 Va. 836, 14 S. E. 754.

In the interpretation of a policy of insurance in all cases it must be liberally construed in favor of the insured so as not to defeat without a necessity his claim to the indemnity which in making the insurance it was his object to secure. And when the words are, without evidence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. *Miller* v. *Insurance Co.,* 12 W. Va. 117."

Mrs. Helen Martin, plaintiff's witness, testified on direct examination as follows (record, page 46):

"Q. Do you tell this jury that you were in the house at the time Dr. Williams examined your mother?

A. I was.

Q. Tell the jury just what transpired between Dr. Williams and your mother as to her sicknesses or the attention she had had from physicians.

A. She told him she had been to the hospital in October, 1919, under the care of Dr. H. B. Sanford and Dr. Robins, and she also told him that she had had the flu in January and had been under the care of Dr. Rollins at that time, also under the care of Dr. Rollins in the hospital in May, 1920.

Q. You heard her tell Dr. Williams that?

A. I did."

It is, therefore, quite apparent that this plaintiff's intestate withheld nothing from the examining physician but made a detailed disclosure as to her previous sicknesses and disabilities and it is further quite evident that (as shown in the "note"—evidence, above) this examining physician never asked the plaintiff's intestate anything about cancer.

Next in order comes the second question:

DID THE INSURED STATE TO THE INSURER THAT SHE HAD NEVER HAD CANCER?

It is submitted that she did not. The above mentioned "note"—evidence, in view of the demurrer, conclusively disposes of this question and it is not thought needful or necessary to further discuss it.

Next comes for disposition the third question:

DID THE INSURED EVER HAVE CANCER?

Dr. Charles R. Robins, Dr. J. A. Rollins and Dr. H. B. Sanford, witnesses for the defendant, all three treated the plaintiff's intestate prior to the time that she made application to the insurer for insurance and all three testified that they thought that she had cancer though none of them stated that they had made a miscroscopic examination of the infected tissue so as to definitely determine that fact. Dr. Rollings, a witness for the defendant, says on cross examination (record, page 24):

"Q. Can you on your oath tell this jury that Mrs. Kenney died of cancer which she had in July, 1920?

A. *I can say I believe she died of cancer. I did not make any microscopic examination of any tissue.*

Q. *And therefore you cannot swear to that?*

A. *No.*

Q. You can't tell whether the disease is cancer or not unless you make a microscopic test?

A. Not definitely."

Dr. William A. Simpson, witness for the plaintiff, testified on this point as follows (record, page 50):

"Q. Can you tell whether a person has cancer or not, without a microscopical examination?

A. You have two criterions, one is the gross appearance of the organs involved, and the other is stamping it absolutely by a microscopic examination of the tissues involved.

Q. Then you cannot tell absolutely, as I understand, whether a person has cancer except by a microscopical examination?

A. If you have organs in which you suspect cancer by their gross appearance or what not, stamping it as cancer absolutely rests upon the microscopical examination of the tissues

involved, and that is done to such an extent that even in operations a section is removed and examined while the patient is on the table, to determine what extent of removal there should be of that organ. You may want to remove a portion of it, and you may want to remove the whole organ.

Q. *If I understand you properly, then, one who is suspected of having cancer cannot be defintely said to have cancer unless you have microscopical examination?*

A. *That is the final word.*"

As to this physician's knowledge of cancer, note (record, page 40):

"Q. Are you acquainted with the treatment of cancer?

A. Yes, sir, as much as physicians know about it, generally speaking."

Note, also, (record, page 50):

"Q. Do you know the cause of cancer, or does any physician know the cause of cancer?

A. I don't think anybody would be bold enough to say that he knew what the cause of cancer is."

In view of the fact that it is not in evidence that any of the diseased tissues, if such there were, of the plaintiff's intestate was microscopically examined by any physician and in view of the further fact that this case is before this Honorable Court on a demurrer to the evidence interposed by the defendant, the allegation by the defendant that the plaintiff's intestate had cancer is therefore not sustained—the defendant fails for lack of proof, for nothing stated by the defendant's physician witnesses can be considered that comes in conflict with the direct statement of Dr. Simpson, the plaintiff's witness.

It is hoped that if the foregoing three questions have been satisfactorily answered, this Honorable Court will grant your petitioner a writ of error and *supersedeas;* but if not satisfactorily answered before a writ and *supersedeas* is denied your petitioner, this Honorable Court will consider the following:

In conformity to Section 4220 of the Code of Virginia of 1919, reading as follows:

"*All statements,* declarations and descriptions *in any ap-*

plication for a policy of insurance shall be deemed representations and not warranties, and no statement in such application or in any affidavit made before or after loss under the policy, *shall bar a recovery upon a policy of insurance, or be construed as a warranty, anything in the policy to the contrary, notwithstanding, unless it be clearly proved that such answer or statement was material to the risk, when assumed and was untrue.*"

The insurer had to "clearly prove" that the insured's statement, if such there was, that she had not had cancer before making application to it for a policy of insurance, was "material to the risk when assumed" and "was untrue".

Two facts to "clearly prove":

Two burdens of proof on the insurer:

Was the statement "material to the risk"?

Was the statement "untrue"?

It is to be kept in mind that here is an insurer demurring to your petitioner's evidence when it has these two burdens of proof.

Regardless of how strong in the belief the insurer might have been or is that the plaintiff's intestate had had cancer before applying to it for insurance it never satisfied the statute that says it must be "clearly proven" by it that she did. The belief, not a fact "clearly proven", that she died of "carcinoma of the pelvis" is no proof that two years before that time she had "cancer of the uterus". Cancers are often cured. And the mere fact that one has had cancer and has been cured is not evidence "clearly proven" that it is material to the risk for the insurer to know that one has had it. The one having it must die with it before it becomes material, under our law. It is most earnestly, but respectfully, stated that your petitioner does not for a moment believe that this Honorable Court or the Honorable Judge of the Hustings Court, Part II, of the City of Richmond, has ever taken or will take judicial notice that the fact that one has had cancer before she made application to an insurer for a policy of insurance is evidence, "clearly proven", that that fact "was material to the risk when assumed" (words of the statute). If your petitioner's belief is confirmed, he is entitled to a writ. Especially when this case is before this Honorable

Court on a demurrer interposed by the insurer; and more especially, in view of the said statute imposing the burden of proof on the insurer.

Was the answer untrue? (1) It is submitted that it has been herein established that the question was not asked by the insurer of the insured. (2) It is herein, also, established that the insured did not state to the insurer that she had never had cancer. But these aside. The burden of proof is on the insurer. It must be "clearly proven" (words of the statute) by it that the statement of the insured "was untrue" (words of that statute) and material to the risk.

Dr. Simpson, plaintiff's witness, says (record, page 50, near the top), "I don't think anybody would be bold enough to say that he knew what the cause of cancer is." He says, further, that there is a definite and certain way to determine if one has it. And that it is the way known to the medical profession by which it may be definitely and certainly known if one has it. That is "by a microscopic examination of the tissue involved" (record, page 50). It is therefore quite certain that the other physicians, testifying for the defendant, who state that they did not miscroscopically examine any of the tissue of the insured, could not knowingly state that she had cancer. If they thought she had cancer, the thought was not produced by the well known and only method of a proper diagnosis—a microscopic examination of the infected tissue of the plaintiff's intestate, if she had any. Dr. Rollins, defendant's witness, knew and admitted that such an examination was the only means by which they, as physicians, could say she had cancer (record, page 24). All of the evidence of the insurer and all reasonable inferences therefrom must give way before the evidence of the plaintiff and all reasonable inferences therefrom on a demurrer interposed by the insurer. This being true, it is perfectly manifest that the insurer has not "clearly proven" (in satisfaction of the statute) that the insured had cancer before she made application to it for a policy of insurance.

It may be well, at this point, to determine the meaning of the phrase "clearly proven". Judicial Dictionary-Digest, Vol. I, p. 719—is helpful when it says:

"In the phrases 'full proof' and 'clear proof', neither 'full' nor 'clear' have any technical meaning or force. *Harman & Crockett* v. *Maddy Bros.*, 57 W. Va. 69."

It, therefore, follows that "clear" means obvious, evident, plain—in other words, "clear" must be given its ordinary

and popular meaning. "If the intention of the legislature can be thus discovered, it is not permissible to add to, or subtract from the words used in the statute". *Posey* v. *Commonwealth,* 123 Va. 551-3. Judicial Dictionary-Digest, Vol. I, p. 719, also, says: "*Clear and satisfactory proof", in cases involving fraud* or false swearing *may be defined to be a preponderance of evidence* sufficient to overcome the presumption of innocence or moral turpitude or crime. *Virginia Fire & Marine Insurance Company,* Hogue 105 Virginia 363."

