



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 42  
Issue 4 *Dickinson Law Review - Volume 42,*  
1937-1938

---

6-1-1938

## Evans vs. Penn Mutual Life Insurance Company of Philadelphia

A.J. White Hutton

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

A.J. W. Hutton, *Evans vs. Penn Mutual Life Insurance Company of Philadelphia*, 42 DICK. L. REV. 178 (1938).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol42/iss4/2>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

EVANS vs. PENN MUTUAL LIFE INSURANCE COMPANY  
OF PHILADELPHIA

322 Pa. 547 (1936) 186 A. 133.

A. J. White Hutton\*

The above case presents an interesting study of certain phases of life insurance law as developed in the Pennsylvania decisions on the topics of representation and warranty. Moreover the extensive opinion of DREW, J., concurred in by the entire court except SCHAFFER, J., who took no part in the decision, assumes a prominence in view of the following prefatory declaration by the learned Justice:

"In view of the frequency with which cases of this sort have been arising, we consider it advisable to restate here the chief principles applicable to this type of case, in the hope of making our position in the matter clearer and thereby affording additional guidance to lower courts and to litigants in the disposition of this kind of litigation."

FACTS—

On April 29, 1932 Defendant issued a policy of insurance, without a medical examination, on the life of Edward W. Evans; the mother, Florence W. Evans, being named as beneficiary. The insured at the time was 21 years of age and employed as a right-of-way agent by the Bell Telephone Company. He died on August 9, 1932, the certificate of death stating the immediate cause as cerebral hemorrhage and the duration of last illness as one day. Due notice of death, together with proofs of the same, was given by the beneficiary, but Defendant offered to return the amount of premium paid, denying further liability on the ground of false representation in the application. Thereupon the beneficiary as Plaintiff brought suit for the face amount of the policy which was \$3,000. There were two trials each resulting in a verdict in the Plaintiff's favor and the present appeal was taken by Defendant following the entry of judgment on the second verdict. The application for the policy which was in writing and executed by the insured on April 19, 1932 contained, *inter alia*, the following:

---

\*A.B., Gettysburg College, 1897; A.M., Gettysburg College, 1899; LL.B., Harvard University, 1902; Professor of Law, Dickinson School of Law, 1902-; Member of Pennsylvania House of Representatives, 1931-1935; Author of Hutton on Wills in Pennsylvania.

"17 D. Have you had any other illness or injury? No.

"E. Have you, or have you ever had vertigo, appendicitis, rheumatism, heart disease, Bright's disease, lung disease, or any other disease or infirmity? No.

"18. Have you ever been disabled or had any medical or surgical treatment, or X-rayed for treatment, disease or diagnosis, other than as stated by you above? If so, full details. No.

"19. Are you aware of any circumstances connected with your own health or that of your family which might affect the risk of insurance on your life? No."

In the Affidavit of Defense it was averred that the above answers were false and known by Evans to be false when he made them, and further that for five or six years prior to date of application he had suffered dislocation of a vertebra near the base of the brain and thereafter had several similar dislocations, and the further averment was made that one of these dislocations ultimately led to his death. It was also averred by Defendant that during the five years preceding his death Evans had received medical treatment from three doctors, all of whom had treated him for various dislocations. In reply Plaintiff denied that insured had suffered dislocation of vertebrae or any other injury or that insured had at any time been paralyzed, as Defendant had averred, or otherwise disabled, or had any medical or surgical treatment, but Plaintiff's reply did state "one of the vertebrae would sometimes get out of its rigid position in the spinal column which was promptly restored by osteopathic treatment and massage."

The application further contained the following:

"10 A. Are you now in good health? Yes. B. When were you last attended by a physician or consulted one? Dec. 1931. C. For what disease? Bercitis. D. Give details in full. Housed up two weeks."

On these pleadings the issues of fact were presented to the jury and a verdict in both trials was for the Plaintiff.

