

an accident, will not be sustained by a careful examination of the opinion in that case. It will be well to remember that the plaintiff in that case was suing to recover for the loss of personal property, and not for damages occurring to him while a passenger; and yet the court said that if the accident was caused by the mismanagement of a thing over which the defendant had immediate control, and for the management of which he was responsible, that the presumption of negligence did arise. We agree with counsel for the defendant in error that if, looking at all the evidence, and drawing such inferences therefrom as are just and reasonable, the court below could have said, as matter of law, that the plaintiffs were not entitled to recover, then the order of nonsuit was properly entered. *Pleasants v. Fant*, 22 Wall. 116; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403. But, as we have already shown, the court below, under the circumstances of the case as developed by the plaintiffs' testimony, could not have properly so said as matter of law, and the issues should have been submitted to the jury, under appropriate instructions as to the law by which they were to be guided in reaching a conclusion.

The judgment complained of will be reversed, and this case will be remanded, with instructions to proceed with a new trial under the principles of law as herein announced. Reversed.

FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA, PA., v. MILLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1899.)

No. 288.

1. LIFE INSURANCE—ACTION OF POLICY—EVIDENCE.

Where, in an action on a life insurance policy, defendant set up as a defense that the deceased obtained the policy, and deliberately committed suicide, for the purpose of defrauding the defendant, and in support of such defense introduced evidence of acts, conduct, and statements of deceased, including a letter written to a third person shortly before his death, not as acts or declarations against interest, but as showing his condition or state of mind, and the motives with which he acted, a letter written by the deceased to his wife on the day before his death was properly admitted on the part of plaintiff in rebuttal.

2. TRIAL—INSTRUCTIONS—EXPRESSING OPINION ON FACTS.

It is not error for a judge of a federal court, in submitting a question to a jury, to express an opinion as to the weight of certain evidence bearing thereon, where the jury are expressly told at the same time that the decision of the question rests entirely with them.

3. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATIONS—MATERIALITY.

Under a statute providing that a misrepresentation or an untrue statement made by an applicant for life insurance in good faith shall not work a forfeiture, or be ground of defense in a suit on the policy, unless the misrepresentation or untrue statement relates to a matter material to the risk, the insurer and insured cannot contract as to what statements shall be material, but that question is one to be judicially determined in each case,—by the court if the materiality is obvious, or by the jury if it depends on disputed facts.

4. SAME—CONSTRUCTION OF APPLICATION.

An application for life insurance required the applicant to state whether or not he had ever made application for insurance to any "company, association, or society," on which no policy had been issued, and to "give

name of each company, date of application, kind of policy, and amount applied for." *Held*, that an application for membership in a secret social and beneficial order, membership in which was attended with some benefit payable in case of death, was not within the language of such requirement.

5. SAME—MATERIALITY OF REPRESENTATIONS.

An applicant for life insurance stated, in answer to a question in the application, that he had never made application for insurance to any company, association, or society, on which a policy had not been issued. In an action on the policy after his death, it appeared that nine years before the issuance of the policy he had applied for membership in the Royal Arcanum, which was a secret social and beneficial order, in which some kind of benefit was paid on the death of a member, the nature and amount of which were not shown; that his application was reported on favorably by the examining physician, but rejected by the chief medical examiner on account of a fact shown by the examination, which in itself did not constitute good ground for rejection, which never affected the health of the applicant, and did not exist at the time of the issuance of the policy in suit. It further appeared that the deceased was never informed that he had been rejected on account of his health. *Held*, that the answer to the question in the application was made in good faith, and, if regarded as a misrepresentation, was immaterial to the risk.

6. SAME—STATEMENTS AS TO SICKNESS AND DISEASES.

Statements in an application for life insurance as to the diseases and sickness of the applicant are material, and he is bound in good faith to correctly state the facts so far as he knows them; but he is not bound to remember and state all of his ailments, and the temporary derangement of the functions of his organs, from which he recovered without impairment of his general health.