(The instant case involves an allegation of fraud and there being a presumption of law that the insured was not guilty of any moral turpitude—the burden upon the insurer became two-fold; one to satisfy the statute, the other to overcome the presumption that the insured was not guilty of any moral turpitude.) It therefore becomes apparent that the insurer had to show to the jury by obvious, plain, clear (plainly seen and detected) evidence—proof that it was material to the risk for it to know that the insured had cancer prior to the time she made application to it for insurance; and if it did not so prove, and by "a preponderance of evidence", there could be no bar to recovery on the policies. It is submitted that this burden of proof being on the insurer and the insurer not having shown by any evidence whatsoever that it was material to the risk for it to know that the insured had had cancer before she applied to it for insurance, this Honorable Court will grant a writ of error and *supersedeas* and the insurer must pay the one thousand and four dollars ($1,004.00) with interest.

WAS THE ALLEGED STATEMENT OF PLAINTIFF'S INTESTATE THAT SHE HAD NOT HAD CANCER PRIOR TO THE TIME THAT SHE MADE APPLICATION FOR INSURANCE TO THE INSURED A REPRESENTATION OR A WARRANTY?

That depends entirely on whether she died of cancer.

The Code revisors' note to Section 4220 of the Code of Virginia of 1919, states:

"The revisors were of opinion that if the answer or statement was MATERIAL to the risk when assumed, and was untrue that no recovery should be had; that if IMMATERIAL, although false or fraudulently made that it should not

bar recovery for the reason that such a statement could not have affected the risk, being immaterial to it."

As was said in the second syllabus to *Modern Woodmen* vs. *Lawson,* 110 Va. 81:

"The fact that the answer was merely untrue is not sufficient, under the statute of this State, to vitiate the policy."

It is, also, to be noted that in 13 Virginia Law Register 162, that the effect of misrepresentation in an application for insurance in a matter which did not contribute to the death of the insured does not bar recovery on the policy. This is quite evident; for if one makes a statement in an application for insurance that she has never had pneumonia and the applicant comes to death by means of a railway accident, it is quite apparent that the statement that the applicant had not had pneumonia, even if untrue, could have no bearing, whatsoever, on the death of the insured. The application of these principals of law to the facts in this case will lead to the inevitable conclusion that it was not material to the risk for the insurer to know that the insured had had cancer, even if she had had it, for it is perfectly manifest that the evidence does not disclose the cause of her death. As proof of this note the following:

Dr. Rollins, witness for the defendant, who was the attending physician at the time of the death of the plaintiff's intestate, on cross examination (record, page 24):

"Q. Can you on your oath tell this jury that Mrs. Kenney died of cancer which she had in July, 1920?

A. I can say I believe she died of cancer. *I did not make any microscopic examination of any tissue.*

Q. *And therefore you cannot swear to that?*

A. *No.*

Q. You can't tell whether the disease is cancer or not unless you make a microscopic test?

A. Not definitely."

Section 4220 of the Code required the defendant to clearly prove that the statement of the plaintiff's intestate in her application for insurance was material to the risk when assumed. That could only be done by the insurer proving that she died of cancer. It is evident that if the physician who attended the plaintiff's intestate in her last illness was not cer-

tain of her death then it can be said to a certainty that the defendant insurance company has not clearly proven that it was material to the risk for it to know that she had had cancer prior to making application to it for insurance, even if she had had cancer—and it is denied that she did have it or that she ever stated that she did or didn't have it. It is so very plain that on this demurrer to the evidence, and even if no demurrer existed that the defendant insurance company has not borne this burden, that it is believed this Honorable Court will not fail to grant your petitioner a writ of error and *supersedeas.*

EFFECT OF DEMURRER.

As was said by this Honorable Court in *Citizens Bank* vs. *Taylor,* 104 Virginia, page 164:

"Where, upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must grant judgment in his favor."

And, further, in *Bass* vs. *Norfolk Railway and Light Company,* 100 Virginia, page 1:

"Where reasonably fair-minded men might differ about a question, such question must be decided against the demurrant, on a demurrer to the evdence."

Your pettioner therefore states, with the fullest confidence, that *when the attending physician of the plaintiff's intestate in her last illness is not able to say definitely as to the cause of her death, it may be confidently said that "reasonably fair-minded men might differ" as to whether she died of cancer* and as to whether it was material to the risk for the defendant insurance company to know if she had had cancer prior to the time that she applied to it for insurance and as to whether the statement if she did make one (and it is denied that she did make any) that she had not had cancer was a warranty or a representation. *It could not become a warrnty unless she died of cancer and there is no proof that she did die of cancer.* If it was a representation, it could not become a warranty unless the plaintiff's intestate died with cancer and unless she had stated to the insurer when she made application to it for insurance, that she had never had cancer.

It is confidently stated that the insurer has not borne the

burden of proof imposed by the statute . . . . it has not proven that the plaintiff's intestate died of cancer.

For these reasons the judgment complained of is erroneous and should be reversed, and your petitioner prays that a writ of error and *supersedeas* may be awarded him to the said judgment, and that the said judgment may be refused, reversed and annulled.

_____,
By Counsel.

E. C. FOLKES and
BETHEL & WILLIAMS,
Attorneys for the Petitioner.

We, Thomas A. Williams and Willis D. Miller, attorneys at law, practicing in the Supreme Court of Appeals of Virginia, are of opinion that the judgment complained of in the foregoing petition is erroneous and should be refused and reversed.

THOMAS A. WILLIAMS,
WILLIS D. MILLER.

Writ of error and *supersedeas*. No bond being required. November 22, 1922.

Pleas had before the Hustings Court, Part, II, of the City of Richmond, Va., on the 15th day of May, 1922.

Be it remembered that heretofore, to-wit: on the 16th day of August, 1921, came the plaintiff, Thomas A. Williams, Administrator of the Estate of Margaret R. Kenney, and filed the following notice of motion for judgment against the Metropolitan Life Insurance Company, a Corporation, to-wit:

To Metropolitan Life Insurance Company, a Corporation:

Take notice that I, Thomas A. Williams, Administrator of the Estate of Margaret R. Kenney, hereinafter called the plaintiff, shall, on the 3rd day of October, 1921, at eleven A. M. o'clock thereof, or as soon thereafter as I can be heard, move the Hustings Court, Part II, of the City of Richmond, State of Virginia, at the court-house thereof, for judgment against you, Metropolitan Life Insurance Company, a corporation, incorporated by the State of New York, hereinafter called the defendant, for the sum of one thousand and four

dollars ($1,004.00), with interest thereon from the 20th day of January, 1921, until paid, due to me by you, by reason of the following facts and the account, with affidavit thereto, hereto attached and expressly made a part of this notice of motion for judgment against you, the defendant:

That you, the defendant, by virtue of the policies of insurance in your company, numbers 61860245, 61890318 and 61941299, herewith filed with the original of this notice of motion, owe to the plaintiff one thousand and four dollars ($1,004.00), with interest thereon from the 20th day of January, until paid, because of the death of Margaret R. Kenney, whose life was insured by said policies, and who died on or about the 20th day of January, 1921, in the City of Richmond, State of Virginia; and by reason of the further fact that she, Margaret R. Kenney, and I, the plaintiff, have performed all of the conditions of the said policies, and violated none of their prohibitions, unless there be and except certain conditions of said policies which you, the defendant, prevented her, Margaret R. Kenney, and me, the plain-
page 2 } tiff, from performing, and unless there be and except certain prohibitions of said policies which you caused the said Margaret R. Kenney and me, the plaintiff, to violate.

THOMAS A. WILLIAMS,
Administrator of the Estate of Margaret R. Kenney,
By Counsel.

BETHEL & WILLIAMS, p. q.

ACCOUNT.

Metropolitan Life Insurance Company, a Corporation,

to

Thomas A. Williams, Administrator of the Estate of Margaret R. Kenney, Dr.

January 20th, 1921.

To amount of Insurance under Policy No. 61860245	$468.00
To amount of insurance under Policy No. 61890318	335.00
To amount of insurance under Policy No. 61941299	201.00
	$1,004.00

And with interest on the said $1,004.00 from the 20th day of January, 1921, until paid.

AFFIDAVIT TO ACCOUNT.

