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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

BUILDER'S RISK.

§ 1. FIRE.—*Construction of.*—*Held*, that the condition called a "builder's risk" must receive a reasonable construction, and one not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property.

James vs. Lycoming Ins. Co.
Rep'd Jour'l, p. 9. U. S. C. C. MASS.

CONSTRUCTION.

§ 2. FIRE.—"*Noscitur a Sociis.*"—*Held*, that the application of this maxim is not conclusive, but it has its force and signifi-

cance where every other word used in the proviso designates the means by which a fire may happen for which the company will not be liable, and expresses clearly what is unlawful and employed to disregard or subvert the laws of the government.

Boon vs. Ætna Ins. Co
Rep'd Jour'l, p. 27. U. S. C. C. Conn.

INTEREST ON PREMIUM NOTES.

§ 3. LIFE.—*Failure to pay Interest on Premium Notes does not forfeit a Life Policy.*—A ten year life policy was issued containing these conditions: That if the insured failed to make any of the subsequent payments, such default should not work a forfeiture of the policy, but that the sum insured should be commuted or reduced to a paid-up policy of such proportional part of the whole amount as the number of premiums bore to the number required, and also, if the interest on the premium notes was not paid annually in advance, this default should work a forfeiture of the paid-up policy. Three annual payments were made, and a paid-up policy for $3,000 was issued. Insured failed to pay the interest, amounting to $49.04, on these notes, and died a few months after. It was shown on trial that there was a cash dividend due the insured of $42.07, thus reducing the debt of the insured to $6.97. Defendant refused to pay the policy of $3,000, alleging that it had lapsed by the non-payment of the interest due. *Held*, that the exact conditions of the policy in respect to forfeiture by the non-payment of premiums, have uniformly been enforced by the courts. Such forfeiture is not considered as being in the nature of a penalty, but that in agreements of this kind time is of the essence of the contract. The privilege of keeping the policy in force, or of abandoning it, lies with the insurer, and the failure to pay the notes when required by the company will work a forfeiture of the policy. *Held*, that the annual interest due on these premium notes or loans was not an annual premium, for the non-payment of which the paid-up policy could be forfeited, but that the company was bound to look to the insured for the payment of the interest as though he was a stranger to the contract of insurance. The ultimate pay-

ment of the policy was hypothecated or pledged to the payment of this interest, and became a collateral security for it.

Grigsby vs. St. Louis Mutual Life Ins. Co.

Rep'd Jour'l, p. 52. KAN. C. A.

MILITARY POWER.

§ 4. FIRE.—*Military and Usurped Power does not include the Lawful Acts of the Government in maintaining its Authority.*—The policy was issued on the store of the plaintiff in Glasgow, Missouri. At the time of the fire the city was occupied by the Federal troops as a military post, but was surrounded and attacked by a superior force of the Confederate army. In order to prevent the military stores of the Federal army from falling into the hands of the enemy, who were gaining possession of the place, the Federal commander ordered the City Hall to be set on fire; and the flames from it, through two other intermediate buildings, were communicated to the store of the plaintiffs, which was consumed, including the goods insured by the defendant's policy. The policy contained the agreement that "the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power." *Held*, that the fire was not the act of the rebels, nor was there any ground of inference that the property would have been burned by them if they had been allowed to capture it. The burning of the City Hall was a lawful discretionary act on the part of the United States, and not the physical result of any agency of the rebels, but was an act which they would have prevented if they could.

Military Necessity.—The military necessity was the motive for burning the City Hall, which was done in the exercise of military discretion. This was the efficient means of the fire, which intervened between the acts of the rebels and the fire itself, and without which the fire would not have happened. There was here the intervention of a new affirmative power or force, other than the acts of the rebels, and was the actual means by which the fire happened.

Insurance Co. vs. Tweed, 7 Wallace, 52.

"*Military or Usurped Power.*"—The word "military" in the proviso had no reference to the lawful acts of the military power of the government while attempting to suppress an invasion or rebellion. The term "military or usurped power" is limited to the interference with the public safety by organized force from abroad, or domestic rebellion culminating in actual or formal usurpation of governmental authority, and hostile to the lawful government, and has no reference to the lawful acts of the government in putting down rebellion or preserving the public peace.

Ellis on Insurance, p. 41; Marshall on Insurance, p. 791; Drinkwater vs. London Assurance Corporation, 2 Wilson, 363; City Fire Ins. Co. vs. Corlies, 21 Wend., 367; Sprull vs. North Carolina Ins. Co., 1 Jones, N. Car. Law R., 126.

Boon vs. Ætna Ins. Co.

—§ 2.

PROVISOS.

§ 5. FIRE.—*Force of Provisos and Exceptions.—Held*, that all limitations of the contract of insurance by provisos and exceptions, should be made in clear and unmistakable terms, so as not to mislead the insured, who has a right to expect a construction favorable to himself where the terms will rationally permit it. Where the words of a proviso are capable of more than one construction, that one should be adopted which is most strongly against the party whose language is to be interpreted, and all exceptions should clearly withdraw the case from the general and positive agreement, in order to be binding.

Boon vs. Ætna Ins. Co.

—§ 2.

REPAIRS.

§ 6. FIRE.—*Necessary and Reasonable Repairs, without Notice to the Company, do not vitiate the Policy.*—The agreed statement of facts showed that the boiler and machinery were cracked and in a dangerous condition; that the safety of the property required that both should be repaired or that new ones should be put in their place; that steam was used in the premises both for heating the same and for washing wool; that the quantity of

steam was not increased by replacing the old boiler with a new one; that the new structure erected to cover the new boiler and fireplace was reasonable, necessary, and proper; that the work did not interrupt the use of the mill while it was being done; that the fire was not caused by the changes or repairs, and that the risk was not increased thereby. *Held*, that the repairs were indispensably necessary to remedy the defects in the machinery, that such buildings and machinery are liable to wear out or get out of repair, and that it is for the interest of the insurer and insured that defects which endanger the safety of the property should be repaired, and thus remove the danger of loss. *Held*, that the alteration made by erecting a new structure to cover the new boiler and fireplace was not a greater change in the premises than the law of insurance would allow, as it was reasonable, necessary and proper.

Stokes, appl't, vs. Cox, 1 Hurls. & Nor., 540; Baxendale et al. vs. Harvey, 4 Hurls. & Nor., 444.

Held, that it is necessary to give notice to the company of repairs and alterations of the premises only in the event of an increase of risk, and where there is no increase of risk it is not necessary.

Stokes, appl't, vs. Cox, 1 Hurls. & Nor., 540.

Held, that the insured was not prohibited from remedying defects in the premises or machinery insured, which arose subsequently to the granting of the policy, without his fault, or which were wholly unknown to him at the time, provided such defects were of a character to endanger the safety of the property insured, or to render the same untenantable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appeared that the repairs were unseasonable and increased the risk, or that the fire was owing to the repairs.

James vs. Lycoming Ins. Co.

—1 L.

WARRANTY.

§ 7. FIRE.—*Promissory and affirmative Warranties—Construction of.—Held*, that a literal compliance with conditions subsequent, or promissory warranties, is not always possible. They

must not be inconsistent with the due and customary use and enjoyment of the property, and must receive a reasonable construction, unless they are expressed in such clear and unambiguous terms as to amount to conditions precedent. Affirmative warranties are usually positive representations in the policy of the existence of some state of things at the time, or previous to the time of making the policy, and unless they are true, whether material to the risk or not, the policy is vitiated. The insured is held only to a substantial compliance with a condition precedent, as this cannot be extended by construction to include what is not necessarily implied in its terms.

Newcastle vs. McMorran, 3 Dow. Parl. Cas., 262; Biscard vs. Shepherd, 12 Moore, P. C., 475; Marsh on Ins., 346; 1 Arnold on Ins., (2nd ed.,) 589; Houghton vs. Fire Ins. Co., 8 Met., 125; Fire Ins. Co. vs. Eddy, 49 Ill., 106; 1 Pars. on M. Ins., 423; Daniels vs. Hudson R. Ins. Co., 12 Cush., 416; Paul vs. People's Ins. Co., 6 Gray, 185; Columbian Ins. Co. vs. Lawrence, 2 Pet., 23; Angell on L. & F. Ins., sec. 153; Gillott vs. Ins. Co., 8 R. I., 292; Turley vs. North Am. Ins. Co., 25 Wend., 374; Flanders on Fire Ins., 205; Mayall vs. Mitford, 6 Ad. & Ell., 670; Shaw vs. Robberds, 6 ib., 75; Whitehead vs. Price, 2 C. M. & R., 447; Bunyan on F. Ins., 65; 1 Phillips on Ins., (4th ed.,) sec. 872.

James vs. Lycoming Ins. Co.

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REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

HENRY L. JAMES

vs.

LYCOMING INSURANCE COMPANY.*

The conditions of an insurance policy should receive a reasonable interpretation not inconsistent with the due and customary use and enjoyment of the property insured.

Repairs which become indispensably necessary to the safety of a building and machinery, and to remedy the defects of wear and tear which must necessarily occur, do not vitiate the risk. It is for the interest of the insurer as well as of the insured that all repairs which common prudence would dictate should be made.

The condition called a "builder's risk" must receive a reasonable construction, not repugnant to the nature and purpose of the contract or inconsistent with due and customary use and enjoyment of the property.

It is only when repairs and alterations are made which increase the risk, that the insured is required to give notice to the company of the alterations made.

Where defects in the machinery arise subsequently to the issue of the policy, without the fault of the owner, or which were unknown to him at the time, and where the defects are such as to endanger the safety of the property insured, a reasonable amount of repairs, which do not increase the risk, can be made without vitiating the policy.

* Decision rendered October 6th, 1874.

The words of the warranty, whether affirmative or preliminary, must receive a reasonable construction; and the intention of the parties, as far as it can be ascertained, is to govern. A warranty is a condition precedent, and if untrue when the stipulation is reasonably construed avoids the policy, but even then the insured is held only to a substantial compliance, and its construction will include only what is necessarily implied in its terms.

CLIFFORD, J.

Insurance is a contract between the insurer and the insured, in which the former agrees to indemnify the latter to the stipulated extent in case the property insured is destroyed or injured by the described perils. Conditions are frequently embodied in the contract, that in certain events the policy shall be null or become void, but all such conditions must receive a reasonable construction not inconsistent with the due and customary use and enjoyment of the property by the insured. Matters of law only are in controversy between the parties, as the case is submitted to the court upon an agreed statement of facts to which the policy is annexed.

Thirty-five hundred dollars were insured by the plaintiff for one year, commencing March 14th, 1871, as follows, to wit: fifteen hundred dollars on his stone, frame, and slate roof woolen mill building and L attached; one thousand dollars on movable machinery, tools and furniture therein; and one thousand dollars on stock, raw, unwrought, and in process, including mill supplies. On the 10th of January, following, the property was totally destroyed by fire. By the agreed statement it appears that the L, at the date of the policy, contained an upright steam boiler, about eight feet high, with a bonnet four feet high, reaching through the floor into the room above, and that it was used exclusively for heating the premises and for washing wool; and that the mill was situated on a small stream, which at times did not furnish a sufficient supply of water; that it was found in July, following, that the boiler and chimney were cracked, and in a dangerous condition, so that it was necessary to repair or change them. Payment being refused, the plaintiff brought an action of assumpsit to recover the amount. Proof of loss is waived, and, of course, the judgment should be for the plaintiff, unless the insurance company shows a good defense, and for that purpose they rely upon the following facts: That the old boiler was removed and a new horizontal steam boiler, about sixteen and one half feet long and three and one half feet in diameter, was placed in the L, the end projecting about two and one half feet outside the building; that a brick chimney, separated entirely from the building, and with a brick fireplace, was built at the

end of the building outside, and that the boiler itself was set in brick; that the boiler was used not only for heating the premises and washing wool, but that there was attached to it and run by it a steam engine of fifteen horse power, which was used to supply any deficiency in water power in running the mill; that in order to place the engine and boiler in the mill the wooden side of the lower story of the L was taken out about ten feet in length and ten feet in height; that a structure from ten to twelve feet wide and fifteen to twenty feet long was subsequently erected to cover the projecting end of the boiler and fireplace and lower part of the chimney and the man who feeds the boiler; that the structure was built of wood and had a shingled roof; that the roof commenced about eight feet high and extended up to the second story windows; that it did not extend above the second story windows, and that the structure was not used except in connection with the boiler. Carpenters and other mechanics were employed in taking out the old boiler and in placing and setting the new boiler and engine, and in erecting the chimney outside and in putting up the structure. Carpenters and other mechanics having been employed in making these changes, it is insisted by the defendants that the policy became void; but the plaintiff denies that proposition, and refers to other portions of the agreed facts as sufficient to warrant all that was done in effecting those changes:

1. That the boiler and chimney were cracked and in a dangerous condition, and that it was necessary that both should be repaired or changed. 2. That the agreed statement shows that no more steam was made after the boiler was put in than before, and that the mill was never driven by steam power alone, and that steam power was only used a part of the time as auxiliary to the water power. 3. That mechanics only worked there in connection with making the described changes; that there were no mechanics, except bricklayers, inside the mill save that the superintendent of the mill took up and put down the floor, so far as necessary, and that the carpenter assisted him perhaps for an hour or two. 4. That the structure erected to cover the projecting end of the boiler, the fireplace and the man who feeds the boiler, was reasonable, necessary and proper for that purpose. 5. That the work had all been done some months before the fire occurred; that the fire was in no respect attributable to these changes or to the work that was done, nor did the work during its progress interrupt the use of the mill. 6. That the structure erected was in the angle formed by the main building and the L, and that two of its sides were the sides of the main building and L, as exhibited on the plan in

the case. 7. That the parties agree that the carpenters and other mechanics had ceased to work in the building before the time of the fire, and that there was no increase of the risk.

Viewed in the light of the facts disclosed in these several propositions, it is contended by the plaintiff that he is entitled to recover the whole amount of the loss. Two principal questions arise in the case, as follows: 1. Whether the facts as agreed show that by the work done on the premises in taking out the old boiler and putting in a new one, and in building the brick chimney and fireplace, and erecting the described structure for the purpose mentioned, and in using the steam engine as auxiliary to the deficient water power, the policy was rendered null and void, irrespective of the condition denominated the builder's risk. 2. Whether the condition embodied in the policy called the builder's risk renders the policy null and void in view of the work done on the premises by the insured, and the means adopted by them to accomplish the same, as set forth in the annexed statement, unless permission is indorsed in writing on the policy for the purpose. The condition denominated "builder's risk" is that the working of carpenters, roofers, tinsmiths, gas-fitters, plumbers or other mechanics, in building, altering or repairing the premises named in the policy, will vitiate the same, except in dwelling-houses, where five days are allowed, without notice, in any one year for incidental repairs.

Properly arranged, the several propositions mentioned show the following agreed facts, which are very material to be considered in deciding both of the questions presented for determination: that the boiler and chimney were cracked, and in a dangerous condition; that the safety of the property insured required that both should be repaired, or that new ones should be put in their place; that steam was used in the premises both for heating the same and for washing wool; that the quantity of steam was not increased by replacing the old cracked boiler with a new one of sound construction; that the new structure erected to cover the new boiler, the fireplace, and the man who feeds the boiler, was reasonable, necessary and proper for that purpose; that all the work had been completed several months before the fire occurred; that the work did not interrupt the use of the mill while it was being done, and that the fire was in no respect attributable to the change made in the premises, nor to the work that was done; and that the risk was not increased either by the change made or by the work done. Several other questions were discussed at the bar, but the opinion of the court will be

limited to the two questions presented in the agreed statement of facts, without stopping to inquire what the decision of the court would be if the facts were different.

1. Repairs in this case became indispensably necessary to remedy defects in the premises and the machinery, which endangered the safety of the whole property insured; and the agreed facts show that the repairs made did not increase the risk, and they negative every possible ground of inference that the fire was, in any respect, attributable to the changes made in the premises or to the work that was done in executing the repairs; such an inference cannot be made, as the agreed statement expressly negatives any such theory, and shows that the work was completed several months before the fire occurred. Insurers know, as well as the insured, that such a building and its operative machinery are liable to wear out or to get out of repair, and that it is for the interest of the insurer as well as of the insured, that defects which endanger the safety of the property insured, when discovered, should be repaired so as to remove the danger of loss.

Old fixtures and old machinery under such circumstances may be fully repaired; or if an old chimney or an old boiler has become so defective that good judgment and common prudence would dictate that one or both should be replaced with new, it is entirely competent for the insured to remedy the defects and remove the danger to the safety of the premises in that way; nor can it make any difference that the new boiler is a horizontal one instead of an upright one, nor that it is a few feet longer than the one in prior use, unless it appears that the change increases the risk or is more likely to occasion loss by the described perils. Attempt is made in argument to maintain that the structure erected to cover the projecting end of the new boiler and the fireplace and the man who feeds the boiler is a greater change in the premises than the law of insurance will allow; but the agreed statement affords a complete and decisive answer to that suggestion, as it shows that the changes made did not increase the risk, and that the structure erected was reasonable, necessary and proper for the purpose. Unequivocal support to that view is found in the recent decisions of the courts in the parent country, which show conclusively that the first defense set up by the underwriters cannot prevail. Stokes, Appt. vs. Cox, 1 Hurls. & Nor., 540.

Commenced as the suit in that case was, in the Court of Exchequer, it is necessary to refer to the original case in order to understand the full force of the decision in the appellate court. Same case, 1 H. & N., 320. Insurance was effected in that case on a range of buildings

of three stories, all communicating, comprising offices, warehouses, curriers' shops and drying-rooms, having a stock of oil and tallow deposited therein, a part of the lower story being used as a stable, coach-house and boiler, and the policy contained the words, "no steam engine employed on the premises, the steam from the boiler being used for heating water and warming the shops; that the process of melting tallow by steam in the boiler-house, and the use of two pipe stoves in the building are hereby allowed, but it is warranted that no oil be boiled nor any process of japanning leather be carried on therein nor in any building adjoining thereto."

Four kinds of insurances were described in the policy, to wit: common, hazardous, doubly hazardous, and special risks, and the policy stated that when insurances deemed special risks are proposed, the most particular specifications of the property and all the circumstances attending the same will be required, and that special risks must be particularized on the policy to render the same valid or in force. Certain conditions were indorsed on the policy, one of which provided that if after the insurance shall have been effected the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, "coalkel," kiln, furnace, or the like, the introduction of any hazardous communication, or by any other alteration of circumstances and the particulars of the same shall not be indorsed on the policy, and a proportionate higher premium paid, if required, such insurance shall be of no force. After the policy was effected, which was for a special risk, the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam engine, which was supplied by steam from the boiler mentioned in the policy, but the jury found that the risk was in no way increased. Subsequently the premises were destroyed by an accidental fire. Cresswell, J., presided at the trial, and he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit. Accordingly the defendants obtained a rule *nisi*, and the parties were heard before the chief baron and two of his associates, when the rule was made absolute, one of the associate justices dissenting. Whereupon the original plaintiffs removed the cause by appeal into the Exchequer Chamber, and the parties were there fully heard, and the appellate court unanimously reversed the judgment rendered by the Court of Exchequer, and directed that a verdict be entered for the plaintiffs. Cockburn, Ch. J., gave the opinion of the appellate court that the insured in such a case was not bound to give notice to the insurance

company of the alteration of circumstances, unless it appeared that the change made increased the risk, which was negatived by the finding of the jury. Exactly the same rule was applied by the Court of Exchequer in a subsequent case, where they refer to the final decision in the former case with approbation; and that rule, it is believed, is universally adopted and applied by the courts of that country. Baxendale et al. vs. Harvey, 4 Hurls. & Nor. 444.

2. Suppose the rule is so when the facts are tested by the general law of insurance, still it is contended by the defendants that the evidence as to the work done in taking out the old boiler and putting in the new one, and in building the brick chimney and the fireplace, and in erecting the described structure to cover the projecting end of the boiler and the fireplace, and to afford shelter to the attendant, and in using the steam as an auxiliary motive power, render the policy null and void as in violation of the condition denominated "builders' risk." Such a condition however must receive a reasonable construction in view of the agreed facts of the case, and that construction must be one not repugnant to the nature and purpose of the contract, nor one inconsistent with the due and customary use and enjoyment of the property. Parties, it is true, may make their own contracts, but courts of justice, in all cases except where the language employed is so explicit and unambiguous that it must be understood that the words speak their own interpretation, may give the language a reasonable construction to effect the intention of the parties as collected from the whole instrument, the subject matter and the surrounding circumstances. Undoubtedly the province of construction is limited to the language employed, as applied to the subject matter and the surrounding circumstances, contemporaneous with the instrument; but courts of justice are not denied the same light and information the parties enjoyed when the contract was executed, and for that purpose they may acquaint themselves with the persons and circumstances that are the subjects of the stipulations in the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. Shore vs. Wilson, 9 Cl. & Fin., 569; Clayton vs. Grayson, 4 Nev. & Man., 606; Addison on Con., 846.

Most of the agreed facts are as material in considering the present question as in considering the question just decided, of which

the following are the most important: 1. That the risk was not increased either by the changes made in the premises or by the work done. 2. That the fire was in no respect attributable to the changes or to the work or the subsequent use of the property. 3. That the work was completed several months before the fire occurred. 4. That the repairs became indispensably necessary to render it safe to use the chimney and boiler, without which the mill could not be operated. 5. That the new boiler did not generate any more steam than the old one before it got out of repair. 6. That the structure erected to cover the projecting end of the new boiler and the fire-place, and to afford shelter to the necessary attendant was reasonable, necessary and proper for the purpose.

Facts agreed make a part of the case, and are as material in considering the second question presented for decision as the first; and in that view it necessarily follows that the authorities invoked to support the conclusion that the policy under the general rules of insurance is not rendered null and void by the changes made and work done by the insured subsequent to its date, are equally applicable in considering the second question presented for decision. Stokes, Appt., vs. Cox, 1 H. & N., 510.

Mills and manufactories having mill, steam or engine work were denominated in that case special risks in the policy, and the representation therein was that no steam engine power was employed on the premises. Part of the lower story of one of the buildings was used as a stable, coach-house and boiler-house, and the boiler was used for heating water and warming the shops. Without notice to the defendants, the insured, subsequent to the date of the policy, erected in the stable the machinery of a steam engine which was supplied with steam by the boiler mentioned in the policy. Where the risk is increased by any alteration of the circumstances, the condition was that the policy shall be of no force unless the particulars of the same shall be indorsed on the policy, and, if required, a proportionate higher premium be paid. Afterward the premises were destroyed by an accidental fire, not attributable to the erection or the use of the steam engine. Held in the Exchequer Chamber, reversing the Court of Exchequer, that the policy was not avoided by the introduction of the steam engine and the use of the steam generated in the boiler to work it.

All that the insured, say the court, is called upon to do in such a case is in the event of an increase of the risk, and in that event only to give notice to the insurance company of the alteration of

circumstances. Here it is found as a fact that there was no increase of risk, therefore there was no necessity to give notice. Two thirds of a year and more elapsed, in the case before the court, from the commencement of the risk before the fire occurred, which shows beyond all doubt that the policy attached, as it is not pretended that the case shows any breach of a condition precedent. Conditions subsequent, and even mere promissory conditions, may be of a character that the breach of one or more of them will render the policy null and void; but courts of justice are not inclined to give such a condition that effect unless it clearly appears that such was the intention of the parties as manifested by the language employed in the contract. Whether regarded as a condition subsequent or a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate and put in a new one, or to replace a broken pane of glass, or to stop a leak in a chandelier or other gas fixture, or in a cistern, or to mend a defective chimney, stove-pipe or furnace. Sudden defects of the kind often occur which endanger the premises, and the comfort, health and safety of the occupants; but if such is the true construction of the condition, the insured is prohibited from mending the slightest defect, or removing the danger by the assistance of mechanics, unless he can apply to the insurance company and get their permission to do so indorsed on the policy, no matter how urgent the necessity for repairs may be, nor how great the distance may be from the *situs* of the property insured to the place where the insurance company transact their business. Extreme conditions of the kind, even if they are not void as repugnant to the nature and purpose of the contract, and as inconsistent with the due and customary use and enjoyment of the property, must receive a reasonable construction unless they are expressed in such explicit and unambiguous terms as to amount to conditions precedent or to absolute and unqualified warranties. Warranties may be affirmative or promissory. Affirmative warranties may be express or implied, but they usually consist of positive representations in the policy of the existence of some fact or state of things at the time, or previous to the time of the making of the policy, and they are in general conditions precedent, which if untrue, whether material to the risk or not, the policy does not attach, as it is not the contract of the insurer. Newcastle

vs. McMorran, 3 Dow, Parl. Cas., 262; Biccard vs. Shepherd, 12 Moore, P. C., 475.

Promissory warranties may also be express or implied; but they usually, not always, have respect to the happening of some future event, or the performance of some future act, in which case they are usually held to be conditions subsequent, and subject to a reasonable construction to effect the intention of the parties as evidenced by the language employed, the subject matter and the surrounding circumstances. Marsh on Ins., 346; 1 Arn. on Ins., 2d ed., 580.

Stipulations of the kind must receive a reasonable construction; and the rule is that the intention of the parties, if it can be ascertained, is to govern; "and the intention," says Shaw, Ch. J., "is to be learned from the language used, construed in connection with every part and clause in the contract, the subject matter respecting which the words are used, and the obvious purpose of each stipulation." Houghton vs. Fire Ins. Co., 8 Met., 125; Fire Ins. Co. vs. Eddy, 49 Ill., 106; 1 Pars. on M. Ins., 423; Daniels vs. Hudson R. Ins. Co., 12 Cush., 416; Paul vs. People's Ins. Co., 6 Gray, 185; Columbian Ins. Co. vs. Lawrence, 2 Pet., 23; Angel on L. and F. Ins., sect. 153; Gilliat vs. Ins. Co., 8 R. I., 292.

Beyond all doubt a warranty of an existing fact is a condition precedent; and if it be not true when the stipulation is reasonably construed, it avoids the policy, whether it is material to the risk or immaterial, as the condition is a part of the contract which cannot be enforced unless it appears that the condition is fulfilled, but the insured even in such a case is only held to a substantial compliance, it being well settled law that the condition cannot be extended by construction so as to include what is not necessarily implied in its terms. Turley vs. North Am. Ins. Co., 25 Wend., 374; Fland. on Fire Ins., 205.

Even words of warranty, unless they are so explicit and unambiguous as to speak their own meaning, are subject to construction and will receive a strict or liberal construction to meet the justice of the case, as where there was a warranty that a certain cotton mill should be worked by day only, it was held that the warranty was not infringed because it appeared that the engine and unconnected shafting were kept running all night as the mill and machinery were not substantially worked. Mayall vs. Mitford, 6 Ad. & Ell., 670; Shaw vs. Robberds, 6 ib., 75; Whitehead vs. Price, 2 C. M. & R., 447; Bunyon on F. Ins., 65; 1 Phil. on Ins., 4th ed., sec. 872.

Decided cases may be found in which courts have denied that there is any difference between an affirmative warranty and a promissory condition or stipulation; that the latter as well as the former must always be regarded as conditions precedent, on the literal truth or fulfillment of which the validity of the entire contract must depend, but it is evident that the rule, if it be one, which is not admitted, must be subject to many exceptions, as otherwise the greatest injustice would be done to the insured by the modern practice of crowding policies of insurance with stipulations imposing almost innumerable conditions, covenants and agreements providing for a forfeiture of the indemnity, which were wholly unknown to such instruments until within a recent period, and which, it is to be feared, attract very little attention from the owner of the property insured until they are set up by the insurer subsequent to the loss, to show that the losing party is not entitled to the indemnity for which the premium was paid. Borradaile vs. Hunter, 5 M. & G., 639; Alston vs. Ins. Co., 4 Hill, 329.

Manifest injustice would be done in this case by holding that the condition in question is a condition precedent, as it would prohibit any repairs whatever which involved the necessity of employing a mechanic to work in the mill building. Justice to the defendants, however, makes it proper for the court to say that they do not contend for any such rule. They admit that small repairs may be made, but insist that the repairs made were greater than the law of insurance allows, where the policy contains such a condition as that exhibited in this case, which, of itself, is an admission that the particular condition must receive a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property by the insured. Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of use nor to deprive the owner of the customary enjoyment of the property; and nothing of the kind should be inferred nor admitted, unless it be in obedience to a condition precedent, expressed in explicit and unambiguous terms to that effect. Mills and dwelling-houses almost constantly need repairs; and if they cannot be made, the property is liable to become untenantable, and unsafe and unfit for use; and in many cases the property would be exposed to the danger of destruction by fire or flood. Owners of property must have the right to repair defects which render the property untenantable, or which expose it to the danger of destruction from fire or flood, else the

inevitable effect of a policy of insurance would be, where defects of the kind happen or become known, to render the property comparatively valueless, and of course to deprive the owner of the due and customary use and enjoyment of the property.

Small repairs, such as taking out a broken slate and putting in a new one, or replacing a broken pane of glass, or stopping a leak in a chandelier or other gas-fixture, or mending a leaky cistern, or repairing a defective chimney, stove pipe or furnace, it is properly conceded may be made, but the effect of that concession is to admit that the condition in question is subject to a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property. Necessary repairs of the house, whether small or great, could not be made by the working of mechanics in the premises without avoiding the policy, if it be held that the condition under consideration applies in such cases, as the language of the condition, if taken literally, would forbid everything of the kind; but we are of the opinion that the condition, if construed to exclude all right of making such repairs, would be void as repugnant to the nature and purpose of the contract as expressed both in the written and printed words of the policy. Stipulations of the kind, however, in a policy of insurance, may be held valid, if, by a reasonable construction, the objection to the literal operation of the instrument may be avoided, even though if taken literally they would be invalid. Authorities to support that proposition do not appear to be necessary, as the rule is well established that courts of justice, in the construction of all written instruments, will seek to uphold the instrument if it can be done by a reasonable construction. Harper vs. Ins. Co., 17 N. Y., 198.

Apply that rule to the present case, and it follows, in the opinion of the court, that the condition in question does not prohibit the insured from remedying defects in the premises or machinery insured, which arose subsequently to the granting of the policy without his fault, or which were wholly unknown to him at that time, provided such defects were of a character to endanger the safety of the property insured or to render the same untenantable and unsafe and unfit to be occupied for the purposes and uses described in the policy, unless it appears that the repairs made were unreasonable and increased the risk, or that the fire was in some respect attributable to the repairs or to the work done in making the repairs. Viewed in the light of that proposition it is clear that the second defense must

also be overruled, as the agreed statement directly shows that the boiler and chimney were found to be cracked and in a dangerous condition, so that it was necessary to repair or change them; and that there was no increase of the risk, and that the fire was in no way attributable to the changes made or to the work that was done. Sufficient has already been remarked to show that there was nothing unreasonable done in putting in a horizontal boiler in place of the upright one which was taken out, as the latter reached through the floor into the room above, evidently showing that it was more dangerous to the premises than the new one put in its place. Nor is it necessary to add anything to show that no objection can be taken to the structure erected to cover the projecting end of the boiler and the fireplace, and to afford shelter to the attendant, as the parties have agreed that it was reasonable, necessary and proper for the purpose. When conditions in a contract impose burdens or disabilities on one of the parties they are to be construed strictly against the party for whose benefit they are introduced. Catlin vs. Insurance Co., 1 Sum., 440; Hoffman vs. Ins. Co., 32 N. Y., 414.

Where property is insured in contemplation of its use for a known and specified purpose, the contract imports *ex vi termini* a license to keep the articles and employ the agencies incidental and essential to the beneficial enjoyment of the property for the use proposed; and many courts of high authority hold that a license of this nature so implied from the language employed in the written portion of the policy will not be overruled by a printed prohibition contained in some other portion of the same instrument. Harper vs. Ins. Co., 17 N. Y., 197; Bryant vs. Ins. Co., 17 ib., 201.

Decisions to that effect are quite numerous, and most of them are based upon the theory that an insurance upon a stock in trade used in a particular business, covers all such articles as are necessarily and ordinarily used in such business. 1 Phil. on Ins., 4th ed., sec. 489. Delonguemare vs. Ins. Co., 2 Hall, 621.

Courts of justice agree that the intent of the parties is the primary rule of construction in ascertaining the meaning of a policy of insurance as well as interpreting other contracts, and that it is to be gathered if possible both from the written and printed portions of the policy, giving effect to both as far as may be, but they differ widely where certain conditions are found in the printed part of the policy which are repugnant to the written words contained in the same instrument. None of them, however, support the proposition that a condition in the printed part of the policy, which is repugnant to

the nature and purpose of the contract and inconsistent with the due and customary use and enjoyment of the property insured is a warranty of a condition precedent, which will avoid the policy unless the condition is framed in such explicit and unambiguous terms as clearly to show that such was the intention of the parties. Instead of that they all support the opposite theory that such a condition will not avoid the policy, unless its terms are such that the condition even when compared with every other part of the policy is not susceptible of any other reasonable construction. Many courts hold that when there is a repugnancy in that behalf between the written and the printed portions of the policy, that the former shall prevail over the latter. Harper vs. Ins. Co., 17 N. Y., 198.

Express decision to that effect was made in the case of Harper vs. Ins. Co., 22 N. Y., 198, in which the opinion was given by the chief justice of the highest court in that State, where he said the plain meaning of the written part should prevail, and printed clauses, if repugnant, must yield, or they must be construed so as to avoid a conflict of intention. Exactly the same rule has been laid down by the same court in two other cases, in the first of which it is stated that when a policy of insurance is upon a building and a stock of goods such as is usually kept in country stores, it covers all articles of merchandise coming within such description, even though it include articles generally prohibited except at special rates. Pindar vs. Ins. Co., 36 N. Y., 649; Steinbach vs. Ins. Co., 54 N. Y., 95.

Insurance was granted to the plaintiff in the second case, "on his stock of fancy goods, toys and other articles in his line of business," and "as a German jobber and importer," with the privilege "to keep fire-crackers on sale." It was stipulated in the policy that if the premises should be used for keeping goods denominated specially hazardous, except as provided in the policy, the policy so long as the store was so used should be of no effect. Fire-works were in the class referred to, and it was stated in the policy that insurance thereon added fifty cents per one hundred dollars. Plaintiff kept fire-works, and by their accidental ignition the loss happened. Held that if as matter of fact the keeping of fire-works was in the line of the plaintiff's business they were embraced in the description of the property and were covered by the policy. Different views are certainly expressed by the Supreme Court in the case of Steinbach vs. Ins. Co., 13 Wall., 185, but it is unnecessary in this case to remark upon that difference as it is obvious that the latter contains nothing inconsistent with the conclusion herein stated that the stipulation in

question is neither an affirmative warranty nor a condition precedent; and if neither, then the authorities are all one way that it is open to a reasonable construction. Decided support to the view that the stipulation is open to a reasonable construction is also derived from the following cases, to which many more might be added. Insurance was granted to the plaintiff upon his wagon-maker's shop. By the conditions of the policy the company were not to be liable for damages resulting from explosions caused by gunpowder, gas or other explosive substances, or for damages occasioned by the use of camphene, spirit gas or burning fluid, unless otherwise expressly provided. In the building insured was a shop containing paints and a half barrel of benzine, which caught fire and caused the burning of the property. Held that though the paints and benzine, disconnected and by themselves, would belong to the class of articles excluded by the terms of the policy, yet as it was proved that they were materials used and customary in the manufacture of wagons, and were generally kept in the same shop where wagons were made, they were covered by the terms of the policy. Archer vs. Ins. Co., 43 Missouri, 439.

Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part the stock, it was held that the question whether those articles were included in the term groceries, was a question of fact for the jury; and that where a stock of goods was insured under the general description of groceries, which stock included some of these hazardous articles, the policy was not avoided because the right to keep such articles was not indorsed in writing on the policy as required by one of the conditions. Niagara F. Ins. Co. vs. De Graff, 12 Mich., 134.

Spirituous liquors were also classed as hazardous articles in the following case in which the insurance was effected on a dwelling-house, and the condition of the policy was that the building should not be used for the purpose of storing therein any of the articles denominated hazardous in the policy, and the defendants proved that a tenant used it as a boarding-house, and that she had a regular bar where liquors were kept in open view and were sold by retail, and they insisted that the breach of the condition avoided the policy; but the court held that the keeping of liquors in the building insured for the purposes of consumption or for sale by retail to boarders and others, is not a storing within the meaning of the policy. Rafferty vs. Ins. Co., 17 N. Y., 482.

Substantially the same rule was applied in the following case, which was an insurance on a stock of goods and merchandise contained in plaintiff's store, one of the conditions being that the keeping of gunpowder for sale or on storage upon or in the premises insured shall render the policy void. Leggett vs. Ins. Co., 10 Rich., S. C., 207.

Powder was always kept in the store for sale by retail both before and after the date of the policy, and the court held that the keeping and sale in that way of small quantities of powder did not vitiate the policy, as it was part of the stock of goods insured.

Cotton in bales in the following case was classed as a hazardous article, and one of the conditions of the policy was that if the building should be used for keeping or storing goods denominated hazardous, then and from thenceforth, so long as the same shall be so used, the policy shall cease and be of no effect. Moore vs. Ins. Co., 29 Me., 100. Bales of cotton were subsequently kept in the store for sale; but the court held that such a condition did not avoid the policy, it being intended merely to protect the insurer against the store being used as a depository of such goods as a sole or principal business. Phœnix Ins. Co. vs. Taylor 5 Minn., 492.

Direct support to the conclusion that the condition in question does not avoid the policy in this case is found in the following case, in which the defense set up by the insurance company was based upon the exact same condition. Ins. Co. vs. Chicago Ice Co., 36 Md., 121; (2 Ins. Law Journal, 609.) Insurance in that case was effected upon a large building used for storing ice, the policy containing the exact same condition as that under consideration. Instead of conforming to the terms of the condition, the president of the ice company testified that he always kept a crew of men and a carpenter or two about the building the year round, and that they were constantly making repairs, and in that way kept the building in a thorough condition. Based on that testimony, the defense was that the policy was avoided, but the court decided otherwise, holding that by a fair and reasonable interpretation of the stipulation it cannot be understood as referring to the casual patching up of the building; that it can only be understood as prohibiting such hazardous use as is generally denominated builder's risk, which arises from placing the building in the possession or under the control of workmen, for rebuilding, alteration or repairs, and in support of that theory the court said that such a construction as that assumed, if applied, would defeat the intent of the parties, and would be repugnant to the written clause of

the policy insuring the building, upon which, looking at its size, structure and use, they must have reasonably contemplated the necessity for such repairs as the witness described as indispensable to the proper conduct of the business. Such a building, so constructed, say the court, would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business that breakages should be repaired as they should occur, all of which was known to the insurers; and it must be presumed that the necessity for such repairs was in their contemplation at the time the contract was made, and that permission for that purpose was given by the written terms of the policy insuring the premises as an ice-house. Ins. Co. vs. Davison et al., 30 Md., 107.

Text writers usually adopt the rule laid down in the case of Robertson vs. French, 4 East, 136, that where part of the contract is written and part printed, and there arises any reasonable doubt as to its meaning, the greater effect is to be attributed to the written words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula, adapted equally to the case in contest and that of all other contracting parties in respect to similar subject matters.

3 Kent's Com., 260; 1 Arn. on Ins., 2nd ed., 79; 1 Phil., Ins., 4th ed., sec. 125; 1 ib., sec. 883; Flanders on Ins., 70; 2 Pars. on Ins., 5th ed., 516; Angel on F. & L. Ins., 12 and 67; Smith's Merc. L., 3rd ed., 419; Alsager vs. Dock Co., 14 M. & W., 798; Coster vs. Ins. Co., 2 Wash., 57; Colt vs. Ins. Co., 7 Johns., 390; Park on Ins., 4; 1 Duer on Ins., 64; Bryant vs. Ins. Co., 21 Barb., 151: Cushman vs. Ins. Co., 34 Ill., 495.

Adjudged cases where insurance is granted upon property in contemplation of its use for a known and specified purpose, have decided that such a policy imports *ex vi termini* a license to keep the articles and employ the agencies incidental and essential to the beneficial enjoyment of the same for the use proposed; and many of those cases go further, and hold that a printed prohibition in some other portion of the instrument will not be allowed to prevail against such a license so implied from the language used in the written portion of the policy. Hayward vs. Ins. Co., 2 Abbott, Ct. App. Cas., 351.

All of the adjudications upon the subject appear to sustain the first branch of the proposition there laid down, that such a policy

implies a license to keep the articles and employ the agencies incidental to the due and customary use and enjoyment of the property, but the following cases, to wit: Lee vs. Ins. Co., 3 Gray, 590; Macomber vs. Ins. Co., 7 Gray, 259; and Whitmarsh vs. Ins. Co., 2 Allen, 582, may perhaps be regarded as recognizing an exception to the latter branch of the proposition, where the written terms of the policy are repugnant to the provisions contained in the printed part of the policy if the latter are clear, explicit and unambiguous.

Support to that view is also derived from the case of Steinbach vs. Ins. Co., 13 Wall., 183, [see also 2 Ins. Law Journal, 815,] and from the case of Ins. Co. vs. Brinckley, 2 Law Jour., by Potter, 842; but the court here does not find it necessary to examine that subject, having come to the conclusion to rest the decision in the case upon the ground that the condition in question, when reasonably construed, does not prohibit ordinary repairs, nor such as become indispensably necessary to remedy defects in the premises which endangered the safety of the property, and which occurred without the fault of the insured, provided it appears that neither the repairs made nor the work done in executing the repairs increased the risk, and that the fire was in no respect attributable to the repairs or the work that was done. Having come to that conclusion it is unnecessary to decide whether the printed part of the policy is or is not overruled in case it is repugnant to the written part, as when the whole instrument is properly construed there is not any such necessary repugnancy in this case as is supposed. Such conditions prohibiting repairs which increase the risk, it is held by some courts, are operative only when the increased risk is in existence, and that the policy becomes effectual as soon as the increased risk terminates. Schmidt vs. Ins. Co., 41 Ill.. 298; Ins Co. vs. McDowell, 80 Ill., 129; Ins. Co. vs. Wetmore, 32 Ill., 245.

Enough has already been remarked to show that the court here prefers to rest its decision upon a different ground, but it may not be amiss to add that the ground assumed in those cases would necessarily lead to the conclusion that the plaintiff is entitled to recover.

Judgment for the plaintiff as stipulated in the agreed statement with costs.

UNITED STATES CIRCUIT COURT,

DISTRICT OF CONNECTICUT.

WILLIAM C. BOON ET AL.

THE ÆTNA INSURANCE COMPANY.

A policy of insurance, made by the defendants against loss by fire, of goods of the plaintiffs, in their store in the city of Glasgow, Missouri, contained the usual proviso in such policies that "the company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power." At the time of the insurance Glasgow was a military post, occupied by the forces of the United States engaged in the war of the rebellion, and was a depot for military stores, which were deposited in the City Hall. In consequence of an attack made by a superior rebel force, the United States military commander, finding that the city could not be successfully defended, and to prevent the stores from falling into the hands of the rebels, ordered their destruction, and, as the only means of effecting it, the City Hall was set on fire; whence the fire spread through three intermediate buildings to the store of the plaintiffs, and burned the insured goods. It was conceded that such setting on fire of the City Hall by the military power of the United States was the proximate cause of the fire which destroyed the plaintiffs' goods, unless the attack by the rebels was to be so regarded: and that such firing of the City Hall was a lawful act and justified by the exigency and the motive for which it was done.

Held, 1. That the fire which destroyed the plaintiffs' goods did not happen or take place by means of the attack by the rebels on the city, nor by means of invasion or insurrection, riot, or civil commotion, within the meaning of the proviso in the policy. The attack by the rebels furnished a motive to the setting on fire of the City Hall, but was not the proximate cause of the fire.

2. That the terms "military or usurped power," in the proviso, do not include the lawful acts of the military authorities of the government; but relate to organized unlawful force, acting in hostility to the government or in subversion thereof. A fire caused by the lawful orders of the officer in command of the military forces of the United States would not therefore be within the exception.

3. That the defendant was liable for the loss.

In determining the meaning of one of several terms that are associated in a contract, the maxim *noscitur a sociis* is not conclusive; but in a case of doubt, and where a like meaning will satisfy the requirements of the general purpose, where there is no other clause or expression hostile to the like interpretation, and especially where other consideralions tend to support it, the maxim has especial force and significance.

Where there is an excepting clause in a general and positive agreement, the latter should have effect unless the exception clearly withdraws the case from its operation.

It is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms and not leave the insured in a condition to be misled. The insured may reasonably be held entitled to rely on a construction favorable to himself where the terms will rationally permit it.

Assumpsit on a policy of fire insurance, brought to the Circuit Court of the United States for the District of Connecticut, and tried, on an issue closed to the court, before WOODRUFF, Circuit Judge, and SHIPMAN, District Judge, at the April term, 1874. The facts are sufficiently stated in the opinion.

F. FELLOWES, *for Plaintiffs.*

G. W. PARSONS, *for Defendant.*

WOODRUFF, J.

The facts in this case are not doubtful nor in dispute. The action is brought to recover from the defendant the amount of an insurance against loss by fire upon the goods of the plaintiffs in their store in Glasgow, Missouri, in the sum of six thousand dollars. It is founded on a policy executed by the defendant, dated September 2nd, 1864, and the goods were destroyed by fire on the 15th day of October, 1864, within the term of the insurance. The loss was sufficiently great to entitle the plaintiffs to recover, if the defendant is liable at all, the whole sum insured. The plaintiffs have complied with all the terms and conditions of the policy, by the payment of premium, furnishing proper preliminary proofs, and compliance with all other requirements. The policy however contained the following express proviso, annexed to the agreement of insurance, and in the body of the policy, namely:

"Provided always and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire."

The defense herein rests solely on this proviso, and on the facts which are claimed to bring the plaintiffs' loss within its operation, so as to exempt the defendant from liability under the policy. At and before the time of the fire in question the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a

military post by the military forces and portion of the army of the United States engaged in the civil war, then, and for more than three years theretofore, prevailing between the government and the citizens of several Southern States, who were in rebellion and seeking to establish an independent government, under the name of "The Confederate States of America."

As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the army of the United States, which stores were in a building called the City Hall of the said city of Glasgow, situated on the same street, and on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' store, three buildings being located in the intervening space, not however in actual contact with either.

Colonel Chester Harding, an officer of the United States government and in command of the military forces of the United States, held the possession of the city and had lawful charge and control of the military stores aforesaid.

On the said fifteenth of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city, at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings and killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battle between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the government from their position, compelled their surrender, and entered and occupied the said city.

During the battle, and when the government troops had been driven from their exterior lines of defense, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebels, ordered Major Moore, one of the officers under his command, to destroy them. In obedience to that order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the City Hall, and thereby the said building, with its contents, was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the City Hall, and from building to building through two other intermediate buildings, to the store of the plaintiffs, and destroyed the same, together

with its contents, including the goods insured by the defendant's policy aforesaid.

During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels nor any part thereof obtained the possession of or entered the city.

Upon these facts, and in view of the before-mentioned proviso in the policy of insurance, the question arises, Is the defendant liable for the loss of the plaintiffs' goods, or does that proviso exempt the defendant from liability?

That question depends upon the answer to be given to some other questions, that is to say:

1. It is insisted that, within the just and proper meaning of the proviso, the fire happened by means of the unlawful and rebellious attack upon the city, by forces acting in assumption of usurped power, endeavoring to capture the forces of the United States, obtain possession of territory in the lawful possession and power of the United States, in aid of the usurped rebel government, and to forcibly accomplish its objects and designs; that the fire, and therefore the destruction of the goods, were a military necessity created by such attack by an illegal armed force, and that so they happened by means of the rebellion and the employment of organized forces to effect the object thereof, and the actual attempt of such forces to overcome the authority and government of the United States; that this was therefore the direct or proximate cause of the loss, or, in the words of the proviso, "the means" by which the fire, destroying the goods, "happened."

We think that this reasoning cannot prevail. Fire destroyed the goods. The fire was not communicated to the goods, nor to the building from which it spread, by the rebel forces, nor by any one acting in co-operation with them; nor was it so communicated in any wise in furtherance of the rebellion, its purposes or objects. No act of the rebels, in any physical sense, caused the fire; there is nothing to justify the inference that the rebels would have destroyed the government stores found in the City Hall, by fire or otherwise, nor to justify the inference that the destruction of the goods or any loss thereof would have happened to the plaintiffs by the capture and the occupation of the city by the rebels. As matter of fact there was no connection, direct or by necessary inference, between such destruction of the goods and the attack of the rebels, the capture of the United States forces and the occupation of the city.

But it is said that such attack by a superior armed force created a military necessity that the government stores should be destroyed; which destruction, in the manner in which alone it could be done, involved the destruction of the plaintiffs' goods, and so that destruction was the necessary result of the attack; that the fire being thus the necessary result of the attack, it "happened by means thereof."

The fire was actually and voluntarily communicated to the City Hall by the military authority of the United States. It is conceded on this trial that, in the exigency, it was a lawful exercise of such military authority. The power was discretionary, and if the circumstances were such as made it discreet—and no doubt they were—such setting fire to the City Hall may have been a duty. In saying that it was voluntary we can only mean that it was not a physical necessity, nor the physical result of any agency or act of the rebels or of their unlawful or usurped power. It was physically independent of them, hostile to them, and an act which they not only did not commit, but would not have committed, and would if possible have prevented.

What is called a military necessity was therefore nothing more than this: it constituted the motive and no doubt the sufficient motive to the burning of the City Hall. This was not even an act of resistance to the attack upon the city; it was no part of the defense, nor a force employed in any wise in maintenance of the authority or possession of the government. It was done in the exercise of military discretion, for the incidental purpose of preventing an accession to the means of the rebels for maintaining their rebellion. The importance of preventing such an accession to their means furnished a motive, and it may be conceded a controlling motive, to the burning of the City Hall, but that did not make the fire happen by means of anything done by them. In a certain sense it may be true that the City Hall was set on fire by reason of the attack upon the city by an armed force of rebels, but between that attack and the fire was interposed another actor who caused the fire, who set in operation the means by which it happened. An efficient and a sufficient cause of fire, and the means by which it happened, intervened between the acts of the rebels and the fire itself, and a cause or means without which, (notwithstanding the acts of the rebels,) the fire would not have happened at all.

In the language of Mr. Justice Miller, in the Supreme Court of the United States, in Insurance Co. vs. Tweed, 7 Wallace, 52, "If a new force or power has intervened, of itself sufficient to stand as the

cause of the misfortune, the other must be considered as too remote." That language was used in reference to a similar provision in a policy of insurance, and in aid of the inquiry by what "means" the fire happened. There, as in this case, there was in some sense another cause, but for which the fire would not have happened at all. And the opinion shows that the existence of just such an influential cause is not enough to bring a case within the proviso. The facts here are much stronger than the reasoning there, in withdrawal of the case from the operation of the proviso, because, although the fire would not have happened but for the existence of such remote cause, (the attack by the rebels,) it is equally true that such remote cause would not have produced the fire at all.

To apply the criterion suggested by Mr. Justice Miller, there was here the intervention of distinct, new, affirmative power and force, other than the acts of the rebels, not only sufficient but efficient as the cause of the fire in the City Hall, and the actual means by which it happened.

We think therefore that it cannot be held that, within the meaning of the proviso in question, the fire which destroyed the plaintiffs' goods happened by means of the rebellion, or of anything done by the rebel forces.

2. An obvious inquiry is suggested by the facts stated: Whether the setting on fire of the City Hall was the cause of the loss in such sense that, within the proviso, it was "the means" by which the fire happened? or whether that also was not the remote cause of the fire which destroyed the plaintiffs' goods.

In our preceding discussion we have assumed that the setting on fire the City Hall was the means of the fire to the plaintiffs' goods, within that proviso, unless the rebellion or the acts of the rebels should be held such means; that in that sense the acts of the lawful military authorities of the United States were the proximate and efficient cause and means by which the fire happened, and of the destruction of those goods by fire.

We do not find it necessary to discuss the question, what was the proximate and what was the remote cause of such destruction, under this head. The suggestion that the setting on fire of the City Hall was only the remote cause, while the casual and accidental communication of the fire to the plaintiffs' store from the burning building next adjacent thereto was the proximate cause of the fire and the means by which the fire happened, is not made by the counsel for either of the parties. The contrary is conceded, if not insisted upon,

by both. The decision by the Supreme Court, in Insurance Co. vs. Tweed, was assumed by both to be decisive against such a suggestion. We are therefore not called upon to pursue that subject.

3. It remains to consider the claim of the defendant that the fire happened by means which exempt the company from liability upon the ground that it was caused by "military power," and was therefore within the very words of the proviso.

It is insisted by the plaintiffs that the word "military," in the connection in which it is found in the proviso, does not mean the lawful military power of the government, acting lawfully, in the performance of the proper duty of the government forces, whether engaged in hostile contest with an invading army or in a forcible endeavor to suppress an internal rebellion.

For reasons which seem to us convincing, we are of opinion that the word "military," in the proviso in question, has no reference to the lawful acts of the military power of the government. Neither the reasons for the insertion of the proviso in policies of insurance against fire, nor the history of that insertion, nor any judicial decisions upon the meaning and purport of the proviso, nor the discussions had upon its construction, with especial reference to the meaning of other terms employed therein, sustain the interpretation for which the defendant contends. It is true that the precise question, what is the import and legal effect of the word "military," does not appear to have been decided in any case to which our attention is called. And had that proviso been now for the first time employed to exempt the defendant from a portion of the liability which the preceding general agreement for insurance imports, there would be much plausibility in the argument that the defendant intended not only to exclude liability for the consequences of an insurrection, invasion or rebellion, but for the possible consequences of those violent and forcible means which may be necessary to repel or suppress it. And yet, if this was the intent, it may be pertinently asked, why was the exemption limited to the employment of military force, and not made to include the forcible or violent measures which municipal authorities or police organizations might find it necessary to employ to suppress a riot, insurrection, or civil commotion?

The proviso containing the words "military or usurped power," was inserted in policies as early as 1720, and the history of the subject, as given in Ellis on Insurance, page 41, Park on Insurance, page 657, and Marshall on Insurance, page 791, shows that the occasion thereof was manifestly the liability to loss by fire caused by a foreign

enemy and invasion. And the terms "military or usurped power" were used in reference to the existence of claims to the exercise of governmental authority, enforced within the kingdom and constituting rebellion against the recognized government. The clause originally embraced no other terms than were apt to indicate the violence of enemies from abroad, and of usurpation exercising governmental authority, or rebellion sustained by organized forces within the kingdom.

The exception as then introduced into policies read as follows: "No loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company." The idea of interference with the peace and safety of the realm, by organized force from abroad or rebellion rising to the proportions of actual or at least formal usurpation of governmental authority, (whether more or less successful,) and manifestly hostile to the lawful government, is indicated by this language. The experience of the country, in those days of not infrequent invasion and rebellion, the result of disputes touching the right or the succession to the crown of England, gave occasion for the exception, and by suggesting its cause furnished also an explanation of its meaning. Foreign invading armies, and the organized forces rallied in whole or in part within the kingdom to overturn the government or to enforce the alleged title of a claimant to the crown, usurping or endeavoring forcibly to usurp governmental authority, were in view. Reason for refusing to become liable for losses caused by these forces, in either form, is found not only in helplessness and inability to resist them and the magnitude of the destruction they may effect, but in the want of recourse for indemnity to those who commit the violence.

It is well and pertinently suggested that, while on the one hand no one would think of obtaining insurance against the lawful acts of the government, so on the other an insurer would not think of excepting such lawful acts as a cause of the fire against which he insured. The citizen without insurance and an insurer making insurance, if that contingency was contemplated, would regard his government as bound and presumptively always ready to indemnify against losses sustained by acts done in its own defense or in maintaining the authority of the law.

The subsequent extension of the proviso to "riot, insurrection and civil commotion," rather confirms than impairs this view of the meaning and intent of the original proviso. And these were held to import occasional local or temporary outbreaks or lawless violence,

which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government.

The observations made by the court in the few early cases in which this proviso came under consideration, (although any possible separate meaning of the word "military" is not suggested,) indicate that the clause has reference to acts done in disregard or in subversion of lawful authority, and includes only such affirmative acts. Drinkwater vs. London Assurance Corporation, 2 Wilson, 363; Langdale vs. Mason, referred to by the text writers above cited.

In the last named case Lord Mansfield uses this significant language: "What is meant by military or usurped power? They are ambiguous and they seem to have been the subject of a question and determination. They must mean rebellion when the fire is made by authority; as in the year 1745, the rebels came to Derby, and, if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case. It must be by rebellion got to such a head as to be under authority."

The term "military" is employed in the proviso in a meaning synonymous with the "usurped power" intended to be described, or as qualified and explaining what was meant by "usurped power." It was in this view, and as a ground of distinguishing between the usurped power specified in the proviso and the power of a mob, that Mr. Justice Bathurst, in the case of Drinkwater vs. London Assurance Corporation, construed usurped power to mean either an invasion by foreign enemies, to give laws and usurp the government thereof, or an internal force or rebellion, assuming the power of the government, by making laws and punishing for not obeying those laws.

An "invasion" necessarily supposed organization and military power or force; so of the words "foreign enemy;" and in the use of a phrase which should include also violence within the kingdom, viz: "military or usurped power," something in like manner hostile to or subversive of the laws and of lawful government was intended, as plainly as if the clause had been "or any other military or usurped power."

That the terms used in the proviso have express application to force illegally employed and adversely to the government, is indirectly but impliedly involved in the decision and opinion of the court in the City Fire Ins. Co. vs. Corlies, 21 Wendell, 367. The court deemed the meaning of the words "usurped power" long settled. The property there in question was destroyed by order of the mayor of the city of

New York, for the purpose of arresting a conflagration. It was claimed that this was a usurpation of power and authority in disregard of the law. The court deemed that, if the mayor had no authority to do the act, the company were still liable, for that it was not a usurpation of the power of government, against which the defendants intended to protect themselves.

The case of Sprull vs. North Carolina Ins. Co., 1 Jones, N. Car. Law R., 126, tends strongly in the same direction; and if an armed patrol may be deemed a "military power," that case is especially pointed and significant.

These considerations, and the significant fact that every other word used in this proviso to designate the means by which a fire may happen for which the company will not be liable, expresses clearly and unequivocally what is unlawful, employed in disregard or in subversion of the laws or the government, furnish a strong case for the application of the maxim relied upon by the plaintiffs, *noscitur a sociis*. This maxim is not conclusive, but in a case of doubt, and where a like meaning will satisfy the provision, where there is no other clause or language hostile to the like interpretation, and especially when other considerations tend to support it, the maxim has especial force and significance.

We think it not too much to say that most, if not all, intelligent readers of the proviso in question, would at once declare that the word "military" therein was employed in a sense kindred to the other terms, and that it described an organization military in its form, but unlawful and hostile to the government in its character and purpose.

Again, it is a familiar rule in the construction of provisos and exceptions of this sort, made in qualification of the general positive agreement, that words susceptible of either construction should be taken most strongly against the speaker or party whose language is to be interpreted; and that the general and positive agreement should have effect unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result.

To this should be added, that it is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions in or indorsed upon policies, have been often condemned,

and such special modifications are justly characterized as traps to deceive and catch the unwary. An insured may reasonably be held entitled to rely on a construction favorable to himself where the terms will rationally permit it. Where, as in this case, such construction gives a signification to a word *ejusdem generis* with all those with which it is found associated and in harmony with the general character and purpose of the provision in which they are found, he is clearly entitled to insist upon such construction.

Our conclusion is that the plaintiffs are entitled to judgment for the amount of the insurance, with interest thereon from the expiration of sixty days from the 2nd day of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, and with costs.

SUPREME COURT OF ERRORS OF CONNECTICUT.

NEW LONDON COUNTY.

March Term, 1874.

ELLEN RYAN

vs.

THE WORLD MUTUAL LIFE INS. CO.

In a suit on a policy of life insurance, the plaintiff cannot claim that the local agent of the company willfully and without the knowledge of the plaintiff or the insured wrote the answers in the application incorrectly, for this is an attempt to substitute a different parol contract for the warranties and representations contained in the written agreement.

Where the agent well knew that if correct answers were given in the application it would be rejected by the company, and therefore he sought to obtain a policy by means of false answers, the company was not responsible for an act which could not have been contemplated as being within the scope of the agency.

Where the plaintiff was either an accomplice or an instrument in the perpetration of a fraud on the company, she is not entitled to recover on the ground that where one or two innocent persons must suffer by the fraud, negligence or unauthorized act of a third, he who clothed the third with the power to deceive or injure must be the one.

It was inexcusable negligence in the plaintiff to sign an application without reading it or knowing its contents. The law presumes that all reasonable diligence will be used to see that the answers are correctly written.

A limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured by the use of a reasonable diligence to defeat the fraudulent intent.

Any waiver or estoppel, to be effectual, must be made by an authorized officer of the company.

GEO. PRATT and GEO. RIPLEY, *Counsel for Respondent.*

I. The verdict was not against the evidence. The jury, under instructions from the court, have found the following facts:

1. "That the defendants, acting by an officer clothed with full powers, knowingly waived misstatements and misrepresentations in the answers to this application, and issued the policy intending to bind the company." Or,

2. That the company have estopped themselves from setting up the falsity of certain statements in the application by way of defense.

What were Ames's powers? His signature to the application is "soliciting agent;" to the policy, "agent;" to the proof of death, "agent." The plaintiff had every reason to suppose him to be a general agent of the company, clothed with full powers.

In the absence of any proof to the contrary, the jury were thus warranted in finding that Ames was not merely a special or local agent, but the general agent of the company; and that the company were estopped from relying upon the misstatements in the application to avoid the policy.

The knowledge of the agent is clearly proved. It is shown by the testimony of Mrs. Ryan that all the questions were answered truthfully by her husband; that the agent was told he had been rejected by another company. The agent acknowledged to three witnesses that he did know of this fact at the time of the application. Mrs. Ryan declined to pay the premium, but the agent told her "it was all right in the application," and got the money. Mrs. Ryan and her husband did not read the application, and it was not read to them.

The jury have found, under the instruction of the court, that there was "no fraud, no concealment, no deception, no misrepresentation," and that all questions that were asked were truly answered.

The space of the brief will not permit an analysis of all these questions. Take one for an example: The defendants gave notice that they would prove that the deceased was addicted to the habitual use of

spirituous liquors; and in their requests to the court they asked the court to give no less than three specific instructions on the point of intemperance.

II. The following propositions, applicable to the case at bar, are gathered from the later decisions.

The agent has prima facie authority as extensive as the business on which he is engaged. Union Mut. Ins. Co. vs. Wilkinson, 13 Wall., 222; Malleable Iron Works vs. Phenix Ins. Co, 25 Conn., 465; Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn. 517; Beebee vs. Hartford Ins. Co., 25 Conn., 57.

Facts material to the risk, made known to the agent before the policy is issued, and constructively known to the company, cannot be set up to defeat a recovery on the policy. Hough vs. City Fire Ins. Co., 29 Conn., 10; Peck vs. New London Co. Mut. Fire Ins. Co., 22 Conn., 575; Plumb vs. Cattaraugus Mut. Ins. Co., 18 N. Y., 392; Beebee vs. Hartford Ins. Co., 25 Conn., 51; Woodbury Savings B'k vs. Charter Oak Ins. Co., 31 Conn., 517.

The latest case on the subject of the powers of the agent lays down the doctrine "that an insurance company, transacting business through an agent to solicit, make out and forward applications, to deliver policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts done at such time with reference thereto." Miller vs. Mut. Benefit Life Ins. Co., 31 Iowa, 216; 1 Ins. Law Journal, 25.

This doctrine is recognized as the true one in the latest work on Insurance, and one that has met with great approval. May on Ins., 144-148.

It will be noticed also that the decisions of the court of our State have had a controlling influence in modifying and changing the harshness of the earlier rule. The cases of Beebee vs. Hartford Ins. Co., 25 Conn., 51, and Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 517, are cited as leading cases. The court below ruled that the waiver must be by an officer of the company authorized to make it, and that there must be additional proof of specific authority to make the waiver, provided the waiver was only by a local agent.

That this is not the doctrine in Connecticut, see the cases before cited, and also see Benton vs. American Mut. Life Ins. Co., 25 Conn., 542; Sheldon vs. Connecticut Mut. Life Ins. Co., 25 Conn., 207; Hough vs. City Fire Ins. Co., 29 Conn., 10; Rathbone vs. City Fire

Ins. Co., 31 Conn, 193 ; Couch vs. City Fire Ins. Co., 37 Conn., 248 ; (1 Ins. Law Journal, 141.)

This court will not, therefore, grant a new trial, even if the evidence does not clearly show a specific authority on the part of Ames to waive misstatements and misrepresentations, because sufficient facts are clearly proved to bring the case within the rule laid down in Connecticut decisions, and well expressed by Judge Dutton in Woodbury Savings Bank vs. Charter Oak Ins. Co., 41 Conn., 517. See also May on Ins., 145, and cases cited ; Miner vs. Phenix Fire Ins. Co., 27 Wis., 293 ; (1 Ins. Law Journal, 41 ;) Campbell vs. The Merchants' and Farmers' Mut. Life Ins. Co., 37 N. H., 35 ; Clark vs. Union Mut. Ins. Co., 40 N. H., 333.

The defendants, in their twentieth request, asked the court to charge "that a principal is not bound for the acts of his agent beyond the scope of his authority, and such authority cannot be presumed to cover the fraud of the agent."

The true proposition in regard to the fraud of the agent is this : When a negligent agent or a fraudulent agent of an insurance company effects an insurance for an innocent insurer the party who employs the agent must bear the consequences, upon the familiar principle that when one of two innocent persons must suffer by the fraud, negligence, or unauthorized act of a third, he who clothed the third with power to deceive or injure, must be the one. If either party must suffer by the act of the agent, it must be the party whose agent he is. The principle runs back to Hern vs. Nichols, 1 Salk., 289 ; Clark vs. Union Mut. Fire Ins. Co., 40 N. H., 333 ; Fitzherbert vs. Mather, 1 T. R., 12 ; Walsh vs. Etna Life Ins. Co., 30 Iowa, 133 ; 2 American Leading Cases, 5th ed., 919.

W. P. Prentice and S. C. Dunham, *Counsel for Defendant.*

I. It is a sound rule of law that a written contract cannot be altered or varied by parol proof—*vox emissa volat, litera scripta manet.* Equally well sustained is the rule that, where parties have admitted and acted upon written instruments, one who is cognizant of all the transactions, and has induced another to act upon his representations, shall not be permitted to deny them. Glendale Manf'g. Co. vs. Protect. Ins. Co., 21 Conn., 19 ; Hartshorn vs. Day, 19 How., 211 ; Specht vs. Howard, 16 Wall., 564 ; National Life Ins. Co. vs. Minck, New York Court of Appeals, June Term, 1873, 2 Insurance Law Jour., 822 ; Vose vs. Eagle Life and H. Ins. Co., 6 Cush., 42 ;

2 Parsons on Cont., p. 793; 2 Story Eq. Jur., § 1538; Hermon on Estoppel, pp. 230 and 341. Determined by such authority therefore there was error in the admission of the evidence of the plaintiff of declarations to the medical examiner of the company and to the agent who took the application, before the application was signed.

The defendant had been induced to make the contract of insurance set out by the plaintiff, upon her written representations, incorporated in it as the basis of the contract and signed by her. These representations she was permitted to deny.

Our case seems to fall very nearly within the lines of that of Lewis vs. Phœnix Mut. Life Ins. Co., 39 Conn. R., p. 100, wherein it was held that a similar fraud upon the insurance company avoided the policy, although it did not appear the plaintiff actually participated in the fraudulent intent.

II. Upon the contract in evidence, the plaintiff could not recover. This was in fact admitted on the part of the plaintiff. The representations, the basis of the contract, embodied in it were untrue. Kelsey vs. Universal Life Ins. Co., 35 Conn., 225; Vose vs. Eagle Life & H. Ins. Co., 6 Cush., 42; Ripley vs. Ætna Ins. Co., 30 N. Y., 136; First Nat'l Bank of Ballston Spa vs. Ins. Co. of N. A., 50 N. Y., 45; Anderson vs. Fitzgerald, 4 H. of L. Cases, 484; Ward vs. U. S., 14 Wall., opin. p. 38.

Distinction is also to be made between cases like the present, where an application made the basis of a contract is presumptively the act of the insured, and after its completion is signed by the insured and the plaintiff, and other cases, like Miller vs. The Mut. Benefit Ins. Co., 7 Am. R. and the Wilkinson Case in 13 Wall., where the agent makes the application, or changes it after it has been signed, or substitutes a new paper.

"The application being expressly made a part of the contract, and the contract providing that by accepting the policy the insured becomes responsible for the truth of the statements contained in the application, the fact that the original statement was made by the agent, and without the knowledge of the assured, will not avail to prevent a forfeiture by reason of a material false statement." May on Ins., § 141, p. 143.

In the case of Richardson vs. Maine Ins. Co., 46 Me., 394, even the signature had been made by the agent, but it was held the assured had adopted it. See also, Kennedy vs. The St. Lawrence Co. Mut. Ins. Co., 10 Barb., 285, and Jennings vs. Chenango Ins. Co., 2 Denio, 75. The position of the plaintiff is therefore untenable. Nat. Life Ins.

Co. vs. Minck, N. Y. Court of Appeals, June Term, 1873, 2 Ins. Law Jour., p. 820; Vose vs. Eagle Life & H. Ins. Co., 6 Cush., 42; Specht vs. Howard, 16 Wall., 565; Lefavour vs. Ins. Co., 1 Phil., 558; 2 Big. I. R., 158; LeRoy vs. Market Fire Ins. Co., 39 N. Y. R., 90; Baker vs. Union Mutual Life Ins. Co., 43 N. Y. R., 284; (1 Ins. Law Jourl., 97.)

III. The doctrine of *estoppel in pais* it is claimed sets in. It is said the defendant is estopped from denying that notice to its agent is its own knowledge. And further, that where application is made out by the agent, the statements embodied therein, if contrary to the truth, are those of the insurance company, although the application was signed by the plaintiff, and the company is bound by them.

It would seem a monstrous rule, but it is said public policy demands it, and a waiver of true answers in the application is within the apparent scope of authority of an agent of a life insurance company at a distance from the home office. Such rules have no application in our case.

In Am. Lead. Cases, 921, it is said, "That the answers of the insured were prepared or dictated by an agent of the insurance company will not therefore necessarily excuse the suppression or misstatement of a material fact, and the question will, under these circumstances, depend on whether the agent was acting within the general scope of the authority given by the principal, for otherwise he must, relatively to the matter in hand, be considered as the agent of the insured, and not of the insurers."

Many cases are there cited, and p. 921, upon the authority of Treadway vs. The Hamilton Ins. Co., 29 Conn., and other cases, it is said, "Officers of mutual insurance companies, being agents whose powers are limited, cannot waive any of the conditions," etc., etc., and "officers of such companies have no power to vary any of the stipulations of the policy, or to do that orally which the contract requires to be in writing." And in many cases agents of mutual insurance companies were said to be also agents of the insured, who must therefore take the consequences of their mistakes.

A fortiori if gross negligence or an actual participation in fraud on the plaintiff's part has caused false statements in writing to be made the basis of a contract, which the agent was in no wise authorized himself to alter or to make, no parol evidence can be admitted to vary or contradict them.

IV. Estoppel is only in favor of a party misled, Phil. Ev., 460, 461, and does not apply in favor of the plaintiff. The plaintiff is estopped

by her acts and conduct, Phil. Ev., 453, 464, from denying the authenticity of the application by which the defendant was deceived as to the character of this risk.

Estoppel, such as the plaintiff seeks to make against the defendant by oral admissions, are the most dangerous kind of evidence. Such evidence, it was said in Stone vs. Ramsey, 4 Monroe, 236, 240, 241, cannot overcome the express denial of the answer, and numerous cases are cited on this point in Phil. on Ev., 4th Am. ed., note 129, p. 462, and idem, p. 452.

V. The case of Insurance Company vs. Wilkinson, 13 Wall., 222, principally relied upon by the plaintiff, is not ours. It differs materially in its facts. What the conditions of the policy and of the application were, we do not know, but in the case itself it appears that the insured refused to make statements as to the age of her mother; the information was then obtained from third persons and inserted in the application, after it was made, by the agent on his own authority and without the assent of the insured. The plaintiff was permitted to show that these statements were not his but the agent's, and the rest of the decision is *obiter*.

In our case the application was made up in the presence of the insured and the plaintiff, and then signed by them the last thing before the agent left. It is false by the admission of the plaintiff, and, by conclusive presumption of law, with her knowledge. See the cases of Specht vs. Howard, 16 Wall., 564; Hartshorn vs. Day, 19 Howard, 211; Ward vs. United States, 14 Wall., 28; Sparrow vs. Mut. Ben. Life Ins. Co., U. S. C. C., Mass., 1873; May on Ins., p. 611; Union Mut. Life Ins. Co. vs. Wilkinson, 13 Wall., 222.

VI. There was error in the refusal to nonsuit the plaintiff, when the evidence entirely failed to support plaintiff's case. There was no evidence of payment of premium, and there had been a concealment of important facts in answer to direct questions, as to habits, sickness in the fall of 1871, previous, and Dr. Cassidy's attendance. Ryder vs. Womb, 4 L. R. Exch., 39; G——— vs. Metropolitan R. Co., 82 B., 177; Grand Chute vs. Winegar, 15 Wall., 355; Schuchardt vs. Allens, 1 Wall., 369; Dean vs. Fuller, 40 Penn. L. R., 474; Gardiner vs. Otis, 13 Wis., 175; Hedgpeth vs. Robertson, 18 Texas, 859; Rhodes vs. Otis, 33 Ala., 578; Garnett vs. Kirkman, 33 Miss., 380; Dryden vs. Button, 19 Wis., 22; Foot vs. Sabin, 19 John., 154; Bryden vs. Bryden, 11 John., 189; Lomer vs. Meeker, 25 N. Y., 361; Rudd vs. Davis, 3 Hill., 287; Monk vs. Union Mut. Life Ins. Co., 4 Robt., 455.

In Bryden vs. Bryden and Foot vs. Sabin, the ground is expressly taken: "If a court can rightfully nonsuit the plaintiff upon an undisputed state of facts when the law is against him, they ought to do so, and the refusal to do it is an error in point of law."

VII. By the terms of the contract in suit, the declarations and representations of the insured and of the plaintiff in this case were made warranties, and their literal truth must be proved by the plaintiff or there can be no recovery.

The application being referred to in the policy of insurance as part of the contract, its statements and declarations become express warranties to be literally proved as conditions precedent by the plaintiff, to make out a case. The distinction is well marked between warranties, in which the burden of proof rests with the plaintiff, and representations, (of which latter class the "conditions" in the policy are examples,) which constitute a defense.

An express warranty is an agreement in the policy, or contained in proposals or documents expressly referred to in the policy, and so made part of it, that certain facts are or shall be true, or certain acts shall be done, etc. 1 Phil. on Ins., §§ 754, 756; First National Bank vs. Ins. Co. of North America, 50 N. Y., 45.

CARPENTER, J.

This is an action on a policy of life insurance. The policy is expressed to be "in consideration of the representations, declarations, and covenants contained in the application therefor, to which reference is here made as a part of this contract," etc.; it is further declared that "this policy is issued and accepted on the following express conditions and agreements: First, that the declarations made in the application therefor, and on the faith of which it is issued, are in all respects true," etc.

The application therefor is a part of the policy; and the plaintiff's agreements therein contained are warranties, and if not true, she cannot recover unless there has been a waiver by the defendants, as under the circumstances they are estopped from denying their truth.

In the application are the following questions and answers:

"12. Has the party ever had any of the following diseases?" (naming a long list of diseases, and among them) bronchitis, consumption, spitting of blood, or any serious disease? Ans. None of these."

"17. Has the party had during the last seven years any severe

sickness or disease? If so, state the particulars and the name of the attending physician who was consulted and prescribed. No."

"25. Has the party employed or consulted any physician? Please answer this Yes or No; if yes, give name or names, and residence. No."

"27. (A.) Has any previous examination or application been made for assurance on the life proposed? No."

"(E.) Has any company declined to issue a policy for the party? No."

Upon the trial the plaintiff offered to prove not that the above answers were true, but that different answers were in fact given, both by herself and the insured, and that the answers were wrongly written by the local agent of the defendants, without the knowledge or consent of the plaintiff or her husband. Aside from the claim that the defendants are responsible for the conduct of their local agent, this is merely an attempt to substitute for a part of the written contract declared on, a different parol contract; for the representations and warranties of the plaintiff contained in the written agreement, oral representations and warranties of an entirely different character. It requires no argument to show that this cannot be done. But the plaintiff claims that truthful answers having been given to each interrogatory, and the incorrect answers contained in the application being there by the sole act of the agent, the defendants are bound by the answers as written, and are precluded from denying their truth. Whether this is so or not depends upon the extent of the agent's authority. It must be admitted that the express authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy, and collecting the premiums. The courts in this State have construed the power of these agents liberally and extended them somewhat by implication. Thus it has been held that in writing the application, explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company. In the Union Mutual Ins. Co. vs. Wilkinson, 13 Wall., 222, it was held where an agent, by mistake or acting upon information derived from others which proved to be incorrect, inserted an answer not true in fact, that it was the act of the insurers and not of the insured.

In this case we are asked to go farther than any case has yet gone, and clothe the agent with an authority not given him in fact, and to hold the principal responsible for an act which could not by any

possibility have been contemplated as being within the scope of the agency. In most if not in all the cases in which the act of the agent has been regarded as the act of the principal, the action has been the natural and probable result of the relations existing between the parties, or so connected with other acts expressly authorized as to afford a reasonable presumption that the principal intended to authorize it: but it cannot be supposed that these defendants intended to clothe this agent with power to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He well knew that if correct answers were given, no policy would issue. Prompted by some motive, he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principals any other facts material to the risk which might come to his knowledge from any other source. His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons, and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal.

The principal reason urged for holding the defendant liable in this case is the one suggested in the argument that where one of two innocent persons must suffer by the fraud, negligence or unauthorized act of a third, he who clothes the third with the power to deceive or injure must be the one.

Our answer is, in the first place, this is not exactly a case in which one of two innocent parties must necessarily suffer. There is no absolute loss for us to determine on whom it shall fall. If the plaintiff fails to recover, she sustains no pecuniary loss except the premium paid, nor that even if she is innocent, and the law is so that she can recover it back on the ground that there was a failure of consideration. It is unlike a case of fire insurance. Nearly all property may be insured at some rate--if not in one office in another. But in this case the plaintiff's husband was not an insurable subject. His situation was such that one company had rejected him, and but for the aid of fraud neither this nor any other company would have accepted him. Had the truth been stated, no policy would have issued, and as she would have had no better success probably with

other companies, we cannot see that she has been misled to her prejudice except in relation to the premium, which is comparatively a small matter.

In the second place, if the rule is to be applied to this case it is by no means certain that it will aid the plaintiff; the fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud and the case falls within the principle of Lewis vs. The Phœnix Mutual Life Insurance Co., 39 Conn., 100; 3 Ins. Law Journal, 123. If she was an instrument she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it, and without it being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not. But more than this: the conduct of the plaintiff at the time, and subsequently, is not entirely free from suspicion. There is some evidence tending to prove that she knew of the deception. She testifies that her husband, at the time the application was signed, told the agent several times that he had been rejected by the Massachusetts Mutual, but the doctor told him to say nothing about it. After the doctor had paid the premium she hesitated about repaying him, fearing that the policy would not be good, and even sent her daughter to request him to take the policy away. Thereupon the doctor and the agent assured her that it was all right in the application. Upon that assurance she paid the premium. This, if it falls short of proving actual collusion, shows clearly that she comprehended the importance of the answer, and exhibits her negligence in a stronger light. On the whole we think that she, quite as much as the defendants, clothed this agent with the power to perpetrate the fraud. Courts should never extend by implication the power of an agent except to carry into effect the probable intention of the parties, or to prevent third persons dealing with the agent from being misled to their injury. In this case there is no ground for the supposition that the defendants ever intended to authorize

the agent to act directly contrary to their interests; and if the plaintiff has been deceived, her own negligence at least materially contributed to it.

We need not enlarge upon the evils necessarily resulting from holding insurance companies liable for such acts of their agents. The question is vital to the insurance interests of the country. The insured, no less than the insurers, are deeply interested in it. If this verdict is sustained it will tend to establish a principle fraught only with mischief. Every life insurance company in the country, and to some extent the fire insurance companies, will be at the mercy of their agents. A door will be open to fraud, collusion and legal robbery unprecedented in the history of jurisprudence. In view of the probable consequences of such a principle—evils coextensive almost with the magnitude of the interests involved—we ought to pause and consider well before extending the doctrine of some of the modern cases to a case like this. We are constrained therefore to hold that a limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal and for the benefit of the insured, especially where it is in the power of the insured by the use of a reasonable diligence to defeat the fraudulent intent.

The court very properly instructed the jury that "an untrue or fraudulent statement or denial made by the applicant of a fact material to the risk, to induce the insurance of a policy, will prevent the policy from taking effect as a valid contract unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver, to be effectual, must be made by an officer of the company authorized to make it. If there has been no evidence of any waiver except by a medical examiner of the company, or by a local agent, there must be additional proof of specific authority given them or the company will not be bound."

Some of the cases cited by the plaintiff are cases of fire insurance, in which the agents were entrusted with blank policies, signed by the president and secretary, and had full power to fill up and issue the same without referring the application to the home office. In such cases the corporation contracts solely by its agent. The acts and knowledge of the agent are the acts and knowledge of the corporation, and there is a manifest propriety in holding the corporation liable accordingly.

This court has held, that in writing the answers to the interrogatories in the application, the agent is to be regarded as the agent

of the company rather than the agent of the insured. We do not question the propriety of those decisions, considering the circumstances of the cases in which they were made, but we cannot regard them as establishing an inflexible rule of law, applicable to all cases.

A brief reference to some of the cases will illustrate the distinction which we make. Where the applicant stated fully and truthfully the circumstances relating to the title to the property insured, and the agent, knowing all the facts, but for the sake of convenience, stated the title incorrectly and issued a policy, it was held that the company could not take advantage of it. The court regarded the transaction as equivalent to an agreement that for the purpose of the insurance, the title should be considered as it was stated to be by the agent. Peck et al. vs. New London County Mut. Ins. Co., 22 Conn., 575. See also Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 517. When the applicant answered the interrogatory, "Is a watch kept on the premises during the night?" by stating the facts, and the agent wrote the answer, "Watchman till twelve o'clock," which answer was not strictly true, it was held that the company was bound by it. Malleable Iron Works vs. Phœnix Ins. Co., 25 Conn., 465. See also Beebe vs. Hartford Co. Mut. Fire Ins. Co., 25 Conn., 51; Hough vs. City Fire Ins. Co., 29 Conn., 10.

The case before us is a case of life insurance. The power of the agent was in fact limited; he had no power to issue policies. The terms of this agency conferred no authority to waive conditions or forfeitures, or to agree to false and fraudulent answers to any of the interrogatories, or to make any other contract to bind the company. Presumptively the insured and the plaintiff knew all this before paying the premium; for the printed policy, which was in their hands for several days, contained at the bottom this note: "The president and secretary of the company are alone authorized to make, alter or discharge contracts or to waive forfeitures." The jury then were correctly told that "there must be additional proof of special authority given them" (the local agent and medical examiner) "or the company will not be bound."

The jury found such special authority, but we look through the record in vain to find any evidence to support such a finding.

The verdict was manifestly against the evidence, and justice requires that it should be set aside and a new trial awarded.

In this opinion the other judges concurred except Foster, J., who, having tried the case in the court below, did not sit.

UNITED STATES CIRCUIT COURT,

DISTRICT OF MAINE.

SEPTEMBER TERM, 1874.

JOHN BABSON

vs.

THE THOMASTON MUTUAL FIRE INS. CO.*

The owner of the property in her will appointed T. her trustee, with power to appoint a substitute in case T. should be unable to act as such, and also to name a suitable person to act after his decease; or if such appointment should not be made, then the judge of probate should appoint a successor as provided by law. T. declined acting as trustee, and the Probate Court appointed B. as trustee in his stead. B. insured the property, describing it as "his dwelling-house," although the facts in the case were communicated to the company when the insurance was effected.

Held, that B. had an insurable interest in the property insured.

SHEPLEY, J.

Action on a policy of insurance upon a dwelling-house, the defense to which was that at the time of effecting the insurance plaintiff had no title or insurable interest in the property.

The case was tried before the judge without the intervention of a jury.

The facts of the case are as follows:

The property formerly belonged to Sarah McCrate. She died leaving a will, in which Richard H. Tucker was named executor, and who also was constituted trustee, to whom this property was devised in trust. The will likewise contained the following clause:

"And I hereby authorize and empower the said Richard H. Tucker, the trustee before named, to appoint a trustee to be substituted

* Statement of case furnished by George F. Emery, clerk U. S. C. C., Portland, Me.

for him in case he, the said Tucker, should from any cause be unable to act as such, and also to name a suitable person to succeed him as trustee after his decease; which appointment of a substitute or successor is to be made by the said Tucker in writing, and such substitute or successor shall have the same powers and authority as the present trustee; or if said appointment of a new trustee shall not, from accident or otherwise, be made by the present trustee, or his successor, then the then judge of probate for the county of Lincoln shall appoint one in case of a vacancy as provided by law."

Tucker, the trustee, declined both trusts, in a writing addressed to the judge of probate, in the following words, viz:

"I decline both trusts, and recommend the Hon. John Babson as the most proper and suitable person for the acceptance of the above trust, in my place and stead."

Thereupon the judge of probate passed a decree in substance as follows: "and the said Richard H. Tucker having in writing declined the trust reposed in him by virtue of said instrument, (the will,) ordered, that John Babson be administrator with the will annexed, first giving bond, with sureties," etc.

A bond was furnished, in addition to one as administrator, approved and ordered to be recorded, containing the recital "that whereas the said John Babson has been appointed by the judge of probate trustee of the estate of Sarah McCrate, late of Wiscasset, deceased, agreeably to the provisions of the last will and testament of said Sarah McCrate, and certain property having come into his hands in trust for purposes in said will set forth: now, therefore, if the said John Babson shall faithfully execute such trust according to the will of the testatrix, so far as is consistent with law, and shall make a true and perfect inventory," etc.

Plaintiff thereupon proceeded to execute the trust, and under this state of the title took out a policy in the name of "John Babson," describing the property as "his dwelling-house," although it appeared in evidence that the facts as to title were communicated to the company when the insurance was effected.

Held that the facts disclosed an insurable interest in plaintiff, and judgment was entered for plaintiff.

COURT OF APPEALS OF KENTUCKY.

Appeal from Louisville Chancery Court.

ST. LOUIS MUTUAL LIFE INS. CO., *Appellant,*

vs.

AMANDA L. GRIGSBY ET AL., *Appellees.**

A ten-year life policy was issued to the insured on the half-note plan with the conditions that if hereafter the premiums were not paid, a paid-up policy would be issued for as many tenths of the original sum insured as there had been premiums paid, and that if the interest was not paid on the notes or loans the policy should be void. After three payments were made the company issued to the insured a certificate guaranteeing him a paid-up policy of three tenths of the original amount. Subsequently the interest, amounting to $49.04, was not paid in advance as the terms of the p licy required. On the death of the insured the company claimed that the policy had lapsed by non-payment of interest on the notes.

Held, that in the payment of the regular premiums time is of the essence of the contract, and a failure to pay premiums when due voids the policy.

Held, that the annual interest on these premium notes was not an annual premium, for the non-payment of which the policy would be forfeited, but the company had a right of action against the insured to enforce its payment, and that the ultimate payment of the policy was hypothecated or pledged to the payment of this interest, and became a collateral security for it.

The court, being sufficiently advised, delivered the following opinion herein, to wit:

The policy of insurance made the foundation of this action was issued by the St. Louis Mutual Life Insurance Company on the 16th day of August, 1867. The contract it evidences is that in consideration of the sum of $690.60 in hand paid, and an annual premium of the same amount to be paid on the 16th day of August in each and every succeeding year for nine years, said company assured the life of I. Calvin Grigsby for the term of his entire life, in the sum of ten thousand dollars for the sole use of Amanda L. Grigsby, in trust for

* Opinion delivered October 15th, 1874.

herself and children of the insured. The following provisos were incorporated into the policy:

"1. That if default shall be made in the payment of any of said annual premiums hereafter to become due and payable at the time hereinbefore mentioned and limited for the payment thereof respectively, then and in such case such default shall not work a forfeiture of this policy, but the sum of $10,000, the amount insured, shall be then commuted or reduced to such proportional part of the whole sum or amount insured as the sum of the annual payments so paid by the said insured shall bear to the sum of the ten annual payments herein stipulated and agreed to be paid by said I. Calvin Grigsby as aforesaid."

"2. If the said insured shall fail to pay annually, in advance, the interest on any unpaid notes or loans which may be owing by said insured to said company, on account of any of the above-mentioned annual premiums, at the office of the company in the city of St. Louis, or to agents where they produce the receipts signed by the president or secretary, then and in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

The premiums upon this policy were to be paid upon what is called the half-note plan. The cash payments were made and notes executed in 1868 and 1869, but the insured failed to pay or in any way arrange the premium due on the 16th of August, 1870. He also failed to pay in advance the interest on his three outstanding notes.

In November, 1870, Grigsby was requested to reinstate the policy; he declined to reinstate it, but agreed to pay the interest in default and to accept a commuted or reduced policy for the sum of $3,000. The company accepted this proposition, received said interest and issued to him the following certificate:

Policy No. 7725, insuring the life of I. Calvin Grigsby, is hereby renewed and continued in force for the commuted amount of $3,000 until the 16th day of August, 1871, but this certificate shall not be valid and binding on the company until the premium (as per margin) is paid and the receipt countersigned by S. R. Foot, agent at Louisville, Ky. Signed, WM. T. SELBY, Secretary.

This certificate was duly countersigned and the necessary amount paid. Grisby failed to pay the interest due the 16th of August, 1871,

on the note executed for the aggregate sum of the three notes given in 1867, 1868 and 1869, and died on the 2nd of January, 1872.

Appellee claims that she is entitled to recover the whole amount of the original policy, less the sum due as premiums for 1870 and 1871. She alleges, but fails to prove, that prior to the default in 1870, the company had adopted what she denominates the Massachusetts plan, and that it was bound to keep the policy alive, by applying to the payment of the premiums, the reserve fund to which she was entitled, and that by such application the policy would have been kept in full force up to and after the time at which her husband died. The failure of proof upon this point renders it unnecessary that it shall be further noticed. Appellee further claims that her deceased husband was a lunatic in November, 1870, when he accepted the commuted policy, and that its acceptance was obtained by the fraud of the company. The proof fails to show that Grigsby was at that time or at any subsequent time insane, but if it did, we do not see that such fact would operate advantageously to the appellee.

By the terms of the contract, the failure to pay the premiums as they became due, involved the reduction of the policy in the proportion hereinbefore set out. The party who was in default could not compel the company to reinstate the policy for the full amount, and the agreement of November 2nd, 1870, secured to Mrs. Grigsby the most that she then had the right to claim. The company resists her right to recover on the commuted policy on the ground that the failure to pay the interest in advance on the note executed when the agreement to commute was entered into, released it from all liability and determined the policy. This note was for $817.41; the amount of interest due on the 16th of August, 1871, was $49.04. The proof shows that appellee was then entitled to a dividend amounting to $42.07. The application of this dividend to the payment of the interest would have reduced it to $6.97. The direct question is presented whether from the failure to pay this amount, or even the whole of the interest due, the forfeiture of all rights under the commuted policy followed as a legal and necessary consequence. Some importance is attached to the fact that the certificate evidencing the commutation continued the new agreement in force only until the 16th day of August, 1871. We regard this attempted limitation as to time as unavailing. The company accepted the interest then in arrear, and thereby reinstated the original policy except as to the amount of insurance, and by the terms of that policy it was to continue in force during the whole term of the natural life of the insured.

The conditions in policies of life insurance providing for forfeitures for the non-payment of premiums in exact accordance with the terms of the agreement, have been upheld and enforced by the courts. Such forfeitures are not regarded as being in the nature of penalties. It is considered that in agreements of this character, time is of the essence of the contract. They are contracts to be kept in force from year to year at the will of the insured.

The right to keep the policy alive by the payment of the stipulated premiums, is a privilege secured to the insured by his agreement with the insurer. He may exercise or abandon this privilege at his discretion. But if he does abandon it, those beneficially interested cannot complain that the insurer refuses longer to be bound by a contract that has lost all the elements of mutuality. Where, as matter of favor to the insured, credit is extended him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy will be forfeited. In this case there has been no failure to pay either the cash portion of a premium, or to satisfy a note representing any portion of a cash premium.

By the contract of November 2nd, 1870, the original policy was commuted. It thereby became essentially a paid-up policy, except that the company had the right, should its affairs render it necessary and proper, to demand the payment in whole or in part of the note executed for the unpaid portion of the three annual premiums. It does not appear from the record before us, nor from the charter of the company, nor from the amendment thereto, that the failure to pay these premium notes, or such portion thereof as may be called for, will work a forfeiture of the policy of insurance.