The learned Justice referred to the essential facts as follows:

"With the exception of the statement in plaintiff's reply that 'one of the vertebrae would sometimes get out of its rigid position' and be restored by osteopathic treatment, and certain statements in the proofs of death, the defense rested upon the testimony of defendant's witnesses. We are not satisfied that these written statements suffice to show the required bad faith on insured's part in the mak-

ing of the application. At most, they indicated that insured had consulted an osteopath at least once, in February, 1932, for dislocation of a cervical vertebra, that the first dislocation occurred five years before his death, that insured had consulted or employed, for purposes not mentioned, three physicians within three years prior to his death, two of whom were osteopaths, and that his death had resulted from a dislocation of the third cervical vertebra, which occurred while he was swimming. Nothing in this documentary evidence shows that Evans thought or had any reason to think the dislocation he suffered before his application for insurance were more than slight and temporary indispositions, too trivial to be reported in the application.

"Furthermore, it appeared from the testimony that, while a dislocation would sometimes result in temporary paralysis and would require insured to remain in bed, nevertheless the attacks 'usually cleared up within twelve to twenty-four hours,' and left him in an apparently normal condition. Only two doctors, both of whom were osteopaths and were called by defendant, testified to having treated insured for dislocations prior to the allegedly fatal one. The third doctor, who attended him during his last illness, testified to previous treatments for berçitis, which was reported in the application, and for a bronchial inflammation, and further stated that his condition at that time (three months before the issuance of the policy) was otherwise 'perfectly normal.' The court below aptly said: 'Nowhere is it shown that Edward W. Evans knew, or was told by any of the doctors who attended him, that his affliction was a serious one. Indeed the testimony shows that his neck treatments were few and when that condition was rectified he had prompt recovery and immediately thereafter engaged in his work. He may have labored under the impression that his condition was muscular for it was described by one of the osteopaths as a contracted muscle condition. There is also no direct testimony that the dislocated vertebra was the cause of his death; the nearest proof of that fact is the testimony of Dr. James who stated: 'I think that is the way it happened, we have no proof in this case because there was no autopsy.'"

The policy contained the usual provision that all statements made by insured or on his behalf should be deemed representations and not warranties.

#### CONCLUSIONS OF LAW.

After discussing the leading decisions in Pennsylvania on the subject of representations and warranties in life cases and the rulings as to the submission

on the proofs of a case to the jury or the direction of a verdict, together with the rule in *Nanty-Glo Boro. vs. American Surety Company*, 309 Pa. 236, 163 A. 523, and kindred cases, DREW, J., declared:

"These principles may be summarized as follows: (1) Where the statements made by insured in the application are warranted by him to be true, or where the policy expressly provides for its avoidance by the falsity of such statements the insurer may avoid the policy by showing the falsity of statements material to the risk, irrespective of insured's knowledge of their falsity or of his good faith in making them. (2) Where the statements are made representations, the insurer, to avoid the policy, must show they were false and insured knew they were false or otherwise acted in bad faith in making them. (3) If such falsity and the requisite bad faith affirmatively appear (a) from competent and uncontradicted documentary evidence, such as hospital records, proofs of death, or admissions in the pleadings, or (b) from the uncontradicted testimony of plaintiff's own witnesses, a verdict may be directed for the insurer. (4) But whatever disputed questions of fact are presented by conflicting evidence, whether documentary or oral, or whenever the insurer's defense depends upon the testimony of its witnesses, even though such testimony is uncontradicted, the case must be submitted to the jury, subject to the trial court's power to award a new trial as often as in its sound discretion it may think the interests of justice require. (5) When the suit is in equity, the chancellor is the sole trier of fact, and submission to a jury is not required except where he deems it advisable."

The learned justice stamped approval upon the following excerpt from the Opinion of the Court below:

"'Mere mistakes, inadvertently made, even though of material matters, or the failure to furnish all details asked for, where it appears there is no intention of concealing the truth, does not work forfeiture, and a forfeiture does not follow where there has been no deliberate intent to deceive, and the known falsity of the answer is not affirmatively shown.'"

