[HIGH COURT OF AUSTRALIA.]

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. . . . APPELLANT;
DEFENDANT,

AND

KIDMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905.

PERTH, *Oct.* 10, 11, 16.

Griffith C.J., Barton and O'Connor JJ.

Appeal—Warranty—"Good health," meaning of—Entering judgment on application for new trial.

The respondent sued, as administrator of the estate of his deceased wife, to recover £600 payable under a policy of insurance effected upon her life. The original policy, having lapsed, was renewed upon a declaration by deceased, which was agreed to be taken as the basis for such renewal, that she was then "in good health." The declaration was made on 14th September, 1902, and handed in to the company on the 17th. On the 16th, following the directions of her medical adviser, she had gone into a private hospital to undergo an operation for an ovarian disorder. The operation was performed a few days afterwards and resulted in her death. During the previous year she had been informed several times by her medical adviser that she was suffering from an ovarian tumour, and that an operation would be necessary. The jury found that she was "in good health," and judgment was entered for the plaintiff.

Held, reversing the decision of the Supreme Court of Western Australia dismissing an application for a new trial or for judgment for defendant, that the term "good health" meant that the person was free from any apparent sensible disease or symptom of disease, and was unconscious of any derangement of the bodily functions by which health can be tested, and that the verdict of the jury, not being such as reasonable men applying their minds to the actual point for decision could find, judgment should be entered for defendant.

APPEAL from a judgment of the Supreme Court of Western Australia.

The facts appear fully in the judgment of *Griffith* C.J.

Burt K.C., (with him *Pilkington*), for the appellant. The declaration on which the policy was renewed was made on 14th September, 1902, and was to the following effect:—"That I am at present in good health; that since I proposed for the insurance covered by the said policy I have not suffered from any illness or accident . . . and that if this declaration be untrue in any particular the said policy shall be null and void." The insured could not have been in good health at the time the declaration was made. It was made on 14th, the doctor was summoned on 15th, the patient entered the hospital on 16th, the proposal was handed in on 17th, and the operation was performed on 23rd, resulting in death on 26th. It was admitted that a year previously she had been found to be suffering from an "ill-defined ovarian tumour," and the certificate of death signed by Dr. Newton gave this as the cause. She must have known of her condition for at least a year, but her knowledge of what her condition was is immaterial, the representation amounting to a warranty: *Thomson* v. *Weems* (1).

[GRIFFITH C.J.—That does not decide the question of what the warranty means. What is the meaning of "in good health" in such a context?]

Good health is defined in *Hutchison* v. *National Loan Fund Life Assurance Co.* (2).

Even though her illness were latent merely, she would still be disentitled to recover in face of her warranty.

[GRIFFITH C.J.—Good health in this connection has been defined as "conscious freedom from ailment": *Thomson* v. *Weems* (3). When a person says he is "in good health" does he warrant that he is free from such internal troubles as may only be revealed by a *post mortem* examination?]

Even though the expression do not cover ailments of which one is unconscious, still a person suffering with recurring pains,

(1) 9 App. Cas., 671. (2) 7 Court Sess. Cas. (2nd series) 467.
(3) 9 App. Cas., 671, at p. 692.

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

headaches, &c., cannot honestly claim to be in good health. The only question here is whether the insured was in a reasonably good state of health, and such a life as ought to be insured upon common terms: *Ross* v. *Bradshaw* (1).

The Court will discharge the verdict of the jury on being satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the Judge, should have returned it: *Cox* v. *English, Scottish and Australian Bank Ltd.* (2); *Metropolitan Railway Co.* v. *Wright* (3), is not against me.

[GRIFFITH C.J.—The case of *Metropolitan Railway Co.* v. *Wright* (3) laid down no new rule; see *Jones* v. *Spencer* (4).]

A verdict may be entered for appellant under O. LIV., r. 4 (Western Australia).

