Was there a post-mortem examination?—Yes.

Date this 8th day of December, 1892.

(S.,) JOHN B. CRAWFORD,
Attending Physician.

STATE of PENNSYLVANIA, }
COUNTY OF LUZERNE. } ss.

On this eighth day of December, 1892, before me came the above-named John B. Crawford, M. D., known to me as a physician in regular standing, and made oath that the answers by him given to the foregoing questions are true and full, to the best of his knowledge and belief.

(S.,) FRANK H. BAILEY,
Notary Public.

NOTICE.

1st. When the proceeds of a policy are payable to an administrator or executor, a certificate of authority to act as such will be required from the proper court.

2d. When a policy has been assigned as collateral security for debt, evidence must be given to the company of the amount which constitutes the claim, and must be verified upon oath before a notary public. The administrator or executor of the insured and the assignee must unite in a release to the company.

3d. When the death of the person insured is peculiar in any respect, the forms of notice and proof must be adapted to the circumstances of the case.

I hereby certify that I have been acquainted with Helene Roberts, the deceased, for about two years, and know her to have been the identical person insured in the New England Mutual Life Insurance Company.

(S.,) L. D. SHOEMAKER.

IN THE

SUPREME COURT OF PENNSYLVANIA,

EASTERN DISTRICT.

NO. 61, JANUARY TERM, 1899.

GEORGE A. WELLS, ADMINISTRATOR OF HELENE ROBERTS, DECEASED, NOW TO THE USE OF JOHN WELLES HOLLENBACK AND L. D. SHOEMAKER,

Appellees,

vs.

THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Appellant.

PAPER BOOK OF APPELLEE.

JOHN T. LENAHAN,
H. W. PALMER,
Counsel for Appellee.

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[illegible] TIMES PRINT.

IN THE

Supreme Court of Pennsylvania,

EASTERN DISTRICT.

NO. 61, JANUARY TERM, 1899.

GEORGE A. WELLS, Administrator of HELENE ROBERTS, deceased, now to the use of JOHN WELLES HOLLENBACK and L. D. SHOEMAKER,

vs.

THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

Appeal of The New England Mutual Life Insurance Company of Boston, Massachusetts, from the judgment of the Court of Common Pleas of the County of Luzerne, No. 99, May Term, 1893.

APPELLEE'S PAPER BOOK.

APPELLEES' ARGUMENT.

The defense set up by the insurance company was:—

1st The policy is by its terms a Massachusetts contract.

2nd. That as such it is to be judged by the laws of Massachusetts.

3rd. That under a decision of the Supreme Court of that State in the case of Hatch vs. Ins. Co. 120 Mass, 550, no recovery can be had on a policy when the facts appears that the insured has voluntarily submitted to operations resulting in an abortion, knowing that the operation was dangerous to her life, without any justifiable medical reason, because to allow a recovery in such case would be against public policy.

In order to make out this defense it is perfectly clear that the burden was on the defendant to show the facts upon which this policy of law was based, as follows:—

a. That the insured died from the effects of an abortion.

b. That she submitted to the operation voluntarily.

c. That she knew it was dangerous to her life.

d. That there was no justifiable medical reason for the operation.

This burden the defendant assumed, fully recognizing the necessity of establishing each of these propositions as conditions precedent to a successful defense.

They produced testimony tending to show that the insured died of septicemia, or blood poisoning, the result of an abortion. Her attending physicians so testified, and the fact was stated in the proofs of death.

The other conditions were not proved to exist. There was no evidence to show that she knew that the operation

dangerous to her life, or to show that there was no justifiable reason for it. The attending physicians were asked the question, and all responded that they could not from the examinations during the sickness or after death, whether such reasons existed. The jury was asked to find as a fact that which the doctors who attended before and after death were unable to give an opinion upon.

And the question was fully and fairly submitted to the jury by the court:

(See Appellant's Paper Book, pages 78 and 9.)