But however this may be, that question does not arise, as the insured was never required to pay any portion of the principal of the note held against him by the company.

The complaint is that the interest was not paid in advance. It seems that a distinction is taken between the principal sum due and the interest that may accrue thereon. From the peculiar character of the contract this distinction may exist, but we do not see that its existence can convert the accruing interest into an annual premium, for the non-payment of which the rights secured by the paid-up policy may be forfeited. If instead of executing his note, Grigsby paid off the amount due to the company, and then borrowed a like sum, agreeing that the commuted policy should be forfeited if he failed at any time to pay the annual interest promptly

in advance, it is evident the forfeiture would not have been enforced. As matter of fact the company agreed to treat these unpaid notes as loans to Grigsby. The second proviso, heretofore quoted, so denominates them. The language is that "if the said insured shall fail to pay annually in advance the interest on any unpaid notes or loans which may be owing * * * * on account of any of the above mentioned annual premiums," then the company shall no longer be liable to pay the amount secured by the policy.

The term "loan" has a direct and natural connection with the words "annual premiums," and it is manifest that the contemplated loans were to be made up of such premiums. The interest annually accruing on these loans is in no sense an annual premium due from the insured to the insurer. The loan itself does not represent a cash premium, but a debt which the insured may never be required to pay, and which ordinarily will be satisfied out of the dividends, or the insurance to which the assured may be entitled.

The considerations applying to the payment of the annual premium have no application to the payment of interest, or these notes or loans. On the prompt payment of the premiums depends the mutuality of the contract, and the ability of the insurance company to meet its obligations. As to this policy the contract was completely executed so far as the assured was concerned. The annual premiums had all been paid, in the mode prescribed by the contract itself, and the company was bound to look to the insured for the payment of the interest due upon the notes or loans owing by him, and to enforce the payment thereof as though he was a stranger to the contract under which appellee claims. She and those she represents cannot be affected by the default of the party to whom the loan was made, except that her policy, and all profits and payments to which she is entitled thereunder, are pledged and hypothecated to the company for the ultimate payment of the loan, and its accrued interest. The failure of Grigsby to pay the interest due on the 16th of August, 1871, did not affect the ability of the company to meet its obligations to any greater extent than the failure of any other debtor to pay the interest due from him would have affected it; and as the collateral pledged by an ordinary debtor to secure the payment of a like debt will not be forfeited to the company for the non-payment of interest in exact accordance with the terms of the loan, notwithstanding his agreement that they shall be so forfeited, we see no reason why the company shall be allowed to forfeit the

paid-up policy of insurance hypothecated to secure the ultimate payment of the "note or loan" owing by Grigsby.

The failure to pay the interest due on the note or loan, is a default which admits of a certain compensation. The insurance company holds, and has always held, ample security. We have already seen that the reasons that forbid courts of equity from interposing to relieve against forfeiture for the non-payment of premiums, or notes representing portions of cash premiums, do not apply in cases like this. We are satisfied from the nature of the contract, that the forfeiture was intended as a penalty to secure not only the ultimate but the prompt payment of the interest to become due, and as the default is only in time, and as the company can be given all that it stipulated to receive, a case is presented in which relief can and ought to be afforded. The chancellor adjudged the company to pay the amount of the commuted policy, less the note due from Grigsby and its accrued interest up to the date of the judgment. His said judgment conforms to the principles herein announced, and it is therefore affirmed, as well on the original as on the cross appeal.

UNITED STATES SUPREME COURT.

Error to the First Judicial District Court of Hamilton Co., Ohio.

HOME LIFE INSURANCE COMPANY
vs.
DUNN.

1. Where, after a suit has been properly removed from a State court into the Circuit Court of the United States, under the act of March 2nd, 1867, which allows such removal, in certain cases specified by it, "at any time before the final hearing or trial of the suit," the State court still goes on to adjudicate the case against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such State court does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a

waiver on his part, of the question of the jurisdiction of the State court to have tried the case.

2. The language above quoted—"at any time before the final hearing or trial of the suit,"—of the act of March 2nd, 1867, is not of the same import as the language of the act of July 27th, 1866, on the same general subject—"at any time before the trial or final hearing." On the contrary, the word "final," in the first mentioned act, must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a State where by statute the party could still demand, as of right, a second trial,

Held, that such first trial was not a "final trial" within the meaning of the act of Congress, the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the State.

The case is as follows: The judiciary act of 1789, 1 Stat. at Large, 79, thus enacts:

"If a suit be commenced in any State court by a citizen of the State in which the suit is brought, against a citizen of another State, * * * and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending, etc., it shall then be the duty of the State court * * * to proceed no further in the cause."

Then came an act of July 27th, 1866, 14 Stat. at Large, 306. It was as follows:

"If in any suit * * * in any State court by a citizen of the State in which the suit is brought, against a citizen of another State, * * a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates * * * to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, * * * the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause, as against him, into the next Circuit Court of the United States to be held in the district where the suit is pending, * * * and it shall be thereupon the duty of the State court to * * * proceed no further in the cause as against the defendant so applying for its removal."

Finally came an act of March 2nd, 1867. Ib., 558. Its title is, "An act to amend an act entitled 'An act for the removal of causes

in certain cases from State courts,' " approved July 27th, 1866. It runs thus :

" *Be it enacted*, That the act entitled 'An act for the removal of causes in certain cases from State courts,' approved July 27th, 1866, be and the same is hereby amended as follows: That where a suit may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, * * * and it shall be thereupon the duty of the State court to * * * proceed no further in the suit."

Each of these three acts enacts that after the case is removed, in the way which they respectively provide, into the Circuit Court of the United States, it shall there proceed in the same manner as if it had been brought in that court by original process.

These statutes being in force, Mrs. Dunn, widow and administratrix of John Dunn, sued the Home Life Insurance Company of Brooklyn, in one of the courts of Common Pleas of Ohio, on a policy of insurance for $2,000 on her husband's life, and obtained a verdict against the company. The company moved to set aside the verdict, and for a new trial. But upon consideration the court overruled the motion, and it was " therefore considered by the court that the plaintiff recover her damages herein assessed, and the costs to be taxed."

This, of course, in any court proceeding in the course of the common law, would have been the end of all " trials," or of other relief to the insurance company except such as it might have provided for itself through writ of error.

But the law of Ohio respecting second trials is somewhat peculiar. The matter does not, as at common law, and in most of the States, rest in the discretion of the court trying the case, but rests in the option of the suitor himself. One of the statutes of the State—" An act to relieve District Courts, and to give greater efficiency to the judicial system of the State," passed April 12th, 1858, (Swan & Critchfield's Statutes, 1155,) known as the second trial act, thus enacts :

" Sec. 1. A second trial may be demanded and had in any civil ac-

tion which has been * * * instituted in any Court of Common Pleas in this State, in which said court has original jurisdiction, and in which either party has the right by law to demand a trial by jury, * * * and after a judgment or final order has been rendered, upon the terms and in the manner hereinafter provided.

"Sec. 2. Any person desirous of such second trial * * * shall at the term of the court at which judgment was rendered, enter * * * into an undertaking within the time hereinafter limited, with security * * * payable to the adverse party in such sum as may be fixed by the court, and conditioned to the effect that the party obtaining such second trial shall abide and perform the order and judgment of the court, and pay all moneys, costs and damages which may be required or awarded against him consequent upon such second trial."

Under this statute of the State, the insurance company, after trial and judgment, demanded and had leave to have "a second trial." The company gave a bond in $4,000, conditioned that it should abide and perform the judgment of the court, and pay all moneys which might be required of or awarded against it consequent upon a second trial by the Court of Common Pleas of Hamilton County.

At the next term of the court the company—assuming that, notwithstanding the trial already had, (in virtue of their demand for a second trial and their leave to have it) not yet had a final hearing or trial—filed a petition in the Court of Common Pleas, where the case had been tried, to remove it into the Circuit Court, under the last of the above quoted acts of Congress—the act, namely, of 1867. And the Court of Common Pleas ordered the removal, and that no further proceedings should be had before it. A transcript of the record was accordingly filed in the Circuit Court, and the cause docketed there. Mrs. Dunn, by her counsel, now appeared in that court, and moved to dismiss the case as not having been one for removal under any of the acts of Congress.

The ground of her motion apparently was that the petition for removal had been too late; that it should have been before the trial in the Common Pleas; that under the act of 1789 a defendant desiring to remove was bound to petition for a removal, if he wanted one, "at the time of entering his appearance;" that under that of 1866, "at any time before the trial or final hearing of the cause," and that though in the act of 1867 there was a slight transposition of words, so as to read "at any time before the final hearing or trial of the suit," the meaning in both acts was the same, the words "final hearing" referring to proceedings in equity, and the word "trial"

to proceedings at common law; and even if this were not so, that the case was the same, for that the company had had a final trial; that Congress could not be supposed to have had reference to the very peculiar local law of Ohio, about trials of which perhaps not ten of its members had ever heard, but was to be taken to have referred to the general system of the common law, which came to us all by inheritance, and still so widely prevailed over the nation; that thus viewed the company had had a final trial, for it had had a trial on merits before a jury, it had moved for and it had been refused a new trial, and a judgment had been entered against it, which was now in existence, a lien upon its property; that the words "final trial" were used in contradistinction to the words "interlocutory trial," and this trial not having been interlocutory was final. Further than this, that if the application for removal, after a second trial was taken, was in time to be within the terms of the act of March 2nd, 1867, then the act violated the seventh amendment of the Constitution, which reads thus:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It was said that one branch of this suit was a suit at common law, and that the amount in controversy exceeded twenty dollars; and that all of the facts in the case were tried by a jury, and their verdict was affirmed before the case was removed into the Circuit Court for these same facts to be re-examined there, for a cause and under a proceeding not known to the common law, nor within any of its rules.

It was said further, that the law of March 2nd, 1867, was unconstitutional for another reason—to wit, that it destroyed the second trial bond, that had been given in the Sate court to secure the claim being litigated, without the process of law, and without consideration or any equivalent bond being substituted; that the condition of the bond to pay a judgment to be obtained at a second trial in the Court of Common Pleas of Hamilton County, Ohio, was not answered by a judgment obtained in the Circuit Court, and that the sureties on the bond would not be liable to answer to such a judgment.

But the Circuit Court was not of this view, and so, overruling the motion to dismiss, it retained the cause upon its docket.

Mrs. Dunn then filed an amended declaration in the Circuit Court,

and that was now pending there. She now went back into the State courts, and by petition for error filed in the District Court of Hamilton County (a court superior to the Common Pleas, and having in general jurisdiction to review its orders; Code, §§ 512, 513; Swan & Critchfield's Statutes, 1099,) prayed for a reversal of the order which the Common Pleas had made to remove the case into the Circuit Court, and that it should be no further proceeded in before it. The insurance company opposed the application.

The District Court, however, did reverse the order, being of opinion that the petition for removal, in being filed after the trial, had not been filed in accordance with any act of Congress, and that the removal was not authorized by law.

The insurance company then took the question of the right of removal from the District Court to the Supreme Court of the State. That court, like the District Court, held—the bench being unanimous—that the removal, in being made after the trial, was unauthorized by law and void. It said:

"This act of March 2nd, 1867, is an amendment of the act of July 27th, 1866, in which the language used is, that the petition may be filed 'at any time before the trial or final hearing of the cause.'

"We have no doubt the terms 'trial' and 'final hearing' ought to have the same meaning in both acts, and that their transposition in the amendatory act was merely accidental.

"The terms, it seems to us, were intended to embrace actions at law and suits in equity—the word 'trial' having reference to an action at law, and the words 'final hearing' to a suit in equity; and that by 'the final hearing or trial of the suit,' is meant a hearing or trial upon the merits, such as results in a final judgment in an action at law, and a final decree in a suit in equity.

"The act of Congress was doubtless intended to have the same operation in all the States, irrespective of the difference that may exist in the modes provided in the several States for examining, in the appellate court, questions decided in the court below.

"In this State, after final decree, equity cases are appealable to the District Court on the appellant giving notice and entering into an undertaking as required by the statute. In cases in which either party has the right to a trial by jury, there can be no appeal, but either party, after final judgment, by giving notice of his demand, and entering into an undertaking, as required by the statute, is entitled to a second trial. If no undertaking is given, the demand for a second trial and notice of the appeal go for nothing; and the

judgment or decree is conclusive upon the rights of the parties. Such, also, is the effect of judgment or decree from the time of its rendition to the giving of the undertaking. And notwithstanding the appeal or the right to a second trial may be perfected, the lien of the judgment or decree is continued until the termination of the cause on appeal or second trial.

"It is competent for the legislature to take away the right of appeal and of a second trial. If this were done there would be no ground for the removal of the cause under the act of Congress.

"The true construction of the act does not, we think, thus make its operation depend upon whether the legislation of the State allows or does not allow the exercise of appellate jurisdiction after a common law trial, or the final hearing of a suit in equity in the court of original jurisdiction.

"To bring this case within the act of Congress would be to allow the non-resident party to experiment with the jurisdiction of the State courts. If the trial should result in his favor, it would bind his adversary, but if it should result adversely to him, he could escape the effect of the litigation by removing the cause to another jurisdiction. To lead us to such a conclusion, 'the intention ought to be expressed with irresistible clearness.'

"The conclusion at which we have arrived in this case is in accordance with the decision of the Supreme Court of Wisconsin in Akerly vs. Vilas, 24 Wisconsin, 165. The judgment of the court in that case was pronounced by Paine, J., in an able opinion, to which we refer for a more elaborate discussion of the question."

A second trial, contested by the company upon both law and merits, was then had in the Common Pleas, resulting as before in a verdict and judgment for the plaintiff, which judgment the District Court, after hearing upon petition in error, affirmed.

Upon petition averring these facts, a writ of error was granted by one of the justices of this court, to the said District Court, directing the records and proceedings in the cause to be certified to this court, which was accordingly done, and the plaintiff in error, the insurance company, sought herein to reverse the order of the said District Court, asserting that the decision called in question the construction of the statute of 1867, of the United States, and was against the right and privilege set up by the defendant, the now plaintiff in error, thereunder.

The errors complained of were—

1. The reversal by the District Court of the order of removal.

2. The subsequent judgment in the Court of Common Pleas, after the jurisdiction of that court had been ousted by the removal.

3. The affirmance of the said judgment by the District Court.

Mr. H. A. Morill, with whom were Messrs. George Hoadly and E. M. Johnson, *for Plaintiff in Error.*

Mr. W. H. Standish, *contra.*

Swayne, J.

It is insisted that the company, by appearing and contesting the claim in the second trial, waived the question of jurisdiction, and was bound by the judgment. To this there are several answers.

The company resisted the reversal of the order of removal made by the Common Pleas, and did all in its power to that end. Having failed, and being forced into a trial, it lost none of its rights by defending against the action.

The case was out of the Common Pleas and in the Circuit Court. The former had jurisdiction to remit and the latter to receive it. Being in the latter, that court had jurisdiction to retain it. If there were error on the part of the Circuit Court in overruling the motion to dismiss, because the case had been improperly brought there, the remedy should have been sought in the federal courts. The State courts were incompetent to give it. The authority of the latter was at an end until the case should be restored, if that were ever done, by the action of the former. Nothing is lost to the State courts by application of this rule, for if they refuse improperly to permit a case to be removed, their refusal is liable to be reviewed and reversed by the federal tribunals, and the power of paramount and final judgment rests with them. Gordon vs. Longest, 16 Peters, 97. The same rule of exclusion applies in favor of a State or federal court which first gets possession of a case over which both have jurisdiction. Hagan vs. Lucas, 10 Peters, 400; Taylor vs. Carryl, 20 Howard, 583. The conditions prescribed having been complied with, the act of Congress expressly required the State court where it was pending "to proceed no further in the suit."

The further proceedings of the Common Pleas was a clear case of usurped jurisdiction. The illegality was gross. The action of the District and Supreme Courts of the State gave them no validity. The maxim, that consent cannot give jurisdiction, applied with full force. Gordon vs. Longest, 16 Peters, 97. See also Stevens & Dwight vs. Phœnix Ins. Co., 41 New York, 149; Kanouse vs. Martin, 14 How.

23; Same vs. Same, 15 ib., 198. Hadley et al. vs. Dunlap et al., 10 Ohio State, 1, is exactly in point and conclusive.

This brings us to the cardinal inquiry in the case. It is maintained by the counsel for the administratrix that the order of removal by the Common Pleas was erroneously made, the first verdict and judgment being "final," within the meaning of the act of Congress and the laws of Ohio. If the point be well taken, the judgment must be affirmed; otherwise it must be reversed.

It is not denied that the requirements of the act of Congress were fully complied with. No question is raised upon that subject. The proposition involves the construction and effect of the act, and of the laws of Ohio under which the transfer was made. The act declares that the petition may be filed "at any time before the final hearing or trial of the suit." It is contended that the qualifying adjective "final" applies to the term "hearing," and not to "trial," and that any trial, whether final or not, is conclusive against the petitioner. This is too narrow a view. It is contrary to the grammatical construction and the obvious import of the words. The repetition of "final" before "trial" would have been tautology. To produce such a result as that contended for, the indefinite article should have been placed before the word "trial," so that the language would have been: "before the final hearing or a trial." This would doubtless have been done if such had been the intent of the act. The statute is remedial, and must be construed liberally. There is no reason for interpolating this limitation. The adjective must be taken distributively, and applied as well to the second as to the first term, and to both alike. The test is whether the hearing or the trial is the final one in the cause. It would be a strange anomaly if in equity and admiralty cases a final hearing only, could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action at law. This would be in conflict alike with the letter, the spirit, and the meaning of the act, and would largely defeat the purpose of its enactment. It was intended to permit the removal at any time before a hearing or trial final in the cause, as it stood when the application for the transfer was made.

The proposition that the first judgment of the Common Pleas was final within the meaning of the laws of Ohio, cannot be maintained. To say that there can be two final judgments upon the same pleadings, in the same cause, in the same court, and for exactly the same things, as the results of two successive trials, involves a solecism. If

the first judgment was not final, the first trial could not have been so. When the demand for a new trial was made, and the requisite bond was given and approved, the case stood upon the docket in all respects as if a new trial had been granted for some error or defect in the former trial, irrespective of the laws in question, and as if no previous trial had taken place. It is true that the lien of the judgment was preserved, but that was an incident remaining after the principal thing had been put an end to. It was, like the bond, for the security of the plaintiff, and for no other purpose. The former affects the question of the finality of the first trial no more than the latter. The law of Ohio declares that the bond shall be "conditioned to the effect that the party obtaining such second trial shall abide and perform the order and judgment of the court, and pay all money, costs and damages which may be awarded against him, consequent upon such second trial." The proceeding is thus designated and regarded as a "second trial." The judgment following, unless reversed or set aside, is the one to be satisfied, and it must necessarily be final and the only final one. The same remarks as to finality apply to the trial which preceded it.

In the act of Congress of 1866, 14 Stat. at Large, 307, the language used in this connection is, "at any time before the trial or final hearing." If the difference in the act of 1867 be material, it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act, and to make the latter more comprehensive.

The fact that, under our construction, a case which has made progress, however far if it has not passed the final trial, is liable to be removed, has little weight as an adverse argument. Under the judiciary act of 1789, cases that have reached their termination in the highest courts of the States, may be brought here by writ of error for review, and the practice in conformity to that section has been constant from the organization of this court down to the present time. If the act be unwise, the remedy lies with the legislature and the judicial department of the government.

Of the constitutionality of this act we entertain no doubt. The question is not an open one in this court. A few remarks will be sufficient to dispose of the subject. The third section of the Constitution declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish, and that it shall extend, among other things, to controversies "between citizens of different States."

As regards the inferior courts authorized to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised, is not declared. The whole subject is remitted to the unfettered discretion of Congress. It may be applied to any other inferior federal court, and to any State court where a case is presented which by reason of the character of the parties, or a question involved, falls within the scope of such judicial cognizance. Courts of the States and those of the nation are alike within its sphere, and its exercise may be authorized before or after judgment in the tribunals over which it is extended.

This act is confined to controversies between citizens of different States, and the power given to the Circuit Court is appellate. The jurisdiction involves the same principle and rests upon the same foundation with that conferred by the twenty-fifth section of the judiciary act of 1789. The constitutionality of that provision has been uniformly sustained by the unanimous judgment of this court, whenever the subject has been presented for adjudication. The twelfth section of the act of 1789, and the third section of the act of the 2nd of March, 1833, relating to revenue officers, present the same question. We are not aware that a doubt of the validity of either has ever been expressed by any federal court. The acquiescence is now universal. The subject was elaborately examined in Martin vs. Hunter, 1 Wheaton, 333; see also The Mayor vs. Cooper, 6 Wall., 247.

The seventh amendment in the Constitution, touching the re-examination in the courts of the United States of facts which have been tried by a jury, has no application to this case, because the first judgment had been vacated, the first verdict set aside, and a new trial granted, as before stated, when the cause was removed to the Circuit Court.

The judgment of affirmance by the District Court, and the judgment affirmed, are reversed, and the District Court and the Court of Common Pleas will be directed to proceed no further in the suit.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

In Error to the Supreme Court of the State of Wisconsin.

THE HOME INS. CO. OF NEW YORK, *Plaintiff in Error,*

vs.

JOHN F. MORSE AND CHARLES C. PAIGE.

The Constitution of the United States secures to citizens of another State than that in which suit is brought, an absolute right to remove their cases into the federal courts upon compliance with the terms of the act of 1789.

A corporation is a citizen of the State creating it within the clause of the Constitution extending the jurisdiction of the federal courts to citizens of different States.

The statute of Wisconsin which enacts that a corporation organized in another State shall not transact business within its limits, unless it stipulates in advance that it will not remove into the federal courts any suits which may be commenced against it by a citizen of Wisconsin, is an obstruction to this right, and is illegal and void.

Such an agreement derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed.

HUNT, J.

This action was commenced in the Circuit Court of Winnebago County, Wisconsin, to recover the amount alleged to be due upon a policy of insurance issued by the plaintiffs in error to the defendants in error upon the steamboat "Diamond." The Home Insurance Company is a corporation organized under the laws of the State of New York, and having its office and principal place of business in the city of New York.

The company entered its appearance in the Winnebago County suit, and filed its petition to remove the cause to the United States Circuit Court for the Eastern District of Wisconsin. The petition was in the form required by the 12th section of the act of 1789, and

was accompanied by a bond with sufficient bail, as required by that act.

The Circuit Court of Winnebago County refused to grant the prayer for removal, but proceeded to the trial of the cause. A verdict was rendered against the company, judgment entered thereon, and upon an appeal to the Supreme Court of Wisconsin, the same was affirmed. The insurance company now bring a writ of error to this court.

The case of the "Montello" was argued at the same time with the present; both cases, as it was understood, involving the question whether the Fox River was a navigable water of the United States. The decision of that question is not essential to the judgment to be rendered in the present case.

The refusal of the State Court of Wisconsin to allow the removal of the case into the United States Circuit Court of Wisconsin, and its justification under the agreement of the company and the statute of Wisconsin, form the subject of consideration in the present suit.

The statute of Wisconsin in question was passed in the year 1870, and therein it is declared, that "It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or of any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar corporations formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." Laws of 1870, chap. 56, sec. 22, p. 87; or 1 Taylor's Statutes, p. 958, sec. 22.

Desiring to do business in the State of Wisconsin, and in compliance with the provisions of this statute, the Home Insurance Company of New York, on the first day of July, 1870, filed in the office of the Secretary of State of Wisconsin an appointment of Henry S. Durand as their agent in that State, on whom process might be served. The power of attorney thus filed contained this clause: "And said company agrees that suits commenced in the State courts of Wiscon-

sin shall not be removed by the acts of said company into the United States Circuit or federal courts."

The State courts of Wisconsin held that this statute and the agreement under it justified a denial of the petition to remove the case into the United States Court. The insurance company deny this proposition, and this is the point presented for consideration.

Is the agreement thus made by the insurance company one that, without reference to the statute, would bind the party making it?

Should a citizen of the State of New York enter into an agreement with the State of Wisconsin, that in no event would he resort to the courts of that State, or to the federal tribunals within it, to protect his rights of property, it could not be successfully contended that such an agreement would be valid.

Should a citizen of New York enter into an agreement with the State of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that State, or the federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the State. There is no sound principle upon which such agreements can be specifically enforced.

We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi's Case, 18 N. Y. R., 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned, the following cases are cited: Nutt vs. Ham.

Ins. Co., 6 Gray, 174; Cobb vs. New England M. Ins. Co., 6 Gray, 192; Hobbs vs. Manhattan Ins. Co., 56 Maine, 421; Stephenson vs. P. F. & M. Ins. Co., 54 Maine, 70; Scott vs. Avery, 5 House of Lords Cases, 811. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

In Scott vs. Avery, (*supra*,) the lord chancellor says: "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago—Kill vs. Hollester, 1 Wils., 129. That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration. Then, after a lapse of half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported. But in the time of Lord Kenyon occurred the case, which is considered the leading case on the subject, of Thompson vs. Charnock, 8 T. R., 139. That was an action upon a charter-party, in which it was stipulated that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action brought upon breach of the contract, with an averment that the defendant was, and always had been, ready to refer the same to arbitration. This was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." Upon this doctrine all the judges who delivered opinions in the House of Lords were agreed.

And the principle Mr. Justice Story, in his Commentaries on Equity Jurisprudence, § 670, says is applicable in courts of equity as well as in courts of law. "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced.

In Stevenson vs. P. F. & M. C. Ins. Co., 54 Maine, 70, the court

say: "While parties may impose as conditions precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest the courts of their established jurisdictions; as conditions precedent to an appeal to the courts they are void." Many cases are cited in support of the rule thus laid down. Upon its own merits this agreement cannot be sustained.

Does the agreement in question gain validity from the statute of Wisconsin, which has been quoted? Is the statute of the State of Wisconsin, which enacts that a corporation organized in another State shall not transact business within its limits unless it stipulates in advance that it will not remove into the federal courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute in respect to such requisition, under the Constitution of the United States?

The Constitution of the United States declares that the judicial power of the United States shall extend to all cases of law and equity arising under that Constitution, the laws of the United States, and to the treaties made, or which shall be made, under their authority, * * * to controversies between a State and citizens of another State, and between citizens of different States. (Art. 3, § 2.)

The jurisdiction of the federal courts, under this clause of the Constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. This has been held many times. Whelter vs. Railway Co., 13 Wall., 286; Payne vs. Cork, 7 Wall., 437; More vs. Taylor, 4 Wall., 411, and cases cited.

It has been held many times that a corporation is a citizen of the State by which it is created, and in which its principal place of business is situated, so far as that it can sue and be sued in the federal courts. This court has repeatedly held that a corporation was a citizen of the State creating it, within the clause of the Constitution extending the jurisdiction of the federal courts to citizens of different States. Express Co. vs. Kountze, 8 Wall., 342; Combes vs. Mercer

Co., 7 Wall., 118; Whelter vs. Railway, 13 Wall., 275; Wheeler vs. O. & M. R. Co., 1 Black., 286.

The 12th section of the judiciary act of 1789 provides that if a suit be commenced in any State court by a citizen of the State in which the suit is commenced against a citizen of another State, where the matter in dispute exceeds $500, and the defendant at the time of entering his appearance shall file a petition for the removal of the cause for trial into the next Circuit Court of the United States, and shall offer good bail for his proceedings therein, "it shall be the duty of the State court to accept such security and proceed no farther in the case."

This applies to all the citizens of another State, whether corporations, partnerships, or individuals. It confers an unqualified and unrestrained right to have the case referred to the federal courts upon giving the security required. In the case recently decided in this court, of The Home Life Insurance Company vs. Dunn, Ins. Law Journal, *ante*, p. 57, it was held that no power of action thereafter remained to the State Court, and that every question, necessarily including that of its own jurisdiction, must be decided in the federal court.

The statute of Wisconsin, however, provides as to a certain class of citizens of other States, to wit, foreign corporations, that they shall not exercise that right, and prohibits them from transacting their business within that State, unless they first enter into an agreement in writing that they will not claim or exercise that right.

The Home Insurance Company is a citizen of New York, within this provision of the Constitution. As such citizen of another State, it sought to exercise this right to remove to a federal tribunal a suit commenced against itself in the State court of Wisconsin, where the amount involved exceeded the sum of $500. This right was denied to it by the State court on the ground that it had made the agreement referred to, and that the statute of the State authorized and required the making of the agreement.

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the law as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to those of a corporation.

The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitu-

tion of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect.

We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State. These questions have been before the court in other cases, but they do not arise here. In Paul vs. Virginia, 8 Wall., 168, Mr. Justice Field used language, in speaking of corporations, which has been supposed to sustain the statute in question. "Having [he says] no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

So in the Bank of Augusta vs. Earle, 13 Peters, 519, the language of Chief Justice Taney has been invoked for the same purpose.

In each of these cases the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms which are to be understood only with reference to the facts in hand. Thus, the case in which the opinion was delivered by Mr. Justice Field was one involving the construction of that clause of the United States Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and of that clause regulating commerce among the States, not of the one now before us. It involved the question whether the State might require a foreign insurance company to take a license for the transaction of its business, giving security for the payment of its debts, and decided that taking insurance risks was not a transaction of commerce within the meaning of the two clauses of the Constitution cited. It had no reference to the clause giving to citizens of other States the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the State to limit and restrict such resort.

It was not intended to impair the force of the language used by Mr. Justice Curtis in the La Fayette Ins. Co. vs. French, 18 How., 407, where he says, "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet., 519. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." Nearly the same language is used by Mr. Justice Nelson in Ducat vs. The City of Chicago, 10 Wall., 400.

None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others.

The case of the Bank of Columbia vs. Okely, 4 Wheat. R., 235, is relied upon by the court below to sustain the statute and the agreement in question. In that case it was provided in the 14th section of the charter of the bank that whenever a borrower of the bank should make his note by an agreement in writing negotiable at the bank, and neglected its payment when due, the president of the bank should cause a demand in writing to be served upon the delinquent, and if the money was not paid within ten days after such demand it was made lawful for the bank to present to the county clerk the note so unpaid, with proof of the demand, and to require him to issue an execution or attachment against the debtor. Before such execution could issue the bank was required to file an affidavit of the amount due on the note. "If the defendant shall dispute the whole or any part of the debt [the statute adds] on the return of the execution, the court shall order an issue to be joined and a trial to be had, and shall make such other proceedings that justice may be done in the speediest manner." This statute was sustained in the case cited. Mr. Key, for the plaintiff, argued in its support on the theory that the whole effect of the provision was to authorize the commencement of a suit by attachment instead of the usual common-law process. Mr. Jones, *contra*, contended that it was in violation of the provision of the Constitution of Maryland and of the United States securing to parties the right of trial by jury when the value in controversy exceeded twenty dollars.

In rendering the decision the court say: "This court would ponder long before it would sustain this action if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. * * * If the defendant does not avail himself of the right given to him of having an issue made up and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim."

We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

On this branch of the case the conclusion is this:

1. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the act of 1789.

2. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3. The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago County Court erred in proceeding in the case after the filing of the petition and the giving the security required by the act of 1789, and that all subsequent proceedings in the State court are illegal, and should be vacated. The judgment in that court, and the judgment in the Supreme Court of Wisconsin, should be reversed and the prayer of the petition for removal should be granted, and it is ordered accordingly.

WAITE, CH. J., *dissenting.*

I cannot concur in the judgment which has just been announced. A State has the right to exclude foreign insurance companies from the transaction of business within its jurisdiction. Such is the settled law in this court. Paul vs. Virginia, 8 Wall., 181; Ducat vs. Chicago, 10 Wall., 410; Bank of Augusta vs. Earle, 13 Peters, 586. The right to impose conditions upon admission follows as a necessary consequence, from the right to exclude altogether. The State of Wisconsin has made it a condition of admission that the company shall submit to be sued in the courts she has provided for the settlement of the rights of her own citizens. That is no more

than saying that the foreign company must, for the purposes of all litigation growing out of the business transacted there, renounce its foreign citizenship, and become *pro tanto* a citizen of that State. There is no hardship in this, for it imposes no greater burden than rests upon home companies and home insurers.

This insurance company accepted this condition and was thus enabled to make the contract sued upon. Having received the benefits of the renunciation, the revocation comes too late.

The State court had jurisdiction to try the question of citizenship upon the petition to transfer. Upon the facts I think it was authorized to find that the company was, for all the purposes of that action, a citizen of Wisconsin.

DAVIS, J.—I concur in this dissent.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MARCH TERM, 1874.

WILLIAM J. FLYNN
vs.
NORTH AMERICA LIFE INS. CO.

The application for insurance on the life of R. was signed R. for F. Premiums were paid by F., and subsequently a part of them were repaid by R.
Held, that F. could not maintain an action on the policy in his own name.

A. A. RANNEY, *for Plaintiff.*
R. D. SMITH, *for Defendant.*

GRAY, C. J.

This action is brought by William J. Flynn upon a policy of insurance on the life of Garrett Royle, his father-in-law. The application states and the policy shows that the insurance was obtained for the benefit of Flynn, and the application was signed "Garrett Royle, for

William J. Flynn." The original premium was paid by Flynn for Royle, and a receipt therefor given by the insurance company to Flynn, in his own name. The annual premiums were paid by Flynn. Part only of the first premium and none of the subsequent ones were repaid to him by Royle. By the policy, the insurers promise and agree to pay the sum insured to Flynn and his representatives. But the promise and agreement is expressed to be made to and with Royle and his representatives; and the policy is under seal. Royle, and not Flynn, is the covenantee. It is well settled that upon an agreement under seal, none but a party to it can maintain an action at law. Sanders vs. Filley, 12 Pick., 554; Johnson vs. Foster, 12 Met., 167; Millard vs. Baldwin, 3 Gray, 484; Northampton vs. Elwell, 4 Gray, 81; Dicey on Parties, 101. Whatever, therefore, might have been Flynn's right of action if the agreement sued on had been a simple contract, there was no sufficient privity between him and the defendants to maintain an action in his name upon this policy, and it is unnecessary to consider the other grounds of defense.

Judgment for the defendants.

CASES DECIDED IN THE LOWER COURTS.

LAPSED POLICIES—DIVIDENDS.

Baltimore City Court—On Appeal—May Term, 1874.

ALLEN E. FORRESTER

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

The plaintiff in this action was insured by two policies, one dated April 15th, 1871, and the other March 29th, 1872, on each of which only the first premium was paid. On the anniversary of each a dividend was declared, amounting on the former policy to $41.84, and on the latter to $43.03, which could be used at the option of the insured, either in reduction of the premium or in the purchase of additional insurance, payable with the policy. The plaintiff did not exercise his option, but allowed both policies to lapse. He then brought suit against the company to recover the amount of the dividends.

At the trial of the case the plaintiff offered in evidence two policies of insurance on his own life, in favor of himself and his executors, one dated the 15th of April, 1871, the amount of premium on which was $156.50, and the other dated the 29th March, 1872, the premium on which was $162.35. Only the first premium was paid on them, so that they both lapsed at the expiration of one year from date. The dividends offered on the first policy were, in 1872, cash $29.92; reversion $73.22; extra, cash $11.92; reversion $29.18. On the second policy, in 1873, cash $43.03; reversion $103.18.

The plaintiff claimed the cash dividends notwithstanding the policies lapsed, and offered in evidence a "statement" made by the company.

To this the defendant's counsel objected, because on cross-examination it appeared that the plaintiff had torn off the last printed line at the bottom, which read, "of which the value in additional insurance, payable with original policy, is" * * *

The plaintiff argued that the words "over-payment," as used in

the statement of dividends, showed that the company had been overpaid, and the words "cash credit" also showed that the company had cash to his credit.

Defendant offered in evidence a form of the statement which plaintiff had received, as it read before mutilation, showing the line which had been torn off, as above mentioned. Counsel also read from the policy the words, "In every case where this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to the company," and argued that the dividends, not being used to pay premiums, were forfeited. He further read from the pamphlets, showing rates, rules, etc., issued by the company. Under the head of "Dividends and their Uses" he read, "If a cash dividend, available upon the anniversary of a policy, is not used in part payment of the premium then falling due, the company (in the insured's interest) places to the credit of the policy such an amount of additional insurance as the cash dividend will purchase, and this additional insurance is at any time thereafter reconvertible into a certain cash amount, which may be applied toward the payment of any premium falling due." * * * "The only other use to which dividends may be applied is by deducting them from the premiums from year to year, which of course ends the benefit at once and forever." Counsel argued that the two uses named were the only ones to which dividends could be applied; that under the terms of the contract the payments by the insured were to continue for life, and it was in contemplation only of the fulfillment of this agreement that the dividends were calculated; that any other view would disturb the basis of the calculations, and pervert the whole contract; and that the company could not be called upon to refund money upon a broken contract.

The court, Judge PINKNEY, (sitting by special assignment in the Baltimore City Court,) affirmed the judgment of Justice McCaffrey for defendant, saying simply, "The plaintiff was clearly not entitled to recover."

THE

INSURANCE LAW JOURNAL.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 8. LIFE.—*Not always Agent of Company.*—The rule that in writing answers to interrogatories in the application the agent is to be regarded as the agent of the company rather than of the insured, is not inflexible, nor does it apply to all cases.

Peck et al. vs. New London Mut. Ins. Co., 22 Conn., 575; Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 517; Malleable Iron Works vs. Phœnix Ins. Co., 25 Conn., 465; Beale vs. Hartford Co. M. F. Ins. Co., 25 Conn., 511; Hough vs. City Fire Ins. Co., 29 Conn., 10.

Ryan vs. World Mutual Life Ins. Co..

Rep'd Jour'l, p. 97. CONN. S. C. E.

§ 9. FIRE.—*Must State the Truth in the Application.*—The agent who fills up the blanks or makes out the written application, is still the agent of the insurers and not of the insured. If any facts are fully disclosed to him, and he fails to state them in the application, it would be contrary to all sound principles to allow the defendants to take advantage of their own wrong.

Ins. Co. vs. Wilkinson, 13 Wallace, 222.

Cheek et al. vs. Columbia Ins. Co. et al.

Rep'd Jour'l, p. 99. TENN. S. C.

APPLICATION.

§ 10. FIRE.—*Omission of Material Facts.—Held,* that an omission of some fact, though not specially inquired about, does not avoid a policy, unless that fact is a material one, and a failure to disclose would be fatal to the policy. But if the facts not disclosed are material, the policy is voided.

2 Bennett's Ins. Cases, 279; 5 Hill, N.J., 188; Flanders on Ins., 293.

Cheek et al. vs. Columbia Ins. Co. et al.

—§ 9.

ARBITRATION.

§ 11. LIFE.—*Force of Agreement.*—A person obtaining a policy of life insurance may agree with the company to such terms and conditions as they mutually consent to in their contracts, and they may constitute any one an arbitrator to determine whether the conditions have been complied with, and his decision will be final.

Campbell vs. American Popular Life Ins. Co.

Rep'd Jour'l, p. 106. D. C. S. C.

CHANGE OF POLICY.

§ 12. FIRE.—*Change without Consent of Policy-holder.*—The policy was originally made to the plaintiff by the defendant through an insurance agent, P. Afterward P. returned the policy to the defendant with a request to make it payable to K., the mortgagee. It was claimed that this change was made with-

out authority of the plaintiff, that the policy came into the possession of K. by mistake, and that after K. had retained the policy seven months, and the premises had been destroyed by fire, then for the first time plaintiff knew of the change in the policy. *Held*, that the question should have been submitted to the jury whether there had been any authority or consent by the plaintiff for the change in the policy, and also whether the retention of the new policy by K. for seven months did not have some tendency to show that the plaintiff consented to the alleged new arrangement. *Held*, that as a matter of law the retention of the policy by K. did not constitute an acceptance on the part of the plaintiff of the alleged cancellation.

Bennett vs. City Fire Ins. Co.

Rep'd Jour'l, p. 109. MASS. S. J. C.

CONDITIONS.

§ 13. LIFE.—*Non-performance of, when Excusable.*—The policy contained a condition that the insurance money was not to be paid if, in the opinion of the surgeon-in-chief, the insured died by intemperance, or by any disease caused or induced by it. *Held*, that this was a valid condition, and that the plaintiff waived any supposed partiality which might be supposed to be in the surgeon-in-chief, owing to his employment by the company, unless the non-performance of this condition could be satisfactorily accounted for. *Held*, that the fact that the surgeon-in-chief was a stockholder in the company, that his dividends would be affected by the payment of claims, which fact was unknown to the plaintiff at the time of issuing the policy, is a sufficient cause for the non-performance of the condition.

Campbell vs. American Popular Life Ins. Co.

—§ 11.

CONSTRUCTION.

§ 14. FIRE.—*Alteration of Building.*—Insurance was effected on a stock of goods "contained in the frame building known as," etc. When the policy was issued, plaintiff occupied one of the three stores in the building, but subsequently, by removing par-

titions and opening doors, the three stores were made into one, and occupied by him. *Held*, that the policy covered the entire goods of the three stores, and not merely the amount in the store he originally occupied.

West vs. Old Colony Ins. Co., 9 Allen, 316.

Farr vs. Manhattan Ins. Co.

Rep'd Journ'l, p. 114. Mass. S. J. C.

CORPORATION.

§ 15. FIRE.—*Right to remove Cases from the State to the Federal Courts.*—By the statute of Wisconsin passed in 1870, it was declared that "it shall not be lawful for any fire insurance company, association or partnership incorporated by or organized under the laws of any other State of the United States, or of any foreign government, * * * to take risks, or transact any business of insurance in this State, unless * * * it shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court, or Federal courts." *Held*, that any agreement which a citizen of one State may enter into with another State, that in no event will he resort to the courts of that State, or to the Federal tribunals in it, to protect his rights of property, is invalid, and cannot be specifically enforced. Although he may agree in particular instances to submit to arbitration, or to the decision of a single judge, yet he cannot bind himself in advance by an agreement which may be specifically enforced, to forfeit his rights at all times and on all occasions whenever the case may be presented. *Held*, that a compliance with the judiciary law of 1789 enables all citizens of other States in which their cases are brought to remove them from the State courts to the Federal courts, and this applies to all citizens of another State, whether they are corporations, partnerships or individuals. *Held*, that the statute of Wisconsin denying the right of citizens of other States to remove their causes from the State to the Federal courts is repugnant to the Constitution of the United States, and is illegal and void.

Cancemi's Case, 18 N. Y. R., 128; Nutt vs. Ham. Ins. Co., 6 Gray, 174; Cobb vs. New England M. Ins. Co., 6 Gray, 192; Hobbs vs. Manhattan Ins. Co., 56 Maine, 421; Stephenson vs. P. F. & M. Ins. Co., 54 Maine, 70; Scott vs. Avery, 5 House of Lords Cases, 811; Kill vs. Hollister, 1 Wils., 129; Thompson vs. Charnock, 8 T. R., 139; Story on Equity Jurisprudence, § 670; Constitution U. S., Art. 3, § 2; Lafayette Ins. Co. vs. French, 18 How., 407; Ducat vs. City of Chicago, 10 Wall., 400; Bank of Columbia vs. Okely, 4 Wheat., 235.

Home Ins. Co. vs. Morse et al.

Rep'd Jour'l, p. 68. U. S. S. C.

§ 16. FIRE.—*Corporation—Citizenship of.*—A corporation is a citizen of the State creating it, within the clause of the Constitution extending the jurisdiction of the Federal courts to the citizens of the different States. It has the same right to the protection of the law as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

Whelter vs. Railway Co., 13 Wall., 286; Payne vs. Cork, 7 Wall., 437; More vs. Taylor, 4 Wall., 411, and cases cited; Express Co. vs. Kountze, 8 Wall., 342; Combes vs. Mercer Co., 7 Wall., 118; Wheeler vs. O. & M. R. Co., 1 Black., 286; Paul vs. Virginia, 8 Wall., 168; Bank of Augusta vs. Earle, 13 Peters, 519.

Home Ins. Co. vs. Morse et al.

—§ 15.

DESCRIPTION.

§ 17. FIRE.—*Effect of Error in.*—A threshing machine was described in the application, first as on Sec. 36, T. 23, R. 28; and again as "stored in barn on section 36, T. 23, R. 28." In the policy it is described as "threshing machine, Sec. 36, T. 23, R. 38," reference being made to the application for more particular description. No tract in the State answered either description. The machine was burned fifteen or twenty rods from the barn, on Sec. 36, T. 33, R. 28.

Held, that the case was one of repugnant calls, and the reference to the barn controls, on the principle that that description must be adhered to about which there is the least likelihood of

mistake. The misdescription was one of inadvertence, and not a misrepresentation material to the risk.

Miller vs. Terry, 3 Jones, Eq., 29; Yonkers and N. Y. F. Ins. Co. vs. Hoffman F. Ins. Co., 6 Robertson, (Sup. Ct.) 316; 2 Wash., R. I., (2nd ed.,) 631.

Held, that the reference to the section, town and range, and the phrase "stored in barn," in the application were merely descriptive, and not a stipulation that the location should remain unchanged, nor a condition that if changed the insurance should cease or be suspended.

Smith vs. Mech. & Trader's Ins. Co., 32 N. Y., 399; Blood vs. Howard F. Ins. Co., 12 Cush., 472; Flanders on Fire Ins., 241, 255, 269, 485.

Everett vs. Continental Ins. Co.

Rep'd Jour'l, p. 121. MINN. S. C.

ESTOPPEL.

§ 18. MARINE.—*Reformation of Contract in Equity.*—Plaintiff brought a bill in equity to reform a contract of marine insurance by striking out certain articles alleged to have been left standing against the express agreement of the parties, and without his knowledge, or that of his agent. *Held*, that the plaintiff, having brought an action in the court of law upon the policy in its original form to recover the amount of insurance named therein, had conclusively elected to consider it as expressing the true contract between himself and the company, and to abandon any attempt to have it reformed in equity.

Sanger vs. Wood, 3 John., Ch., 46.

Washburn vs. Great Western Ins. Co.

Rep'd Jour'l, p. 112. MASS. S. J. C.

FRAUD.

§ 19. LIFE.—*By Local Agent and Insured—Collusion between.*—The policy contained the condition that the statements made in the application should be true, that the application should be made a part of the policy; the plaintiff's answers are warranties, and if the answers are not true she cannot recover, unless there has been a waiver by the defendants. Upon trial plaintiff

offered to prove that certain answers were wrongly written by the local agent, without her knowledge or that of her husband, the insured. *Held*, that this was merely an attempt to substitute for a part of a written contract a parol contract different from the one declared on. Where the agent of the defendant well knew that if incorrect or untrue answers were given in the application, the policy would not issue, *Held*, that the court will not hold the principal responsible for an act which could not possibly have been contemplated as being within the scope of the agency. In cases where the acts of the agent have been regarded as acts of the principal, the act has been the natural and probable result of the relations existing between the parties, but this does not include a power conferred by the defendants on the agent to enable him to commit a fraud upon themselves. Where the agent is apparently acting for his principal, but in reality acting for himself or others against the principal, there the agency between him and the principal ceases. *Held*, that the rule that where one of two innocent persons must suffer by fraud, negligence, or unauthorized act of a third, that he who clothed the third with power must be the one, does not apply when the fraud could not have been perpetrated by the agent alone, but must have been with the assistance of the plaintiff or insured as accomplice or instrument.

Ryan vs. World Mut. Life Ins. Co.

—§ 8.

JURISDICTION.

§ 20. LIFE.—*Appellate Jurisdiction of Federal Courts.*—"*Final Trial, or Hearing.*"—Judgment was obtained in the Court of Common Pleas for Hamilton County, Ohio, against the defendant, a motion for a new trial was denied, and then, under the laws of the State, a second trial was admissible on its merits. While this trial was pending, a motion was granted in the Court of Common Pleas to remove the case to the United States Circuit Court. The District Court of the county reversed the order of the Court of Common Pleas, and this reversal was affirmed in the Supreme Court of the State of Ohio. Upon a petition averring these facts, a writ of error was granted by one of the justices of the Supreme Court of the United States, directing

the records and proceedings to be certified to that court. On a hearing of the case it was *Held*, that the remedy for errors in the Circuit Court of the United States should be sought in the Federal, not in the State Courts; that after a transfer had been made to the Federal courts, all further proceedings in the State courts were illegal. *Held*, that in that portion of the act which declares that the petition may be filed "at any time before the final hearing or trial of the suit," the word "final" applies to the words "hearing" and "trial," and that the law was intended to permit the removal at any time before a hearing or a trial final in the case as it stood when the application for the transfer was made. *Held*, that jurisdiction of the Federal courts is appellate under the judiciary act of 1789, and cases which have reached their termination in the higher courts of the State may be brought to the Supreme Court of the United States by a writ of error for review.

Gordon vs. Longest, 16 Peters. 97; Hagan vs. Lucas, 10 ib., 400; Taylor vs. Carryl, 20 Howard, 583; Stevens & Dwight vs. Phenix Ins. Co., 41 N. Y., 149; Kanouse vs. Martin, 14 Howard, 23; Same vs. Same, 15 ib., 198; Hadley et al. vs. Dunlap et al., 10 Ohio State, 1; Martin vs. Hunter, 1 Wheaton, 333; The Mayor vs. Cooper, 6 Wallace, 247.

Home Life Ins. Co. vs. Dunn.

Rep'd Jour'l, p. 57. U. S. S. C.

LIMITATION CLAUSE.

§ 21. FIRE.—*Commencement of Claim, Commencement of Limitation—Forfeiture of Vested Rights.*—The policy contained a clause providing that the loss should be paid within sixty days after due notice and satisfactory proof. *Held*, that no claim arises or accrues on the mere happening of the loss. Notice and proofs of loss are conditions precedent.

By another condition, "no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained by any court of law or chancery, unless commenced within the term of one year next after any claim shall occur, and in case such suit or action shall be commenced against the company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive against the validity of the

claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding." *Held*, that the second branch, requiring action to be brought within a year after the time of loss, is inconsistent with the first. The language is that of the company, and the latter must be held responsible for the ambiguity. The words must be construed most strongly against the party using them. Policies ought to be absolutely free from ambiguity, and so framed that "he who runs may read." It is a condition subsequent, involving a forfeiture of vested rights in a much briefer time than allowed by the statute of limitations, and though valid must be construed strictly against the company and liberally in favor of the assured. A defense founded on the breach of such a condition is *stricti juris*, and requires that the intention of the insured to stipulate away his claim be clearly shown. An action brought within a year after proofs of loss were furnished is valid, though more than a year had elapsed since the loss. The time of limitation begins when the proofs of loss are furnished, or at least sixty days thereafter.

Anderson vs. Fitzgerald, 4 H. of L. Cases, 510; Blackett vs. Ass. Co., 2 Crompt. & Jer., 251; Notman vs. Anchor Ass. Co., 4 C. B., (N. S.) 481; Fitton vs. Accidental Death Ins. Co., 1 Best & Smith, 799; Fowkes vs. Ass. Ass'n, 3 ib., 925; Catlin vs. Springfield Fire Ins. Co., 1 Sumner, 440; Palmer vs. Warren Ins. Co., 1 Story, 364, 369; Bartlett vs. Union M. F. Ins. Co., 46 Me., 502; Wilson vs. Conway F. Ins. Co., 4 R. I., 156; Wilson vs. Hampden F. Ins. Co., 4 ib., 166; Hoffman vs. Ætna Ins. Co., 32 N. Y., 413; Reynolds vs. Commerce F. Ins. Co., 47 N. Y., 604; N. Y. Belting Co. vs. Washington F. Ins. Co., 10 Bosw., 435; Merrick vs. Germania F. Ins. Co., 54 Penn., 284; Western Ins. Co. vs. Cropper, 32 ib., 355; Riddlesbarger vs. Hartford Ins. Co., 7 Wall., 391.

Chandler & Co. vs. St. Paul F. and M. Ins. Co.

Rep'd Jour'l, p. 116. MINN. S. C.

OWNERSHIP.

§ 22. FIRE.—*Plaintiffs not bound to disclose a Void Tax Title.*—The application showed that the plaintiffs were the sole owners of the buildings and machinery, but the defendants claimed that the plaintiffs had no insurable interest other than that of tenants. The only adverse title was a void tax title. *Held*, that

the insured were not bound to disclose the existence of a void tax title to the premises.

No Adverse Claimants.—The property had been taken possession of by the military authorities, who held it until the plaintiffs commenced proceedings to regain possession of it. Under a decree of the United States Court a receiver was appointed, who rented the premises to the plaintiffs. *Held*, that these facts do not contravene the statement that no other one was interested in the property. Policy was intended to mean that no third person had any claim upon the property, and that the plaintiffs, though renters, were owners of the property.

Cheek et al. vs. Columbia Ins. Co. et al.

—§ 9.

PRACTICE.

§ 23. LIFE.—*Contract under Seal.*—Insurance was obtained on the life of R., for the benefit of F., and the application was signed R. for F. F. paid the annual premiums, a part of which was returned by R. *Held*, as this was a contract under seal, F. had no right to bring an action in his own name.

Sanders vs. Filley, 12 Pick., 554; Johnson vs. Foster, 12 Met., 167; Millard vs. Baldwin, 3 Gray, 484; Northampton vs. Elwell, 4 Gray, 81; Dicey on Parties, 101.

Flynn vs. North America Life Ins. Co.

Rep'd Jour'l, p. 77. MASS. S. J. C.

REASONABLE DILIGENCE.

§ 24. LIFE.—*Applicant must use Reasonable Diligence to Detect Fraud.*—In a case where the plaintiff testified that she and her husband signed the application without reading it, and without its being read to them, *Held*, that this was inexcusable negligence, that the application was a part of an important contract, and that when she signed it she was bound to know its contents. The law required that she should use all reasonable diligence to see that the answers were correctly written. A limited age as in a case of life insurance will not be extended by operation in law to an act done by an agent in fraud of his principal, and for

the benefit of the insured, where the insured by the use of reasonable diligence can defeat the fraudulent intent.

Ryan vs. World Mut. Life Ins. Co.

—§ 8.

REPRESENTATIONS.

§ 25. LIFE.—*When Material.—Held*, that the representations of the insured respecting his physical health, the use of stimulants, whether he had been afflicted with inflammatory rheumatism, etc., were material in order to enable the medical adviser to form an accurate opinion of the risk, and unless they were true the policy was void.

Anderson vs. Fitzgerald, 4 House of Lords Cases, 484; Cazenove vs. British Ass. Co., 94 Eng. Com. Law, 437; Campbell vs. N. E. Mut. Life Ins. Co., 98 Mass., 381; Price vs. Phœnix Ins. Co., 17 Minn., 497; 2 Ins. Law Journal, 223.

Conover vs. Mass. Mut. Life Ins. Co.

Rep'd Jour'l, p. 93. U. S. C. C. Mo.

TITLE.

§ 26. FIRE.—*What would Pass.*—Plaintiff furnished railroad ties which were examined by company's inspector provisionally, and monthly payments were made on that basis. Ties were not fully accepted until examined one by one as they were laid in place. *Held*, that an acceptance by the company which would defeat plaintiff's recovery for a loss must be such as would pass the title and bind the company to pay for them. Whether the acts of the parties amounted to an acceptance was properly a question for the jury.

Chandler & Co. vs. St. Paul F. and M. Ins. Co.

—§ 21.

WAIVER.

§ 27. LIFE.—*Must be made by the Company.—Held*, that an untrue or fraudulent statement or denial made by the applicant, of a fact material to the risk, to induce the issuance of a policy, will be fatal to the contract of insurance unless the insurer has

in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver to be effectual must be made by an officer of the company authorized to make it.

Ryan vs. World Mutual Life Ins. Co

—§ 8.

WARRANTY.

§ 28. LIFE.—*Not created by Implication.*—In a case where there was no distinct reference to the application in the policy, it was *Held*, that warranties cannot be created by implication. In such a case statements in the application are representations and not warranties.

Campbell vs. New England M. L. Ins. Co., 98 Mass., 381; Price vs. Phœnix Ins. Co., 17 Minn., 497; 2 Ins. Law Journal, 223; May on Insurance, §§ 164, 165.

Conover vs. Mass. Mut. Life Ins. Co.

—§ 25.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT,

WESTERN DISTRICT OF MISSOURI.

NOVEMBER TERM, 1874.

JOHN CONOVER

vs.

MASSACHUSETTS MUTUAL LIFE INS. CO.*

1. *Statements in Application, when not Warranties.*—Where no specific and distinct reference was made in the policy to the written application, the statements in the latter, although it referred to the policy, and contained a warranty, were considered as representations and not as warranties. The recent leading cases on the subject cited.
2. *Untruthful Answers to Material Questions Defeat Right of Recovery.*—Where the policy itself contains a condition that if the statements made by the applicant in the negotiations for the policy shall prove untrue the policy shall be void, untruthful answers to material questions relating to the health and habits of the assured will defeat the right to recover thereon, though the matters misrepresented did not cause or contribute to his death.
3. *Statute Construed.*—The act of the Missouri legislature of March 23rd, 1874, commented on and held not to apply to the case in judgment.

The defendant, through an agency in Missouri, issued a policy for

* From the *Central Law Journal*, St. Louis, Mo.

$5,000 upon the life of Eli Barnum, the plaintiff's intestate, dated June 10th, 1871, and which stated that "this policy is made and accepted upon the following conditions: In case the statements made by or on behalf of, or with the knowledge of the said assured, to the said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue, this policy shall be null and void."

The policy was issued upon an application therefor, dated May 27th, 1871, signed by the applicant and containing 32 special questions to be answered, and which were answered by him. The 7th question was, "Does the party use alcoholic stimulants?" Answer, "No." 8th. "If so, state how often—in what quantities." Answer, "None." 9th. "Has the party at any former time used alcoholic stimulants?" Answer, "No." 15th, "Has the party ever had inflammatory rheumatism?" Answer, "No." 17th. "Has the party now, or has he ever had, a habitual cough?" Answer, "No."

In the application or declaration was the following: "And I do hereby agree that the answers given to the following questions, and the accompanying statement, and this declaration, shall be the basis and form part of the contract or policy between me and the company, and I warrant such answers and statements as true and correctly stated, and agree that if the same be not so in all respects, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits, shall be forfeited to the said company."

The last question was, "Is the party and the applicant aware that any untrue or fraudulent answers to the above queries * * * will vitiate the policy and forfeit all payments thereon? and has he carefully read the questions and answers thereto?" To which he answered in writing, subscribed by himself, "Yes."

The assured died within one year after date of policy, and this is an action by his executor to recover the amount insured by the policy. The company defends the action on several grounds, but it is only necessary to state those on which the judgment of the court rests. The company pleads that the statements in the application as to the health and habits of the assured were untrue in these several particulars, viz.: at the time of signing the application, and for years previously, he had habitually used alcoholic stimulants; that he had had inflammatory rheumatism, and for years labored under a habitual cough. He did not die of rheumatism or any pulmonary disease,

nor, so far as appeared, in consequence of the use of alcoholic drinks.

The action was tried by the court, a jury having been waived. Without recounting the evidence of the various witnesses adduced by the parties, it is sufficient to state that the witnesses on both sides all concurred in the statement that the assured was habitually given to the use of alcoholic drinks; that he not unfrequently became intoxicated, though he would often, for weeks at a time, not drink at all. He was in the army, as a lieutenant in the fifty-seventh Illinois regiment, and it is clearly proved that he had a severe attack of inflammatory rheumatism in 1862, so severe that he had to leave his regiment and be taken to the hospital. It is also shown that he labored under a habitual cough while in the army. On the other hand, there is testimony to the effect that at and about the time of his effecting the insurance in question, his general health was good.

After his death, and after this suit was brought and an answer was filed, the legislature of the State of Missouri passed an act, approved March 23rd, 1874, as follows:

"Sec. 1. No misrepresentation made in obtaining or securing a policy of insurance in the life or lives of any person or persons shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case shall be a question for the jury.

"Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defence based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent. interest per annum from the date of receipt."

HENRY FLANAGAN, JOHN CONOVER, and W. S. EVERETT, *for Plaintiff.*

H. K. WHITE, *for Defendant.*

DILLON, J.

Much of the discussion at the bar was directed to the point whether the statements in the application concerning the health and the habits of the assured were, under the language of the policy in connection with the language of the application, to be considered as war-

ranties, as maintained by the defendant, or representations, as maintained by the plaintiff. It was not seriously denied by counsel that these statements were not true in point of fact, and hence if they are warranties it is plain the plaintiff has no case. The plaintiff's position was that the statements were not part of the policy by insertions therein, or by distinct and specific reference in the policy itself to the application as part of the policy, and hence these statements in the application could at most only be representations; and being such, it was further claimed by the plaintiff that their untruthfulness, although relating to matters material to the company, on preliminary inquiries, were in fact, as the event showed, immaterial, since the death was not caused by the diseases or habits to which the untruthful answers related.

Inasmuch as the policy itself does not distinctly identify and refer to the written application, and make it part of the policy, I am inclined, in view of the established and reasonable rule, that warranties are not to be created or extended by construction, and the doctrines of the later and best considered cases, to hold that the statements in the application are representations and not warranties. Campbell vs. New England, etc., Ins. Co., 98 Mass., 381, 1867; followed in Price vs. Phœnix Ins. Co., Co., 17 Minn., 497, 1871; [2 Ins. Law Journal, 223;] May on Ins., secs. 164, 165.

As this is the view most favorable to the plaintiff, the case will be decided on the assumption that it is correct.

It will be seen, by reference to the statement of the case, that the policy itself contains a condition that if any "statement made by the assured to the company, as the basis of or in negotiation for this contract, shall be found in any respect untrue, this policy shall be null and void;" and in the application the statements therein contained shall, it is declared, "be the basis and form part of the contract or policy" to be entered into between the parties. In the application the applicant declared that he had carefully read the questions and his answers to them, and that he was aware that if any of the answers were untrue or fraudulent, it would vitiate the policy.

The representations upon which the company grounds its defense, relating as they do to the habits of the assured in respect to the use of alcoholic stimulants, then and previously, and to whether he had ever been afflicted with inflammatory rheumatism, (which it is well known often leads to fatal diseases of the heart,) or had ever had a habitual cough, (known to precede or indicate pulmonary diseases,)

were material, to enable the company or its medical adviser to form an accurate opinion as to the risk which the insurer was asked to assume. Now the policy itself contains the express provision that if the statements of the assured, in the negotiations for the policy, shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them ; and the case is governed by and falls precisely within Anderson vs. Fitzgerald, 4 House of Lords Cases, 484, 1853, in which eleven of the judges of England attended the summons of the House of Lords, and where the unanimous judgment was, in a case like the present, that it was erroneous to leave it to the jury to say whether certain answers were material as well as false, and if not material to direct them that the plaintiff was entitled to recover. It was expressly decided that by the contract of the parties, the truth of the representations, and not their materiality, were alone in question, and if untrue the insurer was not liable. That decision was followed in Cazenove vs. British Ass. Co., 95 Eng. Com. Law, 437, 1859, and by the leading case of Campbell vs. New England, etc., Ins. Co., 98 Mass., 381, 403, and in the well considered judgment in Price vs. Phœnix, etc., Ins. Co., 17 Minn., 497 ; [2 Ins. Law Journal, 223.]

These cases hold that where the insurer puts specific questions touching the risk, under conditions like those here agreed upon, the inquiries are conclusively made material, and that false answers avoid the policy. It is not necessary in the case at the bar to go to the extent of affirming that all possible questions and answers are material, or may be made so, for here it is manifest that the questions, upon the answers to which the defense is based, pertaining to the habits of the applicant, in a matter material to health and to diseases he had had or was liable to have, were reasonable, and correct answers to which were essential, that the risk to be assumed by the company might be understood. In Anderson vs. Fitzgerald, *supra*, Lord Chancellor Cranworth observed, that " whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing therefore can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy. Now it appears to me, my lords, that that is pre-

cisely what has been done here. The question for the jury to decide was simply whether it (the answer) was false or not. In that narrow compass the whole case lies."

I cannot refrain from observing that it may be questionable whether the practice of the companies is, after all, so entirely reasonable as it appeared to the lord chancellor. Life insurance has grown to such immense proportions as to have important public relations. It is the method which has been largely adopted to make provision for wife and children, and for those dependent upon the life of the assured. The judgments of courts touching the validity of policies cannot be too carefully considered, so as not to work injustice either to the insurer or the insured. Courts, by a too liberal extension of the doctrine of warranties, and by recognizing the validity of provisions for forfeiture of the rights of the assured, and particularly in allowing the parties, by sweeping language, not fully understood or considered by the assured, when the policy is effected, to make immaterial questions and answers material, have, in my judgment, inclined too much in favor of the companies, and hence the judicial tendency of late is to uphold rather than overturn the contract, when substantial justice requires it.

In view of the fact that the tables upon which the expectation of life is calculated give the average mortality of persons as they run, while the companies select their risk, so that the actual mortality falls below the assumed mortality, and in view of the practice of the companies to put a multitude of questions to the applicant, and to make correct answers to all of them material, I am inclined to consider the legislation of Missouri as well timed and necessary to prevent the unfair practice of the companies in framing their policies, though it is perhaps too broad, if it prevents companies from providing that willful misrepresentations as to material facts will avoid the policy, although it may chance that the misrepresented matters did not actually contribute to the death of the assured. But as the act does not apply to the case in hand, I forbear further remark upon its policy or meaning.

As the questions in this case were material, and the answers untruthful in material respects, and as the parties, in the policy itself, agreed that this should vitiate the policy, the judgment must be for the defendant.

Judgment accordingly.

SUPREME COURT OF TENNESSEE.

APRIL TERM, 1874.

GEO. W. CHEEK ET AL

vs.

COLUMBIA FIRE INS. CO.

SAME vs. NORTH AMERICAN FIRE INS. CO.

SAME vs. PHŒNIX INS. CO.*

1. *Void Tax Title.*—In answer to a question whether the applicant for an insurance against fire owns the property upon which insurance is to be effected, and whether any other person is interested in it, he need not disclose the existence of a void tax title to the same.
2. *Lease of Premises.*—The application in this case, which was made part of the policy, contained the following question and answer: "Is the mill leased or rented? If so, to whom, and how long?" Ans. "No." *Held*, that the question was designed to ascertain whether the applicants had made a lease of the premises, not whether they were holding as lessees.
3. *Concealment.*—The non-disclosure of the fact that the title to the insured premises was in litigation, was *Held*, in the absence of any interrogatory upon the subject, not to avoid the policy.
4. *Application filled out by Company's Agent.*—If all the facts inquired of are truly stated to the company's agent, and he fills out the application, any failure by him to state therein facts made known to him, is to be attributable to the company, and will not avoid the policy. The evidence on this point considered.
5. *Waiver of Defense.*—Where the insurance company rested their defense upon the ground of a misrepresentation of title, *Held*, that they must be confined to this point, and cannot allege other grounds of defense.

The only material fact not stated in the opinion of the court is the existence of the following condition in the policy of the Columbia company: "If the property to be insured be held in trust or on commission, or be a leasehold or other interest not absolute, it must be so represented to the company, and expressed in the policy in

* From the *Central Law Journal*, St. Louis, Mo.

writing; otherwise the insurance as to such property shall be void." Similar provisions were contained in the other policies.

PIERCE & DIX, *for Columbia and North American Companies.*

E. S. HAMMOND and E. L. BELCHER, *for Phœnix Company.*

McFARLAND, J.

These causes have been argued and considered together in this court. They are bills filed to recover the amount of three fire policies underwritten severally by the defendants, who are insurance companies, organized and having their principal offices in other States, but at the time doing business in this State, and represented by the same agent.

The policies were issued upon the application of George W. Cheek & Co., and are each for five thousand dollars "on machinery fixed and movable," in a certain cotton mill described in the policy and application. The loss by fire within the time covered by the contract is shown, and in fact not denied. The defense in each case is placed upon substantially the same ground.

In the application, which is made part of the contract, occur the following questions and answers, substantially the same in each, to wit:

"Are the building and machinery both owned by applicants?" Ans. "Yes." "Is any other person interested in the property? If so, state the interest particularly." Ans. "No." "Is the mill leased or rented? If so, to whom, and how long?" Ans. "No."

The applicants in said written application agree that it contains a just and true statement of all facts and circumstances in regard to the condition, situation and value of the property, known to them, and material to the risk, and make this a condition of the insurance.

The defendants in their answers admit the contracts, but deny "that said George W. Cheek & Co. were the owners of the property described in said policy, or had any insurable interest therein at the time said policy issued, except as tenants," but charge that "in truth and in fact the property at the time belonged to Mr. W. J. Smith and Fielding Hurst, who had purchased the same at the United States direct tax sale in June, 1864."

This defense proceeds upon the ground that the assured had no insurable interest in the property, and also upon the ground that, in

this respect, which was material to the risk, the statements of fact in the application were untrue, and by the terms of the contract it was thereby avoided.

This necessarily presents the question whether or not George W. Cheek & Co. were the owners of the property. They are admitted to have been the owners up to the time of the tax sale referred to. This tax sale is the adverse title set up by the defense. While of course we can make no adjudication binding upon Smith and Hurst, who claim this tax title, still the question is presented, and its discussion is essential to the determination of the present case.

It is not denied that such tax sale was made, and that Smith and Hurst were the purchasers of the property; but it is argued that this sale was absolutely void for several reasons, only one of which we notice. It is clearly shown by the proof that the amount of the direct tax assessed under the act of Congress, together with the penalty and costs, was duly tendered to the commissioners by the owners before the sale, but the tender was refused. Upon this proof we must hold, upon the authority of Bennett vs. Hunter, 9 Wallace, 338, that Smith and Hurst acquired no title under their purchase.

This being the only objection taken to the title, it results that George W. Cheek & Co. not only had an insurable interest, but were the absolute owners of the property, and their statements to that effect in their application were strictly true.

It is next argued that, however the foregoing question may be, Cheek & Co. did fraudulently conceal from the defendants or their agent other facts material to the risk. In two of the cases cross bills were filed to avoid the policy upon this ground. In the other case the defense was made by answer. The other facts charged to have been concealed, or falsely represented in the application, are as follows: Smith and Hurst, under their tax purchase, and by aid of the military authorities, took forcible possession of the property and held it for a short time, until the said George W. Cheek & Co. had instituted legal proceedings to regain possession. Under a decree of a United States court at Memphis, R. C. Brinkley, who had sold the property to Geo. W. Cheek & Co., and who had a lien upon it for unpaid purchase-money, was appointed receiver, with directions that he might rent it to said George W. Cheek & Co. for the sum of one thousand dollars per month, which he did. In this mode, and under this contract with Brinkley, George W. Cheek & Co. had regained possession a short time before these policies were issued, and this was the character of their possession at the time.

It is not shown what became of the proceedings in the United States court.

The first question is, Are these facts inconsistent with the truth of the statements made in the application for the policy, as shown in the three questions and answers which we have set forth?

It is clear these facts do not contravene the truth of the first two questions and answers, to the effect that the applicants were the owners of the buildings and machinery, and that no other person was interested in the property; for we should understand the interest of other persons, inquired after in this question, to be an actual interest, and not a mere pretended claim, without any real foundation. The third question and answer are to the effect that the mill was not leased nor rented to any one. This was doubtless intended to mean that George W. Cheek & Co., who were the owners, were themselves in possession, and so expected to remain; that they had not rented or leased to any third person, who might take possession. On the other hand it is true that the applicants, although the owners, were themselves in possession as renters under the receiver, Brinkley.

The statement contained in this last question and answer, when literally construed, is contradicted by the facts we have stated in regard to the manner in which George W. Cheek & Co. then held possession; but when understood in the sense in which the parties most probably understood it, it is not contradicted by the facts stated.

But the application purports to contain a true statement of all facts material to the risk, and it might be argued that an omission to state some material fact known to the applicant, though not specially inquired about, would be in effect the same as to make an untrue statement in the application. We do not concede this proposition in an unqualified sense to be sound. For if the underwriters choose to insure without special inquiry as to certain facts, the applicant is not bound to know that these facts would be regarded as material, and a failure to disclose them would not necessarily avoid the policy. See 2nd vol. Bennett's Ins. Cases, p. 279, from 5 Hill, N. Y., 188.

If the facts not disclosed were unusual, and such as the applicant must know to be material, the case would be different. Flanders on Ins., 334-5.

At all events, we should say that where the defense is predicated upon a mere failure to disclose some facts within the applicant's

knowledge, not inquired about, the fact not disclosed must be material to the risk in order to avoid the policy. Flanders on Insurance, 293.

We have not found, in the numerous cases referred to on this question, satisfactory authority for holding that the facts, which it is alleged were not disclosed, were so material to the risk as to avoid the policy. For, as indicated, in fire policies there is a distinction between statements made upon direct inquiries, and a mere omission to state facts not inquired about. In the latter cases more latitude is allowed in showing that the facts were not material. Fland. on Ins., p. 328, and authorities there cited.

The cases referred to in Flanders on Insurance, p. 293, and notes, are cases where the facts are stated in the application, and by the terms of the contract are made material.

Treating of concealments, Mr. Flanders says, p. 339: "A pending litigation respecting the subject of the insurance, not voluntarily disclosed, will not avoid the risk. And the underwriters are not competent witnesses in such a case to prove that the fact concealed was material. It is not a question of science or skill, with respect to which they might be experts." For this he refers to Hill vs. Lafayette Ins. Co., 2 Mich., 476. Our own court has held that the existence of a mortgage not disclosed was not material. 8 Hum., 684; although there are authorities to the contrary.

The facts which it is alleged were not disclosed are:

1. The existence of the pending litigation in the United States court. This litigation, as we have seen, involved only the claim of Smith and Hurst, which, in our opinion, was a claim without legal foundation. The applicants, notwithstanding this litigation, assume to state in their application that they were the absolute owners, and we hold their statement to be true.

2. It is said they failed to state that Smith and Hurst had possession. We do not see how this could be material.

3. It is said they failed to disclose that under the pending litigation they had rented under the receiver. Assuming, as we do, that Cheek & Co. were the owners, that the claim of Smith and Hurst was illegal, the practical legal effect simply was that Cheek & Co. would be subject to the order of the court pending the litigation.

All these facts might, within the range of possibility, affect the risk. Parties engaged in an angry litigation about property might be tempted to destroy it rather than have their adversary succeed. But this is rather a remote danger. George W. Cheek & Co. were in

possession, claiming to be owners, and were in fact owners. We do not see that their care and prudence in regard to it would be affected by circumstances stated.

We are not satisfied that a failure to disclose these facts would have avoided the policy. Although the agent says in his opinion the facts might have been regarded as material, it is not a question to be decided by his opinion.

But aside from all this, how are the facts in regard to the alleged concealment? For the complainants it is maintained that these facts were fully disclosed to the agent, but he not regarding them as material, did not insert them in the written application, which was made out by him. Upon this we have the testimony of Cheek and Page, the two members of the firm, the former very positive and decided, the latter not so full, but to the same purport. They have no direct interest, as they have assigned the policies without recourse on them. On the other hand the agent says these facts were not disclosed to him. We do not see that he has a legal interest, but his feelings would naturally incline him not to admit any failure of duty in the matter toward his principals.

The facts are to some extent of a public nature. If we regard the onus upon the defendants to make out the concealment, in this they have clearly failed.

And even if the written application be construed to contain statements inconsistent with the facts, still, in cases where the application is made out by the agent of the underwriters, and the facts are fully disclosed to him, and he fails to insert them, this will not avoid the policy.

Upon this question the defendant's counsel have referred us to a large number of cases, and it is maintained that this is in conflict with the rule which rejects parol evidence to contradict a written contract, and is only allowed in exceptional cases, where the facts untruly stated are of a public and notorious character, or where there is fraud, accident or mistake. We cannot review or undertake to reconcile these authorities. We can only give the rule which is sustained by one class of authorities, and which we think is sound.

1. The agent who fills up the blanks or makes out the written application, is still in this the agent of the insurers, and not of the insured. He is in the employ of the insurers; it is his duty to represent them, and protect their interest, and he cannot rightfully divest himself of this character, although the application is in form the

act of the insured. Bearing this in mind, and regarding the acts of the agent as the acts of the company, then if we assume that the facts were fully disclosed to him, and he failed to state them truly in the application, it would be manifestly against all sound principle to allow any false statement thus inserted in the application to avoid the policy. It would be to allow the defendants to take advantage of their own wrong. It would put it in the power of an agent to destroy the effect of the policy, without fault upon the part of the applicant. Of course, if actual collusion be shown between the agent and insured, the case would be different. This may be placed either upon the ground of fraud or estoppel. We refer to the cases of the Insurance Co. vs. Wilkinson, 13 Wallace, 222, and the Planters' Insurance Co. vs. Sorrells, by this court, at Nashville, (MSS.,) recently decided, as authorities for this holding. In the former case, it was said, this does not come in conflict with the rule rejecting parol evidence to vary a written contract, but proceeds upon the ground that the application in such case is not the statement of the applicant.

The proof clearly shows that the application was made out by the agent of the defendants, and the weight of proof is that the facts were fully disclosed to him.

A question of this character must be determined like any other question of fact, by the weight of evidence. We do not see that any different rule should be adopted as to the amount of evidence required, from the ordinary rule where any other question of fact is involved in a civil case.

Other objections are made: 1. That the complainants have averred that they used all proper precaution to prevent the fire, that this was not admitted, and there is no proof. 2. There is no sufficient proof of the amount of the loss.

We think it manifest, from the record, that the only defenses set up are those we have considered. In fact the real cause of resisting the payment was upon the ground that Smith and Hurst were the owners of the property. This was the real defense, and is the only real defense set up or put in issue.

It appears that proofs of losses were furnished in due time, and no objections were taken to them, and in the first named case the agent at Memphis had been instructed to draw on the secretary of the company for the amount of the policy, and the evidence indicates that the other two defendants were acting in concert on this subject. It appears that George W. Cheek & Co. owed Brinkley balance for

purchase-money a note of $20,000. They (after the fire) offered him in payment four policies of $5,000 each, (not the ones in controversy in this case, as they had $75,000 in insurance, but in others.) He was advised by the agent of the defendant not to take them, but to take the three policies involved in this case, and one other, all of which were in companies represented by him, and this upon the ground that these policies would be paid. Before the time, however, the instructions to the agent to draw for the amount were withdrawn by telegraph, and afterward by letter, and from this letter it is clear that the defense then contemplated was upon the ground that Smith and Hurst were the owners of the property; and the defendants had determined to pay losses, but afterward determined to resist upon this ground. We think, therefore, the questions argued are not raised by the record.

The decrees will be affirmed, with costs. Petition for rehearing denied.

SUPREME COURT—DISTRICT OF COLUMBIA.

MARY C. CAMPBELL

vs.

AMERICAN POPULAR LIFE INS. CO.*

A person obtaining a policy of life insurance may agree that the surgeon-in-chief of the company shall decide whether one of the conditions upon which the policy issued has been complied with, and his decision will be binding.

Where one of the conditions in the policy is that the insurance money is to be paid if, in the opinion of the surgeon-in-chief of the company, the party insured did not die of intemperance, nor by any disease produced or aggravated by intemperance, it was *Held*, that this was a valid condition precedent, and that its performance must be averred or its non-performance accounted for.

If, however, the surgeon is also a stockholder, whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition.

* From the Washington *Law Reporter*, Oct. 27.

The case is stated in the opinion of the court.

E. L. Stanton and A. S. Worthington, *for Plaintiff.*
George Bliss and William A. Cook, *for Defendant.*

MacArthur, J.

This is an action upon a policy of life insurance, and one of the conditions upon which the insurance was to be paid reads as follows:

"That in the opinion of the surgeon-in-chief of this company, the party insured did not die of intemperance, with which disease the party is now, or is supposed to be, affected, nor by any disease produced or aggravated by said disease."

At a former term this court determined that this was a valid condition, and that its performance must be averred in the declaration, or its non-performance accounted for. 2 Bigelow, Ins. R., 16.

The first count of the present declaration sets up the following averments by way of excusing the non-performance of the condition:

"And the plaintiff further says that at the time said policy was issued, as aforesaid, and at the time of the death of the said Nathaniel H. Campbell, as aforesaid, one A. N. Gunn was, and till this suit commenced continued to be, the surgeon-in-chief of the defendant; that at said times and during said period said A. N. Gunn was interested in the determination of the question whether said Nathaniel H. Campbell died of intemperance, or of disease produced or aggravated thereby, among other things in this: that he, said Gunn, was the owner of certain shares of stock in said company, the defendant herein, of great value, to wit, the sum of four thousand dollars, upon which dividends of large sums of money, the exact amounts of which are to the plaintiff unknown, were from time to time, before and after the times aforesaid, declared and paid by said defendant to said A. N. Gunn, and the value of said shares of stock and the extent of said dividends were, at the time aforesaid, and before and afterward, affected by the payment of claims against the defendant, and the refusal to pay them. The plaintiff further says that the foregoing facts relative to the interest of said Gunn in said company were concealed from her by the defendant at the time said policy was made and accepted by her, and for a long time thereafter, to wit, till after the death of said Nathaniel H. Campbell, and that she was utterly ignorant of the same till after this suit was commenced."

There are several special pleas, among them the 3rd, 4th, and 5th, which are the only ones now to be considered, and which set up the condition relative to the finding of the surgeon-in-chief, and the non-performance of that condition by the plaintiff, as a defense; but they do not take any issue as to the averments in the declaration, that he was interested in the matter to be decided by him, and that his interest was concealed from the plaintiff by the defendant when the policy issued, and that she was ignorant of the same until after the commencement of this suit. And, in this respect, a majority of the court are of opinion that the pleas are bad in substance. It is scarcely necessary to suggest that parties may agree to such terms and conditions as they mutually consent to in their contracts, and they may constitute any one an arbitrator to determine matters of controversy, both in law and fact. It is always advisable that the person so selected should be free from interest, but in this respect the party may use his own discretion, and when he is fully aware of the objection, and yet constitutes a person so interested an arbitrator, he is bound by his decision. I know of no authority to controvert this position; while the authorities which sustain it are quite numerous. The plaintiff in this case, for instance, agrees to refer the question, whether the person insured did not die of intemperance, to the opinion of the surgeon-in-chief of the company. She thereby waived any objection to that officer on the ground of any supposed partiality or bias growing out of the circumstance that he was in the employ of the other contracting party. She was aware of his relation to the company by the policy itself, and notwithstanding consented that this matter might be referred to him. The case is different with respect to an arbitrator having a direct interest, and where the party selecting him has no knowledge of that circumstance, and from whom the fact of such interest is concealed, as is the case here, conceded by the present state of the pleadings. We think, therefore, that the averments of the declaration fully excuse the non-performance of that condition, and that the plaintiff may properly object to the decision of the surgeon-in-chief.

We are of opinion that the alleged misconduct of the surgeon in deciding the matter submitted to him, is sufficiently put in issue by the fifth plea. For the reason already assigned, however, the demurrer is sustained, and the parties have leave to amend pleading according to their stipulation.

Wylie and Olin, JJ., dissenting.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK COUNTY.

JUNE TERM, 1874.

WILLIAM W. BENNETT

vs.

CITY INSURANCE COMPANY.*

Where a policy of insurance issued by an insurance company in the name of A., has been sent to the agent of A., and shortly afterward is returned by the agent to the company with a request to have it made payable to B., and the company cancels the first policy, and makes a new one to B., and there is evidence that what was done after the delivery of the first policy to A. by the agent was done without the knowledge or authority of A., the keeping of the new policy by B. for seven months does not, as a matter of law, constitute an acceptance on the part of A., of the new policy, although it is admitted by A. that the possession of the policy by B. was not fraudulent.

Contract on a policy of insurance containing the following provisions: "No insurance, whether original or continued, shall be considered as binding until actual payment of the premium," and, "If this insurance be a mortgagee's interest, the assured shall assign to this company, in case of loss, an interest in said mortgage equal to the amount of loss paid."

At the trial in the Superior Court, before Lord, J., the loss was admitted, and there was evidence tending to show that a policy was issued by the defendant to the plaintiff, through an insurance agent named Prince, who was not the defendant's agent, about November 6th, 1871, and that about November 15th, 1871, the policy was returned by Prince to the defendant with a request, as alleged by the defendant, to "make a policy payable to Charles A. Kingsbury, mortgagee;" or as alleged by Prince, to "make the original policy payable in case of loss to Charles A. Kingsbury, mortgagee;" that the

* Decision rendered June 19th, 1874. To be reported in 115 Mass.

request, however made, was made without the knowledge or authority of the plaintiff; neither Prince nor Kingsbury having authority from the plaintiff to alter or change said policy in any way; and that said policy came into the possession of Kingsbury by mistake; that the defendant canceled the original policy and issued a new one to Kingsbury as mortgagée, containing also the above provisions; that Kingsbury received the policy and retained it for seven months, when the insured premises were destroyed by fire; that the plaintiff then for the first time knew of the alteration of the policy; that Kingsbury offered to surrender the second policy if the defendant would pay the first one; but this the defendant refused, offering however to pay the second on Kingsbury assigning his mortgage to it, in accordance with the provisions of his policy; that the plaintiff paid Prince the premium on his policy when he received it, but Prince did not pay it over to the defendant until December, 1871, after the issue of the second policy, when he paid it together with other premiums paid on policies issued through him. In the course of the trial the presiding judge inquired of the counsel for the plaintiff whether it was claimed that the possession of the policy by Kingsbury was fraudulent, to which the counsel replied that no such claim was made.

The presiding judge ruled that upon the foregoing evidence the case could not be submitted to the jury, "because as matter of law the keeping of the policy by Kingsbury, for seven months, was an acceptance by the plaintiff of the second policy as a substitute for the first, notwithstanding the plaintiff gave no authority to Kingsbury or Prince, or any one, to have any change made in the policy, and notwithstanding the plaintiff had no knowledge of the circumstances," and directed the jury to return a verdict for the defendant; the plaintiff excepted to the above ruling.

W. Gaston, and W. A. Field, *for Plaintiff.*

J. Turner, *for Defendant.*

Ames, J.

The defendants insist that the original policy did not take effect for the reason that the premium was not paid; and also that it was canceled before the loss occurred. It is not denied that the plaintiff paid the amount of the premium, but the defendant insists that this payment was upon the new policy. It appears that the original policy

soon after its issue found its way back into the defendant's hands, and that a new one was issued by it, which it insists is still outstanding and in force, and upon which it professes to be ready to pay the loss.

But the plaintiff claims that he was not a party to this substitution; that it was transacted without his knowledge or consent; that it was not consented to by any person acting under any authority express or implied from him; that it was the result of mistake which did not come to his knowledge till after the loss occurred, and that the effect of the new policy is not merely to insure Kingsbury the mortgagee against loss, but also to require him in case of loss to assign the mortgage to the defendant, and thereby to deprive the plaintiff of all benefit from the policy. If the original policy took effect when it was first issued, and we see no reason to doubt it, it would continue in force until it was canceled or modified by mutual consent. The alleged substitution of a new and different policy in its place could not be made by the defendant without the consent of the plaintiff, or of some person acting by his authority. Whether there had been any such consent or authority was a question of fact, and should have been submitted to the jury. The keeping of the new policy by Kingsbury the mortgagee for seven months, was a matter eminently proper for their consideration, as having some tendency to show an acceptance by the plaintiff of the alleged new arrangement. It was a mistake however to rule that as a matter of law it constituted an acceptance on the plaintiff's part. He should have been permitted to show that he gave no authority to any one to make the substitution, and that he had no knowledge of the circumstances and matters of fact relied upon by the defendant. If the alleged cancellation occurred without his express consent, or under such circumstances that his concurrence should not be implied, the defendant is liable upon the original policy, and the case should have been submitted to the jury with an instruction to that effect.

Exceptions sustained.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK COUNTY.

NOVEMBER TERM, 1873.

ALGERNON S. WASHBURN

vs.

THE GREAT WESTERN INS. CO.

Held, that the plaintiff by bringing an action of law upon the policy in its original form, and prosecuting that action to trial upon the issue whether he had complied with the warranty contained therein, conclusively elected to consider it as expressing the true contract between himself and the company, and to abandon any attempt to have it reformed in equity.

GRAY, C. J.

This is a bill in equity, filed December 28th, 1868, to reform a policy of marine insurance (obtained upon a ship by Alexander H. Howard in behalf of the plaintiff) by striking out a printed clause of warranty "not to load more than her registered tonnage with coal" or certain other articles as having been left standing by mistake, contrary to the express agreement of the parties, and without the knowledge of the plaintiff or his agent. The defendants on July 13th, 1869, filed an answer to the bill, alleging that the policy was in exact conformity with the understanding and agreement of the parties.

At October term, 1869, the plaintiff brought an action at law in the name of Howard, upon the policy as issued, alleging that he had complied with the warranty; to which the defendant answered, admitting the contract to be as there alleged, but denying such compliance; and the case was continued from term to term until April term, 1871, when a trial was had and a verdict returned for the defendants, and exceptions taken, which were argued before the full court in March, 1872, and overruled. Howard vs. Great Western

Ins. Co., 109 Mass., 384. In April, 1873, no replication having been filed in the suit in equity, the defendants, by leave of court, filed a supplemental answer, setting up the proceedings in the action at law, and moved to dismiss the bill. The plaintiff admitted the truth of the facts thus stated, and the question of their effect, without regard to the manner in which they were pleaded, was reserved for the determination of the full court.

We are of opinion that the plaintiff, by bringing an action of law upon the policy in its original form, and prosecuting that action to trial, verdict and judgment upon the issue whether he had complied with the warranty contained therein, conclusively elected to consider it as expressing the true contract between himself and the insurance company, and to abandon any attempt to have it reformed in equity. His bill does not assert an equitable right, which, although it could not have been secured to him in action at law, might coexist with the right asserted by him in that action, but proceeds on grounds wholly inconsistent with those maintained by him in the action at law, and seeks to show that his contract with the defendants was essentially different from that which he alleged, and submitted to the final judgment of the court in that action. If the real contract was as alleged in the bill in equity, the question tried at law was a mere moot question, having no bearing upon the rights of the parties.

The case falls within the principle of the decision in Sanger vs. Wood, 3 Johns., Ch., 416. There the plaintiffs sued the defendant at law upon a contract, and obtained a verdict and judgment for the amount claimed, and then filed a bill to rescind the contract upon the ground of fraudulent acts of the defendant at the time it was made. But, as it appeared that these acts were known to the plaintiffs some days before the trial of the action at law, it was held that by going to trial and judgment therein they had made a conclusive election of remedy, and waived any right to rescind the contract in equity; and Chancellor Kent said: "The suit at law and the action here are inconsistent with each other, since the one affirms, and the other seeks to disaffirm, the contract in question." "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

Bill dismissed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HAMPSHIRE COUNTY.

SEPTEMBER TERM, 1872.

ROBERT J. FAIR

vs.

MANHATTAN INS. CO. ET AL.

Where the plaintiff originally occupied one store in a building and effected insurance on his stock of goods contained in the building, and subsequently by removing partitions made the three stores into one, and a total loss occurring it was *Held*, that he was entitled to recover for all loss of or injury to his goods in any part of the building.

STEARNS & KNOWLTON, *for Plaintiff.*

SOULE & LATHROP, *for Defendant.*

MORTON, J.

The policies of the Manhattan Insurance Company and of the Greenwich Insurance Company each describe the property insured as a "stock of dry goods and other merchandise, hazardous and extra hazardous, his own or held by him in trust or on commission, or sold but not delivered, contained in the frame building known as 'Hunt's Building,' situate on Main Street, in Northampton, as per plan." The policy of the Market Insurance Company contained substantially the same description, except that there is no reference to a plan.

At the time the policies were issued, the main floor of the building was divided into three stores, as shown on the plan, and the plaintiff occupied the west store, the others being occupied by other persons. The building was wholly consumed by fire on May 19th, 1870. At

the time of the fire the plaintiff occupied the whole of the main floor, having removed the partition between the west and middle stores, and opened doors into the east store.

The defendants contend that the policies covered the goods contained in the west store only.

It was not shown or claimed that the removal of the goods by the plaintiff increased the risk, and we are of opinion that this case is not distinguishable in principle from the case of West vs. Old Colony Ins. Co., 9 Allen, 316.

The words of the policies in suit include all the three stores, and there is nothing in them to indicate that the plaintiff occupied or intended to occupy only one of them, or that the intention of the parties was to limit the risk to goods contained in the store then in fact occupied by him.

The reference to the plan was for the purpose of showing the situation of the building in relation to other buildings.

The ruling that the plaintiff was entitled to recover for all loss of or injury to goods in any part of the building, was correct.

Before passing upon the exception to the ruling admitting the auditor's report, the court desire a further argument upon the questions, 1st, whether the auditor exceeded his authority in the manner in which he has stated the case, and 2nd, whether the objections to the report could be first taken at the trial, or should have been taken by a previous motion to recommit.

Further argument ordered.

SUPREME COURT OF MINNESOTA.

APRIL TERM, 1874.

Appeal from Court of Common Pleas—Hennepin County.

WILLIAM CHANDLER & CO., *Respondents,*

vs.

ST. PAUL FIRE AND MARINE INS. CO., *Appellant.**

The defendant insured plaintiffs against loss or damage on their railroad ties piled along the line of N. P. R. R. Between the 7th and 22nd of May, 1871, several thousand of the ties were destroyed by accidental fire. Plaintiffs gave immediate notice of the loss. A disagreement arose concerning the number burned, and some five months were consumed in efforts to negotiate. On April 8th, 1872, plaintiffs furnished defendant formal proofs of loss. Action to recover brought August 7th, 1872.