Haynes K.C., (with him *Jenkins*), for the respondent. There was abundant evidence both ways, and the verdict should therefore stand: *Brisbane Municipal Council* v. *Martin* (5). "Good health" means freedom from any ailment which would tend to shorten life. The strongest case against the respondent is *Anderson* v. *Fitzgerald* (6), which decides that if a policy is obtained on a representation which is not true, and the representation amounts to a warranty, the policy is void. But in that case, as also in *Thomson* v. *Weems* (7) the facts warranted could be proved to demonstration. All that is required to be shown is that the insured was in a general good state of health: *Ross* v. *Bradshaw* (8). A disorder which results in death is not necessarily "a disorder tending to shorten life," if it be not a disorder which generally has that tendency: *Watson* v. *Mainwaring* (9). In *Brealey* v. *Collins* (10), it was taken for granted that a person suffering from gout and rheumatism was "in good health." The only essential implication from a representation that an applicant for insurance is "in good health" is that he is not suffering from "a substantial attack of illness, or from a

(1) 1 Wm. Bl., 312, at p. 313, *in notis*.
(2) (1905) A.C., 168.
(3) 11 App. Cas., 152.
(4) 77 L.T.R., 536, at p. 537, *per Halsbury* L.C.
(5) (1894) A.C., 249.
(6) 4 H.L.C., 484.
(7) 9 App. Cas., 671.
(8) 1 Wm. Bl., 312.
(9) 4 Taunt., 763.
(10) 1 You., 317.

malady which has any bearing on his general health." It does not necessarily mean absence of any slight illness or temporary derangement of the functions of some organ: *Connecticut Mutual Life Insurance Co.* v. *Union Trust Co.* (1). A person is "in good health" within the meaning of a declaration of this nature "unless he is affected with a substantial attack of illness threatening his life, or with a malady which had some bearing on the general health; not a slight illness or a temporary derangement of the functions of some organ": *Manhattan Life Insurance Co. of New York* v. *Carder* (2); *Goucher* v. *North-Western Travelling Men's Association* (3). Here there was no indication of any illness of a serious nature. To vitiate the policy, the illness must tend to shorten life or affect the general state of health: *Jones* v. *Provincial Insurance Co.* (4). The question whether the insured had ever had such an illness was never left to the jury. The Judge was never asked to leave such a question; nor was the point as to nondirection or misdirection taken before the Full Court: *Neville* v. *Fine Art and General Insurance Co.* (5). The direction given to the jury was not objected to at the time, and no exception was taken to it in the Court below. The objection cannot now be taken for the first time. "*The Tasmania*" (6); *Aitkin* v. *McMeckan* (7); *Duff* v. *Duff* (8).

Burt K.C., in reply. No new point has been raised. The Court has power to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial: *Millar* v. *Toulmin* (9), where this proposition was doubted by *Halsbury* L.C. Any doubt has been set at rest by *Allcock* v. *Hall* (10).

Cur. adv. vult.

Oct. 16.

GRIFFITH C.J. This is an appeal from an order of the Full Court of Western Australia dismissing an application for a new trial, or for judgment, in an action brought by the respondent

(1) 112 U.S., 250.
(2) 82 Fed. Rep., 986, at p. 989.
(3) 20 Fed. Rep., 596.
(4) 3 C.B. N.S., 65.
(5) (1897) A.C., 68.
(6) 15 App. Cas., 223.
(7) (1895) A.C., 310.
(8) (Unreported) on appeal to P.C. from Supreme Court of W.A., 5th May, 1904.
(9) 17 Q.B.D., 603; 12 App. Cas., 746.
(10) (1891) 1 Q.B., 444.

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

Griffith C.J.

against the appellant. The respondent sued as administrator of the estate of his deceased wife to recover £600, payable under a policy of insurance effected upon her life in 1901. The defence, so far as it is necessary to refer to it, was that, the policy having lapsed by reason of non-payment of premiums, Mrs. Kidman afterwards, with a view to the revival of the policy, delivered to the defendant a declaration, dated 14th September, 1902, which stated, amongst other things, that she was then in good health; and agreed that that declaration should be the basis of the agreement for the revival of the policy, and that, if it should be untrue in any particular, the policy should be null and void. The defence then alleges that Mrs. Kidman was not in good health at the time when she made the declaration. So far as regards the allegations that she made the declaration, and that it was agreed that it should be the basis of the contract for revival of the insurance, there is no question. At the trial certain facts were practically admitted, being proved by evidence which was not disputed, while others were in dispute. The declaration of 14th September was lodged with the defendant on the 17th with the renewal premium. On the 15th Mrs. Kidman had sent for her medical adviser, who saw her, and advised that an examination under chloroform was necessary. He accordingly examined her on the following day, when he discovered that she was suffering from an ovarian disorder, and advised her that an abdominal operation was necessary, and recommended her to go into a private hospital for the operation. She went into the hospital on the 16th, and a day or two afterwards the operation was performed, and an internal growth was removed. She did not recover from the effects of the operation, and died on the 26th. It was also proved, and not disputed, that about a year previously she had consulted a Dr. Stewart, when she complained of headache and pain in the abdomen, and that Dr. Stewart, after making a special examination, found her suffering from an ovarian disorder, and told her that, in his opinion, she would probably have to undergo an operation. He saw her again in the following month, when he was still of opinion that she would have to undergo an operation, and believes that he again told her so. She was then, in fact, suffering from congestion of the ovaries and a tumour, and in Dr.

