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

chartered by, and doing business under the laws of, that state. The law of the state of Maryland passed in 1894, above referred to, declares that a misrepresentation or an 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. The law of the state of Pennsylvania (Act June 23, 1885; P. L. 134) is to the same effect. Plaintiff in error insists that the trial court erred in giving effect to the Maryland statute, because it only covered policies containing warranties, and that, notwithstanding these plain provisions of the statute, the insurer and the insured could contract as to the materiality of any statement made a part of the contract. We think the statute is clearly applicable to the policy sued on; that, whether in the application the word "warrant" is actually used or not, the language is sufficiently broad to constitute a warranty. May, Ins. § 156; White v. Society, 163 Mass. 108, 39 N. E. 771; Burlegh v. Insurance Co., 90 N. Y. 220. The supreme courts of the states of Maryland and Pennsylvania have each passed upon the effect of these statutes, and held that the "misrepresentation" or "untrue statement" contained in an application for insurance, and which is sought to be made a ground of defense, must be of some material matter, and that the parties cannot, in the face of the law, contract that immaterial matter shall be material, and that contracts of insurance must be made in subordination to the statutes, and can have the legal effect which the law attributes to them, and none other. We do not understand upon what principle of law insurance companies can claim a right to contract to disregard a plain provision of a statute made for their guidance. Insurance Co. v. Ficklin, 74 Md. 172, 185, 21 Atl. 680, and 23 Atl. 197; Hermany v. Association, 151 Pa. St. 17, 24, 24 Atl. 1064; Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co., 19 C. C. A. 286, 72 Fed. 418; Id., 43 U. S. App. 75, 19 C. C. A. 316, and 73 Fed. 653. The supreme court of the United States, in the case of Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, recently had this general subject under review, and decided that under the law of the state of Iowa declaring that a solicitor for insurance should be considered the representative of the company, and not of the person taking the insurance, the parties could not contract to the contrary in order to make the solicitor the representative of the insured, regardless of anything contained in the policy. White v. Society, 163 Mass. 108, 39 N. E. 771; Levie v. Insurance Co., 163 Mass. 117, 39 N. E. 792; Hogan v. Insurance Co., 164 Mass. 448, 41 N. E. 663. It is manifest that these statutes were passed to prevent the defeat of the ends of justice by mere technicality. They are remedial in character, and should be given such liberal and reasonable interpretation as would insure a judicial investigation, in the ordinary way, of whether the particular statement alleged to be untrue or a misrepresentation was material to the risk. If the statement is found to be material, the penalty of forfeiture of the policy will follow, whether the answer be made in good faith or not. Should the question untruly answered relate to something found not to be material, and the answer be made in good faith, then the breach of warranty works no

prejudice to the insured or his representatives. We hold that there is no error in the first instruction of the lower court, and agree with the learned judge that the questions of materiality and good faith in the answers to questions propounded in the application for insurance are not always to be left to the consideration of the jury, but when such materiality is obvious, and the answers in the application are expressly made the basis of the contract, it is a matter for the court to pass upon. Otherwise, or when the materiality depends upon disputed facts, it should be determined by the jury. We have examined the two recent cases in the supreme court of Pennsylvania on this subject, to which our attention was called, of Lutz v. Insurance Co., 40 Atl. 1104, and March v. Insurance Co., Id. 1100, in which the act of the 23d of June, 1885 (P. L. 134), mentioned above, is further considered. We do not see anything in either of these decisions which changes or materially alters the doctrine laid down in the case of Hermany v. Association, 151 Pa. St. 17, 24 Atl. 1064, so far as affects this case. The views of that court coincide with those herein expressed upon the questions of materiality of representation or statement,—as to when determined by the court, and when by the jury.