The policy contained the following clauses: "To be paid within sixty days after due notice and satisfactory proof of the same." Also, "It is expressly covenanted by the parties hereto that no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or chancery unless commenced within the term of one year next after any claim shall occur and in case such suit or action shall be commenced against the company, after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding."

Held, "claim shall occur" obviously means claim shall arise or accrue. No claim arises or accrues on the mere happening of the loss. Notice and proofs of loss are conditions precedent. The limitation begins from the furnishing of proofs, or at most sixty days thereafter.

The second branch of the condition, requiring suit to be brought within one year of time of loss, is inconsistent with the first. The ambiguity must be removed by construction. The language is that of the company and must be construed most strongly against the party using it. A policy should be absolutely free from ambiguity, and so framed that "he who runs may read." This rule is peculiarly applicable in the present case, where the condition is wholly for the benefit of the company, and a condition subsequent involving a forfeiture of vested rights, which must be construed strictly against the company and liberally in favor of the assured.

Held, that the action was commenced within the time limited by the condition.

* Tried April Term, 1874. Decision rendered October 12th, 1874. To appear (probably) in 20 Minn.

It was in evidence that the ties were examined by the R. R. Company's inspector, and monthly payments made to plaintiffs on the basis, also that the ties were not fully accepted until examined one by one when laid in place.

Held, that it was a question for the jury whether the acts of the parties amounted to an acceptance.

Held, that an acceptance which would defeat recovery by plaintiffs must have been such as would pass the title to the Construction Company and bind the latter to pay for them.

Order denying a new trial affirmed.

CORNELL & BRADLEY, *for Respondents.*

HARVEY OFFICER, *for Appellant.*

YOUNG, J.

By a policy issued April 11th, 1871, the defendant insured plaintiffs for the term of six months, against loss or damage by fire, to the amount of $5,000, on their railroad ties piled along the line of the Northern Pacific Railroad, from the Junction to the Red River of the North in Minnesota, agreeing to make good to the assured all loss, etc., "to be paid within sixty days after due notice and satisfactory proofs of the same." Between the 7th and the 22nd May, 1871, several thousand of the ties insured were destroyed by accidental fire. The plaintiffs gave immediate notice of the loss, and the defendant thereupon entered upon an investigation of the facts relating to the fire. A disagreement arose between the parties as to the actual number of ties burned, and some five months were consumed in fruitless negotiations on this subject. On the 8th April, 1872, the plaintiffs furnished the defendant with formal proofs of loss. This action was brought on the 7th August, 1872, to recover the amount claimed to be due plaintiffs on the policy. The policy contains the following condition limiting the right of the assured to sue and recover for a loss: "It is expressly covenanted by the parties hereto that no suit or action against the company for the recovery of any claim, under or by virtue of this policy, shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur, and in case such suit or action shall be commenced against the company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding."

The first branch of this condition clearly sustains the plaintiffs' contention. The expression "claim shall occur," obviously means

claim shall arise or accrue. No claim occurs or arises in favor of the assured upon the mere happening of the loss. The giving of notice and the furnishing of satisfactory proofs are conditions precedent to be performed by the assured, before they are entitled to claim the stipulated indemnity; and not until sixty days after the performance of the last of these conditions can their claim be enforced by suit. It is unnecessary to determine in this case whether by the first branch of the condition the time of limitation begins to run from the furnishing of proofs, or sixty days thereafter. It would seem, however, that the claim exists when notice has been given, and proofs furnished, although it is not payable until the expiration of the sixty days.

The second branch of the condition as clearly provides, that unless suit is brought within one year after the occurrence of the loss, the lapse of time shall be conclusive evidence against the validity of the claim. These two limitations cannot stand together. By the first an action might be sustained if commenced before June 8th, 1873, or at any rate if brought prior to April 9th, 1873; but by the second, lapse of time would be a conclusive bar to such action, if brought after May 22nd, 1872. During the interval an action might be maintained under the first limitation, but must be defeated by the second.

The two branches of the condition being thus inconsistent, and the whole being ambiguous, its meaning can only be ascertained by a resort to construction.

The language of the condition is the language of the company, and for any ambiguity in its terms the company is responsible. If the company has seen fit to express itself in terms that require interpretation, it cannot complain if any doubt as to the meaning of the condition is resolved in favor of the assured. The rule that words are to be taken most strongly against the parties using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments. These policies are wholly prepared by the company issuing them, and should be drafted with the most scrupulous exactness. They should be absolutely free from ambiguity. A policy ought to be so framed that "he who runs can read." It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it. Anderson vs. Fitzgerald, 4 H. of L. Cases, 510. This rule has been adopted in many cases, involving the construction of exceptions, warranties and conditions precedent in policies. (See Blackett vs. Assurance Co., 2 Crompt. & Jer., 251; Notman vs.

Anchor Assurance Co., 4 C. B., (N. A.,) 481 ; Fitton vs. Accidental Death Ins. Co., 17 ib., 135 ; Brannstein vs. Accidental Death Ins. Co., 1 Best & Smith, 799 ; Fowkes vs. Assurance Assn., 3 ib., 925 ; Catlin vs. Springfield Fire Ins. Co., 1 Sumner, 440 ; Palmer vs. Warren Ins. Co., 1 Story, 364, 369 ; Barlett vs. Union M. F. Ins. Co., 46 Me., 502 ; Wilson vs. Conway Fire Ins. Co., 4 R. I., 156 ; Wilson vs. Hampden Fire Ins. Co., 4 ib., 166 ; Hoffman vs. Ætna Ins. Co., 32 N. Y., 413 ; Reynolds vs. Commerce Fire Ins. Co., 47 N. Y., 604 ; N. Y. Belting Co. vs. Washington Fire Ins. Co., 10 Bosw., 435 ; Merrick vs. Germania Fire Ins. Co., 54 Penn., 284 ; Western Ins. Co. vs. Cropper, 32 ib., 355.) It is peculiarly applicable to the condition we are now considering for the reason that this condition is not only wholly for the benefit of the company, but is also a condition subsequent by which a valid claim, founded on a contract fully performed by the assured and broken by the company, is defeated unless an action is brought to enforce it within a time much shorter than that allowed by the statute of limitations. Such a condition is valid, (Riddlesbarger vs. Hartford Ins. Co., 7 Wall., 391, and cases cited,) but like other conditions subsequent which work forfeitures of vested rights, it is to be construed strictly against the company, and liberally in favor of the assured. A defense founded on the breach of such a condition as this, is *stricti juris*, and we ought not to hold that the assured have stipulated away their claim to the indemnity secured by the policy unless their intention to do so clearly appears.

The defendant's counsel has failed to point out to us any sufficient ground for preferring the construction claimed by the company, to that relied on by the plaintiffs. Aside from the rule before mentioned, the reason of the case certainly favors the plaintiffs' position. It is natural that the parties should have intended to refer the commencement of the period of limitation to the date when the cause of action accrued, and that the time during which the assured could not sue should not be counted as part of the year within which they were required to sue. This construction leaves no door open for suits upon fraudulent claims, after the lapse of time has made the proof of fraud difficult or impossible.

The assured, as a condition precedent to their right of action, must still furnish satisfactory proofs of loss, either within the time fixed by the policy, or, if no time is fixed, within a reasonable time after the loss ; the action must be brought within a year and sixty days thereafter, at the furthest, and the company is thus amply protected from suits upon stale claims. On the other hand, if the suit must be brought in

all cases within a year after the loss, as no suit can be brought until sixty days after the proofs have been furnished, and as the time within which proofs can be furnished must vary with the circumstances of each case, the condition will operate very differently in different cases, and may very often allow the assured but a very brief and inadequate time in which to bring suit after their cause of action accrues.

The plaintiffs' construction of the condition, highly reasonable in itself, is supported by the decision in the Mayor of New York vs. The Hamilton Fire Ins. Co., 39 N. Y., 45; cited with approval in Killips vs. Putnam Ins. Co., 28 Wis., 484, although the latter case was decided on other grounds.

But whether or not the plaintiffs' construction thus sustained by authority is more reasonable, it is certainly not less reasonable than that contended for by the defendant, and in accordance with the rule before stated, the condition must be taken in the sense most favorable to the plaintiffs.

The action having been commenced within the time limited by the condition thus construed, it is unnecessary to consider the question fully discussed in the briefs of counsel, whether the conduct of the defendant amounted to a waiver of the condition as construed by defendant.

It appeared at the trial that the ties burned were cut by plaintiffs in fulfillment of a contract with the Northwestern Construction Company, which was then engaged in building the Northern Pacific Railroad. There was evidence that the ties were examined by the railroad company's inspector, and marked upon the end as good or bad, while lying in piles alongside the railroad, and that monthly payments upon their contract were made to the plaintiffs upon the basis of the estimate thus made. But there was also evidence that this estimate was merely provisional, and that the ties were not fully accepted by the Construction Company until they had been examined one by one as they were laid in place upon the road bed.

The court properly left it to the jury to find whether the acts of the parties amounted to an acceptance of the ties burned, and correctly instructed them, that "an acceptance of the ties by the Construction Company, which would defeat a recovery by the plaintiffs in this action, must have been such an acceptance as would pass the title to the ties to the Construction Company, and bind the Construction Company to pay for them."

The jury having found for the plaintiffs in the full amount claimed,

must have found that none of the ties burned had been accepted by the Construction Company, but that they were at the time of the fire the property of the plaintiffs. This finding of the jury, under a very accurate instruction as to the law, and upon sufficient evidence, is a full answer to the defendant's last point, that the plaintiffs had no insurable interest in a large part of the ties destroyed.

The order denying a new trial is affirmed.

SUPREME COURT OF MINNESOTA.

APRIL TERM, 1874.

Appeal from District Court.—Sherburne Co.

JOHN EVERETT, *Respondent,*

vs.

CONTINENTAL INS. CO., OF NEW YORK, *Appellant.**

Defendant insured plaintiff's threshing machine, described in the application, first, as "on Sec. 36, T. 23, R. 28," and again, as "stored in barn on Section 36, T. 23, R. 28." In the policy it is described as "threshing machine, Sec. 36, T. 23, R. 38," reference being made to the application for more particular description.

There is no tract answering either description in the State. The machine was burned while standing outside of, but within 15 or 20 rods of the barn, on Sec. 36, T. 33, R. 28. Plaintiff claimed, and referee found, that the clause "stored in barn," etc., was fraudulently inserted after signing. Defendant claimed this finding was not warranted by the evidence.

Held, that the matter of fraudulent alteration was of no essential importance. In either event the misdescription was the result of inadvertence and mistake. The intention of the parties was to describe the machine where it actually was. The case is one of repugnant calls, and the reference to the barn controls on the principle that that description must be adhered to about which there is least likelihood of mistake. The misdescription was not a false representation material to the risk.

Held, that the reference to the section, town and range, and the phrase, "stored

* Decision rendered October 8th, 1874. To be reported (probably) in 20 Minn.

in barn," in the application, were merely descriptive, and not a stipulation that the location should be unchanged, or if changed that the insurance should cease.

Judgment affirmed.

KERR & COLLINS, *for Appellant.*

H. C. GORDON and HAMLIN & SEARLE, *for Respondent.*

BERRY, J.

This is an action upon defendant's policy insuring the plaintiff against loss or damage by fire on a certain threshing machine. In the application for insurance the machine is described first as "on Sec. 36, T. 23, R. 28," and again as "stored in barn on Section 36, T. 23, R. 28, owned and insured by L. L. Chaffin." In the policy it is described as "threshing machine, Sec. 36, T. 23, R. 38." Reference being made "for more particular description to the application."

The undisputed facts are that the barn of L. L. Chaffin was situate on Section 36, T. 33, R. 28, in Sherburne County in this State, and that at the time of making the application, a part of the machine (to wit, the separator and trucks) was in said barn, while the rest was outside of, but within 15 or 20 rods of the same, but on said Section 36 last mentioned.

There is no tract of land answering the description, S. 36, T. 23, R. 28, or S. 36, T. 23, R. 38, in this State. It is not pretended that the description was inserted in the application through any intentional or fraudulent misrepresentation on the part of the insured, or with any purpose of deceit. On the contrary, it appears that the barn was "insured" by defendant's agent, and that at the time when he took the application for insurance of the machine, he knew where it was from personal observation

On August 13, 1870, some three or four months after the issue of the policy, the machine was mostly destroyed by fire, while standing in a field upon Section 36, T. 33, R. 28, where it had been in use. There is no controversy as to the identity of the machine destroyed with the machine insured and intended to be insured, and no pretense that the plaintiff owned any other machine. The plaintiff claims that the clause "stored in barn," etc., was fraudulently inserted in the application after he had signed it, and the referee so finds. The defendant claims that this finding of the referee is not warranted by the evidence.

In our opinion this matter of fraudulent alteration is of no essential

importance. Strike out the clause spoken of from the application, and upon the facts stated there can be no room for doubt that the referee was entirely right in finding that the misdescription in the number of the township in the application, and in the numbers of the township and range in the policy, was "by inadvertence and mistake," and that the intention on both sides was to describe the machine (according to the fact) as being upon Sec. 36, T. 33, R. 28.

On the other hand, giving the defendant the benefit of the assumption that the referee is wrong, that the clause referred to was in the application at the time when it was signed by plaintiff, and that it was there with plaintiff's knowledge, and the fact that the misdescription was the result of "inadvertence and mistake," and that the intention of both parties was to represent the machine as being where it in fact was, is made still more apparent than before by the mention of the barn. For the case being one of repugnant calls, the reference to the barn controls upon the principle that "where more than one description is given, and there is a discrepancy, that description will be adhered to, as to which there is the least likelihood that a mistake could be committed, and that be rejected in regard to which mistakes are more apt to be made. "Miller vs. Terry, 3 Jones, Eq., 29; Yonkers & N. Y. F. I. Co. vs. Hoffman F. I. Co., 6 Robertson, (Sup. Ct.) 316; 2 Wash., R. P., (2nd ed.,) 631; 1 Gr. Ev. § 301, and note. That the barn was on Sec. 36, T. 33, R. 28, where the machine also was at the time of the application to insure, as well as of its destruction, there is no dispute. Whether then the clause, "stored in barn," etc., be rejected or not, the misdescription in the application cannot be regarded as "false or erroneous representations material to the risk," (and by the express terms of the policy, it is only such false or erroneous representations as are material to the risk that will avoid the policy,) or as possessing any practical importance. And we do not understand the defendant's counsel to contend very strenuously to the contrary.

But assuming, as the defendant does, and as we do in defendant's favor, that the clause, "stored in barn on Sec. 36, T. 23, R. 28, owned and insured by L. L. Chaffin," was properly a part of the application, and that the policy was insured with reference to this clause, the principal defense in the case is that under the terms of the application and policy, the threshing machine was insured only while stored in the barn of L. L. Chaffin. But this defense is based upon an entire misconception of the effect of the mention in the application and policy of the place where the machine was situate at

the time of the application, or of the issue of the policy. The reference in the application and policy to the section, town and range, as corrected by the mention of the barn, or by the other facts appearing, and the statement that the machine is "stored in barn," etc., are mere matter of description, operating simply to locate the machine.

One obvious purpose of the location would appear to be the identification of the machine. In addition, this location might be important in view of a clause of the policy in reference to increase of risk, a clause upon which however no defense is based in this case. But whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was in letter or in spirit a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed the insurance should cease, or be suspended. Smith vs. Mech. & Traders' Ins. Co., 32 N. Y., 399, and cases cited; Blood vs. Howard F. I. Co., 12 Cush., 472; Flanders on Fire Ins. 241, 255, 269, 485.

This disposes of this case, and renders it entirely unnecessary to examine or consider most of the points presented in the briefs of counsel.

It is not insisted that the fact that a part of the machine was not in the barn at the time of the application, but outside, and distant some 15 to 20 rods, was a "false or erroneous representation material to the risk," such as would avoid the policy according to its own terms, or that it is in any way important.

Judgment affirmed.

COMMISSION OF APPEALS OF NEW YORK.

PHILO T. RUGGLES, AS RECEIVER, ETC.,
vs.
ORLOW W. CHAPMAN, AS SUP'T OF INS. DEP'T,

The securities held by the superintendent of the Insurance Department for the security of policy-holders are held as a statutory trust, which he cannot voluntarily transfer and which the courts have no authority to compel him to transfer to a receiver appointed in a proceeding to dissolve a corporation under the general provisions of the statutes. It is the duty of the legislature rather than the courts to to resolve the difficulties arising from the two independent schemes of dealing with insolvent companies.

PER CURIAM.

In each of these cases the substantial question is presented by the claim of the plaintiff to require from the superintendent of the Insurance Department a transfer of certain securities which he holds in his official character. The plaintiff is a receiver appointed by the New York Common Pleas in the exercise of its equitable jurisdiction, at the suit of a stockholder and creditor of the Eclectic Life Insurance Company, in a suit to establish its insolvency and procure its dissolution, and the distribution of its assets.

The securities which the defendant holds were placed in his hands by the insurance company in question in pursuance of the requirements of the law. (Stat. at Large, 4th ed., p. 218, sec. 6.) His duty in respect to such securities is defined by the same statute. It is there enacted that the superintendent of the Insurance Department shall hold such securities as security for policy-holders in said companies. By a subsequent section of the same act (sect. 17, p. 224, 225) it is made the duty of the Attorney General under specified circumstances to apply to the Supreme Court for the dissolution of the company and the distribution of its assets, including the secur-

ities deposited as aforesaid. The Supreme Court, in case it is made to appear that the assets and funds of the company are insufficient to reinsure the outstanding risks, is required to decree the dissolution and distribution as before mentioned. Undoubtedly any surplus which should remain after satisfying the policy-holders would be applicable to the satisfaction of the general creditors of the corporation. On the other hand, in a proceeding to dissolve a corporation under the general provisions of the statutes, the receivers who are appointed have certain general and defined powers and duties, and are required to make distribution upon principles which look to the preservation of equality of right among all the creditors, with some immaterial exceptions.

We do not perceive the authority of such a receiver to require from the superintendent of the Insurance Department the surrender of a trust which has been devolved upon him by law. We are entirely clear that the superintendent could not voluntarily transfer the trust, and we are at a loss to find any authority in the courts to compel him to do so. Not regarding for the moment his official character, and the statutory sanction of his trust, if it rested on contract alone it is difficult to see on what footing a court could assume [to pass] into the hands of its receivers property lawfully held in trust, in the absence of misconduct on the part of the trustee. Mortgagees in trust could not be compelled to yield to receivers representing creditors at large. It is quite obvious that there are difficulties in the way of harmonizing these two independent schemes of dealing with insolvent insurance companies; but we are of opinion that the claims of the receiver cannot be asserted as paramount to the statutory duty of the superintendent. We venture to add that it is better that the legislative power should be invoked to resolve the difficulty and to provide for the protection of the rights of the parties interested in such cases by general laws, than that the courts should attempt to build up a system out of the discordant and scanty material of positive enactment now to be found in the statutes.

The judgment must be affirmed.

All concur, except Grover, J., taking no part.

COURT OF ERRORS AND APPEALS OF NEW JERSEY

JUNE TERM, 1874.

In Error to Supreme Court.

THE MUTUAL BENEFIT LIFE INS. CO., *Plaintiff in Error,*

vs.

HENRIETTA HILLYARD AND GEORGE M. LUMPKIN, ET AL., *Defendants in Error.*

Plaintiff issued a policy for $5,000, upon the life of a citizen of Virginia, in 1849. Annual premiums were regularly paid up to and including 1860. The premium due in 1861 was not paid by reason of the war then existing. The insured died in 1862. After the close of hostilities, the premium with interest was tendered and refused. The policy provided, that in default of payment of premium when due, all liability should cease, and the sums paid should be forfeited.

The main question is whether the effect of the civil war was merely to suspend the premium, or to avoid the policy.

1. All commerce and friendly intercourse between citizens of the insurrectionary States and districts, and the rest of the Union, during the recent civil war was suspended, and any act of intercourse inconsistent with the condition of hostilities was unlawful.

2. As a consequence it was unlawful between such citizens to remit or to receive the money to pay a premium on a policy of life insurance, coming due during the war, as it involved an act of amicable intercourse.

3. Whether a pre-existing contract is dissolved or not by the war, depends upon whether it is essentially antagonistic to the laws governing a state of war. If the contract is of a continuing nature, as in the case of a partnership, or of an executory character merely, and in the performance of its essential features would violate such laws, it would be dissolved, but if not, and rights have become vested under it, the contract will either be qualified or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such rights. The tendency of adjudication is to preserve, and not to destroy contracts existing before the war.

4. A policy of life insurance issued before the war by a corporation in this State, for the benefit of parties in Virginia, where premiums had previously been paid, is not dissolved or forfeited for the mere non-payment of a premium falling due during the war, and where the payment with proper interest was promptly tendered at its termination. The payment had become impossible by the act or force of the law, and for that reason was suspended and excused for the time being.

5. A condition for the payment of the premium in a life policy, after the first is *sui generis*, and not of the nature of a condition precedent to the vesting of a right, and is subject to be suspended the same as clauses for performance in any other contract.
6. The fact that the insurance company is mutual does not create a partnership among the insured so as to make the contract continuing. The insurance is between the corporation and the insured.
7. The fault of the rebellion cannot be imputed to the plaintiffs, so as to make the non-payment their fault. The law deals with the existence of hostilities, and considers all citizens of the belligerent States, respectively, as mutual enemies. The causes of the contest do not affect the legal results between the individuals.

Judgment affirmed.

F. H. Teese and B. Williamson, *for Plaintiff in Error.*

J. Dixon, *for Defendants in Error.*

Bedle, J.

This suit was brought upon a policy of life insurance, issued by the Mutual Life Insurance Company, a corporation of this State, on Dec. 27, 1849, upon the life of John H. Hillyard, then and continuously afterward up to his death a citizen and inhabitant of the State of Virginia. He died June 1, 1862. The annual premium was $302.50, which amount was regularly paid each year, up to and including Dec. 27, 1860. The premium of Dec. 27, 1861, was not paid, by reason of the insurrection and condition of hostilities then existing in that part of the State of Virginia where Hillyard and those for whose benefit the insurance was effected resided, but as soon as such hostilities were terminated, that premium with lawful interest was tendered to the company, and by it refused. By the policy, the company in consideration of $302.50 paid at the date thereof, and of the annual premium of $302.50 payable on Dec. 27 of every year during the life of Hillyard, agreed to pay $5,000, the sum insured, within ninety days after notice and proof of death, subject to certain conditions, and among them, in substance, that in default of the payment of any of the annual premiums on the days mentioned, the company should not be liable to pay the sum insured, or any part thereof, and that the policy should cease and determine, and all previous payments and benefits thereupon be forfeited to the company.

The main question involved is as to the effect of the recent civil war upon the policy—whether the payment of the premium was suspended merely, or the policy avoided. No argument can be drawn from the hardship of either view. It is undoubtedly important that life insurance companies should promptly receive their premiums, and

clauses to secure that result will be strictly enforced, as in the case of Catoir vs. American Life Insurance Company, 4 Vroom, 488, but at the same time, when such an unexpected event as a civil war between the States occurs, it is equally important to know whether the insured, if unable to pay the premium by reason of that, shall lose all benefit from the insurance and forfeit to the company the whole amount paid, which may, as in this case, including principal and interest, nearly equal the sum insured. It is an injury to the company not to receive prompt payment, but it would be a greater injury to the insured to lose all benefit from the insurance.

War always creates hardships, and private rights must necessarily suffer from the hostile condition; but the evident object and tendency of judicial action is, where the government has not created forfeitures, and where the question is one of the mere effect of the war *ipso facto* upon private contracts and interests, to interfere with them only so far as may be rendered necessary by the existence of hostilities, and when to preserve them would be inconsistent therewith. It would be impossible to so declare the law as that no injury would result, but it should be the purpose of the court, as far as consistent with principle, to sustain the interests of both parties—the one as well as the other—in the policy, doing as little injury as possible to either. The difficulty in this case arises from the non-payment of the premium of Dec. 27, 1861. In an ordinary case the policy would be forfeited, according to its terms; but if unlawful to pay the premium when due, by reason of the war then existing, the question to be settled is, how such state of war, or the non-payment for that cause, affects the contract? It cannot be disputed that the existence of the war, taken in connection with the proclamation of the President of August 16, 1861, and the act of Congress of July 13, 1861, which authorized the proclamation, suspended all amicable intercourse, and made it unlawful then to transmit the money for the premium, from the insurrectionary State to this. That doctrine arises out of the fact of all wars, whether foreign or civil; but in addition to that, the clear effect of the proclamation, with the force and authority of section 5 of the act of Congress, was to make it incontestable that during the insurrection intercourse necessary to transmit money was suspended. The transmission of money among other consequences involves intercourse inconsistent with a condition of hostilities, and therefore it was unlawful to remit it, and by the evident force of the act of Congress alone, after the proclamation it was unlawful to receive it, as the result of any intercommunication between those of the belligerent

States. How then was the contract of insurance affected by the non-payment of the premium for that cause, or by the war? The only ground upon which it can be claimed that the war *ipso facto* dissolved the contract is this, that to make the annual payments involved an act contrary to the laws of warfare, and that act in this case consisting chiefly in the intercourse necessary to accomplish it, which would be unlawful.

It is granted that to transmit the money would be unlawful, but the result sought does not follow from that alone. War does not defeat a debt, yet the right to collect it during the continuance of the strife is suspended, and the creditor loses his interest. Let us analyze the case of a debt due, as for instance for goods sold before the war, but payable at a time after its commencement, and, to make the illustration as forcible as possible, payable at different times by installments during the war. The actual contract is, the debtor having received the goods, that he shall pay for them at the time appointed. In the absence of hostilities it is the right of the creditor to receive, and the duty of the debtor to pay; but war having occurred, the debtor cannot discharge that duty without an infraction of law. Any attempt to do it would be an act clearly inconsistent with the state of war, but the debtor is not discharged for that reason.

The debt should be paid by the contractor; the contract itself requires it; yet the payment may be suspended and the debt subsist, and it is so with any executed contract not obnoxious to the policy of warfare. Rights vested under it will be saved, but any immediate benefit is suspended. If the contract could be carried out by any hocus pocus action in making the payment of the several installments it would still be unlawful to do it, for the law does not require or tolerate any such irregularity, and therefore suspends the payment, leaving the claim disturbed as little as possible, and although the creditor must submit to the loss, yet he is allowed as much benefit from his contract as is consistent with the state of war. It will thus be seen that it does not necessarily follow, that when the contract itself requires payment the contract will be entirely dissolved. The law strips the contract of its objectionable features and leaves the rest intact. There is a class of contracts however, upon which the war works complete dissolution, and among them are those termed continuing. They are of an executory nature merely, and where the contract in its essential features, if it subsists, must violate the law governing hostilities. The chief instance is a partnership. It is undoubted that no contract can be made during belligerency, and

although a contract of partnership is made before the war, yet it contemplates the continuous performance of acts amounting to distinct contracts. The life of a partnership is in the continuance and performance of the transactions it contemplates. Without that the relation would be barren. It is of the nature of a partnership that there should be intercommunication of the partners, each also is interested in the business and is affected by the acts of the other, and as stated by Chancellor Kent in the great case of Griswold vs. Waddington, 16 Johnson, 491, "when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law as well as common reason adjudges the partnership to be dissolved." Hence the agreement of partnership is not suspended, but dissolved. Although a contract of partnership is dissolved, yet as to all transactions executed before the war, there is no rule of law requiring a forfeiture of the profits to the partner who happens to possess them. The remedy to collect them during the war would be suspended, yet the right to them remains. But this contract of insurance is not of the exact nature of a debt, nor is it of the character of partnership. It is peculiar. If the premiums had all been paid previous to the war, there would have been only a debt payable at death, an event certain to happen, and if Hillyard had died before the premium of Dec. 27, 1861, had accrued, there is no reason in the policy of the law, or in plain justice, why, after the war, the sum insured could not have been collected.

A mere contract of life insurance subsisting at the breaking out of the war, without requiring the performance of an act inconsistent therewith, and especially with a clause, as in this, against entering into the military or naval service, is not in itself antagonistic to the laws governing a state of war, and, as already said, if it is to be condemned, it must be upon the ground that it contains provisions for the payment of premiums, which if strictly carried out would be antagonistic. How then should the law deal with this contract containing such provisions? Shall the payments be suspended, or the policy avoided? For the present I disregard the question of condition precedent, for that is confined to the mere interest of the parties, while this depends chiefly upon considerations of public policy. It is sufficient now to say, that on the payment of the first premium a right became vested in the continuance of the contract of insurance, but on condition that the premiums be promptly paid. The contract was executed to the extent that the premiums were paid, and the right thereby acquired was private property.

It is the policy of all enlightened governments not to confiscate debts and credits, although the power to do it exists. 1 Kent, 65 ; 8 Cranch, 110 ; Brown vs. U. States, 6 Wall., 533 ; Hanger vs. Abbott. Chief Justice Marshall, in Brown vs. U. States, assumed it to be the universal practice not to exercise the right. This contract is of the general character of debts and credits, and the policy of the government would be to leave the interest acquired under it undisturbed by any act of confiscation. There is also a policy in the law, which is careful of private rights, and it is not confined to times of peace. When the dread necessities of war break up all friendly intercourse, disturbing and destroying trade, commerce, property and life itself, it is still the policy of the law to save from wreck and loss all private property and rights possible to be saved, consistent with the stern demands of the hostile state.

The reason why contracts or transactions between the belligerents are interdicted, is that they are in violation of the doctrine that all commerce, friendly intercourse, and trading with the enemy, are contrary to the nature of a state of war, but the destructive power of the interdiction should not be carried farther than necessary to enforce the doctrine. There is no reason why *ante bellum* contracts, not entirely executory, should not be preserved from dissolution, to the extent that they are not inconsistent with the duties and requirements of a condition of hostilities.

The test to dissolve a pre-existing contract, is its essential antagonism to the state of war. It is so in partnerships; it is also so in contracts of affreightment. But if rights have been acquired under a contract not substantially antagonistic, the law will either abridge or qualify it, or suspend its performance, in whole or in part, according to the nature of the contract. There are analogies to that effect. It is unlawful to insure enemies' property, yet a policy of that kind, issued previous to a war, may be qualified so as to save it from entire destruction.

The case of Furtado vs. Rogers, 3 B. & P., 191, (1792,) was an insurance effected in Great Britain, on a French ship previous to the commencement of hostilities between Great Britain and France. The policy was in the usual form, including an insurance against captures. The ship was captured by British force. The court held "that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country, and that if he had expressly insured against British capture, such a contract would be abrogated by the law of

England." The court also said "that the plaintiff was not entitled to a return of the premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain." In that case the court did not consider the contract dissolved, but that it was subject to a qualification that it should not apply to British captures. To the same substantial effect are the cases of Kellner vs. Le Mesurier, 4 East., 395; Gamba vs. Le Mesurier, 4 East., 408.

In Brandon vs. Curling, 4 East., 409, a kindred case, Lord Ellenborough, C. J., after referring to the two Le Mesurier cases, says, "It follows a consequence of the same principle, that wherever the generality of the terms of assurance might in their actual application to the covering of any particular risk produce, if effect were given to them in their extended sense, a similar contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril, which could not be so made the subject of a legal insurance in direct terms by a British underwriter."

He gives two instances of implied exceptions that may arise in the application of general words of insurance, one of which is, that where an insurance is upon goods generally, a proviso shall be considered engrafted as follows: "Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer," and the other is that "the risk of detention of princes, etc., must be understood to be restrained and qualified by an implied proviso that it shall not extend to cover any loss happening in the course of any contraband adventure in which the goods would become liable to seizure, as forfeited by the laws of this country."

These cases are referred to merely to show how contracts may be restrained or qualified, when to carry them out according to the full scope of their terms would be unlawful. An instance of supension of agreement exists in the case of a debt already alluded to.

Another is in the suspension of a clause in a policy of insurance fixing a time within which suit must be brought. Semmes vs. Hartford Ins. Co., 13 Wall., 13. In that case the Supreme Court say: "We have no doubt that the disability to sue imposed on the plaintiff by the war, relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible, and removed the presumption which that contract says shall be conclusive against the

validity of the plaintiff's claim." See also Hanger vs. Abbott; also U. S. vs. Wiley, 11 Wall., 508; and The Proctor, 9 Wall., 617.

In Parsons on Contracts, vol. 2, p. 187, the author states that a law may have the effect of suspending an agreement that was originally valid, and which it makes impossible without violation of law, and yet leave the contract so far subsisting that upon a repeal of the law the force and obligation of the contract remains." See also Bayles vs. Fettyplace, 7 Mass., 325; Hadley vs. Clark, 8 J. R., 259.

In a Mississippi case, 45 Miss., 581, Statham vs. New York Life Insurance Co., found also in 3 Bigelow, 650, a part of the opinion of Simrall, J., contains so much good sense on this subject that I will quote it: "As a general proposition war suspends the performance of *ante bellum* contracts, and denounces as illegal and invalid those made *pendente bello*. If an ante bellum contract is dissolved at all, it is because its performance is inconsistent with the duties and allegiance which the parties owe to their respective countries, and involves some violation or infringement of these, and which has not been performed in whole or in part by either party. The annihilation of such a contract would not be injurious to either party, but would rather dissolve their inconvenient relations. But if the contract has been partly exercised by one party, by parting with money or other valuable things on the consideration and promise that the other will perform his part of the engagement, it would be gross injustice, and repugnant to reason, that intervening war should destroy the contract, devolving all the loss upon one party to the gain of the other. Nor should that be so unless an overruling policy should so require, etc. If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, then no principle of law or policy arising out of a state of war between their respective countries would demand an abrogation of the contract, or its non-performance." In that case it was held that the contract could be performed by payment of the premium to an agent of the New York company, residing in Mississippi, where the insured lived. In 19 Johnson, 136, Buchanan vs. Curry, the defendant was an alien enemy of the United States residing in Canada; one of the plaintiffs was a naturalized American citizen resident in New York State, and the other was also a British subject in Canada. The contract was for the delivery of timber, but made before the declaration of war in 1812. Some of the timber was delivered before the war. The places of delivery were so general that the plaintiffs could elect to

deliver the timber in Canada, or within the United States. It was held that the contract was not dissolved by the war, and that the plaintiffs could deliver the timber to an agent who resided in the United States, in performance of the contract.

The tendency of adjudication is to preserve and not to destroy pre-existing contracts. Where performance can be had without contravening the laws of war, the existence of the contract is not imperiled, and even if performance is impossible, the contract may still, when partly executed, be preserved by engrafting necessary qualifications upon it, or suspending its impossible provisions, if made so by the act of the law. If the contract in question can be saved while the war lasts, it should be, and it is clear to my mind that the law will allow a suspension of the payment of the premium, and permit the payment to be made on the return of peace, with proper interest, unless there is something in the terms of the contract to prevent it. There is no more hardship in that than in suspending the payment of a debt. There is more in the latter, for the creditor loses his interest, but the insurance company will receive it, as is right. The company should receive it, because its ability is sustained by its premiums, and the entire accumulations. The nature of the contract is such that when enforced the equivalent for the sum insured should be made up. There is no question raised in the case as to the amount of interest tendered. The declaration states that legal interest was tendered. If compound interest could be required, as perhaps it ought to be, the company would be reimbursed for the delay.

But it is said that the payment of premiums is a condition precedent, and if not made with exactness, that there can be no excuse for it unless specially provided in the policy. It is difficult to define the precise nature of the condition for the annual payments. The contract is *sui generis*. It may be admitted that the payment of the premium is a condition precedent to any recovery, the same as the performance of an entire contract may be, but the payment after the first is not a condition precedent to the vesting of substantial rights under the contract, although liable to be defeated by force of the clause of forfeiture.

The payment of the first premium covers the whole lifetime, and makes a complete vested right to the sum insured if death takes place before another premium is payable; but if not, it is subject to the payment of further premiums. This is not in the nature of a condition precedent to the vesting of a title to real estate. In such

a case, if the condition becomes impossible to be performed, nothing vests, because the instrument creates no right at all, without the complete performance of the condition. A condition as affecting real estate, where its nature is most distinctly seen, if precedent must be performed before any estate vests; if subsequent, it divests an estate vested. If the condition precedent is void or impossible to be performed, nothing vests. If the condition subsequent is void or impossible, the estate, having vested, remains undisturbed. The condition in question cannot in any technical sense be regarded as precedent or subsequent, so as to vest or divest rights under the policy. It is a condition in the contract, and a part of it, and peculiar and arising out of the very nature of life insurance contracts. The policy is necessarily of the character of mutual agreements, partly executed on one side; and although the performance of the same on the part of the insured may be precedent to the final performance by the company, yet we should subject it to the same restraints and influences of the law as any other contract. When the first premium is paid a full contract of insurance is completed, subject to conditions peculiar to that class of contracts. The use of the words "condition precedent," Baron Parke, in a certain case, Bradford vs. Williams, (L. R., 7 Exch., 261,) said he thought unfortunate; that "the real question, apart from all technical expression, is what in each case is the substance of the contract."

So far as the precedent payment of the premium in arrear is concerned, it would of course have to be made before recovery. Time also is of the essence of the contract, and no fault or neglect of the party could excuse a non-payment; but why should not this, like any other contract, be subject to such qualifications and conditions as the law may impose? I am unable to discover any reason. This should have no immunity from the fate of any other contract when, by an unexpected event, it becomes unlawful literally to carry it out.

This subject, as we are now considering it, is free from any question of public policy, and cases excusing performance according to contract, by reason of a subsequent unlawfulness, are in point.

In Bayles et al. vs. Fitzplace et al., 7 Mass., 324, the plaintiff sold, in 1807, sugar to defendants at Boston, for which defendants promised to pay two several sums, at different times, and to deliver within a reasonable time what were called certificates of debenture of the United States. These were to be issued by the government officers, and could not be obtained unless the sugars were exported. Within

the reasonable time necessary for exportation an embargo was laid by the United States. The court held that the embargo operated as a temporary suspension of the performance of the contract. Sewell, J., said that "the mere suspension of the exercise of this right operated equally upon the plaintiffs and defendants, was created by laws to which both were parties and formed a part of that system of regulation to which they had referred themselves in the implied intentions if not in the express letter of their contract." Sedgwick, J., said "the defendants of course were prevented inevitably, and without any fault on their part, from performing their promise. Now it is clearly settled by innumerable authorities that whenever a contract which was possible and legal at the time it was made, becomes impossible by the act of God, or illegal by an ordinance of the State, the obligation to perform it is discharged, or if such ordinance be temporary the obligation is suspended during its continuance." See references in note to that case.

In Hadley vs. Clarke, 8 T. R., 259, in Court of King's Bench, where defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, on the vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the further order of council. Held, that such embargo only suspended, but did not dissolve the contract, and that when the embargo lasted two years.

In Jones vs. Judd, 4 Comstock, the plaintiffs made a sub-contract to do work upon a canal in New York. Afterward the legislature passed an act which put an end to the original contract and the sub-agreement. The defendant had paid plaintiffs for all the work done except ten per cent., which was not to be paid until the final estimate. Held, that as the plaintiffs were prevented by authority of the State from completing their contract, they were entitled to recover. The act of the legislature excused the performance of the condition precedent of entire performance. The following are cases and references in the same direction as those cited: 6 Ad. & El., (N. S.) 607; Anglesea vs. Rugeley, 7 E. & B., 763; Exposita vs. Bowden; Chitty on Contracts, (10th Am. ed.,) 804; 2 Parsons on Contracts, (1st ed.,) 187.

Warranties in contracts of marine insurance are always regarded as most imperative in their performance; yet Arnold, in vol. 1, p. 585, of his valuable work on Insurance, says "it may be stated generally that compliance with a warranty will be dispensed with if it be rendered unlawful by a law enacted since the time of making the policy." The foundation of this doctrine is in the maxim that the law

does not seek to compel a man to do that which he cannot possibly perform, and as an illustration of it, the familiar instance is given in the books, that if "H covenants to do a thing which is unlawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed." Broom's Maxims, 168. Although the instance is of the repeal of a covenant, by the effect of an act of Parliament which is permanent, yet the principle is fairly deducible from it that if the act interdicted is only temporarily unlawful, it suspends the operation of the covenant. See Cohen vs. N. Y. M. L. Ins. Co., 50 N. Y., 622; [2 Ins. Law Jour., 426.]

It must be considered, in analogy to the marine insurance cases, that there is engrafted by necessary force of the law upon the policy a proviso, or exception, saving it from forfeiture or extinction by suspending the payment of the premium when, by an unexpected condition of affairs, it has become temporarily unlawful to make it. The contingency of a civil war could not by any possibility have been anticipated at the making of the policy, and it would be grossly unjust to allow a forfeiture when by suspending the payment the contract could afterward be substantially performed. The law in my judgment will save the policy from so disastrous a result. The basis of all the argument against this view, so far as adjudication is concerned, is the case of Paradine vs. Jane, Aleyn, 26. The comments of the chief justice upon it are forcible. It is a case of hardship only, not of impossibility of performance. The exact language of the report cannot fairly be construed against the principle now insisted on. It is as follows:

"And this difference was taken, that where the law creates a duty or a charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by a tempest or by enemies, the lessee is excused. So of an escape. So in 9 E., 3, 16, a supersedeas was awarded to the justices that they should not proceed in a cessavit upon a *cessr* during the war, but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, *if he may*, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it."

The point of the second proposition is, "if he may," = he *must if possible*, however hard. The impossibilities recognized by the law

are, impossibility by act or force of law, and impossibility by the act of God. It is unnecessary in this case to deal with the latter excuse, as there is more difficulty about it; but as to the former, it is said in Chitty on Contracts, 804, that the non-performance of a contract will always be excused where it is occasioned by act of law, or by an act done by public authority." The doctrine already considered would apply to a case where the disability was only on the part of the party to perform; but in the case before us the company could not receive the payment without a violation of law on their part. To do so would necessitate an act of intercourse. Hence both parties were under a legal disability—one to pay, the other to receive. This is the effect of the act of Congress, and of the state of war.

The right of those interested in the policy to pay and save the insurance was just as strong as those of the company to receive. Neither could enjoy the right. By what principle, then, can the company exact strict compliance with the clause to pay at a definite time? The hands of each were tied, and the company could not complain of the other's default. According to all analogy and principle, the performance must be suspended under such circumstances. To dissolve when the contract is part exercised, would not place the parties in a just position; but to suspend will best reach the intention and spirit of the contract.

The suggestion that this being a mutual company the contract is therefore like a partnership, and dissolved, is disposed of by what Allen, J., said in substance in Cohen vs. New York Mutual Life Ins. Co., 50 N. Y., 624, [2 Ins. Law Jour., 426,] that the company is a body corporate, capable of contracting as such, and the relation is between insurer, a corporation, and insured; that the members are not partners between themselves. The contract is the contract of the corporation, and whatever incidental advantages appertain to a member, that that does not affect the contract in the policy. Besides, if a partnership it would result in an accounting, as of the time of the dissolution, which would be at the commencement of the war, and the defendant would hardly desire that result.

The further suggestion by defendant's counsel, that the fault of non-payment must be imputed to the plaintiffs, because the rebellion was their fault, cannot be regarded. The law deals with the condition of things when actual hostilities exist, and considers all the citizens of the belligerent districts as enemies mutually. The causes of the contest are swallowed up in the strife, and the legal results of it between individuals are not affected by the causes which induced it.

If this insurance company had been located South, and the plaintiffs North, the law would affect them the same as it does now, with their present status.

The questions involved in this cause have greatly agitated the courts of this country, and resulted in adverse decisions. I have not reviewed them, but will content myself with merely a reference to them, both in favor of the result reached, and those adverse.

In favor : 7 Bush., 179, N. Y Life Ins. Co. vs. Clopton ; 20 Grat., 614, [1 Ins. Law Jour., 115,] Manhattan Ins. Co. vs. Warwick ; 42 N. Y., 54, Robinson vs. N. Y. Life Ins. Co.; 45 Miss., 581, Statham vs. N. Y. Life Ins. Co.; 9 Blatchf., 234, [1 Ins. Law Jour., 573,] Hamilton vs. Mutual Life Ins. Co.; 50 N. Y., 610, [2 Ins. Law Jour., 426,] Cohen vs. N. Y. Mut. Life Ins Co.; 50 N. Y., 626, [2 Ins. Law Jour., 372,] Sands vs. N. Y. Life Ins. Co.

Adverse : 44 Geo., 119, Dillard vs. Manhattan Life Ins. Co.; 2 Abb., Pr., N. S., 167, O'Reily vs. Mut. Life Ins. Co.; also Tait vs. N. Y. Life Ins. Co., in U. S. Circuit, Western Tennessee, [2 Ins. Law Jour., 863.]

In addition to these cases the recent action of the Supreme Court of the United States, in affirming by a divided court two adverse judgments, exhausts all the adjudication I can find upon the distinct subject.

The objection that the suit is not brought in the name of the proper party is correctly disposed of by the chief justice, and nothing further need be said upon it.

The judgment of the Supreme Court must be affirmed.

Dissenting opinion by Chancellor Runyon.

The declaration states that on the twenty-seventh of December, 1849, the daughters of John H. Hillyard, now deceased, then of Richmond in Virginia, the survivors of which children, with the husbands of such of them as are married, are the plaintiffs in this suit, by Edwin Hillyard, their "trustee and agent," made and entered into a certain agreement (a policy of insurance,) with the defendant, whereby the company, in consideration of $302.50, to them paid by Edwin Hillyard, trustee, and of the annual premium of $302.50 to be paid on or before twelve o'clock, noon, on the twenty-seventh day of December in every year during the continuance of the policy, assured the life of said John H. Hillyard for the term of life, payable in trust to said Edwin Hillyard, trustee, for the benefit of the above-mentioned

children of John H. Hillyard; that the company thereby promised and agreed to and with the assured, his executors, administrators and assigns, well and truly to pay, or cause to be paid, the sum insured to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of said John H. Hillyard, deducting therefrom all notes taken for premiums on that policy, unpaid at that time.

The policy contained certain provisos, among which was the following: In case the said Edwin Hillyard, trustee, should not pay the annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

The annual premiums were paid up to December 27, 1861, but the one which then became due was not paid. John H. Hillyard died June 1st, 1862. After his death, and after the condition of hostility between the part of the country in which he resided and the Federal government ceased, the premium due on the twenty-seventh day December, 1861, was tendered, but refused.

This case comes before us on demurrer to the declaration. The plaintiff in error insists that the action cannot be maintained by the plaintiffs therein, but should have been brought in the name of the trustee. I consider it enough to say, on this head, that the declaration avers that the agreement for life insurance was made by them through Edwin Hillyard, not only as their trustee, but as their agent. If made by him as their agent, they, as principals, may of course maintain an action upon it.

The main subject of consideration is, whether the action can be maintained in view of the fact that the declaration admits that no annual premium was paid on the policy after the twenty-sixth of December, 1861, and, alleging no release or waiver, seeks to excuse the non-payment on the ground of the existence of the governmental interdict, which was issued during the civil war. The question is, whether this excuse will avail—a question which the conflicting decisions of the courts on the subject leave so entirely open as to compel us, for want of authoritative adjudication, to seek a conclusion by the guidance of legal principle. The question is one of law merely, from which all considerations foreign to the discussion must be excluded. The plaintiffs have sued in a court of law for the insurance money. Their claim is based on the contract between them and the company, and by the construction of that contract, according to legal principles,

they must abide. The company have the right to such a construction of their agreement. The cases which have come to my notice, in which this subject has been discussed, are: Manhattan Life Insur-Co. vs. Warwick, 20 Gratt., 614; [1 Ins. Law Jour., 115;] New York Life Insurance Co. vs. Clopton, 7 Bush., 179; Dillard vs. Manhattan Life Insurance Co. 44 Geo., 119; Statham vs. New York Life Ins. Co., 45 Miss., 581; Cohen vs. New York Mut. L. Ins. Co., 50 N. Y., 610, [2 Ins. Law Jour., 426;] Sands vs. New York Life Ins. Co., 50 N. Y., 626, [2 Ins. Law Jour., 372;] Hamilton vs. Mut. Life Ins. Co. of N. Y., 9 Blatch., 234; Tait vs. N. Y. Life Ins. Co., Cir. Ct., U. S., for the West. Dist. of Tenn., [2 Ins. Law Jour., 863,] and O'Reily vs. Mutual Life Ins. Co., of N. Y., 2 Abb. Pr., N. S., 167. None of them except Dillard vs. Manhattan Life Ins. Co. presented the exact features of the present case.

Here no tender of the unpaid annual premium to the agent of the company in rebel territory, when it became due, is averred. Here the death of the person insured occurred before tender to the company. This is not a suit to rehabilitate a policy on equitable grounds, in the lifetime of the person insured, but an action to recover the insurance money on a claim of loss.

No question of agency is presented here, nor of the validity of any disputed payment. In Manhattan Life Ins. Co. vs. Warwick, the payments of annual premiums were made up to 1861, and receipts given, signed by an officer in New York, and countersigned by an agent in Richmond, to whom the money was paid.

In 1861 the premium then due was paid to that agent, but only his receipt given for it, and the company did not receive it. In 1862 the insured offer to pay the premium then due, to the agent in Richmond, but he declined to receive it, the company having given him directions that the premiums must be paid in New York. The person whose life was insured died in 1862, after this last tender. It was held that the company was liable to the insured for the amount of the insurance less the amount of the last premium, which he had not paid, and that the war did not revoke the agency in Virginia. In New York Life Insurance Co. vs. Clopton there was a tender to the company's agent, in Virginia, of the premium of 1862, punctually, when it was by the terms of the policy payable; the tender, however, was in the local currency of that State, and the agent, considering it best for all parties, substituted for it a bond for the payment, with interest, at the end of the war. He had received all the previous premiums in that currency, and had paid them over to the company without objection.

The court held that his authority so to receive might be assumed by the assured, and that the fact that Virginia was the place of payment might have implied that the currency of that State at the time of payment, however it might then have been changed and depreciated, would have been received by the company. The court adds: "But however this may be, as the appellant (the company) could not have lawfully collected the premium, and may have lost it by insolvency or confiscation had it been paid to Garland, (the agent,) the tender as made, and the substituted bond as executed, may be regarded as equivalent to actual payment, and may have been as beneficial to the appellant, and by its security even more so. The refusal to accept the tender for the year 1862 dispensed with a formal repetition for the years 1863 and 1864," (the person whose life was insured died in the last named year;) "and moreover we may infer, from Garland's testimony, that bonds were given for those years also."

On these facts we cannot say that the literal non-payment of the three last premiums was either voluntary or prejudicial, or was ascribable even as much to the appellees as to the appellant. And so understanding the phase of the case, and the attitude of the parties, we cannot consistently with the spirit of the contract, and equal justice to the parties, adjudge the policy void.

In Dillard vs. Manhattan Life Ins. Co., the annual premiums had been paid from 1859 to 1862, and from that time till 1865 no premiums were paid, the assured residing in rebel territory. In February of the last mentioned year the person whose life was insured died. After the war had terminated, the unpaid premiums were tendered and refused. It was held that the tender was ineffectual.

In Statham vs. New York Life Ins. Co., the company had at the outbreak of the war an agent in Mississippi, who remained during the war. It was held that the war did not revoke the agency, nor make it unlawful for the agent to receive premiums which were tendered, and that a payment to him would have been a discharge of the premium, and that a tender to him of the premium due December 8th, 1861, (the person whose life was insured, died in 1862,) saved the assured from being in default as to the payment of the premiums.

In Cohen vs. New York Life Ins. Co., it was held that the non-payment of the annual premiums falling due during the war was legally excused by the fact of the disability arising from the war, and that the tender after the war revived the policy. In this case there had been no loss, and the action was in equity, the relief prayed being that the assured might be permitted to make payment of the unpaid

annual premiums, and that the policy might be declared valid, or that the company might be compelled to pay back to the plaintiff all sums paid upon the policy, with interest, and all dividends declared under the policy, etc. The cause came before the court on demurrer.

In Sands vs. The New York Life Ins. Co., the annual premium had been paid by the assured to the company's agent in Mobile up to 1862, and on the day in that year when the annual premium became due, (January 18th,) the assured paid to the agent there the premium in Confederate notes, which the agent accepted as cash, as and for the premium which fell due on that day. The person whose life was insured died in July of that year. It was held that this was a valid payment.

In Hamilton vs. Mutual Life Ins. Co. of New York, the action was in equity for the same relief, under the same circumstances prayed in Cohen vs. New York Life Ins. Co., and with like result.

In Tait vs. New York Life Insurance Co., the assured in the first year of the war made a tender, to a person who was up to the beginning of the war the company's agent in Memphis, of the annual premium which fell due in that year, and the tender was made on the day the premium fell due, but the tender was refused. The court held that the policy was unlawful, as indemnifying a public enemy against loss in time of war, and that such a policy, where entered into before hostilities, is abrogated when they occur; that the relations it established were illegal between belligerents; that where a life policy provides that it shall be void upon the non-payment of premiums within the time prescribed, such payment is a condition precedent; and that time is as of the essence of the contract, and that there can be no recovery if punctual payment is not made; that where the performance of a condition precedent becomes unlawful, or by the act of God impossible, that will not authorize a recovery upon the contract without performance, and that the agency of one authorized to receive premiums and renew policies becomes unlawful when the insured and insurer become public enemies.

In O'Reily vs. The Mutual Life Insurance Company of New York, the action was in equity to declare the policy valid and binding on the company, and that the assured might be reinstated in his rights in respect thereto, or that a new policy might be executed to him, etc. The court (Superior Court of New York city,) denied the relief. It appeared that the plaintiff paid the premiums up to the breaking out of the war, to an agent of the company in Alabama, and after the war

broke out he paid them to that agent there as they became due, and as soon as practicable after the close of the war, in 1865, tendered the premium due that year to the company. It is understood that a determination of the question now before us was prevented in the Supreme Court of the United States, by an equal division of the justices in conference, and the consequence is, that the opposite judgments of the courts below in the two cases involving the question, stand affirmed. It will be perceived that in some of the cases above cited there was an element which is not found in this case—payment or tender of premium during the war, to an agent of the insurer—and in some of them relief was sought in equity, while as yet the person whose life was insured was living.

The payment of the annual premiums according to the terms of the policy was a precedent to the obligation of the company from year to year. The latter rested on the former. The company undertook to pay on the death of the person whose life was insured, on condition, and only on condition, that the annual premiums were paid according to the stipulations of the policy in that behalf. It is part of the expressed consideration of their promise, and it is expressly provided by the policy, that in case of the failure to pay those premiums the company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease and be at an end.

In determining the character of a condition, whether it is precedent or subsequent, the question is, whether the conditional event is to happen before or after the principal. Here the conditional event is the payment to be made on the death of John H. Hillyard, and the principal, the payment of the annual premiums as they should become due. The principle is laid down in the second resolution in Thorpe vs. Thorpe, 1 Salk., 171. "Where a certain day of payment is appointed, and that day is to happen subsequently to the performance of the thing to be done by the contract in such case, performance is a condition precedent, and must be averred in an action for the money." "For," said the court, "every man's bargain ought to be performed as he intended it; when he relies on his remedy it is but just that he should be left to it according to his agreement; but on the contrary, there is no reason that a man should be forced to trust when he never meant it."

No argument is necessary to establish so evident a proposition as that the company's obligation, under such a policy as that in the suit, is predicated upon the payment of those premiums according to the

stipulation of the policy. In Catoir vs. American Life Ins. and Trust Co., 4 Vroom, 487, 489, the court said on the subject, speaking in reference to such a provision in a policy of life insurance: "There can be no objection to a provision of this kind. It is salutary and wise for the solvency and success of corporations like the defendants. The insurance is accepted upon these terms. They form part of the written contract, upon which the claim for the benefit of it is based, and the plaintiff is bound to a strict performance of them, unless such performance is legally modified by the company." In Howell vs. Knickerbocker Life Insurance Company, 44 N. Y., 276, 284, [1 Insurance Law Journal, p. 443,] the court said on the same subject: "Payment was a condition precedent to the continuance of the policy, and no mere accident or act of God, however controlling, could continue the policy in force after the pay-day, without payment. This could be done only by the agreement, or consent of the defendant properly given, or by some act which would estop the defendant from denying payment."

The obligation of the company under the policy did not by the payment of the first premium, or of subsequent premiums, become a debt, but a contingent liability merely—a liability to pay, provided the person whose life was insured should die before the next pay-day, not having violated any of the conditions of the policy; a liability which would terminate in case that person should survive that day, and the annual premium which then would become due should not be paid. If this be the extent and condition of the company's obligation, if their liability to the assured was contingent, conditional, dependent upon the payment by the latter of the annual premiums as they should become due, they cannot be liable to him unless he has done the thing which they stipulated with him should be done as a condition on which their liability was to depend, or they have waived, or are estopped from denying performance. That such is the character, condition and extent of the liability is thoroughly established. Catoir vs. Am. Life Ins. Co., *supra;* Want vs. Blunt, 12 East., 183; Howell vs. Knickerbocker L. Ins. Co., *supra*, [1 Ins. Law Journal, 443;] Gamble vs. Ins. Co., 4 Irish Rep., C. L., 204; Dillard vs. Manhattan Life Ins. Co., *supra;* Davison vs. Mure, 3 Doug., 28; Warsley vs. Wood, 6 J. R., 710; Campbell vs. French, 6 J. R., 200.

To keep the policy in force, says Bunyan, (Treatise on the Law of Life Assurance, p. 66,) the renewal premium must be actually paid; it is not sufficient that there was no intention to discontinue the policy, and that the office is not in fact damnified by the delay.

The common equitable relief in respect of money payments does not apply, for the company has not the power of compelling the payment of the premium. Tarleton vs. Staniforth, 5 J. R., 645; S. C., judgment affirmed, Exch. Cham., 1 B. & P., 471. Accy vs. Ferine, 7 M. & W., 51. The act of God will not excuse the default of performance of a contract of this character, absolute in its terms, and making no allowance or provision for the act of God, or other inevitable necessity. See, in addition to the cases above cited, Trustees vs. Bennett, 3 Dutch., 514; Thompson vs. Dudley, 25 N. Y., 72.

If the assured fall dead with the money in his hand, on his way to the office of the insurer to pay the annual premium, and so it remain unpaid beyond the time limited, the company is discharged from all liability under the policy. Though he may have paid annual premiums greater in their aggregate amount than the sum insured, nevertheless there is no remedy, nor can any recourse be had to the insurer in the premises. Hard as is this judgment, yet it is the dictate of that stern justice which regards with equal eye the obligations of each of the parties, giving to each the advantage for which he has stipulated, but only on the terms on which alone he is entitled to it.

It is impossible to shut our eyes to the fact, that the bargain between the insurer and insured under this policy is in its very essence conditional. The company did not agree to pay in consideration of the promise of the assured, but in consideration of his performance. That is evident from the nature and character of the contract. The assured made no promise at all. He was bound by no covenant to pay or to do anything. The company therefore had no remedy whatever against him. The contract was in this respect unilateral. Were this a case of mutual undertakings, the question whether the promise of the assured was the consideration for that of the insurer, or whether the performance and not the mere promise of the former was the consideration of the promise of the latter, would be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to the case. Chitty on Contracts, 11th Am. ed., 1082; Hotham vs. East India Co., 1 J. R., 645; Porter vs. Sheppard, 6 J. R., 668; Campbell vs. Jones, 6 J. R., 571; Moretan vs. Lamb, 7 J. R., 130; Shinn vs. Roberts, Spen., 435, 443.

Nor can we fail to perceive the injustice of holding, in such a case as this, the one party to the bargain after the consideration has failed, while the other is permitted to derive, at the expense of the former,

all the advantages to which by its terms he would have been entitled only by a strict performance of its stipulations. It should be a hard necessity of inflexible and inexorable law which compels a court to such a judgment. It is not insisted in this case that such a result could be permitted to follow the failure of the assured to pay according to the agreement, if such a failure arose from the act of God, but it is insisted that the public interdict, which forbade commercial intercourse between the assured and the company, which forbade the one to pay and the other to receive the annual premium, works an exception to the rule. This reason is not apparent. The interdict of the government would excuse performance of a covenant, and it would relieve from a forfeiture, and from penalties, and from payments, where time is not as of the essence of the contract, but such is not this case.

The question here is not as to the liability of the assured for non-payment, nor whether he shall be relieved from a forfeiture or penalty, but whether the company are liable to him, now that the condition on which alone they were to be liable by the terms of the contract has not been performed. The question is whether the character of the contract is to be altered, and its identity destroyed; whether from a conditional agreement it is by operation of law to become in effect absolute and unconditional. The tender of the unpaid premium, with the interest thereon, is a mere delusive formality; for the money, if accepted, is to be returned in the shape of the insurance money. The tender amounts merely to the expression of a willingness to allow the company to retain out of the sum insured the amount of the unpaid premium and interest. It makes no difference, in reaching a conclusion on this subject, that many annual premiums have been paid. The matter must be determined on legal principle. The law must be the same if only one premium had been paid, and it is hazarding nothing to say that the courts would shrink from a judgment which, in a case where a company had received only the first premium of perhaps $3,000 on a policy of $60,000, should compel the payment of the latter sum under circumstances such as this case in other respects presents. And yet the principle would be precisely the same. The injustice would be only greater and more flagrant, because the amount of money would be larger.

It is said, however, that notwithstanding its form, this contract may be regarded as one of mutual obligations. If this be conceded, it seems to me clear that it was a contract of a continuing character, one which required that something be done—the payment of annual

premiums to keep it alive. I cannot agree to the proposition that the contract was executed on the part of the company when the first premium was paid. The position appears to me to be utterly untenable. As a continuing contract the war put an end to it. The prohibition of war, in the language of Chancellor Kent, in Griswold vs. Waddington, 16 John., 438, "reaches to all interchange, transfer or removal of property, to all negotiations or contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat."

"Executory contracts," said the court in Hanger vs. Abbott, 6 Wall., 532, 536, "with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates, for that purpose, with a force equivalent to an act of Congress."

By the common law, if there were a contract with an alien, and while it was merely executory a war broke out between Great Britain and the country of the alien, that would dissolve the contract. Exposita vs. Bowden, 4 E. & B., 963; S. C., 7 E. & B., 778. But if the contract were executed, if nothing remained to be done by either party, and a cause of action had accrued to the alien thereon before the commencement of hostilities, the effect of this was held to be only to suspend the right of the alien to sue till the return of peace. Flindt vs. Waters, 15 East., 260, 265. In that case, which was an action on a policy of marine insurance, Lord Ellenborough said, "The ground of our decision in this case will not at all clash with the doctrine laid down by the court in Brandon vs. Nesbitt. The point there decided was, that the fact of parties interested in the insurance having become alien enemies before the loss happened, might be pleaded to an action brought in the name of the British agent who effected the insurance; and the court are disposed to confirm that doctrine. But the defense of alien enemies must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself, on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it. Here the objection is taken upon the general issue, which is a plea of a perpetual bar, and if found against the plaintiff would have concluded him forever, so that though peace should be established to-morrow between the two countries, and the Crown should not

have interfered to seize the debt; yet on this plea in bar, the plaintiff would have been forever estopped to sue for his debt. But here the objection is only of a temporary nature; the contract itself was perfect at the time it was made; the trade was with an alien friend which required no license, though one was obtained *ex abundanti cautela.* The insurance, the loss, and cause of action had arisen before the assured had become alien enemies; when, therefore, they became such, it was only a temporary suspense of their own right of suit in the courts here, as alien enemies. This, therefore, being only a temporary disability on the part of the assured, and there being no personal disability in the plaintiff, their agent, to sue, he is not excluded from his right to recover, by this species of defense set up under the pleas of the general issue. It is claimed, however, it may be remarked, that this contract differs essentially from a contract of copartnership, which the war admittedly dissolves, in this, that the latter contemplates continual communication and association, whereas the former requires only annual communication. I do not see on what principle the distinction between communication which by the contract is periodical merely, and that which, though incontemplation of law continual, is practically only occasional, is based. If the war actually by its duration prohibits the parties from such periodical communication, and such communication is necessary to the existence of their contract, the same reason would apply in the one case as in the other. If the condition of war or the interdict of government made it illegal for the company to receive the premiums, in common justice they must be held to be absolved from all obligation for the performance of which they were dependent upon those premiums."

In Brewster vs. Kitchell, 1 Salk., 198, Lord Holt said, that where a man covenants to do an act which is unlawful when the covenant is made, and the act is subsequently rendered unlawful by statute, the covenant is repealed.

The condition of war, and the consequent interdict of the government, prevented the parties from continuing the contract. They did more. They deprived the company not only of the annual premium, but to a great degree, at least, of the power to protect themselves against violations of the conditions of the policy. It is just to hold that the war destroyed a contract, which it put it out of the power of the parties to it to continue on the terms on which alone it was based, rather than to seek to uphold it to the manifest detriment of the loyal citizen, who is in no wise in fault.

It may be observed that the opposite view not only disregards the character and elements of the contract, but casts upon the company the burden of presumptions to which they cannot be fairly subjected. The logic is, the war forbade the payment of the annual premium, therefore it is to be assumed that the assured would, but for that prohibition, have paid it; that he was not only able, but willing to pay it. And if the war had lasted ten years and the person whose life was insured lived to the end of that period, the result would of course have been the same.

The war put an end to this contract of insurance, if not when it broke out, then at the time when its prohibition took effect upon it, which was when commercial intercourse between the parties became necessary to its existence or continuance, when that prohibition prevented the payment and receipt of the annual premium payable on the twenty-seventh of December, 1861. It does not seem to me to be necessary on principle to hold that such a contract is dissolved by the breaking out of the war, but only when the prohibition of the state of war takes effect upon it, to the disturbance of the relations of the parties to each other in reference to it.

Though war puts an end at once to marine insurance upon a vessel of the enemy, for the two-fold reason that intercourse is forbidden and the effect of the insurance is indemnity, and therefore strength to the enemy; the reason does not appear to be applicable to the case of a life insurance, contracted for before the war, until the war affects the relation of the parties or disturbs the contract. When the war thus prevented the payment of the premium, it deprived the company, *pro tanto*, of the means of providing the insurance money, and deprived the assured of the privilege of keeping up the policy, and securing the continuance of the liability of the company to him. Up to that date the contingent conditional liability of the company continued, and had John H. Hillyard died before the annual premium payable in 1861 became payable, not having violated any of the conditions of the policy, it violates no principle to say that the company would have been liable to pay the insurance money, and it might have been recovered by suit after the return of peace. But the payment of that premium was a condition precedent, not only to the continuance of the liability, but to any liability whatever, of the company beyond that day.

It is said, however, that the late war was not between independent nations, but was a rebellion, an insurrection merely, and that the strict rules applicable to war between independent countries do not

apply to it, and therefore the act of the government may be pleaded merely as creating an impossibility of performance, so that the question whether such impossibility will excuse may be considered unembarrassed by the rules governing the people of independent countries at war with each other.

It has been repeatedly authoritatively held that the late war was a public war between governments, and all the inhabitants of the loyal States and those of the rebellious States, and that the people of each occupied the position of enemies to the people of the other during the continuance of the war. The Prize Cases, 2 Black., 635; Mrs. Alexander's Cotton, 2 Wall., 404; Coppell vs. Hall, 7 Wall., 542; McKee vs. United States, 8 Wall., 163; United States vs. Grossmayer, 9 Wall., 72.

In the second case cited, 2 Wall,, 419, the court said, "It is said that though remaining in rebel territory, Mrs. Alexander has no sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy's property; but this court cannot inquire into the personal character and dispositions of the individual inhabitants of enemy's territory. We must be governed by the principle of public law, so often announced from the bench, as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

But if it be conceded that the late war was a mere insurrection, and that the impossibility of performance arose from the special interdict of the government merely, the case is not changed. It will still be governed by the same rules. The same question will still exist, to be answered by the application of the same principles.

In Hadley vs. Clarke, 8 J. R., 259, an embargo of the British government was held not to absolve the defendants from an obligation to carry the plaintiffs' goods from Liverpool to Leghorn, although it lasted two years. Lawrence, J., said: "This is certainly a case of hardship on the defendants, but I do not see any legal grounds on which they can be excused paying the damages which the plaintiff has suffered in consequence of their not having performed their engagement. The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains; they contended that the defendants were only bound to fulfill their engagement within a reasonable time, and then argued that as the

embargo prevented the completion of the contract within a reasonable time the defendants were absolved from their engagement altogether. But it was incumbent on the defendants when they entered into this contract to specify the terms and conditions on which they would engage to carry the plaintiffs' goods to Leghorn; they accordingly did express the terms and absolutely engaged to carry the goods, 'the dangers of the seas only excepted;' that, therefore, is the only excuse they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In All., 27, this distinction is taken: 'Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract;' so in this case there was one accident against which the defendants provided by their contract: they might also have provided against the embargo. But we cannot vary the terms of the contract, and the defendants must be bound by the terms of the contract they have made."

To the same effect is Brown vs. The Royal Insurance Society, 5 Jur., N. S., 1255, where a fire insurance company after a loss had elected to reinstate the premises in preference to paying the claims, and while they were proceeding to reinstate them the commissioners of sewers caused them to be taken down as a structure in a dangerous condition, but such condition was not caused by the fire. It was held that a plea showing performance to be impossible was no answer to a suit against the company for damages for the loss.

It will be observed that these were cases of covenants and not of conditions. It is not to be forgotten that the company has rights under their contract, and as to the construction to be placed upon it, which the court is bound to respect.

In the language of Lord Kenyon, in Campbell vs. French, "The plaintiff in error, who entered into the contract imposing these terms upon his contract, and subscribing it with that limitation and that condition, had a right to impose those terms; and if any person tell him that he acceded to other terms he has a right to answer, 'This is not my contract—*non hac in fœdera veni*,—do not impose on me other conditions than those I have imposed upon myself by the contract I have entered into.' If this case had been foreseen perhaps

the condition would have been adapted to the case, but we are now construing a strict legal instrument, to which legal effect may be given."

If it be said that the view I have taken of this subject will inflict hardship on the assured, by subjecting him to the loss of the premiums he may have paid before the war broke out, the answer is, that the hardship is attributable to the contract he made, and to the effect of war upon it, and it may be added that as to the hardships which have arisen from the state of hostility between the Federal government and the section of country in revolt, it is just that they should fall rather on the inhabitants of the latter than on loyal people. As was said by the court in the case of The Rapid, 8 Cranch, 155, 164, in affirming a decree of condemnation against the goods of an American citizen which were owned by him when the war broke out, and were then in the enemy's country, and which had been taken on board a privateer while they were being transported hither during the war in an American vessel employed by him for that purpose alone:

"It is the unenvied province of this court to be directed by the head and not by the heart. In deciding upon principles that must define the rights and duties of the citizen, and direct the future decisions of justice, no latitude is left for the exercise of feeling."

For the reasons I have given I am of opinion that the judgment of the Supreme Court should be reversed.

SUPREME COURT OF ILLINOIS.

JUNE TERM, 1874.

Error from Circuit Court.

THE CITY OF ALTON

vs.

HARTFORD FIRE INSURANCE COMPANY.

An ordinance of plaintiff required the insurance companies to report their premium receipts as a basis for levying a tax to support the Fire Department.

Held, that the ordinance had no validity without warrant in the city charter, and could not be offered in evidence without showing authority to pass such an ordinance.

The authority relied on by plaintiff was an act authorizing the return and taxation of agency receipts in the respective counties, towns or municipalities, and providing that the act "shall not be construed to prohibit cities having an organized fire department, from levying a tax or license fee of two per cent., in accordance with the provisions of their respective charters, on said gross receipts, to be applied exclusively to the support of the Fire Department of such city."

Held, that it was incumbent on plaintiff to show the city had a fire department to justify the levy.

J. W. COPPINGER, *for Plaintiff in Error.*

CHARLES P. WISE, *for Defendant in Error.*

BREESE, J.

This was an action of debt for a penalty brought by the city of Alton, against the Hartford Fire Insurance Company, alleged to have been incurred by that company for failing to report the amount of premiums earned by it, for the year 1872.

A judgment was rendered against the defendant company for the sum of fifty dollars, and an appeal taken to the Circuit Court, where a trial was had, resulting in a judgment for the defendant.

To reverse this judgment the plaintiff brings the record here by writ of error.

The plaintiff, to maintain its case, offered in evidence an ordinance of the city of Alton, adopted on the 11th of July, 1870, entitled, "An ordinance regulating the licensing of insurance companies in the city of Alton." Objection was made to the introduction by defendant, which the court allowed and excluded it from the jury, and plaintiff offering no other testimony, the court directed the jury to find for the defendant, which they did. These are the errors assigned. It is contended by plaintiff that it had a right to introduce the ordinance in evidence without showing authority to pass such an ordinance. It insists it has a right to introduce it without any preliminary evidence. It was claimed by the defendant that the charter of the city conferred no powers on the municipality to pass such an ordinance. No attempt being made by the plaintiff to remove this objection, by a production of the charter, the ordinance had nothing on which to rest, and was properly excluded. It may be admitted, a party is not to be controlled in the order of his testimony—what portion of it shall be first introduced; but if he fails to state he will show the connecting link in his chain of evidence, and does not show it, the court has no other course to take but to direct a verdict for the defendant, unless the plaintiff voluntarily submits to a nonsuit.

Clearly, without warrant in the city charter the ordinance had no validity and was not evidence, for the city possesses no powers except such as are expressly granted, or such as are necessary to carry into effect a power expressly granted.

Plaintiff says the object of the ordinance was to enable the city of Alton to fix the basis for imposing a tax of two per cent. upon insurance companies, to be applied to the support of the Fire Department, in conformity with the requirements of Section 30 of an act entitled "Insurance," approved March 11th, 1869. That section is as follows:

"Every agent of any insurance company incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May annually, the amount of the net receipts of such agency, which shall be entered on the tax list of the county, town, etc., and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located, said tax to be in lieu of all town and municipal licenses. And all laws and parts of laws inconsistent herewith are hereby repealed: Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department, from levying a

tax or license fee, not exceeding two per cent., in accordance with the provisions of their respective charters, on said gross receipts, to be applied exclusively to the support of the fire department of such city."—Sess. Laws, p. 209, 228.

Clearly it was incumbent on the plaintiff to show that the city of Alton had a fire department to justify this levy. This record fails in this respect. Van Inwagen vs. City of Chicago, 61 Ill., 31.

We think there is no error in this record.

The constitutional question sought to be brought before us by the defendant in error will be considered and decided after full argument on both sides. The judgment is affirmed.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

ACCIDENT.—*Accident insurance is not a contract of indemnity and does not limit the liability of a railroad corporation for damages.*

The plaintiff sued a railway company for injuries received. He had received £31 on account of injuries from an accident company. The question was whether the damages which he was entitled to claim against the railway were to be assessed without any reference to the sum paid by the insurance company, or whether they were to be reduced by the amount so paid.

Held, that no deduction is to be made from the amount of damages on account of the sum paid under the policy. "If a man is injured on a railway through the company's negligence, he is not to have less because he has insured himself against accident. He pays his premiums in order to get back an equivalent, and if he is liable to have the amount of his insurance deducted, he loses the benefit of the premiums paid. It is said that he is only actually damaged beyond the amount of his insurance; but according to Dalby vs. the India and London Assurance Company, insurance is not a contract of indemnity. The plaintiff is entitled both to the insurance money and compensation. He gets his insurance money under a contract as a *quid pro quo*, having paid his premium for it, and he is entitled besides to compensation from the company for the legal injury they have committed. The plaintiff does not obtain his money from the insurance company because he has met with an accident, but under the terms of a contract."

The case of Hicks vs. the Newport Railway Co. was cited, where it was decided that where death has ensued, the jury are to take into account the sum payable in respect of a policy on the life of the deceased. "But that was an action under Lord Campbell's act for compensation where the injury causes death. In that case the test

is the reasonable expectation of pecuniary advantage, through the continuance of the life of the deceased. The fact that the death made money payable to the relatives under a policy can no more be left out of sight than, if the heir at law sued, the fact that he came into a large estate."

Court of Exchequer, England.

LIFE.—*Title to the policy of a bankrupt husband for the benefit of the wife is in the wife, but premiums paid after insolvency may be recovered from the wife after payment of the policy.*

The creditors of a bankrupt firm excepted to the schedules of the firm, because life policies taken out for the benefit of their wives were not contained or surrendered.

Held, that the title both legal and equitable is in the wife, and cannot be controlled or assigned by the husband. But any payment made out of their individual or partnership effects after they became insolvent was a fraud, whether so intended or not, so far as to entitle the assignee to recover from the wife the amount advanced, with interest, out of the policy when it shall have been paid, and this claim, when ascertained, may be sold by the assignee, and will pass the contingent right to the purchaser. The register will take proof as to the amount paid by the bankrupts, if any, after they became insolvent, and out of what fund paid, which claim, when ascertained, will be sold for cash by the assignee, as provided for the sale of other debts or choses in action.

In re Bear & Steinberg, Bankrupts.

U. S. D. C., Southern Dist. Miss.

LIFE.—*Suicide not a presumption of insanity.*

In an action to recover $1,000 on a policy issued by plaintiffs, the court ruled that the fact of suicide was not a presumption of insanity, and, even if insanity be proved, yet if it could be established that the person committing suicide knew the physical consequences of the act at the time, the company would be excused and his representatives would have no right to recover.

Catharina Hartmann vs. Connecticut Mutual Life Ins. Co.

S. C. Hamilton Co., O.

MARINE.—*Estimation of expenses arising from the sale of damaged cargo at an intermediate port in determining liability of insurer.*

The Herder, in distress, put into the port of Glasgow, with her cargo more or less damaged. A portion of the barley, being part of

her cargo, was then reshipped in the steamers Ethiopia and Victoria, bound for New York, to the extent of 2,189 bags, yielding 410,396 pounds, and this portion was received by the owners in New York. The residue of the barley was sold in Glasgow, justifiably on account of damage—*i. e.*, 504 bags, containing 102,709 pounds, yielding money there $2,097.93, and subject to general average charges of $546.33, leaving a net credit of $1,551.60. The insured value of this portion sold in Glasgow was $3,430.43. It is shown that all the charges arising from the sea damage to the 504 bags of barley, and pertaining to the sale thereof, were deducted in Glasgow from the gross proceeds of sale, leaving the net amount of $2,097.93.

The question was, whether in a risk on a grain cargo specified to be free from particular average above ten per cent., the expenses occasioned by the peril and sale of damaged grain at an intermediate port should be estimated in determining whether the damage had exceeded ten per cent.

The court held that whatever may be the proper rule of calculating a partial loss, in this case, under a valued policy, it seems that the damage to the shipment of barley by the partial loss on the 504 bags sold in Glasgow is less than the ten per cent. excepted in the policy. The proceeds to be received by the owners reduce the loss below the average. The result is that the defendants are liable for the general average charge of $546.33, but are not liable for the particular average or partial loss sustained by the plaintiffs.

Becker & Co. vs. General Ins. Co., of Dresden.

Court of Arbitration, New York.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 29. FIRE.—*Company bound by Act of—Waiver of Premium by.*—The agent, intrusted with certificates of contracts for intermediate insurance, duly signed, with authority to deliver to applicants for insurance, erased therefrom a material stipulation without knowledge of the insured of the circumstances of erasure, or of the agent's lack of authority to erase. *Held*, that the company will be bound to the same extent as if the erasure had been authorized. Where the agent delivered the certificate to the applicant, giving time for payment of premiums, and the company charged the agent with the amount of the premium, which was settled after the loss, a condition in the printed part of the policy of the company, according to the terms of which the insurance was effected, that no insurance is binding until ac-

tual payment of premium, must be considered as waived, although the agent had no express authority to give time for payment.

Dayton Ins. Co. vs. Kelly.

Rep'd Jour'l. p. 169. OHIO S. C.

§ 30. FIRE.—*Responsibility of Company for Acts of.*—An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal.

Masters vs. Madison County Mutual Ins. Co., 11 Barb., 624; Sarsfield vs. Metropolitan Ins. Co., 61 Barb., 479; 2 Am. Leading Cases, 5th ed., p. 917.

Continental Ins. Co. vs. Kasey.

Rep'd Jour'l, p. 208. VA. C. A.

§ 31. FIRE.—*Filling Application.*—Where title was fully and freely stated to agent as incumbered leasehold, and the agent filled the application stating it to be unincumbered fee simple, *Held*, that the company was responsible for the false statement in the application.

Flanders on Ins., 101; Union Mut. Ins. Co. vs. Wilkinson, 13 Wallace, 222; 1 Ins. Law Journal, 607.

Planters' Ins. Co. vs. Sorrells.

Rep'd Jour'l, p. 195. TENN. S. C.

ESTOPPEL.

§ 32. FIRE.—*Transfer of Charter.*—Transfer of charter by directors, without authority of stockholders, is invalid, and transferees take nothing; but subsequent participation in the business, or silent acquiescence by the stockholders, estops them from denying the validity of the transfer, in a suit brought by assignee in bankruptcy; and where additional stock is issued by the transferees in compliance with a law authorizing such increase, the stockholders are estopped from denying the validity of the proceedings to increase the stock, or the validity of the stock issued.

Upton vs. Jackson.

Rep'd Jour'l, p. 189. U. S. C. C. MICH.

FRAUD.

§ 33. FIRE.—*Repudiation of Stock.*—Parties induced to purchase stock through fraud or misrepresentation may repudiate their stock and be relieved of liability provided they use due diligence and act promptly, but will be estopped from setting up fraud or misrepresentation as against creditors after continued participation in the business of the company, or acquiescence in their position as stockholders.

Upton vs. Jackson.

—§ 32.

INCREASE OF RISK.

§ 34. FIRE.—*Burden of Proof.*—Insured may not change the use of the building so as to increase the risk, but the burden of proof is on the insurer to show such increase of risk.

Flanders on Insurance, 232, 236, and note 3.

Planters' Ins. Co. vs. Sorrell.

—§ 31.

INSOLVENCY.

§ 35. FIRE.—*Liability of Stockholders.*—Where the company passed a resolution declaring the unpaid stock non-assessable, and the words "non-assessable" were printed across the certificate of stock, *Held*, that the stockholders or directors had no power to limit or exempt the stockholders from liability as against creditors. *Held*, that the assignee in bankruptcy represents the interests of creditors as well as bankrupt, and can recover so far as touches the validity of the stock as if acting solely in the interest of creditors.

Upton vs. Jackson.

—§ 32.

INTERMEDIATE INSURANCE.

§ 36. FIRE.—*Release from—Authority of Company to contract under Charter.*—A certificate of contract for present insurance and for a policy on the risk was surrendered by the insured on the delivery, by an agent, of policies obtained from his own compa-

ny, and by it from other offices insuring the property. The latter policies were void by reason of the company procuring them failing to notify the insurers of other insurance. *Held*, that where the delivery of a void policy is the sole consideration for the release of a liability, the release may be avoided without returning or offering to return the policy of the debtor. Where the charter authorizes a company "generally to do and perform all things relative to the object of the association," and further provides that "all policies or contracts of insurance" shall be subscribed by the officer designated for that purpose by the directors, the latter proviso does not disable the company from binding itself by contracts for policies and intermediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be issued.

Dayton Ins. Co. vs. Kelly.

—§ 29.

OCCUPATION.

§ 37. FIRE.—*Change of.*—Where it was stated in application that the insured building was occupied as a dwelling, when upon proof of loss the occupation was shown to be that of a boarding-house, *Held*, that it does not avoid the policy that the building is, or was after the insurance, occupied as a boarding-house, unless it can be shown that the risk was increased.

Parsons's Mercantile Law, 503, note 1.

Planters' Ins. Co. vs. Sorrells.

—§ 31.

OTHER INSURANCE.

§ 38. FIRE.—*Not indorsed on Contract to Insure—Not stated in Application—Indorsement of, by Agent.*—Where a contract for intermediary insurance, and for a policy on the same risk, is made subject to the conditions in the printed policy, a condition in the policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy, does not require that either prior or subsequent insurance should be mentioned in or indorsed on the contract. A condition in a contract

for insurance requiring notice of prior insurance is waived by accepting the risk on the application, in which the question concerning prior insurance is not answered.

21 Ohio St., 176; 6 Gray, 85.

Notice of additional insurance required to be given to the insurer, may before the receipt of the policy be given to the agent of the insurer who effected the insurance, where he is also intrusted with the delivery of the policy in fulfillment of the contract; and his indorsement of such additional insurance upon the policy is the act of the company. Where a company, in compliance with a contract to insure, procured the policies of other companies, and forwarded them to its agent, and the agent afterward agreed to additional insurance, and indorsed it on the policies, *Held*, that the agent, though authorized to act for his principal, could not bind the other underwriters. It was the duty of the insurer to obtain the assent of the other underwriters.

Dayton Ins. Co. vs. Kelly.

—§ 29.

RECEIVERS.

§ 39. LIFE.—*Cannot Claim Securities held by Superintendent. Held*, that the securities in the hands of the Superintendent of the Insurance Department for the security of policy-holders cannot be voluntarily transferred, and other courts have no authority to compel a transfer to the receiver appointed in a proceeding to dissolve a corporation under the general provisions of the statutes.

Ruggles vs. Chapman.

Rep'd Jour'l, p. 125. N. Y. COM. A.

REPRESENTATIONS.

§ 40. FIRE.—*Effect of Error in Material Matters—When made Jointly by Agent and Insured.*—A material misrepresentation on the part of the insured, whether through fraud or mistake, will avoid the policy.

Flanders on Ins., 327; Carpenter vs. American Ins. Co., 1 Story's R., 57; 1 Phillips on Ins., sec. 537.

If the misrepresentation was not material, such as would affect either the acceptance of the risk or the rate of premium, it will not avoid the policy. Whether the acceptance of the policy or premium rate has been affected or not is a question for the jury.

Columbia Ins. Co. vs. Lawrence, 2 Peters, 25.

If the company, not relying on the statements of the insured, sends its own agent to examine the property, and issues its policy on his representations, the insured is not responsible for a misdescription, though constituting a warranty, unless he withheld information required by the obligations of good faith. Where the agent makes an examination in behalf of the company, and inserts a misdescription in the policy based both upon his own examination and the representations of the insured, if the latter were not bona fide, or induced the company to issue a policy which it would not otherwise have issued, the insured ought to bear the loss; but if the misdescription was bona fide, and immaterial, though constituting a warranty, the insured may recover.

Ins. Co. vs. Wilkinson, 13 Wall., U. S. R., 222, and 1 Ins. Law Journal, 607; Masters vs. Madison County Mut. Ins. Co., 11 Barb., 624; Sarsfield vs. Metropolitan Ins. Co., 61 Barb., 479; 2 Am. Leading Cases, 5th ed., p. 917.

Continental Ins. Co. vs. Kasey.

—§ 30.

TAXATION.

§ 41. FIRE.—*Authority of a Municipality to Tax.—Held*, that a municipal ordinance authorizing a tax on premium receipts has no validity without warrant in the city charter, and cannot be offered in evidence without showing authority to pass such an ordinance.

A section of the act claimed as authority for the ordinance, provided, "that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax in accordance with the provisions of their respective charters, to be applied exclusively to the support of the fire department of such city." *Held*, that it was incumbent to show that the city had a fire department to justify the levy.

City of Alton vs. Hartford Fire Ins. Co.

Rep'd Jour'l, p. 751. ILL. S. C.

TITLE.

§ 42. FIRE.—*Misrepresentation of—Building on Leased Land.*—Statement in the application that the title was that of fee simple, and unincumbered, while it was in fact a leasehold, incumbered by a claim for $200, avoids the policy unless insured is relieved from the consequences for sufficient reasons. Where insured building stands on leased land, *Held*, that absolute ownership of the building is as great an interest in the subject of insurance as is expressed by "fee simple."

Planters' Ins. Co. vs. Sorrells.

—§ 31.

WAR.

§ 43. LIFE.—*Non-payment of Premium During.*—The remittance or receipt of money to pay premiums as between the citizens of the insurrectionary States and the rest of the Union during the civil war involved an act of friendly intercourse, and was therefore unlawful. Whether a pre-existing contract is dissolved or not by war depends on whether or not it is obnoxious to the policy of warfare. If the contract is of a continuing and merely executory nature, and its essential features a violation of the law governing hostilities, as in the case of a partnership, war will work a complete dissolution. But a mere contract of insurance, not requiring the performance of an act inconsistent with a state of war, is not in itself antagonistic to the laws governing a state of warfare. It is the policy of the law to preserve contracts and private rights existing before the war.

1 Kent, 65; 8 Cranch, 110; Brown vs. United States, 6 Wall, 533; Hanger vs. Abbott, 6 Wall., 532, 536.

The test to dissolve a pre-existing contract is its essential antagonism to a state of war. But if rights have been acquired under a contract, not substantially antagonistic, the law will either qualify it or suspend its performance.

Furtado vs. Rogers, 3 B. & P., 191; Kellner vs. Le Mesurier, 4 East., 395; Gamba vs. Le Mesurier, 4 East., 408; Brandon vs. Curling, 4 East., 409; Semmes vs. Hartford Ins. Co., 13 Wall., 13; Hanger vs. Abbott; U. S. vs. Wiley, 11 Wall., 508; The Proctor, 9 Wall., 617; Parsons on Con-

tracts, vol. 2, p. 187; Bayles vs. Fettyplace, 7 Mass., 325; Hadley vs. Clark, 8 J. R., 259; Statham vs. New York Life Ins. Co., 3 Bigelow, 650; Buchanan vs. Curry, 19 Johnson, 136.

In a contract of life insurance made before the war between a corporation in New Jersey and a citizen of Virginia, the law will allow a suspension of the payment of premium until the return of peace, with proper interest, unless there is something in the terms of the contract to prevent it. A condition for the payment of the premiums after the first is *sui generis*. It is not in the nature of a condition precedent to the vesting of a right. The policy is of the nature of mutual agreements partly executed on one side, and is subject to the same conditions and qualifications as other contracts with regard to the suspension of their performance.

Bayles et al. vs. Fettyplace et al., 7 Mass., 324; Hadley vs. Clarke, 8 J. R., 259; Jones vs. Judd, 4 Comstock; 6 Ad. & El., (N. S.,) 607; Anglesea vs. Rugely, 7 E. & B., 763; Exposita vs. Bowden; Chitty on Contracts, (10th Am. ed.,) 804; 2 Parsons on Contracts, (1st ed.,) 187; Arnold, vol. 1, p. 585; Broom's Maxims, 168; Cohen vs. N. Y. M. L. Ins. Co., 50 N. Y., 622, (2 Ins. Law Jour., 426.)

Case of Paradine vs. Jane, Allyn, 26, distinguished.

The fact that the company is mutual does not make the contract like a partnership, and therefore dissolved. The contract is that of a corporation.

Cohen vs. N. Y. M. L. Ins. Co., 50 N. Y., 624, (2 Ins. Law Jour., 426.)

The fault of the rebellion cannot be imputed to the plaintiffs so as to make non-payment of premium their fault. The causes of the contract do not affect the legal results between the individuals.

Mutual Benefit Ins. Co. vs. Hillyard et al.

Rep'd Jour'l, p. 127. N. J. S. C. R.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1873.

THE DAYTON INSURANCE COMPANY

vs.

JOSEPH L. KELLY.*

1. Where the defect in a petition to which a demurrer has been overruled consists in the omission to aver the performance of a condition precedent in the contract sued on, and it appears from the subsequent pleadings and record that the defendant was not prejudiced thereby, the judgment will not be reversed.
2. Where the legal effect of the allegations in an answer is a mere denial of the averments in the petition, such allegations cannot be regarded as new matter which will be taken as true unless controverted by reply.
3. A judgment will not be disturbed for an omission of the court to order an amendment of the petition so as to make its allegations conform to the facts proved or admitted, where the variance between the allegations in the petition and the proof is not material.
4. Where the delivery of a void policy of insurance is the sole consideration for the release of debt or liability, the release may be avoided without returning or offering to return the policy to the debtor.
5. Where the charter confers upon an insurance company power "generally to do and perform all things relative to the object of the association," and provides in a subsequent section that "all policies or contracts of insurance" shall be

* Syllabus and case from advanced sheets of 24 Ohio State Reports, furnished through the courtesy of the publishers, Robert Clarke & Co., Cinn., O.

subscribed by the president or some other officer designated by the board of directors for that purpose, the latter provision does not disable the company from binding itself by contracts for policies and immediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be executed.