Stewart's opinion, this disorder had probably existed for two or three years. The only other medical evidence was that of a practitioner who assisted at the operation, and who was called by the plaintiff. He said that the trouble had probably existed for six or seven years, and would have caused sharp pain. All this evidence was undisputed. There was other evidence, which, if believed by the jury, would have shown that, on the 14th, when she made the declaration, so far from being in good health, she was suffering very acutely from this ovarian affection. There was also evidence that, about a year before, she had consulted a medical gentleman in Melbourne, who, after an examination, had found her suffering from an ovarian disease, and had advised an early operation. This evidence, however, was disputed on various grounds; but the evidence of Dr. Stewart, to which I have referred, was uncontradicted. The case was tried before *McMillan* J., who directed the jury as follows (I quote from his own judgment in the Full Court):—"The only question which you have to consider in this case, and the question the answer to which will determine the case, is whether the defendant company have satisfied you that the plaintiff was not in good health at the time she made this declaration. It is impossible for me to tell you what good health means, because it is a question of fact, and, in my view, is a question for you entirely. What you have to ask yourselves is whether Mrs. Kidman was in good health within the fair meaning of the words. What the insurance company in a case like this are anxious to guard against is entering into an insurance in a case where the risk would not be of the ordinary kind, and you must, therefore, ask yourselves whether, in the fair, ordinary, and usual meaning of the words, Mrs. Kidman was in good health on the 14th September, 1902." The jury found that she was in good health, and judgment was entered for the plaintiff. On appeal to the Full Court, the Acting Chief Justice (*Parker* J.), dealing with this point, said: "I venture to think that a fair construction of the term 'good health,' as therein used, is that the deceased lady was not afflicted with any disease or illness tending to increase the ordinary risk undertaken by societies which insure lives." *McMillan* J., in his judgment said—

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

Griffith C.J.

"It was open to the jury, on the evidence, to form the opinion that the ailment from which Mrs. Kidman was suffering was not one which was in itself of a dangerous character, or one which could substantially increase the risk which was being undertaken by the company." *Burnside* J., said—"Without in any way endeavouring to define what good health means I take it that the word health does not mean an entire absence from any bodily infirmity, but to my mind must be held to indicate an absence of or freedom from any physical disease or derangement of the functions or organs of the body tending to shorten life." All three Judges, therefore, appear to have thought that the question to be determined was whether, upon the evidence, the ailment from which Mrs. Kidman was undoubtedly suffering was one which would tend to shorten life. If that was the question to be decided by the jury, there was evidence (to which it is not necessary to refer) from which reasonable men might have answered the question in the negative. The learned Judges, being of that opinion, dismissed the application, which was made on the ground that the verdict was against the evidence.

Before us two points were made—First, that upon the whole of the evidence the jury ought to have found, as reasonable men, that the disease from which the lady was suffering was one which would tend to shorten life. If that were the only point, the decision of the Full Court would, as I have just said, have been right. The other point was that, upon the admitted facts, reasonable men, applying their minds to the actual point for decision, could not find that she was in good health within the meaning of that term as used in the declaration. Now, it is quite clear upon the authority of *Thomson* v. *Weems* (1), that the allegation that she was in good health was a warranty, and that it was not a question for the Court or jury whether the particular ailment (if any) which rendered the statement untrue was or was not material. That was a matter for the consideration of the insurance company, who were the judges of whether the ailment was sufficiently material to induce them to decline to renew the policy. The ailment might appear trivial or unimportant to the jury, but the law is that, when a warranty is