The Opinion concluded with this statement:

"Clearly the question of good faith was, under the evidence thus presented, for the jury. Since the case has twice been submitted to a jury, each time with the same result, and since no prejudicial error in the conduct of the trial below or abuse of discretion in the

refusal of a new trial has been shown, the entry of judgment on the jury's verdict must be held to have been proper."

#### DEDUCTIONS.

It would appear from a reading of the opinion in the *Evans* case and the observations made on the cases cited, that the rule of law in Pennsylvania is that where by a provision in the policy all statements made by the insured in his application for the insurance or on his behalf are deemed to be representations and not warranties, false statements material to the risk, as may be made by the insured, will not avoid the policy unless in addition it is shown by the insurer that the falsity of the statements was known to the applicant and made for the purpose of deception. In short, the statements must have been fraudulently made, and the case goes to the jury for determination and cannot be taken from it by the Court on a directed verdict unless the third principle as laid down by DREW, J., is applicable, viz:

"(3) If such falsity and the requisite bad faith affirmatively appear  
 (a) from competent and uncontradicted documentary evidence, such as hospital records, proofs of death, or admissions in the pleadings, or (b) from the uncontradicted testimony of plaintiff's own witnesses, a verdict may be directed for the insurer."

See *Bradich v. Metropolitan Life Insurance Co.*, 128 Pa. Superior 513 (1937), 194 A. 522.

#### COMMON LAW.

Professor Vance in his admirable handbook of the law of Insurance, Hornbook Series, Second Edition, page 359, thus defines representations:

"Representations are statements made to give information to the insurer, and otherwise induce him to enter into the insurance contract. They may be oral or written, and may be made before or at the time of the execution of the contract. If written they may be found within the contract or without it.

"False representations, whether innocent or fraudulent, will in all cases render a contract of insurance voidable, provided they are material; but immaterial representations are wholly without effect, unless statutes provide otherwise."

It is believed that these statements of the law, as they have been derived from marine sources, have never been applied in Pennsylvania in their pristine stringency to cases of fire and life insurance. A very able common pleas judge, THAYER, P.J. of the Philadelphia Courts, observed in *Aicher vs. Metropolitan Life Insurance Co.*, 13 Phila. 139 (1879), as follows:

"It is an established principle of marine insurance that the misrepresentation or concealment of a material fact will avoid the risk, although no fraud was intended. But it is denied in many decisions that this principle extends to fire policies, and it certainly does not extend to life insurance."

See also P. & L. Digest of Decisions, Vol. 9, Column 14798.

Referring particularly to the life cases as reviewed in the *Evans* case,

DREW, J., opines:

"An examination of cases in other jurisdictions and of other authorities shows clearly that they are not in entire harmony as to whether the misrepresentation must be with intent to deceive or whether it is sufficient to show a false statement material to the risk. Cf. Couch on Insurance, sections 818, 824 ff.; Cooley's Briefs on Insurance, c. 12, sections 1, 2; 32 C. J. 1286. It is suggested that the confusion arises from a failure to keep clearly in mind and to apply consistently the distinction in result between representations and warranties, as well as from the fact that a gradual change in the language of policies, from that of warranty to that of representation, and in the attitudes of various courts toward the relation between insurer and insured has been taking place. The recent cases in this jurisdiction have certainly shown a very clear and unmistakable trend toward broadening an insured's right of recovery, of which the insistence on good faith as the test in representation cases is perhaps the chief instance."

At common law, as derived from the marine cases, it is the duty of the applicant for insurance to disclose facts material to the risk as well as by actual representations to inform the insurer correctly of facts material. As observed by Professor Vance, *supra*, in England the insured is under obligation to disclose to the insurer every material fact that is or, in due course, ought to be known to the insured; furthermore, the presence or absence of a corrupt intent on the part of the insured is wholly immaterial. However, in the United States this stringent rule has been confined to marine insurance, and in fire and life cases bad faith in failing to disclose must be shown by the underwriter if a policy is defended for breach of the duty to disclose. The late Judge Taft has well explained this departure from the strictness of the English rule in the well known case of *Penn Mutual Life Insurance Company vs. Mechanics Savings Bank and Trust Company*, 72 F. 413, 38 L.R.A. 33 (1896), wherein he said:

"The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has

led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean towards the view that no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal from the insurer a fact believed to be material; that is, unless the nondisclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss can be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence.