Extract from charge:

"It is contended on the part of the defendant that the insured, being a single woman, became pregnant and voluntarily and without any justifiable medical reason submitted to an illegal criminal operation for the purpose of procuring an abortion upon herself and that she died as a direct result thereof. If that contention upon the part of the defendant is sustained by the fair weight of the evidence in this case, the plaintiff here ought not to recover."

"It is conceded by both sides that there was an abortion. But was it the result of an illegal operation voluntarily submitted to for such purpose and without justifiable medical reasons? The principal contest here has been: was it submitted to voluntarily by the defendant and without justifiable medical reasons. If you believe it was submitted to voluntarily by Miss Roberts and without justifiable medical reasons, as stated, you should return a verdict in favor of the defendant. If this contention has not been made out by the fair weight of the evidence, and to your satisfaction, you should return a verdict for the plaintiff for the full amount with interest."

After stating the evidence the judge said: (Ibid pp. 11 and 12.)

"Suppose, gentlemen of the jury, you answer these two questions in the affirmative: First, that the operation had been performed upon her in Nanticoke, and next that such statement is true. The next question for you to pass upon will be, was there sufficient medical reason for performing the operation, because as stated by both gentlemen, and by the doctors, an abortion is simply the premature birth of a child, and there may be many accidental or legal abortions, in other words, abortions which are not criminal. From the evidence in this case do you believe that this woman, unmarried, voluntarily submitted herself to have an abortion performed, without justifiable medical reasons for so doing? The stress of the case is there. Now, what evidence is there upon this question? At the time Dr. Guthrie examined Miss Roberts, in August, 1891, a year and about three months prior the organs and parts of the body examined by him were in good condition. So far as appears in that case from that time up to the time of the unfortunate death there was no medical or surgical examination of the woman. You have the fact that the woman was unmarried; it has not been disputed she was pregnant, with child, the foetus being about three months of age at the time of the delivery. It is not necessary to prove by direct and positive evidence that there was a medical necessity for the operation. If you find in the case indirect and circumstantial evidence which satisfies you that there was no justifiable or good medical reason for it, you should find a verdict in favor of the defendant company. There is some medical evidence in the case. Dr. Crawford in his deposition has testified as follows: "Q. Could the lacerations of the womb as described by Dr. Kirwin have been produced by an abortion other than a criminal abortion? Answer. Well, perhaps, that may be a hard question to answer. Lacerations of the womb sometimes occur from spontaneous delivery, but usually not at an early period, at full time. Where the foetus is large the womb is sometimes ruptured, but I don't think that in delivery at

an early date. I would say, however, if it is proper, that the condition the lacerations that Dr. Kirwin described would correspond fully with the description which she gave to me of the operation that had been produced—the violence that was done to her womb at the time of the operation." It is not a question of the violence which was done to her womb, or whether she died in consequence. The question is does the fair weight of the evidence satisfy you that there was a medical reason for this operation? Again, Dr. Stoeckel testified substantially that she was unable to give an opinion, or would not give an opinion. Upon a hypothetical question put to Dr. Guthrie, called by the defendant, he stated from the facts submitted to him he was unable to give an opinion. Dr. Bullard and Dr. Guthrie gave what in their judgment were conditions existing in a female, pregnant, which would justify or give good medical reasons for an abortion. One, as I remember it, is the presence of Bright's disease of the kidneys, which as time progresses would probably cause convulsions, and produce the woman's death. Dr. Bullard spoke of a cancer of the womb, and perhaps both doctors gave as a reason malformation of the pelvis, and perhaps other reasons. Whether these conditions existed in this unfortunate girl at the time of the operation is not given by any of the doctors."

From these extracts from the charge it will be seen that the defendant company contended before the jury that they had sufficiently proved the facts upon which the Massachusetts policy of law was based—not directly, but inferentially, and that their contention was fully and fairly submitted to the jury. The jury found against them on the evidence, and therefore, the finding of the jury has established that the facts upon which the Massachusetts policy was declared do not exist in this case.

If the case was properly submitted to the jury, and if no competent evidence was excluded, then the result must stand, as, to the jury, and not to the court, the law commits the ascertainment of facts.