(1) 9 App. Cas., 671.

given, its truth is made material, and if the statement is untrue the policy is void. As to the meaning of the term "good health," that, I conceive, with all respect to *McMillan* J., is a question of law, or, at most, a mixed question of law and fact. The construction of a written document is for the Court; indeed, I am not sure that that was not the learned Judge's own view, because he was careful to point out to the jury that the construction of documents was a matter for the Court. I may observe, in passing, that he expressed his strong disapprobation of the verdict of the jury, which, he thought, could not have been supported if it had been the verdict of a Judge instead of a jury.

With regard to the meaning of the term "good health," there is singularly little authority to be found in the English cases; indeed, the only case cited to us in which a definition of that term is attempted is *Thomson* v. *Weems* (1), where the definition given by Lord *Fullerton* in the case of *Hutchison* v. *The National Loan Insurance Co.* (2) was quoted by Lord *Watson*, without expressing either approval or disapproval of it. Lord *Fullerton* defined "good health," in the ordinary sense of the term, to mean "the perfect conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptoms of ailment." If that definition were turned into a negative form I should be disposed to say it was correct—that is, that if a person is not in conscious enjoyment of all his faculties and functions, and is conscious that he is not free from any ailment affecting them, or of symptoms of ailment, he is not in good health. We have, however, also had the assistance of the comments of learned American Judges and text-writers as to what is the meaning of the term "good health" in this connection. It is necessary, of course, to consider the purpose for which the declaration in which the term is used was made, and also to have regard to the context, which shows that the statement made by Mrs. Kidman was a declaration as to facts. The declaration stated that she was at present in good health, that since her original proposal she had not suffered from illness or accident, that her habits were temperate, that an application for

(1) 9 App. Cas., 671.
(2) 7 Court Sess., Cas. (2nd Series), 467.

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

Griffith C.J.

insurance had not been made to or declined or deferred by any other insurance office, and that none of her relatives were or had been affected by disease. The context shows that all these statements were intended to be made as of matters within her own knowledge. It is clear that she must have known whether she had suffered from illness or accident, whether her habits were temperate, and whether she had applied elsewhere for insurance. Of course, as to the state of health of her relatives, she could only be supposed to speak to the best of her belief; so I think the answer that she was in good health must mean that she was so, so far as her means of observation and knowledge extended. That statement, as *Burnside* J. very properly pointed out, did not amount to a warranty as to the non-existence of any latent disease. In my opinion, a sufficient definition of the term "good health," as used in the declaration, is that it means that the person in question is free from any apparent sensible disease or symptom of disease, and is unconscious of any derangement of the bodily functions by which health can be tested. That is very nearly in the words of Lord *Fullerton*. It follows as a corollary that a woman who is conscious of an affection of the ovaries, or ovarian tubes, of such a nature that an abdominal operation is, in the opinion of her medical adviser, highly expedient, if not absolutely necessary, is not in good health. If that is a correct statement of the law, and I think it is, it is a fact proved in this case, upon uncontested evidence, that Mrs. Kidman was not in good health on 14th September, when she made the declaration, and that the warranty was therefore broken, and the defendant was entitled to judgment.

It becomes necessary then to consider the course which the case took at the trial. The learned Judge, as I have pointed out, directed the jury that it was a question of fact for them whether Mrs. Kidman was on 14th September in good health, in the fair, ordinary, and usual meaning of the words. Now it may be that the learned Judge really intended by that direction to define the term practically in accordance with the definition which I have given. If he did so, no objection can be taken to the summing up; and in that view the verdict of the jury is directly contrary to the undisputed evidence. If, however, it is to be taken that the