State of Virginia,
City of Richmond, to-wit:

This day personally appeared before me, a notary public in and for the State and City aforesaid, in my City aforesaid, Thomas A. Williams, Administrator of the Estate of Margaret R. Kenney, who made oath that he is the plaintiff mentioned in the notice of motion for judgment with which this affidavit is filed; that to the best of his knowledge the amount of the plaintiff's claim is the sum of $1,004.00 as shown in the foregoing account, and that the said amount is justly due by the defendant to the plaintiff, and that the credits, so far as the same exist, are distinctly stated in the account, and that the plaintiff claims interest on the said $1,004.00, the amount justly due, from the 20th day of January, 1921, until paid.

THOMAS A. WILLIAMS,
Administrator of the Estate of Margaret R. Kenney.

Subscribed and sworn to before this the 15 day of Aug., 1921.

My commission expires on the 29 day of Sept., 1922.

J. T. BETHEL,
Notary Public.

page 3 } PLEA AND COUNTER AFFIDAVIT.

And the said defendant, by Wellford & Taylor, its attorneys, says, that it did not undertake or promise in manner and form as the said plaintiff hath above complained. And this the defendant puts itself upon the country.

METROPOLITAN LIFE INSURANCE
COMPANY OF N. Y.
By WELLFORD & TAYLOR, Attorneys.

COUNTER AFFIDAVIT.

State of Virginia,
City of Richmond, to-wit:

Before me, Henry W. Oppenheimer, a Notary Public in and for the City aforesaid, in the State of Virginia, personally appeared W. J. Shillinburg and made oath that he is Manager and agent of the Metropolitan Life Insurance Company of New York, the defendant herein; and as such duly authorized to make this affidavit in its behalf; and that the plaintiff is not entitled, as the affiant verily believes to recover anything from the defendant on the claim set up in his notice of motion.

W. J. SHILLINBURGER, Mgr.

Subscribed and sworn to before me in my City aforesaid, this 3rd day of October, 1921.

HENRY W. OPPENHEIMER, N. P.

page 4 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 19th day of December, 1921.

This day came again the parties in person and by counsel and the Defendant, by Counsel, having heretofore filed in writing its Counter Affidavit & Plea of Not Guilty and put itself upon the country, and the Plaintiff likewise and issue is joined thereupon. Whereupon came a panel of nine qualified jurors free from exception for the trial of the issue joined in this case, and from said panel of nine qualified jurors the parties, by their attorneys, *beinning* with the Plaintiff alternately struck from said panel the names of one juror each, the remaining seven constituted and composed the jury for the trial of the issue joined in this case, to-wit: J. E. Cox, G. M. Wakefield, W. W. Burke, W. C. Grantland, C. S. McKenney, J. P. Atwell & R. D. McGehee, who being elected, tried and sworn the truth to speak upon the issue joined & having fully heard the evidence and arguments of Counsel retired to their room to consult upon a verdict, after which consultation, they returned into Court and announced that they could not agree, thereupon, by consent of both plain-

tiff and defendant, by counsel, the jury were adjourned over until tomorrow morning at ten o'clock with the usual admonitions given them. And the further consideration of this case is continued until the then tomorrow morning at ten o'clock A. M.

And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 20th day of December, 1921.

This day came again the parties by counsel and the jury appeared in Court pursuant to the conditions of their adjournment were sent to their room to further consider of their verdict, and after sometime returned into Court and announced to the Court that they could not agree. Thereupon, R. D. McGehee, one of the Jurors, was withdrawn and the rest of the panel discharged from the further consideration of this case. And this case is continued generally.

page 5 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said City, on the 15th day of May, 1922.

This day again came the parties in person and by counsel and the defendant, by its counsel, having heretofore filed in writing its counter affidavit & plea of not guilty put itself upon the country, and the plaintiff likewise and issue is joined thereupon. Whereupon, came a panel of nine qualified jurors free from exception for the trial of the issue joined in this case, and from said panel of nine qualified jurors the parties, by their attorneys, beginning with the plaintiff alternately struck from said panel the names of one juror each, the remaining seven constituted and composed the jury for the trial of the issue joined in this case, to-wit: R. A. Wood, W. D. Horton, R. H. Major, J. W. Rothert, Jr., H. S. Klotz, Lee Ferguson and W. D. Sarvay, who being elected and sworn the truth to speak upon the issue joined and having partly heard the evidence, the defendant, by counsel, thereupon demurred to the evidence and the plaintiff, by counsel, joined therein, and then the jury retired to their room to consult upon a verdict, and after sometime returned into Court and rendered the following verdict, to-wit: "Subject to the ruling of the Court upon the defendant's demurrer to the evidence, we,

the jury, find for the plaintiff and assess his damages at One Thousand and four Dollars ($1,004.00), with interest thereon from January 20th, 1921". J. W. Rothert, Jr., Foreman. And then the Jury was discharged. Thereupon, the defendant, by counsel, made the following motion, that the verdict of the jury be set aside on the ground that said verdict was contrary to the law and the evidence, which motions the Court ordered docketed and continued, all parties consenting thereto, also consenting that the Court may enter judgment at this or any subsequent terms of this Court.

Memo.: During the trial of this case, various and sudry exceptions were taken both by the plaintiff & defendants to sundry rulings of this Court.

page 6 } And the said Defendant demurs to the evidence in this case and says that the matters shown in said evidence are not sufficient in law to maintain on behalf of the plaintiff the issue joined, and the defendant assigns the following grounds of its demurrer:

FIRST. That the evidence shows that the policies sued on were obtained by misrepresentation and concealment of facts material to the risk when assumed.

SECOND. That the insured in her answers to the questions propounded to her by the medical examiner of the defendant failed to make full and frank disclosures as to the condition of her health and her treatment by physicians.

THIRD. That the policies sued on were obtained by the insured by reason of her misstatements and her suppression of *materials* facts which she ought in good faith to have stated at the time of her examination by the medical examiner of the defendant, as set forth in her applications for said policies.

FOURTH. That the evidence clearly proves that some of the statements, declarations, and descriptions of the insured to the medical examiner of defendant when she took the medical examination for the policies sued on respecting the condition of her health and her treatment by physicians, were material to the risk when assumed and were untrue.

WHEREFORE, for want of sufficient matter in that behalf shown to the jury in evidence aforesaid, the said defendant

prays judgment and that the plaintiff may be barred from having or maintaining his action aforesaid.

WELLFORD & TAYLOR,
for Metropolitan Life Insurance Co., Deft.

JOINDER.

And the said plaintiff joins in the foregoing demurrer to the evidence and says that the matter aforesaid to the jurors in form aforesaid shown in evidence is sufficient in law to maintain the issue joined on the part of the plaintiff.

Therefore, forasmuch as the said defendant has given no answer to the same, the said plaintiff demands judgment and that the jury be discharged after they have assessed
page 7 } the plaintiff's damages, and that the defendant be convicted, &c.

THOMAS A. WILLIAMS,
Adm'r Estate of Margaret R. Kenney.
By BETHEL & THOS. A. WILLIAMS,
Counsel.

page 8 } DEMURRER TO EVIDENCE.

The plaintiff and defendant produced to the jury the following evidence which is all the evidence that was introduced:

(See manuscript for policies, applications, etc.)

page 9 } Virginia,
In Hustings Court, Part II, of the City of Richmond.

December 19, 1921.

Thomas A. Williams, Administrator of Margaret R. Kenney,
vs.
Metropolitan Life Insurance Company.

EVIDENCE FOR THE PLAINTIFF.

HELEN MARTIN,
Was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mrs. Martin, what is your name?

A. Helen Elizabeth Martin.

Q. How old are you?

A. I will be nineteen the 13th day of February.

Q. Are you the beneficiary under these three policies issued by the Metropolitan Life Insurance Com-

page 10 } pany?

A. Yes, sir.

Q. Who was your mother?

A. Margaret R. Kenny.

Q. She is the Margaret R. Kenney on whose life the three policies were taken out?

A. She was.

Q. Do you know whether or not she paid the premiums on the policies from the time she took them out?

A. She did, each week.

Q. Are these three *three* policies of insurance she took out, to the best of your knowledge and belief?

A. (Examining) Yes, sir.

Mr. Williams: I wish to offer these three policies in evidence at this time, as part of the testimony of this witness.

Note: Said policies are here filed.

By Mr. Williamst:

Q. When did Mrs. Kenney die?

A. January 20, 1921.

Q. Did you make demand upon the Metropolitan Life Insurance Company? Are you the only heir of Mrs. Kenney?

A. Yes, sir.

Q. You are the only child she left?

A. Yes, sir.

Q. Did you make demand on the Metropolitan

page 11 } Life Insurance Company for the money due under these policies?

A. Yes, sir.

Q. Did they pay it?

A. No, sir.

Q. They refused to pay it?

A. Yes, sir.

didn't know herself what I had her mother knew

CROSS EXAMINATION.

