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Clerk, Supreme Court of Appeals
Richmond, Va.

# Record No. 5197

## In the Supreme Court of Appeals of Virginia at Richmond

## RESERVE LIFE INSURANCE COMPANY

v.

## EARL H. FEREBEE

FROM THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

### RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND

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## Record No. 5197

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of June, 1960.

RESERVE LIFE INSURANCE COMPANY, A TEXAS CORPORATION, Plaintiff in Error,

*against*

EARL H. FEREBEE, Defendant in Error.

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From the Court of Hustings for the City of Portsmouth

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Upon the petition of Reserve Life Insurance Company, a Texas corporation, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 1st day of October, 1959, in a certain motion for judgment then therein depending wherein Earl H. Ferebee was plaintiff and the petitioner was defendant.

And it appearing that a *supersedeas* bond in the penalty of one thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

## RECORD

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### MOTION FOR JUDGMENT.

1. That the said Reserve Life Insurance Company issued Hospital and Surgical Expense Policy Number CR-726487, the effective date of which was January 25, 1957, to the said Earl H. Ferebee pursuant to an application executed at Portsmouth, Virginia, on the 21st day of January 1957.

2. That said Earl H. Ferebee was hospitalized at Portsmouth General Hospital, Portsmouth, Virginia, from March 25, 1958 through April 9, 1958, where he underwent surgery, and during which period the above policy was in full force and effect.

3. That under said Policy Number CR-726487, the said Earl H. Ferebee is entitled to recover $10.00 per day for the 16 days he was hospitalized as a resident bed
page 3 } patient; that he is entitled to $250.00 for a surgical operation that resulted in the removal of a kidney; and that further he is entitled to recover $30.00 for the use of the operating room, $12.50 for medicines other than antibiotics, $25.00 for anesthesia, $10.00 for x-ray, $15.00 for antibiotics, $10.00 for laboratory service, $6.25 for dressings, $10.00 for transfusion, and $11.15 for hypodermics, which sums total altogether $539.90 as aforestated.

4. That application for benefits due under the policy has been made by the said Earl H. Ferebee to the said Reserve Life Insurance Company, and payment of said benefits has been denied to the unjust detriment of the undersigned.

* * * * *

page 17 } INSTRUCTION P1.

The Court instructs the jury that if they believe from all the evidence that the plaintiff, Ferebee, made a full and truthful disclosure of his medical history as required on the application for insurance in response to the questions of the agent of the defendant, and that he had no knowledge that any material answers, or any part thereof, were not

recorded on said application by the agent then you must find for the plaintiff.

Granted.

R. F. M.

page 18 } INSTRUCTION P2.

The Court instructs the jury that in Virginia all statements, declarations and descriptions in any application 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.

Granted.

R. F. M.

page 19 } INSTRUCTION P3.

The Court instructs the jury that if you believe from the evidence that the application for insurance here involved was filled in by Eddie A. Brown, agent for the defendant, Reserve Life Insurance Company, then the part that the insured, Earl H. Ferebee, signed the application is not conclusive evidence that he had read or had knowledge of the answers contained therein, and that whether or not Earl H. Ferebee did have actual or constructive knowledge of the contents of said application is a question of part to be determined by the jury; but there is a *prima facias* presumption that a person has read and understands a writing to which he affixes his signature.

Granted Ex.

R. F. M.

page 20 } INSTRUCTION D1.

The Court instructs the jury that if they believe from the evidence that the insurance company would not have issued the policy if it had known the past medical history of plaintiff and that plaintiff gave false answers to the agent of the

insurer on any such medical questions or that plaintiff actually knew or had constructive knowledge that such questions were being falsely recorded by the agent on the application, then the plaintiff can not recover and you must find for the defendant insurance company.

Granted.

R. F. M.

page 21 } INSTRUCTION D2.

The Court instructs the jury that there is a presumption that Earl H. Ferebee read and understood the application to which he signed his name and he is thereby charged with knowledge of its contents and that this presumption remains throughout the trial unless it is rebutted by competent evidence from the plaintiff. The court further instructs the jury that if you believe from the evidence that the plaintiff has not overcome this presumption then he is charged with knowledge of the false answers and can not recover and you must find for the defendant.

Granted.

R. F. M.

page 22 } INSTRUCTION D3.

The Court instructs the jury that where both the applicant and the insurer's agent know that material answers on the insurance applications are false, then the plaintiff can not recover and you must find for the defendant.

Granted.

R. F. M.

page 23 } INSTRUCTION D4.

The Court instructs the jury that if you believe from the evidence that Earl H. Ferebee had actual or constructive knowledge that the application contained false answers material to the risk, then the plaintiff can not recover and you must find for the defendant.

Refused, repetitious.

R. F. M.

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page 25 }

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At the Court of Hustings for the City of Portsmouth held on the 13th day of May, 1959.

* * * * *

This day came the parties by their attorneys and thereupon, came a jury, to-wit: Jobe Harrell, James H. Scruggs, John Vermillion, Jr., Henry L. Brantley, Jr., Lyman C. Robinson, Shelton W. Alphin, and R. C. Dempsey, who being duly sworn, the truth to speak, upon the issue joined, and having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict, and after sometime returned into Court, having found the following verdict: "We, the jury, find for the plaintiff in the amount of $539.90. Jobe Harrell, Foreman;" whereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury and grant it a new trial on the grounds that the said verdict is contrary to the law and evidence, which motion is continued.

* * * * *

page 26 } October 1, 1959.

Mr. L. Shields Parsons, Jr.
Attorney at Law
700 Board of Trade Building
Norfolk, Virginia

Mr. William B. Spong, Jr.
Attorney at Law
203 Court Street
Portsmouth, Virginia

*Re*: Ferebee *v.* Reserve Life Insurance Company.

Gentlemen:

After reading the evidence it appears to me that this case does not come within the principles set out in the case of

*New York Life Insurance Co.* v. *Eicher*, 198 Va. 255, 93 S. E. (2d) 269, but more nearly to the rulings in *Gilley* v. *Union Life Insurance Co.*, 194 Va. 966, 76 S. E. (2d) 165.

In the *New York Life Insurance Co.* v. *Eicher* case the application for insurance contained materially false answers, which both the agent of the company and the assured knew. The company was held not to be bound by the fraud and collusion of the agent and the assured.

In this case the application for insurance does not contain any materially false answers, in fact all the answers are true, but are incomplete. In answer to question 8 of the application relating to previous diseases and ailments, the answer is recorded yes, that is the applicant had had certain of the ailments mentioned. It is true that the only ailment underscored was "hernia" and the company's agent states that the usual method employed to denote what disease the insured states he has, yet the evidence of the plaintiff (and it must be viewed most favorably for him in view of the jury's verdict), clearly shows that the company's agent was fully advised of the assured's previous health history.
page 27 } The last part of question 8 is: "If answer is 'yes', give full details," followed by two blank lines which have been left empty even though the answer of "yes" was written above.

To question No. 9 as to whether assured, &c., had received medical or surgical advice or treatment within past three years, the answer given was "yes." Follows the usual "If the answer is 'yes' give details below." The only matter reported under details is one hernia operation of 7/31/56. Although the plaintiff testified in detail as to all his previous health conditions and told the company's agent about them.

It thus appears from the evidence that the assured gave truthful answers to all questions and there is no evidence of any fraud or collusion on the part of the assured. On the contrary it appears he acted honestly with the company, and when he signed the application, even if he knew the answers were incomplete, he made no answer that was materially false.

In the case of *Johnson* v. *State Farm Life Insurance Company* 176 F (2d) 83, 84 it is said:

"But it is also the well recognized rule that where an application for a policy of insurance discloses upon its face that a question is incomplete or imperfectly answered, or it is not answered at all, the acceptance of the application and the issuance of the policy without request for clarification

or completion of the application constitutes a waiver of the incompleteness or imperfection of the answer, or the failure to answer at all, and renders such condition of the application immaterial."

