percolation, may not use the water of such springs for any purposes which either his pleasure or necessities may suggest, and in such quantity as his judgment may approve.

But, that, on the contrary, this court will adhere to the doctrine established in this state, as well as in many, if not all, the states of this country, and in England, and laid down by the text-writers of acknowledged ability, that the rights of riparian owners to the use of the water of a natural stream is one thing, but that so far as concerns springs and the waters flowing to or from them, it does make a vast difference, in the law, "whether the water percolate or whether it don't percolate."

R. L. BURNETT,
CICERO GEARHART,
Counsel for Appellees.

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,

APPELLEE,

vs.

The New England Mutual Life Insurance Company, of Boston, Massachusetts,

APPELLANT.

Paper Book of Appellant.

W. S. M'LEAN,
J. B. WOODWARD,
Counsel for Appellant.

News Print. 4 Butler Ave.

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APPENDIX.

PLAINTIFF'S WITNESS.

DEFENDANT'S WITNESSES.

DOCUMENTS.

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.

APPELLANT'S PAPER BOOK.

1.

NAMES OF THE PARTIES AS THEY STOOD UPON THE RECORD OF THE COURT BELOW AT THE TIME OF THE TRIAL, AND THE FORM OF THE ACTION

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.

No. 99, May Term, 1893.

Assumpsit.

II.

ABSTRACT OF THE PROCEEDINGS SHOWING THE ISSUE AND HOW IT WAS MADE.

Summons in assumpsit returnable second Monday in May

Exit March 14, 1893.

March 14, 1893, statement and copy filed.

March 16, 1893, summons returned served on John Marston, Jr., etc. Same day gave defendant a copy of plaintiff's statement and copy.

May 6, 1893, affidavit of defense filed.

July 19, 1893, defendant enters rule to take depositions on ten days' notice.

October 28, 1893, supplemental affidavit of defense filed.

January 4, 1894, deposition of J. B. Crawford filed. Same day objections of plaintiff's attorney to the deposition of J. B. Crawford and agreement of counsel that the same may be read in evidence subject to said objections, the said objections to have the same force and effect as if made at the time of taking of the deposition.

October 28, 1895, defendant pleads non assumpsit.

February 11, 1896, binding instructions and verdict for defendant.

February 12, 1896, court grants rule to show cause why new trial should not be granted.

May 21, 1896, stenographer's notes of testimony filed.

November 16, 1896, rule for new trial made absolute.

June 17, 1897, issue joined and jury sworn. Verdict in favor of plaintiff and against defendant for $3,795.00.

July 8, 1897, sheriff's receipt for jury fee filed and judgment entered.

July 14, 1897, recognizance in error filed, taken and acknowledged in the sum of $8,000.00. Same day certiorari from Supreme Court filed and service of rule endorsed

thereon to plead accepted by H. W. Palmer, attorney for appellee.

July 29, 1898, by remittitur from Supreme Court received and filed judgment of court below is reversed and new venire awarded. Copy of opinion of Supreme Court filed.

Dec. 7, 1898, issue joined and jury sworn.

Dec. 9, 1898, verdict for plaintiff for $4,080.00.

Dec. 10, 1898, reasons for new trial filed and stenographer ordered to write out testimony and charge.

Jan. 16, 1899, record of trial and charge of court filed.

III.

THE VERDICT OF THE JURY AND THE JUDGMENT THEREON.

Dec. 7, 1898, issue joined and jury sworn. Verdict in favor of plaintiff for $4,080.00.

Jan. 21, 1899, sheriff's receipt for jury fee filed and judgment entered.

IV.

HISTORY OF THE CASE.

On the 13th day of August, 1891, Helene Roberts, an unmarried woman twenty-seven years old, took out a policy of life insurance in the defendant company. On the 19th day of August, 1891, she assigned the policy to John Welles Hollenback and L. D. Shoemaker, the use plaintiffs, to secure them for certain loans which they had made to her.

On the 26th day of November, 1892, Helene Roberts died, being still unmarried, from the results of an operation performed upon her to produce an abortion.