II.

The burden of proving the facts necessary to bring the case within the public policy of Massachusetts was properly assumed by the insurance company.

The facts in Hatch vs. Insurance Company were found by the judge sitting without a jury. The insurance company wrote a policy on the life of a married woman in which her husband was named as beneficiary. She became pregnant and with his knowledge and consent and voluntarily, believing and knowing that such operation would be dangerous to her life, without any justifiable medical reason, and for the mere purpose of being rid of undesired offspring, she submitted, and died from the operation. We quote the following from the report:

"At the trial in the Superior Court, before Coburn, J., without a jury, the issuing of the policy, the death and due proof thereof, were admitted. The judge found the following facts:

"That the insured died on April 27, 1874, by reason of a miscarriage, produced by an illegal operation, performed upon her on April 16, 1874, and voluntarily submitted to by her, with intent to cause an abortion, without any justifiable medical reason.

"That such an operation is dangerous to a woman's life, and was known to be so by the deceased and by her husband, but that the evidence offered in this case shows that not more than about one per cent. of such operations result in causing the death of the woman."

Hatch vs. Ins. Co., 120 Mass., 550.

Upon these findings the trial judge entered judgment for the plaintiff for the amount of the policy. The judgment was reversed by the Supreme Court. The opinion was as follows, in part:

"Endicott, J. It appears by the bill of exceptions that the defendant voluntarily submitted herself to an illegal operation, with intent to cause an abortion, without any justifiable medical reason; that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died.

"It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and by all of the civilized states, and known to her to be dangerous to life, did actually result in death. And the question is raised, whether, for a death so caused, the defendant is liable."

The court declared that it would be contrary to public policy to pay a life insured under such circumstances.

This policy of law thus declared and here invoked as a defense, rested on the facts of that case. What the policy of Massachusetts would be on the facts of this case is not known, and can only be known when submitted to the Supreme Court of that state. So far as shown by evidence the facts are that the insured was a single woman, insured for the benefit of herself at the end of 48 years, which insurance was assigned to her sureties; that she became pregnant, had an operation of some kind performed which resulted in a premature birth—the reasons for the operation not known: that she believed the operation to which she had submitted to be perfectly safe; that whether she had no justifiable medicinal reason not proved; that what she did was without the knowledge of the assignees of the policy.

It must be apparent that this is a very different case from that presented to the Supreme Court of Massachusetts. In that case the insured was a married woman to whom the birth of the child would bring honor and not shame. The beneficiary was her husband who aided and abetted and consented to the murder of his own offspring, and came with bloody hands and guilty heart to demand recompense and reward for the crime. The woman believed the ordeal to which she submitted herself was dangerous to life. She

deliberately balanced on one side the pains of maternity, the joy and burden of bearing a legitimate child, with the risk of death on the other side—chose and lost, and the accessory before the fact sought the aid of the law to aid him in recovering the price of blood.

It might be well held that an insurance company ought not to be called upon for payment for such a claimant. In the case of a young unmarried woman, the insurers knew, if they knew anything, that she loves not wisely but too well; that means will be taken to conceal the lapse from virtue; they know that not more than one per cent. of the cases of abortion are attended with fatal consequences—in fact, the operation is not more dangerous than the contracting of a severe cold. They knew that this universal risk could be avoided by a suitable condition in the policy, but they did not insert such a condition. They rely upon a policy of the law hid away in a single case described in an old report never referred to in any subsequent decision, and hid away in the musty folios of the lawyers' libraries. Let us concede that this contract must be adjudged by the laws of Massachusetts, and that when they show similar facts and get a jury to find them they are entitled to the benefit of law declared upon them.

FOURTH ASSIGNMENT.

Taking the assignments of error in the order followed by the appellant:

Fourth. The court erred in refusing to affirm defendant's sixth point, which was as follows:

"That under all the evidence in the case there can be no recovery on the policy, and your verdict must be for the defendant."