The insurer cannot successfully contend that it relied only upon the underscoring of the one ailment in question 8 as the jury has decided that plaintiff gave a full answer to the question to the agent, who was duty bound to
page 28 } communicate this information to the company or the insurer.

Since the answers in the application are not materially false, the Court finds that the motion for a new trial should be denied and judgment will be entered on the verdict.

Yours very truly,

Judge.

RFM/mvw

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* * * * *

At the Court of Hustings for the City of Portsmouth held on the 1st day of October, 1959.

* * * * *

This day again came the parties by their attorneys and the Court having fully heard the motion of the defendant heretofore entered herein to set aside the verdict of the jury heretofore rendered and grant it a new trial on the grounds that the said verdict is contrary to law and evidence, doth overrule the same, and doth grant judgment on the verdict. It is therefore considered by the Court that the plaintiff recover of the defendant the sum of Five Hundred Thirty-nine Dollars and Ninety Cents ($539.90) with interest thereon to be computed after the rate of six per cent per annum from the 13th day of *Mary,* 1959, until paid and his costs by him about his suit in this behalf expended, to which action of the Court the defendant, by counsel, excepts, but the said defendant having signified its intention to appeal to the Supreme Court of Appeals of Virginia for a writ of error to this judgment, the execution of this judgment is suspended

for a period of sixty days, and bond is fixed at One Thousand Dollars $(1,000.00).

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## NOTICE OF APPEAL.

This day comes the defendant by its attorney, and notes an appeal to the decision of the Court in the above entitled matter.

(on back)

Filed Oct. 19, 10:07 A. M. The Court of Hustings.

JOHN R. PORTER, JR., Clerk.

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page 34 }

* * * * *

## ASSIGNMENTS OF ERROR.

Now comes your defendant and assigns the following errors in this cause:

1. That the Court erred in not granting the motion to strike at the end of the plaintiff's case, because as a matter of law the plaintiff had not made out a cause of action nor a right to recover.
2. That the Court erred in granting Instruction No. P-1 because the evidence shows that Ferebee did not make a full disclosure of his medical history on the application for insurance.
3. That the Court erred in allowing plaintiff's Instruction No. P-2 that this law is inapplicable to this proceeding.
4. That the Court erred in granting plaintiff's Instruction No. P-3 on the ground that the phraseology indicating the question as to whether or not the plaintiff had actual or constructive knowledge does not apply because the evidence

clearly shows that he did have actual knowledge of the contents of the application with reference to the medical history.

5. That the Court erred in ruling that defendant's Instruction No. D-4 was inadmissible on the ground that this is clearly the law in the State of Virginia as set forth in *New York Life Insurance Company* v. *Eicher,* in that it was not repetition.

6. That the Court erred in not granting the defendant's motion to strike on the grounds (1) that the application speaks for itself and is duly signed by the plaintiff and that the policy of insurance offered speaks for itself page 35 } and is to be construed with the application as the entire contract between the parties. (2) that the answers given by Mr. Ferebee on the application to the agent, were fully known by him to be incorrect at the time he signed the application; (3) that the plaintiff in answering question 6, was he in good health?, answered yes when he in fact knew that he had just come from the hospital, and had had serious and continuous illnesses prior to that time; (4) that he was fully aware that question 8 was incorrectly and falsely answered when he signed it; (5) that on his application, for illnesses, he listed his sicknesses, for which he had medical treatment in the past three years as none as of April 21, 1958, and that on April 19, 1958 he had signed one stating that he had had influenza and grippe during that period.

RESERVE LIFE INSURANCE COMPANY, A TEXAS CORPORATION
By L. S. PARSONS, JR.
Of Counsel.

(on back)

Filed Nov. 2, 1959 9:45 A. M. The Court of Hustings.

JOHN R. PORTER, JR., Clerk.

* * * * *

page 4 } EARL H. FEREBEE,

Plaintiff, having been first duly sworn, was examined and testified as follows:

*Earl H. Ferebee.*

DIRECT EXAMINATION.

Examined by Mr. Spong:

Q. State your name, please.

A. Earl H. Ferebee.

Q. Where do you reside, Mr. Ferebee?

A. 22 King Street.

Q. That is in the City of Portsmouth?

A. Yes.

Q. During the period from March 25, 1958 through April 9, 1958, were you a patient at Portsmouth General Hospital?

A. I was.

Q. Did you undergo surgery at that time?

A. I did.

Q. During that period did you have a hospitalization policy with the Reserve Life Insurance Company of Dallas, Texas?

A. Yes, sir.

Q. When did you apply for that policy?

A. I would say January 17, 1957.

Q. Was the policy in full force and effect, to the best of your knowledge, at the time you were hospitalized in 1958?

A. It was.

Q. Mr. Ferebee, where was the application for this policy made?

A. At my home.

page 5 } Q. Would you relate the circumstances leading to and including the taking of the application for this policy?

A. Well, I was called by the Reserve Company and Mr. Brown came around to my house to write this policy. He asked me certain questions which I answered and after answering those questions I signed the policy and I thought it was in effect.

The Court: You signed the application?

A. Yes, sir.

Mr. Spong:

Q. Mr. Ferebee, I show you, at this time, a policy with the Reserve Insurance Company, No. CR726487 and ask you if that is your policy which was issued to you?

A. That's it.

Q. On the inside of that policy is a photostat and I ask

you if that is a copy of the application which you signed on the day in question?

A. To the best of my knowledge, yes.

Q. All right.

* * * * *

page 6 }

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Mr. Spong:

Q. Mr. Ferebee, I refer to the application attached to "Plaintiff's Exhibit B" and I will read you Question 9: "Have you or any member of the family group to be insured received medical or surgical service or treatment within the past three years?"

The answer shown on there is what?

A. "Yes."

Q. The answer is "Yes." Was that "Yes" written by you or written by Mr. Brown?

A. Written by Mr. Brown.

Q. That "Yes" was written in response to his asking you that question?

A. That's right.

Q. Mr. Ferebee, in response to that question, what did you tell Mr. Brown?

A. I stated that two times I had been to the hospital for flu; once for twitching of the legs; once for an attack of kidney colic and then for repair of a hernia on the left side.

Q. At the time you were in the hospital for a "twitching of the legs" as you call it, how long were you hospitalized?

A. Just overnight.

Q. Overnight?

A. I would say from 10:00 o'clock at night until page 7 } 10:00 o'clock the next morning, approximately. In other words, when Dr. Jones came there, he asked me how I felt and I told him "All right." He dismissed me.

Q. Do you remember when that was, Mr. Ferebee?

A. No, I do not.

Q. But you were hospitalized overnight on that occasion?

A. That is correct.

Q. Did you tell Mr. Brown about an attack of kidney colic?

A. I did.

*Earl H. Ferebee.*

Q. How long were you hospitalized on that occasion?
A. From 10:30 Saturday morning until close around noon on a Monday morning.
Q. I believe you said you advised Mr. Brown of occasions when you were hospitalized for influenza?
A. Correct.
Q. In addition to the twitching of the legs, the kidney colic, and the two attacks of flu, what other hospitalization period or illness did you advise Mr. Brown of?
A. Repair of the hernia on the left side.
Q. I refer you again to the application attached to "Plaintiff's Exhibit B" and I ask you to tell the jury and the Court what shows on the answer to Question 9 after "Yes."
A. "Hernia" is the only thing I can see.
Q. Can you read this?
A. 7/31/56, operated on; Elmore Jones.

page 8 } Mr. Parsons: You may read off the original here.
The Court: Do you want to offer it in evidence?
Mr. Parsons: I will offer a photostatic copy of that which has been stipulated to.

A. "7/31/57, operated, T. Elmore Jones, for hernia on left side."

Mr. Spong:
Q. Is this your writing, Mr. Ferebee?
A. No, sir.
Q. Whose writing is that?
A. I don't know unless it is Mr. Brown's.