6. Where an agent of an insurance company, intrusted with certificates for intermediary insurance duly signed by the secretary of the company, with authority to deliver the same to applicants, erases therefrom a material stipulation, and afterward delivers the same to an applicant for insurance, who has no knowledge of the circumstances of the erasure or the want of authority on part of the agent to make it, the company will be bound by the certificate to the same extent as if the erasure had been authorized.
7. Where a contract for present insurance and for a policy on same risk is made subject to the conditions contained in the printed policy of the insurer, a condition in the printed policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy, does not require that either prior or subsequent insurance should be mentioned in or indorsed on the contract.
8. A condition in a contract for insurance requiring notice of prior insurance is waived by accepting the risk on an application wherein the question concerning prior insurance is not answered.
9. Where notice of additional insurance is required to be given to the insurer, it may, before the receipt of the policy, be given to the agent of the insurer who effected the insurance and with whom the policy is intrusted for delivery to the assured in fulfillment of the contract; and the indorsement of such additional insurance upon the policy by such agent must be regarded as the act of the principal, thereby assenting to the additional insurance.
10. Where the agent of an insurance company effects a contract for intermediary insurance and for a policy, and delivers a certificate of the contract to the applicant under an agreement to give time for the payment of the premium, and the principal charges the agent with the amount of the premium, which is settled and paid after the loss, a condition that "no insurance, original or continued, shall be considered as binding until the actual payment of the premium" contained in the printed policies of the company, according to the terms of which the insurance was effected, must be deemed to have been waived, although the agent had no express authority to give time for the payment.

Error to the Court of Common Pleas. Reserved in the District Court of Preble County.

The original action was brought by the defendant in error against the plaintiff in error.

In the court below the defendant demurred to the petition on the ground that it did not state sufficient facts, which demurrer was overruled.

The cause was afterward tried to a jury, and resulted in a verdict for the plaintiff.

A motion was made by defendant for judgment in its favor, notwithstanding the verdict, which motion was overruled.

A motion was also made by defendant for a new trial, which was also overruled. Judgment was afterward rendered on the verdict in favor of plaintiff.

These several rulings and judgments are alleged to have been erroneous.

THOMAS MILLIKIN, *for plaintiff:*

I. The petition does not state facts sufficient to constitute a cause of action. It sets out an agreement "for insuring according to the tenor and conditions of their printed policies," etc., but there is no recital of said conditions. The contract sued on, and set out, refers to another contract which is not set out, but which contains terms and conditions which form part of the contract sued on. And it is utterly impossible to ascertain what would be the proper construction, or legal effect of the contract, without also stating the tenor and conditions of their printed policies.

The contract set out in the petition recognizes that it is only a temporary insurance, until a regular policy is issued from the office of the company, and that it will become void if the risk is not accepted.

The petition is silent as to whether the risk was accepted or not, and whether a regular policy was ever issued. This being a condition on the face of the contract, and upon which its very life depends, there should be an averment that the risk was accepted, or at least that it was not rejected, and that the company had not issued a regular policy.

There is no averment, even in the most general terms, that Kelly "performed all the conditions on his part," or that he did anything except to make the application for insurance.

II. The court erred in overruling the motion of defendant to have judgment rendered in its favor, upon the statements in the pleadings, notwithstanding the verdict against the defendant. The code expressly authorizes such motion. 2 S. & C. 1054, sec. 384.

The second defense distinctly alleges that the issuing of the receipt by the secretary, and the alteration thereof by Gunckel, was without authority. The reply does not deny either of the allegations of this defense.

The reply to the third defense concedes: That Kelly gave Gunckel discretion as to what company to apply to, limited only to the companies he was agent for, and for that purpose he, before making an actual request for insurance, signed an application for insurance, not dated, or directed to any company, and delivered it to Gunckel. That Gunckel delivered to plaintiff the policies in the German, Cooper,

and Central companies, and that he surrendered the receipt. This was after the fire.

It claims that the three policies were void, because the Dayton Insurance Company failed to notify the companies of other insurance. That he gave up the receipt, induced by defendant's acts to believe that the three policies were binding.

It is manifest from these facts that Gunckel was Kelly's agent in this matter, when the blank application was given him by Kelly, and he was instructed to exercise his discretion as to the company. That Kelly commenced his action upon an instrument which he had long before surrendered. The arrangement by which the three policies were exchanged for the receipt, it is not claimed was rescinded. Kelly still holds the three polices. The excuse for bringing suit on the receipt, instead of on the three policies, is not valid. The excuse is, that the three policies are void, because the Dayton Insurance Company did not give the German, Cooper, and Central companies notice of Kelly's prior insurance.

It was not the duty of the Dayton Insurance Company to give such notice.

In the action between Kelly and the Dayton Insurance Company, the validity of these policies cannot be tried. Fire Ins. Dig., 416, sec. 90; David vs. Hartford Ins. Co., Supreme Court of Iowa, 1862; 51 Penn. St., 402; 16 Peters, 400 (cond.); 20 Barb., 635.

No fraud is alleged, and there is no offer to rescind. It follows that Kelly is the owner of the three policies, and not the owner of the receipt.

The fourth defense is, that it is one of the conditions of the company's printed policies, that if there is prior insurance on the property, "not notified to this company, and mentioned in or indorsed upon this policy," the policy shall cease and be of no effect.

That Kelly had other prior insurance at the date of the application, and at the issuance and delivery of the receipt, which was not notified to the company, not mentioned in his application, nor indorsed, nor requested to be indorsed, on any policy to be issued, nor on any receipt.

The reply admits that there was other prior insurance at date of the application, but says that plaintiff notified Gunckel, the agent of the defendant, of the existence of such other insurance.

The fact is conceded, that the prior insurance was not mentioned in, or indorsed on the application, or on the receipt, nor requested to be so indorsed.

Mere notice to Gunckel is not enough. The contract requires that it shall be mentioned in or indorsed upon the policy, or the contract shall be void.

This is the unbroken current of authority in relation to prior insurance. Harris vs. Ohio Ins. Co., 5 Ohio, 467 ; Carpenter vs. Providence Ins. Co., 16 Peters (cond.,) 400 ; 19 Ohio, 149.

A verbal waiver of the condition is void. Contract of insurance must be in writing. 12 Cush., 469 ; 36 Barb., 372 ; 16 Ohio, 148 ; 1 Phil. Ins., 483–4.

Mere knowledge of other insurance is of no avail, if not indorsed. Forbes vs. Agawam Mutual Insurance Co., 9 Cush., 470.

The reason of the rule is stated with clearness and force in Hale vs. Mechanics' Ins. Co., 6 Gray, 169 ; Couch vs. City Ins. Co., (Sup. Ct. of Conn., 1871,) [1 Ins. Law Jour., 141 ;] Angel Fire Ins., 235, sec. 174 ; 4 Howard, U. S., 185.

The sixth defense and the reply thereto is in reference to subsequent insurance, and raises the same question as the fourth defense.

The seventh defense recites : That its only power to make contracts of insurance is contained in the 9th section of its charter, which provides that all contracts of insurance " shall be subscribed by its president, or such other officer as may be designated for that purpose by the board of directors, and attested by the secretary, and being so subscribed and attested, shall be obligatory upon the company."

That the board never authorized any one but the president to subscribe such contract, and no one else had such authority. The secretary had authority only to attest, when subscribed by the president.

No reply was filed to this answer, and it stands undefended. Angel & Ames on Cor., 268, sec. 277 ; Couch and Wife vs. The City Fire Ins. Co., Ins. Law Journal, Oct., 1871 ; Heart vs. Providence Ins. Co., 2 Cranch, 127 ; 1 Phil. Ins., 9 ; 16 Ohio, 164 ; 19 Ohio, 149 ; Angel Fire Ins., 503, sec. 457 ; 6 Duer, 13.

III. The Court of Common Pleas erred in overruling defendant's motion for a new trial.

IV. The Court of Common Pleas erred in permitting to be read to the jury the copy of a receipt, different from the one actually delivered by Gunckel to Kelly, being the one without the erasure. This was a material and fatal variance. The petition was not amended so as to let in the altered receipt. It is true the plaintiff, in his reply, admits the erasure and consequent variance, but the plaintiff's case

must be made in his petition, not in his reply. Durbin vs. Fisk, 16 Ohio Stat., 533.

V. The court erred in charging the jury, that under the first and seventh defense, if Young, as secretary, signed the contract, and if C. F. Gunckel was the agent of the company, the contract would be binding, though not signed by the president.

This charge assumed, in direct opposition to the 9th section of the charter, that the secretary had power to bind the company by a contract of insurance, and that, too, without proof that he had been clothed with such power by the charter-by-law resolution of the board, acquiescence, or in any other way.

The presumption of law is that the secretary has no such power. The party alleging such authority must prove it. 2 Phil. Ins., 524, sec. 1872.

VI. The court erred in its charge in effect, that if Gunckel was the company's agent, and made the alteration in the contract or receipt without Kelly's knowedge, and before delivery, then the company would be liable upon what remained of the contract.

Any agent, the court say in substance, may so act and bind the company. This doctrine is unsupported by any authority. If he could erase a material part of the contract, he might thereby change its entire character.

VII. The court erred in charging that the company could authorize an agent to sign contracts, instead of the president, and that is, if Hecker's letter was written with the company's knowledge, or acquiescence, it was binding, and Gunckel was the agent for that purpose.

But Gunckel was not agent to alter the blank contracts of insurance signed and sent to him.

There was not a word of proof tending to show that the company knew of, or acquiesced in, the writing of Hecker's letter.

VIII. The fifth charge throws upon the Dayton Insurance Company the duty of notifying the German, Cooper and Central of other insurance, taken by Kelly, without the qualification which should have been given, that Gunckel, or the Dayton Insurance Company, had notice of such prior insurance. This was error. The fact of prior insurance was within Kelly's knowledge. It was his duty to give the notice.

IX. The sixth charge, in substance, states that as to a contract of insurance, dated December 5, notice of prior insurance (taken on the 27th of November) is sufficient, if given on the 18th of December,

and before loss by fire; also, that notice "of all the insurance" on the 13th of December is sufficient as to insurance not issued till the 14th of December.

This charge puts at defiance the written agreement of the parties, which requires that prior insurance shall be notified to the company, and mentioned in or indorsed upon the policy.

The words in the printed policy requiring the notice of insurance to be given "before any loss by fire occurs," refer exclusively to subsequent insurance. The judge, in his charge, makes the words apply also to prior insurance. This is a manifest error.

X. The tenth charge is, in substance, that if Gunckel was agent of company to receive and forward applications for insurance, receive premiums and issue certificates of insurance, then notice to him of prior and subsequent insurance would satisfy the requirements of the contract (in reference to the terms contained in defendant's policies) before the issuing of the regular policy.

This charge is based on the idea that neither prior nor subsequent insurance was required to be indorsed. No distinction is made between notice of prior and subsequent insurance, nor as to the time when the notice was given.

Will it be claimed that notice of prior insurance given after the insurance contract was made would avail?

Admitting that Gunckel was agent, for the purpose stated in the charge, it does not follow that he was a general agent of the company, so as to bind the company by notice to him of subsequent insurance.

He exhausted his power, and performed his whole duty, when he delivered the policy; after that, notice of insurance could only be given to the company.

MATTHEWS, RAMSEY & MATTHEWS, *for Defendant:*

I. The demurrer to the plaintiff was rightly overruled.

It was not necessary that the petition should set out specifically what the tenor and conditions of the printed policies are. The whole of the contract is set out. It states that it is "binding on the Dayton Insurance Company, of Dayton, Ohio, until a regular policy shall be issued from the office of said company, or should the risk not be accepted, and the above sum of money refunded to the applicant, then this receipt is void," etc.

The petition does not, in terms, allege which, if either, of these alter-

natives happened; but it does state that said agreement remained in full force until the 7th day of January, 1868, when the loss occurred. If it remained in force at that time, then the necessary implication is, that nothing had previously occurred to defeat its operation.

It also alleges that the insured property was destroyed by fire, "whereby there became due and payable to the plaintiff, from the defendant, the sum of five thousand dollars." This was sufficient, especially after answer and after verdict. The code requires that pleadings should be liberally construed. Erwin vs. Shaffer, 9 Ohio St., 43; Bethel vs. Woodworth et al., 11 Ohio St., 393.

II. The second defense consisted, substantially, in allegations of a want of authority in the officers and agents of the company signing and issuing the contract sued upon, to bind the company thereby.

Though the reply does not deny this, what is more to the purpose, the petition does.

The original reply denied all the allegations of the third defense.

The amendment to the reply states that the new policies were delivered after the loss; that they were void by reason of the failure of the defendant, who undertook to procure them, to notify the companies who issued them of the existence of prior and subsequent insurance on the property, and that the plaintiff accepted the said policies and surrendered the original contract under the belief that the substituted policies were valid, which belief was induced by the acts of the defendant in procuring and delivering them.

It is urged that the defendant could be in no default in not giving notice of prior and subsequent insurance, because it owed no duty to the plaintiff. This is a mistake. It undertook to procure valid insurance. Its duty then grew out of its undertaking. The consideration was the release of its own liability. Upon the facts, as they might be shown under these pleadings, the defendant procured the surrender of the original agreement, on which its liability had become fixed, without any consideration. It is certainly not entitled to judgment on that showing.

As to the question whether the invalidity of the substituted insurance, as between the plaintiff and defendant, can be shown, the authorities cited by counsel for plaintiff in error show an entirely different principle than that claimed by them. But whether so or not, the rule has no application here. The obligation assumed by the defendant was to procure valid insurance. It is certainly competent to show, in an action between these parties, in which the question is whether that obligation has been performed or broken, that the de-

fendant has violated it, because the policies of insurance procured by him are not valid.

Whether notice of prior insurance to the defendant's agent is notice to the defendant, and whether that notice, without indorsement on the instrument, avails, see May on Insurance, sec. 370, p. 449, and cases there cited.

In regard to the seventh defense, we claim :

1. That the answer merely amounts to a denial of the allegation in the petition, that the company issued the contract sued on. It consequently made an issue of fact, without further pleading, and its allegations of fact, inconsistent with those contained in the petition—such as that the company had authorized no one but the president to sign contracts on its behalf—need no further denial. That allegation cannot, therefore, be taken to be true, until proved.

2. That the section of the charter quoted does not sustain the construction sought to be imposed on it. It is merely directory. It does not, either in express terms or by any fair inference, forbid or prohibit the execution of contracts of insurance in any other mode, or declare such to be void. May on Insurance, sec. 15, and cases cited, and sec. 23 and note.

III. The motion for a new trial was properly overruled.

It cannot be denied that the secretary was authorized to appoint agents, and confer upon them their authority.

The company held Gunckel out to the world clothed with the apparent authority to bind it, by the delivery of such contracts ; and that, too, with an erasure of part, such as was made in this instance. The plaintiff was justified in believing he was authorized to do so, for he had no means of knowing but that the paper was in the precise form in which it was when issued by the secretary. The appearance of authority extended as well to the document erased as to the document entire.

That Gunckel acted as agent for the defendant in the transactions out of which this controversy arose, admits of no serious question.

It is insisted that there was a variance between the pleading and the proof, in that the copy of the contract stated in the petition, and read to the jury, was the entire printed paper without the erasure.

But the variance, supposing that technically it could only have been avoided by an amendment to the petition, instead of by way of reply, is nevertheless not essential, nor was the defendant prejudiced thereby.

The first four charges of the court relate to the authority of Gunckel to bind the defendant, as its agent, by the delivery of the

compact sued upon, and may be considered together. That there was no error in these charges, we refer the court to May on Insurance, sec. 14, p. 14; Bulkeley vs. The Derby Fishing Co., 2 Conn., 254: Fuller vs. Boston Mut. Fire Ins. Co., 4 Met., 206; Prince of Wales Life and Ed. Ass. Co. vs. Harding, 1 E. B. & E., 183; Trustees of First Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 309; Sanborn vs. Fireman's Ins. Co., 16 Gray, 448; Am. Mut. Ins. Co. vs. Union Mut. Ins. Co., 19 How., (U. S.) 318; Union Mut. Ins. Co. vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607.]

The fifth and ninth charges need no comment. The sixth and seventh are necessarily connected. They relate to the defenses based on the alleged want of notice of prior and subsequent insurance, and want of indorsement thereof on the policy or contract sued on.

The written application for the insurance now sued upon was filled up by Gunckel, and contained, among other interrogatories, the following interrogatory: "*Insurance*—What amount is now insured on the property? In what offices, (state particularly,) and on whose account?" To this the applicant made no answer.

This application was made out by Gunckel as agent of the company, and not as the agent for the plaintiff. Union Mut. Ins. Co. vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607.]

The plaintiff in error, having accepted the application with the interrogatory above quoted unanswered, thereby waived notice of prior insurance altogether, and was not afterward entitled to require it. Lorillard Fire Ins. Co. vs. McCulloch, 21 Ohio St., 176.

An office which issues a subsequent policy will be presumed to have notice of the prior one. Barnes vs. Union Ins. Co., 45 N. H., 21; Horwitz vs. Equitable Ins. Co., 40 Mo., 557.

And where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of the company. Van Bories vs. United Life, etc., Ins. Co., 8 Bush., (Ky.) 133.

McIlvaine, J.

1. Did the Court of Common Pleas err in overruling the demurrer to the petition?

The petition counted upon a written contract, of which the following is a copy:

This is to certify, that the Dayton Insurance Company, of Dayton, Ohio, have received from Joseph J. Kelly, by their agent, Charles F.

Gunckel, the sum of sixty dollars, for insuring according to the tenor and conditions of their printed policies, issued from their office, in Dayton, Ohio, from this date, 12 o'clock at noon, until March 5, 1868, at 12 o'clock at noon, $5,000 in the following property: Hogs and products of hogs, contained in his frame pork and slaughter-house, situate in Campbelltown, Preble County, Ohio.

This receipt and agreement is binding on the Dayton Insurance Company, of Dayton, Ohio, until a regular policy shall be issued from the office of said company; or should the risk not be accepted, and the above sum of money refunded to the applicant, then this receipt is void, and of no effect.

Signed by the secretary of the company.

J. R. Young, Secretary.

This is of no effect until countersigned by the agent, Charles F. Gunckel. Dated at Middletown, Ohio, this 5th day of December, 1867. [Signed,] Charles F. Gunckel, Agent.

The objections urged against the petition are, that it did not set out the conditions contained in the "printed policies;" that it did not state whether or not the risk was accepted, or whether a regular policy had been issued, and that it contained no averment of the performance of conditions on the part of the plaintiff below.

If it were necessary to determine whether the facts stated in the petition are sufficient to constitute a cause of action, we would probably resolve the question in the negative. Section 138 of the code, however, provides that the "court, in every stage of the action, must disregard any error or defect which does not affect the substantial rights of the adverse party: and no judgment shall be reversed or affected by reason of such error or defect." Now, we are all agreed that the defects in the petition, whatever they be, were supplied by averments in the answer and reply: so that, upon the whole record, we find that the defects in the petition did not affect any substantial right of the defendant below. Thus, if the plaintiff should have averred in the petition that a regular policy had not been issued, etc., the want of such averment was supplied by an allegation to that effect in the answer, which was not denied in the reply. And again: if the petition was defective in not averring the performance of conditions precedent, the defect was cured by the averment in the answer, that such conditions (naming them) had not been performed by the plaintiff, followed by averments in the reply, that they had been per-

formed, or that the performance had been waived by the defendant. 8 Ohio St., 293.

II. The overruling of defendant's motion for judgment in its favor on the pleadings, notwithstanding the verdict, is assigned for error.

Several objections are made under this assignment, which will be disposed of hereafter, when we come to consider the alleged errors in the charge of the court, as given to the jury. In addition to what has already been said, it will suffice in this connection to add that the averments in the answer to the effect that the secretary of the defendant, and its soliciting agent, Gunckel, had no authority from the company to make the contract sued upon, must be regarded as a denial of the averment in the petition, that "the company agreed to make such insurance." Where the only legal effect of matter stated in an answer is a denial of facts stated in the petition, no reply is necessary. Such an answer does not contain "allegations of new matter constituting a defense," which must be taken as true unless denied.

III. The refusal of the court to set aside the verdict and grant a new trial is also assigned for error. Under this assignment three general propositions are discussed: 1. That the verdict was not sustained by sufficient evidence. 2. That incompetent evidence was admitted. 3. That the court erred in its charge to the jury.

1. The following state of facts can fairly and reasonably be deduced from the testimony, all of which is set out in the record.

J. R. Young, the secretary of the defendant below, (an incorporated insurance company,) was authorized by the company to negotiate contracts for insurance, to sign and issue certificates like the one sued upon, to appoint agents to solicit risks, and to receive applications for policies, and to authorize such agents to deliver to applicants for policies the above-named certificates, and to collect premiums for insurance. Charles F. Gunckel was appointed such agent by the secretary, and was supplied with certificates duly signed by the secretary, with authority to countersign, fill blanks, and to deliver the same to applicants upon the receipt of premiums.

Gunckel was also agent for several other insurance companies, among which were the Ætna, the Home of New York, and the Hamilton.

About the 30th of November, 1867, Gunckel, being such agent, solicited a risk from the plaintiff, and agreed with him to postpone the payment of the premium for ninety days from the date of insurance; and at the same time prepared an application for a policy,

which contained the usual interrogations respecting the proposed risk. The ninth interrogatory was as follows: "*Insurance*—What amount is now insured on the property? In what offices, (state particularly,) and on whose account?" To this interrogatory there was no answer given. The fact was, however, that the plaintiff had previously obtained a policy from the Enterprise Insurance Company for $2,000 on the same property. This application was signed by the plaintiff, and delivered to Gunckel, with the understanding that upon call by the plaintiff for insurance, Gunckel should address and forward the application to such company as he might select. On the 5th of December following, the plaintiff, by letter to Gunckel, requested insurance to the amount of $5,000. Same day, upon receipt of plaintiff's letter, Gunckel remitted to plaintiff a certificate signed by Secretary Young, a copy of which is set out in the petition, having first, however, erased the words, "or should the risk not be accepted, and the above sum of money refunded to applicant, then this receipt is void and of no effect;" and at same time forwarded the plaintiff's application to the home office of the defendant, with information that a certificate for insurance had been issued to the plaintiff. The erasure by Gunckel was without authority from defendant. The plaintiff, however, received the certificate in good faith, and without any knowledge of the circumstances of the erasure.

Upon the receipt of the plaintiff's application at the home office of the defendant, the officers in charge procured from the German Insurance Company a policy in favor of the plaintiff for $2,000, from the Cooper Insurance company a like policy for $2,000, and from the Central Company one for $1,000, and forwarded the same to Gunckel to be delivered to the plaintiff in lieu of their own policy for $5,000. Each of these policies contained a condition that "if the assured shall have or shall hereafter make any other insurance on the property hereby insured, without the consent of this company written hereon," then this policy shall be void. At the time the German, Cooper and Central companies delivered the policies to the defendant, they respectively charged the defendant with the amount of premium thereon, and the defendant charged Gunckel with the amount of premium on the plaintiff's risk.

The printed policies of the defendant, referred to in the instrument upon which the suit was brought, contained the following conditions:

"Provided, further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby in-

sured, not notified to this company, and mentioned in or indorsed upon this policy, or if the said assured, or his assigns, shall hereafter effect any insurance on the same property, and shall not, with all reasonable diligence, and before any loss by fire occurs, give notice thereof to this company, and have same indorsed on this policy, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect."

And also a further condition that "no insurance shall be considered as binding until the actual payment of the premium."

On the 13th of same month the plaintiff made application by letter to Gunckel for further insurance, on the same description of property, to the amount of $10,000; and at same time informed him that he (plaintiff) had obtained other insurance on same property, from the agency of Landis & Son, to the amount of $13,000, including $7,000 applied for on that day. The amount of insurance thus notified to Gunckel included also the policy for $2,000 from the Enterprise company, which had been obtained before the execution of the instrument sued on. On the next day, December 14th, Gunckel indorsed on the policies then in his hands, from the German, Cooper and Central companies, the amount of insurance in other companies, which was thus notified to him.

Neither the German, the Cooper, nor the Central company assented to or was notified of any insurance on the property effected by plaintiff after the date of their respective policies.

On the 18th day of same month, the property insured was destroyed by fire; and on the next day Gunckel, having full knowledge of the loss, delivered the German, Cooper and Central policies to the plaintiff, who, in consideration thereof, and in the belief that they were valid and binding policies upon the companies by whom they had been issued, surrendered the instrument sued on to Gunckel, to be canceled, and at the same time executed to Gunckel his note for the amount of the insurance premium, as per agreement. This note was afterward paid, and the payment accounted for by Gunckel. The loss was notified to the companies interested, including the German, Cooper and Central, and proof thereof duly made. The German, Cooper and Central companies repudiated the plaintiff's claim, on the ground that their policies were avoided by reason of subsequent insurance, without notice to them, and without their consent. Proof of loss was afterward, and about three months after the fire, made as against the defendant.

If our view of the law governing this case (as hereinafter stated)

be correct, the foregoing statement of facts is sufficient to sustain the verdict.

2. Did the court err in admitting incompetent testimony? The testimony objected to was a copy of the instrument set out in the petition. Neither the instrument, as set out in the petition, nor the copy offered in evidence, manifested the erasure, which, according to the averments in the answer and the admissions in the reply, had been made by Gunckel before it was delivered to the plaintiff. The objection, as we understand it, is, that the paper offered in evidence, though a copy of the instrument as set out in the petition, did not support the plaintiff's case as it was finally made by the pleadings.

We do not perceive how the plaintiff was prejudiced by the supposed variance. The instrument, as it existed before the alteration by Gunckel, was shown and admitted to be as set out in the petition. Nor was there any controversy as to its altered condition at the time of delivery. Hence no proof in relation to its condition or terms, either before or after alteration, was necessary; nor could the introduction of a copy of the paper as it was before or as it was after the alteration, prejudice the defendant. The court might have ordered the petition to be amended so as to state the contract as it was not only proved, but admitted to be, yet the failure to do so was not error for which the judgment should be disturbed.

It is also claimed that the court erred in permitting the plaintiff to prove that the policies issued by the German, Cooper, and Central companies were void by reason of subsequent insurance without their assent. The defendant had set up as matter of defense, that the plaintiff had released and surrendered the obligation sued on. The reply in substance was, that the supposed release was made solely in consideration of these policies; that the policies, at the time they were delivered to him, were in fact worthless and void, and therefore there was no consideration for the supposed release.

The ground of objection as stated is, that these policies were valid on their face, and there being no allegation of fraud, and no offer to return the policies to the defendant, the plaintiff, as against the defendant in this action, should not have been permitted to show them to be worthless. We think otherwise. At the time the plaintiff surrendered the certificate the liability of the defendant thereon had become fixed. The loss by fire had occurred, and unless the surrender and release were supported by a valuable consideration the plaintiff ought not to have been bound thereby. The underwriters themselves had avoided their policies by insisting upon the condition as to no-

tice, and assent to subsequent insurance. It was not necessary that the plaintiff should have returned or offered to return the policies. If they were in fact and in law worthless and void, as against the underwriters, the defendant sustained no injury by reason of the plaintiff's failure to return them.

Another question made in the case may as well be considered in this connection. The German, Cooper, and Central companies avoided their policies for want of notice of and assent to subsequent insurance. Whose duty was it to give them notice and obtain their consent? The plaintiff, at that time, had no contract relation with these companies, nor had he any knowledge that these policies had been issued. He was content with the defendant's contract for insurance. When he desired additional insurance he notified the defendant's agent, in whose possession these policies were. The agent consented to the insurance by indorsing it on the policies. But this did not answer the condition. The agent, we think, under the circumstances, was authorized to act for his principal, the defendant, but could not bind the underwriters. If the defendant still desired to substitute these policies for its own undertaking, it was its duty to obtain from the German, Cooper, and Central companies their assent to the proposed additional insurance.

IV. Did the court err in its instructions to the jury?

1. The court instructed the jury, among other things, as follows:

"In regard to the issues made by the first and seventh defenses, if it was proved that the contract upon which suit was brought was signed by J. R. Young, as secretary of the defendant, and if Charles F. Gunckel was agent of the defendant, the contract would have the effect of binding the company, though not signed by the president of the company."

The defenses referred to were based on the provisions of defendant's charter, the ninth section of which provides as follows, (49 Ohio L., 191:) "That all policies or contracts of insurance that may be made or entered into by said company may be made either under or without the seal thereof, and shall be subscribed by the president, or by such other officer as may be designated for that purpose by the board of directors, and attested by the secretary; and being so subscribed and attested, shall be obligatory upon said company according to the tenor, intent and meaning of this act, and of such policies or contracts."

This charge assumed, as was averred in the answer and not denied in the reply, that the contract sued on was not subscribed by the

president, and that the secretary had not been designated by the board of directors as an officer for the purpose of subscribing "policies or contracts of insurance," as required by the ninth section.

It must be admitted that the charter gave to the company all the powers that it possessed. It undoubtedly gave the power to make contracts of insurance, and the ninth section prescribed a form for the preservation of the evidence of its contracts, which is made obligatory on the company. If this form constitutes the only mode by which the company can obligate itself, of course any other mode would no more create a binding contract of insurance than if the corporation had never existed.

The question therefore arises, is the form thus prescribed the only one in which the defendant can enter into a binding contract of insurance? It will be observed that the ninth section does not, *in totidem verbis*, confer upon the company the power to make contracts of insurance. If there were no express grant of such power to be found elsewhere in the charter, I admit that it would be implied from the provisions of this section; and in that case, the form therein prescribed would be exclusive. But if the grant of power to contract be found elsewhere in the charter, then our inquiry will be confined to the question, whether the form prescribed in the ninth section was intended as a limitation upon the power to contract, or merely as prescribing the manner of executing its policies.

Insurance against fire was the sole object and purpose for which the defendant was incorporated. And the first section of its charter declares that it shall be capable "generally to do and perform all things relative to the object of the association." This grant is certainly broad enough to confer the power to make contracts relative to insurance—power to negotiate and agree upon all the terms and conditions of the risk. Indeed, the very terms of the ninth section seem to imply that negotiations have ended in a complete contract before the execution of the formal instrument is required. Having found in the first section of the charter a grant of power to contract for insurance, we do not feel authorized to so construe the ninth section as to render null and of no effect all contracts made within the scope of the power there conferred, unless and until the president or other designated officer has subscribed the "policy or contract of insurance." On the other hand we feel justified in holding that the terms, "policies or contracts of insurance," as here used, were intended to embrace the final instruments—such as are technically called policies of insur-

ance, and do not include intermediary contracts of insurance, or contracts for policies.

2. The court further charged, "That, if the jury find that Gunckel was the agent of the defendant, and that he made the alteration in the receipt or contract before it was delivered to Kelly, and that he did not do so by Kelly's procurement or assent or knowledge, then the alteration does not affect the liability of the defendant, but would be liable upon what remained of the contract."

We find no error in this instruction. The testimony shows that the secretary of the company was authorized to negotiate contracts for insurance, and also to appoint agents to solicit applications, etc. It also shows that the secretary had supplied Gunckel, as agent of the company, with these receipts or certificates, duly signed by himself, with authority to deliver them to applicants. We think the company, therefore, and not the applicant, should bear the consequences of Gunckel's erasure, although he was acting in violation of his duty to the company in making it.

The company held Gunckel out to the world clothed with the apparent authority to bind it, by the delivery of such contracts; and that, too, with an erasure of part, such as made in this instance. The plaintiff was justified in believing he was authorized to do so, for he had no means of knowing but that the paper was in the precise form in which it was when issued by the secretary. The appearance of authority extended as well to the document erased, as to the document entire.

3. The court instructed the jury in relation to the condition in the contract concerning other insurance as follows:

"That, even if the jury should find that Kelly did not notify Gunckel of the insurance in the Enterprise company of November 27th, 1867, on or before the 5th day of December, A. D. 1867, yet if he wrote to Gunckel on the 13th December, informing him of all the insurance, and Gunckel was the agent of the defendant, that such notice, if received before the loss, would be a good compliance upon the part of Kelly, with his obligation to give notice to the company of all other insurance, and that it would be sufficient as to the Enterprise insurance, and sufficient as to the $7,000 applied for on that day to Landis & Son, although such $7,000 was not issued until the 14th of December.

"That it was not necessary that any indorsement of either prior or subsequent insurance should be made upon the contract sued upon or recited in the same."

If, under the contract, the plaintiff was required to give notice of prior insurance, we doubt whether this instruction, in so far as it relates to that subject, could be sustained. The contract was for insurance according to the "tenor and conditions of the printed policies" of the defendant. The conditions, in relation to other insurance contained in the printed policy, were as follows:

"Provided, further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, not notified to this company, and mentioned in or indorsed upon this policy, or if the said assured, or his assigns, shall hereafter effect any insurance on the same property, and shall not, with all reasonable diligence, and before any loss by fire occurs, give notice thereof to this company, and have same indorsed on this policy, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect."

A fair and reasonable construction of this contract would require notice of prior insurance to be given at the time of making application for insurance. The object of notice is to enable the insurer to act prudently and intelligently in relation to the risk; yet, notwithstanding the reference to the condition in the printed policy, it was competent for the defendant to waive the condition, and we think it was waived, in so far as it related to the notice of prior insurance. The risk was taken upon an application which formed part of the contract. The interrogatory in the application for insurance, in relation to prior insurance, was not answered. The acceptance of the risk upon such an application is a waiver of any notice which a truthful answer to the interrogatory would have disclosed. 21 Ohio St., 176; 6 Gray, 85.

As to notice of subsequent insurance, the charge of the court was right. Notice to Gunckel was notice to the defendant. We are not prepared to say that the notice to Gunckel would have been sufficient, if he had been the agent of the defendant merely for the purpose of soliciting applications and collecting premiums. Confessedly his authority in relation to this risk was much more extensive. He was, in fact, intrusted with the German, Cooper, and Central policies, for the purpose of delivering them, in lieu of the defendant's own policy, and lifting the instrument sued on. Had he been intrusted with a policy of the defendant, for delivery, in performance of the contract, there can be no doubt that notice to him and indorsement by him of subsequent insurance thereon would have bound the company. He, in fact, indorsed the subsequent insurance upon the policies in his

possession, and, in our opinion, he thereby assented, as the agent of defendant, to all the subsequent insurance of which he had notice.

We also think the court below was right in charging the jury "that it was not necessary that any indorsement of either prior or subsequent insurance should be made upon the contract sued upon, or recited in the same." The parties contemplated and contracted for a "regular policy," but the instrument sued on is not such policy. We understand, as did the court below, that the meaning of the parties was, that prior, as well as subsequent insurance, should be mentioned in or indorsed upon the regular policy, when or after it should be issued. Such recitals or indorsements would be a full compliance with the contract in this respect. No such policy having been issued, there was no failure to comply with this condition.

The court also instructed the jury, "that, if the company charged the amount of the premium to Gunckel, and Gunckel received the note of Kelly for the same, which was subsequently paid, that was a good and sufficient compliance with the contract upon Kelly's part, and the contract is binding, although said note was not given until after the fire."

The facts assumed in this charge, in connection with the fact admitted in the defendant's answer, viz., that Gunckel was the agent of the company, "to solicit applications and to collect premiums, when insurance was effected," amount to a waiver of the condition in their "printed policies," "that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium." It is very doubtful whether such condition, in the policy contracted for, attaches to a contract for intermediary insurance, (10 Bosw., 83;) but whether it does or not, the charging of the premium to such agent, and the agent's agreement to give time for its payment, and the subsequent payment to the company, constitute a waiver of pre-payment.

Judgment affirmed.

Day, C. J., White and Rex, JJ., concurring. Welch, J., not sitting.

UNITED STATES CIRCUIT COURT,

WESTERN DISTRICT OF MICHIGAN.

OCTOBER TERM, 1874.

CLARK W. UPTON, AS ASSIGNEE, ETC.,
vs.
SAMUEL D. JACKSON.*

The plaintiff, assignee in bankruptcy, sued the defendant stockh lder to recover unpaid stock.

Held, that if the original charter was transferred by directors without authority of stockholders, the transfer would be invalid, and the transferees would take nothing. But if the shareholders subsequently participated as stockholders in the business of the company under a new management, or silently allowed the scheme to be carried out without objection, they were estopped from denying the validity of the transfer.

Where the charter originally limited the amount of stock, but subsequent legislation authorized its increase on compliance with certain conditions, and parties, claiming the right to do so, complied with the conditions and issued additional stock, there, as between the purchasers or holders and the corporation or its creditors, the former are estopped from denying the validity of the proceedings to increase the stock, or the validity of the stock issued.

Parties induced to purchase such stock through fraud or misrepresentation, may repudiate their purchase and be relieved of their liability, provided they act promptly, and are guilty of no laches, but after payment of repeated assessments, or participation in person or by proxy in stockholders' meetings, and continuing to hold stock for a year or more, and until the company's insolvency, it will be too late to set up misrepresentation or fraud.

Where only twenty per cent. of the increased stock had been paid in, and the company passed a resolution declaring the remaining eighty per cent. non-assessable, and the words "non-assessable" are printed across the certificate of stock, *Held*, that the stockholders or directors had no power to limit or exempt the stockholders from liability, as against creditors.

The assignee in bankruptcy represents the interests of creditors as well as the bankrupt, and can recover, so far as touches the validity of the stock, as if acting solely in the interest of the creditors.

HUGHES, O'BRIEN & SMILEY, *for the Plaintiff.*

J. W. CHAMPLIN and L. D. NORRIS, *for the Defendant.*

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* Charge delivered December 17th, 1874.

WITHY, J.

Gentlemen of the jury: This suit is said to be a test case upon the law and fact for a large number of cases pending in this court, brought by the plaintiff as assignee in bankruptcy of the Great Western Insurance Company, of Chicago, to recover from alleged stockholders the unpaid stock held by them in that now bankrupt corporation. The ability with which it has been tried by the learned counsel must satisfy all parties concerned that their rights and interests have been placed before the court and jury in the fullest measure. Evidence has been put in under objections to its admissibility, subject to such rulings as the court should deem necessary in its instructions to the jury, and I shall further on inform you upon what basis you are to place your finding.

The Great Western Insurance Company was chartered by the legislature of Illinois in 1857, organized in 1859 with an authorized capital of $500,000, and a subscribed capital of $100,000. From its organization up to some time in 1860 the company transacted the business of fire insurance, having its office in Chicago. In 1860 its capital was impaired by losses and the company ceased to do business. In 1869 the legislature of Illinois passed a general insurance law, which among other things authorized existing insurance companies to increase their capital stock, by amendment of their charters and conforming to certain requirements. With a view to bring this company within the provisions of that law, certain parties sought to acquire control of its charter. To show what was done, the plaintiff has introduced evidence tending to prove that some of the holders of the original stock transferred their stock to two or three of their associates, and these, as directors of the company, made a transfer of the charter to new parties, and thereupon stock in addition to the original $100,000 was issued under the charter which permitted $500,000 capital.

An attempt was then made under the law of 1869, by those exercising control, to effect an authorized increase of capital up to $5,000,000. To prove what was done in that behalf, documents properly authenticated under the great seal of the State of Illinois have been put in evidence, being a consent by stockholders to such increase; a copy of the charter as amended, with a declaration of a desire to amend; a certificate of conformity by the attorney general of the State, and one by the auditor of public accounts as to the condition of the capital, etc. There is evidence that the company, thus

reorganized, opened an office in Chicago and transacted the business of fire insurance, issuing a large number of polices from July, 1870, up to the time of the great fire in Chicago, October 8th and 9th, 1871; that stock was issued and sold up to about one million dollars; that defendant, a resident of Grand Rapids, Michigan, purchased from an agent of the company, on the 25th day of November, 1870, one thousand dollars of the new stock; that he paid twenty per cent. assessed thereon, and received a certificate for one thousand dollars, across which was printed the word "non-assessable." After the time of the Chicago fire he paid ten per cent. additional on his stock, and before aware of the insolvent and bankrupt condition of the company.

There is also evidence that the company, while so transacting business, caused circulars in pamphlet form to be printed and distributed, representing from time to time the authorized capital, the amount subscribed, the amount paid in, and the names of stockholders and officers. Its policies also contained statements of the actual capital and names of the officers. Defendant continued to hold his stock certificate from the time of its issue, in May, 1870, to the time of this trial, pending which he offered to surrender it. There is evidence of stockholders' and directors' meetings being held, and that owing to the Chicago fire in 1871, the company became largely involved upon its policies. In January, 1872, a creditor commenced proceedings in bankruptcy, and in February the corporation was adjudicated bankrupt by the United States District Court at Chicago. Plaintiff was appointed assignee, and received conveyance of the property and assets of the company. Such proceedings were thereafter had, that the bankrupt court made a call upon all stockholders for payment of their unpaid stock, of which due notice was given, and a personal demand was made upon defendant. He refused, and this suit is brought to enforce collection.

On the other hand, defendant has introduced evidence attacking the proceedings to reorganize the company in 1870, and to show want of authority to issue the stock sold to defendant. It is, that the holders of the original stock never parted with their stock, never by vote or otherwise authorized an increase of stock, and never authorized a transfer of the chartered rights of the company. There is also evidence tending to show that the required assent to an increase of stock was not signed by enough of the stockholders, that it was in part signed by persons owning no stock and by persons holding void stock, and that many of the names signed to the document consenting to an increase of stock were forgeries.

I deem it unnecessary to make further reference to the testimony; enough has been stated to indicate the material questions arising, and upon which instructions and rulings are required.

Substantially, the defense urge that the proceedings to reorganize the company and increase the stock were without right or authority of law, and were fraudulent and void; that the directors could not transfer the charter and rights of stockholders without authority from the shareholders; and it is urged the latter never gave such authority; again, that the stockholders never by vote or otherwise consented to an increase of stock, and that the paper filed in the office of the auditor of public accounts was not signed by shareholders, but was false and forged as to many of the names appearing thereon, and therefore that the stock issued and sold to defendant was void.

Assuming that the transfer of the charter was made by directors without authority of stockholders, the rule would be against the validity of the transfer, and the transferees would take nothing thereby. But there is evidence tending to show that the shareholders acquiesced subsequently in the transfer by the directors, by acting as stockholders in meetings held under the reorganization or new management, and that some of them held office, purchased of the increased stock, and participated in various ways in the business of the company. I instruct the jury that such participation would amount to acquiescence on the part of such stockholders, and be a ratification of the action of the directors, which would estop the shareholders from denying the validity of the transfer. Those stockholders, if any, who remained silent and allowed the proceedings to go forward, and the scheme to be foisted upon the public without objection, permitting the company to be held out as authorized to issue policies, increase its capital, and deal with the public, would be equally estopped.

The charter of this corporation, as originally granted, limited its capital stock to $500,000. The rule of law is, that in the absence of further legislative sanction, any stock issued in excess of the $500,000 would be unauthorized and void. But when the legislature in 1869 granted authority to existing insurance companies to increase their stock upon taking certain proceedings, and persons acting under color of authority took proceedings and attempted compliance with the law, and in pursuance of those proceedings actually issued additional stock, claiming to have obtained the right so to do, obtained control of the corporation's affairs and launched its new

scheme—then, as between the purchasers and holders of such new stock, and the corporation or its creditors, the shareholders are estopped from denying the regularity of the proceedings to increase the stock, and from denying the validity of the stock so issued. If through misrepresentation and fraud any one is induced to subscribe for or purchase of such stock, he may repudiate the stock and be relieved of his relation of stockholder, provided he does so promptly and uses reasonable diligence in measures to that end. But it will be too late to set up the misrepresentation and fraud after he has paid repeated assessments, participated in person or by proxy in the meetings of stockholders, and continued to hold his stock for a year or more, and until the company has by reason of losses become insolvent, and creditors seek to have its assets applied to the payment of their claims.

For the purposes of this suit, prosecuted by the assignee in bankruptcy of the corporation against a holder of the increased stock, and therefore brought in behalf and for the interest of creditors as well as the bankrupt company, I hold that there was legislative authority to reorganize and increase the stock of the Great Western Insurance Company, and that the documentary evidence, put into the case by plaintiff, of authenticated copies of papers in the office of the auditor of public accounts of Illinois, are legally sufficient to establish the right and authority to issue the increased stock. The documentary evidence, taken in connection with proof of user under the charter as amended, such as the opening and keeping of an office, the actual issue and sale of stock to the amount of a million dollars, more or less, and the transaction of business for about a year and a half, not only constitutes prima facie evidence of the existence of the corporation under the amended charter with power to increase and dispose of the capital stock, but concludes all stockholders who, by continued silence or participation in its affairs as stockholders or officers, permitted the company to palm itself off on the public as a corporation entitled to the exercise of such power and rights. The alleged false, irregular, and defective proceedings in launching the new enterprise could have been inquired into by the State; but such stockholders will not be allowed to question the proceedings as against the rights of creditors. The practical effect of the rulings I have given would be to exclude much of defendant's evidence. These rulings have not been made so much for the purpose of instructing the jury as to decide the questions raised at the bar, and so ably argued.

Gentlemen of the jury: the instructions which will form the basis

of your verdict are brief, and I now invite your attention to them. If you find that defendant, on or about November 25th, 1870, became the holder, by purchase or otherwise, of one thousand dollars of the stock of the Great Western Insurance Company, and continued to hold and own the same up to the time of the insolvency and bankruptcy of the company, in February, 1872, and during that time paid thirty per cent. thereof assessed by the company, and acted in person or by proxy at a stockholders' meeting; and if you find the company during all that time, or up to its actual insolvency, was doing business as an insurance company, issued stock and policies, and kept an office, and advertised itself by pamphlets and circulars representing and holding itself out to the public as a corporation authorized to do a fire insurance business, with an authorized capital of $500,000, a subscribed capital of one million dollars, or about that, the amount thereof paid in, and giving the names of stockholders and officers, then I instruct you defendant is estopped from denying the validity of the stock held by him, and is liable to plaintiff for the amount thereof unpaid, with interest at six per cent. from August 22nd, 1872.

There is printed across defendant's certificate of stock the words "non-assessable." Twenty per cent. had been paid when it was issued, hence the remaining eighty per cent. was represented as non-assessable. Evidence is in the case showing that the company passed a resolution declaring eighty per cent. of all the new or increased stock non-assessable.

I instruct you that the directors and stockholders had no power to exempt stockholders from liability, or to limit their liability within the full amount of the stock held as against creditors of the corporation. The capital stock was held out as, and did represent part of, the assets of the company, upon the faith of which the public did business with it. The stock issued represented capital. Whatever was not paid was subject to be called for if necessary to meet liabilities.

The plaintiff, as I have said, sues as well in the interest of creditors as of the bankrupt, and no defense can be set up against his right of recovery which could not be set up if the suit was solely in the interest of creditors, so far as touches the validity of the stock in question. Under these brief instructions I submit the case to the jury.

SUPREME COURT OF TENNESSEE.

DECEMBER TERM, 1872.

PLANTERS' INSURANCE COMPANY

vs.

R. P. SORRELLS.*

It does not avoid the policy, that a house insured as a dwelling is, or was after the insurance, occupied as a boarding-house. The insured may not alter the use in such manner as to enhance the risk, but the burden of proof is on the company to show such increase of risk.

An answer of the insured in the application that his title was that of "fee simple," and unincumbered, while it was only a leasehold, incumbered by a claim of $200, avoids the policy unless the insured is relieved of the consequences by other considerations. But the insured is relieved of these consequences if he disclosed freely and fully the nature of the title to the agent, and the latter inserted the false answers in the application.

Absolute ownership of the building insured is as great an interest in the subject of insurance as is expressed by "fee simple."

DEADERICK, J.

In December, 1867, plaintiff in error insured R. B. Sorrells against loss or damage by fire to the amount of $2,000 in the aggregate, on a dwelling-house valued at $850, a one story building used as a bar-room and valued at $400, furniture valued at $100, and several other articles of personalty at different and distinct valuations.

All the property insured, except $50 to $75 of the personalty, was destroyed by fire on the 28th of March, 1868. The company refusing to pay the losses, Sorrells brought suit in the Circuit Court of Davidson County, and obtained judgment, from which the company have appealed in error to this court. A reversal of the judgment is asked in this court, upon several grounds.

First—It appears that in the application for insurance, it was stated

* From the official transcript by Hon. J. O. Pierce, published in the *Western Insurance Review*. See similar points discussed in the case of Cheek et al. vs. Columbia Fire Ins. Co., *ante*, p. 105.

that one of the insured buildings was occupied by the applicant as a "dwelling, meat-store and shoe-shop," when upon proof of loss it is shown that W. H. Sorrells, a brother of the assured, occupied the dwelling as a boarding-house.

It does not avoid the policy of insurance that a house insured as a dwelling house is, or was after the insurance, occupied as a boarding-house. Parsons Mer. Law, 503, note 1.

While the assured may not change or alter the use of the building in such manner as to enhance the risk of the insurer, we cannot see that the change of occupants could increase the risk, and if there be an increase of risk by a change of the circumstances disclosed in the application, the burden of proof is on the insurer to show such increased risk. Fland. on Ins., 232, 236, and note 3.

It is further insisted that the insured, to the question in his application, "What is your title?" answered, "Fee simple;" and in answer to the question, "Is your property incumbered, by what and to what amount?" replied, "No;" whereas, in fact, the applicant had a leasehold title only, and not a fee simple in the soil upon which the buildings were erected, and they were incumbered by a claim of one Hamilton to the amount of $200.

The facts are as alleged, and avoid the policy, unless Sorrells is relieved from the consequence of these untrue answers for the reasons set up by him.

These reasons are, that he is not responsible for the insertion in the application of the false answers to the questions, but they were put in by the agent of the company, although he disclosed to him freely and truly the nature of the title by which he held the premises, and the amount and character of the incumbrance upon them.

But it is insisted for the company, that conceding that the disclosures were made as claimed to have been made, that it is not admissible to show the fact by parol evidence in contradiction of the written answers in the application, where such answers are made warranties, as they are claimed to be in this case. This proposition seems to be fully sustained by the authority referred to in support of it. Fland. on Ins., 92.

On the other hand, there are well considered cases which hold that where the answers are incorrectly written down by the agent of the company, when the facts are truly stated by the insured, that the company shall not be relieved of liability because of the blunders or mistakes of its agents; and "that to allow the company under such circumstances to avoid their contract on account of a mistake into

which they themselves had led the plaintiffs, would be to allow them to take advantage of their own wrong." Fland. on Ins., 101.

In the case of the Union Mutual Insurance Company vs. Wilkinson, reported 13 Wallace, 222, [1 Ins. Law Jour., 607,] the Supreme Court of the United States holds that the company is bound by the acts of its agents, and when an agent makes out the application for insurance, and inserts in it representations that are untrue, without the assent of the assured, it was the act of the company, and not the act of the assured, although signed by him, does not invalidate the policy, and that parol testimony may be heard to show that the answers were thus written by the agent.

The court says that to allow verbal testimony to show these facts does not contradict the written contract, though the application is signed by the party. It goes upon the idea that the writing was not the assured's statement, and that the company are estopped to set up that it is the representation of the assured.

This holding was in the case of a "mutual insurance company," and in which it was stated by counsel for plaintiff in error that "all the statements in the application are express warranties;" and it was argued in that case, as in this, that the warranty was a part of the contract, that the matter was such as it was represented to be, and could not at law be contradicted by parol evidence, but might be reformed in equity.

The court further said in that case, that for the insurer to insist that the policy is void because of these representations contained in it, and which were inserted by him or his agent, knowing they were not the representations of the insured, would be an act of bad faith and gross injustice.

Sorrells, the plaintiff below, was examined as a witness on the trial, and stated that he disclosed fully all the facts in relation to his title to the property insured, which was a lease of the land having more than a year to run, with the privilege to remove all the erections thereon at the expiration of his lease. That he was ignorant of the meaning of the term "fee simple," and of the business of insurance, and that all the writing was done by Farrar, the agent, and he told him of the claim of $200 Hamilton held on the property.

The brother of the insured also testified, corroborating the testimony of the insured as to his disclosures of the character of his title to the land and improvements, and the incumbrance of $200 due Hamilton.

Farrar contradicted these witnesses, and their testimony was before the jury upon a proper charge of the court.

The plaintiff below was the absolute owner of the building insured, and the term fee simple expresses no higher or greater interest in the subjects of insurance than he held.

The court charged the jury that the plaintiff might recover under this policy for a part of the property, if not entitled to recover for all.

It is sufficient to say as to this, that if erroneous, which we do not hold, it is an error that has not prejudiced plaintiffs in error, as the jury have found that the plaintiff below was entitled to recover for all, and where the charge is erroneous, if it has not injured the party complaining of it, it constitutes no ground for reversal.

Upon the whole we think there is no error in the record for which the judgment should be reversed, and affirm it.

UNITED STATES CIRCUIT COURT.

DISTRICT OF IOWA.

MAY TERM, 1874.

B. F. ALLISON

vs.

PHENIX INS. CO., OF BROOKLYN.

Defendant issued a policy insuring $2,000 on plaintiff's stock of goods, and $200 on his household goods and furniture, in one building. The whole was subsequently transferred to another town, in accordance with a permission indorsed on the policy. The policy provided, "If any other insurance has been or shall hereafter be made upon the said property, and not consented to by this company in writing hereon, this policy shall be null and void." Subsequent to the transfer, plaintiff obtained insurance in another company as follows: $500 on the building, $200 on household furniture, and $75 on his general library therein. This policy provided, "that any other insurance on the property hereby insured, or any part thereof, not notified to the company, should avoid the policy." Neither company had notice of other insurance. The application to the second company stated that there was "no other insurance on the household furniture."

Held, that the second policy, so far as respects the furniture, did not constitute additional insurance within the meaning of the condition in the prior policy.

The decision in Carpenter vs. Providence Ins. Co., 16 Pet., 495, whose soundness has been criticised, would make the second policy void if not ratified, but does not establish that the second policy is to be considered in all respects valid unless avoided by the company before the loss.

The authorities are conflicting whether if the second policy had been valid as respects furniture, it would have avoided the first as to the goods, but it is unnecessary to decide this question.

This is an action on a fire policy to recover $2,000, the amount insured by the defendant upon the plaintiff's stock of goods. The written portion of the policy, which was dated February 7, 1870, and expired in one year, is as follows: $2,000 on his stock of dry goods, boots and shoes and groceries; $200 on his household goods and furniture, in a one story wood building 20 × 52, on lot 1, Blk. 18, town of Ogden, Iowa. On the 13th day of June, 1870, the agent of the defendant indorsed on the policy; "Permission is hereby given by the Phenix Insurance Company to B. F. Allison to transfer his stock of goods and furniture to Grand Junction, Iowa, to be kept in a one and a half story wood building, 22 × 36 feet, detached." The transfer was made accordingly.

The defendant's policy contains the following provision: "If any other insurance has been or shall hereafter be made upon the said property and not consented to by this company in writing hereon, this policy shall be null and void." On this provision a special defense was made by the company, which set up (4th count of answer) that the plaintiff, without its consent, had procured "other insurance," to wit: "$200 in the Hawkeye company," on his household furniture, being part of the property covered by the defendant's policy. The facts in this respect appear in the special verdict, hereafter set forth.

The jury found against the company on the other defenses, and rendered a general verdict for the plaintiff for $1,500, (the value of the stock of goods consumed,) subject to the rights of the parties on the facts found in the special verdict, which is as follows:

"We find that the foregoing verdict for the plaintiff is subject to the rights of the parties upon the following special verdict as to the defense set up in the fourth count of the answer in respect to other insurance, to wit:

"After the policy in suit was issued, and before the fire, to wit, on the 29th day of November, 1870, and after the property mentioned in the policy in suit was removed to Grand Junction, under the permission indorsed on the policy, the plaintiff herein applied to the

Hawkeye Insurance Company for insurance, and on November 29th, 1870, the said Hawkeye company issued to the plaintiff a policy of insurance of that date for one year, whereby, in consideration of $12.50, said Hawkeye Insurance Company insured the plaintiff against loss or damage by fire, as follows: "$500 on his frame store and dwelling-house in Grand Junction, and $200 on his household furniture, and $75 on his general library contained therein," and delivered said policy to the plaintiff, and said policy remained in force until after said house and furniture and library were destroyed by fire. The said store and house thus insured by the Hawkeye company are the same building into which the defendant gave the plaintiff permission to move the goods and household furniture mentioned in the policy in suit. Said store and dwelling-house were all under one roof, and so was the 'one story wood building,' at Ogden, mentioned in the policy in suit.

"Said policy issued by the defendant, and said policy issued by the Hawkeye company, and the respective applications by the plaintiff for insurance to the said companies, are annexed as part of this special verdict. The same fire totally consumed the building, the stock of goods therein, and all the household furniture. When plaintiff removed to Grand Junction he took his stock of goods and most of his household furniture with him, but after such removal and before taking out the policy in the Hawkeye company he had made some additions to his household furniture.

[In the written application to the Hawkeye company, the plaintiff, in answer to a question, said there was no insurance on the building or household furniture.]

"The jury submit to the court as a question of law under the pleadings, whether the above facts constitute a defense to an action on the policy in suit for the value of the stock of dry goods insured in said policy? If they do, then the jury find for the defendant, if not, they will find a general verdict for the plaintiff for the amount named therein to wit, $1,500."

The application for insurance in the Hawkeye company stated incorrectly that there was "no other insurance on the household furniture." The Hawkeye policy contained a condition "that any other insurance on the property hereby insured, or any part thereof, not notified to the company, should avoid the policy." The Hawkeye company had no notice of the prior insurance in the defendant company on the furniture; nor did the defendant company have notice of the subsequent policy in the Hawkeye company. The stock of goods and

the household furniture, and the house at Grand Junction, were destroyed by a fire having a single origin. The plaintiff, after the fire, compromised his loss under the Hawkeye policy with that company.

The defendant now moves to set aside the general verdict, and for judgment in its favor on the special verdict; and on the other hand, the plaintiff moves for judgment on the verdicts of the jury. It is on these motions that the cause is before this court. The action was only for the value of the goods destroyed by the fire.

PHILLIPS & PHILLIPS, *for Plaintiff.*

GATCH, WRIGHT & RUNNELS, and AUSTIN ADAMS, *for Defendant.*

DILLON, J.

There are two questions here. One is, the subsequent policy on the furniture in the Hawkeye company, supposing it to be a valid and binding insurance, avoids the policy in suit as respects the stock of goods, which was separately valued therein, there having been no notice to the defendants of the Hawkeye policy. The other is, whether the subsequent policy in the Hawkeye company was such "other insurance" as contravenes the provision in the defendant's policy in that regard, the Hawkeye company having been informed by the plaintiff's application that there was no other insurance on the furniture, but after the loss having compromised with the plaintiff in respect to its policy, not having had before the fire any knowledge of the policy issued by the defendant or ratifying its own policy with knowledge of the prior policy. The Hawkeye company insisted that its policy was not binding on it, because of the misrepresentation as to prior insurance, but the policy covered other risks and the controversy was closed by the payment to the plaintiff of a sum less than the sum insured.

Under these circumstances it is clear that the second policy, as respects the furniture at all events, could not have been enforced against the Hawkeye company, and if not, can it be set up by the defendant as constituting other or additional insurance in violation of the condition in this respect contained in the policy now in suit.

The general but not uniform opinion of the courts is, that to avoid the first policy the second policy must be valid, that it must constitute an effectual insurance, and we are inclined to so hold if this can be done consistently with Carpenter vs. Prov. Ins. Co., 16 Pet., 495. The case last cited has been subjected to much criticism, (see Clark

vs. New England etc. Ins. Co., 6 Bush., 342, 350; Hubbard vs. Hartford Fire Insurance Company, 33 Iowa, 325; May on Insurance, sec. 365 and the authorities there collected,) and it may be conceded that, though not unsupported, it does not, at least in its reasoning, accord with the prevailing view. But if the case at bar falls within its principle, it is our duty implicitly to apply that principle to it. That case holds that the company which issued the second policy (the Providence company) was entitled to notice of the prior insurance in the American company, though the policy in that company had been "procured by misrepresentation of material facts"—and the reason given (which has been criticised and its soundness denied) is, that such a policy is not "to be treated, in the sense of the law, as utterly void *ab initio*, but merely voidable, and as one that may be avoided by the underwriters upon due proof of the facts, but until so avoided, to be treated for all practicable purposes as a subsisting policy." The decision would make it the duty of the plaintiff to have disclosed the prior insurance in the defendant's company to the Hawkeye company, and if he did not, but stated that there was no such prior insurance, the policy in the Hawkeye company, if not ratified, would be void. And it does not establish that the policy in the Hawkeye company is to be considered as in all respects a valid policy unless avoided by that company before the loss.

We are therefore of opinion that the policy in the Hawkeye company, so far at all events as respects the furniture, was invalid; that it did not in fact and in law constitute any insurance, and therefore the defense based upon the ground that other insurance was procured contrary to the provision of the policy in suit, fails.

This view is, in our judgment, consistent with the real point in judgment in the case of Carpenter, though it may not consist with all of the reasoning of the learned justice who delivered the opinion of the court.

This makes it unnecessary to decide whether if the Hawkeye policy had been valid as respects the furniture, this would have avoided the defendant's policy as respects the stock of goods. On this point the cases cannot be reconciled. That it would not thus avoid the policy as to the goods, see Lockner vs. Home Ins., 16 Mo., 247; S. C. affirmed, 19 Mo., 628; Phœnix Ins. Co. vs. Lawrence, 4 Metcalf (Ky.) 9; Clark vs. New Eng. etc. Ins. Co., 6 Cush, 342, explained May on Ins., sec. 278, note on p. 303; French vs. Chenango Ins. Co., 7 Hill, N. Y., 123; (compare Wilson vs. Ins. Co., 2 Selden, 53;) Sloat vs.

Royal Ins. Co., 47 Penn. St. 12; Davis vs. Boardman, 12 Mass., 79; Howard Ins. Co. vs. Scribner, 5 Hill, N. Y., 298.

But on the other hand, that it would avoid the policy entirely, see Smith vs. Empire Ins. Co., 25 Barb., 497, 504; Kimball vs. Howard 8 Gray, 33, 30, compare with Clark vs. New England Insurance Company, *supra;* Associated Fireman's Ins. Co. vs. Assum., 5 Md., 165; Barnes vs. Union etc. Ins. Co., 51 Maine, 110. In this last case, where there was the usual provision against alienation, or material change of title, and an insurance was effected by the plaintiff on an undivided half of a dwelling-house, and afterward on the petition of his co-tenant a partition was decreed, this was held to be equivalent to an alienation and purchase, and avoided the policy as to the building, and it was further held that the policy being void as to the building, the plaintiff could not recover for the loss of furniture therein insured in the same policy, and separately valued, the ground of decision being the supposed entirety of the contract, as that if it became void in part it was void *in toto.* I doubt the soundness of this decision as to the furniture, but as it is not essential, the court gives no opinion as to the point whether a second valid insurance of furniture, there being no fraud, would avoid the first policy as to the other and distinct property, separately valued.

Judgment for the plaintiff.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1873.

JOHN EVANS

vs.

THE STATE OF OHIO.*

1. On the trial of E., charged, under the act of March 20, 1860, with causing a building owned by him to be burned, with the intent to defraud the insurer of such building, H., called as a witness on behalf of the State, having testified that he burned the building in question, and that he was hired to do so by E., the court was requested, on behalf of the accused, to instruct the jury that H. was guilty of no crime if he burned the building at the instance of E., and was therefore interested in procuring the conviction of E. *Held*, that this instruction was properly refused. The criminal liability of H. for his participation in the transaction, whatever it was, was in no way affected by the result of the prosecution against E.
2. Under section 91 of the criminal code, a variance, on the trial of such case, between the allegations of the indictment descriptive of the insurer of such building, and the proof given in support thereof, unless such variance is found to be material to the merits of the case, or to have the effect to prejudice the accused, does not entitle him to an acquittal.
3. The mere fact that leading questions are improperly allowed on the examination of a witness, although allowed as of right, is not error for which the judgment will be reversed.

Motion for the allowance of a writ of error to the Common Pleas of Cuyahoga County.

Evans was convicted, at the February term of the Common Pleas of Cuyahoga County, of the crime of arson. The indictment was framed under the act of March 20, 1860, (S. & C., 457 *a*,) and charged the accused with causing a then unfinished dwelling-house belonging to him to be burned, with intent, as alleged in the indictment, to "defraud the Royal Insurance Company, a corporation doing business in the State of Ohio;" by which company it was further, in substance,

* From advanced sheets of the 24 Ohio State Reports.

alleged, said property was insured to said Evans against loss or damage by fire, in the sum of $1,500.

Upon the trial of the case, the prosecutor, after having given evidence tending to prove that the value of the building burned was more than fifty, and did not exceed eight hundred dollars, called one Sherman as a witness.

On his direct examination he gave no testimony in relation to the character or value of the building. On cross-examination he was asked what the building was worth, and stated that, if finished, it would have been worth from $1,500 to $2,500. On examination, the prosecutor was allowed, against the objections of the defendant, to put leading questions to the witness in relation to the condition and value of the building. This was allowed on the ground that the defendant, by introducing that subject on the cross-examination, had, so far as related thereto, made the witness his own. The only testimony disclosed by the bill of exceptions, as having been given in answer to such leading questions, was to the effect following: That shingles which had been once used, when used the second time, ought to be laid with reference to their condition, as affected by the former user; that the value of the building would depend, in some degree, upon whether the lumber used in its construction was new, or lumber which had been used; and that the building, at the time it was burned, was lathed, but the kitchen had not been built.

One Hover was also called as a witness for the State, and testified that the accused hired him to burn the building in question, in order that he might obtain the "insurance money," and that he did accordingly burn it, at the instance and by the procurement of the accused.

Further testimony was given on behalf of the State, tending to prove all the allegations of the indictment, and on behalf of the accused, tending to show that he was not guilty of the offense charged.

On the close of the testimony, counsel for the accused requested the court to instruct the jury: "1. That before the accused could be found guilty, it was necessary that the jury should be satisfied, beyond a reasonable doubt, that the Royal Insurance Company, mentioned in the indictment, was an incorporated company. 2. That if the testimony of the witness Hover was true, the act of setting fire to said dwelling was not a criminal offense on the part of said Hover, and that he was interested in sustaining the fact that he was hired to burn said building, as it would result in his acquittal, if tried for setting said building on fire."

The court declined to give these instructions, and the defendant excepted. The alleged errors now relied upon are: 1. That the court erred in permitting the prosecutor to put leading questions to witness, Sanford. 2. And in refusing to give the requested instruction to the jury.

S. Burke and S. E. Williams, *for the motion.*

William Robinson, *prosecuting attorney, contra.*

Per Curiam.

1. The instruction to the jury first requested on behalf of the accused, was properly refused. Whether the witness, Hover, if he purposely and willfully burned the building in question, although he did so at the request of the general owner, with intent to aid him to defraud the insurer of the building, would nevertheless not be liable to indictment and conviction under section 12 of the crimes act, for maliciously burning the building of another, is a question which need not now be determined. However that may be, it is clear that his liability could be in no way legally affected by the result of the prosecution in the present case. Upon the trial of Hover upon such charge, the fact that Evans had been convicted of the crime with which he is here charged, would be wholly immaterial; and if it be conceded that it would be material for him to show that he did the act at the instance of Evans, it is clear that the record in the present case could not be used by him as evidence of that fact. The question of his guilt or innocence would not depend upon whether Evans had been prosecuted for the crime here imputed to him, nor could the determination of that question be legally affected by the result of such prosecution.

2. The second instruction requested on behalf of the accused was also properly refused. The failure on the part of the State to prove that the insurance company named in the indictment was an incorporated company, presented at most a case of variance between the allegations of the indictment and the proof. It was a variance which, it may be admitted, would have been fatal at common law. Whether such particularity of description was necessary or not, the averment being made, and being descriptive of the alleged insurer of the building, as well as of the party it was alleged the accused intended to defraud, a failure to sustain such averment by sufficient proof would, at common law, have resulted in the defeat of the prosecution. But the rules of the common law relating to this subject

have been essentially modified by the criminal code. Section 91 is as follows: "Whenever, on any indictment for any offense, there shall appear to be any variance between the statement in such indictment and the evidence offered in support thereof, in the Christian name or surname, or in both Christian name and surname, or other description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial shall be had, shall find that such variance is material to the merits of the case, or may be prejudicial to the defendant."

The jury, under the instructions of the court, must have found that the insurance company named in the indictment was a party capable of entering into a contract of insurance, and that there was, at the time the building was burned, a valid and subsisting contract of insurance between that company and the accused, of the character charged in the indictment. These facts being established, it was wholly immaterial to the merits of the case whether the company named was a corporation or not. The guilt or the innocence of the accused did not at all depend upon that question. The variance referred to, therefore, if there was such variance, did not touch the merits of the case; and it does not appear, and the court before which the case was tried has not found, that it operated, in any way, to the prejudice of the accused.

3. Nor does the action of the court, in allowing leading questions to be put to the witness Sherman, constitute ground for reversal. The State had, by other witnesses, given evidence to show that the value of the building burned was more than fifty, but not to exceed eight hundred dollars. The defendant, on the cross-examination of Sherman, who had given no testimony in chief as to the value of the building, elicited evidence tending to show the value of the building burned to have been greater than the amount insured.

The purpose of this evidence was to show that the defendant had no motive to commit the offense. The testimony of Sherman on the cross-examination was that, if the building had been finished, it would have been worth from $1,500 to $2,500. The testimony elicited by the questions objected to was calculated to show how this valuation ought to be affected by the character of the materials used in the building.

Without conceding the correctness of the ruling, that the defendant, by his examination, had made the witness his own, so as of right to entitle the State to put leading questions, yet the questions

allowed, and the evidence thereby elicited, show no cause for reversing the judgment. The allowing or refusing of leading questions in the examination of a witness must very largely be subject to the control of the court, in the exercise of a sound discretion. While we do not say that a case may not arise in which there may be such an abuse of discretion as to deprive the party of a fair trial, and thus call for the interference of this court, it is plain that the present one is not of that character.

Motion overruled.

COURT OF APPEALS OF VIRGINIA.

JUNE TERM, 1874.

THE CONTINENTAL INS. CO.
vs.
THOMAS A. KASEY.

1. In a case of insurance upon property, when the insurer is induced to enter into the contract through a misapprehension as to a material matter, occasioned by the covenant or declarations of the assured, he is entitled to be reheard, whether the misrepresentation is induced by fraud or innocent mistake.
2. When an insurance company, not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, the insured is not responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty; unless there was a withholding of information by the insured, incompatible with the obligations of good faith and fair dealing.
3. When the agent of an insurance company makes an examination of the property to be insured on behalf of the company, and inserts in the policy a misdescription based as well upon that examination as upon the representation of the assured, then if the misdescription by the insured was not *bona fide*, or if its effect is to induce the company to issue a policy which it would otherwise have rejected, the company will not be responsible for the loss. But if the misdescription was *bona fide* and immaterial, the insured may recover; though, according to the policy, the description of the property constitutes a warranty.
4. An insurance company establishing a local agency, must be responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal.

Judgment reversed.

The case is sufficiently stated in the opinion.

GRIFFIN, *for the Appellant.*

EDMONDSON & BLAIR, and J. F. JOHNSON, *for the Appellee.*

STAPLES, J.

This is an action of assumpsit upon a policy of insurance executed by the Continental Insurance Company, of the city of New York. The action was brought in the Circuit Court of Roanoke County, where, as is averred, the insurance was effected and the property was located. A verdict and judgment were rendered in favor of the plaintiff. Upon the trial various exceptions were taken by the defendants to the rulings of the court. It is, however, only necessary at present to notice the defendants' fourth bill of exceptions, which brings before us the instructions offered during the trial.

Both parties asked for instructions. Some of those asked for by defendants were given, others were refused. In relation to those that were refused, it is impossible for this court to say that any error was committed in so doing, for the plain reason that the bill of exceptions contains no part of the evidence. A party complaining of the action of the court in refusing his instructions, is required always to incorporate in his bill of exceptions so much of the evidence at least as tends to show that the instructions have some application to the subject matter of controversy. Unless this is done, this court may be continually required to consider mere abstract questions of law having no bearing upon the case. This is the well settled doctrine of the appellate courts everywhere.

This brings us to the consideration of the three instructions given at the instance of the plaintiff. The first and third are substantially the same, and may be examined together. They declare, in effect, that the plaintiff has a right of recovery upon the policy, although misrepresentations may have been made by him to the defendants before and in regard to the property insured, unless such misrepresentations were material or prejudicial, and were willfully made with intent to defraud the defendants. The proposition here announced is an entire misconception of the law governing contracts of insurance. The error is in assuming that a misrepresentation, to defeat the policy, must be made with intent to defraud.

The rule upon this subject is thus laid down in Flanders on Insurance, page 327: "Any material misrepresentation, therefore, or any failure to comply with the conditions of the insurance on the part of

the assured, will avoid the policy, such as misrepresentation of the construction, nature, character, value and situation of the premises or goods to be insured, or any other misrepresentation that induces the insurer to take the risk which he otherwise might have rejected, or to take it at a less premium."

In Carpenter vs. American Insurance Company, 1 Story's R., 57, the applicant had represented that certain additions had been made to the property, and upon the faith of these representations the policy was issued. Mr. Justice Story, in commenting upon this point, said: "It turns out that this representation is utterly untrue; whether by design or mistake is not material. No one can doubt the materiality of this representation, for it was the very point upon which the policy was undertaken. This makes an end of the case, for a false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance undertaken on the faith thereof, whether the false representation was by mistake or design. See 1 Phillips on Insurance, sec. 537. Authorities to the same effect might be multiplied almost without number. They all approve the proposition that when the insurer is induced to enter into the contract through a misapprehension as to a material matter, occasioned by the conduct or declarations of the opposite party, he is entitled to be released, whether the misapprehension be produced by fraud or innocent mistake; the result is the same in either case.

On the other hand, if the misrepresentation was in no wise material to the risk, and could have had no effect to induce the insurer more readily to assume the risk, or to diminish the premium, then it is clear the policy will not be avoided upon the ground of such misrepresentation. Whether indeed the misrepresentation has affected the premium, or induced a policy which otherwise would have been declined, are questions to be determined by the jury. Columbia Ins. Co. vs. Lawrence, 2 Peters's R., 25.

As has been seen, the instructions of the Circuit Court ignore these principles. They insist that no misrepresentation, however material, affects the policy, unless with a fraudulent intent. This was clearly erroneous, and renders it necessary that the verdict and judgment should be set aside and a new trial awarded.

The second instruction presents a question of greater difficulty. It declares that although the plaintiff may have represented the premises to be frame and shingle houses, yet if the agent of the company was present, and inspected the buildings at the time of the agreement to insure, and before the policy was issued, and inserted the description

in the policy, based upon his own inspection as well as the plaintiff's representations, and such a description was a mistaken one, the plaintiff is entitled to recover, notwithstanding the misdescription contained in the policy.

The chief difficulty in the way of maintaining this instruction is, that by the express terms of the policy the description of the property therein contained is made an express warranty. And the doctrine is well understood, that a warranty is in the nature of a condition precedent. It is a matter of no sort of importance whether in such case the condition be material or immaterial; it must be literally performed. This is the general rule. Circumstances, however, sometimes occur to prevent its application. For example, if the company, not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, it would seem to be clear that the insured would not be responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty, unless indeed there was a withholding of information by the insured, incompatible with the obligations of good faith and fair dealing.

But suppose, as assumed in the instruction, the agent makes an examination of the property in behalf of the company and inserts in the policy a misdescription, based as well upon that examination as upon the representations of the insured, what is the effect of a misdescription thus attributable to the mistake of both parties? This will depend very much upon the circumstances. If the representation of the owner was not *bona fide*, or if its effect is to induce the company to issue a policy which it otherwise would have rejected, it may be that the insured ought to bear the loss, notwithstanding the company through its agent may have contributed to the mistake.

On the other hand, if the mistake was an innocent one, and the representation was in no wise material to the risk, justice and sound policy would seem to require that the company shall be held to the observance of its contract. The rule of law which invalidates an insurance unless the warranty is strictly performed, however immaterial it may be, is an extremely technical one. Its operation is often to defeat the right of recovery, contrary to the plain justice of the case, and the real intent of the parties. A rule thus stringent ought not to be applied to an innocent mistake, not affecting the risk, to which both parties have contributed. The company cannot justly complain that it is held liable in such case, first, because its own agent

has aided in the misrepresentation, and secondly, because its conduct would not have been different had the fact been truly stated.

In the case of Insurance Company vs. Wilkinson, 13 Wall. U. S. R., 222, [1 Ins. Law Jour., 607,] Mr. Justice Miller delivered a very interesting opinion, greatly to be commended for the sound and thoughtful views therein presented. Much of it has a strong application to the present case. In the course of the opinion, he said: "It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. It was well known, however—so well that no court would be justified in shutting its eyes to it—that insurance companies organized under the laws of one State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. The agents are stimulated, by letters and instructions, to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance, as the full and complete representative of the company in all that is said or done in making the contract."

The learned justice concedes that according to some of the earlier decisions, "the responsibility of these companies for the acts of their agents was limited to the simple receipt of the premium and delivery of the policy; a doctrine which had a reasonable foundation to rest upon, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion. But to apply such a doctrine in its full force to the present system of selling policies through agents, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." See also Masters vs. Madison Co. Mutual Insurance Company, 11 Barb. R., 624; Sarsfield vs. Metropolitan Ins. Co., 61 Barb. R., 479; 2 Amer. Lead. Cases, 5th ed., 917.

The tendency of the modern decisions is in accordance with the liberal views announced by the Supreme Court of the United States. It is a source of congratulation that the courts in construing these contracts are abandoning mere technicalities, and rendering decisions more in harmony with the general sense of mankind and the dictates of an enlightened judicial policy.

The case before us presents a striking illustration of the views here suggested. The record does not contain all the evidence adduced on the trial. It is very evident, however, that the east end of the main building insured was made of logs, weather-boarded and plastered. No one could see the logs, and it is very probable their existence was unknown both to the plaintiff and the agent of the company. Both concurred in representing the buildings as frame, and this description was inserted in the policy. Now conceding that this was a misdescription, which is very questionable, to say the least, no one can suppose it was material to the policy, or that it had the slightest effect upon the premium. In other words, the misrepresentation, if such it was, was wholly immaterial. And we are told that this constitutes a breach of warranty, and a consequent forfeiture of the policy. We cannot subscribe to this view. If any breach has occurred, we think the company is estopped under all the circumstances to insist upon it. This, of course, is said upon the assumption that the facts are as stated in the instruction. We are, therefore, of opinion that the second instruction correctly expounded the law, except that it does not sufficiently distinguish between material and immaterial representations. As already stated, if the description of the property contained in the policy was material to the risk, the plaintiff cannot recover, notwithstanding the agent of the company may have concurred in the misrepresentation. Upon any future trial the instruction may be so modified as to conform to this view.

Before concluding this opinion, it is proper to add that all of us concur in the opinion that the Circuit Court did not err in sustaining plaintiff's demurrer to the three pleas in abatement. All the judges agree that the pleas are defective ; but they are not agreed as to the grounds upon which they are to be so adjudged. It is deemed, therefore, most advisable upon this branch of the case to pronounce a simple judgment of affirmance, without attempting to give reasons which would not be authoritative and may tend to mislead.

In regard to the motion to quash the writ made by defendants, it is sufficient to say that the defendants did not claim oyer of the writ, and thus make it a part of the record, nor have they brought it before

us by bill of exceptions. The rule is well settled, that though the writ is, even without oyer, considered as part of the record for purposes of amendment, and for the support of the proceedings, yet it is not so for the purpose of reversing them, unless indeed made so by oyer, except in cases of judgment by default. 2 Tucker's Com., 250, and cases there cited.

The assignment of error under the third bill of exceptions was very properly waived by the defendants' counsel in the argument here. The bill of exceptions does not state that the witness answered the question. It is therefore impossible for this court to say that an answer was given to the question, or if given, that it had any influence upon the verdict. Johnson, ex'or, vs. Jennings, adm'r, 10 Grat., 1. To prevent misapprehension on any future trial, it is proper to say we are all of opinion that the evidence was clearly admissible. This necessarily results from what has been already said upon the question arising under the fourth bill of exceptions.

The judgment of the Circuit Court must be reversed, and the cause remanded to be proceeded with in accordance with the principles herein announced.

SUPREME JUDICIAL COURT OF MAINE.

LAW TERM, 1872.

NATIONAL TRADERS' BANK
vs.
OCEAN INSURANCE COMPANY.

Equity.—Mistakes—What is sufficient proof of, to authorize court to reform an instrument.—When an insurance company undertakes to insure the charter of a vessel after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port, when in fact her charter requires her to use two, a court of equity will order the policy reformed so as to describe the voyage correctly.

BILL OF EQUITY.—The complainants seek to have an insurance policy issued by the Ocean Insurance Company upon the bark Maria Henry, of which they are the owners, reformed so as to express what they allege to be the intention of both parties at the time it was made, which (as written) it now fails to do, owing to a mistake in filling it out, as they say.

On the fifth day of April, 1866, at Liverpool, Eng., the master of the vessel chartered her to take a cargo to some place in Cuba, and "there, or at *some other usual place* in the island, be made ready and adapted to take on board a full and complete cargo, * * * * which the said charterer binds himself to ship, * * * * and the master is bound to receive, and being so loaded and dispatched shall proceed to Queenstown or Falmouth for orders," etc., etc. She proceeded to St. Jago with coal, and then went to Manzanilla, (both places being in the island of Cuba,) where she loaded with timber, and sailed for Falmouth, Eng., for orders as per charter. While on this voyage, and after reaching a point where the routes from St. Jago and from Manzanilla to Falmouth are identical, the vessel was lost through perils insured against.

The company refusing to pay the sum by them insured on the vessel ($5,000,) an action at law was brought against them, which they defended successfully on the ground of deviation, the policy as actually issued and delivered only covering a voyage "at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe." The complainants set out in their bill that the ship's husband, in behalf of all the owners, agreed with the president of the company, acting and authorized to act in its behalf, for an insurance of $5,000, "on the whole round charter aforesaid, valued at $16,000, and then and there, at the office of said company, [the said Hearne,] informed William W. Woodbury, the president of the company, * * * * that the vessel was chartered for a round voyage to Cuba and back to Europe, and to go to Falmouth for orders where to discharge, * * * * that said Hearne had not received a copy of the charter-party, and did not know at what port in Cuba the vessel would discharge, or to what port she would go to load; that said Woodbury replied that he would give him (Hearne) a policy for five thousand dollars that would cover the round voyage at the same rates of premium as charged by the New England, or any other good office in Boston; that he would make it all right.

To this Mr. Hearne assented, and on the eighth day of May, in the

same year, called for the policy, which is the one now sought to be reformed.

At that time, the complainants aver, Mr. Woodbury produced a premium note for Hearne's signature, dated May 8th, 1866, for $251.50, payable in six months, being five per cent. on the sum insured and a dollar and a half for the policy.

Hearne demurred to the rate charged, and Woodbury replied, "You don't know how many ports in Cuba will have to be used; the policy is to cover the round voyage. You sign the note and we will make it all right as we agreed."

Thereupon Mr. Hearne, believing that the policy covered the round voyage, took it and signed the premium note, which was paid at maturity.

The prayer of the bill was to have the policy so reformed as to describe the voyage from Liverpool to be "to one or more ports in the island of Cuba," etc.

The bill was filed in January, 1871. By their answer, the defendants deny that their late president, Mr. Woodbury, who died in July, 1869, made any such agreement or had any such conversations as are stated in the bill.

The general replication was filed in June, 1871, and thereupon testimony taken by both parties, which it is not necessary to recapitulate, as the statements of the witnesses for the complainants, fully sustaining the charges in the bill, were not directly contradicted by the evidence put in by the defense.

The cause was heard upon bill, answer, and proofs.

A. A. Strout, *for the Complainants:*

The action of the court now invoked by us is frequently exercised. 1 Pars. on Mar. Ins., 150, and cases cited. Henckle vs. Royal Ass. Co., 1 Vesey, 314; Moteaux vs. London Ass. Co., Atk., 545; Collett vs. Momson, 12 Eng. L. & Eq., 171; Andrews vs. Essex Ins. Co., 3 Mason, 10; Tucker vs. Madden, 44 Maine, 215.

J. and E. M. Rand, *for the Defendants:*

The strongest evidence is necessary to show such a mistake as will authorize this court to alter the terms of a written instrument.

1 Story's Eq. Jur., §§ 152–157, and numerous cases. And it must be shown by the same weight of evidence, that the mistake is mutual —that of both parties.

Kerr on Fraud and Mistake, 409, note, 418 et seq.; Sawyer vs. Hovey, 3 Allen, 331 ; Lyman vs. Ins. Co., 17 Johns., 374.

No evidence that the insurance company ever understood this policy was to be as the plaintiffs assert; this is expressly denied in the answer; and nobody ever heard that there was any error in the policy during Mr. Woodbury's lifetime.

The bill proceeds solely upon the ground of mistake, and to sustain it a mutual mistake must be found.

WALTON, J.

This is a bill in equity asking the court to reform an insurance policy. The authority of the court to grant the relief pray for, is conceded.

The only question is, whether the evidence of mistake is such as to justify the court in exercising its authority.

It seems to be proved, beyond reasonable doubt, that the owners of the bark Maria Henry obtained for her a charter in Liverpool, requiring her to proceed to some safe port in Cuba, Havana excepted, there to discharge her cargo, and at that port, "*or at one other usual place in the island,*" to take in a return cargo, and thence return to Europe ; that after this charter had been obtained, and after the vessel had sailed in pursuance of it, one of the owners, being in Portland, applied to the president of the Ocean Insurance Company for an insurance of $5,000 on this charter ; that he told the president of the insurance company that no copy of the charter had been received, and that he did not know what ports in Cuba it required the vessel to use ; that he wanted a policy that would cover the round voyage, and that the president agreed to give him one ; that he afterward called at the office of the insurance company and signed an application for the insurance, and received a policy, and carried it away without stopping to read them, not doubting, as he testifies, that they had been prepared so as to cover the round voyage, as the president of the company had promised him they should be ; that it was afterward discovered that neither the application nor the policy was so written as to cover the round voyage ; that they limited the vessel to the use of one port only in the island of Cuba, whereas the charter required her, if necessary, to use two ; that the vessel did in fact use two ports of the island : one to discharge her outward cargo, and one other to take in a return cargo, and that she was afterward lost on her return voyage.

As there can be no recovery upon the policy as now written, for

the reason that between the voyage insured and the one actually made by the vessel there would be apparently a fatal deviation, the plaintiffs ask to have the policy reformed, so that it will describe the voyage correctly.

We think the relief prayed for should be granted. When, as in this case, an insurance company undertakes to insure the charter of a vessel, after being informed that no copy of the charter has been received and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port, when in fact her charter requires her to use two, we think a court of equity should order the policy reformed, so as to make it describe the voyage correctly.

The mistake in this case seems to be established beyond the possibility of doubt. The policy and the charter are both written instruments. A comparison of the two demonstrates that the voyage described in the charter is misdescribed in the policy.

Can there be any doubt that this misdescription was the result of mistake? We think not. It is impossible to believe that the applicant for insurance knowingly paid the premium for a void policy. Nor would it be just to the officers of the insurance company to suppose that they took a premium for a policy known by them to be of no value.

The conclusion is therefore inevitable that the misdescription was the result of mistake—a mutual mistake—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected.

Decree reforming the policy as prayed for in the bill, with costs.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH, and VIRGIN, JJ., concurred.

COMMISSION OF APPEALS OF NEW YORK.

ALPHEUS C. YOUNG ET AL., *Respondents*,

vs.

THE PHENIX INS. CO., OF BROOKLYN, *Appellant.**

There is authority for saying, since the passage of the statute entitled, "Of Betting and Gaming," that an averment of interest is necessary in declaring on a marine policy. The exception of insurance made in good faith from the operation of the act has been held to require such good faith to be shown, in order to bring it within the exception, and renders it questionable whether the decisions rendered before the act took effect, that no averment of interest was necessary in declaring on a marine policy, can be considered as binding authority.

The complaint alleges that the plaintiffs were commission merchants, and the defendant issued to them an open policy, and states the conditions of said policy as to plaintiffs' interest and substantially the terms of the insurance, the subject insured and the "proper indorsement." *Held*, that the allegation of such proper indorsement having been duly made, must, in connection with the terms of the conditions of the policy, be construed as a sufficient averment of some interest, and if regarded as too indefinite, the proper remedy was an application to make it more definite.

The subsequent allegations of damage and its discovery, of information to defendant, and of defendant's instructions to ascertain amount of damage, that defendant afterward demanded and received a premium from plaintiffs, and of the proceeds realized from the sale, and consequent damages, constitute an averment of the plaintiffs' full interest and of the defendant's recognition of such interest.

The complaint states that the loss was caused by collision with another vessel before the policy attached, and also that the boat and cargo were in good condition when the policy attached. It is further stated that no substantial injury appeared to have been done at the time of the collision, and none was discovered until the discharge of cargo commenced.

Held, that there was no admission of a violation of the implied warranty of seaworthiness, or any affirmation that the injury was in active operation when the insurance commenced.

The complaint does not set forth the policy, and makes no further reference to a condition that a statement of the damages must be furnished within thirty days, than the allegation that certain facts mentioned prevented such a statement. *Held*, that it would not be proper for a court on demurrer to decide that such a condition, implying entire forfeiture, had not been complied

* Decision rendered January Term, 1875.

with. Such a penalty should only be declared on affirmative evidence of non-compliance or violation.

Judgment affirmed.

This is an appeal by the defendant from a judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment at Special Term entered in favor of the plaintiffs on a demurrer by the defendant to their complaint.

The action was on a marine policy of insurance, covering a cargo of potatoes. The complaint therein was demurred to on the ground that it did not state facts sufficient to constitute a cause of action.

The questions raised and decided in this court sufficiently appear by the opinion of the chief commissioner.

SAMUEL HAND, *for Appellant.*

N. A. CALKINS, *for Respondents.*

LOTT, C. J.

There is authority for saying that since the passage of the statute entitled "Of Betting and Gambling," (Rev. Stat., p. 661,) it is necessary, in declaring on a policy of marine insurance, especially where the policy does not on its face import that the insurance is upon interest, "to aver that the insured had an interest to be protected thereby, in such a sense that the insurance operated as a security or indemnity to protect him against loss from the perils insured against." It was so held by Woodruff, J., in Williams vs. Ins. Co. of North America, decided by him at Special Term in the New York Common Pleas, in June, 1854, after a careful examination of the question. See 9 How., Pr. Rep., p. 365. And Selden, J., in Ruse vs. the Mutual Benefit Life Ins. Co., 23 N. Y., 516, maintains the same principle and doctrine with his usual ability in his opinion, leading to the decision in that case, which was to the effect that a party in an action on a life insurance policy on the life of another, cannot recover without proving an interest in such life.

The statute referred to declares, by section eight, that "all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or thing in action so wagered, bet or staked, shall be void." But section ten further declares that the said section shall not be extended so as to prohibit or in any way affect any in-

surances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law."

Judge Woodruff, in construing these provisions, says: "It seems to me just to say that the statute, when it declares that the prohibition shall not extend to insurance made in good faith, for the security or indemnity of the party insured, by clear implication declares that it shall embrace and make void every other insurance. If this be so, then it is as if the legislature had said "all insurances shall be void except those so made," and then adds, that it would not be doubted, if that had been the language of the statute, that a plaintiff claiming under an insurance, must, within the recognized rules of pleading, have averred facts showing that his case was within the exception. It may therefore be questioned whether the decisions made before that act took effect, holding that an averment of interest in declaring on a marine policy is necessary to be made in a complaint, are still controlling, and to be considered as binding authority. It is however unnecessary to decide that question. I shall assume, without conceding, that they are not.

The material question then arises, whether the plaintiffs have in their complaint stated facts sufficient to show an interest in the subject insured to entitle them to a recovery for damage thereto, to the extent of such interest. They allege that at the time of effecting the insurance, and of the loss, they were doing business as commission merchants; the defendants issued an open policy of insurance to them, conditioned among other things as follows: "That said defendants do insure the several parties whose names are thereafter indorsed thereon, as owner, advancer, or common carrier, on goods wares, merchandise or country produce, etc., from place to place as indorsed thereon, in a book kept for that purpose, at the rate, and on the goods, wares, merchandise or country produce, as specified in the said indorsement." They then state that the defendant, in consideration of a premium paid to it, "by a proper indorsement on the aforesaid policy duly made, insure the said plaintiffs against loss or damage on a cargo of potatoes then on board the canal boat Nellie Curtis, while lying in the Morris Canal Basin, with the privilege to tow and discharge, in the sum of four thousand dollars," for a certain time, "according as is specified in said indorsement." The allegation of such "proper" indorsement having been duly made, must, in connection with the terms of the condition of the policy, be construed as stating, in a brief and summary manner, the names of the assured and their interest, either as "owner, advancer or com-

mon carrier," etc. That was a sufficient averment of at least some interest, and if the defendant deemed it too indefinite or uncertain, the proper remedy would have been by an application to make it more definite and certain.

The subsequent allegation of damage, and its discovery on commencement to discharge the cargo, and giving notice thereof to the defendant, and that it "thereupon directed said plaintiffs to continue and discharge and sell said cargo and ascertain the amount of damages," and in fact demanded and received a premium from the plaintiffs after notice of such damage; that such discharge and sale for the best prices that could be procured were continued by them, and that they realized in all for the whole cargo, which was alleged to be worth the sum of five thousand five hundred and sixty-eight dollars, only one thousand three hundred and thirty dollars and sixty-five cents, leaving a balance of four thousand two hundred and thirty-seven dollars and thirty-five cents as their total damages; also show that they meant not only to aver an interest in the potatoes to the extent of their entire value, but that the defendant recognized such interest in them by directions given to sell them and realize as much as could be done for the purpose of reducing the amount of its liability. The demurrer, therefore, so far as it was based on the ground that the plaintiffs had not averred any insurable interest in the property insured is untenable.