In Error to the Circuit Court of the United States for the District of Maryland.

This was an action by David P. Miller and Ann E. Percy, executors of William R. Percy, deceased, against the Fidelity Mutual Life Association of Philadelphia, Pa., on a policy of life insurance. There was judgment for plaintiffs on the verdict of a jury, and defendant brings error.

The defendants in error on the 27th day of December, 1897, brought their suit against the plaintiff in error on a policy of insurance insuring the life of William R. Percy for \$25,000, payable to his legal representatives within 90 days after satisfactory proof of death, and of the just and lawful claim, both as to the rights and interest of the beneficiary thereunder, as well as to the justness of the claim. The application was attached to and made part of the policy. The policy was issued on the 5th of August, 1896. The death of the insured, W. R. Percy, occurred on the night of the 26th of May, 1897, by drowning in the Chesapeake & Ohio Canal, about 12 miles below Cumberland, Md., the horse upon which he was riding along the towpath suddenly plunging into the canal with him. The defendants in error were duly appointed executors of his last will and testament.

The suit was originally instituted in the circuit court of Allegany county, in the state of Maryland, but subsequently, on the 23d of March, 1898, on petition of the plaintiff in error, was removed into the circuit court of the United States for the district of Maryland. Ten pleas were filed by the plaintiff in error, and replication and issues followed in regular course of pleading. The defenses set up were: (1) False answers by insured as to his previous condition of health. (2) False answers as to the physicians whom he had consulted. (3) Concealment that he had been previously rejected by the Royal Arcanum. (4) That the policy was obtained by fraud, and that the application had been made with fraudulent intent at a time when he was hopelessly insolvent, indebted to trust estates, and unable to meet his indebtedness, and made for the purpose of protecting his benefi-

ciaries; when he had a deliberate purpose of taking his life, with the intent to liquidate his debts with money derived from the policies of insurance. (5) That the company, in any event, could only be liable for moneys paid to it as premiums, as he had died by his own hand within three years from the issue of the policy.

The clauses of the application for insurance, so far as material to the questions at issue, are as follows:

"(5) That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as here stated. Nothing serious. A. B. Price, M. D.

"Give full particulars as to the nature thereof, date and duration, whether trivial or otherwise. If rheumatism, state whether muscular, sciatic, or inflammatory.

"Dyspepsia about twenty years ago. Ankle broken in 1847.

"(6) That the last physician I consulted, or who prescribed for me, was Dr. A. B. Price, of Frostburg, about Oct., '95, for the sickness here stated: Hurt from riding horseback; irritation of bladder; slight colic several times.

"Give nature and duration of illness, and, if complete recovery, say so.

"(7) That I have not consulted or been prescribed for by any other physician or medical man during the last ten years, except as here stated.

"Give date, nature of illness, and name of every physician for last ten years.

"None but John Porter, dead; after that, family doctor, A. B. Price.

"(8) That I have never made application for insurance on my life to any company, association, or society, upon which application no policy was or has yet been issued to or received by me for the full amount and kind, and at the rate applied for, and that no physician has ever given an unfavorable opinion upon my life with reference to life insurance, except as here stated. No.

"Give name of each company, date of application, kind of policy, and amount applied for.

* * * * *

"I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, are material to the risk, and are the sole basis of the contract with the said association. * * * And all provisions of law in conflict with or varying the terms of this agreement and policy applied for are hereby expressly waived. * * * And that, if any concealment or untrue statement or answer be made or contained therein, then the policy of insurance issued thereon, and this contract, shall be, ipso facto, null and void, and all moneys paid hereon shall be forfeited to said association: provided, always, that, if the necessary payments be made to keep said policy in force, it shall, in the event of my death, be incontestable for the sum payable thereunder after three years, except as therein set forth."