Proofs of death were regularly furnished the defendant showing the death to have resulted from "peritonitis and septicemia, the result of abortion."

The company refused payment, and thereupon George A. Wells took out letters of administration on the estate

of the assured, and brought suit to the use of the assignees of the policy.

The case has been tried three times in the lower court and has been before this court on appeal once before, reported in 187 Pa. 166, when the judgment was reversed and a new venire ordered because the lower court refused to admit the deposition of a physician taken before he was made incompetent to testify by the Act of 1895, the witness having died before the trial.

The policy provided that it should be void if the insured died in consequence of any violation or attempt to violate any criminal law of the United States, or of any State or country in which the insured might be, and being a Massachusetts contract it was ruled by a decision of the Supreme Court of Massachusetts in a case almost identically the same, where the court held that no recovery can be had upon a policy of life insurance, upon the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason.

> Hatch vs Mutual Life Insurance Co., 120 Mass. State Reports, 550.

The plaintiff made out a prima facie case by putting in the policy, payments of premium, and proofs of death, and rested. No testimony was taken in rebuttal.

Defendant's testimony was entirely uncontradicted and was to the effect that the insured had visited the abortionist several times, and for that purpose had gone to Nanticoke, a small town nine miles from where she lived, that she had sought the doctor and begged him to perform the operation, that he made several futile attempts and the foetus was finally expelled, as a result of which the insured died; that she had had several abortions performed upon her before this one. These facts were proved by the declarations of the insured to five disinterested persons, two of whom were the officers

of the law who went to get her statement for the purpose of prosecuting the abortionist criminally, one of whom was her boarding mistress, and the other two, physicians who attended her.

The Court refused defendant's point asking for binding instructions, and held that it was necessary for the defendant to prove that the operation for abortion, as a result of which the insured died, was not justified by any medical or surgical necessity, a thing impossible to do, as no one had examined her, except the doctor who performed the operation, since she had been examined for her insurance; the name of the doctor who performed the operation was not known, and was only disclosed at the last trial, and he could not be called to testify to something that would incriminate him, if he had been known.

When the defendant attempted to prove this negative, to-wit, that there was no medical or surgical necessity for the abortion, in the only possible way open to it, by the opinions of physicians based on all the facts attainable, the Court refused to allow a physician called for that purpose to give his opinion as to the medical or surgical necessity. Then, too, the Court took infinite pains to caution the jury about accepting the testimony of defendant's witnesses although such testimony was wholly uncontradicted, the witnesses entirely disinterested, and the declarations they testified to against interest.

V.

POINTS SUBMITTED IN WRITING TO THE COURT BELOW.

The plaintiff respectfully requests the Court to charge the jury:

1st. That the contract of insurance, the payment of premiums and the death of the insured have been sufficiently proved, and the plaintiff is entitled to a verdict for the amount of the policy, with interest from December 15th, 1892, unless the defendants have proved to the satisfaction

of the jury that Helene Roberts voluntarily submitted to have a criminal abortion procured on her person from the effects of which she died, and that there was no good medical reason warranting the performance of the act.

Affirmed.

2nd. That the defendant seeks to avoid the insurance contract on the ground that the policy of the law in the State of Massachusetts forbids the recovery of money on any insurance contract when death is the result of an abortion voluntarily submitted to by the insured without good medical reasons. That in order to avail themselves of this defense the defendant must prove the facts upon which the defense rests. It is not sufficient to prove simply that the insured died from the effects of an abortion.

The defendant submits the following points:

1st. That the policy upon which this suit is brought is a Massachusetts contract, governed by the laws of Massachusetts.

Affirmed

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.

4th. 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.

I decline to affirm this, or to so instruct you. The Court instructs you that under the testimony in this case you should find a verdict either for the plaintiff for the amount of the policy, with interest from the 15th of December, 1892, or generally in favor of the defendant.

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 fradulent 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 believe 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.