Judge left the question of law to the jury—which, I think, he did not intend to do—then their finding, so far as it is on the question of law, is irrelevant; and, as applied to the law which really governs the case, the verdict is contrary to the evidence. So that the best that can be said for the verdict is that it is either a verdict on an immaterial issue, or a verdict against evidence. The jury apparently considered that the disease was not likely to shorten life, and that, that being so, Mrs. Kidman was in good health. The same contention was urged before the learned Judges in the Full Court and before us. If the verdict is regarded as one given on an immaterial issue, the defendant's rights are, in substance, though not in form, analogous to the right of a defendant under the old system of pleading to move for arrest of judgment, on the ground that the issues found in favour of the plaintiff were immaterial. In the present case, on the admitted facts, the defendant was entitled to succeed. Is there then anything to prevent us from giving it the judgment to which it is entitled? The only form in which the objection is taken is that the verdict was against the evidence, for the summing up of the learned Judge is not attacked. I think that, under the circumstances, the direction of the learned Judge should be read in the sense in which I have interpreted the words "good health," in which view the verdict was against the evidence. The other view is that a question of law was left to the jury, which they decided wrongly, and upon which their decision cannot have any effect in determining the rights of the parties. It follows, therefore, that, in either view, the defendant should have had judgment, and I think that it is entitled formally to raise the point on the objection that the verdict was against the evidence. In this respect the case is very like a case decided this year by the Judicial Committee, viz., *Cox* v. *The English Scottish and Australian Bank, Ltd.* (1), on appeal from the Supreme Court of Queensland. In that case the Judicial Committee thought that the learned Judge had left a point of law to the jury, which they had answered wrongly, and they dismissed an appeal from the order of the Supreme Court granting a new trial on the ground that the verdict was against the evidence, expressing surprise that

(1) 1905, A.C., 168.

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

Griffith C.J.

judgment for the defendant had not been asked for. It appears, from the last case cited by Mr. Burt, *Allcock* v. *Hall* (1), that, when upon the admitted facts it is clear that the defendant is entitled to judgment, the circumstances that the onus of proof is upon it, and that the facts have not been found in its favour by the jury do not disentitle it to have judgment entered in its favour. For these reasons I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendant.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion. In this case the issue at the trial was properly restricted to one question, namely, whether Mrs. Kidman's statement in her declaration of the 14th September, 1902—that she was then in good health—was untrue in fact. It was admitted that the onus of establishing that issue was upon the defendant, and that, if it established it, the verdict must be in its favour. The verdict of the jury must be taken to be a finding that the defendant has failed to establish that the declaration of the 14th of September was untrue. In order to determine whether or not the verdict is against evidence, it becomes first of all necessary to ascertain the legal meaning of Mrs. Kidman's statement—that she was in good health at the date of the declaration—in other words, to ascertain how the contract between the parties is to be interpreted. There is no doubt that, if either party had asked the learned Judge at the trial to instruct the jury as to the sense in which the words good health were used by the parties to the contract, His Honor would have been bound to give more explicit instructions to the jury than he did. It is always difficult in cases where a mixed question of law and fact is left to the jury to determine exactly the point where it becomes necessary for a Judge to define the sense in which a word has been used in a contract. There are cases in which a jury may well be allowed to be the judges of the meaning of the language used. On the other hand, there are cases in which the words of a contract are susceptible, grammatic-

(1) 1891, 1 Q.B., 444.

ally, of several meanings, but, legally, of one meaning only. Such was the case here, and I think it would have been within the Judge's duty to interpret the words of the contract. Practically, however, for the purposes of this appeal, it appears to be of little moment whether the learned Judge gave any express direction to the jury as to the meaning of the term "good health." The terms of his direction show that he left it to the jury to determine whether or not this lady was in good health at the time she made the statement: and also to determine what was the meaning of the expression "good health," as it was used in her statement. No objection has been taken to that method of putting the case to the jury, and it appears to me that it must be presumed as against the defendant that the jury were properly directed as to the meaning of the expression, and they must be taken to have understood it to be used in the proper legal sense. Apparently there were two views of the warranty of "good health" placed by defendant's counsel before the jury—one, which I might call the extreme view, that the warranty was a warranty of perfect health — a freedom from even secret defects or ailments not apparent by any symptoms to the insured herself, but which would, in the opinion of a medical man, amount to a derangement of health. It is obvious that the warranty could not mean that. On the other hand, there was the view put forward by Mr. Haynes on behalf of the plaintiff—that in order to prove a warranty of good health was untrue within the meaning of this contract, it was necessary to show that there was such a condition of disease or derangement of the bodily functions as would seriously affect the risk to be undertaken by the insurance company. It is also quite clear that that cannot be the meaning. If it were, then it would be left to the jury to decide the question on the materiality or immateriality of facts affecting the risk. A warranty is binding on the assured, whether the facts warranted are material or not. Whether the state of health will or will not affect the risk is a matter for the insurance companies to determine. They require the information for the purpose of determining that question, and it would be contrary to all the authorities, including that mentioned by the Chief Justice, to hold that, under such a warranty as this, it is for the