(Court looks at paper.)

Mr. Spong:
Q. At the time that you were asked Question 9, did you *you* tell Mr. Brown more information than is shown on that application which I have just handed you?
A. I told Mr. Brown about having emphysema.

* * * * *

page 9 } Q. I understood you to say, Mr. Ferebee, that in addition to the information which you have already related to the jury and to the Court that you gave Mr. Brown that you told him about what?

*Earl H. Ferebee.*

A. Emphysema.

Q. After you had given Mr. Brown this information, did you then sign the application?

A. I did.

Q. Did you read it over?

A. No, sir.

Q. Did Mr. Brown ask you other questions other than the one I have related, No. 9? Did he ask you all the questions that are shown on the application here?

A. Well, he asked me numerous questions, yes.

Q. Did he ask you whether you had ever had heart trouble?

A. Yes, he did.

Q. What was your answer?

A. "No."

Q. Your answer was "No"?

A. That's right.

Q. Did he ask you if you had ever had any disease of the heart, lungs, kidney, stomach, bladder or any high blood pressure?

A. That is correct. He asked me those questions; yes.

Q. And you told him about the complaints that you heretofore related?

A. Correct.

Q. So that at the time he took this application, you told him each time you had been hospitalized within

page 10 } three years?

A. That's right.

Q. You told him about the twitching of the legs?

A. Yes.

Q. And about emphysema?

A. Yes.

Mr. Parsons: Of course, Your Honor, this is pure argument.

The Court: You have been over it once, Mr. Spong.

Mr. Parsons: All right to emphasize a point, but I think that is overdoing it a little bit, Judge.

Mr. Spong:

Q. Mr. Ferebee, after you were hospitalized for this operation, you applied for recovery under this policy?

A. That's right.

Q. And you were rejected?

A. That's right.

Q. Did you contact Mr. Brown subsequent to that?

*Earl H. Ferebee.*

A. I received a letter which denied me, a notice, denying me the payment. I called the office under pretence of getting another policy. I said that I would like to see Mr. Brown about another policy, about a policy, at least. I asked for a Mrs. Brown. She answered and she said, "He doesn't come here but I will give him a call. He might be here after lunch." She said she would get in contact with him. He would come to my house, which he did.

That was that afternoon. He came to my house.

Q. Did you advise him that this policy had been
page 11 } rejected?

A. I did. I showed him the letter. I showed him my policy.

Q. What conversation took place?

A. When I showed him the letter, I asked him what was the joke and then I asked him, I said, "Do you remember me giving you that information?" He said, "I do. I remember something about it." I said, "Why didn't you put it down?" He said, "I don't know."

He then tells me to write a letter to the company and not to be sarcastic or threatening; just a good business letter and he was sure they would pay off.

Q. Did you write the company?

A. I did.

Q. Did you write them more than once?

A. I wrote them twice.

Q. Mr. Ferebee, in addition to the questions that I have put to you heretofore which came from this application, did Mr. Brown ask you if you were then in good health?

A. Well, now, you ask me a question I can't answer. I don't remember. I don't remember whether he asked that question or not. I wouldn't say "Yes" and I wouldn't say "No."

Q. I again refer you to the application attached to "Plaintiff's Exhibit B," Question 5, and ask you to read the answer which is shown thereon. Read the question and the answer.

A. The print is too fine for me to read.

Mr. Spong: I will use this photostat again.

Q. Read Question No. 6.

page 12 } A. "Are you and all the members of the family group to be insured in good health and free from any physical or mental disease?" The answer is "Yes."

*Earl H. Ferebee.*

Q. Mr. Ferebee, you say you do not recall whether that specific question was asked you or not?

A. I couldn't say "Yes" or "No," but it must have been "Yes" by the answer there.

Q. Would your answer have been "Yes"?

A. It would.

Q. Mr. Ferebee, who is your physician?

A. Dr. T. Elmore Jones.

Q. Has he treated you for a number of years?

A. Yes; around twenty-five, I would say.

Mr. Spong: Answer Mr. Parsons.

CROSS EXAMINATION.

By Mr. Parsons:

Q. Mr. Ferebee, I show you a document entitled "Application for Hospital and Surgical Expense Policy" with a T100U on it. Will you look at that and see if there is not the original application?

A. I would say it is. It is my handwriting on it to the best of my knowledge.

Q. Where *is* says "Signed" is the name of Earl F. Ferebee. That is your writing, is it not?

A. Yes, sir.

Q. That is your handwriting?

page 13 } A. Yes, sir.

The Court: You want to offer that as a substitute for the photostatic copy?

Mr. Parsons: Yes, sir, I do at this time. I would like to offer this photostatic copy. It would be "D," I believe, according to the previous agreement. Your Honor.

The Court: "Defendant's Exhibit D."

Mr. Parsons:

Q. These questions on here were all asked of you by Mr. Brown?

A. You've asked a question. I wouldn't say "all." I would imagine so, yes. I know of no reason why he should omit any.

Q. Mr. Ferebee, where was this document filled out; at your home?

A. Yes, sir.

Q. At the time that you were sitting there, sir, did you

mention to Mr. Brown that you had just gotten out of the hospital on the 10th of January?

A. Did I mention to him that I had gotten out of the hospital on the 10th of January?

Q. Yes. Did you tell him that?

A. No, I didn't because I don't think I got out of the hospital on the 10th of January. Wait a minute; with a case of flu 1958. Yes; I would say "Yes."

Q. January of 1957?

A. Yes. I was hospitalized with a case of flu for five days or something like that.

page 14 } Q. The hospital listing said you were in there for virus influenza and chronic emphysema.

A. I was not.

Q. During that time did you tell Mr. Brown that you had trouble breathing for sometime prior to that?

A. I cited to him that I had emphysema which is a shortness of breath caused by a defect of the lungs.

Q. Did you use the medical term or did you tell him you had shortness of breath?

A. I used the medical term of emphysema.

Q. He did not write that down on this document, did he?

A. I don't see it.

Q. He did not write down on this document, sir, that you had had hypertension, did he, either?

A. Well, I have never known that I had hypertension.

Q. Did you tell him about going to the hospital for that one day?

A. With a twitching of the legs only; from the hips down and not from the hips up.

Q. You told him about that?

A. I positively did.

Q. Mr. Ferebee, while Mr. Brown was filling this out, were you observing what he wrote down?

A. I was looking at him.

Q. And you say what he was doing, did you not, sir?

A. It wasn't legible to me what he was writing

page 15 } down. I was fifteen or twenty feet away from him.

Q. When he finished this document, he handed it to you, did he not?

A. No, he didn't hand it to me. He was sitting in the chair. He had it on the arm of the chair and I signed it.

Q. You signed on the arm of the chair?

*Earl H. Ferebee.*

A. Yes. He was using his briefcase to write it on.

Q. Isn't it true, sir, that you realized when you saw this document that he had not written down any answers except one on Question 8; that is the question concerning the disease of the heart, lungs, kidneys, stomach, virus, high blood pressure and so forth, and the only mark under that is "Hernia"?

A. Correct.

Q. And you also knew, sir, did you not that the only thing mentioned on this thing, the only thing he wrote down concerning operations was the operation for hernia? That is correct, is it not?

A. Correct.

Q. So that you knew he had not put on this form the other illnesses that you had mentioned?

A. That is correct.

Q. Mr. Ferebee, this is "Defendant's Exhibit A." It was offered and has been accepted as part of the evidence. I would like for you to examine that, sir. I have the original if you would prefer to examine that and this one. Let me get you the original. I think they are clearer.

These, sir, and you can correct me if I am wrong, are two applications made to the Reserve Life Insurance page 16 } Company and they are the originals, to be compensated for your illness in the hospital, isn't that correct?

A. I would say this one was, yes. This one and the other one, too; both of them. I will say this much. As I said in the lower court, I don't remember signing this one.