It is also claimed that the complaint, assuming an insurable interest to be sufficiently alleged, shows on its face that the plaintiffs cannot recover, because it is stated therein that the "peril" which caused the loss complained of was a collision with another vessel, and that it occurred before the policy attached, and the appellant's counsel says on this question that "two views may be taken, either of which is fatal to the complaint." The first is stated to be that the injury to the cargo had not commenced before the policy attached, although the cause—the leak produced by the collision—was in existence before that time, in which case it is insisted "that the implied warranty of seaworthiness, which was a condition precedent to the policy attaching, was violated." The other view mentioned is "that the injury to the cargo was in active operation, though possibly not at its highest point, when the insurance commenced, in which case it was a peril in existence, and did not arise after the policy attached." The first view is answered by the averment in the complaint that the canal-boat having the cargo on board was, at the time of effecting

the insurance, "in good condition and seaworthy," and that "said cargo was in good condition."

The answer to the other view is that it does not appear, as is substantially conceded in presenting the first, that the injury had in fact commenced when the insurance was effected, nor, if it had, that the plaintiffs knew it. On the contrary, there is a statement that at the time of the accident mentioned there appeared to be no material damage done to the boat, and that it was not discovered that any whatever had occurred till the plaintiffs commenced to discharge the cargo, which was about a month and a half after the commencement of the risk.

Under such circumstances it cannot be said that the complaint shows affirmatively "that the injury to the cargo was in active operation" when the insurance commenced.

It is also claimed, on behalf of the appellant, that "the complaint shows a failure to comply with a condition of the policy, viz., to furnish a statement of the damages within thirty days."

There is this difficulty with reference to that point. The policy itself is not set forth in the complaint, nor does it appear what the nature and extent of that requirement was, nor the effect or consequence of a non-compliance with it. All that is alleged is, "that the reason why said plaintiffs did not furnish and deliver to said defendant a statement in writing, and verified, of the amount of damages within thirty days, as is called for in said policy of insurance," was the existence of certain facts stated. That allegation appears to assume or rather involve another, to the effect that the condition does not absolutely in all cases require such statement within that time, but that it may be excused under certain circumstances. At all events it cannot be required or be proper that the court on demurrer should in such an allegation in the complaint declare and decide that a condition operating as an entire forfeiture of a compensation for loss and damage actually incurred had not been complied with. Such a penalty should only be declared on affirmative evidence—what the condition is, and that there has been a non-fulfillment or violation of it.

I think, too, that the excuses alleged substantially show that the defendant waived a strict compliance with the condition, which apparently related to the source of preliminary proofs, or some verified statement as to the amount of damages by discharge of the potatoes, and the sale of them, with the object of ascertaining the damages

and other matters mentioned by me when considering the question of interest.

The complaint is loosely and inartificially drawn, but not so much so as to justify the conclusion that it does not state facts sufficient to constitute any cause of action.

It results from the above considerations that the court at Special Term did not err in overruling the demurrer, and that the judgment of affirmance by the General Term was also right, and must be affirmed, with costs.

All concur.

CASES DECIDED IN THE LOWER COURTS.

VALIDITY OF CONTRACTS MADE IN OTHER STATES—PREMIUM NOTE ASSESSMENTS.

Supreme Court of New Jersey.

COLUMBIA FIRE INSURANCE COMPANY
vs.
DAVID P. KINYON.

A law of New Jersey prohibits any foreign company from transacting business connected with insuring property situated in the State, without compliance with the laws, and further provides for the authorization of agencies, and prescribes penalties for agent acting without authority.

In an action to recover premium note assessments, *Held*, that comity requires the enforcement of contracts made in other States, and valid there, unless clearly prohibited by statute. The legislature has power to invalidate in the courts insurance contracts made in other States on property in New Jersey, but the court will not impute such an intention unless the language of the statute admits of no other reasonable construction.

Nothing in the statute invalidates the rule, that the law of the place where a contract is made or to be performed is to govern as to the validity and construction of the contract. The acts of New Jersey are for the protection of the public against irresponsible companies, and impair the validity of contracts made in violation of them, at least so far as concerns the right of the corporation to sue, but public policy may require that the insured be permitted to enforce the agreement.

The declaration is defective in that it fails to show that when the assessment was made on the premium notes the defendant was a member of the corporation, and, as such, liable to assessment. If the policy had expired the defendant could not be held without alleging that the loss accrued before its expiration. If the policy was alive, the losses must have accrued while it was in force.

Judgment for defendant.

This was an action on the case by the Columbia Fire Insurance Company, a foreign corporation chartered by the State of Pennsylvania, to recover the amount of certain alleged assessments made on deposit or premium note given by the defendant for his policy. The other facts appear in the opinion.

VAN SYCKEL, J.

The principal question is as to the force of our acts of 1860 and 1867, concerning insurance companies.

The fourth plea avers that the policy of insurance and the premium notes were made and delivered at Raritan in this State, contrary to the act of our legislature entitled "An act to regulate the business of fire insurance companies or associations not incorporated by this State," approved March 19th, 1860, and also to the act entitled "An act to regulate the business of fire, life, accident, marine and live-stock insurance by companies or associations not incorporated by this State," approved April 19th, 1867.

To this plea the plaintiffs replied that they did not make and execute the policy, and take the premium note at Raritan in this State, but that the same were made, executed and delivered at Columbia, in the State of Pennsylvania, and thereupon defendant demurred to this relidcation.

The demurrer, admitting all the facts well pleaded in the replication, raises the question, whether this contract of insurance made in Pennsylvania can be enforced here.

It is the evident purpose of the acts of 1860 and 1867 to put under certain regulations the doing of business in this State by foreign insurance companies. This object is accomplished by prescribing the conditions upon which they may effect insurance through agencies established here. No intention is manifested of an attempt to restrain or control the business of these corporations, so far as it is transacted outside the limits of this State, or to give our legislation any extra territorial effect.

Comity requires us to enforce a contract made in another State, and valid there, unless it is clearly prohibited by some provision of these enactments.

The defendant insists that this restraint is found in the first section of the act of 1860, which provides, "That it shall not be lawful for any company chartered by another State, to transact any business connected with insuring property situated in this State," etc. Even if this section is not superseded by the act of 1867, it must, in connection with the subsequent provisions, be construed to inhibit any foreign company from transacting any business connected with insuring property situated in this State, through agencies established here, without conforming to the requirements of our laws. That this is the fair construction of the act is manifest from its second section,

which authorizes the Secretary of State, after the foreign company has complied with its terms, to issue a certificate of authority, not to enable the company to make a contract out of this State to insure property here located, but to allow an agency to be established in the county where applied for to transact business in this State.

It is also to be observed that the penalties denounced by the act are aimed only at the unauthorized agent acting within this State.

Corporations are artificial beings, the creatures of positive law, and not citizens with the meaning of that clause of the Federal Constitution which secures to the citizens of each State "like privileges and immunities with the citizens of the several States." It may therefore be conceded, not only that our legislature may put under restraint business transacted in this State by a company created by the law of another State, but in the exercise of their plenary power may limit if they cannot deny the right of such company to sue in our courts. Although it would be competent by legislation to invalidate in our courts an insurance contract made in good faith in another State on property located here, it would be so contrary to the comity which has been observed between the States, that such an intention will not be imputed to the law-maker, unless the language used so clearly expresses that purpose as to bear no other reasonable interpretation. There is nothing in our laws except the clause above cited to countenance in the slightest degree such a disposition on the part of our legislature, and the language there used will not only bear another construction, but it was omitted from the later act of 1867, which repeals all inconsistent legislation.

It is argued that, under the rule now adopted, agencies established here may evade our laws by the simple device of concluding their contracts out of the State. If our laws were otherwise so impotent as to permit such palpable evasion to pass unpunished, it would be clearly within the reach of the first section of the act of 1860.

The following cases support the rule that where the policy is issued and the insurance effected in a foreign State, on property situated in another State whose laws render it void if made there, the contract is valid and enforceable by either party. Hyde vs. Goodnow, 3 Comst., 267; People vs. Imlay, 20 Barb., 68; Huntly vs. Merrill, 32 Barb., 627; Williams vs. Cheney, 3 Gray, 215.

Hyde vs. Goodnow was a suit in New York upon a deposit note given for an insurance effected in New York on property situated in Ohio. The Ohio statute declared void every policy signed, issued or delivered in that State, or on any property of any kind situate in that

State, by any foreign company, except through a duly licensed agent. The Court of Appeals held that the contract was not made in Ohio, and therefore was not within the prohibition of this statute.

It is not to be presumed that the court overruled the words, "or on any property of any kind situate in that State," contained in the Ohio statute.

In the later case of the People vs. Imlay, the defendant set up that the contract was in contravention of the statute of New York concerning foreign insurance companies, but the defense failed on the ground that the contract was made in Pennsylvania, and being valid there, would be enforced in New York.

There is nothing in our statute which will make this case an exception to the general rule that the law of the place where a contract is made or to be performed is to govern as to the nature, validity, construction and effect of such contract; being valid in such place, it is to be considered equally valid everywhere. It will be enforced here not *proprio vigore*, but *ex comitate*.

My conclusion is that a contract of insurance made out of this State on property here situate, is valid.

The regulations of our insurance laws are not merely for the purpose of revenue, leaving unimpaired the contract made in violation of them.

The act of April 15th, 1846, imposes a tax upon foreign companies which establish agencies in this State, the principal object of which, as stated in the preamble, was to deprive them of the advantage they would otherwise have over our home corporations.

The subsequent acts of 1860 and 1867 manifest very clearly the more important purpose of protecting the public against imposition which might otherwise be practiced by wholly irresponsible companies, by requiring that the foreign company shall exhibit under oath, and file with our Secretary of State, a statement showing that they are possessed of a sound, well invested capital of at least one hundred and fifty thousand dollars over and above all claims and liabilities, before authority can be had to appoint agents.

The raising of revenue by the imposition of a tax is merely incidental. The agent therefore who acts without due authority is not only liable to the penalty in such case prescribed, but the contract made in contravention of the law is itself void so far as concerns the right of the foreign principal to sue upon it. Washington County Insurance Company vs. Dawes, 6 Gray, 376; Williams vs. Cheney, 8 Gray, 206.

In such cases it may be required by public policy, that the party insured shall be permitted to enforce the agreement, but no opinion is expressed on this point.

The objection, that in the replication there is a departure in pleading, is not well taken. The place laid in the declaration was merely formal.

The demurrer to the replication reaches back in effect through the whole record, and attaches ultimately to the first substantial defect in the pleading. Under this rule the sufficiency of the declaration has been made the subject matter of discussion.

1. The declaration alleges that the members of the corporation are to be assessed on the premium notes to pay the losses. It recites that the defendant became a member in March, 1867, and became insured for a large amount, without specifying the sum for which he was insured, or the time the policy was to run.

There is nothing in the pleading to show that when the assessment was made, the defendant was a member of the corporation, and, as such, liable to assessment.

2. It is further averred that every member is bound to pay losses and necessary expenses in proportion to the amount of his deposit note. The amount of losses and expenses for which the deposit notes were assessed is not stated; in fact it is not directly set forth that any losses were incurred, nor is the aggregate amount of the deposit notes shown. There is no sufficient allegation by which it can be determined whether the sum demanded by the plaintiff is according to the terms of the contract. The action being *ex contractu* for a specific, liquidated sum, there must be such a statement of facts as will show a right to recover the amount claimed.

The allegation is that the company in January, 1870, made an assessment of seven and a half per cent. on the original amount of all premium notes held by the company and in force on the 27th day of November, 1869, and by such assessment assessed upon the premium note of the defendant the sum of seventy-five dollars for the purpose of paying losses incurred by the company by damage by fire. The assessment was laid to pay losses, but the pleader has wholly failed to state whether the sum assessed was less, greater, or precisely equal to the amount of losses, or whether they were such losses as accrued while defendant was a member of the company, and for which he would be liable. The legal right to assess the defendant must be clear on the face of the declaration. If the policy had expired, the defendant could not be held without alleging that the loss accrued

before its expiration. If the policy was alive, the losses must have occurred while it was in force. Long Pond Insurance Company vs. Houghton, 6 Gray, 77 ; Savage vs. Medbury, 19 N. Y., 34.

It does not therefore appear that the assessment was laid upon the basis authorized by the corporation act.

These are substantial infirmities in the declaration, and therefore there must be judgment for the defendant.

DELAYED PAYMENT OF PREMIUMS—FORFEITURE.

New York Supreme Court—First Department.—May, 1874.

RUTH E. DEAN, *Respondent,*

vs.

ÆTNA LIFE INSURANCE COMPANY, *Appellant.*[*]

If by the express terms of a policy of insurance the premiums are made payable on or before a day specified, non-compliance therewith forfeits the policy, unless the time for making such payment has been extended by competent authority.

Appeal from judgment recovered on a verdict rendered at the Circuit, and from order denying motion made upon the minutes for a new trial.

T. G. Strong, *for Appellant.*

Joseph H. Choate, *for Respondent.*

Daniels, J.

By the express terms of both the policies in suit, the premiums on them were made payable on or before the twentieth day of September, in every year during their continuance. And each contained the statement that it was understood and agreed that in case the premium should not be paid on or before the days mentioned for the payment thereof, the policy should cease and determine. The premiums which became due and payable on the twentieth day of Sep-

[*] From the *New York Daily Register.*

tember, 1869, were not paid on or before that day, and the consequence resulting from that circumstance was, that the policies ceased and determined unless the time for the payment was extended by some agreement or arrangement binding on the company. That such an agreement had been made was a fact to be satisfactorily established by the plaintiff before her right to recover upon the policies could be maintained, and that she endeavored to prove.

The evidence given in support of that fact consisted of the declarations and statements of the defendant's general agent, in charge of its business at the city of New York. These statements were made on the second of November, 1869, and also a few days after the decease of the person whose life was insured by the policies, who died on the nineteenth of November of that year. They tended to show that an agreement was made between him and the defendant's general agent, on the twentieth of September preceding, by which the payment of the premiums for that year was so far extended that no part of them became due until the fifth of November, 1869; and it was shown that payment of such part was tendered to the agent and refused by him after the statements were made, and before that day. At the time when the statements were made by the agent, admitting that he had made an agreement on the twentieth of September, 1869, extending the time for the payment of the premiums for that year, he also delivered to the person he had the interview with, written memoranda indicating the amounts required to be paid according to the terms of that agreement; but they did not of themselves constitute such agreement, and were not delivered by way of renewing or entering into it. The witness who received them stated that the agent gave him the memoranda "as indicating the arrangement which he had previously stated" to him; and, as such, they were no more than the oral declarations of the agent reduced to writing.

Two other memoranda, signed by the defendant's agent, were found among the papers of the person whose life was insured, after his death, and were received in evidence on the trial; but they were evidently made before the twentieth of September, 1869, because they call attention to the fact that the premiums on the policies would become due on that day, and request payment of the amounts. That is succeeded by certain figures unexplained upon the papers, which, with the explanation afforded by the agent's declarations, may possibly tend to indicate the existence of the agreement relied upon to sustain the recovery. But if they are capable of being used in that

manner it could not be done without the declarations themselves; so that if they were incompetent evidence for use in the case, nothing was proved from which an agreement for the extension of the time for the payment of the premiums could be inferred. Substantially, that depended upon the declarations of the agent for proofs of its existence. Without them, there was nothing from which the extension of the time for the payment of the premiums could properly be found as a fact.

In this state of the proof, and after the evidence was all taken, the defendant moved for a nonsuit, specifying, among other reasons, in support of its motion, that it was not proved that the conditions of the policies as to payment were received, and the time of payment extended by the defendant, or any person authorized to do so upon its behalf. The motion was denied, and the defendant excepted. If this objection had been broad enough to present the question whether the agent's declarations were competent evidence to show an extension of time for the payment of the premiums against the defendant, it would have been in time, although the proof of them was received without objection. Those declarations were not competent evidence of the existence of an agreement made six weeks before the time when they were made, against the defendant, the principal of the agent making them. Anderson vs. Rome, etc., Railroad Co., 54 N. Y., 334. And the omission to object to them when they were offered did not deprive the defendant of the right to insist upon their incompetency at the close of the evidence, or any other time during the progress of the trial. This was substantially held in the case of Hamilton vs. N. Y. Central Railroad Co., 51 N. Y., 100.

But the objection actually taken did not present this point for the decision of the court. It simply presented the objection that the agent was not authorized to waive or extend the time of payment of the premiums. Whether the proof given to show that an agreement had been made for the extension was competent proof for that purpose was not mentioned nor suggested. Neither this motion, nor the ground specified in its support, nor any other objection taken during the trial, presented that question. And, as it was not raised at any time during the trial, it was necessarily waived when the case was submitted to the jury. The defendant had the right to have the case tried, if it so elected, on incompetent evidence; and the omission at any time to object, is conclusive evidence of such waiver. By such conduct even the right to a trial by jury may be waived. Gleason vs. Keteltas, 17 N. Y., 291; Penn. Coal Co. vs. Del. & Hud.

Canal Co., 1 Keyes, 72; West Point Iron Co. vs. Reymert, 45 N. Y., 703; Fisher vs. Hepburn, 48 N. Y., 41; Delancy vs. Brett, 51 N. Y., 78.

The plaintiff offered in evidence a note made on the twentieth day of September, 1868, given by the person whose life was insured by the policies, for the payment of the premiums upon them in sixty days after its date, containing the agreement that the policies should be null and void if the note should not be paid when it was due. This was objected to by the defendant, on the ground that it was immaterial. The objection was overruled, and the defendant excepted. In one respect this was material evidence, for the authority of the agent to extend the time for payment of the premiums was controverted by the defendant, and if that had previously been done by him, with the approval of the defendant, it was a fact tending to show the existence of the authority. When the agent himself was examined as a witness, the defendant showed the transaction of 1868 fully by him; and it appeared from his evidence that the papers were sent to the defendant, who made no objection, but approved of the arrangement. This was all competent for the purpose of showing the agent's authority to change or extend the time fixed for the payment of the premiums. The agent, on the defendant's examination of him, showed that a receipt had been given when the note was taken, and there could be no well founded objection against afterward receiving the receipt itself for the purpose of having its precise terms in evidence. It was a material part of the transaction which the defendant had taken pains to prove, and there could be no impropriety in reading it to show exactly what had been done, so far as that appeared by the receipt.

The declarations proved to have been made in one of the interviews after Mr. Dean's death, and which was objected to as incompetent by an objection expressly confined to the particular occasion inquired for at that time, did not tend to prove the existence of any valid agreement for the extension of the time fixed by the policies for the payment of the premiums. And for that reason the exception taken to the decision allowing them to be proved, can be of no service to the defendant. The admission of the agent shown under it, tended to prove that the terms proposed had not been complied with by Mr. Dean, and for that reason it was entirely ineffectual as evidence against the defendant. It maintained the position of the defendant, and tended to subvert the plaintiff's claim. Vandervoort vs. Gould, 36 N. Y., 639, 644.

The conversation which was stated by the witness Keese was of the same general nature. He said that Morton told him substantially what he had said during the trial as a witness; so that it could not possibly have done the defendant any harm. And while it was objected to, it was not because it was incompetent, but simply because it ought to have been called out on the direct examination.

The remark made by the witness concerning this conversation is equally as applicable to the one just before considered; for that was no more than a repetition of what Morton, the agent, swore to himself.

The evidence sufficiently showed the service of the notice and proof of the death of the person whose life was insured, without the declaration of the agent that they had been received by the company. They were tendered to the general agent, and, after being refused by him, were mailed, under his direction, to the president of the company, at its place of business in Connecticut, and that, certainly, should be sufficient to prove compliance with the terms of the policy on this subject. Besides that, it appeared that the refusal to pay was placed by the company on the omission to pay the premiums; and that would be sufficient to constitute a waiver of all proof of death. Post vs. Ætna Ins. Co., 43 Barb., 353; Cornwell vs. Haight, 21 N. Y., 462.

An objection was taken to the copy of the notice and proof of death offered in evidence; but it was not objected to because it was a copy. The objection was expressly placed on the reasons that it did not appear that the original came to the possession of the company; that the fact of mailing was not such evidence of its receipt as to justify the admission of a copy in evidence. These reasons were not good, because the proof did show a proper service of the original. The tender to the agent, and mailing to the president as he directed, sufficiently showed the service of the notice and proof of death to comply with the terms of the policy. The only authority opposed to the validity of such a service is that of Hodgkins vs. Montgomery County Mut. Ins. Co., 34 Barb., 213, and that was afterward reversed by the Court of Appeals, 41 N. Y., 620.

The agent appears to have been the general agent of the company at the city of New York, and he was authorized, as such, to transact all the company's business at that place, which included all that he did concerning this insurance; and, for the reasons already given, as well as those mentioned by Mr. Justice Brady, the judgment, after

being modified as directed by him, should, with the order denying a new trial, be affirmed.

DAVIS, P. J., dissented on the following grounds:

First.—Incompetent declarations of agent were admitted, against defendant's objection. They were not harmless, because they were regarded by the court and jury as material and important, as appears by the charge, and because the ruling upon them established a rule of evidence for the case, and subsequent evidence of such declarations was given, to which, it must be assumed, the defendant omitted to object on that ground, in deference to the ruling that such declarations were competent.

Second.—The fact that the policies were canceled in October was competent, as tending to corroborate the testimony of the agent that no extension was made—it was an act in the due course of business.

Third.—There was no evidence in the case to establish the alleged waiver, except incompetent proof of Morton's declarations. The motion for a nonsuit raised the question of absence of lawful proof of waiver. The overruling of the motion was error.

Fourth.—The verdict was against evidence, and a new trial should have been granted on that ground.

The claim is of a most suspicious character, and the evidence to uphold it, I think, was illegal and insufficient. I think a new trial should be granted.

The judgment of the court, in accordance with the opinion of Justices Brady and Daniels, was as follows: Judgment and order reversed and new trial granted, with costs to abide event, unless plaintiff, within twenty days after entry of the order herein, stipulate to deduct $2,997.60 as of the date of the verdict; in which case judgment and order affirmed, without costs to either party.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

LIFE. — *A fit claimed to be caused by eating frozen pork, is a fit within the meaning of the application, and its concealment renders the contract null.*

This is a somewhat peculiar action. One of the plaintiffs, Fournier, took out a policy with defendants for $10,000, and afterward transferred it to Fletcher. He answered the usual questions and signed these answers, which are warranted to be true. In the 13th question he is asked among other things if he ever had *apoplexy* or *fits*, both of which he answered in the negative. The 17th question asks if he had any severe sickness during the last seven years, to which he answered, No. About four months later he had a fit of despondency, when he asked the doctor for poison, and two weeks later he cut his throat and almost succeeded in destroying his life. About a year before he insured he had a fit, caused, some say, by eating frozen pork. Dr. Sequin, since dead, attending him, and Dr. McMillan, who has been examined, was also called in. He calls it an apoplectic fit. At all events it was a very serious one. After the attempt at suicide the company investigated the matter and tendered back the premium they had received, demanding the surrender of the policy. When the second premium became due Fletcher and Fournier tendered it, but the company refused to accept it, and the present suit was brought to have the tender declared good and the policy declared valid. Was it valid or was it void from the beginning? Was Fournier bound to reveal the fit he had the year before he insured? No doubt his condition was then unsatisfactory, as he had a number of these fits not long after effecting the insurance. I have not to decide whether there was fraud or not; the only question is, whether the

answers were true or not. There is no difficulty about the case. The answers were not truly given, and the contract is a nullity in consequence. The action must be dismissed, and the policy declared null, as asked in defendant's plea.—[TORRANCE, J.]

Fletcher et al. vs. Ætna Life Ins. Co.

Superior Court, Montreal, Canada, Dec., 1874.

FIRE.—*Interest in reform of mortgage.*

The owner of a block of buildings insured against loss by fire, agreed to mortgage them to G. N. as security for a loan of money. A mortgage was thereupon executed, but by mutual mistake of the parties, the premises insured and agreed and intended to be mortgaged, were incorrectly described therein. As further security for the loan the mortgagor assigned to the mortgagee the policy of insurance, and procured a memorandum to be written on it as follows: "Payable in case of loss to G. N. to the extent of his claim."

The insured premises were destroyed by fire, the mortgage debt remaining unpaid, and the mortgagee brings this action against the mortgagor and the insurance company for a reformation of the mortgage.

Held, that the action will not lie against the company, for the reason, first, that it has no interest in the subject matter of the action; and second, that there is no question between the plaintiff and the company.

Newman vs. Home Ins. Co.

Opinion filed June 11th, 1874. S. C., Minnesota.

FIRE.—*Municipal corporations not liable for the destruction of buildings to prevent the spread of a conflagration in the absence of a statute creating such liability.*

An ordinance of the defendant, a muncipal corporation, authorized the mayor to order the destruction of any buildings he might deem necessary to arrest the progress of a fire. In virtue of this authority, the mayor ordered the destruction of two buildings belonging to plaintiff. This action was alleged by plaintiff to be without sufficient cause, as they would not have been burned by the fire, nor was the fire extinguished or arrested by tearing them down. Compensation was therefore demanded of defendant for their value.

Held, that municipal corporations, whose officers are by statute and by ordinance authorized to order the destruction of any building

or fence, "when they shall deem it necessary to arrest the progress of and extinguish" a fire, are not liable to the person whose property is thus destroyed in the absence of a statute creating such liability.

The destruction of buildings, etc., under such circumstances is not a taking of private property for public use within the meaning of Section 18 of Article 1 of the Constitution, but is a regulation of the right which individuals possess to destroy private property in case of necessity, to prevent the spreading of fire or other great calamity.

The legislature cannot authorize the taking of private property for public use, except upon first making or securing just compensation therefor, and any statute professing to do so would be void and confer no authority to that end.

S. C., Iowa.

Field vs. City of Desmoines.

MARINE.—*Port risk does not cover risks connected with a voyage.*

William Nelson, Jr., insured with the Sun Mutual Insurance Co., $6,250 on the hull of the ship Confidence for one month, from Oct. 5th, 1867, in the port of New York, against a port risk. On the 28th October, 1867, the ship being loaded with cargo, in charge of a pilot, and in tow of a steam tug, left her berth to proceed to sea, being then bound on a voyage to the port of Glasgow.

In proceeding down the river the ship got on a reef, and after being hauled off was taken to a berth where her cargo was discharged. She was then placed in the dock, and after repairing her damages she reloaded her cargo, and completed her voyage to Glasgow. The claim on the Sun Co. was for repairs by getting on the reef, and also for certain charges in the nature of a general average assessment upon the interests concerned in the voyage to Glasgow, and amounting in all to about $1,000 on the policy of the Sun Co.

The defense was that the words "port risk," inserted in the application by the applicant, and contained in the policy, was a limitation of the risks covered under the policy to those incident to a vessel lying in port, and did not cover any risks connected with a voyage. That as soon as the ship proceeded on her voyage, she was no longer covered under the port policy. There was no dispute as to the fact that the ship was in the prosecution of a voyage to Glasgow when the accident occurred.

Witnesses on the part of the defense were produced to show that the words "port risk" had a limiting effect upon the policy, and should be construed as words intended to contradistinguish such risks from voyage risks; that the port risk as used in the policy was understood

by underwriters and merchants to terminate at the moment the voyage begins. It also appeared that the ordinary rate of premium on such a port risk was a nominal one, being one quarter of one per centum a month, while the premium on the voyage on which the vessel was engaged at the time of the accident, and which would last about as long, was ten times as much.

The evidence and the authorities being in favor of this construction, the judge directed the jury to give a verdict for the defendant.

Nelson vs. Sun Mutual Ins. Co.

Decision rendered Feb., 1874. N. Y. Sup. Ct.

FIRE.—*Construction.—Fall of building voids policy*

This was a suit brought on a policy of insurance issued by the defendant to the plaintiff, for one year from August 2, 1872, for $1,000 on frame church edifice, situate on the N. E. corner of May and Second Streets, Chicago, and $500 on furniture and fixtures therein.

Property burned July 29, 1873, (four days before expiration,) for which plaintiff claimed damages in amount named.

The policy contained the following clause, "If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine."

The facts shown were, that the church was built on posts five feet high; that on or about July 15 Chicago was visited by a violent wind storm, which blew the building off its posts and over the adjacent sidewalk, rendering it necessary to prop it up on the north side by a dozen pieces of scantling to prevent its falling completely down. One witness stated that it stood on an angle of 45 degrees, others that the north side, of the floor was down on the ground, while the south side, resting on fallen posts, was up two or three feet. The whole building was thrown out of proper shape, and many of the studding drawn out of the sills.

Held, that this was a falling within the meaning of the above recited condition, and that the policy thereby ceased to be operative.

Judgment for defendant.

The Congregation Rodeph Sholom vs. Girard Ins. Co., of Philadelphia.

Decision by Rogers, J., Feb. 5th, 1874. Circuit Court, Cook Co., Ill.

MARINE.—*Failure of collecting agent to pay premium note.*

A premium note given by the insured was sent by the company, for collection on its maturity, to the bank where he had a deposit, and collections maturing, more than sufficient to meet the

amount of the note. The cashier promised to pay the note and charge the same to the account of the insured, but failed to do so. The note was returned as unpaid, but was afterward returned and paid. The loss occurred in the interval.

Held, that the bank was the agent of the company in collecting the note; the agreement of the cashier with the insured amounted to a payment and estopped the company from claiming a forfeiture for non-payment.

Gerlach vs. Amazon Ins. Co.

U. S. D. C., Cleveland, Ohio.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 44. FIRE.—*Examination of Property by.*—The application, which was the basis of the policy, covenanted that the statements contained in it were a full and true exposition of the facts so far as "known to the applicant" and "material to the risk." The application required the distances of all buildings within less than one hundred feet to be stated. One building within the prescribed distance was not stated. There was no evidence of fraudulent or intentional omission. The agent, who wrote the application, examined the premises before taking the risk, and evidently knew the fact. *Held*, that the failure to mention did not vitiate the policy.

Miner vs. Phœnix Ins. Co., 27 Wis., 693, and cases cited.

Wright vs. Hartford Fire Ins. Co.

Rep'd Jour'l, p. 251. Wis. S. C.

§ 45. LIFE.—*Has no continuing Interest after the Discontinuance of his Agency.*—C., with the acquiescence of the company, purchased the interest of two local agents, collected the premiums and reserved his commissions. He was afterward appointed State agent. The company subsequently abolished its State agency, and proposed that C. should appoint local agents, and dispose of his interest on his own terms. The warrant appointing him general agent provided, that "No commission can be claimed by any person whose agency has been discontinued;" also, "The right to discontinue any agent or agency at any and all times is reserved." A memorandum, also intended to be part of the contract, provides that, "Business obtained previous to date hereof, shall stand on same basis as heretofore." The testimony tended to show that the basis of the previous contracts was substantially the same as that of the contract concerning the State agency, except as regarded the rate of commissions. *Held*, that C. had no continuing interest in the business after the discontinuance of the agency. The memorandum referred simply to the rate of commissions during the continuance of the agency. The proposition of the company to treat with him on the basis of a continuing interest, was of the nature of an amicable settlement, not the concession of a right. No continuing right in the business can be raised by implication or usage.

Partridge vs. Ins. Co., 15 Wall., 513.

Mutual Benefit Life Ins. Co. vs. Charles.

Rep'd Jour'l, p. 265. U. S. C. C.

BURDEN OF PROOF.

§ 46. FIRE.—*Distance of Buildings.*—Where the insured was required in the application to state the distance, etc., of buildings within a distance of one hundred feet, if the distance of a building not mentioned was less, the burden was on the insurer to prove the fact. In the absence of such proof the presumption is that the distance is greater.

Wright vs. Hartford Fire Ins. Co.

—§ 44.

CONSTRUCTION.

§ 47. FIRE.—*Concerned in the Loss.*—The policy required the

certificate of the nearest magistrate not "concerned in the loss." The insured was suspected of incendiarism, and if guilty would have been liable to the nearest magistrate for damages, resulting from the fire having been communicated to adjoining property owned by him. *Held*, that as the granting of such a certificate would have been almost conclusive against his right of recovery in an action against the insured, the magistrate was "concerned in the loss," within the meaning of the policy. The object of the phrase was to obtain an impartial and indifferent arbiter between the parties.

Wright vs. Hartford Fire Ins. Co.

—§ 44.

§ 48. LIFE.—*Of Policy against Insurer, when applicable—Of the Policy and Application.*—The rule that a policy shall be construed most strongly against the insurer, can be resorted to only when, after the use of proper helps to arrive at the intent of the parties, the language is of doubtful import. When by the express language of the policy the application is made a part of the policy, and both are by their terms made to constitute the contract, the two papers must be construed as if they were embraced in one.

Foot vs. Ætna Life Ins. Co.

Rep'd Jour'l, p. 260. N. Y. Com. A.

CONTRACT.

§ 49. LIFE.—*Relief from Hardship.*—If the contract relations of two persons are such that one or the other must suffer a hardship, each party being equally free from blame, the law will leave it precisely where the policy places it.

Worthington vs. Charter Oak Life Ins. Co.

Rep'd Jour'l, p. 269. Conn. S. C. E.

DEVIATION.

§ 50. MARINE.—*Reformation of Contract.*—When a company insures the charter of a vessel after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port,

when her charter actually requires two, a court of equity will order the contract reformed to describe the voyage correctly.

National Traders' Bank vs. Ocean Ins. Co.

Rep'd Jour'l, p. 214. Mr. S. J. C.

OTHER INSURANCE.

§ 51. FIRE.—*What Constitutes.*—Defendant issued a policy insuring $2,000 on plaintiff's stock of goods, and $200 on his household goods and furniture, in one building. The whole was subsequently transferred to another town, in accordance with a permission indorsed on the policy. The policy provided, "If any other insurance has been or shall hereafter be made upon the said property, and not consented to by this company in writing hereon, this policy shall be null and void." Subsequent to the transfer, plaintiff obtained insurance in another company as follows: $500 on the building, $200 on household furniture, and $75 on his general library therein. This policy provided, "that any other insurance on the property hereby insured, or any part thereof, not notified to the company, should avoid the policy." Neither company had notice of other insurance. The application to the second company stated that there was "no other insurance on the household furniture."

Held, that the second policy, so far as respects the furniture, was void and did not constitute additional insurance within the meaning of the condition in the prior policy.

Clarke vs. New England, etc. Ins. Co., 6 Bush., 342-350; Hubbard vs. Hartford Fire Ins. Co., 33 Iowa, 325; May on Insurance, sec. 365.

Carpenter vs. Providence Ins. Co., 16 Pet., 425, distinguished.

Allison vs. Phenix Ins. Co. of Brooklyn.

Rep'd Jour'l p. 198. U. S. C. C.

PLEADING AND PRACTICE.

§ 52. MARINE.—*Averment of Interest required by the Statute.—What constitutes a sufficient Averment.*—The statute entitled "Betting and Gaming," N. Y., 1 Rev. St., 661, renders unlawful and void all wagers and stakes and contracts based on any unknown or contingent event, but provides that it shall not be extended to include insurance made in good faith for the security or indemnity of the insured, and not otherwise prohibited by

law. *Held*, that there is authority for saying that an averment of interest is necessary in declaring on a marine policy in order to bring it within the exception, and renders it questionable whether decisions previous to the act taking effect, that no such averment was necessary in declaring on a marine policy, can be considered as binding authority.

Williams vs. Ins. Co. of North America, How. Pr. Rep., 365; Ruse vs. Mutual Benefit Life Ins. Co., 23 N. Y., 516.

The complaint alleges the business of the insured, and states the conditions of said policy as to the interest of the insured, and substantially the terms of the insurance, the subject insured and the "proper indorsement."

Held, that the allegation of such proper indorsement having been duly made, in connection with the terms of the policy, is a sufficient averment of some interest, and if regarded as too indefinite, application should have been made to make it more definite. The subsequent allegations of damage and its discovery, of information to defendant, of defendant's instructions to ascertain its amount, and subsequent demand for and reception of a premium, and of the proceeds of the sale and estimated damages, amount to an averment of the plaintiff's entire interest and of the defendant's recognition of such interest. The complaint states that the loss was caused by collision before the policy attached, but that the boat and cargo were in good condition at that time; also that no substantial injury appeared to have been done at the time of the collision, and none was discovered until the discharge of the cargo commenced. *Held*, that there was no violation of the implied warranty of seaworthiness, or any affirmation that the injury was in active operation when the policy attached. The policy is not set forth in the complaint, and the only reference to a condition that a statement of the damages must be rendered within thirty days is an allegation setting forth the facts that prevented a compliance. *Held*, that it would not be proper on demurrer to decide that such a condition involving entire forfeiture had not been complied with. Such a penalty should only be declared on affirmative evidence of non compliance.

Young vs. Phenix Ins. Co.

Rep'd Jour'l, p. 219. N. Y. Com. A.

PRACTICE.

§ 53. FIRE.—*Conclusiveness of Verdict under Instructions.—Arson.—Refusal to instruct.*—Where in conflicting testimony the court charged that the policy is void unless the property is worth the sum stated in the application, also that the insured could not recover unless the owner of the ground, also that if the statement concerning the thickness of a wall was untrue no recovery could be had, a finding by the jury for the insured was conclusive on all these disputed issues, and cannot be disturbed by an appellate court. Where the question of incendiarism by the insured was litigated during the trial, and submitted to the jury on an issue of fact, an appellate court will not disturb the verdict. Where the value of property was trifling, and there was no proof that it could have been injured by the fire, a refusal of the court to instruct concerning a policy clause requiring the property to be put into the best possible shape after a fire, was no error.

Wright vs. Hartford Fire Ins. Co.

—§ 44.

§ 54. LIFE.—*Refusal of new Trial by Appellate Court.*—A new trial should be refused by an appellate court with extreme caution, and only when the court can see that no possible state of proof, applicable to the issues in the case, will enable the defeated party to succeed. It is not sufficient that his success is highly improbable; it must be certain.

Edmondston vs. McLord, 16 N. Y., 543; Griffin vs. Marquadt, 17 N. Y., 28.

Foot vs. Ætna Life Ins. Co.

—§ 48.

§ 55. FIRE.—*Insurable Interest.*—Where, in an action upon a policy of insurance, it appears from the petition that the insurance company, for a specified premium, executed and delivered a policy insuring A. against loss by fire, on specific property occupied by the insured, an insurable interest in the insured, under the code, is sufficiently shown.

People's Fire Ins. Co. vs. Heart.

OHIO S. C.

PREMIUM.

§ 56. LIFE.—*Not a Debt.—Relations of, to Contract.*—A premium due is essentially different from a debt. One is optional the other obligatory; one creates an obligation, the other discharges it. Its payment is in substance the making of a contract. Payment of premium purchases actual insurance until the next is due, and the right to insure by further payments. The right to future insurance is an existing right, liable to be defeated by future non-payment, which is so far a condition subsequent. Future insurance is not an existing fact, and cannot exist except upon the payment of the premium. As to that it is a condition precedent. Time is of the essence of the contract. The law will no more postpone than it will excuse altogether the payment. Where the law intervenes to prevent performance, as in unconditional contracts, there is no contract and no liability to either party.

Worthington vs. Charter Oak Life Ins. Co.

—§ 49.

§ 57. LIFE.—*Waiver of Prompt Payment.*—It is for the jury to determine whether the habit of an agency in giving thirty days grace amounted to a general practice of the company in regard to that agency field. If the company, by its general course of dealing, and its particular course with the insured, led him to believe he could have thirty days of grace, payment within that time, if the insured was living, was valid.

Bliss on Life Ins., 2d ed., p. 299, et seq.

If, however, there was no such waiver of prompt payment, the receipt of a premium when the insured was dangerously ill, and this fact was unknown to the agents to whom it was offered, did not renew the policy.

Garber vs. Globe Mutual Life Ins. Co.

Rep'd Jour'l, p. 307. U. S. C. C.

RESIDENCE.

§ 58. LIFE.—*Within Prohibited District.*—Residence within a prohibited district renders the policy void, unless the condition is waived by the company, or its authorized agent. Receipt of pre-

mium, with a knowledge of such violation, by the authorized officers of the company transacting the business with respect to this policy, is a waiver. But receipt of premium when ignorant of the violation does not renew the policy.

Bliss on Life Insurance, 2d ed., 344.

Garber vs. Globe Mutual Life Ins. Co.

—§ 57.

VESTED RIGHT.

§ 59. LIFE.—*Destruction of.*—If the law is driven to the alternative of destroying a vested right or making a new contract, it will adopt the former. There is no precedent for the latter, and no limit to the mischief which would follow its introduction into the system of jurisprudence.

Worthington vs. Charter Oak Life Ins. Co.

—§ 49.

WAR.

§ 60. LIFE.—*When the contract is dissolved by.*—The payment of premium when due is a condition precedent to the further liability of the insurer. The required payment is in no sense conditional on the non-intervention of accident, misfortune or the law; it is absolute, and this would seem of itself to be a sufficient answer to a claim on a policy where payment of premium was prevented by the rebellion.

Opinions excepted to in Hillyard vs. N. J. Mut. Ben. Life Ins. Co., 35 N. J., 415; Hamilton vs. Mut. Life Ins. Co., 9 Blatchford, 234; Manhattan Life Ins. Co. vs. Warwick, 20 Gratt., 614; Clopton vs. N. Y. Life Ins. Co., 7 Bush., 179.

In an obligatory contract payment will be excused if unlawful.

School District No. 1 vs. Dauchy, 25 Conn., 530.

But that doctrine has no application to an optional contract, and will not save the policy where war has made the payment of premium illegal. The law will not imply a qualification of the policy conditions in the case of war, such that the insured should have the advantages of payments not made. A State law requiring the company to maintain an agent in the State, for purposes of taxation and service of process, is not an implied agree-

ment between the company and the insured to maintain an agent in the State to receive premiums.

Hamilton vs. Mutual Life, and Manhattan Life vs. Warwick, excepted to.

The question is not whether the insured will be excused from performing, but what are the consequences of non-performance. Time is of the essence of the contract; the law having intervened, there is no contract and no liabilty to either party. The law does not strictly deprive the insured of a vested right, it simply enforces the contract. Where these payments might have been made by the insured or his agent residing in the North, the consequences are attributable to his own act, and not to the law. There can be no forfeiture in the proper sense of the term, where there is no vested right. The assumption of such a doctrine would work a hardship to the company, and the court should not relieve one party at the expense of the other.

Clopton vs. New York Life Ins. Co., excepted to.

Each payment of premium during war is an act requiring intercourse between enemies, and therefore war dissolves the contract, which depends on the payment of premiums after its commencement.

The Rapid, 8 Cranch, 155; Griswold vs. Waddington, 16 Johnson, 479; The Julia, 8 Cranch, 181.

A premium due is not obligatory, therefore not a debt whose payment is suspended during war. The contract is executed and therefore not dissolved by war until the next premium becomes due; it then becomes executory and war works a dissolution.

Cohen vs. N. Y. Mut. Life Ins. Co., 50 N. Y., 610; Sands vs. N. Y. Mut. Life Ins. Co., 50 N. Y., 626; Martine vs. International Life Ins. Co., 53 N. Y., 339, excepted to.

Tate vs. N. Y. Mut. Life Ins. Co., U. S. D. C., Tenn.; Dillard vs. Manhattan Life Ins. Co., 44 Georgia, 119.

Worthington vs. Charter Oak Life Ins. Co.

—§ 49.

WARRANTY.

§ 61. LIFE.—*False or Fraudulent Answers in Application.*—Where the application provides that its statements shall be the basis of the contract, and that "any untrue or fraudulent answers,

any suppression of facts in regard to the party's health," etc., shall avoid the policy, and the policy makes the application a part of itself, and provides that if it be found "in any respect false or fraudulent, the policy shall be void;" *Held*, that all the representations of the insured are warranties, and must be substantially true or the policy will be void.

Jennings vs. Chenango Mut. Ins. Co., 2 Denio, 75; Chaffer vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 376; Chase vs. Hamilton Ins. Co., 20 N. Y., 52; Le Roy vs. Market Fire Ins. Co., 39 N. Y., 90; 1 Phillips on Ins., sec. 891, etc.

It matters not whether the representations are material or not, the parties have made them such by inserting them; or whether the insured made untrue statements believing them to be true.

Duchett vs. Williams, 2 Cromp. & M., 348; Sewell vs. Middlesex Mut. Fire Ins. Co., 8 Cush., 127–133; Vose vs. Eagle Life and Health Ins. Co., 6 Cush., 42.

It matters not that the agent who procured the insurance knew the true state of the facts. The policy embodies the contract and must speak for itself.

Jennings vs. Chenango Co. Mut. Ins. Co.; Chase vs. Hamilton Ins. Co.; Sewell vs. Middlesex Mut. Fire Ins. Co.

The mere fact that the statements are warranties, and untrue, avoids the policy; an express provision to that effect in the policy or application was unnecessary. The words "false or fraudulent" in the policy do not both mean the same thing. "False" is sometimes used as fraudulent, sometimes as untrue; here it must be construed in the latter sense.

Alston vs. Mech. Mut. Ins. Co., 4 Hill, 334; Carpenter vs. Amer. Ins. Co., 1 Story, 62; Mutual Life Ins. Co. vs. Wager, 27 Barb., 364.

Foot vs. Ætna Life Ins. Co.

—S. M.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF WISCONSIN.

Appeal from Rock Circuit Court.

GEORGE A. WRIGHT, *Respondent*,

vs.

THE HARTFORD FIRE INS. CO., *Appellant.**

The policy required the certificate of the nearest magistrate not "concerned in the loss." The insured was suspected of incendiarism, and if guilty was liable to the nearest magistrate for damages resulting from the fire having been communicated to adjoining property owned by him.

Held, that the term "concerned in the loss" was intended to secure an impartial and indifferent arbiter; the magistrate was "concerned in the loss" within the meaning of the policy.

Where in conflicting evidence the court charged that the policy is void unless the property is actually worth the sum stated in the application, and the jury found for the insured, it was tantamount to finding that the value was not overestimated.

Where the question of incendiarism by the insured was litigated on the trial, and fairly submitted to the jury on an issue of fact, an appellate court will not disturb the verdict.

Where the insured was required in the application to state the distances, etc., of buildings within less than four hundred feet, if the distance of a building not mentioned was less than one hundred feet, the burden is upon the insurer to

* Cause submitted January 13th, 1874. Decision rendered February 2nd, 1375.

prove the fact. Where it is admitted that such a building was within the prescribed distance, and the agent who wrote the application examined the premises and knew the location, in the absence of fraudulent intention shown on the part of the insured, the failure to mention the existence of the building does not vitiate the policy.

Where the title to ground on which the building stood was only discovered to be doubtful by measurement subsequent to the fire, and the jury found for the insured, under instructions that he could not recover if not the owner, the finding was conclusive of the question of title.

Where the policy required the property to be put into the best possible shape after the fire, and its value was trifling, and there was no proof that it could have been injured, a refusal of the court to instruct on the point was not error.

Where the representation of the thickness of a wall was in dispute, and it was submitted to the jury as a question of fact, under instructions that if untrue the policy would be void, the finding of the jury for the insured was conclusive of its thickness, and where the agent was present when the measurement was made, in the absence of evidence of fraud, even if erroneous, the court would hesitate to reverse the judgment.

Judgment affirmed.

Action upon a policy of insurance, dated August 6th, 1872, in and by which the defendant insurance company insured the plaintiff against loss or damage by fire to his hardware store or tinshop in Lima, Wis., to the amount of $700, to his stock of merchandise therein $250, and to his tools and fixtures therein $250. The store and most of its contents were burned on the evening of September 6th, 1872. The complaint is in the usual form of complaints in like actions, and the plaintiff claims therein to recover the whole amount of the risk so taken.

The policy of insurance contains the following conditions:

"If an application, survey, plan or description of the property herein insured is referred to in this policy, such application, survey, plan or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk; * * * or if the assured is not the sole, absolute and unconditional owner of the property insured, or of the land on which such building or buildings stand, by a title in fee simple, and this fact is not expressed in the written portion of the policy, * * * * then and in every such case this policy shall be void. In case of loss the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire, the whole value and ownership of the property, and the amount of loss or damage; and shall produce the certificate under seal of a magistrate, notary public, or commissioner of deeds, near-

est the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount claimed by the said insured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire. * * * When personal property is damaged the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and costs of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers in writing, under oath, shall form a part of the proof required, * * * and until such proof and certificate are produced * * the loss shall not be payable. Any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under the policy. And it is further expressly covenanted by the parties hereto, that no officer, agent, or representative of the company shall be held to have waived any of the terms and conditions of this policy unless such waiver shall be indorsed thereon in writing. This policy is made and accepted upon the above express conditions."

It is alleged in the complaint that after the property was burned, the plaintiff applied to one Hull, then a justice of the peace of the town of Lima, and the justice nearest the place of the fire, for a certificate of the fire and loss as required by the policy, but that such justice, without any reasonable cause, and for the purpose of injuring the plaintiff, refused to give the same; also that Hull was concerned in the loss, was a bitter enemy of the plaintiff, and before that time had made a criminal complaint against him, charging that the plaintiff was guilty of the crime of burning the property. It is further therein alleged that the plaintiff procured and gave to the defendant, in due time, the certificate in the required form, of one P. C. Stillman, and that the latter (quoting from the complaint) "was at the time of said fire, and from thence hitherto has been and now is, a justice of the peace in and for said town of Lima, and resides within about half a mile of the place of said fire, and did at the time of said fire, and with the exception of said Hull is the nearest the place of said fire of any magistrate, notary public or commissioner of deeds, and that said Stillman was not concerned in said loss, nor related to this plaintiff; and that said certificate of said Stillman stated that he was at the time a justice of the peace and a resi-

dent of said Lima Center, Rock County, Wisconsin, and that he administered the above-mentioned oath to this plaintiff, was one of the justices of the peace nearest to said fire in said village of Lima Center, and that he was not concerned in the above loss by fire, nor related to the said insured, George A. Wright."

Full performance by the plaintiff of all the conditions of the policy to be performed by him, is also averred in the complaint.

In his application for the insurance, (which application is the basis of the policy,) the plaintiff stated that the value of the store was $1,000, of the stock, $400, and of the tools and fixtures $400. To a question which required him to state the distance and materials and uses of other buildings within one hundred feet of the one to be insured, the plaintiff answered as follows: "About 25 feet south to frame building occupied as a hotel; three feet north to two story frame store. He also stated, in reply to appropriate questions, that except a mortgage for $200, he was the sole and undisputed owner of the property proposed to be insured; that he owned and held, by deed of warranty, the ground upon which the building stood, and that a certain brick wall between the hardware store (which was a brick building) and a wood or frame addition thereto (being the tin-shop) was thirteen inches thick." Such application concludes as follows: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk."

The answer, either by express averments, or by averments of want of knowledge or information thereof sufficient to form a belief, contain specific denials of most of the material allegations of the complaint. It also contains the following defenses:

1. That Mr. Hull was the nearest magistrate to the place of the fire, that he was not concerned in the loss, nor related to the plaintiff, and that the latter had never requested him to make the certificate required by the policy.

2. That when plaintiff made such application, the building insured was not worth $500, nor was the stock therein worth $200, or the tools and fixtures worth $200, and that the plaintiff well knew the value of the property and fraudulently overestimated the same.

3. That the damages, by reason of the fire, did not exceed to the buildings $400, to the stock $40, and to the tools and fixtures $60.

4. That the plaintiff "deliberately, premeditatedly and feloniously"

set the building on fire, or caused it to be done, and thus in his own wrong caused the insured property to be burned.

5. That there were other buildings within less than 100 feet of the insured building, not disclosed in the application, and that the plaintiff was not the owner of a portion of the land on which the tinshop addition stood.

6. That the plaintiff did not put the personal property damaged by the fire, in the best order possible, as required by the policy.

7. That the brick wall between the hardware store and the tinshop was only eight inches thick, instead of thirteen inches as stated in the application.

It is further alleged in the answer, that the proximity of such other buildings, the want of title in the plaintiff to a portion of the ground upon which the insured building stood, and the fact that the brick wall above mentioned was but eight inches thick, were conditions material to the risk, and that had their existence been known to the defendant a higher rate of premium would have been exacted, or the risk would not have been taken.

The testimony introduced on the trial, and the rulings and instructions made and given by the court, are sufficiently stated in the following opinion.

The jury found for the plaintiff, and assessed his damages at $1,200 —the full amount of the insurance; a motion for a new trial was denied, and judgment was afterward entered pursuant to the verdict. The defendant appealed.

Messrs. Cassoday and Carpenter, *for Respondent.*

Isaac Lyon, *for Appellant.*

Lyon, J.

We have had considerable difficulty in obtaining a correct understanding as well of the facts of this case, as the points upon which the defendant seeks a reversal of the judgment of the Circuit Court. This difficulty arises from the circumstance that the learned counsel for the defendant, who usually prepares his cases and arguments with great care, has been disabled from so doing in the present cause by severe and protracted indisposition. The testimony contained in the bill of exceptions is very voluminous, consisting of over 430 manuscript pages; and the comparatively small portion thereof printed in the abstract of the case does not seem to have been aptly

selected to show the full tendency and effect of the testimony on behalf of the plaintiff. The cause was not argued at the bar, and, for the reason just stated, the counsel for the defendant, with the consent of the opposing counsel, was excused from filing a printed argument or brief, and we have before us only his random brief, which was evidently hastily prepared for use in the Circuit Court. Of course these observations imply no censure, but they are made solely for the purpose of explanation, should we fail to comprehend, fully and correctly, any material fact or question involved in the issue.

It will be convenient to examine the points which seem to present themselves for consideration, in the order in which they are stated in the answer.

1. It will be remembered that a provision contained in the policy of insurance required that, in case a loss should occur, with his proof of such loss the plaintiff should produce a certificate of certain facts and opinions, "under the seal of a magistrate, notary public or commissioner of deeds, nearest the place of the fire, and not concerned in the loss or related to the assured." The plaintiff accompanied his proofs of loss with the certificate, in the prescribed form, of one Stillman, then a justice of the peace of Lima, and the nearest officer designated in the policy, to the place of the fire, except one E. Hull, who was also a justice of the peace. The proofs were objected to by the general manager of the defendant company, for the reason that the certificate was not made by the magistrate, notary or commissioner nearest the place of the fire—that is, because it was not made by Justice Hull. It seems that the plaintiff had applied to the latter justice for the certificate, but he refused to give it.

The learned circuit judge submitted to the jury the question of fact whether there had been a substantial compliance with this condition of the policy, and instructed them that a substantial compliance therewith was sufficient. He refused to give an instruction to the effect that if Mr. Hull was the magistrate nearest the place of the fire, not concerned in the loss or related to the assured, his certificate was indispensable to the plaintiff's right of action.

The evidence shows conclusively that the fire from the plaintiff's burning building communicated directly to and burned the building of Mr. Hull, occupied by him as a store and residence, and also burned a portion of his goods therein; that he had no insurance on the property thus destroyed, and that he made a complaint to a magistrate against the plaintiff, charging him with the crime of setting the fire. If the plaintiff willfully set the fire which destroyed his

property, the defendant company is not liable for his loss, but he is liable to Mr. Hull for the loss of the latter caused by the same fire. Had Mr. Hull made the certificate required by the policy, it would have been strong, almost conclusive evidence against his right to recover for his loss in an action therefor against the plaintiff. Hence he had an interest in withholding the certificate, and in the establishing of the fact that the plaintiff willfully set the fire.

We do not understand that the term "concerned in the loss," as employed in the policy, means merely a pecuniary interest in the money which may be obtained from the insurance company on account of a loss, but that it is inserted in the policy to secure an impartial arbiter between the company and the assured—one who will neither make nor lose, directly or indirectly, by the determination of the rights and obligations of the parties in respect to the loss, but who stands indifferent between them. We think, therefore, that Justice Hull was "concerned in the loss," and that Justice Stillman was the proper person to make the certificate, and had the learned judge so instructed the jury, it would not have been error. The instructions given were more favorable to the defendant than it had any right to demand, and it cannot be heard to complain of them.

2. On the subject of the value of the insured property at the time the policy was issued the testimony is very conflicting. There certainly is testimony tending to show, and from which the jury might have found, that the property was then of the value stated by the plaintiff in his application for insurance. The judge at first instructed the jury that if the plaintiff overestimated such value honestly, and in consequence of a mere error of judgment, it would not avoid the policy. But he subsequently modified his charge in this respect, and instructed them that unless the property was actually worth the sum stated in the application, the policy is void, and that its validity does not depend upon the plaintiff's knowledge that he had made an overestimate of the value. Under the modified instruction the jury must have found that the value of the property was not overestimated by the plaintiff. This disposes of the point.

3. The testimony also tends to show that the plaintiff's loss on each class of insured property equaled the insurance thereon, and the jury were instructed that if he recovered in the action, his recovery must be limited to his actual loss. This was manifestly correct.

4. The question as to whether the plaintiff set the fire was litigated

on the trial, and was fairly submitted to the jury. On this issue of fact, the verdict was for the plaintiff, and we cannot disturb it.

5. As to the proximity of other buildings not mentioned in the application. There is considerable testimony relating to a building on an adjoining lot in the rear of the insured store, not so mentioned, but we find no statement of the distance between the two buildings. If such distance was less than 100 feet, the burden was upon the defendant to prove the fact. Failing to do so, the presumption is that the distance between the two buildings was more than 100 feet.

There was, however, a building on the opposite side of the street, within less than 100 feet of the insured building, but it is very evident, from the testimony, that the agent of the plaintiff who wrote and received the application and delivered the policy, knew the fact. He went upon the premises and examined them before taking the risk, and he does not claim to have been ignorant of the existence and location of the building across the street. Furthermore, there is no testimony tending to show that the plaintiff fraudulently or intentionally omitted to mention such building in his application. Under these circumstances, the failure thus to mention it does not vitiate the policy. Miner vs. Phœnix Ins. Co., 27 Wis., 693, and cases cited, [1 Ins. Law Jour., 41.]

Testimony was introduced on the trial, tending to show that a strip of ground, about four feet wide, under the side of the tinshop next to Mr. Hull's store, did not belong to the plaintiff, but belonged to Hull. The plaintiff stated in the application that he was owner of the ground upon which the tinshop stood. This is claimed to be a misrepresentation of title which avoids the policy. It is only necessary to say on this subject, that until after the fire all parties supposed that the plaintiff owned the strip, and doubt was raised as to his title thereto by a subsequent survey; that the testimony tending to show that Hull owned it was most unsatisfactory; and that the question of ownership was submitted to the jury with an instruction that if they found that the plaintiff was not the owner, he could not recover. Under this instruction the jury must have found that the plaintiff was the owner of such strip, and the verdict is conclusive of that question.

6. We think there is nothing in the point that the plaintiff failed to put the damaged property in the best possible order after the fire. The value of such property was trifling in amount, and there seems to be no proof that its value could have been improved. Hence, the

refusal of the judge to give an instruction on that subject, asked on behalf of the defendant, was not error.

7. The only remaining defense relates to the thickness of the brick wall between the tinshop and the hardware store. It is stated in the application that such wall was thirteen inches thick, whereas the testimony is quite satisfactory that it was only about eight and a half inches thick. Yet there is some testimony tending to prove that it was a thirteen inch wall. The plaintiff testifies that he measured across the door casing in the wall and found the distance sixteen inches, and another witness testified that the door jamb projected one inch and a half beyond the wall on either side. The thickness of the wall, as stated in the application, was merely an estimate from such measurement made by the plaintiff, and it seems to have been an overestimate thereof. The judge gave the same instruction relative to such statement, that he gave concerning the alleged overestimate of the value of the insured property, and submitted it to the jury as a question of fact, whether there was a misrepresentation in respect to the thickness of the wall. The verdict for the plaintiff shows conclusively that the jury found the wall to have been thirteen inches thick. While, probably, we should not have so found from the testimony; yet, inasmuch as there was some testimony to support the verdict in that particular, we are powerless to interfere.

But we fail to find any testimony tending to show that the plaintiff did not make an honest estimate of the thickness of the wall, and inasmuch as the agent of the defendant was present when the measurement and estimate were made, and had full opportunity to correct the same if erroneous, we should hestitate to reverse the judgment, even though it were conclusively proved that the wall was less than thirteen inches thick.

Many exceptions were taken on behalf of the defendant to the rulings of the court on objections to the admission of testimony offered on the trial, but we discover no error in these rulings, or at least none of sufficient materiality to work a reversal of the judgment.

Upon due consideration of the whole case, it seems to us that the judgment of the Circuit Court ought to be affirmed.

It is so ordered.

COMMISSION OF APPEALS OF NEW YORK.

REBECCA L. FOOT, *Appellant,*

vs.

THE ÆTNA LIFE INS. CO., OF HARTFORD, *Respondent.**

The rule that a policy shall be construed most strongly against the insurer only applies when the language is of doubtful import.

Where the application provides that its statements shall be the basis of the contract; that any "untrue or fraudulent" answers shall void the policy, and the policy makes the application part and parcel of itself, and further, that if "in any respect false or fraudulent it shall avoid the policy," *Held*, that the two papers must be construed as one. All the representations are warranties, and must be substantially true. It matters not whether material or not; the parties have made them so; nor whether made innocently, believing them to be true, nor whether the agent knew the facts.

Held, that the mere fact of the statements being warranties and untrue, avoids the policy, though no clause exists in the policy or application expressly voiding it on that account.

Held, that the words "false or fraudulent" in the policy were inserted for abundant caution to cover statements simply untrue, as well as those colorably true but fraudulent in fact.

Held, that a new trial should be refused by an appellate court with extreme caution and only when the court can see that no possible state of proof applicable to the issues will enable the defeated party to succeed.

Judgment reversed and new trial granted.

Appeal by plaintiff from the judgment of the General Term of the New York Common Pleas, reversing a judgment entered for her upon the verdict of a jury, and ordering judgment absolute in favor of the defendant.

The action was upon a policy of insurance upon the life of Major Alfred Foot, plaintiff's husband.

On the 24th day of January, 1867, the plaintiff by her husband made an application to the defendant for a policy of insurance upon his life. The application contained certain questions to be answered as to the health and condition of the husband. The eleventh ques-

* Argued September 26, 1874. Decision rendered January Term, 1875.

tion was as follows: "Had the party ever had any of the following diseases; if so, how long and to what extent, * * * spitting of blood, consumption, * * * * disease of the lungs," etc.

To this question the answer was "No." The thirteenth question was as follows: "Has the party had during the last seven years any severe disease? If so, state the particulars and the name of the attending physician?" To this question the answer was "No." After the questions and answers, the application contained the following: "It is hereby declared that the above are correct and true answers to the foregoing questions, and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract of insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, etc., shall render the policy null and void." That was dated Jan. 24th, 1867, and signed "Rebecca L. Foot, per Alfred Foot." The policy was dated the same day, but there was a clause in it that it should not be binding until countersigned by the agent, and it was so countersigned February 2nd, 1867, and soon after delivered to Alfred Foot. It contained the following clause: "It is also understood and agreed to be the true intent and meaning hereof, that if the proposed answers and declarations made by the said A. Foot, and bearing date the 24th day of January, 1867, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

Major Foot entered the army of the United States in 1861, and in 1864 was twice wounded. After a partial recovery he was ordered to Arizona for duty, and sailed from New York for his destination in November, 1865. While upon the ocean, the seventh day out, he had an attack of spitting blood, which continued two days, and reduced him very much, disabling him from duty for several weeks. He reached California, and while at Drum Barracks in March, 1866, he had another hemorrhage and attack of spitting blood which lasted about two days, and confined him to his bed several weeks. Neither of these hemorrhages was preceded or followed by any cough. He returned from California in June, 1866, and from that time until the last of August, 1868, his health continued good. At the latter date he had another attack of hemorrhage, and he died of consumption September 1st, 1869.

Upon the trial the judge permitted the plaintiff, under objection and exception on the part of the defendant to prove facts tending to

show that Major Foot did not intentionally or fraudulently make any misrepresentations or give untrue answers to the questions, and he charged the jury substantially that his answers did not vitiate the policy, unless knowingly untrue. To this charge defendant excepted. Defendant requested the judge to charge the jury that, "if the party had previous to his application, contrary to his answer to question No. 11, the disease of spitting blood, the disease of consumption, or disease of the lungs, or either of them, prior to the application, the policy is void;" also, that "if the party had during the last seven years preceding the application, contrary to his answer to question No. 13, a severe disease, to wit: spitting of blood, consumption, or disease of lungs, the existence of either of them during the last seven years prior to the application rendered the policy void." The judge refused to charge either of the requests, and defendant excepted.

S. A. Foote, *for Appellant.*

S. Hand, *for Respondent.*

Earl, Com.

Parties to insurance contracts have the right to make their own bargains, as in other cases. An insurance policy is to be construed like other contracts, with the view to arrive at the intent of the parties. The rule that an insurance policy shall be construed most strongly against the insurer can be resorted to only when, after using such helps as are proper to arrive at the intent of the parties, some of the language used, or some phrase in the policy, is of doubtful import, in which case the rule should be applied, because the insurer wrote the policy. Here it is clear that both parties intended that the policy and the application or proposal should constitute the contract between them. They so expressly agreed, and it is so stated both in the policy and the proposal. By the express language of the policy, the proposal, and the answers and declarations therein made, are made part of the policy. Hence the two papers must be construed as if they were embraced in one.

All the representations of the assured contained in the policy by being written therein, or incorporated therein by reference to the proposal, are warranties and must be substantially true or the policy will be void. Jennings vs. Chenango Mut. Ins. Co., 2 Denio, 75; Chaffer vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 376; Chase vs. Hamilton Ins. Co., 20 N. Y., 52; Le Roy vs. Market Fire Ins. Co., 39 N. Y., 90; 1 Phillips on Ins. sec. 891, etc. It matters not whether

the representations are material or not. The parties have made them material by inserting them, and it matters not if the party insured made the untrue statements innocently, believing them to be true. Duchett vs. Williams, 2 Cromp. & M., 348; Lowell vs. Middlesex Mutual Fire Ins. Co., 8 Cush., 127-133; Vose vs. Eagle Life and Health Ins. Co., 6 Cushing, 42. Nor does it matter if the agent who procured the insurance for the company knew the true state of the facts. The policy embodies the contract and must speak for itself. Jennings vs. Chenango County Mutual Ins. Co.; Chase vs. Hamilton Ins. Co.; Lowell vs. Middlesex Mutual Fire Ins. Co., *supra*. Hence if we should treat Dr. Buchlia, upon whose medical examination the policy was issued, as the agent of the defendant, the fact that he had at the time knowledge of Major Foot's prior condition, obtained before, while not acting for the defendant, it could make no difference with defendant's liability. The plaintiff in this action must stand by the answers of her husband as embraced in the contract, however innocently they may have been made. To render the policy void on account of the untrue answers, it was wholly unnecessary that the proposal or the policy should contain a clause expressly providing for a forfeiture on that account. The mere fact that the statements are warranties and untrue, vitiates the policy.

But it is claimed on the part of the appellant, that because the policy incorporates into itself the proposal, and the answers and declarations therein made, and provides that the policy shall be void if they are false or fraudulent, therefore it is not sufficient to avoid the policy that they are simply untrue, but to have that effect they must be knowingly and intentionally so.

The proposal is made part of the policy, and in that the words "untrue or fraudulent" are used. I have no doubt that the words "false or fraudulent," written in the policy, are used in the same sense. Effect should be given to both the words false and fraudulent. If they both mean statements made intentionally and knowingly to deceive, then it was unnecessary to use both, and nothing is added to the sense by the use of both. The word false is sometimes used in the sense of fraudulent, and sometimes in the sense of untrue. The following are instances of the latter use of the word:

In Alston vs. Mech. Mut. Ins. Co., 4 Hill, 334, Chancellor Walworth says: "and if the representations be false in any material point, even through mistake, it will avoid the policy."

In Carpenter vs. Amer. Ins. Co., 1 Story, 62, Judge Story says: "A false representation of a material fact is, according to well settled

principles, sufficient to avoid a policy of insurance underwritten on faith thereof, whether the false representation be by mistake or design."

In Mutual Life Ins. Co. vs. Wagner, 27 Barb., 364, Judge Sutherland says: "A false representation will avoid the policy if the actual risk was greater than it would have been had the representations been true. In such action it would not have been necessary for the insurers to show that the misrepresentation or concealment was intentional or fraudulent."

Having provided in the proposal, which is made part of the policy, against both untrue and fraudulent statements, how can we infer that in the policy, based upon the proposal, it was the intention to cut down the force of these words, and confine the avoidance of the policy to statements fraudulently made? Having embraced the statements made in the proposal in the policy, and thus made them warranties, so that if untrue the policy would be avoided, it is not inferable that by the insertion of the words false and fraudulent, it was the intention to save the policy from statements simply untrue. These words were inserted for abundant caution. They were intended to cover statements untrue, as well as such as were colorably true, but fraudulent in fact.

I am therefore of opinion that the judge at the trial term erred in his charge as made, and his refusal to charge the jury as requested, and that the judgment was properly reversed at the General Term. There were doubtless other errors committed upon the trial, but most, if not all, of them resulted from the erroneous theory upon which the judge tried and submitted the case. They may be avoided upon a new trial.

The General Term should not, upon the reversal, have ordered absolute judgment for the defendant; such a case is rarely proper when there is a reversal at General Term upon exceptions taken at the trial. This was an appeal to the General Term, from a judgment entered upon a verdict. Upon such an appeal the General Term could only consider the exceptions, and all the evidence given may not have been before it. It could not, therefore, certainly know what might be made to appear upon a new trial. It is only when the appellate court can see that no possible state of proof applicable to the issues in the case will entitle the respondent to a recovery, that a new trial should be denied to him upon a reversal of his judgment. Edmondston vs. McLord, 16 N. Y., 543.

In Griffin vs. Marquadt, 17 N. Y., 28, Judge Comstock says: "It is proper to say, and to say it with great distinctness as the opinion

of this court, that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."

It is not sufficient to refuse a new trial, that it is highly improbable that the party defeated upon the appeal can succeed upon the new trial. It must appear that he certainly cannot. This we cannot say in this case, both from the nature of the controversy and from the fact that we may not have before us the whole case made by the plaintiff upon the trial.

It follows that the judgment must be reversed and new trial granted. Costs to abide event.

All concur.

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

THE MUTUAL BENEFIT LIFE INS. CO.

vs.

WILLIAM CHARLES.*

The defendant, an agent of the company, purchased the business of two local agents, with the acquiescence of the company, and continued to collect the premiums and reserve his commissions. He was subsequently appointed general agent for the State. The warrant appointing him to this position provided, that "no commission can be claimed by any person whose agency has been discontinued," also, "the right to discontinue any agent or agency at any and all times is reserved;" In a memorandum bearing even date, and evidently intended to be part of the contract, it is provided that, "business obtained previously to date hereof shall stand on same basis as heretofore." The testimony tended to show that the basis of such previous contracts were the same as the present, except as to the rate of commission. Afterward the company abolished its State agency, and proposed to allow the defendant to appoint local agents, and make his own bargains with them for the transfer of his in-

* Decision rendered February 27th, 1875.

terest. The defendant claimed that, by an understanding with the company, he was entitled to a life interest in the business which he had purchased, and that which he had worked up, which the company denied.

Held, that the agent had no continuing interest in the business after the discontinuance of the agency. In the absence of proof of such continuing interest in the business previously purchased, the memorandum must be construed as referring simply to the rate of commissions during the existence of the agency.

The offer to treat with him on the basis of a continuing interest, was of the nature of an amicable settlement, not the concession of a right. No such continuing right can be raised by implication or usage. The defendant is ordered to account for and pay over to defendant all money in his hands as agent, and surrender all books and papers.

Messrs. Hitchcock and Dupee *for Complainant.*

Thomas J. Turner and F. W. S. Brawley, *for Defendant.*

Opinion of the Court :

The bill in this case charges in substance that on the 1st of April, 1870, complainant appointed the defendant, William Charles, its agent for the State of Illinois, and that said Charles continued to act as such agent in the management and prosecution of the business of the complainant in this State until the 13th day of September, 1873, when he was removed from such agency. Demand was made on Charles to account for and pay over to the company all money in his hands as such agent. At the time of being so removed Charles had in his hands the sum of $16,500 belonging to the company, which he refused to pay over to them.

To this bill defendant filed an answer, and also a cross-bill, in both of which he alleged in substance that he went into the employment of the complainant as an agent in 1863, acting in a general way all over the State; that in 1868 he bought the interest of one Oviatt, a local agent in the business of the company, for which he paid $7,000, with the consent and knowledge of the company, which sum, he avers, he was induced to pay from an understanding between himself and the company that he was thereby securing to himself a life interest in the business of said company in the hands of Oviatt, which was the collection of renewed premiums on policies which had been placed by Oviatt. In like manner he afterward paid to G. R. Clarke, the agent of said company at Chicago, the sum of $4,000 for Clarke's interest in the business of the company, and on the 1st day of April, 1870, he was appointed the General Agent of the company for the entire State of Illinois. He continued to act as such agent until sometime in the spring of 1873, when the company changed its plan of doing business, and adopted a system of appointing local

agents, each reporting to the home office instead of to the general agent for the State. He was dissatisfied with this change, and refused to act as special agent, and a difficulty then arose between himself and the company in regard to the amount he was entitled to claim from them, he insisting that he was entitled to the commuted value of all the business he had himself worked up, as well as that he had purchased from Oviatt and Clarke—that is to say, the right to collect during his life the renewal premiums on the business which he had organized and purchased, and retain his commissions therefrom.

The complainant, by its answer to the cross bill, denies that it ever made any contract with Charles entitling him to any commissions except so long as he should continue to be the agent of the company, and insisting that, by the terms of the contract appointing Charles its agent, the right of removal was reserved. His agency had ceased, and his right to commissions had therefore ceased, so that there was no interest to commute or settle.

The warrant or letter appointing Mr. Charles the agent of the company for this State provides, sec. 11: "You will be allowed 15 per cent. commission on the cash paid on the first year's premiums on all policies procured by you; 5 per cent. commission on cash collected and remitted for renewal premiums on such policies. No commission is allowed on premium loans or interest collected, or on dividends or losses paid. No premium can be collected and no commission can be claimed by any person whose agency has been discontinued."

Sec. 16 provides, "The right to discontinue any agent or agency at any and all times is reserved."

And by a memorandum signed by the president of the company, bearing date the same day as his appointment, and evidently intended to be part of the contract, it is stipulated, among other things, that "Business obtained previously to date hereof shall stand on same basis as heretofore." What were the specific terms of the former contracts by which Charles acted as agent of the company prior to April 1, 1870, is not shown by the proof—Charles insisting that his copies were destroyed in the fire of Oct. 9, 1871—but what testimony there is tends to show that the contract was substantially the same as that of 1870, with the exception that the commissions were somewhat higher.

It is conceded that, after Mr. Charles purchased the interest of Oviatt and Clarke, he continued to collect the renewal premiums on the policies placed by them respectively, and to retain his com-

missions therefor. It is also conceded that, when the company decided to discontinue the State agency, the officers proposed to allow Charles to name the local agents, and to make such bargains as he could with them for the transfer of his interest in the business for their respective localities.

Upon this testimony the question is, Does it appear that Mr. Charles had any continuing interest in the business of the company originated or purchased by him after he ceased to be the company's agent? In other words, was he entitled either to continue to collect the renewal premiums on his old business, and retain his commissions for so doing, or if the company withdrew those collections from him was he entitled to the commuted value of the business? The contract in unambiguous terms, says: "No premiums can be collected and no commission can be claimed by any person whose agency has been discontinued," and the right to discontinue any agent or agency is at all times reserved by the company. Clearly, then, there is no right in Charles to continue to collect the renewal premiums. Much stress is laid on the memorandum made at the same time with the appointment, which provides, that "All business obtained previously shall stand on the same basis as heretofore," and, if the proofs showed that there was a continuing life right to commissions or renewals on the business "previously obtained," this memorandum would show that this right continued.

But I think that the fair construction of this memorandum is that it applies to the rate of commissions on such business during the time Charles remained agent. Manifestly the legal effect of the contract of April 1, 1870, is to give the company the right of removal of any agent at pleasure, and to prohibit his collection of premiums after such removal, and, to my mind, the memorandum or supplementary contract does not change any original contract in that regard.

It does appear that after the decision to vacate the State agency had been arrived at, negotiations were had between Mr. Charles and the company with a view of adjusting and settling his interest in the business, and that at least one of the officers—Chancellor Dodd—seemed to treat with him on the basis that he had a continuing interest, but I think that was done more for the purpose of obtaining an amicable settlement than as a concession that his contract gave him such right.

The company naturally wished to avoid an open rupture with an agent so influential and active as Mr. Charles was and had been, and probably considered the propriety of allowing something of his claim

to avoid difficulty, and also was willing to concede something to him from the fact that his salary had in a certain sense terminated without fault of his, but solely from a change of policy on the part of the company. The case of Partridge vs. Insurance Company, 15 Wall., 513, [2 Ins. Law Jour., 458,] is in point on the question that there can be no continuing right in the business raised by implication or usage. The cross-bill is therefore dismissed, and the defendant ordered to account for and pay over to complainant the money in his hands and surrender all books and papers.

SUPREME COURT OF ERRORS OF CONNECTICUT.

SEPTEMBER TERM, 1874.

MARIA WORTHINGTON
vs.
CHARTER OAK LIFE INS. CO.

The insured, a non-combatant, continued to pay his premiums to the company's agent until the war, when the agency was withdrawn. A subsequent tender of the premiums and interest after the close of the war was refused.

Held, that the payment of premiums when due was a condition precedent to any subsequent liability of the insurer. The payment of the first and subsequent premiums purchases insurance for one year, and a right to continue the insurance on the same terms through life, at the option of the insured. The required payment is in no sense conditional. It is absolute. The doctrine that illegality excuses from payment in a positive agreement is not applicable to an optional contract like this.

The law will not imply a qualification of the policy conditions in the case of war, such that the insured should have the advantages of payments not made.

A law of the State requiring the company to maintain an agent there for purposes of taxation does not justify the inference of an implied agreement between the company and the insured, to maintain an agent for receiving premiums. Such an agency in the event of war would be a source of revenue to the enemy, freed from responsibility to his home office, and by reason of its powers would give the policy the effect of a continuing contract.

The law excusing for non-performance of a contract prohibited by the intervention of the law will not aid the insured; the question is not whether he is excused from performing, but what are the consequences of non-performance? Time is of the essence of the contract; the law having intervened there is no contract and no liability to either party.

The law does not deprive the insured of a vested right, but simply enforces the contract. The hardship is attributable to the contract, not to the law. Neither the defendant nor the law guaranteed that the performance should always be lawful.

Consequences are not attributable to the law which the party by his own act, in neglecting to come north, has brought on himself.

The insured having failed to pay the premium, there was no vested right and therefore no forfeiture strictly speaking. A rule recognizing such a forfeiture here, would be equally applicable to the case of prevention from any other misfortune.

The application of this doctrine, from the nature of the business, would work a hardship to the company, and a court should never relieve one party of a hardship at the expense of the other; it should be left where the contract places it.

Each payment of premium is an act requiring intercourse between members, therefore war dissolves the contract when dependent on subsequent payment of premiums for its continuance.

A premium due is not a debt; its payment is optional, not obligatory, therefore its payment is not like a debt suspended during the war.

The contract is executed, and therefore not dissolved by war until the next premium becomes due; after that it becomes executory and war works a dissolution.

Defendants' demurrer sustained.

The facts set forth in the declaration are substantially as follows:

On the 14th day of January, A. D. 1854, Lewis Worthington, a resident of Greenville, South Carolina, and a citizen of that State, procured of the defendants, through their agent, then stationed at said Greenville, a policy on his life for the sum of one thousand dollars, premiums to be paid annually. The policy was in the usual form, and contained the usual provision for a forfeiture in case the premiums were not paid on the day they should become due. There were also certain other restrictions concerning residence within certain geographical limits, such as are usually found in life policies.

Worthington resided at Greenville from the date of the policy until his death, which occurred April 7th, 1869. The premiums on the policy were paid regularly to the agent of the defendants at Greenville, until and including the payment of January 14th, 1859, when the defendants withdrew their agent from the State, and notified Worthington that thereafter they should notify him duly and regularly, when his premiums would be due, etc. They did so notify him, and on receiving said notice he continued to pay the premiums down to and including the payment of January 14th, 1861, after which time he received no notice from the defendants, nor did he ever pay any premiums afterward. Soon after the war closed, in the year 1865. Worthington offered the defendants the amount of the back premiums, with interest thereon from the time they respectively became due, and offered to do whatever he was bound to do to restore said

policy, but the defendants refused to receive the premiums and interest, and denied all liability under the policy. Worthington made a similar offer of premiums on several occasions afterward, but the defendants each time refused to receive them. After Worthington's death, the plaintiff made an offer of premiums and all dues that were in arrears, but the defendants refused to recognize any liability under said policy.

Worthington was a non-combatant, not engaged in any way in the rebellion. The policy was made payable to Maria Worthington, wife of the plaintiff. The defendants having filed a demurrer in the court below, the case is reserved for the action of this court.

JOHN R. BUCK, *for the Plaintiff:*

Plaintiff maintained first, that the rebellion did not so affect the contract between the parties as to render it void *ipso facto*.

Second, that the failure on the part of Worthington to pay the premiums in the years 1862, 1863, 1864 and 1865, did not abrogate the contract so that an offer of payment made within a reasonable time after the close of the war would not restore it.

In order to bring the contract within the rule which calls for its dissolution, it must relate to that which can be the subject of confiscation, seizure, etc., by the hostile powers.

This is not a contract of continuous performance within the meaning of the rule laid down on that subject with reference to contracts held to be dissolved by a state of war; nor was any continuous act necessarily required on the part of Worthington when the war broke out. The contract had been executed, so far as he was concerned, until January 14th, 1862.

This contract was partly executory and partly executed, and the authorities which may be cited to show that it should be abrogated by the war, will all be found to relate to another class of contracts.

Worthington acquired a right in the policy which nothing but his own act could destroy. The war could not abrogate this vested right. It was a debt due him, and if the company had closed its business when the war broke out, he would have been entitled to the surrender value of his policy.

If the defendants had kept an agent at Greenville during the war, the contract would not have been abrogated, as payment could have been made or tendered within the Confederate lines, which would have been lawful.

There is nothing in the life of a non-combatant which can be the subject of belligerent rights.

Insurance upon such a life could give no aid or comfort to either of the hostile powers.

The doctrine of abrogation of contracts by war has never been applied to cases of life insurance. Such a claim would abrogate a policy the premiums on which had been paid before the war began, and were not due by the terms of the contract until after the return of peace.

While the property of a non-combatant may by the laws of war be taken by the enemy, his life can never be the subject of belligerent power. The ordinary laws of war have never been held to apply to non-combatants.

Those authorities which relate to cases of insurance on property are not controlling in this case.

If Worthington had no legal excuse for non-payment, then he must forfeit his rights under the policy; we say that the war excused him from such payment; he was forbidden to do so by the President's proclamation of August 16th, 1861; it was impossible for him to make the payment without violating this law; he was prohibited by the common laws of war from making the payment.

By the same law which forbids the act, a forfeiture is claimed for not performing the act; the law of nations forbids the payment; the law of nations punishes for its non-payment. This is the position which must be taken by those who insist that war does not excuse the non-payment of premiums.

The act of God and the law will excuse the non-performance of a contract.

Cases cited by plaintiff:

The William Bagaly, 5 Wall., 377, 407; Hanger vs. Abbott, 6 Wall., 532, 536; Esposito vs. Bowden, 4 Ellis & Blackburn, 963; Esposito vs. Bowden, 7 Ellis & Blackburn, 763; Reid vs. Hoskins, 4 Ellis & Blackburn, 979; Slatham et al. vs. N. Y. Life Ins. Co. et al., 45 Miss.; Ward vs. Smith, 7 Wall., 452; Clark vs. Morey, 10 John. Rep., 73; Conn. vs. Penn., 1 Wash., Circuit Ct. R., 524; Denistoun vs. Imbrie, 3 Wash., Circuit Ct. R., 396; Buchanan vs. Curry, 19 John., 137; Kershaw vs. Kelsey, 100 Mass., 561; Clopton vs. N. Y. Life Ins. Co. 7 Bush., 179; Slatham vs. N. Y. Life Ins. Co. 45 Miss., 581; Hamilton vs. Mutual Life Ins. Co. of N. Y., Circuit Ct., Southern Dist. N. Y., Blatchford, J., [1 Ins. Law Jour., 573;] Cohen vs. N. Y. Mutual Life Ins. Co., 50 N. Y, 610, [2 Ins. Law Jour., 426;] Sands vs.

N. Y. Life Ins. Co., 50 N. Y., 626, [2 Ins. Law Jour., 372;] Martine vs. International Life Ins. Co., 53 N. Y., 339, (affirming Cohen's & Sands' cases,) [3 Ins. Law Jour., 48;] Hillyard vs. New Jersey Mutual Benefit Life Ins. Co., 35 N. J., 415, [2 Ins. Law Jour., 137, and 4 Ins. Law Jour., 127;] Manhattan Life Ins. Co. vs. Warwick, 20 Gratt., 614, [1 Ins. Law Jour., 115;] Bousmaker, 13 Ves., 71; People vs. Tubbs, 37 N. Y., 587; Tonling vs. Hubbard, 3 B. & P., 291; Semmes vs. City Fire Ins. Co., 13 Wall., 162, [1 Ins. Law Jour., 663;] Jones vs. Judd, 4 Conn., 412. (14 Peters, 173;) United States vs. Thomas, 15 Wall., 337; Davis vs. Gray, 16 Wall., 203; Worth vs. Edmonds, 52 Barb., 40.

H. H. & H. S. Barbour, *for the Defendants:*

The defense rested on the following grounds:

By the terms of the policy, payment of the annual premium was a condition precedent to the right to recover thereon. The premiums were the consideration for the risk assumed by the defendant, and the plaintiff must show that the premiums have been paid according to the terms of the policy, or that payment has been waived or prevented by the wrongful act of the defendant, or she cannot recover.

This construction of the policy is just to both parties—the insurer can maintain no action to recover a premium—the insured has the right to pay, and keep the policy in force as long as he chooses to pay. If for any cause he is unable to pay the premium, it may be his misfortune, but the insurer should not be held to a construction of the contract not contemplated by either party.

The reasons given in the declaration for the non-payment of the premiums afford no legal excuse for failure to pay, as required by the policy. Indeed, it was not impossible for the assured to make payment if he wished to keep the policy in force. If he chose to remain where he could not make the payments at Hartford, where they were payable, it was his own fault, and not the fault of the defendant. It was his duty to come within our lines, and was not impossible for him to do so, or, at least, in some way to make payment. He might have made payment through an agent here. The same may be said of the plaintiff, who, as appears by the policy paid the first premium.

Neither did the offer to pay the premiums, more than three years after the policy, by its provisions, had terminated. revive the policy.

The act of Congress, July 13th, 1861, with the proclamation of the

President, of August 16th, 1861, dissolved the contract between the parties to this policy. Indeed, the defendant could not have received the premiums from 1862 to 1865, if they had been tendered by the insured while residing in South Carolina.

That all the principles and rules applicable in cases of war between different countries are so as respects the different portions of our country in the late war, is established by many decisions.

The decisions of courts fully establish this doctrine as well in regard to all executory contracts, partnerships and agencies, as to marine insurance. Why not to life insurance? The subject matter of such insurance is life—in this case the life of an enemy.

Cases cited by defendant:

Howell vs. Knickerbocker Life Ins. Co., 3 Robertson, N. Y., 232, [1 Ins. Law Jour., 443;] Reese vs. Mutual Benefit Life Ins. Co. 8 Geo., 534; Reese vs. Mutual Benefit Life Ins. Co., 23 N. Y. R., 516; Mutual Benefit Life Ins. Co. vs. French, 2 Cin. S. C. R., 326; Angell on Fire and Life Ins., p. 592, sec. 399; Bradley vs. Potomac Fire Ins. Co., of Baltimore, 32 Md., 108; Want vs. Blunt, 12 East., 183-191; Mulfrey vs. Shawmut, 4 Allen, 116; Strong vs. Taylor, 2 Hill, 326; Carpenter vs. Stevens, 12 Ward, 589; Owens vs. Farmers' Joint Stock Co., 57 Barb., 518; Scott vs Avery, 36 Eng. L. & Eq. R., 1; Tate vs. N. Y. Life Ins. Co., Opinion of Emmons, J., [2 Ins. Law Jour., 863;] Robert vs. New Eng. Life Ins. Co., 1 Disney, 355, 2 ib., 106; School Dist. No. 1 vs. Dauchy, 25 Conn., p. 536; Dillard vs. Manhattan Life Ins. Co. 44 Geo., 119; Baker vs. Union Mutual Life Ins Co., 43 N. Y., 283; Pitt vs. Berkshire Life Ins. Co., 100 Mass., 500; 5 Wallace 377; Perkins vs. Rogers, 35 Ind. R., p. 124; Semmes vs. City Fire Ins. Co., 36 Conn., 543, [1 Law Ins. Jour., 663;] Moakley vs. Riggs, 19 Johns., 69; Dermott vs. Jones, 2 Wall., 1; Harmony vs. Bingham, 12 N. Y., 99; Tompkins vs. Dudley, 25 N. Y., 272; Adams vs. Nichols, 19 Peck, 275; Oakley vs. Morton, 11 N. Y., 25; Taylor vs. Cullen, 6 Cowen, 624; Prichard vs. Merchants' Life Insurance Co., 3 Common Bench Reports, 622; 19 Grattan, 393; 2 Black., 687; 5 Wall., p. 407; Billgery vs. Branch, 19 Grattan, 431. See also 15 Wall., 395; 37 N. Y., 178; 42 N. Y., 54; Gray vs. Sims., 3 Wash., 276. Duer on Marine Ins., vol. 1, pp. 416-478; Griswold vs. Waddington, 16 Johns., 498.

CARPENTER, J.

This is an action on a policy of life insurance. The declaration sets out the policy, alleges the payment of the annual premium up to

January 14th, 1862, the non-payment and an excuse for non-payment for that and the succeeding years, the death of the insured, proofs of death, and a refusal to pay. To the declaration there is a demurrer. The sufficiency of the declaration depends upon the legal effect of the non-payment of the premiums, considered with reference to the facts alleged as an excuse.

A contract of life insurance is a peculiar contract. It has no parallel and few analogies in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts, and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance.

As the time for which the party was insured by the actual payment of premiums had expired before his death, the case turns entirely upon the second part of the contract. In respect to that, what relation did the contracting parties sustain to each other? The defendants, for a valuable consideration, made an irrevocable proposition to insure the applicant during life, upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted, he was to comply with the condition and pay the premium on or before a given day. If he neglected to pay within the time limited, according to the letter of the contract, he virtually rejected the proposition, and the contract was at an end.

In terms, the contract is a very simple one. The defendants, in effect, say to the other party: "Pay at the time stipulated and you are insured; omit such payment and our proposition is withdrawn, and your right to insure is extinguished." It is impossible to put any other construction upon it. There is no room for doubt or uncertainty. The payment required is in no sense conditional. The proposition is not, pay if convenient; pay unless sudden sickness prevents; pay unless some unexpected turn of fortune deprives you of the means of paying; pay unless the act of God or the law intervenes to prevent payment; but absolute payment is required. To

make it still clearer, the proposition is not, if poverty, sickness, accident, or the law prevents payment, you shall be insured the same as if you had paid. None of these risks were taken by the defendants; they were all taken by the insured. Every word of the instrument, embodying the agreement of the parties, is consistent with this view of the contract, and the whole instrument, when fairly considered, is inconsistent with any other view of it. It would seem that this analysis of the contract would of itself be a sufficient answer to the plaintiff's claim.

But courts of high standing, both of our sister States and of the United States, have viewed these contracts differently, and have come to a different result. They vary somewhat, however, in the reasons for their conclusions.

The case of Hillyard vs. New Jersey Mutual Benefit Life Insurance Company, 35 N. J., 415, [2 Ins. Law Jour., 137*] interpolates in the contract a provision, that if the law rendered the payment of the premiums impossible at the time, the insured was excused from paying, and might save the insurance by paying it subsequently.

In Hamilton vs. Mutual Life Ins. Co., 9 Blatchford, 234, [1 Ins. Law Jour., 573,] one reason given, among others, is, that the contract imported an agreement by the company to keep an agent in the State where the insured resided—one of the seceding States—during the war; and that the withdrawal of that agency was a wrongful act, which excused the insured from paying and saved the insurance.

In the case of Manhattan Life Insurance vs. Warwick, 20 Gratt., 614, [1 Ins. Law Jour., 115,] importance is attached to the local law of Virginia, which, as is held, required the company to keep an agent in that State during the war, to whom premiums could be paid; and that payment to him in one instance, although not strictly in the mode prescribed in the contract, and in another instance a tender of payment during the war, and after the authority of the agent had been, in form at least, revoked, operated to keep the policy alive.

In the case of Clopton vs. The New York Life Insurance Company, 7 Bush, 179, stress is laid upon the hardship of the case if the forfeiture is enforced.

