sustained, or on what ground the bill was dismissed. As the record stands this decree might be pleaded successfully as a bar to any other bill brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice,* or had stated as the ground of dismissal the misjoinder of parties, or want of interest in two of them, we would have affirmed it, but, to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised, and if they fail to do this within a reasonable time, to dismiss it without prejudice.

REVERSAL AND REMAND ACCORDINGLY.

JEFFRIES *v.* LIFE INSURANCE COMPANY.

Where a policy of life insurance contains the following conditions, to wit:

> "This policy is issued by the company, and accepted by the assured, on the following *express conditions and agreements, which are a part of the contract of insurance:*
>
> "*First.* That the statements and declaration made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured *affecting the interest of the company*—"

And the further condition:

> "That in case of the violation of the foregoing condition, . . . this policy shall become *null and void*—"

Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk.

Accordingly, where, on a suit against an insurance company, the plea alleged that the party insured, by his application for a policy, in answer

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* Story's Equity Pleading, § 541.

Statement of the case.

to a question asked of him by the insurance company, whether he was "*married or single*," made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further question whether "*any application had been made to any other company? If so, when?*" answered "*No;*" *whereas, in fact, at the time of making such false statement, he knew that he had previously made application for such insurance, and been insured in the sum of* $10,000 *by another company*, a demurrer to the plea was held bad; though the plea did not aver that true information on the questions to which the false answers were made "affected the interest of the company," or in other words, was material to the risk.

ERROR to the Circuit Court for the Eastern District of Missouri.

Jeffries, administrator of Kennedy, sued the Economical Life Insurance Company, of Providence, Rhode Island, in the court below, alleging that on the 19th of October, 1870, the said company issued a policy of insurance upon the life of the deceased for $5000; that Kennedy died in August, 1871, and that notice had been given to the company of his death, payment of the amount of insurance demanded and refused.

The policy, which the declaration set out at length, contained the clauses following, viz.:

"This policy is issued by the company, and accepted by the insured and the holder thereof, on the following *express conditions and agreements, which are part of this contract of insurance:*

"1st. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured, *affecting the interests of said company.*

"6th. That in case of the violation of the foregoing conditions, or any of them, . . . this policy shall become null and void."

The plea averred—

"That the policy was issued and accepted, on the following *express conditions and agreements contained in it and made part of the contract of insurance*, to wit, that the statements and declaration made in the application for the policy, and on the faith of

which it was issued, were in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured *affecting the interests of the defendants*, and upon the further condition, that in case of the violation of the aforesaid condition, among others the policy should become *null and void*.

"That the said Kennedy did violate the first condition in this, that the statements and declarations made by him in his application for the said policy, were not in all respects true, but were false in the following respects, to wit:

"1st. That in the application for the policy, and on the faith of which the same was issued, in answer to the question therein asked of him as to whether he was married or single, he stated that he was single, whereas, in fact, he was married, having a wife then living, as he well knew.

"2d. That in the application for the policy, and on the faith of which it was issued, in reply to the question therein asked of him, '*Has any application been made to any other company; if so, when?*' he answered '*No;*' whereas, in fact, he had, prior thereto, to wit, in April, 1870, applied for insurance upon his life, to the Mutual Life Insurance Company of New York, and had been insured therein in the sum of $10,000, as at the time of making the said answer, he well knew."

To this plea the plaintiff demurred, but the court overruled the demurrer, and entered judgment for the company. From the judgment so entered, the present writ of error was brought.

The demurrer admitting that the statements made in the application were false, the question in the case, of course, was this: "Was the plea bad because it did not aver also, that the false statements were material to the risk?"

Messrs. T. W. B. Crews and J. S. Laurie, for the administrator, plaintiff in error:

1. The statements contained in the decedent's application were not *warranties*. They are not pleaded as warranties. The plea does not allege that the statements were in writing, and if they were not, but were oral only, then, as no particular form of words is essential to make a warranty,

but the question is one of intent, it should have been left to a jury to say whether there was a warranty.

The use by a pleader, of the terms "express conditions and agreements," does not of itself import a condition precedent or a warranty.* If a warranty is relied on, it should be averred. The distinction between a warranty and a representation, is one well known, and, in insurance, vital. A misrepresentation will not vitiate a policy unless material to the risk. The materiality must be averred. It is a fact for the jury.†

2. Independently of any question of defective pleadings, the plea shows on its face that no misstatement in the application could have been meant to vitiate the policy, unless the same "*affected the interest* of the said company;" affected the interests of the company injuriously, of course, thereby meaning. The plea while iterating the language of the contract, yet seeks to defeat a recovery, on the ground of the misstatements, without venturing to allege that they did affect the interests of the company in any way.

Now, it appears that of the two misstatements made in this case, neither affected the interests of the company injuriously; and, indeed, that if they affected those interests at all, they affected them beneficially.

In the first one, the company being told that the applicant was an unmarried man, asked of course, and got a higher premium than if they had been told that he was married; it being matter of notoriety, that a married man is regarded, in the parlance of insurers, as a "better life," than an unmarried one.

So, too, being told that no application had been made elsewhere, they necessarily made a more searching examination into the character of the applicant's health than they would otherwise have made. By his untrue answer the applicant invited medical inquiry. The question put to him

* Bliss on Life Insurance, 2d edition, § 63.

† Daniels *v.* Hudson River Insurance Co., 12 Cushing, 416; Farmers' Insurance Co. *v.* Snyder, 16 Wendell, 481; Phillips on Insurance, 5th edition, p. 580, § 540.

on his application, was not as to *what* other company he had applied to; or for what amount or for what *rate*, but was simply, "*Has any application been made to any other company? If so, when?*" Had he answered truly, he would have said "*Application has been made to another company. It was made about six months ago.*"

The company to which he was now applying would have inquired and would have learned that he had been taken recently, and taken for a large amount, $10,000. This would have tended to show that he was a fit subject for a risk. Such prior insurance by another company would have been regarded as complimentary to the applicant; or in mercantile phrase, as an "indorsement" of his life.