I decline to affirm this point. The pith of it is that one of the questions asked is "that if there is any concealment of fact bearing upon the proposed risk whether inquired about or not." It has not been shown by evidence here that even if there was an abortion procured, that if this woman had procured an abortion upon herself previous to the time in question such was a material reason, concealed. In addition it is stated in the application for this policy: "The medical examiner will put the following questions and will fill out the answers in his own handwriting." Head, No. 23, it is stated: "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." Answer "yes." "If the proposed life be a female, she will answer the following questions, viz.: Is she single or married, or soon expecting to be married? A. Single. If pregnant, how far advanced?" No answer. "Is there any reason to apprehend unusual difficulty of labor?" No answer. "Has any former labor been difficult? If so from what cause?" No answer.

Specific questions to which she made no answer are put by the insurance company. These specific questions and the failure to answer should have greater weight than general or indefinite questions.

6th. That under all the evidence in the case there can be no recovery on the policy, and your verdict must be for the defendant.

The Court declines to affirm this point.

VI.

CHARGE OF THE COURT.

Gentlemen of the Jury:

Upon the application of Helene Roberts, an unmarried woman of about twenty-seven years of age, the defendant company on the 13th of August, 1891, issued to her a policy of insurance insuring her life for the sum of three thousand dollars. On the 26th of November, 1892, about a year and three months after the policy had issued, Helene Roberts died, in this city. Proofs which seem to have been satisfactory were made to the insurance company of her death. The insurance company declined to pay the amount named in the policy, or I believe any other amount, and the reason they aver for failure to pay according to the contract, as alleged by the plaintiff, is substantially this: It is contend-

ed 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 the 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. The other contention of the defendant is that Helene Roberts in her application concealed a material fact, an abortion, bearing upon the proposed risk, and therefore the plaintiff cannot recover.

This case, gentleman, although it has taken some time to try, is narrowed to a few questions. When the plaintiff had shown the premium required by the policy was paid by Miss Roberts, the policy in pursuance thereof issued to and received by her, she paid the second premium which fell due in the following August, the policy was in life, she died, and proof of her death made to the company, they had made what is called a prima facie case, that is a case which would entitle the plaintiff to recover if there were nothing else shown. That there was an abortion produced does not seem to be questioned. You need not perhaps waste time upon this question. 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 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 defendant 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.

There is no sworn testimony in the case to show when the operation or the abortion was committed, or by whom it was committed. The nearest approach is the testimony

of Dr. Crawford, in his deposition, in which he says that when he went into the room where Miss Roberts was lying dangerously ill, he at once recognized from the odor in the room that there had been an abortion, or a miscarriage But there is no sworn testimony whatever that any person used any illegal means to procure this abortion. I use the word sworn with care, gentlemen The testimony rests principally upon the alleged admission of Miss Roberts This presents two inquiries which should be submitted to you. First, did she make the admissions which have been sworn to? Not whether they are true, but did she make them? She was not under oath, but very ill It is testified to by Dr. Crawford, Dr. Stoeckel, Mrs. Harvey, the mistress of the boarding house, Mr. Whalen, and Mr. Davison, the alderman. It is a question for you to decide, not for the Court Where it is clearly or satisfactorily proved to the jury that an admission or statement was made by a person it should have weight, but you will keep in mind too that all verbal statements or admissions when repeated by another are liable to change, by dropping a word here or adding one there The weight of the evidence, indeed all of the evidence submitted tends to show that this unfortunate woman did make certain statements as to her condition and as to how it was brought about. If you conclude after an investigation of this matter that she did not make any statements of the kind charged you may stop there. But if you conclude that she did make the statements, or substantially the statements testified to, you will take the next step Were they true? There is no sworn evidence whatever that Dr. Dan, as he is called, performed an operation upon this woman, either criminal, legal or illegal. There is the statement which it is alleged Miss Roberts made that Dr. Dan performed the operation As to this you will inquire Take the condition of the woman as she was as she has been shown to you by the evidence, the state of her suffering and illness Do you believe from the evidence if she did make the statement it was true and that it was Dr. [illegible] of Nanticoke who performed the operation? She had