Q. Which one are you referring to as not remembering to sign? There are two of them.

A. "Exhibit B."

Q. These forms are slightly different and dated five days; isn't that correct?

A. I don't know. I haven't paid that much attention to it.

The Court: Are they signed?

Mr. Parsons: Yes, sir. They are both signed.

A. One is March 24th. Both of these say March 24th. I'm wrong. One says 4/17/58 but the other doesn"t have a date on it.

Mr. Parsons: That is correct. That is the date of the

*Earl H. Ferebee.*

receipt. One was written on 3/24/54 and, I'm sorry, they are the hospital dates.

Q. On the face of that document you have, sir, it says in Paragraph 3; I cannot read that writing. Do you know who wrote this particular writing?

A. I would say it was my handwriting but I have no recollection whatsoever of writing it.

Q. Do you know what it says? I cannot read it.

A. It has "Earl H. Ferebee" right here.

Q. In Paragraph 3?

page 17 } A. No. I can't read it.

Q. On the bottom of this application, sir, it says "Paragraph 5: List all sicknesses for which you have had medical treatment in the past three years." What is the answer on the exhibits that you have there?

A. "None"; but it is not in my handwriting.

Q. On the other one, in Paragraph 5 it says, "List all the sicknesses which you have had medical treatment for the past three years."

A. "Influenza and the grippe."

Q. One doctor's name was Mayo?

A. Correct.

Q. And the other T. Elmore Jones?

A. Correct.

The Court: Proof of loss?

Mr. Parsons: Yes. Proof of loss claims. We are interested in what has been offered.

Q. Mr. Ferebee, at that time you also did not list again these other operations and other sicknesses that you had, isn't that correct?

A. I don't think I could find room on that to have listed them. Very small space there.

Q. On one of them there is nothing. On the other one there are only two items. Correct?

A. Correct. The one you say there is nothing on was not filled in by me; not my handwriting.

Q. You did not on this application or proof of

page 18 } claim of loss, you did not put down any other illnesses other than the one that was apparently received on April 17th?

A. No. I couldn't put it down. It wasn't made out in my handwriting. I didn't make it out.

*Earl H. Ferebee.*

Mr. Parsons: I would like to offer this at this time, Your Honor. I don't want to be precluded from making appropriate motion, however. This is "Exhibit A." These are "Exhibits A and B."

Q. Mr. Ferebee, I hand you the original of a report forwarded to the Reserve Life Insurance Company, showing the hospital history report of your hospitalization. I wonder if you would examine that, sir, and it starts in 1942.

A. That doesn't have anything to do with the application. It said three years prior.

Mr. Spong: If it please the Court, I wonder if this is the proper witness to introduce this exhibit through. I have no objection to the introduction of it, but it is a hospital report and Miss Appleman is here.

The Court: I don't think it is proper, this witness, not the proper one to introduce this particular paper but he can ask him to look at it and if he had those particulars ailments—

Mr. Parsons: That is what I plan to do.

Q. I wonder if you will look in the lower right-hand corner, 12/27/42 it says "lobar pneumonia," isn't that correct?

A. Right.

page 19 } Mr. Spong: I apologize for interrupting, Mr. Parsons, but the question before the Court, and I think it is pretty well agreed on, is that we are concerned through the application with the ailments for three years preceding this application. I don't want to preclude Mr. Parsons from questioning this gentleman on his life's medical history, but the crux of this matter involves a three-year question on a three-year application, and I submit to you to go back to 1942 or 1943 is beyond the scope of the question before us.

Mr. Parsons: Question No. 8 does not limit time. "Have you or any member of the family group ever had any diseases of the heart, lungs, kidneys, stomach or bladder, virus, high-blood pressure, paralysis, arthritis, syphilis, cancer, diabetes, hernia, goitre, or rectal diseases." Doesn't limit time.

Next question: "Have you or any member of your family group to be insured received medical or surgical treatment during the past three years?" Two separate things. One of them asked you if you ever had such a disease and the

other said "Received medical treatment in the past three years."

I think if you can show these diseases at any time, it is proper evidence for what it is worth.

Q. Was the lobar pneumonia in 1942?

A. Whether lobar or not, I can't answer. I had pneumonia in 1942.

Q. From 7/4/45 to 7/18/45 you had an operation on the right hernia?

A. I don't know about the dates but I had an operation on the right hernia.

Q. And in October of 1948 you had repairs on page 20 } that?

A. Yes, sir.

Q. In May and June of 1949 you had a hydrocila of the cord.

A. That is correct.

Q. That is connected also with the hernia?

A. Correct.

Q. In March and April of 1954, it is listed as chronic bronchitis and influenza. Is that substantially correct?

A. I would say the influenza is but so far as the bronchitis is concerned, I was told it was influenza.

Q. In June of 1955 you were listed on the hospital records as having hypertension. This is the one you say was the twitching of the legs?

A. That's correct. I don't know about the date but it was at the same time.

Q. In 1956, in March, I believe, this is what you called kidney colic; left ureteral calculus.

A. Whatever the medical name is.

The Court: Isn't that a form of gallstones?

Mr. Parsons: That is my understanding of it.

A. What I understood at the hospital was that it was kidney colic.

The Court: Formation like a stone?

A. The only thing they treated me out there was to give me a shot in the arm Saturday morning and Sunday afternoon. Gave me a dose of castor oil to take a picture with to

be x-rayed the next morning. That's why I took it to be kidney colic instead of stones.

Q. In 1956 you had operation for hernia that is page 21 } listed on the application?

A. Correct.

Q. In January of 1957, the same month that you got the policy out, you were in the hospital for seven days from the 3rd of January to the 10th of January with a virus infection and emphysema?

A. That emphysema had been on me. The only thing I was told was that I had the flu, virus flu. That is what the doctor diagnosed it.

Q. In Paragraph B which is called "Past History," it lists the two hernias and also lists cardiac affliction for about one year. Is that correct?

A. Cardiac affliction for one year? I never had any cardiac affliction, to my knowledge.

Q. That is heart trouble, isn't it?

A. I think so.

Q. Did you tell Mr. Brown you ever had heart trouble?

A. No, I didn't tell him because I didn't have any. Couldn't tell him what I had never had.

Mr. Parsons: I believe that's all.

## RE-DIRECT EXAMINATION.

By Mr. Spong:

Q. Mr. Ferebee, Mr. Parsons questioned you about applications which were made to the Reserve Life Insurance Company and I believe you acknowledged that you had signed both of these?

A. I said I would say they were in my handwriting.

Q. Your signature?

page 22 } A. That's right.

Q. Now, under No. 5 on this one which has been marked "Exhibit B." I believe "Defendant's Exhibit B," where the word "None" is written, is that your handwriting?

A. No, sir.

Q. You did not place that there?

A. No, sir.

The Court: Which one is that?

Mr. Spong: That is the one received by the company on

April 21st; the only identifying date I can find. Isn't that marked "Defendant's Exhibit B"?

The Court: Yes.

Mr. Sprong: On the other application, I believe, it is marked "Defendant's Exhibit A," is that correct, Your Honor?

The Court: Yes.

Mr. Spong:

Q. On that application, you have listed these attacks of influenza which Mr. Parsons has discussed with you.

A. Influenza and grippe.

Q. On these applications, Mr. Ferebee, why were you hospitalized? What was the nature of your illness at the time of this operation?

A. I had a malignant tumor on my right kidney.

Q. And that was removed?

A. The kidney was removed.

Q. As a result of that operation this claim was

page 23 } initiated?

A. Yes, sir.

* * * * *

MISS MARGARET APPLEMAN,

a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Spong:

Q. Please state your name.

A. Margaret Appleman.

Q. Miss Appleman, I have in my hand a hospital history reported dated April 25, 1958 and it is signed "Margaret B. Appleman." Is that your signature?

A. Yes, sir.

Q. This report, executed in 1958, gave a history and a physical examination which is referred to under Section A of the report and I will ask you to read that to the jury and the Court. This is in 1958.