By Mr. Taylor:

Q. Are these the proofs of death in this case?

A. (Examining) Yes, sir.

Note: Said proofs of death are filed in the record.

By Mr. Taylor:

Q. Mrs. Martin, did not your mother have a cancer, and was she not operated upon for it in the hospital?

A. Not to her knowledge.

Q. She did have a cancer, though, and she was operated upon for it?

A. She was operated on, but I didn't know what it was for, I can't tell you.

Q. And she did not know?

A. I don't know that; I don't know.

page 12 } Q. I understood you to say she did not know.

A. I don't understand the question.

Q. Your mother was operated on for cancer in October, 1919, wasn't she?

A. Not that I know of. She was operated on, but I don't know what for.

Q. You don't know whether she was operated on for cancer, or for what?

A. No, sir.

Q. Do you know whether your mother knew?

A. No, sir.

Q. Was there any recurrence of that trouble in the spring, along about May, 1920, and further treatment of your mother for the same trouble?

A. She was back in the hospital, but I don't know what trouble it was for.

Q. You don't know what trouble it was for?

A. No, sir.

Q. What did the doctors say?

A. The doctors never told me anything.

Q. But she was back in the hospital, in May, I believe it was, 1920?

A. Yes, sir.

Q. How long was she there?

page 13 } A. I think she was there two weeks.

Q. And at that time she was being treated by Dr. Rollings, wasn't she?

A. Yes, sir.

Q. Did he come to see her often?
A. No, not so very often.
Q. He was coming to see her in June, the month that this application was written, was he not?
A. I don't think so.
Q. The last you can recall of his treatment, do I understand you to say, was in May, 1920?
A. The last I can recall of his treatment was just about a week after she came from the hospital.
Q. Do you know the day she did come from the hospital?
A. No, sir.
Q. You just know it was about May, 1920?
A. Yes, sir.
Q. Had there not been some radium treatment started of your mother?
A. Not to my knowledge.
Q. You don't know anything about that?
A. No, sir.
Q. Didn't the doctor say why he took her to the hospital in May?

Q. He just said she must go to the hospital and
page 14 } didn't say what for?
A. No, sir, he didn't say what for.

Q. Didn't he say it was for cateurization?
A. No, sir.
Q. How long was your mother in the hospital in 1919 when Dr. Robins performed the operation?
A. She was there three weeks.
Q. And then she went back to the hospital in 1920, in May?
A. Yes, sir.
Q. And you didn't have any idea what she was there for?
A. Neither time did I know what she was there for.
Q. You did not make any inquiry of the doctor about your own mother?
A. No, sir, I did not.
Q. You just let it go so?
A. Yes, sir.
Q. You did not ask him what was the trouble?
A. No, sir.

By Mr. Williams:
Q. Mrs. Martin, you are married?
A. Yes, sir.
Q. The policies of insurance here, do you remember when those applications were signed by your mother?
page 15 } A. The part of June or the first of July, I don't exactly remember the day.

Q. Do you know whether the applications were signed at the same time she got these policies, or were the policies issued after the applications were signed?
A. The policies were issued after the applications were signed.
Q. Do you remember the times the doctor came there to examine her?
A. You mean, how many times?
Q. Yes.
A. Three times.
Q. He came three times to examine her?
A. Yes, sir.

Witness stood aside.

Note: It is admitted by and between the parties hereto that Thomas A. Williams is the duly qualified administrator of Margaret R. Kenney, deceased.

Plaintiff Rests.

page 16 } EVIDENCE FOR THE RESPONDENT.

C. T. GOODLIFF,
Was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:
Q. Where *fo* you live, Mr. Goodliff?
A. 618 north 31st street.
Q. What do you do now? Anything?
A. Not at present, no, sir.
Q. In 1920 were you working for the Metropolitan Life Insurance Company?
A. Yes, sir.
Q. Did you write the applications for these policies on the life of Margaret R. Kenney?
A. Yes, sir.
Q. How did you come to write them?
A. I was given a phone call by a young lady in the office to call—

Mr. Williams: If Your Honor please, I object to that under the statute.
Mr. Taylor: He is not stating the language at all.

page 18 } The Court: Just state that you were called there and went.

Witness: I went on a phone call that came into the office for an agent to write insurance.

Mr. Williams: Would not the phone call be hearsay? Did the phone call come to another party, or did it come to you?

The Court: All I am going to let him say is that he got a phone call and went to see the lady. Start with the lady you went to see.

Witness: Your Honor, I got the message from the other party to come.

Mr. Williams: Exception.

The Court: In consequence of the message where did you go?

Witness: I forget the number now, on Ashland Street.

By Mr. Taylor:

Q. What was the message?

A. A call to write insurance.

Q. You were called on to write insurance where and for whom?

A. For Mrs. Kenney.

Q. Did you do that?

A. Yes, sir.

page 18 } Q. Had you ever solicited Mrs. Kenney for insurance?

A. No, sir, not personally.

Q. What was the extent of the soliciting you had done there, if any?

A. On a street canvass in that neighborhood I solicited that house.

Q. How many times do you suppose you solicited that house?

A. To my knowledge once, perhaps twice, I wouldn't say.

Q. Had you ever seen Mrs. Kenney to know her?

A. Not previous to the call at which you wrote her, you mean?

A. Yes, sir.

Q. Did you know there was any such person as Mrs. Kenney living there?

A. I did not know the party that came to the door the day I made the canvass previous to that.

Q. What was the extent of your canvass when you went there the first time?

A. Why, Mrs. Martin, I tried to write her husband, and I asked her if anybody else was in the house that I could write.

She said possibly later, not then. She seemed rather impatient, so I left.

Q. So you went to write these policies and got these applications pursuant to a message that was given you in the office?

A. Yes, sir.

page 19 } CROSS EXAMINATION.

By Mr. Bethel:

Q. How many applications for insurance did you write?

A. Two.

Q. Why did you write two?

A. From the fact that Mrs. Kenney didn't know at the time what policy of insurance would suit her best. I wrote one for 60 (cents a week) and one for 40 on two separate policies, so that when I went back to deliver the policies, in case she was not in a position to take the entire amount, she could take either policy she desired to take, or all.

Q. How many applications did you write?

A. Two.

Q. Who wrote the third one?

A. I have no idea. I wrote two.

Q. Look at these applications and see if they are not all three in your handwriting.

A. (Examining) No, sir; this 15c. one is not in my handwriting.

Q. Do you know whose handwriting it is in?

A. No, sir, I do not. Those two are in mine; this is not.

Q. Did Mrs. Kenney sign that application?

page 20 } A. This one?

Q. Yes.

A. No, sir.

Q. How did she get the insurance if she hadn't made application?

A. She made applications for the 60 and 40; that is all she got.

Q. How many policies?

A. Three policies were issued and delivered.

Q. Why did she get three policies when she only signed two applications?

A. I can't tell you that. Possibly it was done through the home office of the Company, possibly because they wouldn't issue that much on that plan, sixty and forty. I can only tell you the policies came down as three different policies; I delivered them as such and collected on them.

Q. You say that you swear that you didn't write that application?
A. Yes, sir.

Mr. Bethel: I would like for the jury to look at those.

Jury examines three applications.

By Mr. Bethel:
Q. Now, you said a moment ago that you had been soliciting people in that neighborhood for insurance, and
page 21 } that you called at this house for insurance but you did not solicit her personally. Whom did you solicit at that house?
A. Mrs. Martin.
Q. Did you ask if there was anybody there who wanted insurance?
A. No. I solicited Mrs. Martin personally for insurance on herself first.
Q. Why didn't you solicit everybody in the house?
A. No one else was there to come to the door.
Q. How do you know that?
A. From Mrs. Martin's statement.
Q. Did you collect on these policies at the house?
A. Yes, sir.
Q. Were the premiums paid promptly?
A. Yes, sir.

By Mr. Taylor:
Q. How much did you say she applied for?
A. Two applications of 60 and 40, a total of $1.00.
Q. That is the total of these three, is it not—60 and 25 and 15?
A. Yes, sir.
Q. So that instead of issuing a 60 and a 40, the company issued a 60 and a 25 and a 15, the same amount was issued that she applied for?
page 22 } A. Yes, sir.

By Mr. Bethel:
Q. You say that you wrote these two applications?
A. I wrote two applications, yes, sir.
Q. One for 60 and one for 25?
A. One 60 and one 40 was the way I wrote it.
Q. Is that on the applications now?
A. The 60 and 40 applications stand as I wrote them.

Q. So you wrote a 40 application?
A. Yes, sir.
Q. Where is that application?
A. I can't tell you. After I turn them in I don't see them any more.

Note: Said applications are here filed with the record.