been there several times before and he had been unsuccessful and finally that he had made a botch or a bungling job of it, to use the doctor's words. No person has testified that he saw the woman in Nanticoke, or how she was able to return to Wilkes-Barre. You will take all these matters in consideration in arriving at a decision. 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 the 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 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 Kirwan 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. Again, gentlemen, suppose you should decide there was an operation performed upon this woman submitted to by her voluntarily, and without justifiable medical reasons, there is still another question. Was the death which occurred the direct result of the operation? For example, if a woman were to have a criminal abortion performed upon her which injured her very much, she lingered for sometime, then other matters set in, and she died from other causes, it would not void the policy. If void at all for this reason it must be because death is the direct and not the indirect

result. I think the doctors, so far as they testify upon the subject, practically agreed that death resulted from septicaemia, or blood poisoning, which was the result of the abortion. When was this operation performed? How long before death? Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning, or septicaemia, 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.

Counsel have submitted questions of law which the Court will now answer.

The plaintiff respectfully requests the Court to charge the jury:

1st. That the contract of insurance, the payment of premiums and the death of the insured have been sufficiently proved, and the plaintiff is entitled to a verdict for the amount of the policy, with interest from December 15th, 1892, unless the defendants have proved to the satisfaction of the jury that Helene Roberts voluntarily submitted to have a criminal abortion procured on her person from the effects of which she died, and that there was no good medical reason warranting the performance of the act.

Affirmed.

2nd. That the defendant seeks to avoid the insurance contract on the ground that the policy of the law in the State of Massachusetts forbids the recovery of money on any insurance contract when death is the result of an abortion voluntarily submitted to by the insured without good medical reasons. That in order to avail themselves of this defence the defendant must prove the facts upon which the defense rests. It is not sufficient to prove simply that the insured died from the effects of an abortion.

Affirmed.

The defendant submits the following points:

1st. That the policy upon which this suit is brought is

a Massachusetts contract, governed by the laws of Massachusetts.

Affirmed.

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 voids it.

Affirmed.

4th. 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.

I decline to affirm this, or to so instruct you. The Court instructs you that under the testimony in this case you should find a verdict either for the plaintiff for the amount of the policy, with interest from the 15th of December, 1892, or generally in favor of the defendant.

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 fradulent 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 believe 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.

I decline to affirm this point. The pith of it is that one of the questions asked is "that if there is any concealment of fact bearing upon the proposed risk whether inquired about or not." It has not been shown by evidence here that even if there was an abortion procured, that if this woman had procured an abortion upon herself previous to the time in question such was a material reason, concealed. In addition it is stated in the application for this policy. "The medical examiner will put the following questions and will fill out the answers in his own handwriting." Head, No. 23, it is stated: "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 fradulent 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." Answer "yes." "If the proposed life be a female, she will answer the following questions, viz: Is she single or married, or soon expecting to be married? A. Single. If pregnant, how far advanced?" No answer. "Is there any reason to apprehend unusual difficulty of labor?" No answer. "Has any former labor been difficult? If so, from what cause?" No answer.

Specific questions to which she made no answer are put by the insurance company. These specific questions and the failure to answer should have greater weight than general or indefinite questions.

6th. That under all the evidence in the case there can be no recovery on the policy, and your verdict must be for the defendant.

The Court declines to affirm this point.

Before verdict rendered in above entitled cause, counsel for defendant respectfully excepts to the charge of the court and answers to defendant's points wherein they are negatived, and requests that the same be reduced to writing and filed of record in the cause.

Now, 16th January, 1899, I hereby certify that the foregoing transcript of the notes of the court stenographer of the charge of the court, points submitted and answers to same, in my belief is correct, and the same is hereby approved and ordered to be filed.

JOHN LYNCH,
A. L. J.

VII.

SPECIFICATIONS OF ERROR.

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 6th, 1892.

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

Q. Have you 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 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."

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."

To which the Court answered:

"I decline to affirm this or to so instruct you. The Court instructs you that under the testimony in this case you should find as a verdict either for the plaintiff for the amount of the policy with interest from the 15th of December, 1892, or generally in favor of the defendant."