Mr. Parsons: If Your Honor please, I think it would be appropriate for the document to be in evidence. It has been referred to by both parties.

*Margaret Appleman.*

* * * * *

page 24 }

* * * * *

Mr. Spong:

Q. I hand you an exhibit which has now been marked "Plaintiff's Exhibit C," Miss Appleman, and ask you if you will read Section A of the report as taken from the report of the hospital record.

A. This pertains to Mr. Earl H. Ferebee, dated April 6, 1958. Had physical examination and it works up to Duke Hospital several weeks prior to admission at which time a uretal tumor on right was found. He was advised to have his kidney removed. Had been in apparently good health prior to the developing of right upper quadrant mass. No history of hematuria."

Q. Miss Appleman, I refer you to under Past

page 25 } History, Section B of the same exhibit, "Cardian affliction, about one year."

A. Read this?

Q. No. I will ask you, in preparing this report, would that refer to one year prior to the time the report was made?

A. Yes, sir.

The Court: What was her answer?

A. Yes, sir.

Mr. Spong:

Q. So if that is an accurate statement, it would go back at latest to April of 1958? I mean, 1957?

A. Yes, sir.

Mr. Parsons: Your Honor this is a factual—

The Court: Sustain the objection. That would be a matter of opinion.

Mr. Parsons: In your records, Miss Appleman, do you have any records which would indicate information leading to cardiac affliction for about one year?

A. Yes, sir.

*Eddie A. Brown.*

Mr. Spong:
Q. What is the date of those records?
A. The date of this record is admission date, March 24, 1958. Patient was discharged on April 9, 1958.
Q. Do you know by whom a report was prepared?
A. The house physician.
Q. Is it in his handwriting?
A. Yes, sir.
page 26 } Q. I will ask you this. These marks (This has been stipulated) but these marks showing on this exhibit, the stars and that underlining is not your handwriting?
A. No, sir.
Q. Answer Mr. Parsons.

Mr. Parsons: No questions. I would like to reserve the right to recall her if necessary for the Defendant.
Mr. Spong: That is the Plaintiff's case, Your Honor.
Mr. Parsons: I would like to make a motion, if Your Honor please.

(In Judge's Chambers).

Mr. Parsons: My motion is a motion to strike and it is based on a recent case, *New York Life Insurance* v. *Eicher*.

(Off the record discussion.)

The Court: Motion to strike is overruled.
Mr. Parsons: I would like to note an exception and state I disagree with the Court's ruling.

(In court room.)

EDDIE A. BROWN,
a witness called by Counsel for Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Parsons:
Q. State your name and address, please.
A. Eddie A. Brown, 123 Pinners Avenue.
Q. What is your present occupation, sir?

*Eddie A. Brown.*

A. I sell insurance for Reserve Life.

page 27 } Q. How long have you been so employed, approximately?

A. This time it was a little over three years.

Q. I hand you a document which is the original of an exhibit and ask you if you sold that policy of insurance to Mr. Ferebee?

A. I did.

Q. What is the date that that policy was written by you?

A. It was written on the 21st day of January 1957.

Q. Where was this application taken, sir?

A. It was taken on King Street in Mr. Ferebee's house.

Q. Did you call on Mr. Ferebee?

A. I did, sir.

Q. When you called on him to sell him this policy of insurance, did you go into the question of his health at that time?

A. Well, I do on all policies.

Q. At that time, sir, did you ask him the question that says, I believe: "Have you or any member of the family ever had any diseases, *et cetera?*" I wonder if you will read the question and tell what his answer was. Question 8.

A. We asked, "Have you or any member of the family group to be insured," and we pause there and ask the person or tell the person that this means anybody that is going to be insured on the policy, "ever had any disease of the heart, lungs, kidneys, stomach, bladder, virus, high blood pressure, paralysis, arthritis, syphilis, cancer, diabetes, hernia or rectal diseases?"

Q. What was his answer?

page 28 } A. The way I asked that question is this: "When I read these questions if you ever had any of these diseases, you tell me when I get through." I read it just like I did. He said, "Hernia." I understood "Hernia" and down here, I made a statement of what it was.

Q. Did you put down every disease he told you about?

A. To the best of my knowledge.

Q. Did you fail on that application, sir, to put down any diseases that he had had prior to this time that he had told you about?

A. Ask that again, sir.

Q. Did you fail to put down on that document anything, any diseases or hospitalization that he told you about at this time?

A. To the best of my knowledge, I put exactly what Mr.

*Eddie A. Brown.*

Ferebee gave me on this application. Filled it out and handed it to Mr. Ferebee to sign as we do everybody else.

Q. Did Mr. Ferebee sign this in your presence?

A. Yes, sir.

Q. Was it given to him or presented to him so he could read it?

A. Yes, sir. He had possession of it.

Q. Do you recall whether he read it or not, sir?

A. I don't know about that.

Q. Did you have any occasion to talk to Mr. Ferebee subsequent to this time?

A. You mean after this?

Q. Yes.

A. Yes. I can't tell you when. We have what
page 29 } we call "lead girls" that call on the telephone
to get leads. People find out people who are interested in hospitalization. I came in one morning to the office. As a matter of fact, I go in every morning to the office at 9:00 o'clock and Mrs. Hill said, "I have a lead for you."

The Court: That is not proper evidence.

Mr. Parsons:

Q. Tell what you did when you saw him.

The Court: Did you see him?

A. Yes. I saw Mr. Ferebee at the same address.

Mr. Parsons:

Q. What was the conversation at that time?

A. I went in and spoke friendly, naturally, to Mr. Ferebee and the best I can say, he said that I had sold him a boner. I asked him what he meant and he told me they failed to pay and asked me what kind of policy I sold him; It failed to pay off.

Q. Mr. Brown, at that time, did he say anything to you about not putting down things on that application?

A. I don't recall it; no, sir.

Q. What advice, if any, did you give him at that time?

A. Mr. Ferebee asked me why didn't it pay off, I believe, and I told him that was beyond my control; but if he thought the company owed him money, a just claim, then to write the company; not to write a threatening letter or anything

but write them a nice letter and if they owed him, I was sure they would respond and pay him, and if they didn't, they would give him the reason why. I had been page 30 } with the company a number of years and never had any trouble with them.

Q. Did Mr. Ferebee ever tell you anything about having a twitching of the legs or high blood pressure?

A. I don't recall. If he had said "high blood pressure," I would have closed the book and walked out nicely. We wouldn't write a person having high blood pressure.

Q. On January 21st, when you were taking this application, do you recall if he told you he had been in the hospital for a week in the early part of January?

A. I can't recall that. I would have had it down. I would have had a record of it here.

Q. Do you recall him saying anything about having a shortness of breath?

A. No, sir, I can't say he did. I couldn't say he didn't as far as shortness of breath. I won't answer that "Yes" or "No" because I wouldn't know; but I do know that if it was either one of these up here, I would have had it underscored.

Q. That's all.

## CROSS EXAMINATION.

By Mr. Spong:

Q. Mr. Brown, you run a store other than writing this insurance, don't you?

A. I did run a store until I had the misfortune to have it burn down.

Q. I am sorry to hear that but you had an occupation other than selling this insurance?

page 31 } A. At the time I sold him this. Is that what you mean?

Q. Have you had an occupation?

A. I have had several occupations.

Q. How long have you been writing this insurance?

A. How long? This time, I believe I started on the 28th of March 1955.

Q. So you have had occasion to fill in a number of applications similar to this?

Q. In response to Mr. Parsons asking you a question, asking you if Mr. Ferebee told you anything about short-

*Eddie A. Brown.*

ness of breath, your answer, if I took it down properly, was that you couldn't say that he didn't?

A. I didn't say "If I took it down properly."

Q. I am talking about myself.

A. I said I couldn't say if he did or didn't on shortness of breath. Shortness of breath certainly wouldn't be sickness; not with us.

