fidelity the defendants had guaranteed. The court held that all the assured had done was to declare a course that he intended to pursue, and that it was not a warranty.

Suppose a ship insured for Rio Janeiro, and after the description is written "intended to touch at St. Thomas." Surely such a clause gives the assured liberty, but he does not thereby warrant to touch.[1]

In a case of *Notman* v. *The Anchor Ins. Co.*,[2] a man's life was insured—he "about to proceed to Belize," and he paid an extra premium to cover twelve months' residence at Belize. He did not soon go to Belize—not for upwards of a year; afterwards he went to Belize, and before twelve months' residence there had expired, he died. Held, that he had not warranted to go to Belize at any fixed time, and that the company was liable.

§ 207. *Burden of proof.*

Where misrepresentation is alleged, the onus of proving it is on the insurers. They must prove the representation false, and false in a point material. The insurer is to have the benefit of doubts.

In a case of *Fowkes* v. *Manchester and London Life Assurance Association*,[3] the Court of Queen's Bench held that a mis-statement did not vitiate the policy unless it was wilful.

§ 208. *Materiality of representation is a question of fact.*

Duer is of the opinion, and such is certainly the inference from the authorities cited below, that when the materiality does not "depend on the testimony of witnesses, but results as a necessary consequence, from the nature of the fact, or has been established by prior adjudications, it is the duty of the judge to give a positive instruction to the jury, and that their verdict in opposition to his charge would be set aside as contrary to law."

Thus, in regard to the insured's representation, that he is the owner of property, when he is not the actual and legal owner, but his interest is inchoate, equitable, qualified or contingent, the Courts of New York and Massachusetts have decided that it is not material to the risk, while in the United States Courts, as well as in Tennessee and Illinois, directly the contrary is held, and in neither case was the question of materiality submitted to the jury.[1] This would be so in Quebec Province. If the insured be proved not owner he cannot recover.

Bunyon, p. 78, says it is the duty of the judge to see that the jury are not misled by the evidence.

It is the practice of most offices to insert the statements or representations, made at the time of effecting the insurance, in the body of the policy. By this means they become a warranty, and preclude questions from arising upon the subject of the *materiality* or *immateriality* of the statements.

Representations in life insurance, observed Lord St. Leonards, in *Anderson* v. *Fitzgerald*,[2] need not be material if false. It is sufficient to ask the jury, was the representation, or were the statements, false. Secondly, were they made in effecting or obtaining the policy?

The judges were asked:—Was it necessary for the insurance company to prove on the trial that the answers given by Fitzgerald to questions twenty-one and twenty-two were or was material, as well as false. All the judges answered: That it was not necessary.

Conditions often apply to material misrepresentatious and go on (as in this case) that if any fraud shall have been practised, or any false statements made in or about obtaining the policy, the policy shall be null. (*Per* the eleven judges.)

The words of the assured in his answers are to be construed as the words of the assurers and most strongly against them if ambiguous. (*Per* the eleven judges.)

[1] And so of Grant's warranty pretended.

See *Elliott* v. *Wilson*, 7 Brown's Cases in Parliament. Liberty to touch at Leith was held not a warranty to do so.

[2] English Jurist, A.D. 1858, p. 714.

[3] Q. B. England, A.D. 1863.

[1] *Strong* v. *Manufacturers' Ins. Co.*, 10 Pick. 40; *Curry* v. *Commonwealth Ins. Co.*, *id.* 535; *Fletcher* v. *Commonwealth Ins. Co.*, 18 Pick. 417; *Ætna Ins. Co.* v. *Tyler*, 12 Wend. 507; *S. C.*, 16 *id.* 385; *Columbian Ins. Co.* v. *Lawrence*, 2 Peters 25; *S. C.*, 10 *id.* 507; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters 495; *Brown* v. *Williams*, 15 Shepley, 252; *Illinois Mut. Fire Ins. Co.* v. *Marseillles Manufacturing Co.*, 1 Gilman 236.

[2] 4 House of Lords cases, English Jurist of 1853.