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

O'Connor J.

jury to determine whether the insured's state of health will affect the risk. There is no difficulty in the interpretation of this contract if we follow the ordinary rules of interpretation of contracts, and it is a safe rule to inquire in the first instance what is the nature of the contract, and what was the object of the parties in entering into it. When a person about to insure is asked whether he is in good health, it must be taken that the question is one which he is competent to answer, a question asked about something within his knowledge. That is shown by the contract itself. It is initiated by a proposal for insurance containing a number of specific statements about health. The insurance companies have fortified themselves by requiring this personal statement to be made before their medical officer; one of the questions asked of the proposer, is "what is his present and general state of health?" The answer in this case was "good." There are a number of other questions required to be answered in this personal statement which inquire specifically into the conditions and working of the principal organs and functions of the body, into the habits of life of the proposer, and into other matters all within his knowledge, on all of which he can speak from personal knowledge. In addition to that the insurance companies obtain a confidential report from their medical officer, which is made upon his examination of the proposer. What the nature of that examination was in this case is not material, but it appears that the insurance company had an opportunity of making such an examination if they thought fit. In that examination the medical man has an opportunity of testing for many conditions of ill-health of which the proposer could not well be aware. It must be remembered, therefore, in interpreting the general questions about the proposer's health, that he is at the same time being asked specific questions about his health and habits, and that the medical man has an opportunity of examining and testing for defects of health which may be unknown to the proposer. Under these circumstances, I think that the question, "Are you in good health?" or "What is the state of your health?" must be taken to be asked with regard to what the proposer feels himself, and with regard to all those symptoms and indications of bodily health, the absence or presence of which must be sufficiently

apparent to every applicant for insurance to enable him to answer the question from his own knowledge. I have referred to the proposal because, if it were not for the accident of this policy not having been accepted within a certain period, the answer to that question in the proposal would have been the basis of the contract, and this declaration on which the defendant relies would not have been necessary; it was only because of the delay that it became necessary to make the first declaration of September, 1901. I take it that the words "good health" in the declaration of the 14th September, 1902, upon which the policy was revived, must be taken to have the same meaning as in the declaration of September, 1901, and in the answers to the questions put when the proposal was made in 1901. Taking that view of the circumstances surrounding the initiation of the contract, I think the word "health" must be taken to have been used in those documents in its ordinary signification as meaning the condition of health of which a man is conscious from his own feelings—that meaning, I think, is well explained in the passages to which we have been referred in *Goucher* v. *North-Western Travelling Men's Association* (1), and in the case of *Thomson* v. *Weems* (2). I entirely adopt the definition of good health given by my learned brother, the Chief Justice; that definition appears to me to contain all the essentials of the admirable direction to the jury given by Mr. Justice *Dyer* in the case of *Goucher* v. *North-Western Travelling Men's Association* (1). As Mr. Justice *Dyer's* statement appears to me to be accurate as well as full it may be useful to quote it in detail. The learned Judge said—"The term 'good health,' as here used, does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. It cannot mean that the man has not in him the seeds of some disorder. As has been well remarked by some of the law writers—'Such an interpretation would exclude from the list of insurable lives a large proportion of mankind.' The term 'good health,' as here used, is to be considered in its ordinary

(1) 20 Fed. Rep., 596.

(2) 9 App. Cas., 671.