Q. You are saying that you don't know whether he told you?

A. I said I wouldn't say "Yes" or "No" whether he had said he had shortness of breath or not.

Q. You don't know whether he told you that or not?

A. No, sir.

Q. You don't know what emphysema is?

A. No, sir.

Q. You don't know?

A. No, sir.

page 32 } Q. So, if he told you he had emphysema, you wouldn't have known what it was?

A. No, sir. I put it on there the best way I knew how.

Q. I direct you now to Question No. 8. The answer shown on that application is what?

A. "Yes."

Q. Was that written by you?

A. Yes.

Q. Was everything on this application written by you with the exception of Mr. Ferebee's signature?

A. No, sir.

Q. What was written by him?

A. All Mr. Ferebee has on here is his signature.

Q. That is what I asked you.

A. You said on the application.

Q. That is by your company up there. He paid you at the time this application was written by you $9.55. That is what it shows, doesn't it?

A. Yes.

Q. What does that represent?

A. $6.00 registration fee and one month's premium.

Q. In all these questions asked by Mr. Parsons, you prefaced all of them, "To the best of your knowledge," and then insofar as this shortness of breath, you say he didn't say he did or he didn't?

A. That's right.

page 33 } Q. So it is entirely possible that Mr. Ferebee told you about some things other than that hernia, isn't it?

*Eddie A. Brown.*

A. It is not entirely possible that Mr. Ferebee told me that he had diseases that the application reads.

Q. Is "emphysema" listed anywhere under No. 8?

A. No, sir.

Q. I want you to examine it very carefully. Is "emphysema" there anywhere?

A. No, sir.

Q. So your contention is that if he had told you anything that is on this policy, you would remember?

A. If he told me that he had emphysema and been hospitalized for it, I would have put it down there somewhere on the application or either used the back of it.

Q. That isn't what you just said, Mr. Brown. You said that if he had told you that he had something that was on this application, you would have underscored it?

A. I would have underscored it.

Q. That was your original response?

A. That is the diseases that we put riders on.

Q. How about influenza?

A. That doesn't carry a rider. I put it down if he had been hospitalized in three years for it. I would have put it down. It wouldn't have anything to do with the policy.

Q. You are maintaining that he didn't tell you anything about influenza?

page 34 } A. That's right.

Q. You are sure of that? That is to the best of your knowledge?

A. Yes; sure, it is to the best of my knowledge.

Q. He didn't tell you anything about influenza?

A. No. What he told me he had, I have it on that paper there.

Q. That is not exactly right, Mr. Brown. You said you couldn't say whether he told you about shortness of breath or not?

A. When a person is hospitalized, we put the date he is hospitalized and what for; where he is hospitalized.

Q. You are familiar with the application for payment under this policy that Mr. Ferebee filed?

A. Mr. Spong, you are asking me do I know what the procedure is in paying off on the policy?

Q. No. I want to know if you are familiar with the applications that he filed to obtain payment under this policy?

A. No, sir.

Q. You haven't seen it?

A. No, sir.

*Eddie A. Brown.*

Q. No one showed you those?

A. No. I do have the record or did have it when we paid off a claim at Duke Hospital.

Q. I hand you "Defendant's Exhibit A," I believe. This is the original. I believe this is the original which was filled out, received by your company in April of 1958, and I ask you what Mr. Ferebee has reported to your company that he has had.

page 35 } What does that say?

A. I guess that is "emphysema."

Q. No. That is "Influenza." What is this here?

A. Grippe.

Q. So, subsequent to his last hospitalization, he reported that to your company?

A. He might have reported it to the company but he didn't report it to me.

Q. Did you—

Mr. Parsons: Your Honor, this is in the realm of argument. They speak for themselves.

Mr. Spong: I have asked him all I am going to on that.

Q. Mr. Brown, did you fill in this policy on top of your brief case, sitting in a chair?

A. I couldn't say. I filled it out in Mr. Ferebee's house. That is the usual place, filling them out on top of the brief case.

Q. You remember?

A. No. That is too far down the line. I couldn't say whether I filled it out on the arm of the chair or brief case. The procedure is to fill it out on the brief case.

Q. When you returned to Mr. Ferebee's house after the claim had been denied, did he remind you about the things that he told you on your last visit to his house?

A. I don't remember if he did.

Q. That's all.

page 36 } RE-DIRECT EXAMINATION.

By Mr. Parsons:

Q. One other question, sir. In going down these questions of heart, lungs, kidneys and so on, when you asked him if he had ever had any disease of the heart, did he say he had ever had heart disease or cardiac condition?

*Eddie A. Brown.*

A. As I stated before, I *real* all those questions at one time. This means anybody that is going to be insured on this policy. When I got to hernia, he said, "I had a hernia." I underscored.

Q. Is that the normal way the policy is sent in? If there is any disease there, it is underlined by the agent. Is that what you are told to do?

A. Yes, sir.

Q. That is the way the company understands it?

A. We underscore it. Sometimes a person has two of them and we put both of them down.

Q. You don't recall the use of the word "hypertension" at any time, do you, in reference to Mr. Ferebee?

A. No, sir.

Q. That's all.

The Court: Mr. Brown, you say after you filled in all the answers to these questions, you had him sign it?

A. Yes, sir.

Q. And you don't know whether he read it over or not?

A. No, sir. I handed it to him. If he is seated, we take it over to him.

page 37 } The Court: When you asked him about these diseases, you asked him in a lump? You would go right along?

A. Yes, sir.

The Court: And then you underscored the word "Hernia" and the next part of the question, if the answer is "Yes" and then "Give details," you didn't detail?

A. Details come on the bottom.

The Court: The details are in the next question?

A. That is where we are instructed to put them, Your Honor.

The Court: He didn't read this application back over? When he answered the question "Yes," he had some of these diseases or one of them, no way to know what you were putting in there because you didn't fill it in?

*Eddie A. Brown.*

A. On that application it says, "Have you or any member of the family group to be insured ever had any diseases of the heart, lungs, kidneys, stomach, bladder," and these other things listed, and I underscored "Hernia," and I answered the question, "Yes." It says, "If answer is "Yes," give full details." Well, now, our instructions are to put the full information—

The Court: I am asking you what you did when it said, "Give full details." What did you do? What did you answer to "Give details."?

A. I didn't put nothing under there but down here is where we give the record of what happened.

The Court: That's the next question. The next question is about "Have you been treated within three years"—

page 38 } A. That's right.

The Court: That is on the question. The answer to Question 8, when you asked this man if he had any diseases and he answered "Yes"—

A. Yes, sir.

The Court: And then were it gives two lines to give details, you didn't put what details were.

A. No details on that, but we were instructed to give all the information down there.

The Court: I know, but the applicant doesn't know what you are underscoring; what that means, does he?

A. I don't know about that. I handed it to him to sign.

Mr. Parsons:

Q. Mr. Brown, the only disease that was mentioned was the hernia, isn't that correct?

A. Yes, sir.

Q. And the details that are put in here in answer to Question 9 relates to the hernia mentioned in Question 8, doesn't it?

A. That's right. Underscore the top one and come to the bottom one and put in details.

Q. If you had put the details under Question 8, you would have had to repeat it?

A. I would have put "Hernia" and still come down to where he was hospitalized.

Q. And the custom of your company is to fill it out in detail in the itemized columns?

page 39 } A. That's right. If we don't have room enough there, we will put it on the back of the page.

Q. All right.

RE-CROSS EXAMINATION.

By Mr. Spong:

Q. Mr. Brown, suppose somebody had had a disease, a disease listed here, rectal. Suppose they had had a rectal disease in 1952 and you were filling out the application in 1959.

Mr. Parsons: If Your Honor please, I think we ought to confine ourselves to some reasonable period or to the facts in the case. This is pretty far ahead.

Mr. Spong: I don't think it is, Your Honor. He stated that the procedure he follows—

The Court: If it were more than three years old, would you have made a notation?