The defendants in error and the plaintiff in error respectively asked certain prayers or instructions of the court,—the defendants in error, six in number; and the plaintiff in error, five. The court granted the first, third, and sixth prayers of the defendants in error, amending, however, the first and sixth, and granted in lieu of the fourth a separate instruction of its own. It rejected the first, second, third, and fourth prayers of the plaintiff in error, and gave its fifth prayer, with an amendment by it, and treated the court's instruction granted in lieu of defendants in error's fourth instruction as one covering the second and third offered by plaintiff in error.

The instructions or prayers granted by the court are as follows:

"First [being the first prayer of defendant in error as amended]. If the jury find that the plaintiffs are the executors of the late William R. Percy, and that the defendant corporation executed the policy of insurance offered in evidence and delivered the same to said Percy in his lifetime, and that said Percy paid the defendant all premiums payable thereon at the time of said delivery, and paid all further premiums due thereon up to the time of his death, and complied with all the undertakings stipulated to be performed on his part in said policy, and that he died on the 26th day of May, 1897, and that the plaintiffs exhibited and delivered to the defendant the proofs of death

and justice of claim offered in evidence on or about the 21st day of June, 1897, and more than 90 days before this suit was brought, then the plaintiffs are entitled to recover in this suit, unless the jury shall find from the evidence that the application for the policy on the part of the said William R. Percy, deceased, contained some misrepresentation or untrue statement of fact made not in good faith by said applicant, or unless they shall find said application contained some misrepresentation or untrue statement or some material matter to the risk, or unless the jury find that said policy of insurance was obtained by said Percy from the defendant by fraud of him, said Percy, or that the said Percy destroyed himself. This prayer I grant, in connection with such other prayers as I shall grant, and such instructions as I shall give to the jury. The law of Maryland, passed in 1894, declares that a misrepresentation or untrue statement by an applicant for life insurance, made in good faith, shall not work a forfeiture, or be a ground of defense in a suit on a policy of life insurance, unless the misrepresentation or untrue statement relates to a matter material to the risk. This law renders it now impossible for the insurer and the insured any longer to agree that a statement shall be taken to be material to the risk, and to make it so, if in fact it is not really so, and prevents their contracting that a matter really irrelevant shall be taken to be material; and the plaintiffs' counsel contend that the court of appeals of Maryland, by its opinion in the case of this Same Defendant v. Ficklin, 74 Md. 172, 21 Atl. 680, and 23 Atl. 197, has decided that the question of materiality, as well as the question of good faith, is always to be left to the jury. However this may be, there are statements required in nearly all applications for life insurance which it would be the duty of the court, if requested, to instruct the jury are material to the risk, and as to which it would be the duty of the jury to act upon the instruction of the court. In my judgment, it amounts to this: that now, under the act of 1894, the untrue statement must relate to some matter material to the risk; and the materiality no longer depends upon the agreement of the parties that it shall be so considered, but upon the actual fact that it is so. If the materiality is obvious and legally indisputable, it is within the province of the court to instruct the jury that the statement is material; but if it is not obvious, or depends upon disputed facts, it is the duty of the court to have the jury decide whether it is material or not.

"Second [third prayer of defendants in error]. That the defendant has offered no legally sufficient evidence to sustain the seventh plea pleaded by it in this cause.

"Third [court's prayer in lieu of defendants in error's fourth]. The plaintiffs' fourth prayer has reference to the matter of the Royal Arcanum. All we know, from the evidence in this case, of the Royal Arcanum, is derived from the application made by Percy, and the witnesses who have spoken of it. It appears to be a secret order of a beneficial character, membership in which is attended with some benefit payable in case of death. I hold that, so far as the nature of this order appears, it is not within the terms of the eighth clause of the application to the defendant company. This ruling is supported by several decided cases. I refuse plaintiffs' fourth prayer, and give instead the following instruction: The jury are instructed that the evidence in this case does not justify them in finding that the statement made by Percy in the eighth clause of his application for the policy sued on had reference to the application by him dated August 12, 1897, for membership in the Frostburg Council of the Order of Royal Arcanum, given in evidence, and that in considering the truthfulness of the statement made by Percy in said eighth clause, so far as it relates to the applications for insurance on his life in any company, association, or society, the jury should disregard said application for membership in said order. There is another clause of that eighth section which has reference to an unfavorable opinion by a physician; and as to that I instruct the jury that the statement in said eighth clause, that no physician had ever given an unfavorable opinion on his life, with reference to life insurance, does not render the policy sued upon void, unless the jury find that said Percy knew of such unfavorable opinion, and, knowing it, concealed the fact by the said statement made by him in his said application to the defendant company.