"In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination, and determine the extent to which it is exposed to danger of fire from surrounding buildings, or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history."

An examination of the cases of both fire and life insurance in Pennsylvania shows that our courts have not differentiated very sharply between the principles of insurance law applying to representations on the one hand and those of concealment on the other hand, but the tendency has been to mingle the same as will be noted in the remarks quoted supra of Judge Thayer and as will also be observed in the citation of 9 P. & L. Digest of Decisions, Column 14798, wherein the learned editor draws the following conclusions from the cases as therein collated:

"In order that a representation may avoid a policy of insurance on property, it must be false, fraudulent and material; a representation will not, therefore, avoid the policy, although untrue and material, unless made with intent to deceive the insurer."

It is believed that the tendency of our courts to commingle the law of representation and of concealment and to assimilate the two into one has played considerable part in the development of the "good faith" doctrine as applied to representations in life cases and exemplified now most emphatically in *Evans vs. Penn Mutual Life*.

Another factor has been the statutory changes in the law of warranty in life cases in this and other states, notably New York.

A warranty has been defined by Vance and other writers as a statement or promise set forth in the policy, or by reference incorporated therein, the untruth or nonfulfillment of which in any respect, and without reference to whether the insurer was in fact prejudiced by such untruth or nonfulfillment, renders the policy voidable by the insurer, wholly irrespective of the materiality of such statement or promise.

See Vance, *supra* page 384.

It was the practice for many years for life insurance companies to incorporate the application together with the various answers made by the applicant into and to constitute it a part of the policy itself and all of the representations made therein were warranted to be true and correct, the penalty being forfeiture on a plea set up by the insurer on an action on the policy that there was a breach of warranty.

In Pennsylvania as well as in other states this form of defense upon the part of unscrupulous underwriters became in the course of time nothing short of a scandal as is evidenced by a host of cases in this country and furthermore explains in large part the tendency of the courts to lean in its several constructions of warranties and representations toward the insured and to impose presumptions and burdens of proof upon the insurer.

#### STATUTORY PERIOD.

A culmination of this matter in Pennsylvania is exhibited in several statutes enacted over a half century ago. The one, having reference to the matter of the application being made a part of the policy, is the Act of May 11, 1881, P.L. 20 (No. 23), entitled "An Act relating to life and fire insurance policies," and provides as follows:

"Section 1. Be it enacted, &c., That all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which

contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

A similar provision has been incorporated into the Insurance Code of May 17, 1921, P. L. 682, 40 PS Section 510 (d).

The other statute referred to is the Act of June 23, 1885, P. L. 134 (No. 101) entitled "An Act relating to warranty in the application for insurance policies" and provides as follows:

"Section 1. Be it enacted, &c., That hereafter whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation, or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

The effect of this statute was to reduce warranties to the plane of representations and to require that the fact alleged to be misrepresented was material to the risk.

*Hermany vs. Fidelity Mutual Life Association*, 151 Pa. 17 (1892) was assumpsit by the widow and the children of the insured as beneficiaries in a life policy. The defense was, inter alia, that the statements made by the decedent in the application were false, and in turn the Act of 1885 was pleaded by the plaintiffs despite the fact that in the policy a waiver of the statute was attempted. Upon verdict and judgment for the plaintiffs, the defendant appealed assigning certain errors.

STERRETT, J., observed, concerning the Act of 1885 after quoting it:

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of pre-

venting injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the waiver was invalid."