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

O'Connor J.

sense, and means that 'the applicant was free from any apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested': *Conver* v. *Phœnix Insurance Co.* (1). . . . 'The term must be interpreted with reference to the subject matter, and the business to which it relates. . . . It means apparent good health, without any ostensible or known or felt symptoms of disorder, and does not exclude the existence of latent unknown defects . . . but a predisposition to,' or manifestation of, 'a disease or disorder of such a character and to such a degree as to seriously or obviously affect the health, and to produce bodily infirmity, is incompatible with a representation of good health.'" That, as an exposition to a jury, seems to me to be an admirable statement of the law; but for the purpose of a precise statement of general applicability, I entirely adopt the definition of the learned Chief Justice. Such being the meaning of "good health" in the statement warranted by Mrs. Kidman to be true, the question we have to determine is whether the jury, as reasonable men, could come to the conclusion, in the face of the admitted facts, that the statement was true; or, to put it according to the onus of proof, could they, as reasonable men, come to the conclusion that the defendant had failed to prove that the statement was untrue? In my view, it is impossible that a jury could reasonably come to the conclusion that this lady was in good health at the time she made this declaration. I do not propose to make any detailed comment upon the evidence; I base my view entirely upon matters of fact admitted and proved by the plaintiff's evidence. I disregard, for the purposes of my judgment, the testimony of Dr. O'Hara, because there is evidence upon which the jury might come to the conclusion that he had mistaken the identity of the person he examined; and I also leave out of consideration the evidence of Mrs. Hugg, which, on various grounds, was attacked. It is highly probable that the evidence of both these witnesses is in fact true; but as there is a contest as to the correctness of their evidence, I propose to leave it out of consideration. I take the case as resting entirely upon facts proved in a way which makes them

(1) 3 Dill., 226.

practically unassailable. The facts which are proved by the two medical men, and the statement made by the doctor who performed the operation, show that this lady had been suffering for some six or seven years from a diseased condition of the ovaries and the fallopian tubes; that this condition was such as to cause her headaches at menstrual periods; and that it seriously interfered with the comfort of her life. She seems to have consulted these doctors upon several occasions. She saw Dr. Newton in October and November, 1901, and complained to him of headaches. He examined her, considered her symptoms, and told her that she was suffering in such a way that an operation was advisable, that she was suffering from congestion of the ovaries and tumour, and that that condition had existed for some time. We have no evidence from Dr. Newton, who performed the operation; but we have the evidence of Dr. Haynes, who was present, and saw the patient's condition as disclosed by the operation. Dr. Haynes said there was a condition of ovaritis and a thickening of the fallopian tubes which had probably existed for from six to eight years. He called it "tubo-ovarian trouble," and said that he would expect the patient to have suffered a sharp pain at certain periods. Whether the condition is called tubo-ovarian trouble or tubo-ovarian disease does not seem to me to make much difference. It is quite clear that, at the time the lady made the statement that she was in "good health," she was suffering from a diseased condition of important organs and functions of the body, which so far interfered with the comfort of her life that she was willing to undergo the risk of a serious operation in order to be free from the trouble. It is impossible to say that a person, who is consciously suffering from such a condition of important organs and such a derangement of the functions of the body, can be said to be in good health; nor can it be reasonably adjudged that her statement, made while she was so suffering—that she was then in good health—can be anything but untrue. In my opinion, therefore, the verdict of the jury was not warranted by the evidence, and it should be set aside. We have then to consider whether, under the circumstances, the Court should enter a verdict for the defendant, or should grant a new trial. In my opinion, the Court ought to enter judgment for the defendant. We have

H. C. OF A. 1905.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. KIDMAN.

O'Connor J.

before us all the facts which can be proved. If the case went down to trial again, it would be impossible for another jury to reasonably find a verdict for the plaintiff; and to send the case down for another trial would be only a useless expenditure. It appears to me, therefore, that this Court will properly exercise its powers by entering the verdict for the defendant.

Appeal allowed, judgment set aside, and judgment entered for the defendant.

Solicitors, for appellant, *Stone & Burt.*
Solicitor, for respondent, *Jenkins.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

THE GREAT FINGALL CONSOLIDATED LIMITED . . . . . } APPELLANTS;

DEFENDANTS,

AND

SHEEHAN . . . . . RESPONDENT.

PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1905.

PERTH, *Oct.* 16, 17, 18, 20.

Griffith C.J., Barton and O'Connor JJ.

Appeal—Master and servant—Worker—Accident—Compensation—Liability of employer — Release — Accord and satisfaction— Contract — Consideration — Workers' Compensation Act (*W.A.*) 1902 (*No.* 5).

An appeal lies to the Supreme Court of Western Australia from a decision of the Local Court in an action for compensation under the *Workers' Compensation Act.*