Witness was then excused.

page 23 }

CHARLES R. ROBINS,
Was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:
Q. Dr. Robins, you are a practising physician and surgeon of the city of Richmond?
A. Yes, sir.
Q. How long have you been such?
A. Well, I graduated in 1894; I have been practising in Richmond since 1895.
Q. Did you do any operation on a Mrs. Margaret Kenney in 1919?
A. Yes, sir.

Mr. Bethel: Now, if Your Honor please, we want to object to that. Anything along that line we consider absolutely irrelevant to this case, for the reason that the party died in 1921 and what her condition was in 1919 we think has absolutely nothing to do with this case.
Mr. Taylor: It is hardly necessary to argue that, if Your Honor please.
The Court: The objection is overruled.

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Mr. Bethel: Exception.

By Mr. Taylor:
Q. When was that operation performed?
A. I operated on her October 2, 1919.
Q. Was it much of an operation, Doctor?
A. Yes, sir, very much; probably the most serious operation that can be done at all.
Q. What was the trouble?
A. She had cancer of the cervix, the neck of the womb.
Q. You say that is a most serious operation?
A. Yes, sir.

Q. Was it a bad case of cancer, or what? What kind of a case was it of cancer?

A. Well, she had a cancer of the cervix or neck of the womb, and that is a very bad condition, one that is very difficult to cure, and in a woman of her age—she was 35—the younger the woman is the more malignant the trouble is. In order to get any prospect of a cure you have to do what we term a radicial operation, that is to say, you remove not only the organ, but what we call the connective tissue in the pelvis and the lymphatic channels; we clean out the pelvis and take out everything in the pelvis. That requires a great deal of dissection and is a very serious operation, and especially in a woman of her build, she was very atout and very hard to operate on.

page 25

Q. Was there much cutting to be done, or not?

A. Oh, a good deal; it was a long operation, hard work.

Q. How did you happen to go into the case? Who brought the case to you?

A. She was referred to me by the doctor who was attending her at the time, Dr. H. B. Sanford; he is a practising physician, and he recognized the case as one for surgery and referred her to me for operation.

Q. Do you know whether or not this lady herself, Mrs. Kenney, knew she had cancer?

A. It is right hard for me to answer that question categorically, because I don't know what I told her. I only know what I usually do. My common practise is when a patient comes to me with a cancer that I imagine I may be able to cure, I tell her she has cancer and needs an operation which may cure her. If it is an inoperative case, I do not tell the patient but tell her people. We considered her case a curable one and therefore operated; I don't mean absolutely curable. but with the prospect of a cure.

Q. Did you tell the family anything about it?

A. I told Dr. Sanford, who was her doctor. I never saw any of her family except the patient herself.

Q. You have no recollection of telling the patient what her trouble was?

A. No, I don't remember, but I am very certain

page 26

that I did. This was 1919, and I cannot possibly remember all the conversations I had then.

Q. You are very certain you told her what?

A. That she had cancer, because that is my usual custom.

Q. How would you put that? Do you mean you are sure you told her that?

A. No, I am not sure, but that is my custom, tell them what

I can so that they can give a reason for doing what I advise. If they don't know what is the matter with them you can't manage them so well.

Q. You feel very certain you did tell her, but you are not willing to say you did?

A. That's the idea, sir.

Witness was then excused.

page 26 }

J. A. ROLLINS,
Was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. Doctor, how long have you been practising medicine in Richmond?

A. I started to practise medicine in Richmond about the middle of July, 1919.

Q. Did you know Mrs. Margaret Kenney, the insured in this case, who died?

A. I did.

Q. Did you practise on her in the year 1920?

A. I did.

Q. Will you please state what that practise was? When was it, Doctor, that you practised on Mrs. Kenney?

A. I first saw Mrs. Kenney professionally about the 20th of January, 1920.

Q. Did you see her often during that time, during January and February, or how was it?

A. I saw her quite frequently, practically daily during January and February. I say practically daily; not every day; some days I didn't see her.

Q. When did you see her again after February?

page 28 }

A. I saw her a few times during March.

Q. Did you see her in April?

A. I may have seen her once or twice, or three or four times, in April, so far as I can recall.

Q. How about May?

A. I saw Mrs. Kenney during May.

Q. Did you see her in her home?

A. About the middle of May, yes.

Q. What was her trouble then?

A. During May she had what I considered recurrent carcinoma of the pelvis.

Q. Carcinoma is cancer?

A. Yes, it is generally spoken of as cancer.
Q. She had recurrent carcinoma in May?
A. About the middle of May, yes.
Q. Did you have her taken to the hospital, or not?
A. Yes.
Q. Did you treat her for it? Did you treat her in the hospital for it?
A. I treated her for ulceration of the vault of the vagina.
Q. Your treatment was cauterization; is that the idea?
A. I did do a cauterization about the middle of May for this ulceration in the top of the vagina.
Q. Did you see her often during the middle of
page 29 } May?
A. I saw her daily in the hospital for about ten or eleven days.
Q. Did you see her in June?
A. I think I saw her three or four times during June, that is, after she had gone home from the hospital; she was in the hospital ten or eleven days.
Q. Did you tell her what she was going to the hospital for?
A. I told Mrs. Kenney she had ulceration in the top of the vagina, which demanded some treatment.
Q. Did you tell her what the treatment was to be? I mean, did you tell her it was to be cauterization?
A. I don't know whether I told her it would be cauterization or not. I told her it would be some local treatment.
Q. You don't recall that you told her she had a cancer?
A. I recall that I did not tell her.
Q. Did you tell her family, or any of her people?
A. I told her daughter.
Q. Was that Mrs. Martin here?
A. Yes, sir.
Q. You told her that her mother had cancer, did you?
A. Yes; not in the presence of Mrs. Kenney.
Q. That is the usual practise, is it, not to tell the people direct?
A. I usually do not, unless it seems to be indi-
page 30 } cated—unless some urgent treatment is necessary which demands immediate co-operation.
Q. You said in the proofs of death "carcinoma of pelvis recurrent after carcinoma of the uterus, duration from personal knowledge one year." That is your statement in there, is it, Doctor?
A. (Examining proofs of death) Yes, sir.
Q. And she died from cancer?
A. That was my statement.

Q. Was any radium treatment given for this cancer?
A. There was radium treatment attempted.
Q. It was not carried out, then?
A. No, sir.
Q. Why was that?
A. On account of a hemorrhage from the ulceration.
Q. You mean, it was considered dangerous to keep up the radium treatment?
A. Yes.
Q. Did Mrs. Kenney know that radium treatment was being given her?
A. She knew that it was contemplated being given her, but she knew that the treatment was unsuccessful, as I say, on account of the hemorrhage.

page 31 ⟩ Q. When was that radium treatment started—about when?

A. That was the first part of May, to the best of my recollection. I am not positive about that.
Q. Did her family know that radium treatment had been attempted, that it had been started and discontinued; I mean, Mrs. Martin and her husband, or do you know anything about that?
A. Yes.
Q. All you know, then, about Mrs. Kenney's knowledge of it is that she knew it had been discussed, but you don't know, you say, whether Mrs. Kenney knew that the radium treatment was started, or not, or do you know?
A. Mrs. Kenney knew that I wanter her to have radium treatment; she knew that it was attempted and that it was unsuccessful on account of the hemorrhage.

CROSS EXAMINATION.

By Mr. Bethel:
Q. Doctor, you spoke of this radium treatment having been given Mrs. Kenney, and that the attempt at radium treatment was discontinued on account of hemorrhage. What was the cause of that hemorrhage?
A. The method of treatment, the induction of needles containing radium.

page 32 ⟩ Q. Then the hemorrhage was not due to her trouble but was due to needles being introduced?

A. Yes, sir.
Q. The needles were stuck in the blood vessels?
A. Yes, sir.

Q. Can you on your oath tell this jury that Mrs. Kenney died of cancer which she had in July, 1920?

A. I can say I believe she died of cancer. I did not make any microscopic examination of any tissue.

Q. And therefore you cannot swear to that?

A. No.

Q. You can't tell whether the disease is cancer or not unless you make a microscopic test?

A. Not definitely.

Q. Then you cannot say she had cancer in July, 1920, when she took out these policies?

A. Except from my opinion based on the clinical appearance of the ulceration and the symptoms.

By Mr. Taylor:

Q. Doctor, would the fact of this hemorrhage indicate, one way or another, the cancerous or non-cancerous condition of this woman?

A. I don't think so.

Q. But it was your judgment and your opinion

page 33 } that she did have cancer at that time?

A. From the clinical findings I did.

Witness was then excused.

page 34 } H. B. SANFORD,

Was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. You are Dr. Sanford?