4. We will now consider the question of whether the application for certificate of membership in the Frostburg Council of the Royal Arcanum was within the scope of the questions and answers made thereto by the deceased in his application for insurance, copied in full in the statement of facts of the case. This subject was very fully discussed in the case of Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co., 19 C. C. A. 293, 72 Fed. 419. Judge Taft, speaking for the United States circuit court of appeals, Sixth circuit, said:

"The circuit court was right in holding that within the scope of the question: 'Have you your life insured in this or any other company? If so, give the name of each company, and the kind and amount of the policy,'—were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum, mutual aid associations. It will be conceded that these associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring, upon certain conditions, the payment of a sum certain to the member's representatives on his death, has much resemblance, in form, purpose, and effect, to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations, which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (Indemnity Co. v. Dorgan, 16 U. S.

App. 290, 309, 7 C. C. A. 581, and 58 Fed. 945; Insurance Co. v. Crandal, 120 U. S. 527, 533, 7 Sup. Ct. 685), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description, 'policy of life insurance in any other company.' We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid associations, and the certificates of life insurance which they issue to their members. In Dickinson v. A. O. U. W., 159 Pa. St. 258, 28 Atl. 293, the defendant association sought to avoid its certificate on the ground of misrepresentation in the application. The plaintiff objected to the introduction of the application, because it had not been attached to the policy in accordance with the Pennsylvania statute which forbade the introduction by an insurance company, in defense of a suit on its contract of insurance, of an application not attached to the policy when issued. It was held that the statute did not apply, because the defendant association was not an insurance company, but belonged to the distinctly recognized class of organizations known as 'benevolent associations.' See, also, Association v. Jones, 154 Pa. St. 99, 26 Atl. 253; Commonwealth v. Equitable Ben. Ass'n, 137 Pa. St. 412, 18 Atl. 1112; Commonwealth v. National Mut. Aid Ass'n, 94 Pa. St. 481; Lithgow v. Supreme Tent (Pa. Sup.) 30 Atl. 830; Theobald v. Supreme Lodge, 59 Mo. App. 87; Sparks v. Knight Templars, 1 Mo. App. Rep'r, 334. It is true that in other states it has been held that such associations are within the description of 'insurance companies,' and that the contracts they make are properly termed 'policies,' as those terms are used in the statutes of such states. State v. Nichols, 78 Iowa, 747, 41 N. W. 4; Insurance Order v. Lewis, 12 Lea, 136; Assurance Fund v. Allen, 106 Ind. 594, 7 N. E. 317; Com. v. Wetherbee, 105 Mass. 159; Sherman v. Com., 82 Ky. 102. In this conflict of authority, we must lean towards the decisions of the state courts of that state, according to the laws of which we must construe this contract, and, for the reasons already given, hold that certificates of membership in mutual benefit benevolent associations were not embraced in the question asked by the company in that state."

We have given this full extract from the opinion of Judge Taft because it treats this difficult and comparatively new question, in a case practically identical with the one under consideration, with much force, ability, and clearness; and we concur in his reasoning and conclusion as to what the law is, and adopt the same as applicable to this case.

It will be observed that the learned judge in the court below, in considering this question (court's instruction No. 4), was embarrassed by the lack of evidence as to the character of the Royal Arcanum Association. He said:

"It appears to be a secret order of a beneficial character, membership in which is attended with some benefit payable in case of death."

Can it be said from this description that the certificate of membership in this secret order came within the language used in the application for policy: "That I have never made application for insurance on my life to any company, association, or society"? "Give name of each company, date of application, kind of policy, and amount applied for." This last inquiry, read in connection with the first, shows clearly that it was a policy in some "company" about which information was sought, and that in the first inquiry the words "company, association, or society" all referred to one and the same thing, viz. to an insurance company; and, besides, while, in their broader sense and acceptation, the words "company, association, or society" may cover