We do not attempt to give all the points considered, nor even the substance of the argument; for in all the cases the whole question is elaborately discussed. Other points, however, and some of the arguments, will be more fully noticed as we proceed. A due regard to

* See report of same case on appeal, 4 Ins. Law Jour., 127.

these various decisions, and others of like import, requires us to examine with care the law bearing upon this case.

1. It will be seen from what has already been said, that we regard the payment of the premiums as a condition precedent to any subsequent liability on the part of the defendants. If this had been an absolute contract by the insured to pay a sum of money by a given time, neither accident, inevitable necessity, nor the act of God, would excuse a non-performance. But if payment was unlawful, that would be an excuse. (School District No. 1 vs. Dauchy, 25 Conn., 530.) But that doctrine has no application to a case where it is at the option of the party to do or not to do the thing contemplated. He has a perfect right to do it, or not to do it. He needs no excuse, whatever his action may be. The question is, If he omits to perform, from any cause whatever, does he thereby obligate the other party precisely as he would if he had performed? The answer to this question must be found in the contract itself. By a reference to it, it will be seen that there is nothing in it which gives the slightest indication that such was the intention of the parties, and there is no legal ground on which we can interpolate in the contract such a provision. We venture to say that no precedent can be found for such action by a court of justice, prior to some of the recent decisions upon this subject. If any such exist they have escaped our notice. We cannot, therefore, accept as sound, the doctrine that the existence of the war, making it illegal to pay the premiums, saved the rights of the party and kept the policy in force.

2. The ground taken, that the late late civil war was such an extraordinary event, and so entirely unlooked for, that it will be presumed that it was not contemplated by the parties, and therefore the law will imply a qualification of the conditions in case of war, is hardly tenable. In the first place, the policy itself provides that the insured shall not, without the previous consent of the company, "enter into any military or naval service whatsoever (the militia not in actual service excepted.") So that, in this case, war was in the minds of the parties, and therefore there would seem to be no room for the supposed presumption. On the contrary, the fact that war is clearly referred to, shows that the parties contemplated a state of war as possible; and the fact that the qualification contended for is not inserted, affords some ground for presuming that the parties did not intend such a qualification.

But aside from this—assuming that the possibility of a war between the sections was not contemplated by the parties—is it clear that

the law will imply the modification of the contract contended for? In the case of written contracts, the law will imply nothing except what may fairly be presumed to have been intended by the parties. Hence, if an unlawful act is embraced in general words used in a contract, the law will presume that the parties did not intend it, and will imply an exception. A case in one of the English reports affords an illustration. A contract of marine insurance insured against capture. The vessel was captured by the government of the insurer. It was held that the capture, although within the letter of the contract, was not within its true meaning, on the ground that an express contract insuring against such capture would be void as against the policy of the government, and therefore the law presumed that the parties intended that such a capture should be excepted.

But what reason is there for presuming an exception in the present case? It cannot be presumed from the mere fact that the act to be done, which was lawful when the contract was entered into, had unexpectedly become unlawful. That may have been a good reason why the insured, in exercising his right of election, should elect not to pay the premiums; but it certainly affords no ground for presuming that the parties intended in such a case that he should have all the advantages of an actual payment.

The business of life insurance has grown to immense proportions in the last fifty years. During that time it has engaged the attention of many of the best minds in this country and in Europe. It has been studied from every possible stand-point, and considered with reference to every possible vicissitude in human affairs, including a state of war as well as peace. Every element that enters into the chances of human life, and that affects the risk assumed, has been well considered and reconsidered, and the policies of all well regulated companies have been prepared with great care, with a view to express clearly the precise intention of the parties, and to guard the rights of all concerned. With all the light that experience and thought have thrown on this subject, it never has occurred to any one connected with the business, so far as we know or believe, that a clause of this kind was needed to protect the rights of any one. On the contrary, we venture to assert that a life insurance policy containing a provision that in case of war between the government of the insured and the government of the insurer, the policy should be continued in force during the war, without the payment of the premiums, would be unprecedented in the history of life insurance; and if a court of justice construe the contract as meaning that, they

impute to the parties a meaning which they did not intend; for it cannot be presumed that any company, managed by intelligent men, would knowingly and understandingly make such a contract.

3. In two of the cases referred to, the decision rests, in part, upon an interpretation of the contract which injects into it a provision binding the company always to keep an agent in the State in which the insured resided, with authority to receive the annual premiums, and that the withdrawal of the agency was a breach of the contract by the company, which estopped the company from setting up the non-payment of the premiums as a defense. It is not pretended that the policy itself contains any language that will bear such a construction; but the obligation is inferred, partly from the circumstances under which the contract was entered into, and partly from the law of the State in which the contract was made, requiring all foreign companies doing business in the State to keep an agent there to file certain sworn statements in public offices, etc., and accept service of process against the company.

So far as the present case is concerned, we might dismiss this point with a simple allusion to the fact that the law of South Carolina is not made a part of this case; and that so far as the inference is one of fact it hardly falls within the province of this court. But we choose not to rest our decision upon any narrow or technical ground.

We shall therefore assume that the laws of South Carolina in this respect are substantially like the laws of Alabama and Virginia, and treat it simply as a question as to the proper construction of a written instrument, taking into consideration the local law and the circumstances attending the case. The obligation inferred is hardly a proper subject of legal inference. Whether the premiums should be paid in South Carolina or Connecticut, was a matter of indifference to the law. To justify a court of justice in drawing such an inference, the circumstances should be very strong. In this case they seem to be rather weak. The fact that the contract was made with, and the premiums paid to, an agent of the company in South Carolina, coupled with the fact that the insured, with the knowledge and consent of the company, always resided there, affords very slight grounds for presuming that the parties contracted that the defendants should always, and under all circumstances, during the life of the policy, keep an agent there for that purpose. On the other hand, the fact that the parties contracted expressly in reference to the time of payment, and the receipt to be given therefor, and were silent in respect

to the place of payment, affords some presumption that they intended to leave that matter to be regulated by their mutual convenience. To us, the latter presumption seems much stronger than the former.

The principal if not the only provision in the statute, which bears upon the question, is that which requires a sworn statement of the gross premiums received for insurance by the company at the agency during the preceding year to be annually deposited with the assessor. This was undoubtedly for the purposes of taxation; and is some indication that the legislature intended that the premiums paid by citizens of the State should be paid through the agency, that they might be reached for that purpose. If the legislature intended that it is a little surprising that they did not express that intention in plain language, instead of leaving it to be implied from language which may, with equal propriety, bear another construction, and be operative without resorting to the implication. This and other requirements of the statute were only operative in case the defendants chose to transact business in the State, and only so long as they continued to do so. There is nothing which, even by implication, requires them to begin business, and there is not enough to justify the inference that they intended to compel the continuance of business when once begun. Taking the statute and the circumstances together, the interpolation of such a provision in the policy seems more like the creation than the construction of a contract.

But let us test this interpretation by its fruits. The agency is continued during the war that the policy-holder may there pay his premiums from year to year. The moment the agent receives it, it is subject to the confiscation act, and immediately finds its way into the Confederate treasury. This is conceded; and the learned judge in Hamilton vs. Mutual Life Insurance Company of New York, attempts to evade the force of it by suggesting, on page 256, that the insured "could have tendered the premium, and the agent could have refused to receive it because he could not remit it, and because it would be confiscated." In that event, we apprehend that a shrewd and sagacious government would not have been long in discovering that the insured held funds belonging to a Northern institution; and vigilant collectors would soon have destroyed all hope that he could keep them from the benefit of the creditor until after the termination of the war. If the Confederate government had determined to devise a plan by which they could draw funds from the loyal people of the North to aid in carrying on the rebellion, they could hardly have devised a more in-

genious or more successful one than this. The success and magnitude of such a scheme will be apparent when we consider that probably every life insurance company in the country had agencies in the seceding States; and that the number of policy-holders was so large as to justify the belief that the flow of money through this channel into the treasury of the confederacy would have been constant and unremitting. And then, to trace results still further, after the termination of the war, and the policy-holders have paid to the rebel government the premiums for four successive years, suits are brought on the policies, and courts of justice are gravely asked to hold the companies liable, and that too without any abatement on account of the premiums which the companies did not receive. Such are some of the consequences to which this argument inevitably leads.

But again; let us briefly consider the effect of the war upon such a contract as is here contemplated. It is now supposed to be a contract containing mutual obligations. The defendants undertook to keep an agency in South Carolina, and the insured, if he would continue his policy, undertook to pay his premiums at such agency. It must be remembered that the obligation to keep an agency is inferred partly from the previous course of business, and if it exists at all it obliges them to continue the agency during the war substantially as before. It must also be borne in mind that it is not a rule for an isolated case, but it is applicable to all life insurance companies, and all their agents, and to every policy in the seceding States. In theory, and before the war such it was in fact, the business of the agency is to negotiate and secure new policies and receive premiums as they become due on outstanding policies. The agents are required to report their proceedings, and make remittances at short intervals to their Northern principals and receive instructions from them. Practically the whole business of the agency is interrupted and destroyed, and the agent is reduced to a mere figure-head without duties or powers, to whom each policy-holder may annually go through with the form of tendering his premium. Every possible advantage to the company from the agency is destroyed, and the agency, which is judicially required, is radically and essentially different from anything which either party ever contemplated. Is that just? Is it not much more reasonable to hold, and does it require any argument to show, that such a contract is entirely abrogated by the war? Every argument and every reason that can be urged for the abolition of a contract of partnership or of affreightment applies equally well to such

a contract as this. It becomes a contract of continuing performance in the strictest sense.

4. But it is said that the non-performance of a contract will always be excused when the intervention of the law forbids one party from performing and the other party from receiving performance. This is doubtless a sound proposition. But the difficulty is, it does not aid the plaintiff. The real question is, not whether the party is excused from performing, but what are the consequences of not performing? In one of the cases the court says: "Their" (the defendants') "inability to receive the premium when due amounted to the same thing as if said premiums had been actually tendered and the defendants had refused to receive them." With all deference we submit that this cannot be true as a general rule. No case occurs to us in which it would be true when applied to an unconditional contract. To illustrate; a man contracts to erect for another a wooden building at a given place on or before a given day. Before performance the act becomes unlawful—by city ordinance, for example, forbidding the erection of wooden buildings in that locality. Non-performance would certainly be excused, but his legal excuse would give him no right under the contract. No action could be maintained against him for not erecting the building, and it is equally true that he could maintain no action against the proprietor for the price agreed to be paid, nor for damages for not permitting the erection of the proposed building. The law having annulled the contract, both parties are absolved from all obligation under it. Therefore it is not true that the parties would stand as they would if performance had been lawful, and there had been a tender of performance and a refusal. Neither is the proposition a sound one in its application to the case under consideration. Let us lay aside the existing insurance, and consider the contract solely in reference to the future. The defendants say to the insured, "pay us so much money on or before a given day, and we will insure your life a given sum for one year from that day." The defendant's undertaking is a conditional one. If the other party does not pay no obligation attaches. Before payment, and on the day named, the law absolutely prohibits the one party from paying, and the other party from receiving pay. It cannot be true that that would be equivalent to payment; or, assuming that there is no legal impediment, a tender of payment and a refusal. If it is, then the law excuses one party from paying the consideration, and yet gives him the benefit of the contract as if he had paid. It deprives the

other party of the consideration, and converts a conditional promise into an absolute one without performance of the condition.

It is no answer to say that the premium may be subsequently paid, or allowed when the policy is collected. The parties have a right to make their own contracts, and courts have no power to vary them, or make contracts for them. They have fixed the time of payment and made it material. Time is of the essence of the contract. The law will no more postpone the payment in such cases than it will deprive the party of it entirely. In this as in unconditional contracts, the law having intervened to prevent performance, there is no contract and no liability attaches to either party.

The only possible answer to this view of the case, that we can conceive of, is, that the insured had a vested interest in subsequent insurance in consideration of the premiums paid for the preceding years, of which the law will not deprive him. If the law is driven to the alternative—either to destroy that right or vary the contract, or rather make a new one for the parties—we submit that the former is less objectionable than the latter. For the latter we have no precedent, and there is no limit to the mischief which will follow the introduction of such a principle into our system of jurisprudence. In respect to the former, it is neither the first nor the only instance, in which war destroys private rights and vested interests. But no such alternative exists. It is not strictly correct to say that the law deprives the insured of a vested right. The law simply enforces, according to its letter and spirit, the contract which the party made. If that works a forfeiture, the hardship is attributable to the contract and not to the law. Neither the defendants nor the law guaranteed that performance by the insured should always be lawful.

Thus far, in considering this point, we have assumed that the law directly prohibited the payment of this premium. But such is not the fact. Payment in itself considered was not unlawful. The law simply prohibited intercourse between enemies. As a consequence, payment which required such intercourse was prohibited. If payment could be made without such intercourse it was perfectly lawful. Such payment was certainly possible. Had the insured come into the Northern States and remained here, or employed an agent, as he had an opportunity to do—for war, as a coming event, cast its gloomy shadow before, especially in South Carolina—he or his agent might have paid, and the defendants might have received, the premiums without the violation of any law whatever. We cannot, however, attribute to

the law, consequences which the party, by his own act, has brought upon himself.

5. In Clopton vs. New York Life Insurance Company, 7 Bush, 179, the court attaches importance to the supposed hardships of a forfeiture. It says: "However lawful the conditions of avoidance, as prescribed in this case, may be admitted to be, it is in effect a forfeiture which ought not to be favored. To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal for no better cause than the inevitable non-precise payment of another installment of premiums, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay when there was legal ability to receive the premiums."

The rule of law that forfeitures are not favored is a salutary rule, and we have no disposition to weaken its force. We should be careful, however, to guard against its misapplication. In respect to contracts, it is usually, if not universally, applied to cases in which the party, by doing or omitting to do some act, forfeits an estate or a sum of money, in addition to losing the advantages of the contract. This is the first instance within our knowledge in which it has been applied to give the party the benefit of the contract without performance on his part. We contend that this is not such a forfeiture as calls for or admits of the application of the rule. One man cannot forfeit the property of another. The thing forfeited must be his own. The argument assumed that the plaintiff had a vested right to the sum insured for; whereas he had no such right, not even contingently, unless he continued to pay the premiums. In this case the insured failed to pay the premiums, consequently he had no vested right to the insurance. Therefore, there was no forfeiture, in the proper sense of the word, in respect to that.

The court also speaks of forfeiting the whole amount of premiums previously paid. This is only partially true. To a considerable extent he received a valuable consideration for the amount paid, in the risk which the company assumed during the time the policy was in force. So that the real loss by a failure to pay is comparatively small, and the possibility of such a loss must be presumed to have been in the minds of the parties when entering into the contract, and considered by them accordingly. The possibility of a failure to pay was provided for in the provision in such case, that "all payments made

thereon shall be forfeited to the said company." In a hazardous contract, that was a risk which the insured assumed. It is not, therefore, such a forfeiture as courts of equity will relieve against, much less will courts of law make a contract for the parties for the purpose of avoiding it.

Again: If this principle is to be applied to life insurance policies, there is no reason for limiting the application to cases of war. There is the same hardship, and therefore the same propriety, in applying the rule to cases where the party, by accident, misfortune, or inevitable necessity, fails to pay the premiums. To apply the rule in such cases would make the companies insurers against all such contingencies, and that certainly will not be seriously claimed. This rule, too, if applicable at all, must be applied in all cases, whether few or many premiums have been paid. There is no room or reason for a distinction between the payment of one and many, except that each payment slightly increases the value of the right acquired. If but a single payment had been made, would any court seriously consider the propriety of straining the law or the contract for the purpose of saving a forfeiture?

But this is not all. The application of this doctrine to cases where the payment of the premiums has been interrupted by war, fails to take a comprehensive view of the question at issue. It looks only to the immediate parties to the suit, and regards the policy as an isolated transaction; whereas in fact it is but one act—a small fraction, indeed—of a vast business. It is a business, too, which is based upon a calculation of chances and system of averages. The average dura- of any number of insurable lives may be estimated with tolerable accuracy, and each person, of whatever age, in a healthy condition, has his "expectation of life," which is known and relied upon. Some exceed, and some fall short of the average. Hence, some pay more. some less: but the sum insured is the same, whether few or many premiums are paid. The company receives on one policy, in premiums and interest, more than it pays; on another much less; but individual policies are not regarded; it is the average duration of life and the result of the business as a whole.

The proportion of those who will allow their policies to be forfeited is also a matter of calculation, and can be determined in advance with reasonable certainty. It is doubtful, however, whether these forfeitures operate in the end to the advantage of the companies. As a rule, the policies which lapse are the best risks for the insurers. As they drop out, the average of those which remain is materially

reduced. But whether they gain or lose is not material. In ordinary times, the consequences of forfeited policies can be anticipated and provided for. The late war caused all policies subject to its operation to lapse temporarily. It will probably be found that a few only returned to pay their premiums at the close of the war. Of those, most, if not all, are cases in which the insured either died during the war, or survived it in impaired health. The application of the rule we are now considering to this class of cases, therefore, practically revives only the very worst risks for the company, and compels it to submit to the loss of all the better and more desirable risks. A court of justice should never relieve one party of a hardship, apparent or real, at the expense of the other. By so doing, possibly the court may impose a greater hardship than the one it relieves. If the contract relations of two persons are such that one or the other must suffer a hardship—each party being equally free from blame—the law will leave it precisely where the contract places it.

Let us consider the consequences of this doctrine to a single company. A large number of policies, many thousands perhaps, were outstanding in the seceding States. Some policy-holders, doubtless, lost their lives in the field. In respect to them, the company is exempt from liability. Others were non-combatants. Of these some, probably a small part of the whole, died during the war, or since. In all such cases, especially where the premiums were paid or tendered immediately after the war, the company will be called upon to pay the insurance. But in the greater number of cases, where the holders of policies survived the war in health, the company has no means of compelling them to revive their policies and pay the arrearages of premiums, but must content itself in seeing them exercise their right of election by refusing to continue the old policy, and taking a new one, thereby saving several years' back premiums. Now, if some means could be devised whereby all the policies held by non-combatants could be revived at the close of the war, and the payment of arrearages be compelled, there would be some justice in holding the company liable in those cases where the policies have terminated by the death of the insured. But a rule of law which revives and enforces all those policies in which all the advantages are against the company, and leaves null and void all those policies in which the advantages are in favor of the company, is neither reasonable, befitting, nor just.

6. One other question remains to be considered. To what extent was this policy abrogated by the war? The general principles of in-

ternational law, which determine the effect of war upon existing contracts, are well established, clearly defined, and not difficult of application. In the case of the Rapid, 8 Cranch, 155, Johnson, J., in speaking of the nature and consequences of a state of war, says: "On this point there is really no difference of opinion among jurists; there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations. In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat." After speaking of some rules which have been introduced into modern warfare, and which owe their existence altogether to mutual concessions, he adds: "On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country." Again, on pages 162-3, he says: "But the object, policy, and spirit of the rule is, to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument."

In Griswold vs. Waddington, 16 Johnson, on page 479, Chancellor Kent, referring to the case of the Rapid, says: "Here then we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiations and contracts, to all communications, to all locomotive intercourse to a state of utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat."

In the case of the Julia, 8 Cranch, 181, Judge Story is equally explicit. On page 193 he says: "At the threshold of this inquiry, I lay it down as a fundamental proposition, that strictly speaking, in

war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse."

Again, on pages 194-5, he says: "But independent of all authority, it would seem a necessary result of a state of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid therefore by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy is strictly inhibited." * * * *

"The ground upon which a trading with the enemy is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptations of unlimited intercourse, or sold by the cupidity of corrupted avarice."

We are aware that there is a tendency in modern times to soften the rigors of war, and relax the principles of international law, so far as they affect private property and rights. On this subject Chancellor Kent, in Griswold vs. Waddington, says: "It is the business of government, and not of the courts of justice, to relax the rules of war. The power that declares, or carries on war, may soften its evils, to every extent consistent with the public interest, of which it is, in this instance, the exclusive judge. It is its bounden duty to make war fulfill its end with the least possible mischief, and to hasten the blessings of peace." This is sound doctrine, and throws all the responsibility where it properly belongs—upon the war-making power. It is the business of the courts to administer international law, and not to relax or modify it according to their notions of propriety. It is much wiser and safer to leave that matter with the power that makes and carries on war. But we need not dwell longer upon the general principles which govern this case.

The law as stated above is pretty uniformly accepted by the modern cases as the established doctrine of this country. They differ somewhat in its application. The difficulty in applying it to a policy of

life insurance arises from the complex nature of the contract. There are cases which regard it as a contract of continuing performance, and therefore dissolved by war. Others consider it a contract of periodical performance, and affected as the payment of a debt is, suspended or postponed until after the war. On this point there has been much discussion. We regard it as immaterial whether it is called by one name or another. In terms it requires certain acts to be done annually, or oftener. On each act future rights and obligations depend. It neither begins nor ends, but continues a contract, and one which contemplates future acts of performance by both parties. As a rule each act requires intercourse, or communication between enemies, whenever the parties to it are citizens of belligerent States. War therefore dissolves the contract so far as it relates to insurance which depends upon the payment of the premiums after the commencement of the war.

The theory that the premium as it becomes due is a debt, is a fallacious one, and leads to erroneous conclusions. It resembles a debt only in that it is a payment of money. A debtor is under obligation to pay; here no obligation exists. The payment of a debt may be compelled; payment of the premium is entirely optional with him who is to pay. The intent accompanying the act, the object aimed at, and the consequences resulting therefrom, are essentially and radically different in the two cases. The one discharges an obligation previously existing, and closes the transaction between the parties; the other creates an obligation which did not previously exist, continues in force an existing contract which otherwise would have terminated, and contemplates future dealings between the parties. While it is in form the payment of money, it is in substance the making of a contract. The payment of a debt is only suspended; the making of a contract is prohibited by the war.

Is the contract executed or executory? Is the payment of the annual premiums a condition precedent or subsequent? On these points there has been little discussion. Courts have assumed one answer or the other, in reply to each, according as their decision has been for or against the company. Perhaps a categorical answer either way would not be strictly correct. In the case before us the premium was paid to January 14th, 1862. Up to that time it was an executed contract. No further act was required by either party. Had death intervened, the contract for future insurance would have ceased to exist, and nothing would have remained but to prove the death and pay

the money—acts which pertain to the remedy. To that extent the contract was not dissolved by the war. By entering into the contract and paying the first premium the party acquired a right to continue the insurance during life. In that respect also it was an executed contract, and the party received all he contracted for—a mere right or privilege, which was unavailable, and without value, unless he complied with the conditions. The law prohibited him from complying and therefore destroyed the right, precisely as it forbids the contract of partnership, or affreightment, and thereby destroys the rights of the parties under it.

In relation to insurance after January 14th, 1862, which is the point that concerns this case, it is different. There is a manifest distinction between a right to insure and actual insurance. There was no actual insurance, and the party could obtain none except by complying with the conditions—an act to be done by him. It was an executory contract on his part, and the law preventing the execution of it by him, the contract was necessarily dissolved.

As to the nature of the condition. It has no reference to present insurance; that is unconditional. The right to future insurance is an existing right, which may be defeated by non-payment of the premium. As to that it is clearly a condition subsequent. But the right is of such a nature that its existence absolutely depends upon payment. Future insurance is not an existing fact, and cannot exist except upon the payment of the premium. As to that, it is as clearly a condition precedent. The war, preventing its performance, dissolved that part of the contract.

There are cases on this subject in which the courts have come to the same result that we have; but we have not deemed it necessary to notice them at length. Tate vs. New York Mutual Life Insurance Co., U. S. Dist. Court of Tennessee, by Emmons, J., [see 2 Ins. Law Jour., 863;] Dillard vs. Manhattan Life Insurance Co., 44 Georgia, 119. We are aware that the Court of Appeals in New York has taken a different view of the question. Cohen vs. New York Mutual Life Insurance Co., 50 N. Y., 610, [2 Ins. Law Jour., 426;] Sands vs. New York Mutual Life Insurance Co., 50 N. Y., 626, [2 Ins. Law Jour., 372;] Martine vs. International Life Insurance Co., 53 N. Y., 339, [3 Ins. Law Jour., 48.] They rely, however, to a considerable extent, upon the authority of the cases we have been considering. Not being satisfied with the reasons given in those cases, we have not regarded them as binding upon us, but have felt at liberty to consider the

case upon principle, especially as we have been informed that the question has been before the Supreme Court of the United States, and no decision rendered, as the Court was equally divided.

We advise the Superior Court that the demurrer should be sustained.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

THE AMERICAN LIFE INS. CO., *Plaintiff in Error,*

vs.

ZENORA F. AND WILLIAM C. D. MAHONE, *Defendants in Error.*

The truthfulness and sufficiency of the answers were made a warranty by the application. The application was filled by the agent and afterward read over to the insured, who signed it.

Held, that it was permissible to prove by a witness present at the time, that the insured answered truly and not as filled by the agent.

Held, that if the insured answered truly, the acts of the agent must be considered the acts of the company, and estops the company from claiming a breach of warranty.

Held, that where there was no issue concerning the previous health of the insured, testimony to prove his previous condition of health was properly excluded.

It was stipulated that all the papers filed in the court where the action was originally brought, and which were competent evidence for either side, and copied in the transcript filed, should be read in evidence.

Held, that the certificate of the medical examiner and statement of the agent appended to the proposals and declarations, which were filed in behalf of the company, were admissible as evidence for the insured.

Held, that the opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals, and the admission of such evidence will justify an appellate court in reversing judgment.

Judgment reversed and new trial granted.

EDWIN L. STANTON, *for Plaintiff in Error.*

This is an action brought by the defendants in error, plaintiffs below, on a policy of insurance for five thousand dollars, issued on August 30th, 1870, by plaintiffs in error, on the life of Leonidas Dillard, the sum insured being payable to Zenorah F. Mahone, sister of the insured. The policy provides that it shall become void if the insured should become so far intemperate as to impair his health. It is also stipulated that if the proposals, answers, and declarations made by the insured, bearing even date with the policy, and on the faith of which the policy was issued, should be found to be fraudulent or untrue in any respect, or if there should be any willful misrepresentation or concealment in said declarations, then the policy should become void.

The fifth question and answer in the proposals for insurance signed by Dillard are as follows:

"5. Is the party temperate and regular in his habits?" "Yes."

The sixteenth question and answer are as follows:

"16. Is the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy and forfeit all payments made thereon?" "Yes."

The declaration signed by Dillard contains, among others, the following statement: "In the foregoing proposal I have not withheld any material circumstances or information touching the past or present state of the health or habits of life with which the American Life Insurance Co. ought to be made acquainted. * * And if at any time hereafter the company shall discover that any fraudulent or untrue allegation be contained herein, or in the proposals, or any material misstatement of facts regarding the condition or health of the party insured, then in any and every such case * * the policy of insurance made on the faith of this declaration and the proposals shall become null, void, and of none effect."

Dillard died on November 4th, 1870.

Of the four issues raised by the pleas the following three only concern the question raised:

1. To the defense that the policy became void because the answer to question five above given was untrue, the plaintiff below [the defendant in error here] replied that the actual answer made to said question was, "that he always takes his drinks," or to that effect, and that the agent of the company himself wrote down the word "yes."

2. Issue was joined, upon the defense that the policy became void

because the insured, after its execution, became so far intemperate as to impair his health.

3. The defense was pleaded that to the question whether a proposal had been made for insurance of Dillard's life in any insurance office, and, if so, whether the same had been accepted or declined, Dillard answered, "Insured in Equitable for $5,000;" suppressing the truth that he had previously applied for insurance to either the Equitable or Continental insurance companies, or to both, and that such application had been refused. The plaintiff below replied, denying the alleged suppressions, and averring that at the time of his applications the insured had received no answer to his application to the above-mentioned companies.

The exceptions taken at the trial were as follows:

1st and 6th. Yeizer, the agent who effected the insurance, testified that having read to Dillard specifically the fifth question and its affirmative answer, and on the completion of the papers having read to him all the questions, answers, and declarations, Dillard signed the answers, and also the declaration, and then took all these papers for examination and kept them in his possession for several hours, and afterward returned them to Yeiser to be sent forward to the company, as his application for insurance.

The plaintiff below then sought to prove by one John T. Cox, that when question five above mentioned was propounded to Dillard by Yeiser, Dillard did not answer "Yes," but answered to this effect: "I never refuse to take a drink;" or, "I always take my drinks," and that the answer "yes" was written down by Yeiser without the knowledge or consent of Dillard. This testimony was introduced against the objection of the defendant below, and an exception was taken.

Afterward the court charged the jury, in effect, that if they believed that Dillard answered question five in the words, "I never refuse to take a drink;" or, "I always take my drinks," then the defendant could claim no benefit on account of the answer "yes," written by Yeizer, even though the defendant when the policy was issued had no knowledge of the transaction other than what appeared on the face of the policies.

2nd. In behalf of the defendant one Dr. Alexander testified that, being medical examiner of the Continental Insurance Company in June, 1870, Dillard came before him for examination as an applicant for insurance in that company, and was examined by him. The witness further testified that as the result of such examination he pronounced Dillard unworthy of insurance. Thereupon the witness was asked by

the plaintiffs below whether he reported in writing to the company his said opinion, and, upon his answering that he did state his opinion in writing, the court, on motion of the plaintiffs, excluded from the jury his testimony above mentioned. The defendant below objected to this ruling and noted an exception. The same witness was asked by the defendant below whether he knew Dillard's state of health at the time of his examination in June, 1870, and if so, what it was and the nature of his malady, if any. To this question plaintiffs below objected, and the objection was sustained, and the defendant below excepted.

3d. Yeiser, defendant's agent, had, on his examination in chief, testified as above stated concerning the occurrences connected with Dillard's application for insurance. On his cross-examination defendant was allowed to elicit from him that one Dearing, general traveling agent and supervisor of the defendant in the Southern States, some time after Dillard's death visited Edwards Depot for the purpose, as he stated, of examining into the defendant's liability on the policy sued on, and remained there some hours, and before leaving expressed to the witness the opinion that it would be best for the defendant to accept the situation, and pay the policy. The admission of this testimony was objected to by the defendant below, and the objection was overruled, and an exception noted.

4th and 5th. It was stipulated that all the original papers filed in the cause in the Circuit Court of Hinds County, where the action was originally brought, and which were competent evidence for either side, and copied in the transcript filed, should be read in evidence. Against the objection of the defendant below, the plaintiff below was aminer of the company, and also a written statement of Yeiser, agent of the company, both made at the time of Dillard's application for insurance. These two papers were appended to the proposals for insurance and declaration, and the proposals and declarations by name are made part of the first and third pleas. In no other way were Dr. Harris's certificate and Yeiser's statements filed in the cause or made part of the record.

The admission of the testimony of Cox as to what was said by Dillard in response to question five, and the instruction of the court to the jury as to the effect of belief by the jury in the truth of such testimony, may be considered together.

The pleadings admit that Dillard, when he applied for insurance, was intemperate in his habits in the use of intoxicating drinks, and

that an untrue answer by him touching this matter would invalidate the policy. The question at issue is, whether the written answer is his.

Yeiser wrote "Yes," to question five, as his understanding of Dillard's words, and afterward twice read it to him. By his response to subsequent inquiries, by the statements in his declaration, and by affirmance of the recorded response to question five, after examination of the papers, Dillard made the written answer "Yes," his own. Nor is that answer necessarily inconsistent with the words alleged to have been used by Dillard when the question was first propounded. Yeiser interpreted the words as an affirmative answer to the question. Dillard, by his acts, approved, adopted, and renewed that interpretation.

The case thus differs from that of Insurance Company vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607.) In the latter case the application contained a question concerning the age of the mother of the insured at her death, and the cause of her death. The written answer represented her age as forty years and the cause of her death as fever. It was proved that the agent who took down the answers of the insured and his wife was told by both that they knew nothing of the cause of the mother's death, or of her age at the time; that the wife was too young to know anything about it, and that the husband never knew her; that when the agent was taking the answers of the applicant and his wife, an old woman was present who said she had knowledge on the subject, and the agent questioned her for himself, and from what she told him filled in the answer without its truth being affirmed or assented to by the plaintiff or the wife. The court below thereupon charged the jury that if the applicant did not know at what age her mother died, and declined to state it, and her age was inserted by the agent upon statements made by others in answer to inquiries he made of them, and upon the strength of his own judgment based upon information thus obtained, it was no defense to the action to show that the agent was mistaken. That ruling was sustained by this court. The reasoning and the decision of this court is that the parol testimony in the case made it clear beyond a question, that the party did not intend to make the representation when he signed the paper, and did not know he was doing so, and in fact had refused to make any statement on the subject; and that the agent for the company knowing that the party was wholly ignorant on this particular subject of inquiry, and would make no statement about it, nevertheless wrote the representation to suit himself. Such

representation was not the statement of the insured, and the defendant company through its agent knew it was not when the contract was made; but this representation was made by the company through its agent, who procured the insured's signature thereto. Upon these facts this court applies the principle that where one party has by his representation induced the other party to give him an advantage which it would be against equity and good conscience for him to assert, he cannot in a court of justice be permitted to avail himself of the advantage. The court therefore held that the writing in question not being the instrument of the party whose name is signed to it, but being procured under such circumstances by the other side, the latter party is estopped from using it or relying on its contents.

In the case at bar, unlike that of Insurance Company vs. Wilkinson:

1. The insured was not ignorant upon the subject of inquiry, and did not refuse to answer, but gave an ambiguous answer, and did not dissent from the interpretation put upon it by the company's agent.

2. He adopted that interpretation of the written answer by response to question sixteen, and again adopted it in his declaration.

3. After deliberate review and examination of the papers, he again approved, adopted, and renewed the written answer by returning the papers to the agent and applying for the insurance upon them.

4. In these last proceedings of the insured, by which he was bound, and without which what previously occurred was merely preliminary and ineffectual, it is conceded that the company's agent took no part. They were solely and deliberately the act of the insured.

Therefore, there exists in the case at bar not one of the facts which in the case of Insurance Company vs. Wilkinson opened the door to parol proof to excuse the insured from the effect of untruth in the written answer. On the contrary, the facts here exclude parol testimony. The insured is bound by the untruth of his own written answer. Liberty Hall Association, 7 Gray, 261; Smith vs. Cash Mutual Ins. Co., 24 Penn., 320; Vose vs. Eagle Life and Health Ins. Co., 6 Cush., 42; Dewees vs. Manhattan Ins. Co., 35 N. Y., 366.

The charge of the court below added to the error of admitting this testimony of Cox. The court wholly excluded from consideration subsequent acts of Dillard, and forbade the jury to find that Dillard adopted the answer. The instruction assumed also that if the insured originally responded in the words mentioned by Cox, he intended thereby to give an answer contradictory to that which was written by Yeiser. In effect the jury were instructed, as matter of law, that by such words, if he used them, the insured intended to say that he

was intemperate and irregular in his habits. But even if the testimony of Cox were admissible, the jury ought to have been permitted to consider Dillard's subsequent proceedings, and also to come to their own conclusion concerning the intention of the insured, as evidenced by his language and conduct.

The law of Mississippi prohibits the court from instructing the jury upon the weight of evidence, thus: "No judge in any cause shall charge the jury as to weight of evidence." (Rev. Code Mississippi, 1871, § 643;) and it is the settled rule of practice in Mississippi, that it is error in charging the jury to assume facts stated in the instruction. (35 Miss., 166, 171; 37 ib., 471, 476; 40 ib., 240, 247.) And this principle is sanctioned by this court in 11 Wallace, 391, 394.

And these rules are adopted as rules of practice in the courts of the United States by act of Congress, June 1, 1872. Statutes at Large, vol. 17, p. 196, § 5.

The testimony of Dr. Alexander, medical examiner for the Continental Insurance Co., that he examined Dillard as a candidate for insurance in that company, and pronounced him unworthy, was excluded from evidence because Dr. Alexander had made a written report to his company. But the testimony sought to be elicited in behalf of the defendant below was not the contents of Dr. Alexander's report, but his act as an officer of the insurance company in rejecting Dillard as an applicant for insurance. And this testimony went to one of the issues in the case; for it was conceded by the pleadings that if Dillard had been rejected as an applicant for insurance in the Equitable Insurance Co. before August 30th, 1870, he suppressed, in his application to the defendant below, a material fact, and the policy thereby became void.

Dr. Alexander also was prevented from testifying as to the state of Dillard's health at the time of that examination. This testimony was material, as bearing upon the nature and effect of the communication made by Dillard in the language used, according to the testimony of Cox, in answering question five. Moreover, the evidence could not be fairly excluded if the opinion and statement of Harris and Yeiser as to Dillard's physical condition offered in behalf of the plaintiffs, were properly admitted in evidence. On the other hand, Dr. Alexander's testimony was free from objections to which the other was subject.

The certificate of Dr. Harris and the statement of Yeiser were not properly admitted in evidence unless the agreement above mentioned covers them. They do not come within the terms of the stipulation:

1. Because they were not properly part of the record of the cause.

The proposals and declarations were incorporated into the pleas by reference to them under that name, and they were set forth in full as exhibits to the pleas. But the certificate of Dr. Harris and the statement of Yeiser were not part of said proposals and declarations.

2. Because they were not under oath, and were not admissions by which the company was bound.

3. Because they were not that competent evidence to which the agreement refers.

Against defendant's objection Yeiser, an agent of the company, who had, in behalf of the defendant, testified only to the execution by Dillard of the proposals and declarations at the time of the latter's application for insurance, was asked, on cross-examination, whether one Dearing, traveling agent and supervisor for defendant in the Southern States, visited Edwards Depot some time after Dillard's death, for the purpose of examining into the claim of plaintiff for the payment of said policy, and whether Dillard made such examination, and expressed an opinion as to whether or not said payment should be made. And also against defendant's objection, Yeiser, in answer to this question, was allowed to testify that Dearing, holding the position just mentioned, did visit Edwards Depot, where Dillard died, for the purpose, as Dearing stated, of examining into defendant's liability upon the policy; that he remained some hours, and before leaving expressed to the witness the opinion that it would be best for defendant to accept the situation and pay the amount of the policy. The admission of this testimony was clearly erroneous. The declarations or admissions of an agent, made in the course of a given transaction pertaining to his agency, are admissions against his principal; but the mere opinion of an agent, based upon past occurrences, is not an admission to be used against his principal, because it is no part of the *res gestæ*. Cortland County vs. Herkimer County, 44 N. Y., 22; Morrell vs. Dixfield, 30 Me., 157; Kemp vs. Balt. Insurance Co., 2 Gill & J., 108; Mich. Central Railroad vs. Gonga, 55 Ill., 503; American Express Co. vs. Gilbert, 57 Ill., 468; Hannay vs. Stewart, 6 Watts., 489.

In the case of the Northwestern Packet Co. vs. Clough, decided at the present term of this court, judgment below was reversed, and a new trial ordered, for the single error of admitting the declarations of an agent, consisting of a narrative of a past occurrence of which the agent had been an eye-witness. In the case at bar, the facts upon which the liability of the company depends all happened before the declarations in question were made by Dearing. Nor were his de-

clarations connected with the statement of any material fact, present or past. It was a grave error to permit the jury to be influenced by the expressions which Dearing is said to have used.

CARLISLE & MCPHERSON, *for Defendants in Error:*

I. The only question presented for the decision of the court by the first bill of exceptions is: Can the answer to a question, as written down by the agent of company, when he took the application for insurance, and which is signed by the applicant, be proved by the evidence of parties who were present, to be not the answer given by the applicant for insurance. In other words, if the agent of the company, without the knowledge or consent of the applicant for insurance, of his own motion, writes down, in the blank furnished by the company, an answer entirely different from the answer actually given, can this fact be established by the testimony of others? I am saved the necessity of arguing this proposition at length, for this court has decided that oral testimony is admissible in just such a case.

Insurance Company vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607.] Justice Miller, delivering the opinion of the court, says (p. 236): "The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in the writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

See also, Miller vs. Mutual Benefit Life Ins. Co., decided by the Supreme Court of Iowa, in April, 1871, reported in 4 Law Times Reports, 218; [1 Ins. Law Jour., 25, 747.]

Question No. 5 is: "Is the party regular and temperate in his habits?" To this question Yeiser, the agent of the company, wrote down the answer, "Yes." John T. Cox was introduced as a witness, and proved that he was present at the time said question was propounded by Yeiser to Dillard, and that Dillard did not answer "Yes," but answered to this effect: "I never refuse to take a drink," or "I always take my drinks," and that the answer "Yes" was improperly

written down by said Yeiser at the time without the knowledge or consent of said Dillard. Plaintiff in error objected to the introduction of this testimony. The objection was overruled, and he tendered his first bill of exceptions.

It is clear that this falls strictly within the rule laid down in the case cited above from 13 Wallace. Hence, there was no error in the ruling of the court below on this point.

II. Two points are presented in the second bill of exceptions. The first is, was it competent for plaintiff in error to prove by a physician who had previously examined Dillard as medical examiner for another life insurance company, the contents of his written report of his examination to that company, without the production of his written report, or accounting for its loss or absence. That the evidence offered was not only incompetent, but also irrelevant under the state of pleadings, is so plain that we will not take up the time of the court in arguing this point.

The witness was also asked to state the condition and state of Dillard's health at the time he examined him in June, 1870, and if he had any disease or malady at that time. This question was objected to by defendants in error and the objection was sustained by the court below. The ruling of the court below was clearly right for two reasons:

1. There was no issue at all in the case as to the general health of Dillard, or that he was afflicted with any disease or malady. The only issues were, that he had falsely and fraudulently answered "yes" to question No. 5, which was, "Is the party temperate and regular in his habits?" and had also falsely and fraudulently answered question No. 15, which was in reference to his having made a proposal for insuring his life in any company, and if insured, in what company and for what amount. The good or bad health of Dillard had not been put in issue, and on this ground the objection was properly sustained.

2. The inquiry had reference to the state of health at a period months anterior to the application made for the insurance with plaintiffs in error, and hence it was irrelevant and incompetent to prove applicant's state of health in June, 1870. Moreover, it was addressed the medical examiner of another life insurance company, who had made a report of his opinion in writing, and the written report was not produced, nor its non-production accounted for, at or before the time of asking the question.

III. The only point presented in this bill of exceptions is that

Yeiser, the local agent, was permitted on cross-examination to state that one Dearing was the general traveling agent and supervisor for the Southern States of plaintiffs in error, and visited Edwards Depot, where Dillard died, for the purpose of examining into their liability upon the policy sued on; and after making the investigation said to witness that in his opinion it would be best for the defendant to accept the situation, and pay the amount of the policy.

As Dearing was the general traveling agent and supervisor of plaintiffs in error, for the entire Southern States, and visited the place where Dillard died, for the express purpose of examining into all the circumstances, so as to ascertain if his principal was liable on the policy, surely it was no error to permit the admissions he made at the time on the subject to be proven. He was an agent, clothed with full powers to make the investigation and arrive at a conclusion. This was within the scope of his authority. The admissions of an individual are certainly competent evidence against him. A corporation can only make admissions through its officers and agents, and when so made they fall within the general rule.

Besides, the statement of Dearing, as proved by the local agent, Yeiser, was so worded as not to admit the actual liability of plaintiffs in error, but was only an expression of opinion that it would be best to accept the situation and pay the amount of the policy. In the form in which the admission was proven, it could not and did not cut any important figure in the case, or materially affect the result, and hence, even if improperly admitted, it is not sufficient ground for reversal.

The foregoing is in reply to the brief of the plaintiff in error, in which the exception is treated precisely as if the questions objected to had been asked in the direct examination of a witness for the plaintiff below, whereas they were asked upon the cross-examination of a witness for the defendant. This makes an entirely different case. Any question is proper on cross-examination which tends to test the correctness of the witness' testimony in chief. And to sustain this exception the plaintiff in error must show by the record, not that the testimony was not competent to sustain the plaintiff's action, but that it was not proper to test the correctness of the testimony in chief. On this point the exception contains absolutely nothing, and the presumption is that the judge who tried the case was correct in allowing the question to be asked.

IV. and V. The bills of exception 4 and 5 present precisely the same legal questions. They are based on defendants in error being

permitted by the court to read to the jury from the transcript of the record sent from the State Court to the United States Court, the certificate of the company's medical examiner, and the answers of John G. Yeiser, the district agent, to the questions contained in the printed blanks furnished by the company to their agents and medical examiners, and which they were required to answer.

These bills of exception show the character of the defense made in the court below.

In the first place it was expressly agreed in open court, "that all the original papers filed in this cause in the Circuit Court of Hinds County, from which this cause was removed, and which were competent evidence for either side, and copied in the transcript filed by defendant below, should be read in evidence."

The originals of the two papers were filed by plaintiffs in error themselves in the State Court as Exhibit No. 1 to their first and third pleas. Not only was this done, but before the plaintiffs in error would go into the trial in the State Court, they required that the plaintiff below should admit that they were the originals, and attached them as Exhibit A to the admission.

It certainly came with bad grace from plaintiffs in error to object to the reading of the papers they themselves filed in the cause, and had copied into the transcript sent up from the State Court to the United States Court. Besides, it was agreed before going into the trial in the United States Court that these very papers might be read as evidence by either side. The plaintiff in error on the trial below read only part of the exhibit filed by them with their first plea (the third plea having been withdrawn by them,) and defendants in error insisted that the whole of the exhibit should be read. Plaintiffs in error declining to read the whole of the exhibit, the court below permitted defendants in error to read it to the jury, which was excepted to, and hence the 4th and 5th bills of exception.

That the court below did not err in permitting the whole of the exhibit to be read, under the circumstances disclosed in the record, is too plain to admit of argument. The objection and bills of exception are the strongest possible evidence of the frivolous and baffling nature of the defense.

VI. This bill of exceptions is to part of the charge given by the judge to the jury.

This charge lays down the law as expounded by this court in the case of Insurance Company vs. Wilkinson, 13 Wall., 222, [1 Ins. Law

Jour., 607 ;] and is fully sustained by numerous well considered cases decided by other courts.

Plumb vs. Cattaraugus Ins. Co., 18 N. Y., 392 ; Rowley vs. Empire Ins. Co., 36 ib., 550 ; Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 526 ; Combs vs. Hannibal Savings and Ins. Co., 43 Mo., 148 ; Beebe vs. Hartford Ins. Co., 25 Conn., 51 ; The Lycoming Ins. Co. vs. Shollenberger, 8 Wright, 259 ; Beal vs. Park Ins. Co., 16 Wis., 241 ; Davenport vs. Peoria Ins. Co., 17 Iowa, 276 ; Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 517 ; Harwitz vs. Equitable Ins. Co., 40 Mo., 557 ; Ayers vs. Hartford Ins. Co., 17 Iowa, 176.

I would call the special attention of the court to the case of Miller vs. Mutual Benefit Life Ins. Co., decided by the Supreme Court of Iowa, in April, 1871, and published in 4 American Law Times Reports, 218, [1 Ins. Law Jour., 25, 747.] It is in many particulars similar to the case at bar, and involves the very questions embraced in the 1st and 6th bills of exception.

STRONG, J.

The general nature of the defense to this action in the Circuit Court was that the policy had been issued on the faith of false and fraudulent representations made by Dillard, whose life was insured, and that those representations were by the express agreement of the parties declared to be warranties.

Among the questions propounded to Dillard, and answered in the "proposals for insurance," was the following : "Is the party temperate and regular in his habits ?" to which the answer "yes" was appended, This was question and answer No. 5. Question No. 16 was : "Is the applicant aware that any untrue or fraudulent answer to the above queries, or any suppression of facts in regard to health, habits, or circumstances, will vitiate the policy?" to which the answer "yes" was also appended. None of the answers were written by Dillard, though he signed his name at the foot of them all. They were written by Yeiser, the agent of the company, and, as he testified, read over to Dillard, who then signed them, and immediately afterward signed a declaration filled up by the agent, which was, in effect, an agreement that if the said proposals, answers, and declarations returned to the company should be found fraudulent or untrue in any respect, or if there should be any willful misrepresentation or concealment in the said declaration, the policy should be void. All this was introduced by the defendants, and after its introduction the plaintiffs were per-

mitted, against the objection of the defendants, to call a witness and prove by him that he was present when Yeiser propounded question No. 5 to Dillard, and that Dillard's answer was not "yes," but "I never refuse to take a drink," or, "I always take my drinks," and that the answer "yes" was improperly written down without the knowledge or consent of Dillard. The reception of this testimony constitutes the basis of the first assignment of error.

That there is no substantial reason for complaining of the ruling of the court in this particular is, we think, fully shown by what was decided in Insurance Company vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607,] and in the cases therein mentioned. The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him. Prepared as it was by the company's agent, and the answer to No. 5 having been made, as the witness proved, by the agent, the proposals, both question and answers, must be regarded as the act of the company, which they cannot be permitted to set up as a warranty by the assured. And this is especially so when, as in this case, true answers were in fact made by the applicant, (if the witness is to be believed,) and the agent substituted for them others, now alleged to be untrue, thus misrepresenting the applicant as well as deceiving his own principals. Nor do we think it makes any difference that the answers as written by the agent were subsequently read to Dillard and signed by him. Having himself answered truly, and Yeiser having undertaken to prepare and forward the proposals, Dillard had a right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what Yeiser stated them in writing to be. The acts and declarations of Yeiser are to be considered the acts and declarations of the company whose agent he was, and Dillard was justified in so understanding them. The transaction, therefore, was substantially this: The company asked Dillard, "Are you temperate and regular in your habits?" to which he answered, "I never refuse to take a drink," or, "I always take my drinks." To this the company replied, in effect, we understand your answer to mean the same, in your application for a policy, as if you had answered "yes," and we accept it as such, and write "yes" in the proposals. Then, upon being asked whether he warranted the truth of his answers, he returned the reply, "Since you so understand my answers, I do." Surely, after such a transaction, the company cannot be permitted to say that the applicant is bound by what was written

in the proposals for insurance as his warranty. And that such was the transaction the evidence received by the court tended to prove. The first assignment of error, therefore, cannot be sustained. Nor can the sixth, which is to the charge of the court, and which presents substantially the same question as that raised by the first.

The second assignment complains of the exclusion of the testimony of Dr. Alexander, a medical witness. He was offered to prove that, as the medical examiner of another insurance company, he had examined Dillard in June, 1870, and had given his opinion in writing to that company that Dillard was not worthy of insurance. This offer the court overruled, and we cannot see why the evidence should have been received. The unfitness of Dillard for insurance in June, 1870, surely could not be proved by the fact that the witness had then expressed an opinion that he was unfit. And besides, such an opinion had no pertinency to any of the issues joined between the parties.

The witness was also asked whether he was acquainted with the condition and state of health of Dillard in June, 1870; and if so, what it was, and the nature of his disease or malady, if any; and to this question, also, the court refused to permit an answer. The policy on which the suit was brought was made on the 30th day of August, 1870. Had the question addressed to the witness related to a time subsequent to the issuance of the policy, the answer to it should have been received, for one of the issues on trial was whether Dillard, "after the execution of the policy, became so far intemperate as to impair his health." But there was no issue in regard to his health prior to the insurance, and therefore the evidence offered was rightly rejected.

Of the fourth and fifth assignments, it is sufficient to say that we do not perceive they exhibit any error.

The third assignment is of more importance. The plaintiffs were allowed in the cross-examination of one of the defendants' witnesses to ask whether one Dearing, the general traveling agent and supervisor of the defendants in the Southern States, did not, some time after the death of Dillard, and after he had made an examination of the claim of the plaintiff, express an opinion that it should be paid. To this question the witness replied that Dearing had expressed his opinion that it would be best for the defendants to accept the situation and pay the amount of the policy. That such an opinion allowed to go to the jury must have been very hurtful to the de-

fendants' case is manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals ; and this is doubly true when the agent was not a party to those occurrences. We have so recently discussed this subject in Clough and wife vs. Northwestern Packet Co., (reported by Wallace,) that it is needless to say more. For the error in receiving this evidence the judgment must be reversed.

The judgment is reversed, and a new trial is ordered.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

SEPTEMBER TERM, 1874.

ELIZA GARBER

vs.

GLOBE MUTUAL LIFE INS. CO.

Residence within a prohibited district, unless waived by the company or its authorized agents, renders the policy void.

Receipt of premiums, with the knowledge of such violation, by the authorized officers of the company transacting the business of the company with respect to the policy, is a waiver of the condition.

If the company's general dealings, and its particular course with the insured, be such as to lead him to believe he could have thirty days of grace, payment within that time is valid, even though the insured is dangerously ill. But if there is no such waiver of prompt payment by the company, acceptance of premium by company, without knowledge of the dangerous illness of the insured, does not renew the policy.

In November, 1869, Charles H. Garber insured his life in the Globe Insurance Company, for $5,000, in consideration of the yearly payment of $134.30. The amount insured was to be paid to his wife, Mrs. Eliza Garber, at his death. Payment was resisted on the ground that the conditions of the policy had not been complied with: first, because the premium of 1872 was not paid when due; and second, because the insured had resided in New Orleans, while the policy required that he should not live south of the 33d degree of north latitude. The last premium was paid a few hours before the death of Mr. Garber.

DILLON, J.

Gentlemen of the Jury: On the 5th day of November, 1869, the defendant issued at its St. Louis agency the policy now sued on, by

which it insured the life of the plaintiff's husband for her use, on certain conditions, for the sum of $5,000.

The company defends the action brought to recover this sum upon two special grounds:

1. Because Mr. Garber resided within the prohibited district of country contrary to the terms of the policy.

2. Because the premium which fell due November 1, 1872, was not paid when it fell due.

It is undisputed upon the testimony that Mr. Garber was taken sick in New Orleans about the 6th or 7th day of November, 1872, and died of yellow fever on the 11th day of November of that year, about 11½ o'clock, A. M.

In the latter part of October, 1872, the agency of the company at St. Louis received from the home office of the company a notice, directed to Mr. Garber, that the premiums on the policy would become due on the 1st day of November, and there is evidence that on the last day of October, or the 1st of day of November, the agents of the defendant at St. Louis directed this notice to the assured at New Orleans, and Mrs. Garber testifies that this notice was received there by her on or about November 4th, at New Orleans.

On the 10th day of November a telegram was sent by Mrs. Garber from New Orleans to a Mr. Warne at St. Louis, directing the latter to go to the company's agency in St. Louis, (at which the policy was issued, and which had collected all the previous premiums,) and pay the premium. Accordingly, on the morning of the 11th day of November Mr. Warne called at the office of the company, and about 9 o'clock, A. M. paid the premium and received renewal receipt, renewing the policy for a year from November 1, 1872. Mr. Warne did not know that Mr. Garber was then sick, and did not, of course, state that fact to the company. On the other hand the company at the time it received the premium did not make any inquiries concerning the health of the assured.

In a short time the agents at St. Louis became aware of the death of Garber, and the circumstances, and communicated them by letter to the home company, and before hearing from it, the agents included the amount in their semi-monthly report to the home company of November 15th. Before this report reached the home company, the latter had telegraphed the St. Louis agency to return the premium and demand a surrender of the renewal receipt.

Shortly afterward the agency here tendered to Mr. Warne the

amount of the premium and demanded a return of the renewal receipt, but the tender was not received nor the receipt returned.

With this brief reference to some of the undisputed facts in the case, we now come to instruct in reference to the law as to the two special defenses relied on by the company. First, as to the residence within the prohibited district. The policy provides that if between the first of July and the first of November the assured shall reside south of the 33d degree of north latitude without the consent of the company given in writing, the policy shall be null and void. The plaintiff admits that Garber did reside in New Orleans between July 1 and November 1, 1872, without the written consent of the company. This is a complete defense, and the plaintiff cannot recover unless the provision of the policy was waived by the acts of the company or its authorized agents.

If you believe, from the evidence, that the officers of the company, transacting all the business of the company respecting this policy, knew that Mr. Garber had been and was residing in New Orleans from July to November, 1872, in violation of the condition of the policy as to place of residence, and received the premium on the 11th day of November with such knowledge, and issued a renewal receipt, then this ground of defense fails. But if the company received this premium without knowledge that the policy had been violated in this respect, then this defense is made out and the plaintiff cannot recover. Bliss on Life Ins. Co., 2d ed., 344.

Second, as to the defense arising out of the non-payment of the premium on the 1st day of November. It is admitted that payment of the premium was not made until November 11th; but the plaintiff also claims that this condition was waived by the company; she claims that the company, by its general course of dealing in giving thirty days time in which to pay the premiums generally, and by its practice in respect, to this particular policy—that the company waived payment of the premium to a period beyond the time when it was actually paid. Evidence has been given to show that the company's agency in St. Louis were in the habit of giving parties thirty days in which to make payment of their premiums. Whether this is satisfactorily established to be the general practice of the company in this respect at St. Louis, is for you to determine. As respects this particular policy, evidence has been given to show that the premium due November 1, 1871, was paid by note, and the premium due November 1, 1871, was paid by a note, December 14, 1871, which note was collected by the St. Louis agents of the company from Garber at New

Orleans in July, 1872. In respect to the premium due November 1, 1871, a letter has been introduced in evidence from the company's officers at St. Louis, addressed to Mr. Garber at New Orleans, dated St. Louis, November 3, 1871, calling attention to the premium due on the first day of that month, requesting payment, and concluding with these words: "Please reply at once, as receipts can be held only thirty days, and then at the risk of the assured." If you find from all the evidence that the company by its general course of dealing, and by its particular course of dealing with Mr. Garber, waived prompt payment of the premium, and led him to believe that he could have thirty days after the 1st of November to pay, then having received the premium within the thirty days, this ground of defense fails. Bliss on Life Ins., 2nd ed., 299 et seq.

If, however, there was no such waiver of prompt payment, then the payment on the 11th would not be effectual to renew the policy if Garber was then dangerously ill with yellow fever, and this fact was not disclosed to the company's agents to whom the premium was offered.

CASES DECIDED IN THE LOWER COURTS.

MISREPRESENTATION.

Hamilton County, Ohio, Common Pleas—January Term, 1875.

MARGARET ORTLIEB

vs.

NORTHWESTERN MUTUAL LIFE INS. CO.

The agent, on account of the imperfect knowledge of English by the insured, filled the application. There was no proof that the agent misunderstood the answers. The policy contained a copy of the application annexed, and after receiving it the insured called attention to an error in regard to the parties to whom it was made payable.

Held, that there was no proof of misunderstanding, which, if shown, could hardly impose a liability on another party.

Held, that misstatements of twelve years as to age, and as to the members of his immediate family being alive when they were dead, were material, and avoided the policy.

J. T. CRAPSEY, *for Plaintiff.*

SAYLER & SAYLER, *Attorneys for the Insurance Company.*

FORCE, J.

This is an action brought upon a policy of insurance. The policy was made upon the life of Gottlieb Ortlieb, payable to himself and his representatives. His widow files a petition, stating that the policy was drawn in that way by mistake; that the agreement between the parties was that the insurance should be payable to her, the widow, and not to the executors or administrators. She therefore asks that the policy be amended, so that it shall be made payable to her, and asks for judgment upon the policy.

The administrator of the estate of the deceased comes in and files an answer, saying that the policy should be made payable to him, and he asks for a proper adjudication to be made.

Then the company come in and file their answer, setting up various

defenses. Among them is an allegation that there are various material misrepresentations in the application for the policy.

There is a great deal of testimony, a great many points were made, and the case was argued very fully, and certainly very interestingly. For the present I will confine myself to the application.

The policy contains a statement that the answers given in the application for the insurance, on the faith of which the insurance is made, constitute the basis of the insurance, and if these statements should prove untrue in any material respect, then the policy is void.

Now, it is claimed that the statements made by Ortlieb—the representations, several of them—were untrue in material respects. The applicant, in the application, says he was thirty years old, while the testimony shows he was forty-two years old. The application says he was born on the 10th of April, 1842; the testimony shows that he was born April 19th, 1830. The application says he lived in Germany fifteen years; the testimony shows that he lived there twenty-seven years. The application says, "My mother is now living, eighty years old, and her health is good;" the testimony shows that his mother died at the age of seventy years, and several years previous to the time when the application was made. The application says, "I have had two brothers, both of whom are living;" the testimony shows that he had three brothers, one of whom was dead. The application says, "I have never had any sister;" the testimony shows that he had two sisters, both of whom were dead.

Now, it is certainly true, and the testimony certainly does show, that some of the statements of the application are not true; and it certainly does show that they are untrue in material respects. If a man who is forty-two years old, calls himself thirty, that is certainly a material error. To say, "My mother is now eighty years old, and living, enjoying good health," is a material misstatement, when the fact is she died some years before. So that it is clear a number of these statements are untrue in material respects; and upon that ground there is no question that the policy is null and void.

It is claimed that, in this particular case, the company has no right to set up this defense, because the agent, or broker, or solicitor of the company who filled out the application, and got the insurance, was in fact, in the procuring of this insurance, the agent of the company rather than of Ortlieb, and therefore the company was responsible for any inaccuracies or misstatements; that if there are any errors, they are the errors of the company, and they cannot set them up against

a person entitled to claim the benefit of insurance. Upon that, it appears that the agent or solicitor, Mr. Graves, saw Ortlieb some six or eight times before the insurance was effected, and sat down with him and took his answers in pencil, and afterward filled them in the application. There is no testimony showing that Graves, the agent, filled up blanks which Ortlieb declined to fill, or left blank; that is, there is no testimony showing that this broker or agent undertook on his own responsibility, or for the company, to fill out a blank which Ortlieb declined to fill, and made no statement at all about.

There is no testimony that Graves, the agent, wrote down something different from what Ortlieb told him. The testimony does not show that Ortlieb made one statement, and that this agent for the company wrote down something else in the application. The testimony is that Ortlieb, being a German, and Graves not speaking German, the latter wrote down the answers as well as he understood them. How well he was able to understand, of course, does not appear perfectly, because there was nobody but those two parties present at that conversation. But it seems that the agent had had some six or eight conversations with Ortlieb before this. He was with him both in the morning and afternoon of the day the application was made. He had several conversations with him subsequently, and there is no statement that any difficulty was found in ascertaining the meaning of Ortlieb in any other conversation than this. And it seems that this conversation was not limited merely to putting the questions and receiving the answers, because the agent says that, besides the formal questions, he had some conversation with him as to where he had learned his trade of gardening, and he replied he learned that in Germany before he came to this country. So the testimony does not prove that the agent did misunderstand the statement that Ortlieb made, and wrote down something different from what Ortlieb said. There is nothing more than the suggestion that that may have been done. There is no proof that that was done.

There is this further: After the application went up to Milwaukee to the home office, and the policy came back, by the usage of this company a copy of the application was annexed. The policy, therefore, came back with a copy of the application containing these questions and answers annexed to it, and came into the possession of Ortlieb. It was certainly natural that he should read it. It was his business to read it, and the proof shows that he did read it, or, at least had it read, because the week after he received it he came to the office of the

company, and said, "There is a mistake in the policy; it is made payable to myself, when it ought to be made payable to my wife."

Hence, it appears that after this policy was returned with a copy of the application attached to it, he had an opportunity of reading it, and he embraced the opportunity, and did read it; and hence, by acquiescing in these questions and answers as they appear, he confirmed and ratified them, even if he may have misunderstood them when made.

Now, the statements, or some of them at all events, were certainly material to the contract of insurance. They were statements as to matters which must lie within the knowledge of the applicant, statements about which the agent could not be informed—as to the age of Ortlieb, and circumstances about his family, etc. There is no statement that the agent voluntarily, of his own accord, filled these blanks when Ortlieb intended to leave them blank. There is no proof that he wrote down anything other than Ortlieb told him; and there is proof that even if Ortlieb endeavored to say something different from what does appear here, and was misunderstood, he at all events, after the policy came into his possession, acquiesced in and ratified these statements.

I will just add this further: There certainly is no proof that Graves fraudulently or willfully misrepresented statements made by Ortlieb; and if it were made out that there was a misunderstanding—that while Ortlieb tried to say one thing, he conveyed something different, and the policy was made upon a complete misunderstanding—that might be a ground on which he would relieve himself from any liability, but it would scarcely be a ground upon which he could impose a liability upon some other party.

Upon this ground, that the statements in the application are untrue in material respects by the fault of the applicant, there will be a judgment for the defendants.

APPLICATION—UNTRUTHFUL ANSWER.

New York Supreme Court—Fourth Department—October Term, 1874.

ANSON M. BAKER
vs.
THE HOME LIFE INSURANCE COMPANY.

An agreement attached to the application for a life policy, and signed by plaintiff, made the answers the basis and part of the contract, and provided the policy should be void and all payments forfeited if they were not full and correct. A clause in the policy likewise contained a similar proviso. The insured answered the question, "Have the parents, uncles, aunts, brothers or sisters, been afflicted with insanity, consumption or any pulmonary, scrofulous or other constitutional disorder?" with an unqualified negative. Several brothers and sisters of the insured had died of consumption.

Held, That the company was not liable. The court will not alter the contract because the question was far reaching, and the answer an incautious and dangerous assertion. A claim that the party had signed the statements without looking at them, or that their contents were misrepresented, will not contradict them.

Where the insured signed with a full knowledge of the contents and legal bearing of the question, a mere statement of the facts to the agent will not relieve her of the consequences.

Motion for new trial after nonsuit at Livingston Circuit, and exceptions, ordered to be heard at General Term in the first instance.

DANFORTH *for the motion.*

CAPWELL *for Defendant.*

TALCOTT, J.

This was an action on a life insurance policy on the joint lives of the plaintiff and his late wife, the loss payable to the survivor. Attached to the application and to the answers to the questions propounded on behalf of the insurance company was an agreement by the plaintiff, signed by him, containing the following among other provisions: "And it is further agreed that the preceding answers given to the annexed questions, and the accompanying statements and this declaration, shall be the basis and form part of the contract, or policy, which may be granted on this application, and if the same

be not in all respects full, true and correct, the said policy shall be void, and all moneys which may have been paid on account thereof shall be forfeited to said company." And the policy itself declares that the same is granted by the company, and accepted by the assured, upon the express condition that if the statements, declaration and agreement made by or for the assured contained in the application, upon the faith of which the policy is made, shall be found untrue in any respect the company shall not be liable for the payment of the sum assured, or any part thereof, and the policy shall cease and be null, void and of no effect. Among the questions and answers in writing, which constituted a part of the application, was the question numbered 20, as follows: "Have the parents, uncles, aunts, brothers or sisters of the party been afflicted with insanity, consumption or with any pulmonary, scrofulous, or other constitutional disease?" This the assured answered by a simple and unqualified negative. The evidence was pretty clear to show that several of the brothers and sisters of Mrs. Baker had died from consumption. As to some of these cases, however, there might have been some question of fact.; but as to the case of William L. Dana, a brother of Mrs. Baker, there seems to have been no room for any such question. Dr. Wolcott, an experienced physician, under whose care Mr. Dana had been for some two years before his death, and who had most ample opportunity for ascertaining by every method the disease with which he was afflicted and of which he died, unhesitatingly pronounces that disease to have been tubercular consumption, and states that he examined his lungs several times during the progress of the disease by the usual methods of percussion and auscultation, and gives the history of the disease and symptoms down to the time of death. The qualifications of Dr. Wolcott are in no wise questioned, and his testimony is in no respect impeached or rendered doubtful. If anything can be proved, as a matter of medical science, we think it was established in the case beyond all question that William L. Dana, the brother of Mrs. Baker, had been afflicted with and had died of consumption prior to the application for this policy. This being so, and the answer to question twenty being thus shown to be untrue, by the express terms of the agreement accompanying the application, and of the policy itself, the company was not liable for the amount insured, or any part thereof.

It is true question twenty is very far reaching, and the answer to it, being an absolute and unqualified negative, was a very incautious and dangerous assertion, but it is not for the court to alter the plain

contract of the parties. If persons procuring policies see fit to take such contracts, and make such statements as the basis thereof, they must abide the consequences.

To allow the statements to be contradicted upon the claim that the party had signed them without having read them, when there was no pretense that he was prevented from reading, or that the contents were in any way misrepresented, would be to destroy all security afforded by reducing contracts to writing. The plaintiff testifies that Mrs. Baker informed the agent of the company that she understood her brother, William L. Dana, had died of consumption. Nevertheless both of the assured signed the statements containing the answer to question twenty, and as to Mrs. Baker there is no evidence tending to rebut the presumption that she signed the paper with a full knowledge of its contents. The case of Rowley vs. Empire Insurance Co., 36 N. Y., 550, on which the plaintiff's counsel seems to rely to establish the proposition that if a true statement is made to the agent and he puts down a false answer, the company is nevertheless bound, is a very different case from the present. In that case the statement was made to the agent according to the truths, and the assured signed the statement in blank upon the agreement of the agent to insert the particulars as furnished to him. The agent took the application away with him, and afterward filled it up incorrectly, and the question in the case was whether in filling up the application, under the circumstances, the agent was acting as the agent of the company or of the assured, and it was held that he acted as the agent of the company in filling up the blanks in the absence of the assured, he having assumed to receive the application in blank, and agreed to fill it up according to the instructions. In Plumb vs. Cattaraugus Ins. Co., 18 N. Y., 392, the agent had assumed to make the survey, it being a part of his duty as agent of the company to make the survey, and he made the statement to the assured of the measurements. The statement signed by the assured, as to the measurements, was according to and on the faith of the measurements furnished to him by the agent; and on the assumption that the agent was authorized on behalf of the company to make those measurements, it was held that the company was estopped to deny the truth and accuracy of the measurements furnished by its agent to the assured, on the principle that "where one by his acts or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring a different state of things as existing at the same

time." The reasons why these cases should not be extended to a case like the present are forcibly presented in Bliss on Life Insurance, § 292. At all events in the present case the evident presumption of the law is that Mrs. Baker fully understood the contents of the statement signed by her, and its legal effect, and there is absolutely no evidence to repel this presumption as to her; consequently, whatever may be claimed as to the evidence touching the diseases and death of Mrs. Baker herself, and of her other brother and sisters, there would seem to be no question but that the statement in answer to question twenty was untrue in regard to William L. Dana, nor that a verdict finding the answer to be true would have been unauthorized upon the evidence.

We think, therefore, that the nonsuit was right upon the ground on which it was placed at the circuit, and a new trial is denied and judgment ordered upon the nonsuit.

MISCELLANEOUS.

LIFE INSURANCE.—WHAT CONSTITUTES AN INSURABLE INTEREST?

In several important respects the quality of the interest that will support a life policy does not seem to be well settled. It is thoroughly established that a wife has an insurable interest in the life of her husband. The strict basis of this interest is not defined, but would seem to rest on her claims on him for support, and not on the grounds of affection. Whether mere relationship will support a policy may be doubted. In Miller vs. Eagle Life, the court says: "A strong probability of the continuance of the life, without a strict legal claim to such benefit, is sufficient to save the contract from being deemed a wager." A majority of the reported cases rest on pecuniary considerations or expectations. A father has been held to have this interest in his minor son and a sister in her brother, on whom she was dependent. But it has also been held that a father has no such interest in his own son, nor a brother in his brother on account of mere relationship. The weight of authority is in favor of resting all insurances on a pecuniary basis. Any pecuniary interest will support a policy, but in the case of debtor and creditor the amount of the policy must not be so exceedingly disproportionate to the debt as to make the transaction in effect a wager. *Dicta* to the effect that no pecuniary interest is required are to be found in some decisions, but with a single exception there is no reported decision to this effect.

The decisions are not agreed whether a policy issued to one having an insurable interest can afterward be assigned or sold to one having no such interest. Some very nice distinctions, however, have been drawn in this country on the question whether such an assignment can be made contemporaneously with the issuance. Opposite decisions have been rendered, some courts ruling that one taking out a policy of insurance may make it payable to whom he pleased, without

regard to interest. The question whether the insured or the beneficiary is the contracting party has not been especially considered; the reasoning in four of the cases is, that as the contracting party has an insurable interest in his own life, the contract has the proper basis as its inception, and will therefore be supported.

"These cases exhibit the tendency of the American courts. But the doctrine advanced by them seems plainly open to Mr. May's criticism of 'doing indirectly what the law will not permit to be done directly,' a practice which the 15 Wall. case refuses to sanction. If the beneficiary may not himself contract for insurance on another's life in which he has no interest, because it would be a mere speculation upon human life, (23 N. Y., 516; 24 N. Y., 653; 39 Conn., 100,) the questions may be asked: 1. Is it any less a wager when the insured makes the contract for the benefit of one who has no interest? 2. How can the insurable interest of A in his own life support a policy which, by its own terms, can never for an instant of time, even at its inception, inure to the benefit of A, his widow, minor children, executors or creditors, or of any one else having an insurable interest in that life? To the first question, the cases in 98 Mass. and 15 Wall. give contrary answers. The second needs to be plainly and authoritatively answered by the American courts."

Summary of an article by Hon. J. O. Pierce, *in the Central Law Journal.*

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 62. LIFE.—*Responsibility of Company for Acts of.*—The application was filled by the agent from verbal answers given by the insured. The agent afterward read it over to the insured, who then signed it. *Held*, that if the insured answered truly, he had a right to assume that the answers, as written by the agent, were sufficient for the purpose; the acts of the agent must be considered the acts of the company, and estop the latter from claiming a breach of warranty.

American Life Ins. Co. vs. Mahone.
Rep'd Jour'l, p. 291. U. S. S. C.

APPLICATION.

§ 63. FIRE.—*Statement as to Inventory.*—The question was asked in the application: "How often is account of stock taken? When was it last, and what amount did it reach?" Answer "Every three months; 1st of January, 1872—$4,000." *Held*, that this was not a condition precedent, such as would work a forfeiture if account of stock was not taken at the end of every three months, but rather a stipulation whose neglect is to be compensated for by damages.

Wynne vs. Liverpool and London and Globe Ins. Co.
Rep'd Jour'l, p. 348. N. C. S. C.

ASSESSMENTS.

§ 64. FIRE.—*By Mutual Companies.*—An assessment made by the receiver of the Slater Mutual Fire Insurance Company, *Held*, not invalid because he had assessed, for dividends due, parties insured in the "Manufacturers' Class" of said company, inasmuch as, such dividends being due, parties so insured might properly be considered in making up the amount necessary to be assessed to pay all the debts of the company.

One liable to assessment in a mutual insurance company cannot avoid his assessment by proving that it had been made as well upon parties not liable as upon parties liable thereto, for the reason that even if this be so he has no ground for complaint, the burden upon him being actually diminished thereby.

Parties insured in a mutual insurance company gave premium notes in the following form:

"Deposit Note. Policy No. —. For value received I promise to pay the Slater Mutual Fire Insurance Company, or their order, dollars, at such time and by such installments as the directors of said company shall, from time to time, assess and order, pursuant to the charter and by-laws of said company."

Held, that the statute of limitations did not begin to run against such notes until an assessment had been made thereon to pay losses incurred.

Although a notice has been given by public advertisement, by

the receiver of a mutual insurance company, to all persons, to present their claims against the same within a specified time, an assessment made against said company by the receiver of another company, after the time named in such notice has expired and an assessment has been made based upon the claims presented in accordance therewith, must, if otherwise justly due, be paid in the same proportion in which other claims are paid, provided there still remain in the hands of such first named receiver, at its presentation, sufficient funds therefor.

To justify an assessment by a mutual insurance company upon an alleged lost or missing note, proof must be furnished of its having at some time existed unpaid and uncanceled, and the records of the company stating the giving of such a note do not furnish sufficient evidence thereof, as the books of a corporate company are not evidence, as against a member of the corporation, of his contracting with the company.

*In the Matter of the Slater Mutual Fire Ins. Co.**

R. I. S. C.

POLICY.

§ 65. FIRE.—*Property covered by.*—The plaintiffs, the P. & W. R. R. Company, procured insurance in the defendant insurance company, the policy of insurance containing the following proviso: "Provided, all the property hereby insured is on premises owned or occupied by the Providence and Worcester Railroad Company, in Massachusetts and Rhode Island. * * * * It matters not whether the property is in motion on the road, at rest, or in buildings." *Held*, that by reason of this proviso the defendant insurance company was not liable for a loss occurring upon premises not used or occupied by the plaintiffs at the time of the issuing of the policy, although owned and occupied by them at the time of the loss.

*Providence & Worcester Railroad Co. vs. Yonkers Fire Ins. Co.**

R. I. S. C.

PRACTICE.

§ 66. LIFE.—*Admissible Testimony.*—Oral testimony is admissible to prove that the answers written down by the agent in

* From 10 Rhode Island Reports.

the application were not those given him by the insured, although the application, in which the answers are made a warranty, was read over to the insured when filled and signed by him. *Held*, that where there was no issue raised as to the previous health of the insured, testimony to prove his previous condition of health was properly excluded. *Held*, that the certificate of medical examiner and statement of agent appended to the proposal and declaration, when the latter were filed in behalf of the company, were admissible as evidence for the insured in an appellate court, under a stipulation that all papers filed and copied in the transcript, which were competent evidence, should be admitted. *Held*, that the opinion of an agent based upon past occurrences is never to be received as an admission of his principals, especially when he was not a party to the occurrences, and the admission of such evidence will justify an appellate court in reversing judgment.

American Life Ins. Co. vs. Mahone.

—§ 62.

§ 67. FIRE.—*Legal Effect of Amendments—Finding of Jury.*—The court permitted plaintiff to amend his complaint by setting forth the application, and making it a part thereof. Immediately on amending the plaintiff submitted his case to the jury. Before the complaint was amended, the plaintiff testified to his compliance with the policy conditions. *Held*, that the legal effect of the amendment was the same as if the application had been set out in the complaint, when it was originally filed; and the fact that the evidence of compliance with the policy conditions was offered before, and not after the amendment, did not affect its validity. The property was not fully insured. The jury found the value of the store to be $700, as stated in the application; also, that the loss was $3,062; of which $462 was the value of the store, and $2,600 the value of the stock. *Held*, that the finding should be read, $462 is the damage on account of the destruction of the store, and $2,600 is the damage on account of the destruction of stock.

Wynne vs. Liverpool and London and Globe Ins. Co.

—§ 63.

§ 68. LIFE.—*Variance in Declaration and Evidence.—Application in Declaration.—Hearsay Evidence, when Admissible.*—The only consideration stated in the declaration on the policy, was the payment of the sum of fifty-seven dollars and forty cents quarterly. The policy offered in evidence expresses that it was made "in consideration of the representations and declarations made to it in the application therefor," as well as the due payment of premium. *Held*, that the declarations in the application were an executed part of the contract; the risk was undertaken on the unexecuted part, to wit, the payment of the premium; therefore the variance was not material.

Pillman vs. Fuller, 13 Mich., 113; 15 Gray, 249; May on Ins., 235; 98 Mass., 381; 1 Chitty, Pl., 299.

The application is no part of plaintiff's cause of action against the company, and need not be set forth in the declaration. It is for the defendant to falsify the representations in the application, not for the plaintiff to prove their performance. It is sufficient to declare generally on a policy of life insurance.

Fowler vs. Ins. Co., 15 Gray, 249; Life and Fire Ins. Co. vs. Johnson, 4 Zabriskie, 676; S. C., 1 Big., 327; N. Y. Life Ins. Co. vs. Graham, 2 Duvall, 506; S. C., 1 Big., 114.

A witness may be permitted to certify what the insured told him, when the door has been opened for its introduction by cross-examination on the other side, and it is sufficiently responsive to the new matter.

Jacobs vs. National Life Ins. Co. of U. S.
Rep'd Jour'l. p. 339. D. C. S. C.

§ 69. LIFE.—*Mistrial, what Constitutes.*—The complaint set forth no further interest than that the insured was a debtor of the plaintiff. The defendant insurer based its defense on new issues set up in the answer, which were denied in the answer in issue. The only one of these issues on which evidence was given, was as to insured's habits respecting intoxicating liquors, and also as to the amount of plaintiff's insurable interest. The court charged that it would determine the case, except upon three issues submitted to the jury, first, was insured indebted to plaintiff, and if so, for what amount; second, had the habits of insured, prior to taking out the policy, been moderate as to the use

of intoxicating liquors; third, did defendant at the time of issue have notice of such habits of insured; also if the jury answered the second in the affirmative, they need not answer the third. *Held*, that when defendant admits plaintiff's case, but sets up new issues in the answer and gives evidence on only one of them, there is nothing for a jury to try as to the remaining issues, and consequently no legal error in failing to give a verdict upon them, either in the form of a general or special verdict.

Barto vs. Himrod, 8 N. Y., 483, 485. Cases of Manning vs. Monaghan, 23 N. Y., 539; Cobb vs. Cornich, 16 N. Y., 602; Gilbert vs. Beach, ib., 606; Clew vs. McPherson, distinguished.

Held, that the burden of proof regarding the new matter rested with defendant, and could not be shifted on the plea that the means of knowledge were peculiarly within the plaintiff's reach, which is not inferable from the circumstances of the case, consequently a charge that plaintiff was entitled to recover unless defendant had satisfied them, by a preponderance of evidence, that the policy conditions had been broken by plaintiff. *Held*, that there was no evidence, as the case stood, that the defendant had any knowledge of the insured's habits, and the court rightly refused to charge that it made no difference with defendant's defense whether it had such knowledge or not, the question being simply one of abstract law, having no foundation in the evidence or issues.

Jones vs. Brooklyn Life Ins. Co.

Rep'd Jour'l, p. 329. N. Y. Com. A.

PREMIUM NOTES.

§ 70. LIFE.—*Effect of Bankruptcy.*—The failure of a mutual company is not such a failure of consideration as to defeat an action upon a premium note given by an insured member. After insolvency the company loses the power of insisting upon forfeitures of stock, by its members, for non-payment or otherwise. Treatment of a member who has failed to pay as if he were still a member, before insolvency, is a waiver of the right to declare his stock forfeited for the non-payment. A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 per cent. on the premium notes in order to enable it to meet its

liabilities, etc. The holders of policies in insolvent mutual companies, when sued upon their premium notes, cannot claim the values of their policies as an offset in equity against their liabilities.

Conigland vs. North Carolina Mutual Ins. Co., Phil. Eq., 341.

North Carolina Mutual Life Ins. Co. vs. Powell.

Rep'd Jour'l, p. 354. N. C. S. C.

SUICIDE.

§ 71. LIFE.—*Construction of Clause in Policy concerning.*—A clause in the policy provided that it should be null and void in case the insured shall die by his own hand or act, "voluntarily or otherwise." *Held*, that the self-destruction must have been willful or intentional to avoid the policy. *Held*, that the term "otherwise" cannot, by any fair interpretation, be limited to cover death by insanity; the word is too vague and intangible to admit of practical application, and the court will not undertake to enforce a provision so dangerous and uncertain.

Jacobs vs. National Life Ins. Co. of U. S.

—§ 68.

TRANSFER OF TITLE.

§ 72. FIRE.—*Without Consent of Company.*—The policy provided that its assignment, or a transfer of the property without the consent of the company indorsed thereon, should immediately terminate the company's liability and void the policy; also that nothing less than a specific agreement indorsed on the policy should be construed as a waiver of its conditions. *Held*, that the policy was void instantly, and *ipso facto*, on transfer of the policy.

Savage vs. Howard Ins. Co., 52 N. Y., 502, [2 Ins. Law Jour., 769.]

A by-law of the company provided that in the event of alienation, "the policy shall therefore be void, and be surrendered to the officers of said company to be canceled, and a ratable proportion of the unearned premiums to be returned." *Held*, that this does not mean the insurance is to continue until the premiums have been returned, but only limits the obligation of the company to pay back the premium until the surrender of

the policy. The consent of an unauthorized agent to an assignment of the policy does not affect the issue where there is no proof that such agent was notified of the transfer of title.

Buchanan vs. Westchester Co. Mutual Ins. Co.

Rep'd Jour'l, p. 335. N. Y. Com. A.

WAIVER.

§ 73. Life.—*Of prompt Payment of Premium.*—It is competent for a life insurance company to waive forfeitures so as to give renewed effect to the contract, where the premium has not been paid when due, and a stipulation in a policy, that it shall cease and determine if the premium be not paid when due, is waived by the act of the company in receiving and retaining an overdue premium.

Bouton vs. The Fire Ins. Co.; Wing vs. Harvey, 27 Eng. L. & Eq., 140; Buckbee vs. U. S. American Ins. and Trust Co., 18 Barb., 541; Sheldon vs. Conn. Mutual Life Ins. Co., 25 Conn., 207; Angell on Ins., sec. 213, and note, sec. 343.

Jacobs vs. National Life Ins. Co. of U. S.

—§ 68.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

THOMAS JONES, *Respondent,*

vs.

THE BROOKLYN LIFE INS. CO., *Appellant.**

The company's answer admitted the allegations of the complaint, but made further allegations concerning the insured's health and habits, which the reply denied. At the trial evidence was only given on the insurable interest of plaintiff, and the insured's habits regarding the use of intoxicating liquors. The judge submitted three issues to the determination of the jury: 1. What, if any, was the indebtedness of insured to plaintiff? 2. Were the insured's habits concerning intoxicating liquors intemperate prior to issue of policy? 3. If not did the company have notice of his actual habits at the time? The jury having answered the first two in the affirmative, the court gave judgment for plaintiff.

Held, That where the defense admits the complaint, and raises new issues in the answer, but only gives evidence on one of these issues, there is nothing for a jury to try on the remaining issues, and no legal error in failing to give a verdict upon them. The discretion of the jury as to finding a general or special verdict can only be exercised as to the evidence bearing on the issues.

Held, that the burden of proof regarding the new matter rested with defendant, and could not be shifted on the plea that the means of knowledge were peculiarly within the plaintiff's reach, which is not inferable from the circumstances of the case.

* Argued May 19, 1874.

There was no evidence, as the case stood, that the defendant had any knowledge of the insured's habits, and the court rightly refused to charge that it made no difference with defendant's defense whether it had such knowledge or not, the question being simply one of abstract law, having no foundation in the evidence or issues.

Appeal from a judgment rendered at the General Term of the Supreme Court in the Second Department, affirming a judgment entered at the Circuit, and from an order denying a new trial.

The action was brought to recover money upon a policy of life insurance issued by the defendant to the plaintiff upon the life of another, viz., one Isaac Newning, on March 12th, 1868.

The complaint, which was in the ordinary form, contained no allegation to the effect that the plaintiff had an interest in the life of Newning, except that he was a "debtorof the plaintiff."

The answer admitted the making of the policy, the regular payment of premiums, Newning's death on March 30th, 1869, notice and proof of death. It further set up as a defense that the policy was made under certain representations contained therein, and in the application for it, and that it was accepted by the plaintiff on the condition that should any of the representations and statements be found to be untrue in any respect, the defendant should not be liable. The statements contained in the application were set forth and alleged to be false in the following particulars:

1. That Newning, though stated to be in good health and free from symptoms of disease, was not so at the time application for insurance was made, and had not been for a long time prior thereto.

2. That, though his habits were stated to be moderately sober and temperate, yet that in fact he used intoxicating liquors excessively and was a common drunkard.

3. That he had disease of the heart, or the symptoms of it.

4. That he had consumption, or its symptoms.

5. That, contrary to the representations in the policy, he had had sickness or disease within the ten years preceding its execution.

6. That, during the five years next preceding the granting of the policy, he had been attended by a physician.

The reply put these allegations in the answer in issue.

At the trial, the only questions on which evidence was given, as far as appears from the printed case, were these: First, the amount of the plaintiff's insurable interest; second, as to Newning's habits respecting the use of intoxicating liquors.

When the testimony was closed the judge charged the jury, and

among other things said that the court would determine the case, except upon three issues which he would submit to their determination. Question 1. Was Isaac Newning on the 11th day of March, 1868, indebted to the plaintiff in any sum of money, and if so, how much? Question 2. Had the habits of Isaac Newning in the use of intoxicating liquors always been moderately sober and temperate prior to March 12th, 1868? Question 3. Did the defendant, at the time this policy was issued, have notice of what the actual habits of Newning were and had been in the use of intoxicating liquors on and prior to that date? He further instructed them that they need not answer the last question in case they answered the first two in the affirmative. To this submission, in this form, defendant excepted.

The court further charged that the plaintiff was entitled to recover unless the defendants had satisfied them, by a preponderance of evidence, that the conditions on which the policy was issued had been broken by the plaintiff. To this proposition the defendant excepted.

The defendant's counsel requested the court to charge the jury that it made no difference whether the company had or had not notice of Newning's habits at the time the policy issued. The court refused so to charge and the defendant excepted.

The jury answered the first question to the effect that Newning was indebted to the plaintiff to the amount of $1,340. They answered the second question in the affirmative, and to the third made no answer. The court thereupon gave judgment in favor of the plaintiff for $1,558, with costs. To the giving of judgment in this manner, the defendant excepted.

The judgment thus rendered having been appealed to the General Term, together with an order refusing a new trial, they were affirmed; whereupon the defendant appealed to this court.

SAMUEL HAND and AUGUSTUS FORD, *for Appellant.*

OSBORN E. BRIGHT, *for Respondent.*

DWIGHT, COM.

It is claimed by the defendant that there was a mistrial in this cause, or such an irregularity in the conduct of it that the judgment of the court below should be reversed.

The irregularity complained of consists in the fact that the judge submitted three questions to the jury without their going through the form of finding a verdict, either general or special, and on receiving affirmative answers to two of these questions, which made any find-

ing upon the third unnecessary, proceeded to order the entry of judgment. The proceeding was plainly informal, and it is insisted that the irregularity was of such a kind as to amount to a mistrial. On this point is cited the case of Manning vs. Monaghan, 23 N. Y., 539. That case, however, does not closely resemble the case at bar in its facts.

In that case, there were answers to specific questions not covering the whole case like a special verdict, and at the same time there was no general verdict. The case in this condition was referred to the court at General Term for judgment upon the answers and the questions of law arising in the cause. The court were of opinion that there was no verdict, general or special, but that even if it could be considered that there was a special verdict, motion for judgment must be made in the first instance at Special Term or at Circuit.

The mistrial consisted in reviewing the case in the first instance at General Term. The cases referred to in the opinion of Denio, J., sustain this proposition : Cobb vs. Cornish, 16 N. Y., 602 : Gilbert vs. Beach, ib., 606 ; and Clew vs. McPherson, unreported. These decisions cannot be considered as disposing of the present question, which concerns the effect of this informality in the court of original jurisdiction. The mode of presenting a case for review at General Term is so specifically pointed out in the Code that the court felt constrained to follow it, partly on grounds of policy to promote regularity of practice. Per Denio, J., p. 544. The case at bar is rather to be considered as within the rule in Barto vs. Himrod, 8 N. Y., 483-485. In that case there was no general verdict, but simply a special finding by the jury of the value of the property taken under a tax warrant, leaving all the other facts upon which the legal rights of the parties depended as stated in the pleadings. The Circuit judge on this state of the case decided in the plaintiff's favor, and judgment was entered on his decision, and an appeal then taken to the General Term in the usual manner. The court after careful consideration agreed that the facts admitted by the pleadings, together with those found by the jury, presented the whole case in the proper form for the consideration of the court. This case distinctly decides that no special form of verdict is necessary, and that it is only essential that a jury should pass upon such facts as are in issue between the parties. Facts admitted by the pleadings are not in issue and need no action of the jury. In other words, the action of the jury need only be invoked where there is something for them to pass upon. The case at bar differs from that of Barto vs. Himrod, in the fact that

there were issues raised in the answer and the reply. Still there was no evidence for the jury to pass upon, except as to one of those issues. The question is thus presented whether it is necessary for a jury to pass upon new matter set up in the answer and controverted by the reply, as to which no evidence is given. The whole theory on which the common law of pleadings rests is that an issue must be framed on which evidence can be adduced by the parties respectively interested in sustaining it. Greenleaf defines an issue "as a proposition of fact to be tried by the jury upon the evidence adduced." Greenleaf on Evidence, § 51. In the early history of trial by jury, they might come to a conclusion without any evidence to sustain it. It was at that time held that though no proofs were adduced on either side, yet the jury might bring in a verdict. Plowden, 12 ; 1 Levinz, 87. The oath of the jurors to find according to the evidence was construed to be to do it according to the best of their own knowledge. Vaughan, 148-9. They might thus bring in a verdict from their personal knowledge, without hearing extrinsic evidence or receiving directions from the judge. This doctrine having been wholly exploded, a jury can no longer find on an issue without evidence.

In applying these principles to the present case, it must be held that when a defendant admits the plaintiff's case as made by the complaint, sets up new matter in the answer so as to raise several issues, and gives no evidence on more than one of these issues, there is nothing for the jury to try as to those issues in which he refrains from giving evidence, and accordingly no legal error in failing to give a verdict upon them. The case falls within the theory of Barto vs. Himrod, as the court has the whole case before it, and needs no information from the jury as to any fact necessary to the disposition of the cause.

The former practice was fully as liberal as that which is maintained here. While it was a rule that the jury must find the facts, yet if in this, or any other particular, the verdict was defective so that the court was not able to give judgment on it, it will amend not only by the plea roll, but by the memory of notes of the judge or of counsel, and even by an affidavit of what was proved at the trial. It is only in the last resort that a new trial is awarded. 1 Tidd's Practice, 662, and cases cited ; 2 ib., 807. The amendment might be made in certain cases in the appellate court as well as in the court below. The 176th section of the Code provides "that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse

party, and no judgment shall be reversed or affected by reason of any such error or defect." The error in the present case belongs to the class here provided for, and there should be no reversal of the judgment on a mere matter of form.