In *March v. Metropolitan Life Insurance Company*, 186 Pa. 629 (1898), GREENE, J., further explained the Act of 1885 in this way:

"The meaning of this language is perfectly plain. A misrepresentation or untrue statement in an application, if made in good faith, shall not avoid the policy unless it relates to some matter material to the risk. If it does relate to such matter the act is inapplicable. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue it shall not avoid the policy. As we said in *Hermany vs. Fidelity Mutual Life Association*, 151 Pa. 17, this act has effected a change in life insurance contracts, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. Ordinarily questions of good faith and materiality are for the jury, and where the materiality of a statement to the risk involved, is itself of a doubtful character, its determination should be submitted to the jury. But it was never intended by the act of 1885, nor did that act assume, to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact. Neither the *Hermany* case nor any other case, before or since, has made any change in the law in this class of cases."

In short the good faith of the applicant who warranted the facts represented was irrelevant by the terms of the statute if facts misrepresented were actually material to the risk. Accordingly, if the facts were admitted the Court could rule as a matter of law as to their materiality and the case would be taken from the jury. This is substantially the ruling of the court in the *March* case, *supra*. If on the contrary immaterial facts were warranted to be true by the terms of the policy but facts so misrepresented were uttered in good faith, the policy could not be avoided by such a breach and the case

went to the jury on the matter of good faith. Moreover, if the facts and their materiality were in dispute as well as the matter of good faith, all of the issues would go to the jury. Thus, it may readily be seen that in practice under this particular act it could not be long until the question of good faith became paramount. This tendency was natural despite the ruling in *Lutz vs. Metropolitan Life Insurance Company*, 186 Pa. 527 (1898), wherein it was held that if it is doubtful whether the matter involved in the questions and answers is material, the question must then be submitted to the jury as to its materiality; nevertheless where the answer is false and the matter involved is palpably and manifestly material to the risk, as in answers as to health, the Act of June 23, 1885, P. L. 134, has no application. The appellate opinion again was written by GREENE, J., who said:

"As the act of 1885 made no change in the law where the matter in question was material to the risk, the duty of the court to pronounce upon this subject was the same after as before the act. As a matter of course there could not be any doubt that previous spitting of blood, or illness, or confinement to the house by reason of illness, or medical service, or the attendance of physicians, or having consumption, were subjects of the most serious and material character, and they have always been so held by the courts. As it was always the duty of the court before the act of 1885 to determine the materiality of the question and answer in cases which were perfectly manifest and free from all doubt, and the act makes no change in the law in such cases, so the same duty remains since the passage. Without repeating the reasons for our decision expressed in the case above referred to, we are clearly of opinion that the present case is of the same character and comes within the same ruling."

The Act of 1885 was repealed by the Act of June 1, 1911, P. L. 581, (See particularly page 598), and as no similar provisions were carried forward in subsequent legislation the Act disappears as an active factor in our law, but it has left its impress of the "good faith" doctrine in the decisions. An interesting illustration of this will be found in the remarks of Judge Clayton of the lower court in the *March* case. See 186 Pa. at page 630.

The only revival apparent in our statute law of the provisions of the Act of 1885 will be found in the Insurance Code of May 17, 1921, P.L. 682, Section 622,40 PS 757, wherein is a provision that the falsity of any statement in the application for any policy covered by subdivision B of the particular Article of the Code, entitled "health and accident insurance," shall not bar the right to recovery thereunder unless such false statement was made with actual intent to

deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. This particular provision is construed and applied in *Koppleman vs. Commercial Casualty Insurance Co.*, 302 Pa. 106 (1930), 153 A. 121.