"Fourth [sixth prayer of defendants in error as amended]. The plaintiffs pray the court to instruct the jury that mere temporary afflictions or ailments, not of a serious or dangerous character, which pass away, and are likely to be forgotten, because they leave no trace on the constitution, are not to be regarded as diseases, within the meaning of the application for the policy of insurance offered in evidence in this case. By the fifth clause of the application, Percy declared that he had never been afflicted with any disease, sickness, ailment, or complaint, except as stated, and, qualifying the statement in writing: 'Nothing serious; dyspepsia about 20 years ago; ankle broken in 1847;—gave the name of his doctor, and also qualifying it by stating that (in the sixth clause) about 1835 Dr. Price prescribed for him for being hurt from riding horseback; irritation of the bladder; slight colic several times. I instruct the jury that the substantial correctness of his statements about his diseases and sickness was material to the risk, and he was obliged to state, in good faith, the facts, as far as he knew them, but that he was not obliged to remember and state all his slight illnesses, or temporary derangement of the functions of his organs, from which he had recovered without impairment of his general health. The statement was, in substance, that he had had no serious illness, and the burden is upon the defendant to satisfy you that the statement was false to a material extent. If, however, upon considering the whole evidence on the subject, you are satisfied that Percy, when he signed the application, knew that he had had a serious disease, of such character as to affect his general health, and by his statement concealed the fact from the defendant company, then the policy would be void.

"Fifth [plaintiff in error's fifth instruction as amended]. The jury are instructed that upon the policy of insurance, with copy of the application attached and made part of the contract as given in evidence, if the assured shall, within three years from the date of the policy, 'die by his own hand, sane or insane,' there can be no recovery by the estate of the dead man of the amount of insurance upon his life, except as to the money so paid into the company by the insured, which money in such event shall constitute the sum insured, and the defendant's liability under such policy; and the jury are further instructed that any form of self-destruction is covered by such description. The plaintiffs' second prayer asks me to say to the jury that upon the issue of suicide there is no legally sufficient evidence from which they can find that Percy committed suicide. I refuse this prayer, and leave the question of suicide to the jury. It is a matter with which a jury of twelve men is better able to deal than a single judge. Suicide is a matter generally incapable of direct proof, and as to which the jury are entitled to draw such reasonable inferences as the proven facts justify to the minds of men experienced in the affairs of life. I do say to the jury, however (leaving always entirely to them the decision of the question), that, so far as I remember the testimony, there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide by intentionally riding his horse into the canal. There is abundant testimony of his having recently taken an unusual amount of life insurance, and of the great disproportion between the annual premiums and the means of Percy to meet them; so that, if there is evidence to prove the suicide, there is abundance of testimony to suggest a motive. But the circumstances which tend to prove that Percy intentionally cast himself into the canal, or intentionally permitted himself to drown while in the canal, seem to me to be slight; but I leave this issue to the jury, with the following instructions for their guidance as to the amount of proof which they should have to justify them in finding that Percy destroyed his own life: The court instructs the jury that the presumption is that the death of the said insured, William R. Percy, was not voluntary, and the defendant, in order to sustain the issue of suicide on its part, must overcome this presumption by evidence sufficient to satisfy the jury that the death was voluntary. If the jury find that Percy drowned himself, or permitted himself to be drowned, then, by the terms of the policy, there can be no recovery of the amount insured; and on this issue I grant the defendant's fifth prayer."