Manifestly, the court could not affirm that point. The direct evidence produced by the defendant had, giving it its widest significance toward the fact that Helene Roberts died

from septicemia or blood poisoning, the result of abortion, that she had been a healthy woman and was unmarried. From this testimony the inference must be drawn by some one if it is effectual as a defense, that Helene Roberts knew that what was done to her was dangerous to life, and also that her condition of body was such that no good medical reason existed which would warrant it. The court had no right to draw any inference. If the facts upon which the defense rested could only be inferred from the evidence given them, the jury was the only tribunal competent to draw the inference.

The law on this subject is very clear.

"When there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury however strong or persuasive may be the countervailing proof.

"Where a court should say that there is no evidence sufficient to authorize the inference, the verdict would be without evidence, not contrary to the weight of it."

Howard Express Company vs. Wile, 64 Pa. St., 201.

"This instruction took every question of fact from the jury. In this, we think, there was error. Setting aside the Tennessee record, which in this part of his charge the judge excludes from consideration, so far from there being any conclusive evidence, which would justify the court from withdrawing the case from the jury, it was all oral testimony, depending not only on the credit to be given to the witnesses, but on the construction to be put on their language. However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence."

Keel vs. Elder, 62 Pa. St., 316.

"In Grambe vs. Lynch, 20 W. N. C. 376, it was held by the court below that "where a witness goes upon the witness stand and swears positively to a fact and that fact is not contradicted, it is established and there is nothing to submit to the jury." When the case was brought to this court the judgment was reversed in an opinion by Paxson, J., who, referring to this ruling, said: "This is an erroneous statement of the law. There is the question of the credibility of the witness and this cannot be taken from the jury. It is their duty to credit a witness if there is no good reason to the contrary, but the mere manner of a witness may discredit him with a jury, and his story may be so against all the probabilities of the case that the jury may be justified in not believing him. It is settled law, where a case depends upon oral testimony, that such testimony must be submitted to the jury." See also Bank vs. Donaldson, 6 Pa. St., 179. The jury are the judges of the credibility of the witnesses, as has been held many times before, and it is not in the province of the court to defeat their verdict upon the theory that they should have believed differently: Fulton vs. Lancaster County, 162 Pa., 306." Coal Co. vs. Evans, et al., 176 Pa. St., 32.

In the case at bar not only the credibility of the witnesses but the inferences sought to be drawn by the defendants from their testimony were for the jury.

The other specification is as follows:

5th. That one of the questions asked the insured in her application attached to the policy was as follows: "23. Does the applicant warrant the truth of all the foregoing answers, and agree that they are a part of the contract of insurance, and that if any answer to the above questions in this statement is fraudulent or untrue, or if there is any concealment of fact bearing upon the proposed risk,

whether inquired about or not, or any non-compliance with the terms and conditions of the policy, it shall vitiate the insurance, and that, in such cases, no return of premium shall be made." To which the insured answered "yes." That this answer was signed by her on the 8th day of August, 1891.

That if the jury believed any abortion or abortions had been performed upon the insured prior to the 8th day of August, 1891. then the concealment of such an abortion or abortions was a material concealment, and the plaintiff cannot recover.

This point asks the court to assume that if the insured had suffered an abortion before she was insured that such abortion was criminal, hurtful to her health, material to the risk, and that the company would not have written the policy if they had known it. Remembering that the word "abortion" means an untimely birth, that abortions arising from natural causes or conditions are not uncommon, it was asking altogether too much of the court to say that any and all abortions would have been material to the risk, and that the company would have refused the risk if the fact had been made known.

They asked her if she was pregnant, and if there was any reason to apprehend difficulty of labor, and these questions she declined to answer, and with these declarations the company was satisfied. Now they complain because she did not answer a question which she was not asked, and this after asking her specifically if she had ever been afflicted with any of the twenty-five different diseases running through the alphabet from asthma to vertigo. Evidently the company did not regard the point whether she ever had been pregnant as material, inasmuch as they failed to ask, and also excused her from answering whether she was pregnant at the time.