#### GOOD FAITH ERA.

One of the last notable cases under the Act of 1885, supra, was *Rigby vs. Metropolitan Life Insurance Co.*, 240 Pa. 332 (1913), where the grounds of defense were that incorrect statements had been made by the insured in his application relating to his previous illness and to medical attendance. The policy stipulated that the statements in the application and the answers to the medical examiner "are correct and wholly true, that they shall form the basis of a contract of insurance if one is issued and that if they are not thus correct and wholly true the policy shall be null and void." Both grounds of defense were submitted to the jury with instructions that under the Act of June 23, 1885, P. L. 134, in order to effect a forfeiture of the policy it should appear that the misrepresentations are untrue statements related to matters material to the risk. The question of good faith did not arise in this case and FELL, C. J., cited in the course of his opinion the cases of *United Brethren Mutual Aid Society vs. O'Hara*, 120 Pa. 256, and *Lutz vs. The Insurance Company*, 186 Pa. 527.

The ostensible genesis of the present "good faith" doctrine is found in *Suravitz vs. Prudential Ins. Co.*, 244 Pa. 582 (1914). The opening remarks in the opinion of ELKIN, J., give the essential facts:

"This is an action on an insurance policy which by its terms made all statements of the insured representations and not warranties. The defense is that the answers contained in the application as to the good health of the applicant for insurance, and whether she ever had any serious illness or disease, were untrue in fact when made, and that the false answers being material to the risk, avoid the policy. Appellant denies that any intentional misrepresentation was made by the applicant to the agent of the insurance company who wrote down the answers in the presence of the husband and daughter of the insured; and at the trial, it was urged that the answers were made in good faith without any intention to evade, suppress or conceal facts which should be disclosed, and that the alleged false answers relied on to avoid the policy were incorrectly written down by the agent who solicited the insurance. It is conceded on all sides that the case was for the jury, and our only concern is to see that it was submitted with instructions properly defining the legal rights of the parties."

The verdict and judgment were for defendant and plaintiff appealed assigning as error various points refused by the trial court and certain features of the charge. The paper books are not available at this writing and the report of the case does not specify clearly the assignments of error, but it is apparent from the opinion of ELKIN, J., that the element of good faith was insisted upon as a point of instructions but denied by the trial court. After calling attention to the difference between warranties and representations the learned justice said:

" . . . . In our opinion the change in the covenant from a warranty to a representation was intended to broaden the scope of inquiry in such cases so as to give relief to parties who in good faith take out policies of insurance, from the harshness, and in many instances the injustice, of the old rule applicable to warranties. If this be the correct view, and it is certainly the just and equitable one, we can see no reason for limiting the inquiry to the single question of the materiality of the answer. Whether true answers were made and whether the answers as made were correctly written down by the agent of the insurance company, and the good faith of the party making the answers to the best of his knowledge and belief, are questions which go to the very essence of the insurance risk, and parties should not be denied the right to have such matters determined before a proper tribunal unless they have covenanted otherwise. . . . The cases are not in entire harmony, but a fair reading of them will show a tendency to broaden the scope of inquiry into questions relating to the materiality, correctness and truthfulness of answers, and the good faith of the applicant in making them, when suit is brought upon a policy containing a covenant that the statements of the insured shall be deemed representations and not warranties."

Judgment was reversed and a new trial granted. The case came up later and is finally recorded in 261 Pa. 390 (1918), but in the second trial the facts as developed differed substantially from those of the previous trial. However, in *Oplinger vs. New York Life Insurance Company*, 253 Pa. 328 (1916) MOSCHZISKER, J., observed:

" . . . . In submitting the issues arising out of this conflict, the trial judge instructed the jury that the evidence, pro and con, was for them to consider and pass upon; that if the insured, prior to his application to the defendant company, suffered from certain designated ailments, of whose character one would surely be cognizant, then the verdict must be for the defendant; but that if he

suffered from certain other ailments, of a kind one might have without being aware of the fact, then the good faith of his answers would depend upon the applicant's knowledge. For instance, on the latter phase of the case, the court said: 'Did he have this heart trouble prior to the time the application was signed, did he know that he had it, and did he sign falsely? If you believe that, then your verdict should be for the defendant. Did he have the heart trouble prior to the signing of the application and when he signed didn't know he had it, and acted honestly in putting his answers in the application, in that case, even if he did have it, your verdict would be in favor of the plaintiff.' The policy expressly provides that 'all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties,' and the trial judge's instructions, above outlined, accord with the law as recently laid down by us in *Suravitz v. Prudential Insurance Co.*, 244 Pa. 582, 588."