Third. The Court erred in refusing to affirm defendant's fifth point, which was as follows:

"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 believe 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."

To which the Court answered

"I decline to affirm this point. The path of it is that one of the questions asked is "that if there is any concealment of fact bearing upon the proposed risk whether inquired about or not." It has not been shown by evidence here that even if there was an abortion procured, that if this woman had procured an abortion upon herself previous to the time in question such was a material reason, concealed. In addition it is stated in the application for this policy "The medical examiner will put the following questions and will fill out the answers in his own handwriting." Head No. 23, it is stated: "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." Answer "yes." "If the proposed life be a female, she will answer the following questions, viz: Is she single or married, or soon expecting to be married? A. Single. If pregnant, how far advanced?"

No answer. "Is there any reason to apprehend unusual difficulty of labor?" No answer. "Has any former labor been difficult? If so, from what cause?" No answer.

Specific questions to which she made no answer are put by the insurance company. These specific questions and the failure to answer should have greater weight than general or indefinite questions."

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."

To which the Court answered:

"The Court declines to affirm this point."

Fifth. The Court erred in charging the jury as follows:

"The testimony rests principally upon the ALLEGED admission of Miss Roberts. This presents two inquiries which should be submitted to you. First, did she make the admissions that have been sworn to? Not whether they are true, but did she make them? She was not under oath, but very ill."

Sixth. The Court erred in charging the jury as follows:

"If you conclude, after an investigation of this matter that she did not make any statements of the kind charged you may stop there. But if you conclude that she did make the statements, or substantially the statements testified to, you will take the next step. Were they true?"

Seventh. The Court erred in charging the jury as follows:

"Take the condition of the woman as she was, as she has been shown to you by the evidence, the state of her suffering and illness. Do you believe from the evidence if she did make the statement it was true, and that it was Dr. Dan at Nantucket who performed the operation?"

Eighth. The Court erred in charging the jury as follows:

"No person has testified that he saw the woman in Nanticoke, or how she was able to return to Wilkes-Barre. You will take all these matters in consideration in arriving at a decision. 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."

Ninth. The Court erred in charging the jury as follows:

"Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning, or septicaemia, 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."

Tenth. The Court erred in its entire charge to the jury.

VIII.

APPELLANT'S ARGUMENT.

There is no class of cases in which juries are as prone to find against the defendant, whether the law and the evidence will warrant them in doing so or not, as in cases against life insurance companies. But there never was a case where the law and the evidence were so plainly against the verdict of the jury as the present case.

The insured was a young unmarried woman, of such amorous propensities that it had been necessary for her to resort to operations similar to the one from which she died in the present case, six times before this one was performed, in order to conceal the evidences of her guilt. This was admitted by her, not reluctantly, but rather boastfully.

At the time she made her application, which was about a year before her death, in the nature of things she must already have had several of these operations, and yet she declared in her application that she had concealed nothing bearing upon the risk. Her death was the result of the last of these operations performed by an obscure doctor who lived in a country town, nine miles from the residence of the insured, whom she sought and in her own words, "pleaded and begged him to help me." Several futile attempts were made to dislodge the foetus, each one of which attempts necessitated a journey by the insured to the residence of the doctor, and finally after the last attempt the foetus was expelled; but the mother died. The foetus was only three months old and three inches in diameter. The insured, so far as the evidence shows, was otherwise healthy, sound and well-formed. These facts were disclosed by the defendant's testimony, and were not denied, nor were the witnesses contradicted or impeached in any way. They were entirely disinterested, and the declarations of the insured were against her interest, and yet the Court submitted the case to the jury with instructions for them to find whether the operation was performed, whether it was voluntarily submitted to, and whether it was medically justifiable.

Having submitted it to the jury, the jury should have been allowed to give full weight to the defendant's testimony, but instead they were cautioned by the Court, with much reiteration, about accepting the testimony of the defendant's witnesses, calling their attention to the fact that the insured was not sworn at the time that she made the declaration, and instructing them to find (1) whether she did make any declarations at all; (2) were such declarations true, if she made them? and (3) were the witnesses who testified to the declarations swearing falsely or not?