A. If he had had any one of those disease, "Have you ever had"? then we would make a record.

Mr. Spong:

Q. Where would you put it on the application?

A. Put it down here and we pin a note up here on this and over and put it back here on another piece of paper.

Q. That's all.

Mr. Parsons: I would like to offer into evidence this transcript and read it into the record. I will just offer it.

The Court: Accepted in evidence as "Defendant's Exhibit E."

page 40 } MISS MARGARET APPLEMAN,

is recalled to witness stand by Counsel for the Defendant.)

*Margaret Appleman.*

DIRECT EXAMINATION.

Examined by Mr. Parsons:

Q. Miss Appleman, you have already been sworn and have testified. Will you please look at your records and see if you have one as of January 15, 1955. Will you look at it and let me examine it, please?

A. (Witness hands paper to Mr. Parsons.)

Q. I wonder if you would look at the sheet that is on top and state what it says on the first sheet with regard to diagnosis of his case at that time.

The Court: Identify who the patient is.

Mr. Parsons:

Q. Will you state who the record pertains to?

A. Mr. Earl H. Ferebee. He was admitted to Portsmouth Hospital on June 15, 1955 and discharged the following day, June 16, 1955. The final diagnosis by Dr. T. Elmore Jones was "Hypertension, psychoneurosis."

Q. I wonder if you would refer to the sheet preceding that, the yellow sheet entitled "History," and I will ask you if you will read what it says under "Personal History."

A. "History of hypertension."

Q. The rest of these records reflect the examination that took place in the hospital, do they not?

A. Yes, sir.

page 41 } Q. And the duration of that was one day?

A. Yes, sir, one day.

Q. I would like to call your attention to the record for January 3, 1957. Who does this refer to, please?

A. Mr. Earl H. Ferebee.

Q. On the King's Daughters Hospital form it says "History." I wonder if you would read just the part there that says "Personal History." Give the dates of the admission to the hospital.

A. This record pertains to Mr. Earl H. Ferebee, admitted January 3, 1957, discharged January 10, 1957.

Q. Read the history related there, please.

A. "Patient is a white man, conscious, coherent, in no acute distress admitted to this hospital due to shortness of breath, productive cough and elevated temperature. Patient had been sick four days ago. Started with dry, hacking cough which became worse and persistent. Associated with

this was loose bowel movement. Urination free and normal. Appetite impaired. No chest pains. No synotis."

Q. What was the diagnosis given on that particular case?

A. Final diagnosis was systenial vinal infection. Complicating disease is chronic pulmonary emphysema.

Q. What is chronic pulmonary emphesema?

A. I would say I am not qualified to answer.

Q. One other item. March 10, 1956. What was the date of admission of this patient and the name of this patient?

A. Record pertains to Mr. Earl H. Ferebee,
page 42 } Mr. Earl Hope Ferebee. Admitted March 10,
1956. Discharged March 12 of 1956. Provisional diagnosis was "Left ureteral calculus" and final diagnosis was the same.

Q. I hand you "Defendant's Exhibit C" and ask you this, and here is the original: If this represents an accurate list of the history of Mr. Earl Hope Ferebee as compiled from the records of the hospital?

A. This is the original report, medical report, made up on April 26, 1928 and information was taken from Mr. Ferebee's record.

Q. That record was prepared by you?

A. Correct.

* * * * *

DR. T. ELMORE JONES,

a witness called in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

page 43 } DIRECT EXAMINATION.

Examined by Mr. Spong:

Q. State your name, please.

A. T. Elmore Jones.

Q. What is your profession?

A. Physician.

Q. How long have you practiced, Doctor?

A. Thirty-five years.

Q. Here in the City of Portsmouth?

A. Yes.

Q. During that period of time have you had occasion to treat Earl H. Ferebee, seated here?

A. I think so. It was from about the first year I started practicing medicine and on through up until the present.

*Dr. T. Elmore Jones.*

Q. Dr. Jones, a hospital report has been introduced here which shows that as of April 25, 1958, Mr. Ferebee had a cardiac affliction for about one year. Do you have any knowledge of any cardiac affliction?

A. I do not. He has never had any cardiac affliction. Unfortunately that got on the record at the hospital. The record was written by one of the residents and I know that I endorsed it there. I realize the fact that I did that but I never read it before I did endorse it. If I had, I wouldn't have approved it.

Quite often I don't read those histories and records because we have had some foreign residents over there and sometimes I can't read them; but I know personally that Mr. Ferebee has never had any heart condition. He had another condition that could possibly be mistaken for heart. He has had emphysema of his lung. We know that and my record goes back to 1955 on that, but as far as heart condition, he has never had anything.

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I think probably a couple of years ago or maybe a year or two ago, I don't remember exactly, he would have what we call an extra beat. We see that quite often. We don't consider that a heart disease. He has never had anything to indicate heart failure. His heart has always been good.

Q. Answer Mr. Parsons.

CROSS EXAMINATION.

My Mr. Parsons:

Q. The words used here are "Cardiac affliction," which would imply, Dr. Jones, that there was something irregular or unusual about the heart condition. Is a skip beat or extra beat unusual?

A. That is not unusual in a man his age or my age. We see it occasionally. I pay no attention to it. It has no clinical significance as far as disability or heart disease goes.

Q. But it is an affiction, isn't it?

A. No, I wouldn't call it an affliction. A heart affliction is where the heart is decompensating and not giving proper circulation for the blood. It is not an affliction. This term "affliction" was written by one of the residents over there. I don't know where he got the idea from.

Q. Is it possible, sir, that the examination at Duke Hospital, and I don't know so I am asking you if you

*Dr. T. Elmore Jones.*

page 45 } recall—

A. I have a report. I haven't got my records here. He has had an examination at Duke Hospital and there is no indication of any heart disease whatever on that examination of Duke Hospital. As for emphysema of the lung, he has that.

The Court: What is the common name of that?

A. Judge, emphysema is a condition of the lung in which the lung, well, we refer to it as a "cotton lung." There has been some disease proceeding over a period of years and little air sacks are present so there isn't the proper exchange of carbon *dixoide* and oxygen in that type of lung. For instance, on exertion, they will have a little shortness of breath. It is not asthma. It is a different thing from bronchial asthma which is spasm of the bronchial tubes in contrast to emphysema of the lung.

Mr. Parsons:

Q. Normally, it increases with age? It gets worse as time goes on?

A. It may get a little worse as time goes on. It has been pretty stationary over a period of four or five years.

Q. Will you tell the jury what aureteral calculus is?

A. That is a small stone that forms in the kidney and as it progresses down the ureta, the little tube leading from the kidney to the bladder, it produces a condition we speak of as kidney colic; urenal colic.

Q. Would that be considered in the nature of a rectal disease?

A. No.

Q. Could that be disabling and in some cases page 46 } requires operation to remove?

A. Sometimes it does. If a stone is large enough that it won't pass through a tube, it has to be surgically removed.

Q. Is it considered to be a disease of the kidneys?

A. Well, that is rather far fetched. In other words, we don't get those stones to form in the kidney unless there is some abnormality thereby, which may be trivial or slight. There is many a person who has had urenal colic and had a little stone like that and passed it and never had any trouble after that.

Q. All right. Thank you, sir.

* * * * *

page 47 } EXCEPTIONS.

Mr. Parsons: Defendant excepts to instruction of the Plaintiff, "P-1," on the ground that the evidence does not disclose that Ferebee made a full disclosure of his medical history on the application of insurance; and further that the evidence clearly shows that he had specific knowledge as to what answers were on the application and that he knew that they were material.

Defendant excepts to Plaintiff's instruction, "P-2" on the ground that while it contains a clear statement of the statutory law, such law does not apply in this proceeding.

Defendant excepts to the granting of Plaintiff's instruction "P-3" on the ground that that phraseology indicating that the question whether the Plaintiff had actual or constructive knowledge does not apply because the evidence clearly shows that he did have actual knowledge of the contents of the application with reference to the medical history.