*Baer vs. State Life Insurance Co.*, 256 Pa. 177 (1917), follows the *Suravitz* case and is one of the few cases in the reports of this time giving the full quotation of the clause now under consideration. This clause is typical of the life policies beginning in the early part of the 20th century:

"Entire Contract. This Policy, together with the application therefor, shall constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy unless it is contained in the application therefor."

The policy was issued July 28, 1913, and the insured died May 4, 1914. Defendant refused to pay on the ground that the insured had made false misrepresentations in his application as to his state of health and his last consultation of a physician. Upon verdict and judgment for the plaintiff, defendant appealed and assigned as errors rulings on the evidence and the refusal to give binding instructions. Said POTTER, J.:

" . . . In the late case of *Suravitz vs. Prudential Ins. Co.*, 244 Pa. 582, the subject of representations in policies of life insurance was fully considered. It was there said (p. 587): 'The cases are not in entire harmony, but a fair reading of them will show a tendency to broaden the scope of inquiry into questions relating to the materiality, correctness and truthfulness of answers, and the good faith of the applicant in making them, when suit is brought upon a policy containing a covenant that the statements of the in-

sured shall be deemed representations and not warranties.' That decision was expressly followed in *Oplinger v. New York Life Ins. Co.*, 253 Pa. 328. We are clear that the trial judge could not properly have taken this case from the jury, and the assignments in which it is alleged that he erred in refusing to do so, must be dismissed.

"Complaint is made in the seventh assignment of the affirmance of plaintiff's fifth point, in which the jury were instructed that, if made in good faith, a misrepresentation by the insured, as to consultations with Dr. Schuster at times other than those mentioned in the application, would not avoid the policy, unless the misrepresentation was a material one. The point was obscure and difficult to understand, and counsel should have been required to restate and simplify the request. It is dangerous to affirm a point which is not clear to the court, for to the jury it would present even more difficulty. We do not, however, feel that the submission of the point as presented amounted to reversible error. The instruction requested was intended to aid the jury in determining the materiality of the representation, if they found it to have been made in good faith. Under the doctrine of *Suravitz v. Ins. Co.*, supra, the question was properly for the consideration of the jury."

In *Skruch vs. Metropolitan Life Ins. Co.*, 284 Pa. 299 (1925), SIMPSON, J., quotes with approval the remarks of ELKIN, J., in the *Suravitz* case, and thus concludes:

"This decision is followed in *Oplinger v. New York Life Ins. Co.*, 253 Pa. 328; *Feinberg v. New York Life Ins. Co.*, 256 Pa. 61; *Baer v. State Life Ins. Co.*, 256 Pa. 177, and *Suravitz v. Prudential Ins. Co.*, 261 Pa. 390, and has never been qualified."

Other cases establishing the good faith doctrine of the *Suravitz* case and with opinions by SADLER, J., are *Livingood vs. New York Life Ins. Co.*, 287 Pa. 128 (1926) and *Kuhns vs. New York Life Ins. Co.*, 297 Pa. 418 (1929). In the latter case the learned justice declares:

" . . . Mere mistakes, inadvertently made, even though of material matters, or the failure to furnish all details asked for, where it appears there is no intention of concealing the truth, will not have this effect: *Skruch v. Metropolitan Life Ins. Co.*, 284 Pa. 299; *Suravitz v. Prudential Ins. Co.*, 244 Pa. 582; *Livingood v. New York Life Ins. Co.*, 287 Pa. 128; *Gimble v. Aetna Life Ins. Co.*, 95 Pa. Superior Ct. 1. The burden of proving the falsity of

the answer, and that it was deliberately given, is on the defendant, who asserts it; *Livingood v. New York Life Ins. Co.*, supra; *Jackson v. State Mutual Benefit Assn.*, 95 Pa. Superior Ct. 56. Unless this situation is made apparent by undisputed proof, documentary or oral, the question is one for the jury, and is not to be declared as a matter of law by the court."