a beneficial order, it will not be maintained that in ordinary life insurance parlance they mean any such thing. An "insurance company," an "insurance association," or "insurance society," all mean one and the same thing; that is, regular insurance. Hence, in the second inquiry, the name of each "company" was alone requested. The plaintiff in error itself is an insurance association, as distinguished from a company, and there are companies and societies in abundance; for instance, "The Equitable Life Assurance Society," "The New York Life Insurance Company," etc., all meaning the same thing. We do not feel that there can be any serious doubt as to the correctness of this conclusion,—particularly when, as we have shown, questions of doubt and ambiguity as to the meaning of the policy should be resolved against the company issuing the same. It was at least the duty of the plaintiff in error to show, in the court below, if it desired to bring the certificate of membership within the language used in the application for insurance in its company, what the insurance in the Royal Arcanum, if any, was. It does not appear in the record that the deceased ever applied for insurance therein, or for any policy therein, but merely for a "certificate of membership" in the order, which was a secret beneficial order; and in so far as there appears to have been any profits to be derived therefrom, as shown by the application for membership, it is in these words: "I direct that, in case of my decease, all benefit to which I may be entitled from the Royal Arcanum be paid Ann E. Percy." Nothing is shown as to what amount was to be received, or whether, as a matter of fact, the deceased would have been entitled at his death to any benefit arising from this secret social and beneficial order. The facts bearing upon the application for membership in the Royal Arcanum and the rejection of the applicant are meager in the record. The application for membership in the Royal Arcanum at Frostburg seems to have been made in July, 1887,—nearly nine years before the issuing of the policy sued on. The local medical examiner examined the deceased, and certified to his being a good risk, and that he would probably live out his estimated expectancy. Subsequently it seems that the application was rejected by the lodge, for what cause is not stated. At the trial of this case, however, the chief medical examiner of the order, from Boston, was examined as a witness for the plaintiff in error, who produced the original application for membership, taken from the archives of the order at Boston, with a pencil memorandum made thereon by the chief medical examiner at that time, as follows: "Rej. Aug. 20; Lt. Wt., High Sp. of U.,"—which means, as interpreted by the present chief medical examiner: "Rejected Aug. 20th; Light weight, too high specific gravity of urine." It does not appear that there was good reason for the rejection, and it is quite clear that the present medical examiner would not have made such rejection. It seems that deceased was 5 feet 6 inches in height, and weighed 119 pounds, at the time his application was sent in. The order's standard weight for a person of that height was 140 pounds, though they accepted risks as low as 116 pounds, 3 pounds less than the weight of deceased at that time. And, so far as the albumen in the urine was concerned, while it was 1038, and 1020 was normal, it was proved

that it was liable to change at any time; and there was nothing to show that the specific gravity at that time might not have been due entirely to some temporary cause, rather than from organic trouble. The matter of specific gravity of urine may or may not be an important element. If the result of organic disease, and progressive in its operation and effect, the materiality of its existence at one time would clearly appear as to any subsequent period in the progress of its operations upon the human system; but in this case it appears that a full medical examination was had before the policy in controversy was issued by the plaintiff in error, and the absence of symptoms which are claimed to have caused a rejection upon the examination for membership in the Royal Arcanum would clearly indicate the immateriality of both the question and answer as showing that the trouble, if any, was not organic, and had ceased to exist. The reason for the action thus taken by the order was never communicated to any one, and it is perfectly certain that deceased was never informed as to it; nor does it appear from the evidence that he was ever advised of his rejection as a member of the order. As to his rejection on account of health, the physician by whom he was examined certified his risk as being a good one, and it does not appear in the evidence in this case that he ever had any intimation to the contrary. Hence, whatever misstatements he may have made as to a physician not having reported unfavorably upon his application for life insurance, it was innocently made, so far as his application for membership in the Royal Arcanum was concerned. Moulor v. Insurance Co., 101 U. S. 708, 710. Further, it does not appear that any report was ever made adversely to him on an application for insurance of any kind. The fourth instruction therefore seems to us to be free from error. Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87; Commonwealth v. Equitable Ben. Ass'n, 137 Pa. St. 412, 18 Atl. 1112; Association v. Jones, 154 Pa. St. 99, 26 Atl. 253; Theobald v. Lodge, 59 Mo. App. 87.