But it is said by the defendant that the jury under the Code has a discretion to find either a general or special verdict, and that discretion has been interfered with. The jury has had the same discretion from time immemorial. 3 Salkeld, 373. It can only be exercised, as has been already shown, as to the evidence bearing upon the issues. No complaint at the trial was made that this discretion was interfered with. The exception to the cause taken by the judge was general, and may fairly be imputable to the form in which the findings were taken, rather than to an abridging of the jury's discretion.

Some objections were made to the judge's charge to the jury. One was that the plaintiff was entitled to recover, unless the defendants had satisfied them by a preponderance of evidence that the conditions on which the policy was issued had been broken by the plaintiff.

The defendant had set up new matter in its answer. The plaintiff had denied it in his reply. The burden of proof on the pleadings rested with the defendant, and the case was tried on the theory that the affirmative was with it. The judge appears to have meant only that in his remark. The counsel should have called his attention to any defect in formal statement, and should have asked him to charge according to any more accurate form of expression. It is suggested that the defendant could claim advantage of the rule which applies when the means of knowledge are peculiarly within the reach of the opposite party, and that it was only necessary for him to make out an apparent case, and then shift the burden of proof upon the plaintiff. It does not appear, however, that the means of knowledge were peculiarly within the reach of the plaintiff. He was insuring the life of a third person, his debtor, and there is no reason why he should be supposed to be more familiar with the state of that person's health, or his habits, than the defendant. In fact, the latter apparently had the greater means of information from the searching inquiries that it might make of Newning and others, from the examination made by its own physician. The final objection is that the court refused to charge the jury that it made no difference in the defendant's defense whether it knew Newning's habits or not at the time the contract was made.

There was no issue in the pleadings involving the question, but after the testimony had all been introduced the plaintiff's counsel

asked that the reply might be amended, so as to allege that the company knew, when the policy was issued, what Newning's habits were as to the use of intoxicating liquors. The judge reserved the question of amendment until the coming of the verdict upon the questions submitted. While matters were in this condition the request to charge referred to was made and refused. There was no evidence, as the case then stood, that the fact was known to the defendant. The proposition as it came before the judge's mind was an abstract question of law, having no foundation either in the evidence or in the issue. The judge rightly refused to charge as requested at that stage of the proceedings, and the whole subject subsequently became immaterial by the finding of the jury that Newning's habits were correctly represented in the application for the policy.

On the whole, the judgment of the court below should be affirmed.

All concur.

Judgment affirmed, with costs.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

COE S. BUCHANAN, *Respondent*,

vs.

WESTCHESTER COUNTY MUTUAL INS. CO., *Appellant.**

The policy provided that a transfer of the property or assignment of the policy without consent of the company indorsed thereon, should render the policy void; also that the insurance should immediately terminate on the cessation of interest or liability on the part of the insured, and that nothing less than a specific agreement indorsed on the policy should be construed as a waiver of its conditions.

Held, that the insurance terminated on the date of transfer. The policy was void *ipso facto*, on alienation of the property.

A by-law of the company provided that on alienation of the property the policy should be void and be returned to the company for cancellation, and a ratable proportion of the premiums should be returned.

* Argued May 13, 1874.

Held, that this does not continue the policy in force until the surrender has been made and the premiums returned. It simply limits the obligation of the company to return the premiums until the surrender has been made.

Held, that the alleged consent of an unauthorized agent to an assignment of the policy, in the absence of proof that he had any knowledge of the alienation, does not affect the issue.

Judgment reversed.

This is an appeal by the defendant from a judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought to recover the amount of loss sustained by the plaintiff, by reason of the damage by fire to certain property insured by the defendant in and by a policy issued by it to Addison Weeks, on or about the 14th day of November, 1868, and bearing date on that day, and which the plaintiff claimed to have been assigned by the said Weeks, to him on or about the 22d day of February, 1869, by an assignment of that date, upon the sale and transfer of the property insured to him. It is alleged in the complaint that the defendant had notice of the said assignment of the policy, (but not of the transfer of the property,) and that "thereupon the defendant, by A. T. Holmes, as agent thereto duly authorized, consented and agreed that the said policy should inure to the benefit of the plaintiff." The property insured by said policy was destroyed and damaged by fire on the 4th day of March, 1869, to an amount exceeding the insurance thereon.

The defendant by its answer admitted the issuing of the policy by it to Weeks, and put in issue the assignment thereof by a denial of knowledge and information sufficient to form a belief in reference to it.

The answer then alleged that if such assignment was made, it was done without knowledge, consent and approval of said defendant or its authorized agents, and that it was not binding upon it. The defendant also insisted that the plaintiff could not have any claim or demand against it under the policy, or the alleged assignment thereof on the ground that upon the transfer, by the said Weeks, of the property covered by the policy to the plaintiff, all the interest of the said Weeks therein terminated, and said policy became canceled and void.

The issues were referred to a referee for trial, and considerable evidence was given before him in reference to the question whether the defendant, by any agent duly authorized, had consented and agreed that the policy should inure to the benefit of the plaintiff, and he

found on that and other questions in favor of the plaintiff, and ordered judgment for the full amount of the insurance, with interest.

Judgment was entered on his report, which on appeal was affirmed by the General Term, and the defendant has appealed from the judgment of affirmance to the Court of Appeals.

The facts material to the decision of the appeal sufficiently appear in the opinion of the chief commissioner.

C. Frost, *for Appellant.*

Thomas M. North, *for Respondent.*

Lott, Com.

The policy under which the plaintiff recovered his judgment contained the following provisions and conditions :

1. "That if the property be sold or transferred, or any change take place in the title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance, or if this policy shall be assigned before a loss without the consent of the company indorsed hereon, * * then, and in every such case, this policy shall be void.

2. "That when property has been sold and delivered, or is otherwise disposed of, so that all interest or liability on the part of the assured herein named, for loss thereon by fire, has ceased, this insurance on such property shall immediately terminate." Also that, "the use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

It appears by the allegations in the complaint, that Addison Weeks, the owner of the property insured when the policy was issued, on or about the 22d day of February, 1869, bargained and sold, transferred and set over the same to plaintiff, and plaintiff testified that he purchased it some time before and took possession of it on that day.

The referee found that the sale thereof was made on the 20th of that month, but did not find when the transfer was made, or when possession was taken. The fire, by which the property was destroyed or damaged, occurred on the 4th day of March, 1869, and at that time the policy, by the clear and express terms of the conditions above set forth, had become void, and the insurance on the property covered by it had terminated. This effect has been declared and established by the Court of Appeals by their decisions in Savage vs. Howard Ins. Co., 52 N. Y., 502, and it is sufficient to refer to it, and to the able opinion given by Allen, J., in support thereof, without here stating

particularly the grounds on which it was based. The effect of that decision is not affected by the referee's conclusion, as matter of law, that "the defendants waived the provisions of the said policy requiring their consent to any sale or transfer of the property insured, or any assignment of the said policy." There is nothing in the findings of fact, nor any evidence in the case, to warrant that conclusion. On the contrary, the secretary of the defendant testified that the first intimation the defendant had of the sale of the property, or the transfer of the policy, was by a letter from the plaintiff dated March 3d, 1869, asking consent to the transfer of the policy to him, but which was not received until the 5th of that month, and that he canceled the policy on that day after the receipt of the letter, and he thereupon inclosed a check for $40.00, the return premium, in a letter to the plaintiff, stating the fact that it was for that purpose, and that the defendant, subsequent to the issuing of the policy, had examined the risk and would not continue it any longer. The referee found that the defendant, when the letter inclosing said check and giving such notice was written, and when the policy was so canceled, was ignorant of such loss and damage. It is therefore evident that the defendant, having no knowledge or notice of the sale of the property and of the transfer of the policy, could not have waived the provision of the policy in relation to those matters.

There was a by-law of the defendant in the following terms, viz. "Section 14. When any property insured with this corporation shall be alienated, by sale or otherwise, the policy shall therefore be void, and be surrendered to the officer of said company to be canceled, and a ratable proportion of the unearned premium to be returned." The counsel of the respondent claims that the condition of the policy was limited thereby, and that "it was not void *ipso facto* or *eo instanti*, on alienation, but upon return of premium, not otherwise, and not till then," and that "the company could not insist on a forfeiture and yet retain the premium, nor so long as they retained the premium." This claim is untenable. The by-law is in harmony with the condition. It is based on the assumption that the policy becomes void whenever and as soon as the property is alienated by sale or otherwise, and it requires the assured to surrender it to the officers to be canceled, and this provides that upon such surrender for cancelment a ratable proportion of the unearned premium is to be returned, and not before. No duty or obligation is imposed on or required of the company to pay back or return any part of the premium, unless and until the policy is actually surrendered by the assured. He and

not the company is to be the moving party, and his failure or omission to make the surrender cannot give him any claim or continue the liability of the company under the policy. As soon as the alienation of the property [the policy] becomes void, and the insurance thereby made immediately terminates. This is the clear and unequivocal declaration of the conditions and provisions of the policy above referred to, and the by-law is, as I have already stated, in harmony therewith.

Assuming the above views to be correct, it was unnecessary to consider whether there was any consent given by an authorized agent of the defendant that the policy should inure to the benefit of the plaintiff in the absence of any finding or proof that the fact of such alienation was known or communicated to such agent.

It follows from what has been said that the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except REYNOLDS, C., and DWIGHT, C., not voting.

SUPREME COURT—DISTRICT OF COLUMBIA.

SEPTEMBER TERM, 1874.

CATHARINE JACOBS

vs.

NATIONAL LIFE INS. CO. OF THE UNITED STATES OF AMERICA.*

1. A declaration on a policy of life insurance stated the consideration to be the payment of premiums quarterly. The policy proved at the trial was expressed to be in consideration of said premiums, and of the statements and declarations made in the application for the policy; held that the variance was not material.
2. The application presented to the company, when the insurance was effected, is no part of the plaintiff's cause of action, and need not be set forth in the declaration.
3. It is competent for a life insurance company to waive forfeitures, so as to give renewed effect to a life insurance, where the premium has not been paid at the time it was due; and a stipulation in a life policy that it shall cease and determine if any subsequent premium shall not be paid when due, is waived by the act of the company in receiving and retaining the premium after that time.

* From the Washington (D. C.) *Law Reporter.*

4. A witness may be permitted to certify what the insured told him, where the door was opened to its introduction by the cross-examination of the witness on the other side.
5. A condition in a policy of life insurance that it is to become null and void in case the insured shall die by his own hand or act, voluntarily "or otherwise," the use of the latter word is too vague and intangible to admit of practical application, and the court will not undertake to enforce a provision so uncertain.

Action on a policy of life insurance for $5,000, issued by the defendant to the plaintiff, on the life of her son, Edward N. Jacobs, and bearing date on the 27th day of November, 1871. The only consideration stated in the declaration for the contract, is the payment by plaintiff to defendant, quarterly, of the sum of fifty-seven dollars and forty cents. It is also alleged that the said Edward N. Jacobs died on or about the 19th day of January, 1873, whilst the said policy was in full force; and that proof of such death was furnished to defendant, and that sixty days have expired, and defendant refuses to pay.

The defendant pleaded that it never was indebted; and that it did not promise as alleged in the declaration. The third plea is in these words:

And the defendant says that, by the terms of the policy of insurance in the declaration in this case mentioned, the same was to become null and void, and the defendant was not to be liable for the sum insured by said policy, in case the person whose life was insured by said policy, to wit, Edward N. Jacobs, should die by his own hand or act, voluntarily or otherwise; and the defendant says that said Edward N. Jacobs did die by his own hand and act, whereby said policy became null and void. And this the defendant is ready to verify; wherefore it prays judgment whether it ought to be charged with the plaintiff's demand.

Upon the trial of the cause the plaintiff offered in evidence the policy of insurance, which is expressed to be made "in consideration of the representations and the declarations made to it (the defendant) in the application therefor, and of the sum of fifty-seven dollars and forty cents * * and the quarterly annual payment of a like amount on or before the 27th day of November, February, May, and August."

To the introduction of said policy in evidence the defendant's counsel objected on the ground that there was a variance between the policy offered and the one decided in the declaration in respect to the consideration of the contract declared on, which is stated to be the payment of certain premiums; whereas the consideration of the poli-

cy, offered in the evidence, consists of the representations and declarations made to the defendant in the application therefor, as well as of the premiums. It is contended that the whole of the consideration should have been stated in the declaration. The objection was overruled, and the policy given in evidence to the jury. This is the subject of the first exception.

The policy of insurance, thus admitted in evidence, contained, among other matters, the following provisions:

"This policy, issued by the company and accepted by the insured and the holder thereof, on the following express conditions and agreements:

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

"That in case of the violation of the foregoing conditions or agreements, or any of them, this policy shall become null and void, all payments made herein shall be forfeited, and the company shall not be liable for the payment of the sum insured, or of any part thereof; that in case the insured shall die by his own hand or act, voluntarily or otherwise, or in consequence of engaging in a duel, or in consequence of violating any law of any nation, state, province, or municipality, this policy shall become and be null and void, and the company will not become liable for the sum insured."

The defendant admitted that all the premiums down to August 27th, 1872, had been paid as they fell due, and the plaintiff then called W. P. Dunwoody as a witness, who testified that he had been the defendant's agent for several years at Washington.

The following receipt was then shown the witness by plaintiff's counsel:

National Life Ins. Co., of the United States of America, Branch Office, Philadelphia. Policy No. 15,553. Premium, $57.40.

Washington, D. C., Nov. 27th, 1872. Received $57.40, which continues in force policy No. 15,553 on the life of Edward N. Jacobs, for three months from date, until the 27th of February, 1873.

J. M. Butler, Secretary.

Notice to Policy-holders.—For terms of mutual agreement, see application and policy. Receipts to be valid must be signed by an officer of the company. Agents should countersign receipts sent to them for delivery, as evidence of payment to them. Agents cannot make binding, or continue any policy; nor can they make, alter, or discharge contracts, or waive forfeitures, or bind the company in any way. When notices are sent to policy-holders that their premiums are about to become due, they are sent solely from courtesy, and not as an obligation of the company, which will be responsible neither for their sending nor their miscarriage. Any extension of time by an agent for the payment of premiums, is without the authority of the company, and will in no way enlarge or extend its liabilities under the policy. E. A. ROLLINS, President.

Across the face:

This payment, if made when overdue, will not be valid in continuing the policy, unless the party insured is in good health at the time. Countersigned by W. P. DUNWOODY, agent at Washington, D. C.

And the witnesses testified that said receipt was the receipt of the defendant, and that he, the witness, as the agent of the defendant, gave said receipt to the insured, who had previously paid him the premium, the receipt of which is thereby acknowledged.

On cross-examination Mr. Dunwoody said that the premium due on said policy was not paid till the 28th day of December, 1872, on which day he delivered said receipt to the insured.

On his re-direct examination, Mr. Dunwoody stated that he had authority to accept an overdue premium on a policy, and thereby continue the policy in force at any time within thirty days, or within a month, after the premium fell due.

The counsel for the defendant then admitted to the jury that Edward N. Jacobs, whose life was insured by said policy, died on the 19th day of January, 1873; that proof of his death was furnished the defendant by the plaintiff in accordance with the requirements of said policy, and as stated in the declaration in this case; and that the plaintiff, as the mother of the insured, had an insurable interest in the life of insured.

And there the plaintiff rested. The defendant's counsel requested the court to instruct the jury that on the evidence the plaintiff was not entitled to a verdict on the ground of the variance already men-

tioned ; and also because the contract declared on is an absolute one, and the policy in evidence is upon the condition that the statements made in the application are, in all respects, true, and made a part of the contract, and should therefore have been set forth in the declaration, and the truth thereof established by the plaintiff, to entitle her to recover. But the court refused to give said instruction, and defendant's counsel excepted.

The defendant put in evidence the application referred to in the policy, and proved a number of facts tending to show that the insured lay down at night under a tree in the open grounds adjacent to the Smithsonian Institution, in the city of Washington, during the prevalence of very cold weather, where he was found about five o'clock P. M., on the 18th day of January, 1873, frozen to death.

The defendant closed its testimony, and the plaintiff called A. R. Jacobs, brother of the insured, who testified in regard to the disappearance of the insured, and that a policeman notified him of finding the body next morning, just as he was dressing to go out and look for his brother.

On cross-examination Mr. Jacobs was asked whether he had ever known the insured to stay away all night before, and replied that he could not recall any particular instance. He was then asked if he recollected of the insured having ever gone to Arlington and staid all night, and replied that the insured, in August, 1872, started to go to Arlington, and remained away all night ; that witness and the plaintiff were very uneasy about him on that occasion ; that in the morning witness went to the Treasury Department and learned when the insured had left there ; that witness then returned home, and found the insured there. The witness was then asked by plaintiff's counsel this question :

" Did he tell you how he came to stay out all night ? " and he replied, " Yes, sir."

He was then asked by plaintiff's counsel : " What did he say induced him to do it ? " To which last mentioned question the counsel for the defendant objected, but the presiding justice overruled said objection, and directed the witness to answer the question, which he did.

The defendant's counsel excepted to this ruling of the court.

The testimony being closed, the counsel for defendant prayed the court to instruct the jury that their verdict must be for the defendant, because a different contract had been proved from that alleged in the declaration, and that the burden of proof is on the plaintiff to prove

the truth of the statements and declarations contained in the application for insurance introduced in evidence and forming part of the policy, and failure to adduce evidence in support of the statements and declarations is fatal to the plaintiff; but the justice refused to give such instructions, saying to the jury: "There has been no proof on that subject. I refuse to give that instruction." To which ruling of the court the counsel for the defendant excepted.

The court then charged the jury, among other things:

"Gentlemen: The defense in this case is that the party whose life was insured by this policy came to his death voluntarily and by his own act; in other words, that he came to his death by suicide; and if that defense is established, it will defeat any recovery in this case, and the verdict will be for the defendant. That is the only defense interposed here, and unless it is established by the testimony in the case, your verdict will be for the plaintiff.

"Now, it does not matter what means a party adopts to terminate his existence, whether it is by violent exercise or by exposure (as is alleged to have been the cause of death in this case) to the elements. If the party lay down there with the purpose of ending his life, that would be suicide. If, overcome by drowsiness, he became insensible, and without any intention or design of taking his life, he lay down there, it would not be suicide. So that you must arrive at the conclusion from the circumstances in the case, in order to uphold the defense, that he intentionally lay down there for the purpose of ending his life. If he lay down there for some other cause, independent of any such intention, the defense is not made out.

"The amount to be recovered, if you find for the plaintiff, will be the amount of the policy, together with the premiums and with interest from the time of the proof of the death."

And the following portions of said charge were duly excepted to:

"The only defense in this case is that the party whose life was insured by this policy came to his death voluntarily and by his own act. To uphold this defense, you must arrive at the conclusion, from the circumstances in the case, that the insured intentionally lay down where he was found dead, for the purpose of ending his life. If he lay down there from some other cause, independent of any such intention, the defense is not made out."

The jury returned a verdict in favor of the plaintiff, and the case is now here on the exceptions.

I. G. Kimball and R. T. Merrick, *for Plaintiff.*

EDWIN L. STANTON and A. S. WORTHINGTON, *for Defendant.*

MACARTHUR, J.

The declaration in this case is upon a policy of insurance issued to the plaintiff, whereby the defendant insured the life of her son, Edward N. Jacobs, for her benefit, in the sum of $5,000.

The consideration is stated to be the payment, by the plaintiff to the defendant, of the sum of fifty-seven dollars and forty cents quarterly.

The policy, which was offered in evidence at the trial, expresses that it was in "consideration of the representations and declarations made to it in the application therefor;" and also of the due payment of the premiums just mentioned.

The defendant objected to the introduction of said policy in evidence, on the ground that there was a variance between it and the policy set up in the declaration, inasmuch as it did not state the entire consideration.

It is admitted that the representations and declarations which constituted the application had been furnished the defendant before the policy issued. It was therefore an executed part of the consideration. The risk of the insurers was intended to be undertaken on the unexecuted part of the consideration, which was the payment of the premiums as they should fall due. We are therefore inclined to the opinion that there was no such variance as would defeat the action. Pillman vs. Fuller, 13 Mich., 113, 15 Gray, 249; May on Ins., 235, 98 Mass., 381; 1 Chitty Pl., 299.

The objection that the application presented to the defendant, when the insurance was effected, is not set forth in the declaration, must be disposed of in the same way. It is no part of the plaintiff's cause of action. If the representations were untrue there could be no recovery. But we all think it is for the defendant to falsify them, and not for the plaintiff to prove their performance in the first instance.

Besides, we are inclined to hold that it is sufficient to declare generally in this way upon a policy of life insurance. It not only avoids great prolixity, but relieves the trial from numerous embarrassments, growing out of alleged variances. It is also in conformity with the simplified forms of pleading recognized by our own rules, and therefore is to be upheld. Fowler vs. Ins. Co., 15 Gray, 249; Life and Fire Ins. Co. vs. Johnson, 4 Zabriskie, 676; S. C., 1 Big., 327; N. Y. Life Ins. Co. vs. Graham, 2 Duvall, 506; S. C., 1 Big., 114.

The third exception is upon the point whether the payment of the overdue premium revived the policy.

The receipt is dated on the day the premium was due, and the agent of the company, who was examined as a witness, stated that he delivered it to the insured, who had previously paid him the money, and that he had authority to accept a premium at any time within thirty days or a month after it fell due.

But it is alleged that that period expired on the 27th of December, or one day before he received the money and gave the receipt. The ceipt itself is executed with all the formalities required by the policy.

Without going into a computation of time to ascertain whether the period within which the agent could receipt for the premium had expired, we are satisfied that the facts stated constitute a reinstatement of the policy. It is true that the policy is to cease as a liability, upon the defendant, if the premium is not paid as it becomes due; and it is also true that the defendant's agents have no power to waive the conditions that are expressly stipulated for.

It is nevertheless competent for defendant to waive forfeitures, so as to give renewed effect to the contract.

In the case of Bouton vs. Fire Insurance Co., decided by the Supreme Court of Coone, the court employ the following language in speaking of a condition of this kind, "but that as that provision was inserted for the sole benefit of the defendants, it is only voidable at their election, and that it was, therefore, competent for them to waive a strict compliance with it after the time stipulated for the payment of such premium; and that in case of such waiver the policy would be revived, and continued obligatory on the defendants on its original terms; and further, that the reception, by them or their authorized agent, of the premium for that purpose, after that time, would have the effect of reviving and continuing the contract evidenced by the policy as though it had been strictly complied with by the insured.

The authorities in support of this opinion are so numerous, uniform, and explicit, and the reasons for it are so fully and satisfactorily given in them, that we deem it sufficient only to refer to them. Wing vs. Harvey, 27 Eng. L. and Eq., 140; Buckbee vs. U. S. American Insurance & Trust Co., 18 Barb., 541; Sheldon vs. Conn. Mut. Life Insurance Co., 25 Conn., 207; Angell on Insurance, sec. 213, and note, sec. 343."

We recognize this authority as settled law, and as entirely decisive of the point under consideration. To allow the company to treat the policy as at an end, and in view of the fact that they have received the

consideration for renewing it would be to suppose a singular degree of license from the ordinary obligation of a contract.

Another point in the case is that hearsay evidence was allowed to go to jury. This has reference to the testimony of A. R. Jacobs, a brother of the deceased, who was permitted to testify what he heard his brother say as to his having staid away from home all night in the month of August, 1872. The fact of his remaining from home all night was drawn out on the cross-examination by defendant's counsel; and the plaintiff's counsel then asked "What did he say induced him to do it?" The answer would be clearly hearsay, when the door was opened for its introduction by cross-examination, and we are inclined to think that such was the case. The fact of his brother's absence in the night time had been particularly inquired into on the other side, and the communication made to the witness was explanatory of that circumstance. At least it appears to be sufficiently responsive to the new matter, to justify its admission.

It remains only to consider the last exception, which is to the instruction of the court upon the meaning of the clause of the policy, which declares that it shall be null and void in case the insured shall die by his own hand or act, "voluntarily or otherwise." In the charge of the court, the jury were instructed that in order to sustain the defense they must believe from the testimony that the insured intentionally lay down where he was found dead for the purpose of ending his life. It must be admitted that this part of the charge was correct, unless the word "otherwise," makes any act not willful or intentional, by which the insured may take his own life, a forfeiture of the insurance.

The counsel for defendant admitted that the courts had decided that although the language of the policy avoided it in case the insured shall die by his own hand or act, yet if he committed the act of self-destruction under the influence of insanity the company would still be liable. In order to meet this interpretation the defendant inserted this term "otherwise," so that they would be exonerated if an insane man took his own life. But the word is not used in this limited sense. It can be reasonably and naturally understood as embracing every species of self-destruction, whether intentional or accidental, caused by the act or hand of the insured. If the act is by his own hand it is only necessary that it should be voluntary or otherwise in order to avoid the insurance.

There is nothing in the ordinary or popular acceptation of the term which would limit its sense only to mean insanity. It is admit-

ted that such was not the understanding of the company, and that this construction would defeat the intention of both parties; and probably no court in America would undertake to enforce a provision so dangerous and uncertain. If the defendant desires to contract that death by insanity shall invalidate the policy, they can easily adopt terms to express that intention. Meanwhile we think that no stress is to be laid upon the use of a word so vague and intangible and so impracticable in its application. Besides, there is no direct testimony of insanity in the case, and no jury in the world that were not themselves crazy would have been warranted in considering the subject.

We think the court below construed the policy properly, and the judgment must be affirmed.

SUPREME COURT OF NORTH CAROLINA.

JUNE TERM, 1874.

S. D. WYNNE

vs.

LIVERPOOL AND LONDON AND GLOBE INS. CO.*

The legal effect of an amendment is to put the case in the same plight and condition as if the matter introduced by the amendment had been inserted in the original pleading at the outset.

A clause in an application for a policy of insurance, that the party insured was to take an inventory of his stock every three months, is not a condition by which the policy was to be defeated and become of no force.

The finding of a jury that the loss of the plaintiff was $3,062, of which the sum of $462 is the value of the store, and $2,600 the value of the stock on hand, should be read, is the damage on account of the destruction of the store and goods.

Counsel for appellants are not justifiable in making up a case in such a way as to leave the court in doubt as to the point intended to be made; every intendment must be made against the appellant.

Civil action for the recovery of a loss by fire, tried by his honor, Judge Moore, at Spring Term, 1874, of Tyrrell Superior Court.

* Published in 71 North Carolina Reports.

Plaintiff brought this action upon a policy of insurance issued by defendant, against the loss by fire of plaintiff's store and stock of goods.

The answer admitted the execution of the policy, but alleged that the contract of insurance was subject to other terms, conditions and limitations and restrictions, than those set forth in the complaint, viz., to certain conditions and warranties that were contained in the application of the plaintiff, a copy of which was annexed to the answer.

One among the issues submitted by the plaintiff to the jury was the following, to wit:

Was the said contract of insurance subject to other terms, conditions, limitations and restrictions than those set forth in the complaint, and if so, does the written and printed paper writing attached to the answer contain them? (The said conditions, etc., are noticed and sufficiently set out in the opinion of the chief justice.)

The defendant introduced the application as evidence, and proved its execution by plaintiff, and moved that the plaintiff be called. Upon motion of plaintiff's counsel, the court permitted him to amend his complaint by setting forth the application, and making it a part thereof. Immediately on amending his complaint the plaintiff submitted his case to the jury.

Before the complaint was amended, the plaintiff stated (in answer to a question of his counsel) that he had complied with all the conditions of the policy of insurance; and before he left the stand, (upon his cross-examination,) the original application for insurance was handed to him, and his signature thereto acknowledged; he also stated that he had not taken an inventory of stock after 1st January, and that he expected, when he entered business, to keep up the annual average value of his stock at $4,000, but he did not state that he had done so.

The defendant asked the court to charge that there was no evidence that the plaintiff had complied with and performed all the warranties as contained in his application; and that as the averments and performance of these warranties are conditions precedent to the right of action, the plaintiff cannot recover.

His honor, the case states, refused the instruction because there was some evidence as before stated. Defendant excepted because the evidence alluded to was as to the conditions of the policy, and before the application had been set out by plaintiff in his complaint; and inasmuch as there was no evidence offered after the amendment, as

to the performance of the conditions and warranties, the plaintiff could not recover.

In the application, plaintiff represented the store to be worth in cash, $700. It was in evidence on the part of the plaintiff, that the store was built by him on leased ground, and that his lease was for two years, with the privilege of five. A witness introduced by the plaintiff stated that if he desired to go into business at the place, he would give $700 for the store. On his cross-examination this witness stated that he was not a merchant, nor did he know the cost of building houses.

The mechanic who built the store was introduced by defendant who stated the actual cost of building the same, everything included, was $226, and that he would replace it for that amount, or for $250 at the outside. This evidence was corroborated by two other mechanics.

Among the issues submitted to the jury were the following :

Was the cash value of the store $700, and cash value of the stock $3,500 at the time of the insurance?

What was the loss to the plaintiff by reason of the fire?

Defendant asked the court to charge that under the contract the company had the right to rebuild, and that therefore the cash value of the store, within the legal intendment of the contract of insurance, was, what it was worth to rebuild it ; and that in estimating the value of the store the jury could not take into consideration the location and favorable circumstances for trade, for that is outside of the cash value, as the fire cannot destroy location, etc.; and that if the jury believe the mechanics who say that the store can be replaced for $250, the plaintiff cannot recover.

His honor refused so to charge, but instructed the jury that in estimating the cash value of the store, then and there, the location and favorable circumstances for trade should not be considered, but find what it would have brought in cash. Defendant excepted.

The court was further asked by defendant to charge that from the application it appeared that an inventory was to be taken every three months by the plaintiff ; that it was taken on the 1st January, 1872, and that the fire occurred more than three months from that time, to wit, on the 4th April, 1872 ; and inasmuch as plaintiff swore that he made no other inventory than the one in January, he did not comply with the conditions set forth in the application, and could not recover. Instructions refused by his honor, and defendant again excepted.

To the first issue, the jury found the value of the store to be as stated in the application: And to the second that the loss was $3,062.33, of which $462.35 was the value of the store and $2,600 the value of the stock. Judgment in accordance with the verdict, from which the defendant appealed.

It is also stated in the case sent up that the jury "responded affirmatively to the following issues in addition to those heretofore set forth, to wit: Has the plaintiff complied with and performed all the conditions, warranties and limitations and restrictions embraced in the contract of insurance?" The jury also found that the inventory was not taken as required in the policy. Other issues were submitted, but were omitted in the statement of the case, as there were no exceptions taken to the finding of the jury thereon.

A. M. Moore and Empie, *for Appellant.*

Jno. A. Moore, *contra.*

Pearson, C. J.

1. The point made on the fact that after the amendment was allowed, no further evidence was offered and the case was immediately put to the jury, has nothing to rest upon; for it is a settled principle that the legal effect of an amendment is to put the case in the same plight and condition as if the matter introduced by the amendment had been inserted in the original proceeding at the outset. So here it is the same in legal effect, as if "the application" had been set out in "the complaint" when it was originally filed. Now this familiar principle follows the rule in equity procedure: "No matter can be allowed to be introduced by way of amendment, unless it existed at the time the original bill was filed." If it occurred since it can only be brought to the notice of the court, and become part of the proceedings by means of a supplemental bill.

2. The seeming discrepancy in the finding of the jury upon the several issues is explained by adverting to the fact that the defendants did not insure the full value of the building or goods; consequently the finding, "of which the sum of $462 is the value of the store," should be read "is the damage on account of the destruction of the store," and "$2,600 the value of the stock on hand," should be read "is the damage on account of the destruction of the goods." This is clear after the rubbish is cleared off. But it is really provoking that gentlemen of the bar, under the privilege accorded to them by C. C. P., pay so little attention to the "making up" of cases for the Supreme

Court, and throw upon the justices so much unnecessary labor. The counsel for the appellant is not justifiable in making up a case in such a way as to leave this court in doubt as to the point intended to be made; every intendment must be made against the appellant.

3. Among the printed matter indorsed on the policy is a stipulation as follows: "The company shall have the option, when the insurance may be on goods, to supply goods of like kind, etc., and when the insurance may be on houses, etc., the company shall have the option with all convenient speed to rebuild," etc. As we understand the case, the company made no offer to rebuild before the action was commenced, at any time before the trial or after the trial up to this date, and the gravamen is, that the verdict is against the weight of the evidence.

With that question we have nothing to do, and we cannot advert to the testimony of several witnesses, professing to be master mechanics, except as tending to show that the prejudice of juries is against insurance companies. It can be duly construed by the judge before whom the trial is had, whether it be the cause or effect of the many references and counter references, in "the policy," to "the conditions indorsed," and in "the conditions indorsed" to the "application," and so in a circle, certain it is that the papers in a policy of insurance are so mixed up and involved that no ordinary man can be supposed to have perused and fully understood them.

4. "The defendant asked the court to charge that from 'the application' it appeared that an inventory was to be taken every three months; that it was taken on the 1st January, 1872, and the fire occurred on the 4th of April, 1872, and that inasmuch as the plaintiff swore he had made no other inventory than the one in January, he did not comply with the condition set out in the application, and could not recover."

"This instruction was declined by his honor, and defendant excepted."

The prayer for this instruction, although argumentative and not very happily expressed, raises the question as to the proper construction and legal effect of so much of "the application" as relates to the taking of inventories.

We think his honor did not err in declining to give this instruction, and concur with him in the opinion that the construction contended for was an attempt to strain this clause of "the application" beyond the meaning that can be fairly put on the words used, and to give to it the legal effect of a condition by which the policy was to be defeated

and become of no force by reason of a collateral matter not affecting and relating to the cause of the loss, but at most amounting to a mode of proof in respect to the extent of the loss, in the event of a fire, when the omission would be compensated for by the presumption which jurors are directed to make against all parties who have agreed, covenanted or warranted to do or not to do any act for breach of which they are liable in damages. The omission to take an inventory at the very day might have had its influence with the jury. But the notion that the omission to take an inventory of the goods in a country store precisely three months after the 1st day of January, 1872, and for no other reason than that the labor shall be done—for how "the inventory is to be made or what is to be its form and purpose," how it is to be preserved and in what manner the defendant is to make it available, is not set out.

Look at the application, "questions and answers," and take it to be intended to be a part of the contract, or policy of insurance. E. g., "How often is account of stock taken? When was it last, and what amount did it reach? Answer: Every three months—1st January, 1872; $4,000." This is all that is written or printed.

Would it from these words enter into the head of any fair minded man to suppose that by these words it was the intention of the insurance company to impose, or of the insured to enter into a condition to the effect that if from any cause he should omit to take an inventory of his stock of goods, on the very day of the expiration of three months after the 1st January, 1872, and so from three months to three months to the very day, not excepting Sundays or unavoidable or excusable causes of delay, the policy would become void and of no force?

We have the authority of Lord Coke for the principle, but in truth it needs no authority; a condition by which an estate is to be defeated, or by which a right is not to accrue, must be expressed in direct words, and in the absence of direct words of condition the construction will be in favor of a warranty or covenant or stipulation to be satisfied by compensation or damages instead of a penalty or forfeiture of the entire amount.

If in our case, instead of a mere question and answer as to the inventory, apt words of condition had been used, in substance, "This application being the basis of the policy, and being so expressly referred to, now the condition of this policy is that provided the said Spencer D. Wynne shall fail at the expiration of three months after the said 1st day of January, 1872, and of each succeeding three

months thereafter, to make a full and complete inventory of his stock of goods, and to enter the same upon his books, subject to the inspection of the insurance company, then this policy is to be void," there would be sense in it—fair play.

But the suggestion that this provision, however artificial and cunningly inserted, can have the legal effect of a condition precedent, by which the policy of insurance is to be void and of no effect, cannot for a moment be entertained in a court of justice without submitting to the degradation of being made an instrument of an insurance company to evade the payment of a loss fairly incurred upon grounds technical and untenable.

No error. Judgment affirmed.

SUPREME COURT OF NORTH CAROLINA.

JUNE TERM, 1874.

NORTH CAROLINA MUTUAL LIFE INS. CO.

vs.

JOHN H. POWELL.*

The failure of a mutual insurance company does not constitute a "failure of consideration," so as to defeat an action upon a premium note given by a person insured therein.

Such a company after its insolvency loses the power of insisting upon forfeitures of stock by its members for non-payment or otherwise.

If such a company before insolvency treat a member who has failed to pay as if he were still a member, this is a waiver of the right to declare his stock forfeited for non-payment.

A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 per cent. on the premium notes in order to enable it to meet its liabilities, etc.

The holders of policies in insolvent mutual insurance companies cannot, when sued upon their premium notes, claim that the value of their policies, (supposing the same to be ascertained,) shall be set off in equity against their liabilities.

* Published in 71 North Carolina Reports. Syllabus in Conigland vs. North Carolina Mutual Ins. Co., Phil. Eq., 341.

Civil action to recover the value of a promissory note, tried by his honor, Judge Tourgee, at Special (January) Term, 1874, of the Superior Court of Wake County.

The following is the case proposed by the plaintiff's counsel and adopted by the presiding judge, and transmitted with the transcript of the record, as the "case settled."

On the trial in the court below, the plaintiff produced in evidence the act of incorporation, ratified 27th January, 1849, entitled "An act to incorporate a Mutual Life Insurance Company in the State of North Carolina," by which the plaintiff became an incorporated company; and proved that under said act the company was duly organized and went into operation sometime in the spring of the year 1849.

Plaintiff then offered in evidence a promissory note, the execution of which, by him, the defendant admitted in the words and figures following, to wit:

"$258.23. Goldsboro, April 23rd, 1865. Twelve months after date, or sooner if required to meet assessments made by the company, I promise to pay to the North Carolina Mutual Life Insurance Company, at Raleigh, or order, two hundred and fifty-eight dollars and twenty-three cents, with interest at 6 per cent. per annum, for value received. No. 1202. JOHN H. POWELL."

It was then proved by the plaintiff that at the time the note was executed, the United States forces had possession of Goldsboro in Wayne County, where the note was given, and had also taken possession of the city of Raleigh, where the plaintiff's office was situate, and performed its functions as a mutual insurance company; and that the jurisdiction of the United States had been maintained within the two places aforesaid ever since, and had gradually from that time been established and maintained over the whole State of North Carolina up to the present time—facts admitted by defendant.

Plaintiff then filed before the court the affidavit of R. H. Battle, now receiver of the plaintiff corporation, under a decree in equity of the United States Circuit Court for the District of North Carolina, and at the date when said note was given and for several years previous, and also subsequent thereto, secretary of said corporation, to the effect that it was not understood between the parties to said note, that it was solvable in money of the value of Confederate currency at the time the note was given; but it was understood between the

said parties that said note was solvable in money of the par funds of the United States. And the plaintiff here rested the case.

The defendant then offered in evidence the policy of life insurance, and a printed pamphlet containing the by-laws, rules and instructions to the agents of the plaintiff corporation, all of which were admitted by the plaintiff to be genuine. He then offered to prove that when the said policy was issued to him, on the 23rd of April, 1851, he did not pay to the plaintiff in money the whole sum of $43.40, specified in said policy as paid at that date, but paid only $21.70 thereof in money, and gave his note, in the form of the note now sued on, for the other $21.70; and that when the next annual premium of $43.40 fell due, according to the terms of said policy, on the 23rd of April, 1852, he paid only $21.70 of that annual premium and six per cent. interest on his note of $21.70 already given, in money, and paid off his said note and the other half of his annual premium, due 23rd April, 1852, by giving a note in the form of the one now sued on, amounting to $43.40 therefor. That in like manner, from year to year, until the 23rd day of April, 1865, he continued to pay only one half of his annual premium specified in said policy, and six per cent. interest on his outstanding note in money, and to give a new note, including the amount of the principal of his outstanding note and the other half of the annual premium due by him for the ensuing year, in the form above specified. That on the 23rd April, 1865, he paid the plaintiff $21.70 in money, being one half of his annual premium as aforesaid, due for the year ending the 23rd April, 1866, and gave his note for $258.23, which included the other half of his annual premium and the principal of his outstanding note, amounting at that time to $258.53; and he at the same time paid the plaintiff in money $14.19, being one year's interest on his said outstanding note for $236.53. That the note declared on by the plaintiff, and offered in evidence, was the one for $258.23, given by defendant, as immediately hereinbefore stated, on the 23rd April, 1865; and the consideration thereof was the payment of his annual half premiums, already accrued in the manner and under the circumstances immediately hereinbefore stated. That on the 23rd of April, 1866, the defendant purposely failed to pay his annual premium, according to the terms of the aforesaid policy, either in money or by giving a note therefor, because the plaintiff corporation was at that time generally reputed to be insolvent, and, as the defendant believed, was insolvent; and that the defendant has never since paid, nor attempted to pay, any such annual premium.

It was conceded by the plaintiff that the directors of the plaintiff corporation has never at any time made any assessment on the note sued upon, against the defendant, to pay losses due to policy-holders, whose policies had fallen in by death, and other debts of the corporation—unless the resolutions of the said directors, of the 6th of August, 1866, (annexed to the record,) and hereinafter more specifically referred to, amounted to such an assessment; or unless the proceedings in the Circuit Court of the United States, in the creditors' bill filed against the plaintiff in equity, before June Term, 1869, and which will be hereinafter more specfically stated, were equivalent thereto; and it was specially conceded by the plaintiff, that no such assessment had been made on the premium note of the defendant sued on, previous to the lapse of his policy, by his failure to renew his premium note, and pay his annual premium on the 23rd of April, 1866.

The defendant then offered to prove, by unwritten evidence, the terms of an oral agreement entered into by and between the plaintiff and defendant, at and preceding the execution of the note given by the defendant to the plaintiff, for one half of his first annual premium, and of the policy issued by the plaintiff to defendant's wife and children on the 23rd of April, 1851, of which agreement the said policy and note were in part execution, to the effect:

1. That it was agreed and understood between the plaintiff and defendant, that any and all notes, including the one declared on, given by defendant in payment of half premiums, should not be collected at the date they became due by their tenor.

2. That the outstanding premium notes should not be collected, but renewed as stated, except as to any assessment made for losses.

3. That notice should be given of such assessment when made, before which the insured should not be in default.

4. That such premium notes should only be paid after death, and then be deducted from the amount due under the policy.

5. That upon the non-payment of the annual premium, or the non-payment of the note for the half amount thereof, the entire agreement should be null, and the defendant discharged from all liability to the plaintiff upon his premium notes, or otherwise, except as to such assessments as may have been then made.

6. That this express oral contract was entered into between defendant and the plaintiff's agent, at the date mentioned, to wit, the 23rd of April, 1851.

This evidence was rejected by the court, and the defendant excepted.

Defendant then offered to prove, by parol testimony, that the plaintiff knew of the alleged unwritten contract made with the defendant by the company's agent, and did not disaffirm the same, but accepted and renewed from time to time the notes given in pursuance thereof.

This evidence was rejected by the court, and the defendant excepted.

Defendant offered to prove, by oral testimony, that it was the usage of the plaintiff corporation to make unwritten contracts of insurance, of the tenor of the oral contract alleged. This too was rejected by the court, and the defendant again excepted.

Defendant then offered to prove that he did regularly renew his note for one half the annual premiums, according to the unwritten contract alleged, until the plaintiff became insolvent, and that he refused to renew only in consequence of such insolvency. The plaintiff offered no objection to the defendant's proving that he regularly renewed his notes, etc., until the plaintiff became insolvent, etc., but did object to his proving that he did these acts in accordance with the unwritten contract alleged. Objection of plaintiff sustained, and the evidence so far as it related to the unwritten contract alleged by defendant was excluded by the court. Again the defendant excepted.

The defendant offered to prove that no assessment had been made and no notice given to him, according to the tenor of the unwritten agreement alleged. Plaintiff did not object to the defendant's proving, if he could, that no assessment had been made on his premium note and no notice thereof had been given to him, but did object to his proving that these acts had not been done according to the tenor of the unwritten agreement alleged. The court excluded this evidence, as a part or consequence of such unwritten agreement, and as offered in connection therewith, but did not exclude it generally. Defendant excepted.

It was conceded by the plaintiff that at the date when the note sued on was given by defendant, to wit, 23rd of April, 1865, the plaintiff corporation was unable to meet and pay its then existing liabilities as they matured; and it was further conceded that it had never been able since to meet and pay its existing liabilities as they matured; and that on the 4th September, 1869, when this action was instituted, the plaintiff was finally insolvent, and has so remained

ever since, and would never be able to pay off its existing debts, and have anything for division among its shareholders or members.

The defendant then offered in evidence a printed statement, admitted to be genuine, and which was made a part of the case, of the proceedings of a general called meeting of the members of the plaintiff corporation, held on the 6th of August, 1866, wherein a speedy winding up of the affairs of the company was resolved on, and the directors ordered to carry the same into effect; and proved that the plaintiff had ever since the said 6th day of August, 1866, ceased to transact any business as a life insurance company.

It was conceded by the defendant that he was, on the 23rd of April, 1865, when his note was given, and had been for many years previous thereto, one of the local agents for the plaintiff, to receive applications for insurance, and to effect renewals thereof in a considerable district of country in and around Goldsboro, Wayne County.

The plaintiff then offered in evidence the record of an equity suit in the Circuit Court of the United States for the North Carolina District, instituted before June Term, 1869, of said court, by Elvira C. Lawrence and others, on behalf of himself and the other creditors of the plaintiff, against the plaintiff in this action. In the original bill of said suit it was alleged that the complainant therein, and other creditors aforesaid, had obtained judgments for their debts, at law against the plaintiff in this action, had sued out executions thereon, and they had been returned totally unsatisfied, and praying the Circuit Court to take into its custody the assets of the North Carolina Mutual Life Ins. Co., and to appoint a receiver thereof, to take charge of and collect such assets, and distribute them among the creditors of said corporation, according to their respective rights. A decree of said court, in said case, made at June Term, 1869, declared said corporation insolvent, appointing one R H. Battle receiver of the assets thereof, and directing him, as such receiver, to institute proper actions in the State courts for the collection of the assets of the corporation, preparatory to the distribution thereof among the creditors of the corporation. The plaintiff then proved, that although this action is conducted in the name of the plaintiff, yet that it was in reality brought, and is in truth and fact carried on by the said R. H. Battle, receiver as aforesaid, in the name of the plaintiff, in pursuance of the decree last aforesaid and for the benefit of the creditors of the plaintiff.

Upon the foregoing evidence, the defendant prayed his honor to instruct the jury :

If they found that the plaintiff, at the time of taking the note now sued on, was insolvent, and that this fact was known to the plaintiff and not communicated to the defendant, nor known to him, and that if this fact had been known to the defendant he would not have executed the note, the plaintiff could not recover.

His honor declined to give the instruction, as prayed, and the defendant excepted.

That the contracts between the plaintiff and defendant were mutual, concurrent and dependent, and that the insolvency of the plaintiff, and its admitted liability to pay the defendant's wife and children the amount of their policy, at any time hereafter, was a discharge of the defendant from his liability ; and, if not to the full amount, yet to the extent of the present value of the policy, as of a solvent corporation. His honor declining to give this instruction as prayed, the defendant excepted.

That if the jury find, that at the time of taking the note now sued for, the plaintiff was insolvent and concealed that fact from the defendant, and falsely represented to him that it was solvent, and thereby induced the defendant to give the said note, when, but for such concealment and false representation, the defendant would not have given the same, the plaintiff could not recover. His honor declined to give this instruction as prayed ; stating to the jury that any concealment, or representation of its pecuniary condition, upon the part of the plaintiff to the defendant, at the time when the note was given, which would vitiate the same, must have been fraudulent as well as false ; and there had been no evidence given to the jury of any fraudulent concealment of, or false and fraudulent representations as to its pecuniary condition, by the plaintiff to the defendant, at the time when the note was given. To this instruction the defendant again excepted.

That the plaintiff, having at a general meeting of its stockholders or members, held on the 6th of August, 1866, adopted the resolution to wind up the affairs of the company, and to discontinue its business from that date, and this action not having been instituted until the 4th day of September, 1869, more than three years having elapsed since the dissolution of the plaintiff corporation, this action could not now be maintained by it. His honor declined to instruct the jury as requested, and the defendant again excepted.

That the note sued on was subject to the scale for Confederate

money, provided by the ordinance of the convention and the act of the General Assembly ; and if entitled to recover, the plaintiff was only entitled to recover the amount specified in said note, reduced by said scale.

His honor refused to give this instruction as prayed, and told the jury that the presumption arising under the ordinance and act of the General Assembly, that the note sued on was solvable in money of the value of Confederate currency at the date when the note was given, was in this case rebutted by uncontroverted evidence. Defendant again excepted.

The defendant then asked his honor to rule that this suit was not commenced in due time, which ruling his honor refused to make, and the defendant excepted.

In support of his first counter-claim, the defendant prayed his honor to instruct the jury, that if he was induced to pay to the plaintiff the sum of $21.70 at the time of the execution of the note sued on, the plaintiff then being insolvent, by the false representation of the plaintiff's agents and officers as to its solvency, and the concealment of its true pecuniary condition, then the defendant was entitled, as against the plaintiff, to a counter-claim of $21.70 with interest.

His honor declined to give this instruction as prayed, stating to the jury that there was no evidence of any fraudulent concealment of its pecuniary condition, or of any false or fraudulent representations as to its solvency, by the plaintiff, or its agents or officers, whereby the defendant had been induced to pay it the said sum of $21.70, at the time when he executed the note. Again the defendant excepted.

The jury returned a verdict in favor of the plaintiff. Judgment in accordance therewith, and appeal by defendant.

FULLER & ASHE, SMITH & STRONG, and BATCHELOR, *for Appellant.*

FOWLE, BATTLE & SON, and HAYWOOD, *contra.*

SETTLE, J.

All of the important questions presented by this record were considered and decided in Conigland vs. N. C. M. Ins. Co., Phil. Eq., 341, and the learned counsel who argued this case at the present term candidly admitted that authority to be against him, and decisive of this action, unless the court reversed that decision.

After giving to the able argument of counsel due consideration, we

see no reason to abandon any of the positions established by that decision.

It is a well considered opinion of the court, delivered by the chief justice, and, as we have before said, meets fully the merits of this case. Some of the evidence offered by the defendant and rejected by the court was admissible, but we need not consider it, for if all that was competent had been admitted, it could not have changed the result. So the defendant has suffered no harm from the rejection of evidence.

The judgment of the Superior Court is affirmed.

SUPREME COURT OF NORTH CAROLINA.

JUNE TERM, 1874.

G. A. WHITLEY, ADM'R, ETC.

vs.

PIEDMONT & ARLINGTON LIFE INS. CO.*

The premium upon a policy of life insurance is considered paid to the company, when, according to instructions, it is delivered to the express company, addressed to the agent of the insurance company.

A policy of life insurance is not binding until the premium is paid—such a clause being contained in the application. And it is the duty of the assured to communicate to the company any material change in his health, in the interval between the application and the completion of the contract by the payment of the premium.

This was a civil action, on a policy of life insurance, tried before Buxton, J., at the Spring Term, 1874, of Stanly Superior Court.

On the trial below many points were raised and decided by the presiding judge, to whose rulings exceptions were taken, but as most of them are not material to the questions decided in this court, they are omitted. The opinion of Justice RODMAN contains all the material facts of the case.

* Published in 71 North Carolina Reports. For report of trial in court below, see 3 Insurance Law Journal, 531.

Under the rulings of his honor in the Superior Court, the jury rendered their verdict against the plaintiff. Judgment in accordance therewith, and appeal by the plaintiff.

McCorkle & Bailey, *for Appellant.*

Montgomery and Battle & Son, *contra.*

Rodman, J.

There are many exceptions in this case as to the competency of evidence which we do not think it material to consider. The material facts, and about which there seems to be no dispute, are these :

On 31st of March, 1872, Matthew Hohn, the intestate of the plaintiff, signed and delivered to the agent of the company a written application for an insurance on his life for $2,000.

It is not denied that the representations therein, as to the health of Hohn at that time, were true. The application contained this language just above the signature of Hohn : "It is hereby declared * * * also that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall have been received by said company, or some authorized agent thereof, on proper receipt of the company, during the lifetime of the person therein assured. The undersigned further binds himself to pay the premium due on policy for which this application is made as soon as policy is issued by said company, or in default of so doing, this is his obligation on which action may be brought at law to recover the same," etc. The application was forwarded to the company by its agent, Courts, who received a policy dated 8th April, 1872. About the 20th April, Hohn received a letter from Courts, dated 12th April, informing him that the policy had been received, and directing him, as he had previously done, to send the premium of $38.84, together with $1, his fee, either by express or by post-office order, to him (Courts) at Ruffin, N. C. Some time early in May, Hohn was taken sick ; he was quite sick on 11th of May, and on that day he, or his relatives, (we think it immaterial which,) delivered to the express agent at Concord a package containing the amount of the premium and fee, directed to Courts at Raleigh, N. C. Hohn died on 13th of May. Courts happening to be in Raleigh on 3rd of June, received the package of money there on that day, and wrote to his son at Concord to countersign the policy and send it to Hohn. Courts was at that time ignorant of the sickness and death of Hohn. The policy

was countersigned on 17th of June, and forwarded to the late residence of Hohn. The premium soon after its receipt was forwarded to, and received by the company.

The policy contains the following: "And it is further agreed by the within assured, that the notice contained on the back of this policy is accepted by the assured as forming a part of this contract," etc., and also, "Not binding on the company until countersigned by its authorized agent or officer, D. W. Courts, or such sub-agent as may be designated by said agent or officer, and the advance premium paid." The page headed "Notice," contains as follows: "The premium of this policy is payable at the commencement of this risk in one or more premiums, as may be expressed," etc.

We may shortly dispose of some preliminary questions. We consider that the premium was paid to the company when it was delivered to the express agent at Concord, directed to Courts. It is true the address was not in conformity with his directions, as it was to Raleigh and not to Ruffin; but as he did actually receive it within a reasonable time, and accepted and forwarded it to the company, who retained it without objection, we consider that any variance from the directed address was waived. Under other circumstances such a variance might be material; we confine our opinion to the particular case before us. May on Insurance, sec. 345, p. 412.

We also consider that it is immaterial whether the premium was paid with the express knowledge and assent of Hohn, or by his relatives without his express assent. Such assent must be presumed under the circumstances. The payment was made for his benefit, and it will be presumed, in the absence of contrary evidence, that a person assents to what is so done; as for example, that he accepts a deed made to him, and delivered to one who professes to be his agent, although in fact he is not.

The main questions are:

1. When was the contract of insurance consummated? Was it upon the acceptance and approval of the application by the company, or upon the payment of the premium on 11th of May?

2. Supposing it was consummated only on the payment of the premium, was the representation of health contained in the application a continuing one up to the consummation of the policy? Because in this last case it would be the duty of the assured to disclose to the company any material alteration in his health in the interval, and as this was not done, and the representation of his health contained in the application, although true at its date, was not true on 11th of May, if

the representation must be considered as made on that day, it would be false, to the knowledge of the plaintiff, and he would not be entitled to recover.

I. On the first question: We think that the clear declaration in the application, that the policy shall not be binding until the premium is paid, followed by a clause in the policy to the same effect, is conclusive on this point. It is true that, taking this to be so, there seems to be no necessity for the words which immediately follow, and which bind the applicant to pay the premium when the policy is issued, because if the premium is paid before the policy is delivered, or if the two acts are exactly concurrent, this obligation could have no effect. We consider it, however, as having been introduced from great caution, and to provide for a possible case in which the delivery of the policy might precede.

II. Was it the duty of the assured to communicate to the company any material change in his health in the interval between the application and the completion of the contract by the payment of the premium?

No rule seems to be better settled than that, upon a contract of insurance, it is the duty of the assured, at or before the making of the contract, to communicate all the facts within his knowledge which may affect the risk. 1 Phil. Ins., sec. 524; May Ins., sec. 200, p. 210.

This duty cannot be the less obligatory because the assured has shortly before represented or warranted a fact to be true, which then was true, but has since ceased to be so. In such case the insurer naturally and rightfully infers that the thing insured continues in the same condition as far as the assured knows.

In Edwards vs. Footner, 1 Camp., 530, the action was on a policy of insurance on goods in the Fannie, from London to Hayti. The ship was captured by a French privateer with the goods on board About a week before the policy was signed, the broker for the plaintiff stated to the defendant that the Fannie was to sail with certain armed ships, and that she herself was to carry ten guns and twenty-five men. The Fannie, in fact, sailed by herself, and carried only eight guns and seventeen men. Lord Ellenborough said, "If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterward altered or withdrawn."

In Traill vs. Baring, 4 De Gex, Jones & Smith, 318, the facts were: The International Life Assurance Society had assured the life of Lydia Taylor for a large sum. On 9th May, 1861, the society assured her life for £3,000, (a part of the sum,) with the Clerks' Association

On 10th May the secretary of the association called on the secretary of the Reliance Society, and proposed that that society should take part of their risk on Lydia Taylor's life by way of re-assurance, stating that the Victoria office had agreed to undertake that risk to the amount of £1,000, and that the association would themselves retain £1,000 of it, and proposing that the society would take the remaining £1,000. The proposal was accepted on the same day. On 18th May, a policy was accordingly issued, being the one on which the action was brought. It was afterward discovered that the association, instead of retaining the risk themselves to the amount of £1,000, had on the 15th May, (three days before the date of the policy,) assured, by way of re-assurance, the whole of its risk with the Victoria office. Lydia Taylor died, and the society refused to pay.

Lord Justice Turner said, "I take it to be quite clear that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterward altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation, to communicate to the party to whom the representation has been made, the alteration of those circumstances; and that this court will not hold the party to whom the representation has been made, bound, unless such a communication has been made." May on Insurance, sections 190, 191, pp. 199, 201.

In both the cases cited, it was admitted there was no actual intent to deceive, and that the representations were *bona fide*, and true at the time they were made.

We think these cases stand on the ground of an admitted principle of equity, which substantially runs through the whole law of that class of contracts in which confidence is reposed in each other by the contracting parties.

The plaintiff is not entitled to recover on the policy. He is entitled to recover the premium paid, on the ground that as the risk never accrued, there was a total failure of consideration; but not in this action, as it is not demanded.

The shape of the issue which the judge submitted to the jury, "Whether Hohn had paid the premium in his lifetime, according to the contract;" was objectionable, because it involved matter of law with matter of fact.

But the instructions which his honor afterward gave to the jury separated the two, and left to the jury only the determination of the facts. Judgment affirmed.

READE, J., *dubitante.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

FRANKLIN FIRE INS. CO., *Plaintiff in Error,*

vs.

SAMUEL E. COLT.

A provision in the company's charter declares that every contract, bargain, agreement and policy for the purpose of insuring against fire shall be in writing or in print under the seal of the corporation, signed and attested by its officers.

Held, that this provision has reference only to the formal executed contracts of the company, not to the initial arrangements that necessarily precede them, and does not invalidate an initial or preliminary contract for insurance with an authorized agent of the company, though not in writing.

Held, that credit which the agent was authorized by usage to give did not impair the validity of the contract, which could be enforced in a court of equity.

Held, that an agent might after a fire fill up a policy in accordance with a previous parol agreement, and such policy would bind the company.

Held, that such policy was the property of the insured, and could be recovered on, though still held by the agent.

Judgment affirmed.

In error to the Circuit Court of the United States, for the District of Connecticut.

FIELD, J.

The charter of the company defendant, in the same clause which authorizes its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements policies, and other instruments" as may be necessary, declares that every such contract, bargain, agreement and policy shall be in writing, or in print, and be under the seal of the corporation and be signed by the president and attested by the secretary or other officer appointed for that purpose.

Where similar language as to the form of the contract, or policy, was used in connection with a like grant of power to insure, in a general statute of Pennsylvania respecting insurance companies, it was held by the late Mr. Justice Grier, in a case before the Circuit Court of the United States, that a company to which the law applied, could make an insurance which would be legally valid, only by a policy attested by the officers and seal of the corporation. The learned justice undoubtedly considered that the mode in which the contract or policy could be made was so associated with the grant of power as to be essential to a valid excercise of the power. And such appears to be the natural import of the language of the clause of the charter of the defendant under consideration in this case, when the whole clause—that which confers the power and that which prescribes the mode of its exercise—is read.

But the learned justice at the same time very justly observed, that before the policy was attested in due form, the president or secretary, or whoever else might act as general agent of the company, might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract specifically ; and that where a loss happened, to avoid circuity of action the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy properly attested.

The requirement of the charter in this case has reference, in our judgment, only to executed contracts or policies of insurance, by which the company is legally bound to indemnify against loss, and not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company.

The preliminary arrangements for the amount and conditions of insurance are in a great majority of instances made by agents. It is always so where the insurance is effected out of the State where the company is incorporated and has its principal place of business. The charter of the company in this case authorized the president and directors to appoint officers and agents for conducting its business in other places than the city of Philadelphia. And it would be impracticable to carry on its business in other cities and States, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not

aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.

In a recent case in the Court of Appeals of Kentucky, this precise question was considered, and its determination was in accordance with the views we have expressed. There the suit was to enforce a parol contract of insurance made by the agent of the company, whose charter provided that all policies or contracts of insurance made by the corporation should be "subscribed by the president, or president *pro tem.*, and signed and attested by the secretary, and being so signed and attested," should be binding and obligatory upon the corporation without its seal, according to the tenor, extent, and meaning of the policies or contracts. And the court held that this clause did not require an executory contract for an insurance to be in writing, and said that it knew of no American charter which did so require, observing that whilst a policy as an executed contract of insurance was defined to be documentary, and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no statute of frauds applied, and that the common law did not require writing.

There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides, with full knowledge by the agent of the condition, character, and value of the property insured. The credit allowed for the payment of the premium was an indulgence which the agent was authorized by general usage to give. Its allowance did not impair the preliminary contract; that being valid could have been enforced in a court of equity against the company; and having been enforced by the procurement of a policy, an action could have been maintained upon the instrument; or the court in enforcing the execution of the contract might have entered a decree for the amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the action of the agent in filling up the blank policy, which was duly attested, as he should have done immediately after the preliminary arrangement with the assured. The agent was authorized to do after the fire, that which he had previously stipulated to do on behalf of the company. The original neglect to fill up the blank

policy at once, constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agent. The filling up of the policy was a voluntary specific performance of the preliminary agreement. And, when filled up, the policy was by express stipulation to be held by the agent in his safe for the assured, and no actual manual transfer was, under these circumstances, essential to perfect the latter's title. It then became his property, and upon a refusal of the defendant to surrender it, two courses were open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.

In Kohne vs. Insurance Company the terms of insurance upon a vessel were agreed upon between the agent of the plaintiff and the company. For the premium a note was to be received with approved security. A policy was accordingly filled up by the president, in conformity with the agreement, and notice thereof given to the agent. Three days afterward the agent called at the office of the company to deliver the note and receive the policy. The company had in the meantime heard of the loss of the property insured, a fact which was unknown to either party when the agreement was made, and refused to deliver the policy, asserting that the agreement for the insurance was inchoate, which it had a right to retract. The assured then brought trover for the policy, and Mr. Justice Washington, presiding in the Circuit Court, sustained the action, holding that the contract was perfected when the policy was executed, and, of course, that the possession of the instrument by the company, after giving notice of its execution, did not impair the title of the assured.

In Lightbody vs. North American Insurance Co., the agent of the plaintiff made a contract of insurance of certain buildings with the agent of the defendant on the 30th of March, and paid the required premium. On the following morning the buildings were destroyed by fire. The policy was made out and delivered by the agent on the 21st of April following, after the company had refused to pay the loss; and the court held that the policy took effect by relation from the day of its date, which was the day the premium was paid and the contract concluded; that it was the manifest intent of the parties that the contract should operate from its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had

then been delivered ; that the agent pursued his authority in delivering the policy after the loss, and that the delivery bound the defendants.

In the case of The City of Davenport vs. Peoria Marine and Fire Insurance Co., the power of an agent to issue a policy after a loss, pursuant to his agreement, was very fully and ably considered with reference to the principal decisions on the subject. There the agreement for insurance was made between the parties by their agents on the 20th of March ; on the night of the same day the property was destroyed by fire ; on the following morning the policy was executed and delivered in accordance with the agreement, both parties at the time being ignorant of the loss. The court held that the policy was valid and binding ; that the doctrine that an act done at one time may take effect as of a prior time, by relation back, was applicable to contracts of insurance ; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, took effect by relation as of that date.

Numerous other authorities to the same purpose were cited on the argument, but we do not deem it necessary to pursue the subject further. We see no error in the ruling of the court below, and its judgment must, therefore, be affirmed ; and it is so ordered.

[NOTE.—The following authorities are cited by Hon. J. O. Pierce in the *Central Law Journal* in connection with the above case. See also Dayton Ins. Co. vs. Kelly, 4 Ins. Law Jour., 169, and Haslett vs. Alleghany Ins. Co., 4 Ins. Law Jour., 372.—ED. INS. LAW JOURNAL.]

Constant vs. Ins. Co., 3 Wallace, C. C., 316 ; Security Fire Ins. Co. vs. Kentucky Marine and Fire Ins. Co., 7 Bush, 81 ; Sheldon vs. Conn. Mutual Ins. Co., 25 Conn., 207 ; Post vs. Ætna Ins. Co., 43 Barb., 351; Walker vs. Metropolitan Ins. Co., 56 Me., 371 ; N. E. Ins. Co. vs. De Wolf, 8 Pick., 56 ; Baptist Ch. vs. Brooklyn Ins. Co., 28 N. Y., 153 and 19 N. Y., 305 ; Henning vs. U. S. Ins. Co., 47 Mo., 425, and 2 Dillon, 26 ; Mutual Ins. Co. vs. McGillevray, 9 Lower Canada R., 488 ; Head vs. Providence Ins. Co., 2 Cranch, 167 ; Flanders on Fire Insurance, pp. 116 and 130 ; May on Insurance, pp. 16-23 ; Bragdon vs. Appleton Ins. Co., 42 Me. 259 ; Hallock vs. Com. Ins. Co., 2 Dutcher, (N. J.,) 268, and 3 Dutcher, 645 ; Keim vs. Home Ins. Co., 42 Mo., 38 ; Baldwin vs. Chouteau Ins. Co., [3 Ins. Law Jour., 369 ;] Ellis

vs. Albany City Co., 50 N. Y., 402; Merchants Ins. Co. vs. Patterson U. S. S. C., January, 1874; Marland vs. Royal Ins. Co. 71 Penn. St., 393; Perkins vs. Washington Ins. Co., 4 Cowen, 645; Carpenter vs. Mutual Safety Ins. Co., 4 Sandf. Ch., 408; Union Marine Ins. Co. vs. Com. Ins. Co., 2 Curtis, 524; Palm vs. Medina County Ins. Co., 20 Ohio, 529; Harding vs. Carter, Park on Insurance, p. 4.

SUPREME COURT OF PENNSYLVANIA.

OCTOBER TERM, 1874.

Error to the Court of Common Pleas for Alleghany County.

HASLETT

vs.

ALLEGHANY INSURANCE CO.*

Where contracts of insurance are required by the charter to be in writing, a mere verbal contract is not binding.

GEO. SHIRAS, ESQ., *for Plaintiff in Error.*

M. W. ACHESON, ESQ., *for Defendant in Error.*

PER CURIAM.

This case turns on the terms of the reserved question, that being all that is before us. The question reserved was, whether a verbal contract of insurance, such as specified in the plaintiff's first point, is binding on the defendant, and entitles the plaintiff to recover in this action. Contracts of insurance are expressly required by the defendant's charter to be in writing, under the seal of the corporation and signature of the president or vice-president. The point referred to in the reservation does not raise a question of estoppel. It is not averred that the premium was paid and that the plaintiff had no knowledge of

* From the Philadelphia *Legal Intelligencer*; See also on this point the case of Franklin Fire Ins. Co. vs. Colt, p. 367.—EDITOR INS. LAW JOURNAL.

the charter requirement, nor is notice to the defendant of non-insurance in St. Louis averred in the point, though it is set forth as a part of the transaction that the insurance should take effect if Captain Kormby had not so insured the freight in St. Louis. This implies it was not to take effect if he had insured there. Notice of non-insurance was therefore essential to fix the defendants finally for payment. There being no sufficient ground of estoppel alleged, the case fell back according to the terms of the reservation, upon the mere binding effect of a verbal contract for insurance, and this the charter answers in the negative. The second question does not arise.

Judgment affirmed.

COURT OF APPEALS OF KENTUCKY.

OCTOBER 22, 1874.

Appeal from Jefferson Court of Common Pleas.

ANN E. SPRATLEY, *Appellant,*

vs.

MUTUAL BENEFIT LIFE INS. CO.,

A policy of insurance issued by a New Jersey company to a citizen of Virginia, containing no condition for the payment of premiums in any other place than New Jersey, is a contract to be performed in the latter State, and must be governed by its laws.

A policy was issued by a New Jersey company to a citizen of Virginia in 1860. Payment of subsequent premiums was prevented by the war. The insured life terminated in 1863, and notice and proofs of that fact were made to an agent of the company in Kentucky in 1872. *Held,* (1) that the parties were bound to give notice in a reasonable time; (2) that the delay here was unreasonable; (3) that the acts of Virginia suspending the statutes of limitation in certain cases did not apply to foreign debtors like this company; (4) that the statute of limitations must be held to have commenced to run within a reasonable time (six months) after the termination of the war, and the policy not being under seal was barred in six years by the laws of New Jersey and in five by the laws of Virginia, and therefore could not be recovered upon in Kentucky.

BULLITT, BULLITT & HARRIS, *for Appellant.*

GAZLAY & REINECKE, *for Appellee.*

LINDSAY, J.

October 9th, 1860, the Mutual Benefit Life Ins. Co. issued to Ann E. Spratley, of Suffolk, Virginia, a life policy for $5,000 upon the life of her husband, Thomas W. Spratley. Before the annual premium for 1861 fell due, the powers of the agent at Suffolk had been revoked in consequence of the civil war. For that reason said annual premium, and those subsequently falling due, were not paid.

In September, 1863, Thos. W. Spratley died at Petersburg, Virginia. In October, 1872, Mrs. Spratley, through her agents and attorneys, delivered to K. W. Smith, agent for the insurance company at Louisville, Kentucky, proof of the death of the insured. On the 17th of February, 1873, this action was instituted.

The company relies on numerous defenses: among others the failure by the assured within reasonable time to present due notice and proof of death. It also pleads and relies on the statutes of limitation. It is in proof that the limitation to actions on life insurance policies not under seal (as is the case with this one) is six years in New Jersey, the domicile of the company, and five years in the State of Virginia, where appellant insists that all the stipulations of the contract were to be performed. Counsel argue that as by the terms of the policy the money is not due and payable until ninety days after due notice and proof of death, limitation does not begin to run until such notice with proof is given to the company. They attempt to assimilate the contract sued on to notes payable on demand. It seems to us that there is an essential difference between them. In cases of notes payable on demand, the debtor is fully advised as to the existence of his debt, and of his subsisting obligation to pay it. It is within his power to seek his creditor, and discharge himself from liability by paying it. So long as he remains quiet and inactive, it is to be presumed that he consents to the inactivity of the creditor, and that the time when the limitation is to begin to run is postponed by the consent of both the parties to the contract. Not so in cases of life insurance. The company has no certain means of ascertaining when by the death of the insured its liability to pay accrues. To remedy this difficulty, the contract requires the assured to notify the insurer of the happening of this event.

The presumption is conclusive that the parties to the contract intended that this notice should be given as soon as it was reasonably possible to do so. The insurer has the right whilst the witnesses are

still alive, and the circumstances still fresh in their memories, to investigate the causes of the death, in order to ascertain whether or not it is liable to pay the insurance. In cases of apparently unreasonable delay, the assured must present a satisfactory explanation therefor, or else the statute should be held to begin to run within a reasonable time after the death.

In this case the prevalence of civil war rendered it impossible to make and present the proof until about the middle of the summer of 1865.

The evidence shows, however, that with reasonable diligence the assured might have been in an attitude to sue by the 1st day of January, 1866. The action was therefore barred in Virginia under the statute of limitation of that State on the 1st day of January, 1871. It is claimed, however, that the running of the statute in said State was suspended by legislative enactment.

On the 2d of March, 1866, the Virginia legislature passed a statute providing that the time intervening between the 17th of April, 1861, and the enactment of said statute should be excluded from the computation of time within which it was theretofore necessary to commence any action or proceeding.

By this act the limitation commenced to run on the 2d of March, 1866, and the action was barred on the 2d of March, 1871.

But it is claimed that the statute was still further suspended by an act passed on the same day, which deprived creditors of the right to enforce the collection of certain of their debts until the 1st day of January, 1868, and provided that the time during which said act should remain in force should be excluded from the computation of time within which any action or proceeding was required to be commenced.

Foreign debtors were excluded from the operation of this act. The first section of this act was afterward continued in force until the first day of January, 1869. We need not determine whether this amendatory act also continued in force the section of the act of March 2d, 1866, suspending during its operation the statutes of limitation.

Appellee was a foreign debtor at the time both the original and amendatory statutes were passed, and therefore was not affected by them.

It may be that the laws of Virginia gave to foreign insurance companies doing business in that State before the war "a sort of local existence," as was held by a bare majority of the Virginia Court of Ap-

peals in the case of the Manhattan Life Insurance Co. vs. Warwick, 20 Grattan 614; 1 Ins. Law Jour., 115.

But, if this be true, it is equally true that the course pursued by Virginia in the war between the States effectually uprooted and destroyed "the sort of local existence" this appellee had in that State. Its domicile was within a State adhering to the Federal government, and from the time hostilities commenced between Virginia and the Federal government this appellee could not comply with the laws of Virginia, and therefore, without fault upon its part, lost its *quasi* local habitation in that State, and, as a matter of necessity, assumed toward Virginia and her laws its original character of a foreign corporation.

It was therefore, so far as this record shows, a foreign debtor in March, 1866, and in nowise affected by the provisions of the act of the 2d of that month.

But in addition to all this, the policy of insurance was a New Jersey contract, to be performed, so far as the payment of insurance was concerned, in New Jersey. The company was expelled from Virginia by force, and was under no obligation to send agents to that State after hostilities ceased, either to solict further business or to put it in the power of Virginia creditors to sue it in the courts of that State.

The action was barred by the laws of New Jersey, and the court below was bound to instruct the jury that it could not therefore be maintained in this State. Wherefore, the instruction to find for the defendant did not prejudice the substantial rights of the appellant.

Judgment affirmed.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

WILLIAM A. BROWN, ET AL., *Respondents*,

vs.

THE ST. NICHOLAS INS. CO., *Appellant.**

A clause in a marine policy provided that in case of detention, by ice or the closing of navigation, from terminating the trip, the policy on the cargo should cease and the unexpired premium be returned. Also, that the vessel should touch and stay at any ports or places, where obliged by stress of weather or other unavoidable accident, without prejudice to the insurance.

The vessel, a canal boat, while being towed down the Delaware, was separated by a heavy gale from the tug and forced ashore, losing a portion of her deck cargo. Ice did not interfere with navigation at the time, but during the same night ice formed round the boat so that the tug could not reach it. After the thaw, wind and ice forced the boat on another vessel and sank it. The cargo was thus injured to more than half its value.

Held, that the gale, and not the ice, was the proximate cause of loss in the first instance.

Held, that under the circumstances the stranding was closely enough connected with the ultimate loss of the boat to make the underwriters liable under abandonment as for a total loss.

Judgment affirmed.

Appeal from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment rendered for the plaintiff at the circuit.

The action was brought to recover the amount of a marine policy of insurance, issued in December, 1863, by the defendant upon a cargo of hay laden on the canal-boat George R. Hale, on a voyage from New York to the city of Washington.

The policy contained a clause, known as an "ice clause," in the following terms: "It is understood and agreed that if any boats, the cargoes of which are covered by this policy, are prevented or detained by ice or the closing of navigation from terminating the trip,

* Argued May 29, 1874.

then in such case the policy shall cease to attach upon said cargo, and this company shall return the premium for the unexpired portion of said trip."

There was also a clause that the insured vessel could "touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance." The canal-boat with her cargo left New York in December, 1863, and proceeded by way of the canals with a tow of other boats to Philadelphia.

She left Philadelphia, January 1st, 1864, in a tow of about twenty-five boats, towed by four or five steam-tugs. They proceeded down the Delaware River on the way to the Chesapeake and Delaware Canals.

In the afternoon the wind began to blow, increasing to a heavy gale. During the gale the tugs were separated from the canal-boats, and the latter were drifted ashore the same night at a place called Church's Landing. This was on the New Jersey side of the river, about 15 miles from Philadelphia. The Hale lost from her deck twenty or more bales of hay at this time, but sustained no other injury.

When she went ashore there was some ice in the river, but not enough to interfere with navigation. During the night ice formed around the boats to such an extent that the tugs could not reach them next morning, though an effort to do so was made. The boat Hale continued frozen in until a thaw occurred, January 18th or 19th.

After the thaw, on the morning of the 20th, the wind and ice forced the boat upon another canal-boat, in such a way that when the tide went down she broke in two and sank.

Four or five days afterward, the remaining canal-boats proceeded under tow, by way of the canal, to Washington, where they arrived safely with their cargoes.

The channel of the river was open during the time that the boats lay ashore at Church's Landing, though incumbered by floating ice. There was nothing but the action of the gale to prevent the boats from reaching the canal at Delaware City on the morning of January 2nd.

After the wreck, the plaintiffs abandoned the cargo to the insurers, (defendants,) and claimed a total loss. The cargo was injured by contact with the water to more than one half its value.

On the trial the judge charged the jury that the stress of weather, by driving the vessel ashore, must be regarded as the primary cause

of the loss of the cargo. To this proposition exception was taken by defendants.

The defendants requested the judge to charge the jury that the plaintiffs were entitled to recover no more damages than sufficient to compensate for the injury to the cargo at the time the vessel was frozen in. The judge refused so to charge, and the defendants excepted.

The court thereupon charged the jury that the plaintiffs were entitled to recover the full value of hay on board the boat George R. Hale, insured by the policy in question. To this direction due exception was taken. The jury having rendered a verdict accordingly, judgment was given against the defendants. This judgment having been affirmed at General Term, the defendants appealed to this court.

J. C. Perry, *for Appellants.*

R. H. Underhill, *for Respondents.*

Dwight, C.

The sole question in this case concerns the proper construction of a clause in a marine insurance policy, commonly termed an "ice clause." The policy attached to a cargo of hay passing from New York to Washington in a canal-boat under tow through the Delaware River. The voyage commenced in the winter, and the insurers, while undertaking the ordinary sea perils, provided if the boat on which the hay was laden was "prevented or detained by ice, or the closing of navigation, from terminating the trip, then in such case the policy shall cease to attach upon the cargo, and the company shall return the premium for the unexpired portion of the trip."

It will be observed that this is not the ordinary case of a warranty operating as a condition precedent to the attaching of the policy. It rather assumes that the policy has attached and provides for its cessation. It is rather in the nature of a condition subsequent. It recognizes the validity of the policy, and the liability of the insurers up to the time when their responsibility terminates on the happening of the prescribed event, prevention or detention by ice or the closing of navigation from terminating the voyage. Until those events happen the insurers are clearly liable for all losses occurring from the ordinary perils of the sea. When they transpire, the policy ceases to have binding effect.

The only point to be considered is whether the boat in the present case was prevented or detained by ice from terminating the voyage.

Was the true cause of detention, etc., the ice or the stress of weather? If the latter, the insurers are still liable, as the main clauses of the policy are applicable; if the former, the insurers are discharged.

The true construction of these words is to be sought in the ordinary rules which control the interpretation of written instruments. They are not ambiguous and need no aid from the testimony of experts. Their signification is purely a question of law. 52 N. Y.

It will be observed that there are two general modes in which it is anticipated the boat may be precluded from accomplishing its voyage: ice or the closing of navigation. These causes may operate either temporarily or permanently. Whether there was a delay by the presence of ice, or a termination of the voyage by the closing of navigation, the insurers were in either case to be discharged. It is plain that either of these causes must operate in the same general manner—that is, as the efficient cause of detention or breaking up of the voyage.

The facts of the present case showed that there was no closing of navigation and no detention of boats by ice along the usual channels of navigation. A heavy gale drove the boat in which the cargo in question was carried, on to the shore, so that she was stranded. The detention caused by her being driven out of her course was due, beyond all question, to the gale. Her detention on the shore until the ice formed around her was due to a consequence of the gale stranding. Did that cause cease to operate because ice formed in front of the boat, and between her and the channel? Is it not rather the true view, that the pressure of the ice prevented the removal of the cause which created the detention and was slowly working the destruction of the cargo.

What is the proximate cause of the loss? This is always a difficult question to determine in the case of a conjunction of causes. The policy must have, in settling this question, a reasonable interpretation with a view to effectuate the intention of the parties. The words "detained or prevented by ice," etc., must mean detention in the ordinary course of navigation. The contract contemplated that the canal-boat should be moved by a tug. This motive power was carried away by a storm, and ice subsequently formed so as to prevent it from returning. The efficient cause of the detention was the loss of the motive power through the stress of the storm, and the ice acted only as an obstacle to its restoration. Suppose that the tug after separation had been captured by an enemy, would the loss of the canal-boat have been due to the capture of the tug? Would not the

true cause of its loss have been the storm which drove the two vessels asunder, and left the canal-boat at the mercy of the elements?

A well-known writer on the law of marine insurance has laid down the rules applicable to this subject which appear to be sound, and which were approved by the Supreme Court of the United States in 12 Wall., (N. J.) 196. These rules are as follows:

"1. In case of the concurrence of two causes of loss, one at the risk of the insured, and the other insured against, or one insured against by A, and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion.

"2. Where different parties, whether the insured and the underwriters or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss." 1 Phillips on Insurance, sec. 136-7. The present case falls under the second of these rules. The predominating efficient cause is the storm. It is well settled that an insurer is liable for all the consequences directly resulting from a peril insured against, as where a boat is lost after a storm has ceased, in consequence of damage done during a storm. 2 Pars. on Maritime Law, 261.

Suppose that in the present case a general of an army had laid down a bridge between the canal-boat as she lay on shore and the tugs in the channel, would the detention have been due to the bridge or to the stranding? If a man's house were besieged by burglars and his friends were prevented from relieving him by the sudden closing of a gate by some distinct act of persons unconnected with the burglary, would his detention be due to the closing of the gate, or rather to the act of the burglars as "the predominating efficient cause?" This point was to some extent involved in Ionides vs. Universal Marine Ins. Co., 14 C. B., N. S., 259. The ship, insured against the perils of the sea, went ashore. The light at Cape Hatteras, N. C., existing there for many years, and visible for twenty-five miles at sea, had been extinguished by the Confederate authorities to harass the United States shipping. The question was whether the cause of the loss was the peril of the sea or the absence of the light. Byles, in giving his opinion, said: "The original cause, and in popular language the cause of the loss, was the captain's being out of his reckoning. He was some fifty miles to the westward of his course without knowing it. The absence of the light was merely the absence of an extrinsic saving power;

could that be said to be the cause of the ship's destruction? Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned, could it be said that the man is drowned because of the absence of the saving power?" P. 296. In the case at bar, the detention commenced with the stranding. That detention and its concomitants never ceased until the boat was destroyed. That was the only detention existing, and the failure of the tug to reach the boat was, in the words of Byles, J., the "absence of an extrinsic saving power." Any other view would lead to mere speculative considerations. Suppose that the intervening ice had not formed, what certainty is there that the canal-boat could have been got off from the shore so as to have pursued her voyage? The detention occasioned by the stranding never ceased until the dangers of the thaw came on, which, in combination with the existing causes growing out of the stranding, led to her destruction. This test has been suggested in one of the cases: Suppose that an insurance had been made in another company against the very cause of loss excluded in this. For example, the boat is insured "against detention by ice," could there have been a recovery on the facts found at the trial? Would it not have been successfully objected that the loss was occasioned by the stranding, and that the detention by ice was merely incidental to that?

Another view of the case may be suggested. The voyage terminated with the stranding. There was never a moment after that occurrence in which it was resumed. Accordingly the formation of the ice could not properly be said to detain a boat whose voyage before that formation had already come to an end. In Boudrett vs. Henlig, Holt, N. P. C., 149, the facts were that of the goods insured against a peril of the sea, a part were lost and a part were got on shore. This last portion was plundered and destroyed by the inhabitants of the coast, so that no part of it ever got to the possession of the insured. Gibbs, C. J., held this to be a case of total loss. The reason given is, that the portion of the goods saved from the wreck, though got on shore, never came again into the hands of the owners. The total loss was the proximate result of the wreck. This case was approved in Ionides vs. Universal Marine Ins. Co. *supra.*

In Hohn vs. Corbett, 2 Bing., 295, goods were insured "free from capture and seizure." The vessel was stranded off Maracaibo, and part of the cargo damaged, and both vessel and cargo seized by royalist,s then in possession of the coast, as prize. There was held to be a total loss both of the damaged and undamaged goods by a peril

of the sea. The loss was deemed to take place at the time of the stranding as to all the goods. The judge in delivering his opinion said, it is clear that the goods would never have moved, as the ship never moved. It was as if they had been cast on a rock and were completely out of reach. P. 210. To the same effect is the language of the court in Magoun vs. N. E. Mar. Ins. Co., 1 Story, 164-165, where it is laid down that if there be a capture, and before the vessel is delivered from that peril she is afterward lost by fire or accident, the whole loss is attributable to the capture. The vessel was never delivered from that peril until she was virtually destroyed and unable to perform the voyage.

In such a case the insurers are liable, though the loss is followed by the operation of a peril excepted from the policy. Phillips on Insurance, § 1161.

It is not claimed that stranding is *ipso facto* a total loss. It may, and often does, prove the destruction of the voyage, by the ship afterward becoming a wreck before she shall be put afloat. Wood vs. Lincoln etc. Ins. Co., 6 Mass., 479 ; Manning vs. Newnham, 3 Douglas, 136 ; 2 Phill. on Ins., § 1526.

Whether it is to be regarded as a total loss or not, depends on all the circumstances of the case, as they ultimately turn out, which may relate back to the time of stranding, and characterize it. It is closely analogous to submersion, and is *prima facie* evidence of total loss. Sewall vs. W. I. Ins. Co., 11 Pick., 90, 94.

If the ship remains stranded and is subsequently lost, and it is claimed by the insurers that such loss is occasioned by peril excepted from the policy, it must appear that it is owing to the direct effect of the excepted peril. 1 Phill. on Ins., §§ 1129, 1151. The burden of proof is thus cast on the defendant. Per Bagley, J., in Levi vs. Allnutt, 15 East., 269.

It is now proper to consider the authorities cited on behalf of the defendant.

The case of Hadkinson vs. Robinson, 3 B. & P., 383, (A. D., 1803,) was an insurance against capture, on a cargo from an English port to Naples, with leave to join a convoy. In the course of the voyage, information was received by the master that the port of Naples was closed against English ships. The ship accordingly proceeded to another port, where the cargo was sold for a small sum, whereupon the assured abandoned as for a total loss. The court held that the fear or prospect of capture in a hostile port was not equivalent to capture itself, or, in its own language, that the peril must act directly

and not collaterally upon the thing insured. If the principle of this case be sound, of which there is great doubt, (3 Kent's Com., 293–4) it has no application to the case at bar, where a sea peril did act directly upon the boat, and occasioned its stranding.

Foster vs. Christie, 11 East., 205, is to the same general effect, Lord Ellenborough remarking that the risk insured against must be the effective cause of the loss.

Spayer vs. New York Ins. Co., 3 Johnson, 88, simply holds that if the event happens, in which the insurers are warranted free from liability, it is equivalent to an actual termination of the risk by the landing of the goods. This, of course, is not disputed.

Livie vs. Janson, 12 East., 647, is much relied on by the defendants. In that case, an English ship endeavored to elude, by night, an embargo in passing out of the port of New York. A body of ice, propelled by the tide and wind, drove her upon Governor's Island, where she was stranded. In the morning she was taken possession of by the custom-house officers, and finally condemned for a breach of the embargo. In an action on a policy of insurance, the court held that the loss was not occasioned by the stranding, but by the seizure, which was deemed to be the proximate cause of the loss. Two observations are to be made upon this case: one is, that the ship was engaged in the violation of law, and on account of that, the seizure was made. The loss was virtually occasioned by the act of breaking the embargo, (per Burrough, J., in commenting on Livie vs. Janson in Hohn vs. Corbett, *supra*, p. 212.) The other observation is, that the peril which was held to occasion the loss acted directly upon the property insured. In that aspect of the case, it falls within the rule laid down by Lord Avanley, in the case of Hadkinson vs. Robinson, already referred to, that the peril must act directly and not collaterally upon the thing insured.

This was not the case in the facts now under discussion as to the action of the ice. It acted only indirectly in preventing the tugs from going to the rescue of the boat. If it had reached the canal, and the storm had caused its banks to burst, and the boat had been swept out into the open fields, and ice had been formed between it and the canal, thus preventing the use of applicances for returning it to the canal, would the ice have acted directly in causing the detention? If so, and there had been no ice, would the earth that was washed out of the canal bank, and whose absence prevented the filling of the level, be a cause of detention? Or if laborers couldn't be got to shovel the earth back, would the absence of them be such a cause?

All these are obstacles or hindrances to the prosecution of the voyage, but none of them act directly as causes within the rule, either in Hadkinson vs. Robinson, or Livie vs. Janson.

It should be added that there is great reason to doubt the soundness of each of these cases. The former of them has already been remarked. Livie vs. Janson has been severely criticised by text writers and doubted in decisions. Mr. Phillips says, it is surely wrong, as well as the *nisi prius* case of Green vs. Elmslie, Peake's N. P. Cases, p. 212. He adds that these decisions need support themselves rather than suffice for the support of others. The case of Livie vs. Janson is treated unfavorably in Hohn vs. Corbett, *supra*, 295. In the recent case of Ionides vs. Univ. Marine Ins. Co., 14 C. B., N. S., 283, it is said by Welles, C. J., to be open to observation. See also Dole vs. N. E. Ins. Co., 2 Cliff., 394-433 ; 1 Phill. on Insurance, section 1136. The principle of the case seems to be opposed to a decision in the same court, Levi vs. Allworth, 15 East., 267, as well as to other cases already cited in this opinion.

The only other case necessary to be noticed is Patrick vs. Conn. Ins. Co., 11 Johnson, 14. In this case a cargo was insured from New York to Cadiz, and there was a clause in the policy that the insurers took no risks in port but sea risk. The ship was forced from her moorings in a violent gale and driven on shore, where she lay above high water mark. After the gale abated, she was forcibly taken possession of by French troops then holding the port, and burnt, with the cargo. The cargo was not injured by the stranding. The court held that the cargo was not lost through the stranding, but through the forcible act of the French.

The decision is rested solely on these doubtful cases of Livie vs. Janson, and Green vs. Elmslie, already considered, and can of course be of no higher authority. It is also quite difficult to reconcile with the decision immediately preceding it in the same volume, where the court held that on the same state of facts the ship was lost by means of the stranding. It seems impossible to deny that the cargo under the circumstances was identified with the ship, and that within the principle in Hohn vs. Corbett, *supra*, the goods were as completely lost at the moment of stranding as if they had been cast on an inaccessible rock.

It is not necessary to consider in detail the exceptions to the charge, as the views already given dispose of them. The judgment of the court below must be affirmed.

Judgment affirmed, with costs. All concur.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

CHARLES W. JEFFRIES, ADM'R OF ALLAN A. KENNEDY, *Plaintiff in Error,*

vs.

ECONOMICAL MUT. LIFE INS. CO.

The policy provided that it was issued and accepted on the following among other conditions: that the statements and declarations in the application "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." Also that the violation of any of the conditions should render the policy void.

The insured, in answer to the question whether he was married or single, stated he was single, whereas he was then married. To the question whether any application had been made to any other company, he answered No, whereas about six months previous he had applied for and obtained insurance in another company.

Held, that it was the agreement between the parties that the company should not be deceived either to its injury or its benefit. The company has a right to fix its own estimate of what is material, and made these questions material by making its liability depend upon the truth of the answers. To leave the question of materiality to the judgment of the jury would be a violation of the legal rights of the company. The attempt was to deceive the company, in which law and justice point to the same result, the exemption of the company.

Judgment affirmed.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

HUNT, J.

The plaintiff, as administrator of Allan A. Kennedy, brought his action against the Economical Ins. Co., alleging that, on the 19th day of October, 1870, it issued a policy of insurance upon the life of Kennedy, in the sum of $5,000, which policy was set forth at length; 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 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 :

1. 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.

6. That, in case of the violation of the foregoing conditions, or any of them, or of the insured dying in, or in consequence of, a duel, or in violation of the laws of the United States, or of any nation, state, or province, or by reason of intoxication, this policy shall become null and void.

The answer of the defendant, among others, contained the following allegations :

That the policy was by this defendant issued, and by the said Kennedy accepted, on the following express conditions and agreements contained in said policy and made part of said contract of insurance, to wit, that the statements and declarations made in the application for said 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, to wit : that, in case of the violation of the aforesaid condition, among others, or of the insured dying in, or in consequence of, a duel, or in violation of the laws of the United States, or of any nation, state, or province, or by reason of intoxication, said policy should become null and void. That said Allan A. Kennedy did violate the first condition in this : that the statements and declarations made by the said Kennedy, in his application for said policy of insurance, were not in all respects true, but were false in the following respects, to wit : Defendant says, that in and by said application for said policy of insurance, and on the faith of which said policy was issued, the said Kennedy, in answer to the question therein asked of him as to whether he was married or single, stated that he was single, meaning thereby that he was a single and unmarried man, whereas, in truth and fact, said Kennedy was then and there a married man, having a wife then living, as he, the said Kennedy, then and there well knew.