On the 30th of June, 1898, after the evidence had all been adduced,—of which there was a great deal,—the instructions given by the court as above

set out, and the arguments of counsel, the case was submitted to the jury, and a verdict for \$26,125 rendered in favor of the plaintiffs; and upon the same day a judgment was rendered thereon, to reverse which judgment the writ of error in this case was sued out.

J. W. S. Cochran and William Pinkney Whyte, for plaintiff in error.
Julian J. Alexander and B. A. Richmond, for defendants in error.

Before GOFF, Circuit Judge, and PAUL and WADDILL, District Judges.

WADDILL, District Judge (after stating the facts). The assignments of error are 11 in number, but it will not be necessary to take them up in detail. They are substantially covered by the following statements: That the court erred—First, in permitting a letter written by deceased to his wife, dated May 25, 1897, the day before his death, to be given in evidence by the defendants in error and read to the jury; second, in amending and qualifying the fifth instruction of the plaintiff in error in reference to suicide, whereby it is claimed that the court expressed to the jury an opinion upon the weight of evidence that resulted prejudicially to the plaintiff in error; third, in holding that the act of the general assembly of Maryland of 1894 was applicable to the policy sued on, and that under the law the insurer and the insured could not contract as to the materiality of statements in the contract of insurance; fourth, in deciding that the clause in the application for insurance as to the insured not having been rejected by any “company, association, or society” did not refer to his proposed application for membership in the Frostburg Council of the Royal Arcanum; fifth, in determining that the ailments or diseases covered by or referred to in the application for insurance were not merely temporary in character, but of a serious and permanent nature. This case depended mainly upon questions of fact, which, when fairly submitted to the jury, and by them determined, are conclusive. The verdict having been found for the defendants in error, it will be presumed that the cardinal facts were all found in their favor; and unless some error of law, either in the admission or exclusion of evidence, or the giving or rejection of instructions, contributed to that result, the judgment of the lower court should not be disturbed.

1. The question of the admission in evidence of the letter written by deceased to his wife depends largely upon the facts and circumstances of the case, and what took place pending the trial. The defense set up by the plaintiff in error was that the insurance policy had been obtained with intent to defraud the insurance company, by the insured deliberately taking his life, and that he did commit suicide. Upon this defense, issue was joined, and the jury was called upon to determine whether the deceased had deliberately taken his own life in furtherance of a contemplated scheme to defraud the company. In support of this defense a long chain of facts and circumstances, showing the conduct, manner, habits, appearance, and state of mind of deceased for some weeks before his death, what he did and said during this time and up to the hour of his death, were submitted to the jury by the plaintiff in error, with a view of showing that he did contemplate suicide. The plaintiff in error further offered in evidence

the contents of a letter (the original being destroyed) written by deceased to one Walter F. Coymer two or three days before he died, in which deceased directed Coymer to pay certain rent due him to his (deceased's) wife, at Frostburg, and that deceased had never done so before. This was also introduced with a view of showing that deceased was deliberately arranging for the fraud set up by the defense. In rebuttal of this, the defendants in error offered, and the court admitted in evidence, the letter which forms the basis of this exception, written by deceased to his wife, dated the day before his death, and mailed in the early morning of that day, which letter was duly received by his wife at Frostburg. We think that this letter, which was entirely inconsistent with the theory of contemplated suicide, was properly submitted to the jury. If it was not a part of the *res gestæ*, it was in rebuttal of evidence offered by plaintiff in error as to the conduct and demeanor of the deceased covering the very period of time involved. It would seem that the defendants in error should have been allowed to introduce evidence of the statements and actions of deceased during the very time that his conduct, actions, and behavior were called into question by the insurance company; and we therefore think that the letter is clearly admissible, under the circumstances. The evidence of the plaintiff in error as to what the deceased said and did was not introduced upon the theory of admissions against interest on the part of deceased, as it did not, in the main, prove or tend to prove anything of that character. It was, on the contrary, introduced with a view of showing the condition or state of mind of deceased at the time, and the motives with which he acted. Just what constitutes the *res gestæ* is sometimes difficult to determine. 1 Greenl. Ev. § 108. In *Thomas' Adm'r v. Lewis*, 89 Va. 1, 57, 15 S. E. 389,—a celebrated and leading case on the subject of gifts *donatio mortis causa*,—the contestants offered evidence of the donee's conversations had two or three days after the death of the donor, tending to show that she did not then claim or have in her mind the existence of the gift. The court, on the distinct ground that it was a part of the *res gestæ*, and in rebuttal of the evidence for contestants, permitted the donee to prove that she and her companion spoke of the fact of the gift, and of the declarations of the donor in her favor, to third persons, on the day of, and before, the death of the donor. *Curtis v. Moore*, 20 Md. 93; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Rawson v. Haigh*, 2 Bing. 104; *Aveson v. Kinnard*, 6 East, 188; *Bateman v. Bailey*, 5 Term R. 512.