Defendant excepts to the ruling of the Court in its refusal to grant charge "D-4" on the ground that this is clearly the law as set forth in the case of *New York Life Insurance Company* v. *Eicher* and should be granted and that it is not repetition and covers a different point from that covered in Defendant's charge "D-1".

The Defendant makes a motion to strike on the grounds, 1, that the application speaks for itself and is duly signed by the Plaintiff that the policy of insurance offered in evidence speaks for itself and is to be construed with the application as the entire contract between the parties, and 2, that the answer is made by Mr. Ferebee on the page 48 } application given to the agent were fully known by him to be incorrect at the time he signed the application that in Question 6, that as a matter of fact, he gave the answer to the question "Was he in good health," the answer was "Yes" when he knew he had recently come from the hospital and had had serious and continuous trouble of various kinds as listed in the evidence; that he was fully aware that the Question No. 8 was incorrectly or falsely answered when he signed it and only listed one operation for hernia when he had had serious other trouble.

In addition, in his application for payment to the insurance company on the application, dated April 21, 1958, he listed his sicknesses for which he had had medical treatment for the past three years, "None." On the one dated April

19, 1958, he stated that he had only had influenza and grippe.

It appears clear that Mr. Ferebee did not reveal the whole truth in the matter. Under the law of *New York Life Insurance Company* v. *Eicher,* it is clear this case falls immediately and is on all fours with that case. Therefore, the motion to strike the Plaintiff's evidence should be granted and the Defendant should recover.

The Court: The Court overrules the motion to strike the evidence. Evidence is conflicting.

* * * * *

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* * * * *

MR. ROBERT J. RAISBECK,

a witness called on behalf of the defendant, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Calder:

Q. What is your name and address, please?

A. Robert J. Raisbeck, 30 Riverview Avenue, Fort Thomas, Kentucky.

Q. And what is your position, Mr. Raisbeck?

A. I am director of Administrative Services for the Cincinnati Regional Office of Reserve Life Insurance Company.

Q. Is that the same insurance company which is the defendant in an action at law brought by Earl Ferebee, which action is presently pending in the Municipal Court of the City of Portsmouth, Virginia?

A. It is.

Q. What are your duties—I didn't get the title of your position.

A. Director of Administrative Services.

Q. What are your duties as director of Administrative Services for the Reserve Life Insurance Company?

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A. I have complete charge of policy issuing department, premium collection department and policyholders' service.

Q. Do you either personally or through someone

under your supervision consider each and every application to the Reserve Life Insurance Company for a hospital and surgical expense insurance contract and make the final determination in each and every case as to whether the Reserve Life Insurance Company shall issue such a contract of insurance?

A. Yes, for the 10-state area that we serve out of Cincinnati.

Q. And what states are included in that 10-state area?

A. Virginia, West Virginia, Pennsylvania, Delaware, Ohio, Kentucky, Illinois, Wisconsin, the District of Columbia.

Q. Mr. Raisbeck, I now show you a document which purports to be a photostatic copy of an application to the Reserve Life Insurance Company for a hospital and surgical expense policy in the name of and signed by Earl H. Ferebee, and which contains in part the following factual information:

That the policy number is CR 726487; that the date of application is January 25, 1957; that question 8 of the policy reads:

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"Have you, or any member of the Family Group to be insured, ever had any disease of the heart, lungs, kidneys, stomach, or bladder; or high blood pressure, paralysis, arthritis, syphilis, cancer, diabetes, hernia, goitre, or rectal disease? If answer is 'yes,' give full details."

His answer was "Yes," and the word "hernia" in the preceding question is underlined.

That there is no indication anywhere on the application that the applicant had ever had any other of the diseases listed in question 8; that question 9 reads:

"Have you, or any member of the Family Group to be insured, received medical or surgical advice or treatment within the past three years? Is answer is 'yes', give details below."

His answer was "Yes," and in the appropriate space provided it is indicated that the applicant was operated on for a left hernia on 7/31/56; and that it does not appear anywhere on the application that the applicant received any other medical advice or treatment within three years preceding the date of the application.

*Robert J. Raisbeck.*

And I ask you, Mr. Raisbeck, whether the factual information on this document corresponds to the description of the document as I have related it to you?

A. It does in all details.

Q. Mr. Raisbeck, is this document which I have shown to you an accurate copy of the application submitted to your office by Earl Ferebee and approved by your office on the basis of the information contained thereon for the issuance of a policy of hospital and surgical expense insurance to Earl Ferebee?

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A. It appears to be an exact photostatic copy of the original document.

Q. Mr. Raisbeck, to the best of your knowledge, did you or anyone employed by the Reserve Life Insurance Company have knowledge of any past medical history of the applicant Earl Ferebee from any source whatsoever other than that contained on the application submitted by Earl Ferebee?

A. No. The only information we had was that given on the application.

Mr. Calder: I now hand this document to the Notary and ask that it be marked Defendant's Exhibit 1 for identification, and that it be attached to and made a part of this deposition.

* * * * *

Q. Mr. Raisbeck, I now show you a document which purports to be a photostatic copy of a hospital history report issued by the Portsmouth General Hospital, Portsmouth, Virginia, concerning Earl H. Ferebee, 422 King Street, Portsmouth, Virginia, dated April 25, 1958, signed by Margaret Appelman, copied April 28, 1958, and which in part contains the following additional factual information:

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That the patient's policy number is CR 726-487; that the patient was admitted on 3/24/58 and discharged on 4/9/58; that the provisional diagnosis was "Adenocarcinoma lower pole of right kidney"; that the final diagnosis was "same plus hypertension and emphysema."

That a right nephrectomy operation was performed on 3-25-58; that the patient had a past history of a right inguinal hernia repair in 1944, a left inguinal hernia repair in 1956 and a cardiac affliction for about one year.

*Robert J. Raisbeck.*

That the dates and diagnoses of the patient's prior admissions were: 11-27-42 to 12-13-42, lobar pneumonia; 7-4-45 to 7-18-45, operation for hernia, right; 9-28-48 to 10-16-48, repair of hernia, right; 5-17-49 to 6-13-49, hydrocele of cord, right; 3-31-54 to 4-17-54, chronic bronchitis and influenza; 6-15-55 to 6-16-55, hypertension; 3-10-56 to 3-12-56, left ureteral calculus; 7-30-56 to 8-11-56, operation for hernia, left; 1-3-57 to 1-10-57, virus infection and chronic pulmonary emphysema.

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And I ask you, Mr. Raisbeck, whether the factual information on this document corresponds to the description of the document as I have related it to you?

A. It does. The information you have given appears on the photostat of the hospital history report.

Mr. Calder: Now, I hand this document to the Notary and ask that it be marked Defendant's Exhibit 2 for identification, that it be attached to and made a part of this deposition.

* * * * *

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Q. Mr. Raisbeck, did you or, to the best of your knowledge, did any other employee employed by the Reserve Life Insurance Company know any of the medical history of Earl Ferebee, which medical history is shown on this document, at or prior to the time that Earl Ferebee's application was approved, other than the medical history contained on the application submitted by Earl Ferebee?

A. We did not. The only information we had was the original application.

Q. Mr. Raisbeck, assuming that the facts relating to past medical history and previous admissions stated on this document marked Defendant's Exhibit 2 for identification and purporting to be a photostatic copy of a hospital history report concerning Earl Ferebee, are true, and assuming further that such of these facts as properly relate to questions 8 and 9 respectively on Earl Ferebee's application for a hospital and surgical expense insurance policy had been disclosed by Earl Ferebee in answer thereto on his original application, would your office have approved the application and caused the Reserve Life Insurance Company to issue the policy to Earl Ferebee?

*Robert J. Raisbeck.*

A. Had we had the information now disclosed by the hospital records, the application would have been rejected and all money paid to the writing agent would have been refunded to Mr. Ferebee.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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