This medical examiner, an able and learned man, after a thorough physical examination, pronounced her sound at that time, which was the important point, and if she truth-

fully answered all that was asked she may be excused for not answering what she was not asked.

Furthermore, the point assumed that Helene Roberts concealed a fact, and that the fact concealed was material to the risk, and that she knew it was material. Perhaps she was wise enough to know that the company would have considered the facts that she had been pregnant and had suffered an untimely birth as material to the risk. If so, she was wiser than most people. The point also asked the court to assume without proof that this fact if found by the jury would have been considered material by the company. The court properly declined to do any such thing.

In her death, when she was pleading with her doctor for a little encouragement, he having imparted the dreadful information that she must die, she said, according to Dr. Crawford's testimony;—(App. page 4 of appellant's book.)

"I cannot recollect all the conversation that took place, but I recognized the fact, or what I regarded the fact, that she was certainly going to die, and told her that her condition was such as in my opinion precluded all hope of recovery. She said, "Oh, no, I am not going to die. I have had as many as six abortions, or had an abortion produced as many as six times, and I have always gotten well, and I will now." I told her I thought no woman ever recovered from the condition that she was in then. Her temperature was very high, I think as high as one hundred and five or six. I don't recollect exactly. It was very high. Her pulse was very rapid—between 140 and 150 per minute. She had general and severe peritonitis."

That this was an exaggeration wrung from her in the hope that she might induce her physicians to give her some hope is apparent. In any event, the question whether the concealment of the fact that she had suffered an abortion before was material to the risk was not a question of law for the court, but was a question of fact for the jury.

"The materiality of a representation is for the jury." Biddle on Insurance, vol. 1, sec. 532 and cases cited.

SECOND SPECIFICATION.

Second. The court erred in refusing to affirm defendant's fourth point, which was as follows:

"You will find as a fact, and so state in your verdict, that Helene Roberts did, or did not, die as the result of an unlawful operation voluntarily submitted to by her."

This is a request to direct the jury to find a special verdict, which is not a right to be demanded by either party, but is always in the discretion of the court, and therefore not assignable for error.

In the case of Chambers vs. Davis, 3 Wharton, page 47, it is said: "The plaintiff contends that the court in effect directed the jury to find a special verdict on certain points, which they had no right to do—the jury being at all times at liberty to judge for themselves whether they would find a general or special verdict. The jury are not bound by a mere request to do so."

In this case it was held not error in the court to call for a special verdict, and to the same effect in Patterson vs. Kountz, 63 Pa., 252. In no case has it ever been held that either party had the right to demand a special verdict.

FIFTH SPECIFICATION.

1st. The court erred in refusing to allow the following question on examination of Dr. E. A. Sweeney: "Q. State in your opinion whether there was any justifiable medical reason for an abortion in that case." "Objected to because the witness has not shown that he has any knowledge upon which such opinion could be given, if he was willing to give it."

The qualifying questions preceding the one objected to were as follows:

Q. You are a practicing physician in the city of Wilkes-Barre? A. Yes, sir.

Q. How long have you been practicing? A. Since May 6, 1892.

Q. You are a graduate of the University of Pennsylvania? A. Yes, sir.

Q. You have read over the answers made by Helene Roberts in her application for insurance? A. I did.

Q. That application was made August 13, 1891, and she died November, 1892. Did you know Helene Roberts? A. No, sir.

Q. Did you ever see her? A. No, sir.

Q. You heard the testimony here as to the age and size of the foetus? A. Yes, sir.

Q. You have heard the testimony about the several visits to Nanticoke? A. Yes, sir.

Q. Have you ever delivered children? A. Yes, sir.

Q. About how many? A. I could not exactly say, during this year I probably delivered sixty or seventy, in that neighborhood, may be more.

Q. Have you ever been present and attended women who have had miscarriages? A. I have, yes, sir.

Q. Delivered the foetus? A. Yes, sir.

Q. In all stages? A. Yes, sir.

The Court: The Court is of the opinion that the question is not proper. The objection is sustained, exception noted for defendant and bill sealed."