A. Yes, sir.

Q. You have been practising medicine in Richmond about how long, Doctor?

A. Since 1904, I graduated in the spring of 1904.

Q. Did you know or have under your treatment Mrs. Margaret R. Kenney in 1919 or 1920?

A. Yes, sir.

Q. Dr. Robins has just testified that he performed an operation on her in October, 1919, and that the case had been referred to him by you. Is that correct?

A. That is correct.

Q. What was Mrs. Kenney's trouble, Doctor?

A. She was suffering with a very serious condition involving the neck of the womb, the uterus. I referred her to Dr.

Robins for examination, and his consultant, and the diagnosis was cancer, carcinoma of the cervix.

Q. This was the diagnosis of you and Dr. Rob-
page 35 } ins?

A. Yes, sir.

Q. Of both of you?

A. Yes, sir.

Q. The diagnosis was cancer?

A. Yes, sir.

Q. And Dr. Robins did the operation?

A. Yes, sir, a very radical operation.

Q. Just what do you mean by that, "very radical"?

A. Removing the uterua, the tubes, ovaries, and as much of the connective tissue around the uterus as was possible.

Q. He removed the uterus, among other things?

A. Yes, sir.

Q. There was a good deal of cutting done, then?

A. Oh, yes, sir. Of course, I don't know whether he removed all of the uterus or not, but, when we speak of a radical operation, everything that is connected with the uterus and surrounding tissues that is safe to remove is taken out; otherwise, the cancer will continue to grow.

Q. Do you know whether Mrs. Kenney knew that she had this cancer?

A. I told her she had it; otherwise she would not have been operated on.

Q. Otherwise she would not have been operated on?

A. No, sir. She was sick and wanted relief. I
page 36 } advised treatment under a surgeon. She refused the treatment. I advised treatment under a surgeon. I advised her to go to a hospital and take the treatment that was best for her case. She refused to go to the hospital. Then I explained fully her general condition. It was pathetic. I had to go into the case in detail and explain to her in a common sense way her condition; that is, not in the ordinary technical terms, because she would not have understood them. I had to impress on her the seriousness of the trouble and get her to understand what was the best chance for her life. She took my advice, went to Stuart Circle Hospital, was operated on by Dr. Robins, returned home. I treated her, and she apparently recovered; that is, she apparently recovered fairly well from the cancerous condition.

Q. Doctor, do you know from any subsequent treatment anything about any recurrence of that cancerous condition?

A. I continued visiting her as her physician until January.

I saw her off and on from the time she left the hospital in May.

Mr. Bethel: January of what year?

Witness: 1920. She was operated on in October, 1919. I saw her back and forth in September and October, 1919, and was her physician off and on all of that time until January she complained of severe pains in her abdomen, the
page 37 } lower part of the abdomen, and also at times in her back. I did everything possible to give relief, comfort and consolation. She was taken with a very severe attack of influenza. She would recurrently improve at times and then have relapses. The weather was very cold. In view of the fact that she complained of pains in her abdomen and back, I suggested to her the advisability of going back to Stuart Circle Hospital for two or three days and have Dr. Robins look her over.

By Mr. Taylor:

Q. When was this, Doctor?

A. This was in January. Now while she was in the height of this attack of influenza, she got another physician, Dr. Anderson; I was turned down and Dr. Anderson came in. I have not seen her since; I didn't know anything further about the case.

Q. Was Dr. Anderson associated with Dr. Rollings?

A. Yes, sir, they work together; Dr. Rollings was associated with Dr. Anderson.

Q. What was the last that you think you saw Mrs. Kenney?

A. I did not see her from shortly after Christmas, in January.

Q. Of 1920?

A. Of 1920. I saw her in January.

Q. And advised her at that time to go back to
page 38 } the hospital?

A. I advised her at that time to consult Dr. Robins. I felt it was my duty to give her the advantage of this advice. It was my duty to protect here as far as possible, because there is always a possibility of the recurrence of this cancerous condition; and if there was a condition of the cancer brewing again or flaring up again, it was my duty to advise her and take all necessary precautions to protect her; and I advised her to go back to Dr. Robins and got back to the hospital.

CROSS-EXAMINATION.

By Mr. Bethel:

Q. Is not there a technical word by which the operation you performed on Mrs. Kenney is known?

A. I did not perform any operation myself; Dr. Robins performed it.

Q. You sent her to Dr. Robins; do you know what kind of operation he performed?

A. Well, I have just described it.

Q. Do you know of any such an operation as the Wertheim operation?

A. Yes, sir.

Q. Is that the operation he performed?

A. That is the operation he performed.

page 40 } Q. Explain what that operation is?

A. That is the removal of the uterus and its appendages, and the connective tissue of those parts of the pelvis is removed, as much of the connective tissue in close proximity to the cancerous area as it is possible to remove, so that the cancer will not spread. The *cacerous* field was cauterized so as to seal the mouths of the blood vessels and peeq particles of cancerous tissue from breaking off and floating in the blood stream to cause cancer at other places.

Q. Was the neck of the womb entirely removed?

A. Well, when you remove the womb, of course the neck comes along with it.

Q. Then you removed the entire cancer, did you?

A. As far as it was possible.

Q. Did you remove the neck of the womb?

A. Of course, the neck of the womb was never taken off; it is just the neck of the womb. When the womb and its appendages were taken out, of course, the neck came along with it.

Q. And the cancer went along with it also?

A. Yes.

Q. A great many times, when a cancer is removed, it breaks out in another part of the body, does it not?

A. Well, it does sometimes; that is a risk.

page 40 } Q. If Mrs. Kenney had a malignant cancer in October, 1919, but for the operation that would have killed her much earlier than 1921, would it not? They do not usually live from the fall of 1919, October, 1919, until January, 1921, with malignant cancer of the womb, do they, without treatment, at the age of 36, or 35, I believe?

A. Well, cancer, you can't tell just how long a person might live with cancer. It depends upon the rapidity of growth at

the seat or site of cancer, and it depends upon the amount of metastasis.

Q. What is that?

A. It is nothing more than fragments of cancer breaking off and floating in the blood stream and lodging in the heart, liver, kidneys or lungs, and may kill you in a few months. It not infrequently happens that metastasis will kill long before the cancer would where it first started; so I cannot tell. Sometimes they die in six months, sometimes in twelve, sometimes eighteen, and some slow forms of cancer will go two years.

Witness was then excused.

page 41 } J. R. WILLIAMS was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. Doctor, you are a practising physician in the city of Richmond?

A. I am.

Q. You examine risks for the Metropolitan Life Insurance Company, I believe?

A. I do.

Q. Did you take the application of Mrs. Margaret R. Kenney in June of 1920?

A. I did.

Q. I am going to hand you these papers, Doctor; will you state whether those are your signatures, and whether Mrs. Kenney signed them there?

A. (Examining) That is my signature, and she signed them.

Q. Did you put down what Mrs. Kenney told you in answer to those questions, Doctor?

A. I did.

Q. Did she say anything to you about having had any cancer?

Mr. Williams: Same objection.

page 42 } The Court: Is the question asked on the application?

By Mr. Taylor:

Q. Doctor, here is Question No. 2; did you ask her whether she had tuberculosis, cancer or tumor?

A. I did.
Q. What did she say?
A. She said she had not.
Q. And you so recorded it on the application?
A. Yes.
Q. The question was asked about hospital treatment; what did she say about that?
A. She told me that Dr. Robins was the last one that treated her in 1918.
Q. Is there any statement as to whether she had had any other medical or hospital treatment there?
A. That was the last.
Q. Look at Question No. 6; did you ask her whether she had had any other hospital or medical treatment, and if so, what was her answer?
A. Here is the question: "I was in the hospital for ——," I asked her whether she had been in a hospital, how many times, and when was the last time, and what doctor, and the answer given was 1918.

page 43 }

Q. She didn't tell you anything about the hospital treatment of two weeks in May, 1920?
A. No.
Q. She didn't say anything about the treatment by Dr. Rollings, according to that application, did she?
A. Dr. Robins was the last one.
Q. It was Dr. Robins when the operation was performed, but Dr. Rollings treated her practically every day during January and February, and nothing is said about that in there?
A. No.
Q. And nothing is said about any cauterization?
A. No.
Q. You recommended that risk as a first-class risk, I believe?
A. I did.
Q. Suppose she had made the statement there that she had been operated on for cancer, that she had just come out of the hospital the month before, and than an examination was made for a cauterization, would you have recommended the risk as first-class?

Mr. Williams: I object.
The Court: Objection overruled.
Mr. Williams: Exception.