We will not take up the specifications of error in their order, but will first take the fourth specification, to-wit, that the Court erred in refusing to give the jury binding instructions for defendant.

"The facts once established or conceded their legal effect is for the Court. When, therefore, upon all the evidence no question of fact is left in doubt or controversy the trial judge should direct a verdict; but if facts are in doubt or if

there is conflict in the evidence relating to them the doubt must be resolved or the conflict decided by the jury before the legal value of such facts can be pronounced by the court."

Coughe vs. McKee, 151 Pa. at page 603.

"When there is no real controversy as to the facts the Court may give a binding instruction to the jury."

Gardner vs. McLallen, 4 W. N. C. 435.

It does not follow that, because the evidence on one side may be overwhelming, in the opinion of the trial judge, the case can be withdrawn from the jury. If there is a conflict of evidence it must go to the jury unless the evidence on one side amounts but to a scintilla.

Holland vs. Kindregan, 155 Pa. 156.

There was some evidence on the part of the plaintiff in this case just cited, but the court directed a verdict for defendant notwithstanding because it was a mere scintilla.

But in the case at the bar there is absolutely no evidence for the plaintiff except to make out a prima facia case, to-wit: The policy, premiums paid and proofs of death.

The proofs of death showed the cause of death to have been the abortion. The defendant showed by the declarations of the insured that she sought the abortionist, pleaded and begged with him to help her; that the foetus was only three months old and three inches in diameter, that the operation was performed with instruments, that several unsuccessful attempts were made, that the only causes that would justify the abortion were disease of the kidneys, which would be likely to produce convulsions in the mother, and deformity of the pelvis, of which there was absolutely no evidence.

The third specification of error is that the court erred in refusing to affirm defendant's fifth point. The fifth point in substance was, that the insured had stated in her application, and warranted her statements to be true, that she

had concealed nothing which had any bearing on the risk, and asked the Court to charge that if the jury believed any abortion or abortions had been performed upon her prior to her application, which was made on the 8th day of August, 1891, then the concealment of such an abortion or abortions was a material concealment and the plaintiff cannot recover. The court declined this point because it had not been shown that even if the insured had procured an abortion upon herself prior to this application, that this was a material concealment; and next, because specific questions were contained in the application, to which she made no answer, as follows:

"If the proposed life be a female, she will answer the following questions, viz: "Is she single or married, or soon expecting to be married? A. Single. If pregnant, how far advanced?" No answer. "Is there any reason to apprehend any difficulty of labor?" No answer. "Has any former labor been difficult? If so from what cause?" No answer.

The court says these specific questions and the failure to answer should have greater weight than general or indefinite questions; but it will be noticed that the specific questions did not cover the fact "concealed," to-wit, former operations for abortion.

The insured declared, when told that she would die, that she would not die, that she had had as many as six abortions before this one and had always gotten well. She made her application in August, 1891, and died in November, 1892. She must have had some of these six prior abortions before her application for it is hardly conceivable that a woman can conceive, abort and then conceive and abort again six times in the space of a year and three months. The point, however, did not assume this to be impossible, but asked: "If the jury believe that some of these abortions were prior to her application then the failure on her part to disclose this fact was a material concealment."

The Court might properly have said to the jury: "The question of the materiality of the concealment (if you

believe there was a concealment) is for you. But what the Court said was: "It has not been shown that the concealment was material." How could it have been shown? The defendant might have called insurance men as experts to prove it but the jury were just as good judges of its materiality as such experts.

An expert who knows no more about the subject matter than the jury is not competent to testify to his opinion.

Lineoski vs. Susquehanna Coal Co. 157 Pa. 153.

The second specification of error is to the refusal of the Court to direct the jury to make a special finding of fact as to whether the insured did, or did not die, as the result of an unlawful operation voluntarily submitted to by her.