The question whether there was any justifiable medical reason for an abortion in the case of Helene Roberts could only be answered by an expert who had made a physical examination of the woman. According to the medical testimony in the case, the reasons that justify the procuring of an abortion are:

(See testimony of Dr. Louise Stoeckle, page 21, of appendix to appellant's book.)

Q. Now, there are cases in which abortions are procured in order to save the life of the mother, are there not? A. Yes, sir.

Q. And physicians of regular standing and of good repute, do it? A. Yes, sir.

Q. And it is regarded as perfectly proper and professional, is it not? A. Yes, sir, to save the life of the mother it is done.

Q. What are some of the reasons and some of the cases in which such an operation is resorted to in order to save the mother's life? A. It might be advanced heart disease, kidney disease, malformed pelvis, and several others.

Q. And in such cases as those you have mentioned is it regarded as perfectly professional to do the act? A. It is considered the proper thing to do.

Q. And the necessary thing to save the mother's life? A. Yes, sir.

(And testimony of Dr. Guthrie, page 27, Ibid.)

"Q. What are justifiable medical reasons for an abortion? A. Well, principally the presence of albuminuria, that is, Bright's disease of the kidneys, in which there is danger from convulsions to the patient should she go on to the full term. A deformed pelvis might be regarded by some, and yet now, regarded in the light of modern surgery, would not be so regarded because the opening of the body and delivery of the child by surgical means deprives that deformity of its terror, for women are delivered now by opening the abdomen very safely that used to be regarded seriously. That would be regarded by many as a reason for interfering. But the reason we principally recognize and find it necessary to bring on premature labor or abortion is where there is danger from convulsions from

Bright's disease. Whether that existed here I do not know."

By defendant's counsel:

"Q. Then the reasons medically are Bright's disease existing in the female, and a deformed pelvis so deformed or malformed as to resort to surgery? A. Principally." There are other reasons.

(Also testimony of Dr. Bullard, page 28, Ibid.)

"Q. I wish you would give what in your judgment and opinion are the medical reasons for an abortion. A. Well, there are certain diseased conditions of the womb that sometimes call for it; there are deformities of the pelvis that would call for an abortion, and threatened convulsions from albuminuria and Bright's disease. I don't know of anything else."

All the knowledge that Dr. Sweeney had of the deceased was obtained from reading her application for insurance, made a year before, in which nothing was said about malformation of any kind—that the foetus was three months old—which would in no way throw light upon the physical condition of the mother: that the insured had been able to travel nine miles in a street car, which would not be a severe journey for a sick woman, and certainly would prove nothing upon which the learned doctor could base a judgment.

Dr. Guthrie, who examined Miss Roberts for insurance, and who was the consulting physician when she died, was asked this question:

(Ibid, page 25, etc.)

"Q. The testimony in this case is that the foetus was three months old, about three inches long, and that this Helene Roberts died from the result of an abortion. The testimony also is that she made several trips to Nanticoke

and had several operations before the one after which the foetus was expelled. That the neck of the womb from the examination made by Dr. Stoeckel was lacerated. Now, knowing these facts can you form an opinion whether or not the abortion in that case was justifiable—medically justifiable? (Objected to; they should find out from the witness whether he can form an opinion or not.)

Q. Were you called in by Dr. Crawford in consultation over Miss Robert's case? A. Yes, sir.

Q. Did you attend as a consulting physician? A. Yes, sir.

Q. And did you make an examination of the case and hold a consultation? A. Yes, sir.

Q. Of course you saw Miss Roberts upon that occasion? A. Yes, sir.

Q. This was how long before she died? A. I cannot state definitly, it seems to me about one day before. I am not positive. It wasn't very long before.

By plaintiff's counsel:

Q. You never made a physical examination of Helene Roberts did you? A. Only what was required for life insurance.

Q. That is to say you asked her certain questions and she answered them? A. Yes, sir. I made a physical examination of her heart and lungs and examined her urine—such as was contained in this report.

Q. You did just what is contained in there? A. Yes, sir.

Q. I mean at the time that you were called by Dr. Crawford in consultation. There was no vagilant examination. There was an examination of the abdomen externally, and the pulse, temperature, etc.