A. I would have recommended that it be rejected.

page 44 } CROSS-EXAMINATION.

By Mr. Williams:

Q. She told you about this operation that Dr. Robins performed on her, did she?

A. Yes.

Q. And you did not investigate that at all?

A. I asked her what the operation was. I think what she told me was that Dr. Robins operated on her and she had her uterus suspended.

Q. You did not investigate to find out whether the uterus was removed?

A. I asked her that question and she said no.

Q. Did you make any examination of her?

A. Yes, of the chest and lungs.

Q. Weren't you there to examine her? Isn't that the duty of the physician who examines for a policy of insurance?

A. Not a general examination.

Q. Don't you make a local examination of that?

A. No, we examine the heart and lungs, and if we have any suspicion whatever we recommend rejection.

Q. At the time you examined, were her heart and lungs in good condition?

A. Yes, satisfactory. Her respiration was 18, heart-beats 76.

Q. Is that good, bad or indifferent?

page 45 } A. That is good.

Q. When she told you she had the uterus suspended, did you investigate through Dr. Robins to find out what his operation was for?

A. No. That is a very minor operation; uterus suspended is not a serious operation.

A. It is a minor operation.

Q. What would you call a minor operation?

A. What you would call a minor operation. We would take the risk if it was just uterus suspended.

Q. Didn't she tell you there, where her daughter heard it, that she had been in the hospital in May previous to the time you made your examination?

A. I have no recollection of it.

Q. You have no recollection of it?

A. No.

Q. Do you deny that she told you that?

A. Yes, I do.

Q. You say emphatically to this jury that that is not so?

A. I say emphatically so.

Q. You say emphatically that she did not tell you that Dr. Robins was treating her in May, 1920?

A. I do.

Q. You tell this jury that emphatically?

A. I do.

page 46 } Q. Didn't you change this; you have got in *her* 1918—1919 on this application here, where you told the jury 1918. Didn't you make that 1919 on the application?

A. The two examinations were both made at the same time. Yes, I made that.

Q. You told t he jury 1918?

A. Yes, that was made at the same time.

Q. Then it was 1919 instead of 1918 that her uterus was suspended.

A. There are two answers of uterus suspended.

Mr. Taylor: I don't think it is possible to state whether it is 1919 or 1918; it is written over.

Witness: It was the same treatment both times; two answers and the same treatment.

By Mr. Williams:

Q. Is that 1918 or 1919?

A. It is the same as the one under it, it is the same as that one, the same as that one, 1918. There it is on there.

Q. I ask you to state whether in clause 4 it is 1918 or 1919?

A. 1918.

Q. What mark was put there afterwards?

A. I don't know what it is.

Q. You made the figures, didn't you?

page 47 } A. I made the figures. It was 1919, what I intended it for.

Q. Then you put something there and changed it; is that right?

A. It might have been a failure of the pencil; I may have changed it; she may have told me six months before, and I might have changed it; but the second question under it is the same.

Q. The others you put 1918?

A. Both or all of the examinations were made at the same time. She might have told me the fall before, or something like that.

Q. I just wanted to know. Didn't she tell you further, Dr. Williams, that she had been treated by Dr. Sanford, and he recommended her to go to Dr. Robins?

A. I have no recollection of it.

Q. Didn't you learn from her that her family physician at the time Dr. Robins operated on her was Dr. Sanford?

A. I have no recollection of it. I put down the major operation in cases of that kind.

Q. You put down a major operation, but you don't put down a minor?

A. I didn't mean that. I mean that if Dr. Sanford was treating her and sent her to a surgeon for a major operation, I would put down Dr. Robin's name if he did the operating.

page 48 } Q. And you would not put down the advising physician. Do you tell the jury that she did not tell you that Dr. Sanford was her family physician at the time?

A. She may have told me that.

Q. And she may have told you that she had some minor operation in May when Dr. Rollings was treating her?

A. No, she didn't say that.

Q. Didn't you ask her who was her attending physician in May?

A. I asked her the last time she had a doctor. That is recorded on that, the date of the last time any doctor ever treated her.

Q. And that is the last time she told you?

A. Yes, that is my recollection.

Witness was then excused.

page 49 } W. J. SHILLENBERG,
was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. Mr. Shillenburg, will you please state your position with the Metropolitan Life Insurance Company in the city of Richmond?

A. Manager of the Richmond branch office

Q. Something has been said, Mr. Shillenberg, about who wrote something in this application, or why three policies were issued in this case instead of two. Are you able to explain that?

A. I think I can.

Q. Just explain it to the jury.

A. In the first place, there was two applications written here by the agent, and they were handed to Dr. Williams, who

examined and made only the two examinations. But when they got to New York, in some way, the policies were issued in multiples, some 10, some 15 and some 25, and this particular insurance here the company saw fit to issue three policies. This alteration, you see, the clerk in the office made that; but he puts the policy number up here to show that it is issued on the same examination, and inside you see the nota-
page 50 } tion, "This policy issued on the same examination as 61890318," which is one of the other policies.

Q. The insurance asked for was given, but it was given in three policies instead of two; is that right?

A. Yes; the same amount of protection was issued as if they had issued two policies.

Q. Does your position and experience with the Company enable you to say what would have been the action of the Company with respect to issuing or rejecting the policies asked for in these applications if the medical examination had shown that this applicant had been operated on for cancer?

A. They would have rejected that application.

CROSS-EXAMINATION.

By Mr. Bethel:

Q. Did you look at the applications, as to the handwriting of all three?

A. I didn't notice particularly.

Q. Are you familiar with Mr. Goodliff's handwriting?

A. I think so.

Q. Look at them and see if they are not all three in Mr. Goodliff's handwriting.

A (Examining) I don't think so. I think that this one, as I said before, was a copy of that application made
page 51 } by some clerk in the home office, and also this notation in there and the memorandum to show that two policies were issued for the same amount as one would have been had they issued that one policy.

Q. You don't think so?

A I don't think so.

Witness was then excused.

Defendant rests.

EVIDENCE FOR PLAINTIFF IN REBUTTAL.

page 52 } HELEN MARTIN,
being recalled, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mrs. Martin, did you, or anyone in your house, to your knowledge, phone down to the Metropolitan Life Insurance Company to send a man out there to write insurance on Mrs. Margaret Kenney?

A. We did not.

Q. How was the insurance taken out? Did anybody solicit it?

A. Yes, sir, Mr. Goodliff solicited it.

Q. How many times?

A. Every time he was in our neighborhood for a month.

Q. How often did he come?

A. Once a week.

Q. To collect the premiums on the insurance?

A. Yes, sir.

Q. You tell the jury that you did not solicit him or anybody to come, but he came there voluntarily?

A. We did not.

page 53 } Q. Do you tell this jury that you were in the house at the time Dr. Williams examined your mother?

A. I was.

Q. Tell the jury just what transpired between Dr. Williams and your mother as to her sickness or the attention she had had from physicians.

A. She told him she had been to the hospital in October, 1919, under the care of Dr. H. B. Sanford and Dr. Robins, and she also told him that she had had the flu in January and had been under the care of Dr. Rollings at that time, also under the care of Dr. Rollings in the hospital in May, 1920.

Q. You heard her tell Dr. Williams that?

A. I did.

Note: At the second trial of this cause on May 15, 1922, it is agreed by and between counsel that Mrs. Martin would further testify that at the time Dr. Williams was examining her mother she was close by and heard all that passed between the doctor and her mother, and that the doctor did not ask her mother a question as to cancer, and that no mention whatever was made of cancer by either party in the examination.

CROSS-EXAMINATION.

By Mr. Taylor:

Q. Did your mother ever see Dr. Sanford when you were not present?

A. Not to my knowledge she did not.

Q. But you don't know—

A. I can't say definitely that she did not.

Q. And you never made any inquiry from Dr. Sanford, you say, or Dr. Robins, or Dr. Rollings, or any of those doctors, as to what was the matter with your mother?

A. No, sir, I did not.

page 54 } Q. Did you feel any curiosity about that subject?