This was a fair request, in the nature of the case, the sympathies of the jury being with the plaintiff. The jury being ready and willing to make a general finding in favor of the plaintiff, could easily justify themselves in the general uncertainty surrounding the facts and the law as they were submitted to them, where they would have hesitated about finding the specific fact that the insured did not die as the result of an unlawful operation, under the evidence, if they had been required so to do.

The plaintiff's first specification of error is to the action of the Court in excluding the testimony of Dr E. A. Sweeney, who would have sworn that the operation, under the circumstances, was not justifiable, if he had been allowed so to do, and was called for that purpose.

The objection made was, "because the witness has not shown that he has any knowledge upon which an opinion could be given, even if he was willing to give it."

We take it that this means, not that he was not qualified as an expert, because the questions preceding and following the objection, and his answers thereto, showed him abundantly qualified, but that the facts on which his opinion was asked were not sufficient to enable him to answer.

The Court sustained the objection, and gave as its reason, that "the question is not proper." The Court does not state, and it is not clear, in what respect it deemed the question improper. It may have been because the question was not stated hypothetically, that is, it was not preceded by the form "Suppose the preceding facts alleged are true," or words to that effect. If this is the objection, it is disposed of by the decision of this Court in Coyle vs. Commonwealth, 104 Pa. 117, where the Court says: "Where in a proper case for expert testimony the facts are admitted or *proved by evidence which is not conflicting*, the opinion of an expert upon such facts is admissible as a scientific deduction. Where, however, the evidence is conflicting, an expert cannot be asked his opinion as drawn from the whole evidence. The questions to him should state specifically particular facts in evidence, hypothetically assuming them to be true, upon which he is to express his opinion." This from the syllabus. Mr. Justice Clark in the opinion says: "Where the facts are not conflicting, however, and are either admitted or proved, the opinion of an expert being a conclusion drawn from facts that are known, is admissible as a scientific deduction according to the skill, experience and knowledge of the witness. The mode of examination which is generally pursued, however, is to interrogate the witness in hypothetical form as to what state of mind is indicated by certain facts assumed as testified by certain of the witnesses, or by all of them, where they are not in conflict."

The testimony in the case at bar is not conflicting and hence there was no necessity for the hypothetical form.

If the Court meant that the question was not proper, because not based upon sufficient facts, which would be consistent with the objection made by the plaintiff's counsel, then a reference to the preceding questions is necessary. He was asked whether he had read the application made by the insured about a year before her death. He said he had. The application showed that the insured was sound, in good health at that time, and gave no indication of any malforma-

tion. He was asked whether he had heard the testimony as to the age and size of the foetus. He said he had. The testimony was that the foetus was three months old and about three inches in diameter. And this testimony was uncontradicted and undisputed. This was important, as an operation to remove the foetus would be less likely to be necessary to save the mother's life and therefore justifiable at that period of gestation than later on. He was asked whether he had heard of the insured's several visits to Nanticoke. He said he had. This enabled him to judge to some extent of her strength of body and state of health, for she had to travel nine miles to visit the doctor, and the undisputed testimony showed that she had visited him several times, and that he had operated on her several times before the operation was successful, very shortly prior to her death. He was then asked the question which he was not permitted to answer, whether in his opinion there was any justifiable medical reason for an abortion in that case. These were all the facts available to the defense on which his opinion could be based and were sufficient for him to give an opinion, and it would have been fair to have allowed him to answer the question.

Good vs. Good, 1 Monahan, 718.
Yardley vs. Cuthberston, 16 W. N. C. 461.
Coyle vs. Commonwealth, 104 Pa. 117.

The other specifications from and including the fifth are to the charge of the Court.

The objection to those portions of the charge specified in the fifth, sixth, seventh and eighth specifications is that the Court unduly and unnecessarily increased the defendant's burden by cautioning the jury about accepting the testimony of the defendant's witnesses, which was entirely undisputed and uncontradicted, the testimony being as to declarations of the insured against interest, the witnesses being entirely disinterested and unimpeached. Declarations against interest are to be taken as true and construed most strongly against the declarant.