The case then, as to both misstatements, falls within the rule laid down by Mr. Parsons:*

"Nor is a policy avoided by such a misstatement or a fact, which, if truly stated, would *diminish the risk;* for then if the insurers are deceived, *it is to their own advantage.*"

At all events, the second misstatement did no harm. Life insurance companies do not like over-insurances, from their tendency to produce suicide. But there is no allegation or pretence here either of suicide or of an insurance in contemplation of it.

The art with which insurers now word and hedge about contracts of insurance in favor of themselves—their adroit modes of getting answers, and their numerous "conditions" hidden in long columns of finely printed matter—has been the subject of just reproof from this court;† and the results of their contrived questions are so frequently and so grossly unjust, that the legislatures of several States, including Maine, New Hampshire, Ohio, and Missouri, have interfered, and provided by direct enactment that misrepresentations not relating to the risk, shall not vitiate a policy, and that in all cases the materiality shall be a question for

* On Contracts, 6th edition, 471, note *a*.

† See as to the devices of insurers, Insurance Company *v.* Slaughter, 12 Wallace, 407, and Insurance Company *v.* Wilkinson, 13 Id. 222.

the jury. The Missouri statute of March 23d, 1874, to that purport, was the immediate result of the case at bar.

Messrs. A. M. Thayer and J. La Due, contra:

Mr. Justice HUNT delivered the opinion of the court.

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offence in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition, will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "*married or single?*" made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether "*any application had been made to any other company? If so, when?*" answered "*No;*" *whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of* $10,000 *by another company.*

We are to observe, secondly, the averment that the statements and declarations made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company.

We are to observe, also, that other clause of the policy, in which it is declared that this policy is made by the company and accepted by the insured, upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true.

This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to de-

termine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied.

Of the authorities in support of these views, a few only will be mentioned. In *Anderson* v. *Fitzgerald*,* Fitzgerald

* 4 House of Lords Cases, 483, 487.

applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions required to be answered. Among them were the following: "Did any of the party's near relatives die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions the applicant answered "No." The answers were false. F. signed the proposal and a declaration accompanying, by which he agreed "that the particulars above mentioned should form the basis of the contract." The policy mentioned several things, which were warranted by F., among which these two answers were not included. The policy also contained this proviso: that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting of this insurance," the policy should be void. On the trial before Mr. Justice Ball, he charged the jury "that they must not only be satisfied that the various false statements were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance." A bill of exceptions was tendered, on the ground that the jury should have been directed "that if the statements were made in and about effecting the insurance and such statements were false in fact, the defendants were entitled to a verdict, whether such statements were or were not material." The exceptions were argued in the Court of Exchequer, where judgment was ordered for the plaintiff on the verdict. A writ of error was brought in the Court of Exchequer Chamber, where the judgment was affirmed by a majority of seven to three. The writ of error to the House of Lords was then brought. Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Creswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Opinions were delivered by Mr. Baron Parke, the Lord

Chancellor, Lord Brougham, and Lord St. Leonards, all concurring in reversing the judgment, on the ground that the question of the materiality of the statements should not have been submitted to the jury. This case was decided upon facts almost identical with the one before us, and presented the precise question we are considering. The counsel for the defendants asked for a ruling, that if the statements were untrue, the defendants were entitled to a verdict, whether they were or were not material. This was refused, and the judge charged that to entitle the defendants to a verdict, the statements must not only be false, but material to the insurance. This was held to be error, and the judgment was reversed.

Cazenove v. *British Equitable Assurance Company*,* is a familiar case, and was decided in the same way. This case was affirmed in the Exchequer Chamber, in 1860.†

Many cases may be found which hold, that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions, that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a

* 6 Common Bench, N. S. 437; and see Duckett *v.* Williams, 2 Crompton & Meeson, 348.

† 6 Jurist, new series, 826, 1860; see also Price *v.* Phœnix Insurance Co., 17 Minnesota, 497.

case, so far as we can discover, in which law and justice point to the same result, to wit, the exemption of the company.

JUDGMENT AFFIRMED.

Justices CLIFFORD and MILLER dissenting.

SCOTT, ASSIGNEE, *v.* KELLY.

1. When an assignee in bankruptcy voluntarily submits himself to the jurisdiction of a State court, and that court renders judgment against him, it is too late for him to allege that the Federal courts alone have jurisdiction in bankruptcy.
2. When the question in a State court is not whether if the bankrupt had title, it would pass to his assignee under the Bankrupt Act, but whether he had title at all, and the State court decides that he had not, no question of which this court can take jurisdiction under section 709 of the Revised Statutes is presented.

ERROR to the Supreme Court of New York; the case being thus:

In July, 1867, three persons, Shawhan, Mendall, and Palmer, of St. Louis, advertised themselves as copartners, under the firm name of Shawhan & Co., and in the September following purchased in that city, under the name of Shawhan & Co., a quantity of flour of one Stanard, and got possession of it without paying for it. "Shawhan & Co." immediately failed; having shipped the flour to agents of theirs in New York, to be sold under the fictitious name and for the account of E. C. Packard & Co. Stanard thereupon, on the 2d of October, 1867, commenced an action in the Supreme Court of New York against Shawhan & Co., and attached, in the hand of the agents of Shawhan & Co., a portion of the proceeds of the flour.

Shawhan, individually, soon after his failure, and on the 28th of October, 1867, was adjudged a bankrupt in Missouri, and one Scott was appointed his assignee. The attachment was levied on the funds mentioned, on the 28th of March,