A. No, because I thought mother was capable of attending to her own business in that affair.

Q. And you did not care to ask any of the doctors anything about her?

A. No, sir, I did not.

By Mr. Williams:

Q. How old are you?

A. I am nineteen. I will be nineteen in February.

Q. You were sixteen in 1919?

A. Yes; I was sixteen at the time mother was in the hospital?

Q. And you were not married them?

A. Yes; I was married in June; she went to the hospital in October.

Witness was then excused.

page 55 } WILLIAM A. SIMPSON

was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Bethel:

Q. You are a regular practising physician, are you not, Doctor?

A. Yes, sir.

Q. From what college did you graduate?

A. The Medical College of Virginia.

Q. How long have you been practising?

A. Since 1918.

Q. What has been the character of the practise you have had, as to the volume of it?

A. It has been largely confined to surgery, a good deal of it.

Q. At what place?

A. I was in the United States Naval Hospital at Portsmouth during the war; 3,500 beds.

Q. Was it mostly filled?
A. It kept full all the time.
Q. How many cases did you see during that period?
A. Surgical cases, you mean?
page 56 } Q. Yes.
A. We ran eight to ten major operations a day.
Q. It has been testified here in the case of Mrs. Margaret R. Kenney that the death certificate shows that she died from recurrent cancer, and that in July, 1920, she took out insurance policies in the Metropolitan Life Insurance Company, She was medically examined on the 26th of June, 1920, and she died on January 20, 1921. It is in testimony here in the death certificate that she died of recurrent cancer. It is also in the testimony that from the time she took out these life insurance policies, or from the time of the medical examination, up to the time of her death, none of her tissue was examined by microscopical examination. I want to ask you, can any practising physician tell whether or not a person has cancer except by a microscopic examination?

Mr. Taylor: We object to that question. He has not seen this party. No foundation has been laid for it.
The Court: I do not think you have laid the proper foundation for it yet.

By Mr. Bethel:
Q. Are you acquainted with the treatment of cancer?
A. Yes, sir, as much as physicians know about it, generally speaking.
page 57 } Q. Do you know the cause of cancer, or does any physician know the cause of cancer?
A. I don't think anybody would be bold enough to say that he knew what the cause of cancer is.
Q. Can you tell whether a person has cancer or not, without a microscopical examination?
A. You have two criterions; one is the gross appearance of the organs involved, and the other is stamping it absolutely by a microscopic examination of the tissues involved.
Q. Then you cannot tell absolutely, as I understand, whether a person has cancer except by a microscopical examination?
A. If you have organs in which you suspect cancer by their gross appearance or what not, stamping it as cancer absolutely rests upon the microscopical examination of the tissues involved, and that is done to such an extent that even in operations a section is removed and examined while the patient is on the table, to determine what extent of removal there should be of that organ. You may want to remove a portion of it and you may want to remove the whole organ.

Q. If I understand you properly, then, one who is suspected of having cancer cannot be definitely said to have cancer unless you have microscopical examination?

A. That is the final word.

page 58 } CROSS-EXAMINATION.

By Mr. Taylor:

Q. In this particular case—let's come down, as has been stated, to brass tacks—do you know Dr. Charles Robins?

A. Yes, sir, very well.

Q. His standing is high as a surgeon, isn't it?

A. Yes, sir, absolutely.

Q. In this particular case, if Dr. Robins testified that he did the operation in October, 1919; that it was a radical operation, most serious, and for a very malignant case, required a great deal of cutting, and that it was cancer; and another physician states that on January 20, 1921, just a little over a year after that, who had her under treatment beginning a few months after the operation by Dr. Robins, and had carried her back to the hospital himself eight months after to Dr. Robins for treatment—if he said, although admitting he made no microscopical examination, that she had carcinome of the pelvis recurrent after carcinoma of the cervix, are you in a position to state that they were mistaken?

Mr. Williams: If Your Honor please, I object. He has not got it all in there. Dr. Robins said it was a curable cancer.

The Court: Dr. Robins said that where he thought the cancer was curable he notified the patient, and where
page 59 } he was not satisfied it was curable he did not tell the patient. Objection overruled.

Mr. Williams: Exception.

A. You mentioned two men; who is the "he" you mentioned?

By Mr. Taylor:

Q. I am speaking of the doctor who started treating her in January, after Dr. Robins operated in October. He said she died of carcinoma of the pelvis recurrent after carcinoma of the uterus. Are you able to state, without having seen the woman, that he was mistaken in his diagnosis?

A. I would not presume to say.

Mr. Williams: Whether he was right or wrong?

Witness: Whether he was right or wrong.

By Mr. Taylor:

Q. Did you ever see this woman?

A. No, sir.

Q. In the naval hospital the practice is with soldiers and men, and not females; and you don't know anything about this lady, as I understand?

A. I have never seen her.

By Mr. Bethel:

Q. Dr. Sanford sent this lady to Dr. Robins to be operated on; he was the family physician, as I understand,
page 60 } and he testified that the cancer was on the neck of the womb, and that not only the neck of the womb but the surrounding tissue was removed, which, of course, included the cancer he said. Now, not knowing the cause of cancer, can you state that any cancer she may have had thereafter was the same cancer or some other cancer?

A. In the same location?

Q. No, in a different location.

Mr. Taylor: Yes, I beg pardon; not in the same organ but in the same location; "carcinoma of the pelvis recurrent after cancer of the uterus;" they are pretty close together.

By Mr. Bethel:

Q. If you have cancer in one place and remove the cancer, it will sometimes break out in other portions of the body?

A. That is true.

Q. If it comes after the other, you don't speak of it as the other, do you?

A. It is usually spoken of as metaastatice, from the same growth.

Witness was then excused.

Evidence closed.

page 61 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 8th day of June, 1922.

This day again came the parties by Counsel, and the Court having maturely considered the Defendant's demurrer to the evidence, and the motions made by the defendant on the 15th day of May, 1922, to set aside the verdict of the jury on the

ground that said verdict was contrary to the law and the evidence, is of opinion and doth decide that the matter shown in evidence to the jury is not sufficient in law to maintain the issue on the part of the plaintiff, and doth sustain the said demurrer and the said motion to set aside the verdict of the jury on the ground that said verdict was contrary to the law and the evidence, to which rulings of the Court the Plaintiff, by Counsel, excepted. Therefore, it is considered by the Court that the Plaintiff take nothing by his bill, but for his false clamour be in mercy, &c., and that the defendant go thereof without day and recover against the Plaintiff its costs by it about its defense in its behalf expended. And the said Plaintiff, by his Attorney, having expressed his desire to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas,* it is ordered that the execution of this judgment be suspended for a period of 90 days in order to enable the said Plaintiff to apply for said writ, but this order is not to be effective unless the Plaintiff or some one for him shall, within 15 days from the entry of this order, enter into a bond in the penalty of $200.00, with surety to be approved by the Clerk of this Court, and conditioned to pay all proper costs in this case by reason of said appeal. The said Plaintiff is given 60 days from this day within which to file such Bills of Exceptions as he may be advised is proper.

page 62 } To Mr. Joseph Taylor:

Please take notice that we shall apply to the Clerk of the Hustings Court, Part II, for a transcript of the record or so much of the case of Thomas A. Williams. Administrator of the estate of Margaret R. Kenney vs. Metropolitan Life Insurance Company, as will enable the Supreme Court of Appeals of Virginia, to whom a petition for a writ of error and *supersedeas* is to be presented, properly to decide on said petition, and to enable the Court, if the petition be granted, properly to decide the question that may arise before it.

Given under our hands this the 5th day of July, 1922.

THOMAS A. WILLIAMS,
Admr. Estate Mrs. M. L. Kenney.

By Counsel.
BETHEL & WILLIAMS.

I hereby accept legal service of the above notice, but if any-

thing less than all of the evidence is to be certified I, of course, reserve the right to agree on what portion is to be omitted.

JOS. W. TAYLOR,
WELLFORD & TAYLOR,
Counsel for Metropolitan Life Insurance Co., Deft.

Richmond, Va.,
September 8, 1922.

Mr. W. E. DuVal, Clerk,
Hustings Court, Part II,
Richmond, Virginia.

Dear Sir:

In making up the record in the case Thomas A. Williams, administrator, etc., vs. Metropolitan Life Insurance Company, it is agreed hereby between counsel for plaintiff and defendant that the original policies of insurance and three applications, therefor, shall be used in the Supreme Court as exhibits with the records to avoid the necessity of copying the same into the records.

THOMAS A. WILLIAMS,
Admr. Estate Mrs. M. L. Kenney.

By BETHEL & WILLIAMS,
Counsel.

page 64 } WELLFORD & TAYLOR,
Counsel for Metropolitan Life Insurance Co.

I, W. E. DuVal, Clerk of Hustings Court, Part II, of the City of Richmond, State of Virginia, do hereby certify that the foregoing is a true transcript from the foregoing cause. and I further certify that the notice required by section 3457 Code of 1904, was duly given in accordance with said section. Also the bond required to be given in this case suspending the execution for a period of ninety days, has been given before the Clerk of this Court with surety, which surety was approved by the Clerk.

Costs of Record $17.00.

Given under my hand this 30th day of September, 1922.

W. E. DUVAL, Clerk.

A Copy—Teste:

H. STEWART JONES, C. C.

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