#### ACT OF 1937.

The *Evans* Case, supra, was decided by the Supreme Court of Pennsylvania June 26, 1936, and the following year the General Assembly passed the act approved May 21, 1937, P. L. 774, as follows:

"Section 1. Be it enacted, &c., That all statements made by the applicant for an annuity or pure endowment contract, or statements made by the insured or in his behalf in the negotiation for a policy or certificate of life, endowment, accident or health insurance, or any reinstatement thereof issued by any insurance company, association, fraternal benefit society, beneficial society, or exchange doing business in this Commonwealth, shall be deemed, in the absence of fraud, to be representations and not warranties."

The language of this statute is substantially the same as that of the New York Statute, Insurance Law, Section 58, which reads: "All statements purported to be made by the insured shall in the absence of fraud be deemed representations and not warranties."

In *Eastern District Piece Dye Works v. Travelers Ins. Co.*, 234 N. Y. 441, 138 N. E. 401, 26 A.L.R. 1505 (1923), it was held that under this statute the defendant's allegation in its answer that the insured in her application had "warranted" certain statements to be true, imposed upon the defendant the burden of proving that the misstatements were fraudulent, as well as false, and material whereas, if they had been alleged to be "representations" the defendant could have made good its defense merely by proving the materiality of the misstatements. See Vance, *Cases on Insurance* (1931), page 421, 422.

The language of the New York Statute is the same as that construed by our courts in the *Suravitz* case and those following, as will be noted in the quotation from the *Baer* case, supra.

Consequently, the rulings in the *Evans* case remain applicable to the terms of the present statute.

#### CONCLUSION.

The late Justice Oliver Wendell Holmes in his lucid little book entitled "The Common Law" sagely observed:

"The history of the law has not been logic, it has been experience."

This wise observation made years ago by this eminent scholar, afterwards the outstanding justice of the Supreme Court of the United States, is very applicable to the development of the doctrines of insurance law discussed in this article.

The old saying is that "Time and tide wait for no man," and in the realm of decisional law time brings many changes as experience dictates. It is obvious to any one studying the subject of insurance law that the conditions confronting both the insurer and the insured are vastly different from what they were a hundred years ago, and it is not strange that principles then enunciated would not fit our present state of affairs. Professor Funk in an article entitled "Duty of Insurer to Act Promptly on Applications," 75 *University of Pennsylvania Law Review*, 207 (1927), treating of a subject entirely different from that discussed in the present article, nevertheless made the following general observation which is not out of line with the present thoughts expressed:

" . . . Insurance has come to play such an extensive part in our civilization that the business is recognized as being quasi-public in character; and the insurance contract is treated by the courts in a way different from ordinary agreements. More and more the tendency seems to be to shift wherever possible the burden of loss due to accident or catastrophe from the shoulders of the individual to those of the community or of a group within the community."

Using the functional approach method in the study of the *Evans* case and the principles enunciated, it would appear that our Supreme Court has definitely taken the stand of leaning to the side of the insured and the beneficiary in life contracts in the effort to approximate social justice. Not only is the good faith doctrine emphasized but the functions of the jury as the ultimate arbiter are manifestly exalted. Conversely the power of the court to direct verdicts is correspondingly curtailed. A study of this particular phase as developed in the opinion of DREW, J., transcends the bounds of this article but it affords an interesting research.

Notwithstanding, a study of the cases also discloses that where fraud on the part of the insured appears, the rights of the insurer as infringed are amply protected.

Lastly, it is still possible for the insurance companies to counteract, if they see fit, the effect of the *Evans* case by a further development of the "sound health" clause, which again is an interesting study, together with the statutory provisions, transcending however the bounds of this particular discussion.

Chambersburg, Pa.

A. J. White Hutton.