2. The action of the court in commenting upon the evidence as to suicide in its amendment to the fifth prayer of plaintiff in error is free from error of a material character. In federal courts considerable latitude is given to the trial judge in passing upon questions of evidence, and he has the right to express his opinion. *Improvement Co. v. Munson*, 14 Wall. 449. He may direct a verdict as to him seems proper from the evidence, and necessarily must, in giving instructions, where the case is submitted to the jury, make some statement bearing upon the evidence, though, as far as possible, he should avoid making any comment upon the weight of evidence that would tend to influence the jury in reaching a conclusion thereon. In *Lovejoy*

v. U. S., 128 U. S. 173, 9 Sup. Ct. 58, Mr. Justice Gray, delivering the opinion of the court, said:

"It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may, in its discretion, express its opinion upon the facts, and that such opinion is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury." *Haines v. McLaughlin*, 135 U. S. 584, 10 Sup. Ct. 876; *Simmons v. U. S.*, 142 U. S. 155, 12 Sup. Ct. 171; *Meyer v. Cadwalader*, 60 U. S. App. 547, 32 C. C. A. 456, 89 Fed. 963.

The language of Mr. Justice Strong in the case of *Evanston v. Gunn*, 99 U. S. 660, 668, seems peculiarly appropriate to this case. He said:

"Sentences may, it is true, be extracted from the charge, which, if read apart from the connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled."

The words of the court in this case, "there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide by intentionally riding his horse into the canal," if standing alone, might possibly be objectionable, as indicating a purpose on its part to take from the jury the consideration of the question of suicide; but, when read in connection with what preceded and what followed, we feel sure that the jury could not have understood that the court meant to take from them the full consideration of the question of suicide. After granting the prayer of plaintiff in error on the question of suicide, the court added:

"The plaintiffs' second prayer asked me to say to the jury that upon the issue of suicide there was no legally sufficient evidence from which they can find that Percy committed suicide. I refuse this prayer, and leave the question of suicide to the jury. It is a matter with which a jury of twelve men is better able to deal than a single judge. Suicide is a matter generally incapable of direct proof, and as to which the jury are entitled to draw such reasonable inferences as the proven facts justify to the minds of men experienced in the affairs of life."

Then follows the language excepted to, quoted above, still further qualified as follows:

"I do say to the jury, however (leaving always entirely to them the decision of the question), that, so far as I remember the testimony, there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide."

Further in the same instruction the court said:

"But the circumstances which tend to prove that Percy intentionally cast himself into the canal, or intentionally permitted himself to drown while in the canal, seem to me to be slight; but I leave this issue to the jury."

Taking this charge to the jury as a whole, it is free from the objection of which plaintiff in error complains; and, from our view of the case, plaintiff in error was not prejudiced by the language of the court on the subject of suicide.

3. Did the trial court err in giving instruction No. 1 of defendants in error, as amended by it, and in holding that the act of the Maryland legislature of 1894 was applicable to the policy sued on? In considering this question it should be borne in mind that the contract of insurance was made in the state of Maryland, by a citizen of that state, with the plaintiff in error, a corporation of the state of Pennsylvania, duly