Gabler's Appeal 5 Cent. 314.

[illegible] ing in connection where it was alleged [illegible] the operation was performed, intervene which produced blood poisoning or septicaemia 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."

There was not a scintilla of evidence of any other cause, the testimony of the defendant that the septicaemia or blood poisoning was caused by the operation was undisputed and finally the proofs of death offered by the plaintiff gave the cause of death as "peritonitis and septicaemia the result of abortion."

(See appendix, page .)

Where alteration of the amount of a promissory note is alleged as a defense to the note, but the signature to the note is not disputed it is error for the Court to say to the jury, "the defendant alleges that the note produced by Winters (plaintiff) is not the note of Mowrer (defendant) nor that it was signed by him," and "If the whole evidence has satisfied you that the note produced was actually signed by George Mowrer as it now appears," etc.

Winters vs. Mowrer, adm., 163 Pa. 239.

Judge Mitchell, in delivering the opinion, says:

"The learned judge, however, used certain expressions in his charge, no doubt inadvertently, which unduly increased the plaintiff's burdens: thus, he said, 'The defendant alleges that the note produced by Winters is not the note of Mowrer, nor that it was signed by him.' And again, 'If the whole evidence has satisfied you that the note produced was actually signed by George Mowrer, as it now appears,'

etc. We do not understand that Mowrer's signature to the note was disputed. Plaintiff had a genuine note and he was entitled to the benefit of a clear understanding of that fact by the jury as the basis of his case. The issue was whether he had fraudulently altered the amount."

Judgment was reversed.

In Kelly vs. Eby, 141 Pa. 176, the defendant testified that the loan was made to her husband. The husband, then solvent, renewed the note from time to time and paid the interest, but never paid the principal. There was evidence that the plaintiff exhibited the note to her brother on the day she received it, and knew that it was the note of the husband.

In such case it was misleading and prejudicial to the defendant to instruct the jury that "if the defendant asked and received a loan of money, and, in fact, a note of the husband, then insolvent, was given to a woman ignorant of its contents, that would not change the character of the loan."

Judge McCollum, in delivering the opinion of this Court, says: "As there was nothing in the testimony to justify the inference that 'a note of the husband, then insolvent, was given to a woman ignorant of its contents,' the charge was misleading in this respect and prejudicial to the appellant."

Judgment was reversed.

The question here is not was the death caused by the abortion? that is admitted, but was the abortion justifiable?

W. S. M'LEAN,
J. B. WOODWARD,
Counsel for Appellant.

We hereby certify that the cases cited otherwise than from State reports are not reported in the State reports.

W. S. M'LEAN,
J. B. WOODWARD,
For Appellant.

APPENDIX.

GEORGE A. WELLS, *Administrator*, vs. N. E. MUTUAL LIFE INSURANCE CO. } In the Court of Common Pleas of Luzerne County, Pa. *Assumpsit.* No. 99, May Term, 1893.

The above entitled cause came on for trial Dec. 7th, 1898, before Hon. John Lynch, A. L. J., and jury, in Court Room No. 2, Wilkes-Barre, Pa.

Appearances:—Hon. H. W. Palmer and Hon. J. T. Lenahan appearing for plaintiff; W. S. McLean, Esq., and J. Butler Woodward, Esq., appearing for defendant.

Jury having been duly sworn at 10:30 a. m., Mr. Palmer opens for plaintiff.

Plaintiff offers in evidence: Policy of insurance, with copy of application attached, No. 93,404, issued by the New England Mutual Life Insurance Co. of Boston, Mass., on life of Helene Roberts. Premium $102.60. Signed by Benj. F. Stevens, president, countersigned by the secretary and assistant secretary. (Policy and application read to jury.) Policy dated 13th August, 1891.

13th August, 1891, receipt of New England Mutual Life Insurance Co., signed Benjamin F. Stevens, president, countersigned by William C. Conover, agent, for premium on policy No. 93,404, life of Helene Roberts, $102.60, paid in cash Sept. 5th, 1891.