5. The learned judge of the court below instructed the jury, in effect, that statements in the application of deceased as to his diseases and sickness were material, and that he was obliged, in good faith, to correctly state the facts so far as he knew them, but that he was not obliged to remember and state all of his slight ailments or temporary derangements of the functions of his organs, from which he had recovered without impairment of his general health, and that if, upon the whole evidence, they were satisfied that the insured, at the time he signed the application for insurance, had any disease serious in its character, likely to affect his general health, and failed to remember the same, then the policy would be avoided. We think this instruction correctly states the law. In the fifth clause of his application, the insured declared that he had never been afflicted with any disease, sickness, ailment, or complaint, except as stated, and qualified the statement by adding: "Nothing serious; dyspepsia about 20 years ago; ankle broken in 1847." He gave the name of his doctor, and also qualified it by stating in the sixth clause that about 1895 Dr. Price prescribed for him for being hurt while riding horseback; "irritation of the bladder; slight colic several times." This state-

ment by the insured of his health, and the temporary ailments and afflictions that he had, shows that the insurer and the insured each had in mind the inquiry after diseases serious in their character, and affecting the general health, and not merely temporary afflictions; and from the evidence it does not appear that the insured made any materially incorrect statement of any kind. These temporary ailments specified do not appear to have been serious in their character, and the insurance company was advised as to them before entering into the policy; and it nowhere appears from the evidence that the deceased was afflicted with a serious disease of any kind, or that he made misrepresentation or false statement as to his health in any respect. Authority in support of these views is abundant. Mr. Justice Harlan, in discussing the question of ailments in Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 258, 5 Sup. Ct. 119, 123, said:

"Unless he had an affection of the liver that amounted to disease (that is, of a character so well defined and marked as to materially derange for a time the functions of the organ), the answer, that he had never had a disease called 'affection of the liver,' was a 'fair and true' one; for such an answer involved neither fraud, misrepresentation, evasion, or concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted." Indemnity Co. v. Dorgan, 16 U. S. App. 290, 7 C. C. A. 581, and 58 Fed. 945; Insurance Co. v. Wise, 34 Md. 598; Insurance Co. v. Moore, 6 App. Cas. 648; Cushman v. Insurance Co., 70 N. Y. 76, 77; Society v. Winthrop, 85 Ill. 542; Brown v. Insurance Co., 65 Mich. 314, 315, 32 N. W. 610.

The assignments of error founded on the refusal of the court below to grant the instructions asked for by the plaintiff in error, referring to the questions we have discussed, and not covered by the instructions given, are without merit, for the reasons we have assigned in sustaining the instructions to the jury in the court below. The case seems to have been fully submitted, with a clear and comprehensive statement of the law, to which, as a whole, no just exception can be taken; and we find no error in the judgment of the lower court for which it should be reversed, and the same is affirmed.

WAGNER et al. v. J. & G. MEAKIN, Limited.[1]

(Circuit Court of Appeals, Fifth Circuit. January 24, 1899.)

No. 670.

1. FOREIGN CORPORATIONS—REGULATION BY STATE—DOING BUSINESS IN STATE.
A petition by a foreign corporation, setting up as a cause of action certain foreign bills of exchange drawn on, and accepted by, defendants, residents of Texas, and also an account for goods sold and delivered by plaintiff to defendants, does not show that plaintiff was engaged in business in Texas, within the meaning of the statute of that state, so as to require, to enable plaintiff to maintain the action, an allegation that it had previously filed a copy of its charter with the secretary of state and obtained a permit to engage in business.[2]

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[1] Rehearing denied February 21, 1899.

[2] As to status of foreign corporations, see note to Silver Mines v. Brown, 7 C. C. A. 419.