Plaintiff's Counsel: We object to the testimony offered, because the witness has not shown such knowledge of the patient, and of the essential requisites, as would enable him, or anybody else, to form an opinion on the subject matter about which he is asked.

The Court: Did you say you examined the abdomen?

The Witness: Yes, sir; not vagilant, not internal.

The Court: The doctor may answer the question now. He may answer whether he can form an opinion.

The Witness: The facts are not sufficient to form an opinion.

With about forty times as much information, three other doctors could not give an opinion as an expert on this question.

The question asked Dr. Sweeney was not a hypothetical question based on proved facts, and therefore it was properly rejected.

It was not a question based on all the factors in the case that had a bearing on the subject.

Dr. Sweeney never saw the woman; had no knowledge of her condition at the time or at any other time.

ASSIGNMENTS FROM FIVE TO NINE, INCLUSIVE.

These are complaints of the charge, based on detached sentences culled here and there. The only one really urged is the 9th, wherein complaint is made of the court for saying:

"Did any other cause, taking in consideration where it was alleged it (the operation) was performed, intervene which produced blood poisoning or septicemia and cause

death? If it did, the company will have to pay the amount of this policy. If it did not, you should return a verdict in their favor."

After this, and as the final instructions came the answer to the defendant's points:

2nd. If the jury believe that the insured died from the results of an unlawful operation voluntarily submitted to by her for the purpose of procuring an abortion, without any justifiable medical reason, there can be no recovery on the policy in this case under the laws of Massachusetts.

Affirmed.

3rd. That if the jury believe that the insured died from the results of an abortion voluntarily submitted to without any justifiable medical reason, there can be no recovery, because a death so caused violates the conditions of the policy, and thereby avoids it.

Affirmed.

The Court fully and fairly represented to the jury the questions of fact presented by the evidence, and so plainly that there could have been no misunderstanding of the true issue.

The defendants tried the case on the theory that Helene Roberts had voluntarily submitted to a criminal abortion without any justifiable medical reason. They presented testimony to sustain this proposition and asked the jury to find the fact in their favor. But inasmuch as the physicians who examined Helene Roberts during life, and attended her in her last sickness were not able to affirm the important fact, the jury did well in declining to guess at it, or to find it without proof.

Upon this subject the physicians testify as follows:

(See testimony of Dr. Stoeckel, appellant's book, app. page 21.)

Q. Had this foetus been quickened in the wound, that is, had the mother felt motion? A. No.

Q. Whether from anything you discovered there there was or was not any good medical reason for this operation? Whether you could tell if there was an operation performed on this woman, whether she had a good reason for it? Could you tell that or couldn't you? A. I couldn't tell that.

(Also testimony of Dr. Guthrie, Ibid page 26.)

The Witness: The facts are not sufficient to form an opinion.

That is all the facts proved and all the facts known to this medical gentleman who attended and examined Helene Roberts in her last sickness.

The case has been tried three times. At the first trial the trial judge gave a binding instruction, and directed a verdict for the defendant. This the court found to be an error, after full and exhaustive argument, and granted a new trial.

In the second trial the jury found a verdict for the plaintiff, which was reversed by this court on the ground that Dr. Crawford's deposition was improperly rejected.

At the last trial all the evidence offered by the defendant was received (except that of Dr. Sweeney) and the verdict was for the plaintiff. It would seem as though further litigation would not be useful, or productive of a different result.

JOHN T. LENAHAN,
HENRY W. PALMER,
Attorneys for Appellees.

SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT.

No. 62, JANUARY TERM, 1899

NORTH END LUMBER CO., Ltd., Appellant

VS.

A. P. O'DONNELL, Appellee.

PLAINTIFF'S APPEAL.

APPEAL FROM THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY.

PAPER BOOK OF APPELLANT.

A. A. VOSBURG,
CHARLES W. DAWSON.
Attorneys for Appellant.

PROVIDENCE REGISTER PRINT.