Defendant further says that in and by said application for said

policy of insurance, and on the faith of which said policy of insurance was issued, the said Kennedy, in reply to the question therein asked of him, "Has any application been made to any other company; if so, when?" answered, "No;" meaning thereby that he, the said Kennedy, had not prior thereto applied for insurance on his life to any other life insurance company; whereas, in truth and in fact, said Kennedy had, prior thereto, to wit, on or about the month of April, 1870, applied for insurance upon his life to the Mutual Life Ins. Co., of New York, and had been insured therein in the sum of $10,000, as the said Kennedy, at the time of making said answer, then and there well knew.

To this plea a demurrer was interposed, which was sustained by the court below. From the judgment entered upon this demurrer, the present writ of error is brought.

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 insurance 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 offense 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 averments 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."

Secondly, we are to observe 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 this 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 determine 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 stipu-

lates 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 could 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 vs. Fitzgerald, 4 H. of L. cases, 474, Fitzgerald 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 insur-

ance," 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." Page 487.

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 Williams, Mr. Justice Talfourd, 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.

Cazenore vs. British Equitable Ass. Co., 6 Com. Bench, N. S., 437; 2 Crampton & M., 348, is a familiar case. The opinion was delivered by Cockburn, C. J., of the Common Pleas, and decided in the same way. This case was affirmed in the Exchequer Chamber in 1860.—See 6 Jur., N. S., 826, 1860; 3 Bigelow Cases, 213; Price vs. Phœnix Ins. Co., 17 Minn. R., 497: 2 Ins. Law Jour., 223.

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 influence 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 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.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

MARINE.—*Liability for insurance on chartered freight in case of a voyage broken up.*

The plaintiff sued on a policy on chartered freight. By the charter-party, which contained the usual exception of dangers of navigation. the vessel was to go from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the policy insured the freight for that voyage. The ship ran on shore between Liverpool and Newport. She was ultimately got off; and though the damage she sustained was not such as to constitute a total loss, the time necessary for getting her off and repairing her, so as to be a cargo-carrying ship, was so long as to put an end in a commercial sense to the speculation as between shipowners and charterers, and the latter accordingly abandoned the contract, and hired another vessel, by which they forwarded the rails to San Francisco.

Held, that the charterer was discharged from his contract by what had occurred, and that therefore the plaintiff was entitled to recover for a total loss of freight.

Jackson vs. Union Marine Ins. Co.

Court of Exchequer Chambers, England.

FIRE.—*Witness may refresh his memory from invoices and accounts.*

The fact that the witnesses referred to invoices and other papers to assist them in remembering the articles and prices, does not necessarily give the statement the character of a copy or of secondary evidence. The point of the matter is, that they swear to the statement as their own work, made out from their knowledge of the facts. One may know that he received and had the articles set forth in a certain invoice, and that these articles, or a certain number of them, were destroyed by the fire, and yet be unable to remember the items without the assistance of the invoice to refresh the memory.

In all cases where accounts are multitudinous, the rule as to the personal knowledge of the witness is relaxed. He must be permitted to put the items into an account, and to refresh his recollection by means of other accounts and papers as to the items.

Alleghany Ins. Co. vs. Hanlon.

Decision rendered October 26, 1874. Pa. S. C.

LIFE.—*Parties to a Suit for Recovery of Profits.*

John Schlecht and Rosina Schlecht took out a policy for $2,000 in the World Mutual Life Insurance, payable, on the death of either, to survivor. In August, 1874, Mrs. Schlecht died, and six weeks after Mr. Schlecht died. Suit was brought by the administrator to recover the face of the policy and such profits as had accrued. The company had not declared a dividend on the policy. A demurrer was interposed by the company, claiming that there was an improper joinder of two causes of action—one for an accounting of the profits and the other for merely a money demand—and that all the policy-holders should be made plaintiffs to the first and the stockholders should be made defendants.

Held, that inasmuch as the plaintiff claims only his share in the profits of the defendant, and it has not appeared that any other policy-holders are entitled to profits, or that they are necessary in the determination of the plaintiff's share, it would be a heavy burden to the policy-holder, if, before a recovery could be had, all of the policy-holders should be required to be brought up as plaintiffs or defendants. The books of the corporation should, and presumably do, show the amount of the profits and the plaintiff's share. It would be the duty of the defendants to ascertain the profits of the business, and they are presumed to discharge such duty in a proper manner, so as to enable the policy-holder to ascertain the amount coming to him without a formal accounting in the ordinary term.

Decision rendered Jan., 1875. N. Y. S. C.

MARINE.—*Concealment of material facts after the slip has been signed.*

The action was on a policy of insurance for £3,200 on freight to be carried by the plaintiff's vessel. The proposal or "slip" was signed for the company on the 11th of March, 1871. On the 16th the vessel was lost, and next day—the 17th—the plaintiff heard of the loss and sent his clerk to the company's office for the policy, without telling him of the loss. The company asked what insurance, if any, had been effected on the ship. The clerk said the insurance

was only to the amount of £2,700, and the company's manager proposed that a warranty to that effect should be inserted in the policy as it was. It was then found that there was a further insurance on the vessel for £500, but which would expire on the 20th of March, and the warranty was altered accordingly, "No insurance on the vessel after the 20th of March beyond £2,700." The company then found out the fact of the loss, and they disputed the claim on the ground that the fact had been concealed. The plaintiff relied on a recent decision in the Court of Queen's Bench, Cory vs. Paton, to the effect that there need not be a disclosure of such a fact after the "slip" was signed. The company, however, insisted that the first proposal was varied and a new one agreed to with the warranty, and that the concealment of the fact of the loss was material with reference to their acceptance of that second proposal.

Held, that if there was a "slip" made out, and afterward a policy was executed, nothing which happened between the time of the "slip" and of the policy was material to be communicated. It was said, however, that if, when the underwriter was asked to give out the policy, he had some words inserted in it for his own advantage, this gave him a right to ask for some further disclosures. But that would be a singular result. The policy must relate back to the original agreement, and the final terms must be considered as those originally intended. Dealing with the matter on the basis, not of mere form, but of substantial principle, the decision in Cory vs. Paton was applicable to the present case.

Lisheman vs. Northern Maritime Ins. Co.

Decision rendered February 6th, 1875. Court of Ex. Ch., England.

LIFE.—*Does the claim under a life policy pass to an assignee in bankruptcy?*

The defendant, a public trader, holding her goods apart from those of her husband, effected a policy of insurance upon his life, of $1,500, which sum was stipulated to be paid to her in the event of his death. The husband having died, and the defendant becoming embarrassed, one of the principal creditors forced her into bankruptcy. The defendant put the assignee in possession of all her goods, but refused to surrender to him the policy. The assignee filed his petition, asking that she be compelled to deliver the policy as a part of the estate of the bankruptcy belonging to the creditors. The defendant responded that the provincial statute, 29 Vict., ch. 17, which authorizes similar assurances, provides that the amount shall be paid in in the manner

directed in the policy, and cannot be subjected by any creditor or creditors mentioned whatever. The assignee contended that the creditors mentioned in the act are those of the husband, and not those of the wife, but the court took the same view of the statute as did the defendant, and dismissed the petition.

Brossard vs. Massouin.

Superior Court, Montreal.

FIRE.—*Liability for assessment in a mutual company.*

Property insured by A., in a mutual company, was transferred by him, together with his right, title and interest in the policy, to B. B. made an absolute transfer of the property, but not of the policy, to C., who at the same time conveyed the premises to the wife of B.

Held, that B. was liable to the company for an assessment. The court say: "The alienation of the property avoided the policy only as to the right of the assured to recover upon it against the company. It did not entitle him to release himself from the obligations which he assumed when he obtained the insurance and became a member of the corporation."

Cummings vs. Sawyer.

Decision rendered January 12th, 1875. Mass. S. J. C.

FIRE.—*A director has no right to purchase claims against his company.*

Suit was brought by William Hanna et al. against the Andes Ins. Co., to recover upon five different claims, amounting in the aggregate to $10,000. On the part of the plaintiffs, it was alleged that sundry parties had insured their property in the Andes; that the property was destroyed by fire; that each of the insured had transferred his claim to the plaintiffs, who were entitled to recover the full amounts of the policies. In answer, the defendants admitted the issue of the policies, but claimed that the parties who held them had not complied with the terms and conditions therein; and further, that each claim was settled through an employee of the company, who had effected a compromise at fifty cents on the dollar, which had been paid; that Hanna, all this time, had been a director of the company, and had paid nothing to the employee except the expense and a small commission for settling the matter, and that all these facts were known to the plaintiffs, who had no right to recover. The plaintiffs demurred to the answer: First, that the allegation that the defendant had settled by an employee was not sufficient, inasmuch as it was not alleged that the employee held a position of trust and confidence,

and was employed specifically to settle these claims; second, that the defendant had no right to settle the claims by compromise—that the company owed the debt and was bound to pay it.

The court held that the allegation that the defendant, through an employee, settled the case, was sufficient, and that it was fair to presume that the employee was duly authorized to make such settlement. As to the allegation that the company had no right to speculate upon the claims of the policy-holders—that if it owed a debt it was bound to pay it—the court would sustain such a compromise if it was shown there was no fraud, and fraud was not charged in this case. The principal point made, however, was that Hanna, who was a director of the company, knew all the facts, and had no right to purchase the claims from an employee. If the employee did settle for the company, and took an assignment in blank, and Hanna, or any other person, aware of that fact, permitted his name to be put in the assignment, he could receive nothing as against the company, if they had in fact settled the claims, because the assignment itself would be void. As a director, he had no right to purchase a claim of this kind against the company, even if it were a valid one. His position was one of great trust and confidence, and he would not be permitted to speculate on the company's affairs. Neither could he buy a claim that had been compromised and recover in full against the company. If this were permitted it would open a door for fraud. While it might be to the interest of the company, and it had a right to compromise a claim where there was a just and reasonable defense to it, it would be the interest of the director owning the claim to oppose any settlement of that kind, and to recover against the company the whole amount, so that his position would be such as to place him directly in antagonism to the very object for which he was placed there by the stockholders of the corporation. If a director has no right to purchase, no other person has a right to enter into partnership with him for the purchase of a claim against a company. The utmost that he can claim is that, as trustee for the company, he is entitled to what he has paid.

Hanna et al. vs. Andes Ins. Co.

Sup. Court, Hamilton Co., Ohio.

FIRE.—*Loan by a company on its own stock as collateral.*

The charter of the Great Western Insurance Company prohibited it from loaning on its own stock. The president had discretionary power from the finance committee to make loans. The president

made a loan to a director, and a member of the finance committee, on the company's stock as collateral.

Held, that the transaction was void, and not made by the company, but by the president without authority. The action on the part of the director was fraudulent. The company has an equitable lien upon the stock for the benefit of the stockholders. The company was justified in selling the stock to satisfy its claims, and the proceeds of such sale could not be claimed by his adminstrator as part of the director's (since deceased) estate.

Weid, executor, vs. Great Western Ins. Co.

New York Court of Common Pleas.

FIRE.—*Policy as prima facie evidence under the pleadings.*

The conditions of the policy were that a watchman should be kept on the premises day and night, and that in case of loss by fire, the damage should be certified to by a justice of the peace. On the trial in the court below, the plaintiffs did not put in evidence that these conditions had been complied with, and the defendants below, although they denied that they had, did not offer any evidence to prove the facts. The court gave a verdict for the plaintiff below, and it was contended that the plaintiffs below should have proven the fulfillment of the conditions of the policy before a verdict could be rendered in their favor.

PER CURIAM.

It is unnecessary to decide whether the application was by reference made a part of the policy in this case. Neither declaration nor the affidavit of claim referred to it, while the defendants, neither by craving oyer, nor by notice, made it incumbent on the plaintiff to call for or produce it. This, it is true, did not preclude the defendant from producing and relying upon it as a warranty and defense in the action. But under the pleadings the policy was evidence to go to the jury as *prima facie* evidence of the plaintiffs' case.

Franklin Fire Ins. Co. vs. Staib et al.

Decision rendered November 9th, 1874. Pa. S. C.

FIRE.—*What constitutes a proximate or remote cause of loss.*

By the negligence of the servants of the railroad, the sparks from an engine set fire to a warehouse near its track and destroyed it. There being a high wind at the time, sparks from the burning warehouse set fire to the stable of the appellee and destroyed it. The stable was 101 rods from the warehouse, with no intervening build-

ings. When it was burned there was a high wind blowing toward the stable. *Held*, that the burning of the appellee's stable was not the natural and proximate consequence of the burning of the warehouse. The following, from the opinion in Flint vs. T. P. and W. R. R. 59 Ill., 349, was adopted by the court as the rule for determining whether the cause be proximate or remote. "If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire was spread beyond its natural limits, by means of a new agency—if, for example, after its ignition a high wind should arise and carry the burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind, such a loss might fairly be set down as a remote consequence, for which the railroad company should not be held responsible."

Toledo, Wabash & Western R. W. Co. vs. Muthersbaugh.

Ill. S. C.

MARINE.—*Insurable interest of consignee.*

Plaintiffs, merchants of London, in the regular course of business, were notified by their correspondent at Bombay, of a shipment of 250 bales of cotton, with request to insure, and notice of a draft at six months' sight for £3,000 against the same, with shipping documents attached. The cotton was duly insured for £5,000, under two open policies held by plaintiffs in the defendant company, "as well in their own names, as for and in the name or names of all and every person and persons to whom the same doth, may or shall appertain, in part or in all." The draft was cashed by the National Bank of India, and by it transmitted to its manager in London for collection, and accepted by the plaintiffs, "against delivery of shipping documents" for the cotton.

The plaintiffs also agreed to hold the amount insured at the disposal of the bank until payment of their acceptance. The vessel on which the cotton was shipped was lost at sea before the maturity of the draft, and the plaintiffs paid the same at maturity, and sued for the amount of the insurance, claiming that they had the whole legal interest; that they were bound as consignees to receive and account for the whole proceeds of the cotton, and therefore were equally entitled to receive, and bound to account for the sum assessed by them

thereon. Citing Bell vs. Brownfield, 15 East, 364; Bell vs. Ansley 16 ib., 141; Hiscock vs. Barrett, cited 16 ib., 145: Wolf vs. Horncastle, 1. B. & P., 316; Page vs. Fry, 2 ib., 240; Cohen vs. Harman, 5 Taunt, 101; Lucena vs. Craufurd, 3 B. & P., 75; 2 B. & P. (N. R.), 269; Caruthers vs. Sheddon, 6 Taunt., 14; Sparkes vs. Marshall, 2 Bing. N. C., 761; Hunter vs. Leathley, 10 B. & C. 868; Watson vs. Swann, 11 C. B. (N. S.), 756; 31 L. J. (C. P.), 210; Waters vs. Monarch Ins. Co., 5 E. & B., 870; 25 L. J. (Q. B.), 102; London & N. W. R. Co. vs. Glyn, 1 E. & E. 652; 28 L. J. (Q. B.), 188, and many others.

Claimed in defense, that the plaintiffs had no insurable interest in the cotton, but a mere expectancy, resting on a contingency: that if they had such interest it was limited to the amount of the bill they had accepted, and they had no right to insure for any but themsleves, or any interest except their own. Citing Robertson vs. Hamilton, 14 East, 522; *Ex parte* Warren, 19 Ves., 345; Wolf vs. Horncastle, *supra;* Lucena vs. Craufurd, *supra;* Powles vs. Hargreaves, 3 M. D. & De G., 430, 23 L. J. (Ch.), 1; Irving vs. Richardson, 2 B. & Ad., 193; Stockdale vs. Dunlop, 6 M. &. W., 224; Sutherland vs. Pratt, 11 ib., 296, 12 ib., 17; Smith vs. Virtue, 9 C. B. (N. S.), 214, 30 L. J. (C. P.), 156; Waters vs. Monarch Ins. Co., *supra;* L. & N. W. R. Co. vs. Glyn, *supra;* Bank of Ireland vs. Perry, L. R., 7 Ex., 14; *ex parte* Smart, ib., 8 Ch. Ap., 220; The Freedom, ib., 3 P. C. 594, and others.

The court, after having had the case some time under advisement, was equally divided in opinion except on a single point. It was held by the whole court that plaintiffs were entitled to recover for the amount of their advance or acceptance.

As to the other points, Bovill, C. J., and Denman, J., held that the plaintiffs had an equitable interest in every part of the cotton consigned to them as security for their advances thereon, and being also the consignees they were entitled to insure the whole value in their own names, and recover the whole insurance, holding the surplus as trustees for the other parties beneficially interested. Keating and Brett, JJ., held that plaintiffs were not entitled to recover beyond their own beneficial interest.*

Ebsworth vs. Alliance Marine Ins. Co.

* From Mouck's "Rep. of cases decided by the English courts." (Eng. C. P.)

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 74. LIFE.—*What Constitutes Payment of Premium to.*—The policy provided that unless the premium was paid when due at the office of the company, or to the agent upon the production of a receipt signed by the officers of the company, the insurance should cease. There was evidence that the agent was authorized to collect premiums, and after deducting his commissions to send a certified check for the balance to the company at regular periods; that the agent was indebted to the insured's firm to an amount exceeding the premium; that the firm was accustomed to pay their private debts from the general funds, and this premium had been so paid before; that the agent promised

the insured to take care of the premium, and told him the day after it became due that he had done so; that the receipt had been received by the agent duly signed, and he so informed the insured, but retained it as a voucher against the insured; that the agent sent the company, after the death of the insured, a few days later, a check for his balance, including this premium in the amount; but the company refused to receive it, and sent back a check for the amount of the premium and demanded the receipt. *Held*, that there was sufficient evidence to warrant the jury in finding that funds which the insured had a right to control and apply to the payment of the premium had come into the agent's hands before the premium came due; that the insured directed the agent to apply so much of said funds as was necessary to payment of the premium; that the agent did so apply it, and that the jury would be warranted in finding a verdict for the plaintiff.

Chickering vs. Globe Mutual Life Ins. Co.

Rep'd Jour'l, p. 417. MASS. S. J. C.

§ 75. FIRE.—*Power to make preliminary Contracts.—Private Instructions of Company to.*—Where an agent was regularly authorized to contract for insurance, and was furnished with blank policies for filling up and delivering to the parties with whom he contracted, he was authorized to make binding preliminary contracts to insure, to be consummated by filling up and delivering the policy, and an agreement to insure for three years was not a parol contract for insurance for that period, but a preliminary agreement to insure within the scope of his authority.

Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402.

The validity of the contract was not affected by credit being given until the delivery of the policy. A recovery of amount insured was proper in action for breach of contract.

Trustees &c. vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; Anchelon vs. Excelsior Ins. Co., 27 N. Y., 216; Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402.

Private general instructions to the agent by the company unknown to the insured, do not affect the rights of the parties.

Angel vs. Hartford Fire Ins. Co.

Rep'd Jour'l. p. 427. N. Y. C. A.

ARSON.

§ 76. FIRE.—*Liability for under the Laws of Ohio.*—On the trial of E., charged, under the Ohio act of March 20, 1860, with causing a building owned by him to be burned, with the intent to defraud the insurer of such building, H., called as a witness on behalf of the State, having testified that he burned the building in question, and that he was hired to do so by E., the court was requested, on behalf of the accused, to instruct the jury that H. was guilty of no crime if he burned the building at the instance of E., and was therefore interested in procuring the conviction of E. *Held*, that this instruction was properly refused. The criminal liability of H. for his participation in the transaction, whatever it was, was in no way affected by the result of the prosecution against E.

Evans vs. State of Ohio.

Rep'd Jour'l, p. 204. OHIO S. C.

§ 77. FIRE.—*Proof in Civil Suit.*—It is usually sufficient in a civil suit involving arson to state what rules of evidence do apply. It is not necessary to charge the jury that the same strength and clearness of proof are not needed in a civil suit as in a criminal suit.

Bailey and Pond vs. London and Lancashire Ins. Co.

Rep'd in July number.

U. S. C. C. LA.

ASSIGNMENT.

§ 78. FIRE.—*What Constitutes a Valid Consent to.—Agent's Authority to give Consent to.*—The policy provided that a conveyance of the property or assignment of the policy, not assented to by the company, shall render the policy void. W., the insured, executes to B. a bill of sale of the property. The inventory was completed and possession given two days later, at which time W. wrote an assignment on the back of the policy to B. W. then sent the policy to the agent, who issued the policy, but from whom the agency had since been withdrawn, who at the request of W. indorsed his consent to the transfer, but at the same time informed the messenger that his act had no legal validity. The

secretary of the company was then shown the policy and informed that W. was the owner of the property, and asked if the assignment and consent were all right; he said yes. The secretary was not informed of the circumstances under which the agent's consent was given, nor was the latter informed of the transfer of the property. *Held*, that as the transfer of the policy was part of the contract of sale, the sale might be regarded as incomplete until this had been fully effected.

Mandy vs. Ins. Co. of N. A., 1 Lansing, 20.

But if the transfer of property be regarded as prior to the company's consent to a transfer of the policy, there is authority for holding that the property was revived by subsequent consent.

Sherman vs. Niagara Ins. Co., 46 N. Y., 526.

Held, that there was nothing in the terms of the policy to require the consent to be previous to transfer of title to give it validity. *Held*, that the agent having surrendered his agency, and balanced his accounts, had no authority to give the assent, and notice of this fact given to the messenger at this time was notice to the principal.

Story on Agency, sec. 140; Bank of U. S. vs. Davis, 2 Hill, 451; Jeffrey vs. Bigdon, 13 Wend., 518; Sutton vs. Dillage, 3 Barb., 529.

Held, that the consent of the secretary may be regarded as a ratification of the agent's consent, or a new consent, in either case binding the company.

Buchannan vs. Exchange Fire Ins. Co.

Rep'd Jour'l, p. 457.

N. Y. Com. A.

CONSTRUCTION.

§ 79. Fire.—*Of Machinery.—Held*, that the word machinery, in a policy on the machinery of a paper-mill, covers all the tools and implements used therewith in the maunfacture of paper.

Buchannan vs. Exchange Fire Ins. Co.

—§ 78.

CONTRACT.

§ 80. Life.—*Time of.—Effect of on Representation of Health.*—The application provided that the insurance should not be binding

until the premium was received by the company or its authorized agent, and binding the insured to pay the premium as soon as the policy was issued. *Held*, that the contract was consummated when the premium was delivered to the express to forward to the agent according to his instruction. *Held*, that the representation as to health in this application was a continuing one up to the consummation of the contract. It was the duty of the insured to communicate any material change of health in the interval. In the absence of such communication a material change of health will avoid the policy, but the premium may be recovered on the ground that as the risk never accrued there was an absence of consideration.

Phil. Ins., sec., 524: May on Ins., sec. 200, p. 210; Edwards vs. Fortner, 1 Camp., 530; Traill vs. Baring, 4 De Gex, Jones & Smith, 318; May on Ins., pp. 199, 201.

Whitley, adm. etc., vs. Piedmont and Arlington Life Ins. Co.
Rep. Jour'l, p. 362. N. C. S. C.

§ 81. LIFE.—*How governed.*—A policy of insurance issued by a company of New Jersey to a citizen of another State, and containing no provision for the payment of premiums in another State, is a contract to be performed in New Jersey and must be governed by its laws.

Spratley vs. Mutual Benefit Life Ins. Co.
Rep'd Jour'l, p. 373. KY. C. A.

§ 82. FIRE.—*Verbal, not binding when Charter requires Contract to be written.*—Where no question of estoppel is raised, a mere verbal contract of insurance is not binding where the charter requires the contract to be in writing, sealed and attested by the officers of the corporation.

Haslett vs. Alleghany Ins. Co.
Rep'd Jour'l, p. 372. PA. S. C.

INTERMEDIATE INSURANCE.

§ 83. FIRE.—*Authority of Agent to Contract under charter.*—The company's charter provided that every contract, bargain, agreement and policy for the purpose of insuring against fire should be in writing or in print, under the seal of the corpor-

ation, signed and attested by its officers. *Held*, that this provision refers simply to the final formal contracts by which the company is bound, and does not invalidate such initial and preliminary contracts to insure as may be made by the company or its authorized agents, though not in writing.

Constant vs. Ins. Co.. 3 Wallace, C. C., 316, distinguished. Security Fire Ins. Co. vs. Ky. M. & F. Ins. Co., 7 Bush, 81.

Held, that credit given by agent according to usage did not affect the validity of the contract, which could be enforced in a court of equity. An agent might after a fire fill up a policy in accordance with a previous parol agreement, and such policy would bind the company. *Held*, that such policy was the property of the insured, and could be recovered on though retained by the agent.

Kohne vs. Ins. Co.; Lightbody vs. North American Ins. Co. ; City of Davenport vs. Peoria Marine & Fire Ins. Co.

Franklin Fire Ins. Co. vs. Colt.

Rep'd Jour'l, p. 367. U. S. S. C.

LIMITATION.

§ 84. LIFE.—*When Limitation begins.—Recovery barred by Laws of another State.*—A policy was issued by a company of New Jersey to a citizen of Virginia in 1860. Before the next premium fell due the powers of the agent in Virginia were revoked on account of the war, and no more premiums were paid. The insured died in 1863. Notice and proofs of death were delivered to an agent in Kentucky in 1872. *Held*, that the parties were bound to give notice within a reasonable time. In case of apparently unreasonable delay unless satisfactorily explained the statute of limitations will be held to begin to run within a reasonable time after death. In this case the statute of limitations began to run within a reasonable time (six months, as shown by the evidence, when the parties might have been ready to sue) after the close of the war. Acts of Virginia suspending the statute of limitations, but excluding foreign debtors from its provisions, did not apply to this company, which after the commencement of the war was a foreign debtor. The policy not being under seal was barred in five years by the laws of

Virginia, and in six years by the laws of New Jersey, and therefore, could not be recovered upon in Kentucky.

Spradley vs. Mutual Benefit Life Insurance Co.

—§ 81.

MISREPRESENTATION.

§ 85. LIFE.—*Made Material by Contract—Materiality a Question of Law.*—The policy provided that it was issued and accepted on the following among other conditions: "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," also, "that in case of the violation of the foregoing conditions, or any of them, * * * this policy shall become null and void." The insured, in answer to this question whether he was married or single, replied single, when he was in fact then married, also to the question whether any application had been made to any other company, replied no, whereas he had applied for and obtained $10,000 insurance but a few months previous. *Held*, that it is the distinct agreement between the parties that the company shall not be deceived either to its injury or to its benefit. It matters not whether the false statement be claimed to be immaterial or even beneficial to the company. The right to contract carries with it the right to determine what is wise and prudent or otherwise. The company in the exercise of this right fixed its estimate of the importance of these inquiries by making its liability depend on the truth or falsity of the answers. The applicant agrees to its importance by accepting the test. To leave the question of materiality to the judgment of the jury would be a violation of the legal rights of the company. The company has a right to contract that its judgment and not that of the jury shall govern, and it is the duty of the courts to give effect to the contract.

Anderson vs. Fitzgerald, 4 H. of Lords Cases, 474; Cazenore vs. British Equitable Ass. Co., 6 Com. Bench, N. S., 437; 2 Crampton & M., 348; 6 Jur. N. S., 826, 1860 (3 Bigelow Cases, 213;) Price vs. Phœnix Ins. Co., 17 Minn., 497.

The rule so frequently laid down that the question of materi-

ality is for the jury to determine, does not apply to cases where the truth of the statements in the application is expressly covenanted and forms the basis of the contract.

Jeffries vs. Economical Mutual Life Ins. Co.

Rep'd Jour'l, p. 386. U. S. S. C.

NOTICE.

§ 86. MARINE. — *Due Diligence.—Use of Telegraph.*—"Due diligence" in countermanding an order for marine insurance or disclosing any subsequent discovery of facts enhancing the risk, does not in all cases require the use of the most expeditious means of communication possible. The requirement is satisfied by the use of the earliest and most expeditious usual route of mercantile communication to be judged of under the circumstances of the case. The question whether the particular mode is the usual one is a question of fact for the jury.

Grier vs. Young, rep. in Miller on Ins. ; Watson vs. Delafield, 2 Caines, 234 ; S. C., 1 Johns., 150 ; 2 Johns., 526 ; McLanahan vs. Universal Ins. Co., 1 Peters, 170 ; Green vs. Merchants' Ins. Co., 10 Pick., 402 ; Byrons vs. Alexander, 1 Brevard, S. C., 213.

Andrews vs. Marine Ins. Co., 9 J. R., 34 ; 2 Duer on Ins., note 4, p. 530 and p. 410, distinguished.

The Atlantic telegraph was not a usual mode of mercantile communication previous to November, 1866. Where an order for insurance to be effected in New York, was mailed from Liverpool on Oct. 27th, 1866, and information of the loss of the vessel was received by the applicant three days afterward, due diligence did not require that the intelligence should be transmitted by telegraph ; it was sufficient to expeditiously forward the information by mail.

Proudfoot vs. Montefiore, L. R., 2 Q, B., 513, distinguished.

Snow et al., vs. Mercantile Mut. Ins. Co.

Rep'd Jour'l, p. 435. N. Y. Com. A.

§ 87. FIRE.—*What constitutes due Diligence.*—It is sufficient compliance with the condition of a policy requiring notice of a loss to be given "forthwith," or "immediately," that the party has used due diligence under all the circumstances.

New York Ins. Co. vs. National Ins. Co., 20 Barb., 475; Bumstead vs. Dividend Ins. Co., 12 New York, 81; Columbian Ins. Co. vs. Lawrence, 2 Peters, 50.

The clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and only requires such reasonable information as shall enable a company to form some estimate of its rights and duties before settlement.

Mc Laughlin vs. Washington Ins. Co., 23 Wend., 525; Lawrence vs Ocean Ins. Co., 11 John., 240; Smith's Mercantile Law, 516, note 10.

Continental Ins. Co. vs. Lippold.

Rep'd Jour'l, p. 430. NEB. S. C.

PAYMENT OF PREMIUM.

§ 88. LIFE.—*When forwarded by Express.*—The agent wrote, "You can forward the premium by bank check, or you can send by express." There were three expressmen on the route. The money was sent by one of these expressmen, who embezzled it, and was sued for the amount by the sender. Notice of sending the money was not given to the agent until two weeks later. *Held*, that delivery to the expressman was sufficient payment to the company.

Godfrey vs. Furzo, 3 P. Williams, 185; Dutton vs. Solomonson, 3 Bos. & Pul., 582; Bayle vs. Bayle, Cowp., 294; Dawes vs. Peck, 8 T. R., 320; 2 Kent's Com., 499; Chitty on Cont., 439, 484, 485; 2 Greenl. Ev., sec. 212; Woolsey vs. Bailey, 27 N. H., 217, 219; Smith vs. Smith, ib., 244, 255. Garland vs. Lane, 46 N. H., 245, 248, and cases cited; 1 Ch. Pl., 6; 1 Parsons on Cont., 445; Arnold vs. Prout, 51 N. H., 587; Chitty on Cont., 750; 2 Greenl. on Ev., sec. 525, and cases cited; Wakefield vs. Lithgow, 3 Mass., 249; Kington vs. Kington, 11 M. & W., 233.

Currier vs. Continental Life Ins. Co.

Rep'd Jour'l, p. 444. S. C. N. H.

§ 89. LIFE.—*Payment of when made.—Payment without Assent of Insured.*—The agent wrote to the insured informing him that the policy had been received from the company and directing him to forward the premium by express. The premium was forwarded as directed on the receipt of the letter, but addressed to the agent at the wrong city. It reached him however within a reasonable time and was forwarded to and retained by the company without objection. *Held*, that the premium was paid

when delivered to the express. Any variance from the proper address, which under other circumstances might be material, was waived by its due reception and acceptance by the agent and company.

May on Ins., sec. 345, p. 412.

Held, that it was immaterial whether the premium was paid with the knowledge or assent of the insured, who was ill at the time, or by his relatives without his express assent. Such assent must be presumed under the circumstances.

Whitley, adm. etc., vs. Piedmont and Arlington Life Ins. Co.

—§ 80.

PRACTICE.

§ 90. FIRE.—*Balance of Testimony.—Admissibility of Evidence.* —The burden of proof is on the affirmative, and that party must fail in an even balance of evidence. But the balance depends on the general strength of the evidence and the credibility, not the number of the witnesses. A contract of insurance affirmed by one witness and denied by another was properly submitted to the jury for their determination of the fact. Where the testimony of one witness denying that he had made a contract or a memorandum was contradicted by another, it was admissible to impeach the evidence of the first by evidence of the second, that the first had told him he had made a memorandum.

Angel vs. Hartford Fire Ins. Co.

—§ 75

§ 91. FIRE.—*Variance—Error.*—Under section 91 of the criminal code of Ohio, a variance, on the trial of arson cases, between the allegations of the indictment descriptive of the insurer of such building, and the proof given in support thereof, unless such variance is found to be material to the merits of the case, or to have the effect to prejudice the accused, does not entitle him to an acquittal.

The mere fact that leading questions are improperly allowed on the examination of a witness, although allowed as of right, is not error for which the judgment will be reversed.

Evans vs. State of Ohio.

—§ 76.

§ 92. FIRE.—*Return of Premium in case of Fraud.*—In assumpsit the defendant pleaded an agreement to accept and an acceptance by plaintiff of a sum in full satisfaction of loss. Plaintiff contended that the agreement was obtained by fraud. *Held*, that the action was not maintainable without a tender back of the sum paid by defendants.

Bisbee vs. Ham, 47 Me., 543.

Potter vs. Monmouth Mut. F. Ins. Co.

Rep'd Jour'l, p. 453. ME. S. J. C.

§ 93. FIRE.—*Finding of the Jury.*—Where there is conflicting evidence it is the province of the jury to decide upon its weight and credibility, and the court will not set aside the verdict, because it disagrees in opinion with the jury.

Ashley vs. Ashley, 2 Str., 1142; Swain vs. Hall, 3 Wils., 45; Lewis vs. Peake, 7 Taunt., 153; Hartwright vs. Badburn, 11 Price, 383; Carstairs vs. Stein, 4 Maule & Selwyn, 192; Woodward vs. Payne, 15 Johns., 493.

The jury are the exclusive judges of the weight of evidence.

Ewing vs. Burnet, 11 Pet., 41; States vs. Lamb, 12 Pet., 1; Richardson vs. Roston, 19 How., 263; Hyde vs. Stone, 20 How., 170.

When the jury have assessed the amount of loss at a certain figure, it is not competent for the court to inquire how the estimation has been made, so long as a substantially just result has been reached.

Bayly and Pond vs. London and Lancashire Ins. Co.

—§ 77.

PROFITS.

§ 94. FIRE.—*Insurance of.*—Where the insured made large profits from illegal rectifying and distilling, but made no claim for profits, it cannot be said that they insure for profits. The question is, what was the actual loss, not of profits, but of property.

Bayly and Pond vs. London and Lancashire Ins. Co.

—§ 77.

PROXIMATE CAUSE OF LOSS.

§ 95. MARINE.—*Construction of Ice Clause.*—A claim in a marine policy provided that if the vessel was detained by ice or

the closing of navigation from terminating the voyage, the policy on the cargo should cease, and the unexpired premium should be returned. Another clause provided that the vessel might touch or stay at any ports or places when obliged by stress of weather or other unavoidable accident, without prejudice to the insurance. The vessel, a canal boat, while being towed down the Delaware, was with several others separated by a heavy gale from the tugs and forced ashore, losing a portion of her deck cargo. Ice did not interfere with navigation at the time, but during the night ice formed around the boats so that the tugs could not reach them. After the thaw, some two weeks later, the wind and ice forced the boat against another vessel, sinking it, and destroying more than half the cargo. The owners abandoned and claimed a total loss. *Held*, that the ice clause is not ambiguous and needs no interpretation from experts; its signification is purely a question of law. It is not a condition precedent but a condition subsequent. Her insurers are liable until the happening of the prescribed event. *Held*, that the stress of weather and not the ice was the proximate cause of the destruction, and of all the consequences, including the ultimate loss which followed.

12 Wall., N. S., 196; 1 Phillips on Ins., sec. 1136–7; 2 Pars. on Mar. Law, 261; Ionides vs. Universal Mar. Ins. Co., 14 C. B., N. S., 259; Boudrett vs. Henlig, Halt. N. P. C., 149; Holin vs. Corbetti, 2 Bing., 295; Magoun vs. N. E. Mar. Ins. Co., 1 Story, 164, 155; Phillips on Ins., sec. 1161.

Stranding is not *ipso facto* a total loss but is *prima facia* of a total loss, and whether it is so to be regarded or not depends on the circumstances.

Wood vs. Lincoln &c. Ins. Co., 6 Mass., 479; Manning. vs Newnham, 3 Douglas, 136; 2 Phil. on Ins. 1526; Sewall vs. U. S. Ins. Co., 11 Pick. 90, 94.

The burden of proof is on the underwriters to show that the loss is the direct result of the excepted peril.

1 Phil. on Ins., sec. 1129, sec. 1159; Levi vs. Allnutt, 15 East., 269. Cases distinguished and excepted to: Patrick vs. Conn. Ins. Co. 11 Johnson 14; Hadkinson vs. Robinson, 3 B. & P., 383, (3 Kent's Com., 293–4;) Foster vs. Christie, 11 East., 205; Spayer vs. N. Y. Ins. Co., 3 John., 83; Livie vs. Janson, 21 East., 647; Last case criticised in Phillips on Ins., Hohn vs. Cor-

betti, Ionides vs. Universal Ins. Co. 14 C. B., N. S., 283; Dole vs. N. E. Ins. Co., 2 Cliff., 394, 433.

Brown vs. St. Nicholas Ins. Co.

Rep'd Jour'l, p. 377, N. Y. Com. A.

SECRETARY.

§ 96. FIRE.—*Authority of.*—A former agent of the company who issued the policy, at the request of the insured indorsed a consent to its transfer, at the same time informing the insured that he had no legal authority. The secretary of the company being shown the indorsement said it was all right. *Held*, that the secretary was one of the principal officers, and could bind the company by insurance and consent in writing or by parol. He could authorize another to write a consent.

Fish vs. Cattenet, 44 N. Y., 538; Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 405.

Buchanan vs. Exchange Fire Ins. Co.

—§ 78.

STORAGE, OR USE.

§ 97. FIRE.—*What Constitutes.*—The keeping of a small quantity of saltpetre for the purpose of preserving meat and other stock in a store, is not a storing within the meaning of the clause prohibiting the storing and selling of certain extra-hazardous articles.

Dobson vs. Sotheby, 22 Eng. Com. Law, 481; O'Neill vs. Ins. Co., 3 Comstock, 127.

To avoid the policy there must be such a quantity stored and sold as would amount to a substantial violation; to charge that if the prohibited article was stored and sold in any considerable quantity the policy was avoided was not error.

Bayly and Pond vs. London and Lancashire Ins. Co.

—§77.

§ 98. FIRE.—*Of Coal Oils and Inflammable Liquids in Paper-Mills.*—A clause in a policy on the stock of a paper-mill prohibited the storage or use of petroleum, rock and earth oils, benzine, benzole and naphtha without consent; it also provided that refined coal, carbon and kerosene oil, when stored in less amounts than ten barrels, shall be classed as extra hazardous. Another clause provided that camphene, spirit gas, or burning fluid, phosgene, or any other inflammable liquid, when used in stores, ware-

houses, shops or manufactories for light, subjects the goods therein to additional charge, and permission for such use must be indorsed on the policy. *Held*, that kerosene is a rock oil, but not an inflammable liquid, and it was not intended to prohibit its use for lighting purposes, nor the storage of forty gallons, which was not an excessive amount for that purpose.

Buchanan vs. Exchange Fire Ins. Co.

—§ 78.

SUICIDE.

§ 99. LIFE.—*What Measure of Insanity will avoid Policy.*—The policy provided that it should be void if the insured "should die by his own hand or act." All the authorities concur in the view that an unintentional or accidental taking of life is not within the meaning of the clause. Whether moral and legal responsibility is essential to avoid the clause in case of insanity, or whether a mere knowledge of the nature and physical consequences is sufficient, is a question of irreconciliable judicial conflict.

Borradaile vs. Hunter, 5 M. & G., 639; Clift vs. Schwabe, 3 M. G. & S., 437; Dean vs. American Mutual Life Ins. Co., 4 Allen, 96; Cooper vs. Massachusetts Ins. Co., 102 Mass., 227; Easterbrook vs. Union Mutual Life Ins. Co., 54 Me., 224; Mutual Benefit Life Ins. Co., 55 N. Y. Rep., 169; Breasted vs. Farmers' Loan and Trust Co., 4 Selden, 299; Life Ins. Co. vs. Terry, 15 Wallace, 580.

The court below charged that the clause would be avoided if the insured killed himself in a fit of insanity which overpowered his consciousness, reason, and will, and thus acted from a mere blind and uncontrollable impulse, or impelled by an insane impulse he could not resist; also that they should find for the company unless the insured at the time of such self-destruction was impelled by an insane impulse which the reason left him did not enable him to resist. It must be presumed that he was not so impelled in the absence of evidence to the contrary. The burden of proof is on the claimant, and the exigency of proof is not complied with by proof that he was merely insane at times. He must be proved insane at the precise time of the act, and in the absence of such proof it must be presumed that he was then sane, and an inference of insanity cannot be drawn from the act of self-destruction. *Held*, that these instructions state the law

more explicitly and more favorably for the insurer than any American authority within the notice of the court. Death resulting under these conditions is no more "death by his own hand or act" than if from accident or mistake. A finding of the jury that the insured killed himself in a fit of insanity, under these instructions, must be conclusive against the insurer, if supported by evidence.

Knickerbocker Life Ins. Co. vs. Peters.

Rep'd in Jour'l for July. MD. C. A.

TITLE.

§ 100. FIRE.—*Under Chattel Mortgage and Receiver's Deed.*—P. was owner of a saw-mill. T. had possession. A contract was executed by which P. agreed to sell on certain terms to T., and the latter agreed that the machinery should be part of the freehold, but did not agree to buy. T. bought the machinery and gave a chattel mortgage on it to B. B. bought out the entire interest of T. at a receiver's sale. There was conflicting evidence about the actual delivery of the contract. It was also claimed that the contract was void for want of consideration. B. effected insurance on the machinery as his own, contained in the mill held by him under contract of sale from P. *Held*, that sufficient consideration was expressed in the contract, and the question of its delivery was proper for the jury. Even if invalid it did not necessarily affect B.'s title. *Held*, that B. was so far the owner of the chattels insured as to have an insurable interest, properly expressed in the policy. *Held*, that evidence to prove B. bought the property for T. was properly excluded. The representation of B. that he held the property under contract from P. was true.

Bicknell vs. Lancaster City and County Fire Ins Co.

Rep'd Jour'l, p. 441. N. Y. COM. A.

WAIVER.

§ 101. LIFE.—*Authority of Corporations, forfeiture of Premium.—Power of Agent.*—Plaintiff wished time to consider whether he should pay his next premium in the usual way. Agent informed him that though he had no power to waive payment of

premium when due, he might rely on the usages of the company to accept an overdue premium within a reasonable time, if the insured were in good health. The secretary being informed of the agent's statement, wrote, after payment was due, that he could pay in the usual way, but said nothing about extension of time. Plaintiff paid the overdue premium within a reasonable time. *Held*, that corporations have the same power to waive their rights, and are bound by estoppels *in pais* like natural persons.

Hale vs. Ins. Co., 32 N. H., 295.

The agent and secretary, whether authorized to contract or not, are agents so far that notice to them is notice to the company. The notice of plaintiff to these parties was notice to the company, and the acts of these parties was competent evidence of a waiver by the company, which the latter is estopped from denying.

Glidden vs. Unity, 33 N. H., 571, 577; 2 Kent's Com., 290, and authorities cited in note *b*.; Smith vs. Meeting house, 8 Pick. 178; Angeli & Ames on Corporations, sec. 237; Pierce vs. Ins. Co., 50 N. H., Lyman vs. Littleton, 50 N. H., 42; Clark vs. Ins. Co., 6 Cush., 342; Heath vs. Ins. Co.. 1 Cush. 257; Vos vs. Robinson, 9 Johns., 192; Ins. Co. vs. Tyler, 16 Wend., 385, 401; McMasters vs. Westchester Co. Ins. Co., 25 Wend, 379.

tinental Life Ins. Co.

Currier vs. Continental Life Ins. Co.

S. C. N. H.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

NOVEMBER TERM, 1874.

CAROLINE A. CHICKERING

vs.

GLOBE MUTUAL LIFE INS. CO.

A policy issued by an insurance company on the life of A., contained a provision that if the premiums should not be paid on or before the days when due, at the office of the company, or to agents when they produce receipts signed by an officer of the company, the policy should cease. On the issue whether a premium due on a certain day had been paid to an agent of the company, there was evidence that the agent was authorized to collect premiums, and after deducting his commissions to invest the remainder in certified checks, which were to be sent with his account to the company at regular periods; that a few days before the premium became due the agent was indebted to the firm of which A. was a member, to an amount exceeding the premium; that it was the practice of the members of the firm to pay their private debts with funds of the firm, and A.'s premiums had previously been so paid; that the agent stated to A. that he would take care of the premium, and after the day when it became due stated to him that he had done so; that the agent had received the receipt signed by an officer of the company, and had so informed A., but retained it as a voucher against A.; that the agent sent the company, after the death of A., a check for an amount including this premium with his account; but the company refused to receive it, and returned him a check for the amount of the premium, and demanded the receipt. *Held*, that the evidence was sufficient to warrant the jury in finding that funds, which the assured had a right to con-

trol and apply to the payment of the premium, had come into the hands of the company's agent before the premium became due; that the assured directed that the agent should apply so much of said funds as was necessary to that payment; and that the agent did so apply it, and that the jury would be warranted in finding a verdict for the plaintiff.

Contract on a policy of insurance for $20,000, dated February 12, 1870, upon the life of Thomas E. Chickering, payable to the plaintiff, his wife. By the terms of the policy the sum of $329.60 was to be paid on before the 9th days of February, May, August and November, in every year during the continuance of the policy. Among the conditions forming a part of the policy were the following:

"3. If the said premiums shall not be paid on or before the days mentioned for the payment thereof, at the office of the company, in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president, vice-president or secretary, then, in every such case, the said company shall not be liable for the sum assured, or any part thereof, and this policy shall cease and determine."

"9. Agents of the company are not authorized to make, alter or discharge contracts, or waive forfeitures."

Trial before Wells, J., who reserved the case for the consideration of the full court upon a report in substance as follows:

Thomas E. Chickering died on February 14, 1871. The answer set up in defense the non-payment of the premium which became due on the 9th of that month. It was admitted that the premium was not paid, unless in the manner shown in the following evidence:

The plaintiff put in the deposition of Edward H. Osborn, a copy of which was made part of the report. He testified, in substance, as follows: "I was agent of the defendant company from February 1, 1870, to December 31, 1872, and had the sole management of the business in Boston. I had previously been the agent of Chickering & Sons, and after I became an agent of the defendants I bought pianos from time to time for my friends, from Chickering & Sons, and rendered accounts to the firm of such purchases. I stated to Thomas E. Chickering that I should take care of his premium, and I did so, the payment prior to his death. I saw him on several occasions prior to the premium becoming due, and subsequently, and told him that his premium was cared for. I made such a statement to him before the premium of February 9, 1871, became due. I should say the same week. At that time I had received the signed receipt for the

premium from the company; but it was not good until countersigned by myself. I communicated the fact to Thomas E. Chickering that I had received the receipt from the company in the usual form of a notice. I had several conversations with him about it. He remarked to me that his premium was due. I said, 'Yes, sir, but your premium is taken care of.' This was the substance of subsequent conversations. It was a matter of conversation from time to time. I had charge of his life policies, and I had been his adviser from time to time, and told him that he could depend upon me to take care of his premiums. Before February 9, 1871, he said to me, 'My premium is due on the 9th.' I said, 'Yes; but you need give yourself no uneasiness about it, as I'll take care of it for you.' At that time I was indebted to the firm of which he was a member, on my running account. I do not remember to what extent the balance was against me; it was for more than the amount of the premium. I had a conversation with Thomas E. Chickering as to this balance due, in connection with the payment of the premium; and I said to him that I would come in at my leisure, and we would have a settlement of our affairs. I saw him the week he died, on several occasions. I saw him on Saturday night prior to the Tuesday morning on which he died. He died at one o'clock A. M. This was the last time I saw him. He then spoke of his premium, and asked me if it was all right. I said, 'You know that I have always told you that I would take care of your premium.' I took supper with him and his family that evening at the Tremont House.

"On February 15, 1871, being in New York, I made and signed the following statement, in writing, at the request of the company: 'New York, February 15, 1871. To the officers of the Globe Mutual Life Insurance Company. I have to report to you the death of Colonel Chickering, insured under policy No. 18788. The premium became due on the 9th instant; but finding it more convenient for him to pay the premium the first of the coming week, I told him I would take care of it for him, though I did not deliver the receipt to him. The premium would have been included in my report of this (15th) as I deemed the premium paid and myself entirely responsible therefor. Colonel Chickering died Monday night, of supposed apoplexy.'

"While in New York, I saw the second vice-president, John A. Hardenbergh, and the president of the company, Pliny Freeman. I saw them on February 15. I had a conversation in regard to

Colonel Chickering's death with John A. Hardenbergh; it is embodied in a letter to the company. This letter was written on the spot and handed to the company. The officers desired me to embody my statement in writing, and I did so. There was other conversation with Hardenbergh. He said there was one question he would like to ask me: Had you seen, instead of the notice of the death of Colonel Chickering, that he had surreptitiously left the country, would you deem yourself responsible for the premium? I told him that I should. He asked me why. I told him because I had promised him I should pay it. I told him I hoped he understood the matter fully, and that I should insist upon sending the premium to the company He remarked to me that he could see no objection to my doing so. I then said to him, that 'By virtue of my contract with the company my report should have been sent to them that day, but of course being in New York it would have to be delayed one day.' He said that was all right. The president was in the room—in and out of the room. Mr. Hardenbergh's and Mr. Freeman's desks were in the same room. Whether he was cognizant of conversation, I don't know. John A. Hardenbergh was then the active manager, and was the one who dealt chiefly with me. The company was supposed to be managed by a board of trustees. I did not give up the receipt to Thomas E. Chickering, because that was my voucher, on settlement with his estate, that I had paid so much on his account. I made a return to the company on February 16 or 17, 1871, and it included this premium. On February 22, I received a demand from the company for the receipt, and I sent it to the company, and received from it a check for the amount of the premium.

Cross-examined. "I did not say, in my statement to the company of February 15, that Chickering said he found it more convenient to pay the premium on the first of the coming month. I said, 'I finding it,' not Colonel Chickering finding it. I found it out, because my connection with the Chickering company had been such that I knew that at the last of the week they had a great deal of money to pay. I told him not only at that time, but on several occasions, that I would take care of it, without any request of his. It was understood that I would. I did not countersign the renewal receipt, or credit Colonel Chickering with any payment for February of 1871, or before February, or do anything respecting the payment due at that date, except to say to him that I would take care of it. It was not my habit to countersign any receipts until they were delivered.

I had no agreement with Colonel Chickering to pay this premium and charge it in my account with Chickering & Sons. It was the general understanding between us. It was not any more than what was embodied in different conversations we had had together at different times. There never was any conversation in which it was agreed that it should be charged in the account with Chickering & Sons. My understanding was, that any charge I had against Colonel Chickering should be set off against any charge Chickering & Sons should have against me, and I presumed that this was Colonel Chickering's understanding. I have not settled the account between me and Chickering & Sons then due, because I've had no occasion to settle the suit. I have a receipt for moneys I paid for the Colonel previously, and no demand has been made on me, nor have I demanded a settlement from the Chickerings. I do not know how the account stands."

By the contract of this witness with the defendant, appointing him its agent, he agreed to devote his exclusive time in the work of soliciting applications, collecting premiums, and delivering policies. The contract contained the following clauses: "That he will make a correct statement on the first and fifteenth of each and every month, of all the moneys received by him or his agents, and after deducting his commissions as above mentioned, he will accompany said statement with a remittance in certified check or draft upon New York for all balances due to said company, and will as agent comply with all the rules and regulations of said company, on violation of any of which this agreement shall be null and void, at the option of the company." "The authority of said agent shall extend no farther than is above stated. He shall not make, alter nor discharge any contract, nor waive forfeitures, nor receive any moneys due or to become due to said company, except on receipt signed by some officer of the company, or other written authority from some officer of the company; and shall receive no further remuneration for any service than is above stated.

The plaintiff also introduced the testimony of Charles F. Chickering, who testified that he was a brother of the deceased, and that they had been members of the firm of Chickering & Sons; that none of the partners of the firm kept private bank accounts; that their private bills were paid by the cashier of the firm by checks signed by the firm; that debts due to the firm were offset against private debts due from the partners. He also testified that he found

the policy declared on immediately after his brother's decease ; that he went to see Osborn early the week following, and demanded a blank for proof of loss ; that Osborn said he would send on and have one the next morning ; that he did not receive one from Osborn, and at his request called on the president of the company in New York ; that the president told him that this was a peculiar case, and must go before the board, and that he must make his application to Osborn ; that this call on the president was about four weeks after his brother's death ; that he should have made a demand sooner, if Osborn had not promised to furnish blank form for proof. He also testified that he asked Osborn why he did not give his brother the receipt for the payment of the premium, and he replied that he held it as a voucher against his brother.

Joseph E. Clapp testified in behalf of the plaintiff that he had been for fifteen years a book-keeper of Chickering & Sons ; that he had paid the previous premiums on this policy with the checks of Chickering & Sons ; that he was accustomed to pay private debts of partners by checks of firm. He also testified that he knew Osborn ; that Osborn came into the office some time previous to February 9 1871, and said he had some money for the firm, thirty dollars over and above the amount of said Chickering's life insurance premium, At the time of the death of Thomas E. Chickering, Osborn owed the firm about seven hundred and fifty dollars. The witness also produced the account of Osborn on the books of the firm, from which it appeared that Osborn paid five hundred dollars November 23. 1870, and one hundred and fifty dollars February 6, 1871.

Dr. John H. Wilcox testified that he met Osborn at a supper at Thomas E. Chickering's on the Saturday night before he died ; that he overheard Osborn say to Chickering that the matter of the life insurance was all right, all correct ; that this was said in answer to a question by Chickering.

The defendant and the plaintiff, by agreement, reserved the right to object to the competency of any of the evidence. After the plaintiff's evidence was all in, the defendant asked the judge to instruct the jury as follows :

" 1. That the evidence offered and produced by plaintiff, so far as legally admissible, in relation to the conversations and transactions between the witness Osborn and Thomas E. Chickering, does not in law, if taken to be true, establish a payment to the defendant of

the premium due on the policy February 9, 1871, pursuant to the terms and conditions thereof.

"2. That the evidence of the plaintiff, so far as legally admissible, does not in law show or establish a waiver, by the defendant, of the non-performance in regard to the payment of said premium at the time and in the manner required by the policy, nor a waiver of the forfeiture which resulted from such non-performance.

"3. That the plaintiff's evidence, so far as legally admissible, does not by law prove or establish a ratification by the defendant of the alleged arrangement or agreement by which the witness Osborn agreed with Thomas E. Chickering to take care or pay said premium.

"4. That upon all the evidence offered by the plaintiff she is not in law entitled to recover in this action."

The judge decided that the second and third prayers for instructions were correct and should be given to the jury; and thereupon, by agreement and consent of parties, the case was taken from the jury and reserved for the consideration of the full court, with the agreement, that if upon so much of the evidence introduced as is competent and admissible, the jury would be warranted in finding a verdict for the plaintiff, judgment is to be entered for the plaintiff for the amount of the policy and interest from May 15, 1871; otherwise judgment is to be entered for the defendant. If, however, the court shall determine that the ruling of the presiding judge as to the second and third prayers was erroneous, the case is to be submitted on these points to a jury.

The case was argued in March, 1874, by H. W. Paine and R. D. Smith, for the plaintiff, and S. Bartlett and W. A. Munroe, for the defendants; and judgment afterward ordered for the plaintiff. The defendants thereupon moved for a rehearing, and this motion was argued in November, 1874.

R. D. Smith, for the plaintiff, cited Hoyt vs. Mutual Benefit Insurance Co., 98 Mass., 539; Bridges vs. Garrett, L. R., 4 C. B. 580 S. C. L. R. 5 C. P. 451; Catteral vs. Hindle, L. R., 1 C. P., 186; S. C., L. R., 2 C. P. 368; Sweeting vs. Pearce, 9 C. B. N. S., 534; Butterworth vs. Cotesworth, cited 9 C. B., N. S., 538.

S. Bartlett and G. O. Shattuck, for the defendants. 1. In the absence of usage or express contract, an agent cannot receive payment of a

debt due his principal by offsetting his private debt. Russell vs. Bangley, 4 B. & Ald., 395. Todd vs. Reid, ib., 210. Bartlett vs. Pentland, 10 B. & C., 760. Scott vs. Irving, 1 B. & Ad., 605. Barker vs. Greenwood, Y. & C., Exch., 414. Stewart vs. Aberdein, 4 M. & W., 211. Young vs. White, 7 Beav., 506. Leverson vs. Lane, 13 C. B., N. S., 278. Piercy vs. Fynney, L. R., 12 Eq., 69.

2. The instrument creating the agency in this case guardedly provides against the collections becoming the money of the agent, and against any use of them by way of set-off or otherwise; and inasmuch as Thomas E. Chickering knew that the sum set off was the defendants' property, he was put upon inquiry as to the authority of the agent, the result of which inquiry, if made, would have negatived the authority, and if not made, he is affected by all the consequences which would have resulted from such inquiry.

3. There is no pretence that there was any evidence in the nature of the agency, or of any custom or usage, or of any transactions under the agency, from which the assent of the principal to the set-off could be inferred.

AMES, J.

The question raised by this report is whether there was any evidence upon which the jury would have a right to find that the premium due from the assured on the ninth day of February, 1871, was paid according to the terms of the policy. Even upon the assumption that Osborn, as the defendants' agent, had no authority to waive or modify those terms in any respect, a seasonable payment to him was all that it was necessary for the plaintiff to prove. He was the agent of the corporation, not merely for this special transaction, but generally, for the collection of all premiums that became due to them within a certain territory; and whatever money came to his hands in this way he was undoubtedly to hold in trust, as a distinct fund; but he held it as an accounting agent, and not as a clerk or messenger of the defendants. The mode of accounting, as pointed out in the contract by which he was appointed, was not by forwarding the specific and identical money which he from time to time received in that capacity; but after reserving out of it the commission which was to be the compensation for his services, by investing the remainder at regular and prescribed periods, in certified checks or drafts payable in the city of New York, and remitted to the defendants with his account.

It appears from the report that he charged himself, in his return to the defendants, with the premium in question, and included it in the certified check with which, according to his regular practice, he had undertaken to pay the balance apparently due to them. The amount of the premium, therefore actually came into their hands in regular course of business; but on the ground that it was not seasonably paid to their agent they have repaid it to him, and now insist that it was not paid by the assured in conformity to the terms of the policy.

The evidence reported had a tendency to show that a few days before the premium became payable Osborn had funds in his hands, belonging to the firm of Chickering & Sons, to an amount largely exceeding the premium; he had been the agent of that firm for the sale of pianos, and in that capacity had made sales, and collected the proceeds of these sales. Whatever money he had collected in that way came to his hands as their agent, and he held it in trust for them. The funds in his hands were substantially their funds, and they had a right to direct to what uses they should be applied.

No question is raised by the defendants as to the right of the assured to pay his own personal debt from the funds of the firm. It appears that such a proceeding was in accordance with the ordinary practice of the partners, and that it had been the habit of the assured to pay the premiums on this policy, as they became due, in that very manner.

It is not contended that the fact that the premium had become due was forgotten by the assured, or that the necessity of prompt and punctual payment was overlooked. It is clear on the evidence that an arrangement of some sort was proposed and discussed for the purpose of meeting that necessity, and the jury might have found from the evidence that Chickering not only relied upon that arrangement, but had every assurance that it had been carried into effect. If there were funds actually in the hands of Osborn belonging to the firm and which he was ready at any moment to pay to the assured, and which the assured had an absolute right to control, that control might as well be exercised by an oral direction to Osborn to apply a portion of the funds to the payment of this premium, as in any other way. If, in addition to such oral direction, there was an express promise by Osborn that he would pay the premium, and after that an express assurance that he had done so, the assured might not unreasonably suppose that he had done all that was required.

It is objected that the effect of such an arrangement would be to

render Osborn a debtor to the corporation without their consent; but it is difficult to see how it could have any effect in that respect, to distinguish it from a payment in any other mode. If it were an actual placing of money in the hands of their agent, it would add to the fund which he held in trust for the defendants, and would not make him their debtor in any other capacity or mode.

There was evidence, also, as to a declaration of Osborn, at about that time, that money had come into his possession exceeding the premium by thirty dollars—a declaration having a tendency to show a specific application of the money by him to that precise purpose. And there was also evidence, not contradicted, that the customary receipt, as a voucher of the payment, had come to his hands in the regular course of business; and although it had not been delivered by him to the assured, that fact was explained by his testimony that the reained it only as a voucher for his own account with the firm.

It is manifest also that in rendering his account to the defendants, he included this premium in the balance which he undertook to pay by the "certified check or draft, payable in New York," required by his contract with them; and although this was not done with literal punctuality as to time, whatever delay occurred was consented to by the defendants.

The evidence was sufficient to warrant the jury in finding that funds which the assured had a right to control and apply to the payment of the premium, had come into the hands of the defendants' agent before the premium became due; that the assured directed that the agent should apply so much of said funds as was necessary to that payment, and that the agent did so apply it. Such facts would show a payment of the premium, within the meaning of the policy.

According to the terms of the report, therefore, there must be judgment for the plaintiff.

COURT OF APPEALS OF NEW YORK.

PRESCENTIA ANGEL, *Respondent,*

vs.

HARTFORD FIRE INS. CO., *Appellant.*

It is an elementary rule of evidence that where the testimony is evenly balanced, the party holding the affirmative of an issue must fail. But the even balance does not depend simply on the number of witnesses, but also on the degree of credibility to be attached to their evidence. The conclusion of the triers must express their conviction of the truth drawn from all the testimony given, and not based upon the number of witnesses.

A contract of insurance affirmed by one witness and denied by another was properly submitted to the jury for their determination of the fact.

Where testimony tended to show that witness had made a statement out of court material to the issue different from his evidence, it was admissible to impeach his credibility by the evidence of another witness that the first had told him he made a memorandum of the contract, which the first denied.

Where the agent was regularly authorized to contract for insurance, and was furnished with policies in blank to fill up and deliver to the parties with whom he contracted, he was authorized to make binding contracts to insure to be consummated by filling up and delivering policy, and an agreement to insure for three years was not a parol contract for insurance for that time, but a preliminary agreement to insure within the scope of his authority.

The validity of the contract was not affected by credit being given until the delivery of the policy.

Private instructions of the company to the agent unknown to the insured does not affect the rights of the parties.

KELBY & FULLER, *for Respondent.*

MR. F. W. HUBBARD, *for Appellant.*

GROVER, J.

The counsel for the appellant insists that the defendant's motion for a nonsuit should have been granted, upon the ground that the testimony was not such as to authorize the submission to the jury of the question, whether the contract, as claimed by the plaintiff, had been made by the parties. The making of the contract was denied in the answer. The plaintiff had the affirmation of the issue, and

was bound to establish it by competent evidence, to the satisfaction of the jury. For this purpose she introduced Mason as a witness, who testified to the making of the contract, as alleged in the complaint. In answer to this, the defendant introduced Carpenter as a witness, with whom Mason testified he made the contract as agent for the plaintiff, Carpenter acting therein as agent for the defendant. Carpenter fully denied making any such contract as that testified to by Mason, or any contract at all with him on behalf of the defendant.

The position of the counsel for the appellant is, that this being the testimony of one witness against that of another having equal opportunities of knowledge, the evidence was balanced, and that the party holding the affirmative of the issue must fail. If right in the premises, the conclusion necessarily follows, as it is an elementary rule of evidence that the party holding the affirmative of the issue must prove it. This he fails to do when the evidence *pro* and *con* is equally balanced, and there is nothing to turn the scale in his favor. But the fallacy of the position is in supposing that as a legal conclusion the testimony of one witness is entitled to the same credit as that of another. This is an entire mistake.

The law imposes upon the triers of the issue, the duty of determining whether or not to give credit to the testimony of any particular witness, and their conclusion should be predicated upon the probability or improbability of the testimony given, the appearance of the witness, and his manner of testifying, the concurrence of the testimony with the circumstances proved, or the reverse, and such other considerations as tend to produce a conviction of the mind as to the truth or falsehood of the testimony. It often happens that the testimony of a single witness will produce complete conviction of its truth, although contradicted by that of two or more, and in such a case it requires no argument to prove that the verdict or finding should be in accordance therewith, instead of that of the greater number of witnesses. The verdict or finding should in all cases express the conviction of the triers of the real truth of the case, from all the testimony given, and not based upon the number testifying to the facts. It was the duty of the trial judge, in the present case, to submit the question as to the credibility of the witnesses to the jury. This he fairly did, and that question was determined by them.

The testimony of Fulton, that Carpenter told him in substance that he made a memorandum of the contract, was competent. Carpenter was examined upon the point, calling his attention to time and place,

and denied that he had so told him. The counsel for the appellant is right in the position, that this would not have made the testimony competent had the question been immaterial. But it was not so. Mason testified that Carpenter at the time made a memorandum of the contract, and hung it up in the office ; Carpenter testified that he made no contract, and made no memorandum. The testimony tended to show that Carpenter had made a statement out of court, upon a point material to the issue, different from the testimony given by him, and it was therefore admissible to impeach his credibility.

The counsel for the appellant is mistaken in supposing that the action was based upon a parol contract of insurance for three years. There was not sufficient evidence to show that Carpenter was authorized to make such a contract, by the defendant. It was alleged in the complaint, and the testimony tended to prove, that a preliminary contract was made, by which it was agreed that the defendant should insure the plaintiff upon the property, against damage by fire, for a sum and at a rate agreed upon for the term of three years from the time of making the contract, and that a policy of insurance should shortly thereafter be made out, to take effect from that time, and delivered to the plaintiff by Carpenter, at which time it was agreed the premium should be paid. It was proved that Carpenter was the agent of the defendant, with authority to negotiate contracts of insurance in its behalf, agree upon the rate of premium, the terms of insurance, and, in short, to agree upon all the terms of the contract. That he was furnished with policies executed in blank by the president and secretary of the defendant, with authority to fill up and deliver the same to any party with whom he made a contract. This authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling up and delivering a policy, pursuant thereto. The case comes directly within the principle upon which Ellis vs. Albany City Fire Ins. Co. was decided by this court. 50 N. Y., 402.

The question, whether such an agent was authorized to bind his principal by such a contract was fully considered in that case. The only distinction between that and the present is, that in that case the premium was paid to the agent at the time of making the contract, and had been paid to the company, while in this, credit was given therefor, until the policy should be delivered. This has no effect upon the validity of the contract. Trustees, etc. vs. Brooklyn Fire

Ins. Co., 19 N. Y., 305; Anchelon vs. Excelsior Ins. Co., 27 N. Y., 216.

A recovery of the amount insured was proper in the action for the breach of their contract. Ellis vs. Albany City Fire Ins. Co., and cases cited, *supra.* The private instructions given by the defendant to Carpenter, by which he was to regulate his conduct in the transaction of the business, were not known to the plaintiff or her agent, and could not, therefore, affect the rights of the parties. The point that the contract was within the statute of frauds, was not insisted upon in this court. The judgment appealed from must be affirmed, with costs.

All concur, except ALLEN and RAPPALLO, JJ., not voting.

SUPREME COURT OF NEBRASKA.

JULY TERM, 1874.

Error to the District Court of Richardson County.

CONTINENTAL INS. CO., OF THE CITY OF NEW YORK,
Plaintiff in Error,

vs.

N. LIPPOLD, *Defendant in Error.**

Plaintiffs insured defendant's dwelling in Arago, through an agent in that town. The policy required that, "immediate notice of the loss should be given to the company in New York, or at the office of the Western Department in Chicago. A few days after the loss, defendant requested local agent to notify the company. Three months after the loss, defendant communicated with general agent by letter, stating the loss. Four months after the loss, general agent addressed a letter to defendant, stating there were suspicious circumstances which should be explained. The fire occurred on the 16th of April, 1871. On the 1st of January, 1872, formal proof of loss was made and transmitted to general agent.

Held, that it is a sufficient compliance with the condition of a policy, requiring notice of loss to be given "forthwith" or "immediately," that the party has used due diligence under all circumstances.

* Reported in 3 Nebraska Reports, 391.

The clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and it only requires reasonable information to enable the company to judge of its rights and duties before payment.

It was a proper question for the jury, whether the defendant had used due diligence.

Judgment affirmed.

J. H. Broady and E. W. Thomas, *for Plaintiff in Error.*

It is not disputed that the building was burned April 13th or 15th, 1871. This is stated in the petition, the answer, the testimony of Lippold, and in his letter of July 15, 1871, to Taylor, the superintendent of the Ins. Co., at Chicago. It is clear from the evidence, that the first and only notice of the fire given to the company was contained in the said letter to Taylor.

The policy required that "immediate written notice of the loss should be given to the company in New York, or at the office of the Western Department in Chicago." The bill of exceptions shows that the proper notice was not given, and no excuse is shown for the failure to give the same.

The giving of the notice in the manner, and within the time required by the policy, is a condition precedent without which no recovery can be had. Gies vs. Bechtner, 12 Minn., 279; Inland Ins. & Dep. Co. vs. Stauffer, 33 Penn. St., 397. Davis vs. Davis, 49 Me., 282. Cornell vs. Milwaukee Mut. Ins. Co., 18 Wis., 387.

The notice in this case was not given within the time required by the policy. The giving thereof three months after the fire, was neither a literal nor a substantial compliance with the condition of the policy. Inman vs. West. Fire Ins. Co., 12 Wend., 452; McEvers vs. Lawrence, 1 Hoff. Ch., 171; Mellen vs. Hamilton Ins. Co., 17 N. Y., 617; Trask vs. State Fire and M. Ins. Co., 29 Penn. St., 198; Whitehurst vs. N. C. Mut. Ins. Co., 7 Jones Law N. C., 433.

The giving of the notice to Walther, the local agent at Arago, cannot be deemed a compliance with the conditions of the policy. Cornell vs. Milwaukee Mut. Ins. Co., 18 Wis., 387; Patrick vs. Ins. Co., 43 N. H., 621.

If it should be contended that the assured had a right to depend on Walther's giving the notice, we say if he employed or requested Walther to notify the company, Walther was *pro hoc vice* the agent of the assured, and not of the insurance company, and it was incumbent upon the assured to prove that his said agent did give the notice within the required time. Not only has nothing like this been proved, but Walther himself testifies that he did not give such notice. Un-

der the pleadings the burden of proving that notice was given lies upon the assured.

There is nothing in the evidence tending to show that the insurance company waived its objections to the fact that the notice was not given in time. If there is any such waiver, it must be in Taylor's letter to Liverpool, dated August 16. But this letter cannot be construed as a waiver. Cornell vs. Milwaukee Ins. Co., 18 Wis., 387; Edwards vs. Baltimore Ins. Co., 3 Gill., 176; St. Louis Ins. Co. vs. Kyle, 11 Mo., 278; Trask vs. State Fire and M. Ins. Co. 29 Penn. St., 198; Bartlett vs. Union Mut. Ins. Co., 46 Me., 500; Barnes vs. Union Mut. Ins. Co., 45 N. H., 21.

The court erred in refusing to grant a peremptory nonsuit on the trial. The courts of this State, in a proper case, have the power to take the evidence given by the plaintiff from the jury, and order a peremptory nonsuit. Ellis & Morton vs. Oh. L. Ins. Co., 4 Oh. St., 628, and authorities there cited. Allen vs. Pegram, Iowa, 174.

A SCHOENHEIT and J. D. GILMAN, *for defendant in error.*

1. The company is estopped from requiring of the insured technical proof of the loss, etc., when its agent, when called upon by the insured, does anything which leads the insured to believe that such proof, etc., is unnecessary, or lulls the assured into a belief that such proofs are not required. Manhattan Ins. Co. vs. Stein and Zang, 5 Bush., 652. Ætna Ins. Co. vs. Jackson & Co., 16 B. Mon., 242.

2. When the company declines to receive the proof of loss or to pay the loss because of insufficiency or informality of proofs, or because made out of time, it is bound to declare to the assured the grounds of such refusal, as then known or believed to exist by its officers or agents, otherwise the objection will be waived. O'Conner vs. Hartford Fire Insurance Co., 31 Wis., 160. Killips vs. Putnam Fire Insurance Co., Wis., 472. Tayloe vs. Merchants Fire Insurance Co., 9 How., 390. Columbia Insurance Co. vs. Lawrence, 10 Peters, 507. Clark vs. New England Mutual Insurance Co., 6 Bush., 342. Vos vs. Robinson, 9 John., 192.

MAXWELL, J.

On the 11th day of May, 1870, the plaintiff in error insured a dwelling-house for defendant in error, situated in the town of Arago, for the sum of $350, the policy to continue in force until the 11th day of May, 1875. The policy contained a provision that in case of

loss, defendant in error should immediately notify the general agent at Chicago. The insurance was effected through a local agent residing in the town of Arago. On the 16th day of April, 1871, the house was destroyed by fire. A few days after the fire, defendant in error requested the local agent at Arago to notify the company of the loss. The local agent stated that he had seen the general agent, and had a conversation with him in reference to the loss. About the 15th day of July, 1871, defendant in error employed one Gus. Doerfelt to write a letter for him to the general agent of the company, stating the loss of the property. On the 16th day of August, 1871, the general agent addressed a letter to defendant in error, stating that there were suspicious circumstances connected with the fire which ought to be explained. On the 1st day of January, 1872, the defendant in error made formal proof of loss, and transmitted the same to the general agent at Chicago. Suit was instituted against the company, in the District Court of Richardson county, on the 22d day of January, 1872. The cause was tried by a jury, and the defendant in error recovered the sum of $253.78.

The only errors assigned are: First, that the court erred in overruling the motion for a nonsuit. Second, that the court erred in overruling the motion to set aside the verdict. The only objection urged by the plaintiff in error, in this court, as ground for reversing the judgment of the court below, is that no notice of the loss was given, in the time required by the terms of the policy. No action can be maintained on the policy until the proof of loss is made, or waived by some act of the insurer. Yet it is a sufficient compliance with the condition of a policy, requiring notice of loss to be given "forthwith" or "immediately," that the party has used due diligence under all the circumstances. New York Insurance Co. vs. National Insurance Co., 20 Barb., 475. Bumstead vs. The Dividend Insurance Co., 12 New York, 81.

In the case of the Columbian Ins. Co. vs. Lawrence, 2 Peters, 50, a certificate accompanied the proof of loss not in conformity to the conditions of the policy. The case was reversed in the Supreme Court and remanded to the Circuit Court, and afterward dismissed by plaintiff without prejudice. A new certificate was procured from a magistrate in compliance with the rules of the company, on the 14th day of February, 1829, five years after the loss, and an action was commenced thereon in September, 1831. The condition of the policy required "all persons assured by the company, sustaining any loss or

damage by fire, forthwith to give notice to the company, or as soon thereafter as possible to deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof the same by their own oath and affirmation, and by their books of account, or proper vouchers, as shall be reasonably required; and shall procure a certificate under the hand of a magistrate, or sworn notary of the town or county in which the fire happened, not concerned in such loss, directly or indirectly, importing that they are acquainted with the character and circumstances of the person or persons insured; and do know or verily believe that he, she or they, really and by misfortune, without any kind of fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and until such affidavit and certificate are produced the loss claimed shall not be payable." The court, says Story, J., 10 Peters, 513, "We think the true intent and meaning of it is, that the certificate must be procured within a reasonable time after the loss. It would be a most inconvenient course to adopt a different construction, not required by the terms of the clause or the context, as it would make the material inquiry not the production of the certificate, but the possible diligence of procuring it. * * * So that it is manifest, that the assured would not be entitled to maintain any action until he had furnished all the preliminary proofs; so that the delay is not injurious to the company, but solely to the assured, by depriving him of his right to judgment until it is procured. * * * We are of opinion, that under all the facts and circumstances, the non-production of the proper certificate at an earlier period is fully accounted for; and that the proper certificate was procured in a reasonable time. * * * If the company had contemplated the objection, it would have been ordinary fair dealing to have apprised the plaintiff of it." Westlake vs. St. Lawrence Ins. Co., 14 Barb., 206; Clark vs. New Eng. Ins. Co., 6 Cush., 342; Francis vs. Ins. Co., 1 Dutcher, 78; Bartlett vs. Union Mut. Ins. Co., 46 Me., 500.

The clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and it only requires reasonable information to be given so that the company may be enabled to form some estimate of its rights and duties before it is obliged to pay. McLaughlin vs. Wash. Co. Ins. Co., 23 Wend., 525; Lawrence vs. Ocean Ins. Co., 11 John., 240; Smith's Mercantile Law, 516, note 10.

In this case, no objection is made to the form of the proof of loss furnished in July, 1871, nor is the refusal to adjust the loss put on the

ground that it is not in proper form. If objection is made by the company to the form of the proof of loss, it is its duty to notify the party of the alleged defect, and failing to do so, it will be deemed waived. A contract of insurance, like other contracts, should receive, if possible, such construction as will carry it into effect. The insurer having received the consideration for assuming the risk, there is no reason why he should be discharged from liability in case of loss, on slight or merely technical grounds. In this case it was a proper question to the jury, whether the plaintiff in the court below had used due diligence in furnishing the preliminary proofs of loss. The motion for a nonsuit was therefore properly overruled, and the question having been fairly submitted to the jury, who found in favor of the defendant in error, we see no error in the record. The judgment of the district court is therefore affirmed. Judgment affirmed.

Chief Justice LAKE concurred.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

AMBROSE SNOW, ET AL.,

vs.

MERCANTILE MUTUAL INS. CO.*

"Due diligence" in countermanding an order for marine insurance on account of subsequent discovery of a loss, does not require the use of the most expeditious method of communication possible. The requirement is satisfied by use of the earliest and most expeditious usual route of mercantile communication.

The Atlantic cable was not a usual mode of mercantile communication previous to November, 1866.

"Due diligence" did not require that an order for marine insurance in New York, sent by mail from Liverpool, on October 27th, 1866, should be countermanded by telegraph on receiving intelligence of the loss three days later. It was enough that the intelligence was expeditiously forwarded by mail.

Judgment affirmed.

Appeal from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment entered at the circuit.

* Argued May 22, 1874.

The action was brought upon a policy of marine insurance. The substance of the defense was, that the owner of the vessel for whose benefit the action is brought, knew of the loss of the vessel and might have informed the plaintiff, his agent, by the use of reasonable and usual means in time to have prevented the insurance, and that his failure to do so was a concealment and renders the policy void.

At the trial certain facts were admitted by the parties, for the purpose of the action. This submission is condensed into the following statement:

The plaintiffs were partners in business, under the firm name of Snow & Burgess. The defendants are a domestic corporation, doing business in the city of New York.

On October 25th, 1866, Wm. Fry Angell was the owner of an insurable interest in the ship Sunda, which was then lying in the port of Liverpool, receiving a cargo of coal, and was perfectly seaworthy. Angell requested his broker in Liverpool, (one Gilchrist,) to write to the plaintiffs in the city of New York to effect an insurance on the ship, in a marine insurance company. In accordance with this direction, Gilchrist, on October 27th, 1866, wrote to the plaintiffs, requesting them to effect an insurance, describing the ship, and stating that she was loaded for Aden, and that she would probably be out of the channel before the letter was received. This letter was received by the plaintiffs on November 8th, 1866, in due course of mail, by ocean steamship.

On the 9th day of November, the plaintiffs, as the agents of Angell, effected an insurance for one year from that date with the defendants for $5,000, at a premium of 15 per cent., for which the plaintiffs gave their promissory note.

On October 29th, (some ten or more days before the insurance was effected,) the ship Sunda sailed from Liverpool on a voyage to Aden and while proceeding to sea was wrecked and lost on the English coast.

The loss was known to Angell as early as October 30th, 1866. The value of the ship exceeded $5,000.

On the 31st day of October, Gilchrist, as the agent of Angell, wrote by the first mail to the United States after the loss of the ship, the following letter, received by them November 13th, in due course of mail:

"I wrote you on the 27th inst., per Java, as per copy annexed, and am sorry now to inform you that said ship was a total loss on Monday, the 29th inst. She was in tow of a steamer, with a pilot on

board, and when she had reached the Queen's Channel struck on the bar, where she remained until low water, and then fell over on her beam ends, and heavy gale coming on at the time with heavy sea, which caused her to become a total wreck. * * Probably you may hear of this by telegram before you receive my letter, but if you do not, and have the insurance effected, I suppose it will be all right, as the owner has nothing more on the ship, and only £1,100 on the freight, as he is a person who never insures much. * * * I do not suppose it is my duty to telegram the loss of said ship ; do you? If so, I shall better know how to act in the future. Please inform me on this point. R. J. GILCHRIST."

It was further admitted that the city of New York had been ever since, and not before July 30th, 1866, in telegraphic communication with Liverpool, England, and that the loss of the Sunda could have been communicated by Angell to the plaintiffs on October 30th by telegraph, and that no such communication was made, and that the loss was not known to the defendant until after the issuing of the policy.

The only other statement on the subject of the telegraph, admitted by the parties, was in the following words: The telegraph between said places (New York and Liverpool) "was, in October and November 1866, used by merchants and others as a mode of communication, whenever in their judgment the interest of their business required the necessary expense for that purpose."

A table was offered in evidence, showing the statistics of telegraphic traffic. In the months of July, August and September, 1866, under a £20 tariff, the average number of messages per day was 29. For the next twelve months, under a £10 tariff, the daily number was 64.

As the tariff diminished, the number increased. In some of the months of 1870, under a tariff of 20 shillings, the average number was nearly 500 per day.

Sufficient notice and proof of loss was furnished to the defendant.

The defendant had offered to return the premium note to the plaintiffs.

The defendant's counsel then moved to dismiss the complaint. The motion was denied and the defendant excepted.

The court thereupon directed the jury to find a verdict for the plaintiff. This direction was excepted to by the defendant. Appeal having been taken from the judgment entered upon the verdict to the

General Term, the judgment was affirmed, whereupon the defendant appeals to this court.

TOWNSEND SCUDDER, *for Appellant.*
RICHARD H. HUNTLEY, *for Respondent.*

DWIGHT, C.

The general rule of law is well settled, that if intelligence of a fact enhancing the risk, or of a loss, is received after an order has been given for a marine insurance, and before the contract is executed, it must be communicated to the underwriters with due diligence, or the order be countermanded. 1 Phillips on Ins., § 561.

The question opened to controversy in the above proposition is the meaning of the expression, "due diligence," or "due and reasonable diligence," as found in some of the authorities.

It is claimed by the defendant that it means *extreme* diligence. To support this view a dictum in Andrews vs. Marine Ins. Co., 9 J. R., 34, is referred to; also 2 Duer on Insurance, Note 4, p. 530.

In order to determine this question a general view should be taken of the authorities.

The defendant urges that the rules of morality require that the insured should use the same diligence to prevent the insurance as he would to prevent the payment of the premium if the vessel were safe, citing 2 Duer on Ins. § 13, and § 19, p. 410.

This consideration would address itself to us with much force if the question were new and open to be considered on purely theoretical grounds. The law on this subject seems to be easily ascertained from the decisions, and it is incumbent upon us to apply and enforce it as we find it.

One of the earliest cases on this subject is Grieve vs. Young, in the Scotch Court of Sessions, reported in Miller on Ins. On December 10th, 1779, Grieve, a merchant in Eyemouth, wrote to his correspondent in Edinburgh to take out an insurance on his ship, which had just sailed, and was then out of danger. As Eyemouth was not a port town, Grieve sent the letter to a place on the London post road whence it would be sent by post to Edinburgh. It was sent on the evening of the 10th, and arrived at six o'clock P. M. on the 11th. The insurance was taken at eight o'clock. The ship was in danger on the evening of the 10th, and went to the bottom at ten o'clock of the morning of the 11th. Grieve was aware of all the

facts of the case. The court held that it was not incumbent upon him to send by express to Edinburgh to give information of the facts, but only to make use of the mail and post a letter at once countermanding the order.

This case was affirmed in Watson vs. Delafield, 2 Caines, 234, S. C. 1 Johns., 150; and in the Court of Errors, 2 Johns., 526. It was held in this case that if an insured, having written letters ordering an insurance, hears of a loss, he is bound if practicable to countermand his order by the same mail. The Supreme Court of the United States, through Mr. Justice Story, lays down the correct rule upon this subject in the case of McLanahan vs. The Universal Insurance Co., 1 Peters, 170. Where a party orders insurance and afterward receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent by due and reasonable diligence, to be judged under all the circumstance of each particular case, for the purpose of countermanding the order or laying the circumstances before the underwriters. The "extreme diligence" recognized in Andrew vs. Marine Insurance Company, may be reconciled with the view of Justice Story, by assuming that in special cases extreme care may be requisite to constitute due and reasonable diligence.

The case of Green vs. Merchants Ins. Co., 10 Pick., 402, presents this question in a clear light. The proposition is there laid down, that if a person who has directed insurance to be procured at a distant place, on a risk already commenced, receives, before the contract is made, intelligence of a loss, he is bound to transmit the intelligence by the earliest and most expeditious usual route of mercantile communication in order that it may be laid before the person requested to underwrite; but the omission to send by an unusual and extraordinary conveyance, although by possibility it might arrive before the policy was effected, will not vitiate the policy. The question whether a particular mode of communication is a usual one is a matter of fact, and must in general be found by a jury. Green vs. Merchants Ins. Co., 10 Pick., 402; McLanahan vs. Universal Ins. Co., 1 Peters, 186; Byrons vs. Alexander, 1 Brevard, S. C., 213.

Following these authorities, we must hold that the plaintiff was not bound to resort to the telegraph to communicate the loss of the Sunda to the defendant unless that was at the time a usual means of mercantile communication.

The statement of facts on which the court below acted, contains no finding upon this subject. In fact, it seems studiously to avoid it.

Had there been a distinct proposition submitted that the telegraph was then a "usual mode of mercantile communication," the plaintiff must clearly have failed to establish a case for recovery. Instead of that, the statement is, that the telegraph between said places (Liverpool and New York) was used by merchants and others as a mode of communication, whenever in their judgment the interest of their business required the necessary expense for that purpose. This is by no means equivalent to a statement that it is a usual mode of mercantile communication. Nor do the statistics of the traffic help the case. At the time of the disaster, between New York and Liverpool the rates were very high, and the telegraph messages unfrequent. All the messages between Valentia and Heart's Content, or in other words between America and Europe, averaged but twenty-nine per day both ways, or fifteen from Europe to America. This was the entire telegraphic correspondence between the two countries for all forms of business, and for all the requirements of friendship and affection. This average had prevailed for three months. The messages for the last of the three months averaged ten less than for the first. Under this state of facts, I can see no reason for finding that the telegraph was at that time a usual means of mercantile communication, within the meaning of the authorities that have been cited.

The case of Proudfoot vs. Montefiore, L. R. 2 Q. B., 513, is not opposed to this view. In that case the Appellant's Court, by agreement of counsel, was authorized to draw inferences of fact as they thought proper. "It was held accordingly, that as the electric telegraph between the places referred to in that case was in general use," between agents and their employers, it was the duty of the insured to make use of it. That decision is in entire conformity with the principles followed in the case at bar, as it turns upon the special circumstances presented to the court. It would be followed in this case if we could be satisfied (as the English court was on the facts submitted to it) that the telegraph between Liverpool and New York was on October 31st, 1866, a usual means of mercantile communication.

The judgment of the court below should be affirmed.

Earl C. and Lott Ch. C., concur.

Reynolds, C. reads for reversal, Gray, C. concurs.

Judgment affirmed with costs.

COMMISSION OF APPEALS OF NEW YORK.

RALPH A. BICKNELL, *Respondent*,

vs.

LANCASTER CITY & COUNTY FIRE INS. CO.*
Appellant.

Plaintiff effected an insurance on his machinery contained in the mill held by him under contract of purchase from P.

It was in evidence that P. owned the building, that T. bought the machinery, and that plaintiff had chattel mortgages on the machinery. T. was in possession of the building under contract of purchase from P. There was conflicting evidence about the actual delivery of the contract. It was also claimed that the contract was void for want of consideration. P. agreed in the contract to sell on certain terms. T. agreed that all machinery then in the mill, or afterward to be put in, should be part of the freehold, but did not agree to buy. Plaintiff bought out the entire interest of T. at receiver's sale, and took a conveyance from the receiver.

Held, that sufficient consideration was expressed in the contract, that the question of its delivery was proper for the jury.

Held, that the plaintiff was so far the owner of the chattels insured as to have an insurable interest, properly expressed in the policy.

Held, that evidence to prove plaintiff bought the property for T. was properly excluded.

Held, that the representation of plaintiff that he held the property under contrac from P. was true.

Judgment affirmed.

The defendant moved for a nonsuit at the close of plaintiff's case on the ground that the plaintiff had not shown any title to the property insured. Again, at the close of the proof, he moved for a dismissal of the complaint, on the grounds that the plaintiff had no insurable interest in the machinery, and that he had not stated his interest in the machinery in the poilcy.

On the argument in this court these positions are sought to be sustained by showing that the instrument signed by Parish, by his agent, and by Thompson & Judd, is not a valid and enforceable contract,

Decision rendered October 6, 1874. Reported below 1 S. C. R., T. & C., 215.

It is claimed that it is without consideration, and so clashes with the provision of the Revised Statutes, (2 R. S., 135, sec. 8,) that every contract for the sale of lands shall be void unless it, or some note or memorandum thereof, be in writing expressing the consideration, and it is argued that if the contract was void the plaintiff could have no interest in the premises, and hence no interest in the personal property upon them.

But if the premises be conceded the conclusion does not necessarily follow. The policy was upon property which *per se* was chattel property. It is not shown that it ever became so affixed to the realty, unless by the provisions of the contract, as that it was not removable therefrom at the will of the owner of the chattels. It is testified to by Thompson that he bought the machinery in the mill. It is testified to that Bicknell bought the planer for Thompson & Judd, and put it in the mill. It is also testified to that Bicknell had chattel mortgages upon the property, so that there was testimony tending to show that the chattel property in the mill belonged to Thompson & Judd. Then the plaintiff showed the purchase by him at the receiver's sale of the interest therein of Thompson & Judd, and the conveyance to him by the receiver. Clearly, the plaintiff had produced evidence which tended to show that he was the owner of this chattel property, and had an insurable interest therein. The statement of the policy is on his property, enumerating it, contained in the saw and planing-mill, held by him under contract of purchase from George Parish. There is no doubt of the correct identification of the buildings in which the property was contained. There is no doubt but that the plaintiff was in possession of those buildings and held them. There is no doubt but that he held them under this written paper, signed by Parish and by Thompson & Judd. Does not this state of facts match with the statement of the policy? That statement is not, that his title to the chattel property is derived from the contract of purchase, but that his property is contained in certain buildings, which buildings he holds under that contract. Whether that contract be void or not, it was under it, or by reason of it, because it had been signed by the parties named in it, and because it was deemed an effectual instrument, that the plaintiff was in possession of the buildings, which contained property to which he had acquired title and then owned.

But it is said that the contract was never delivered. And the witness Beckwith testifies that after it was made it was never delivered to Thompson & Judd. But that same witness afterward says that in

April, 1871, Bicknell gave up his contract. Thompson testifies not only that he and Judd held under the contract, but that it was sent to them for their signatures, and then returned for the signature of the agent of Parish; that it was executed in duplicate, and both copies left with Beckwith. It is not clear from this testimony that there was not a delivery.

There was a question for a jury under proper instruction. And it is quite clear that all parties treated it as well executed, that possession was held by Thompson & Judd, and after them by Bicknell, in reliance upon the instrument as an operative contract.

But though the paper does not contain an agreement by Thompson & Judd to pay for the lands and to take a conveyance, there is an agreement in it on their part. It is that all machinery, etc., then in the mills, or thereafter to be put in them, shall become a part of the freehold, and that Parish shall have title to and lien upon the same. Is it said that by reason of this stipulation, Bicknell could not by the receiver's sale and deed acquire any title or interest in these chattels. The answer is, that he did by that sale acquire the right of Thompson & Judd in the contract. This agreement by them contained in it, was a consideration for the agreement of Parish to sell and convey on payment being made according to its terms, though there was no corresponding agreement to purchase and to pay. So the contract was made valid under the provisions of the Revised Statutes above cited. It was expressed in writing, it expressed the consideration, and was subscribed by the party by whom the sale was to be made.

In any view, Bicknell was shown to be so far the owner of the chattels insured, as to have an insurable interest in them, and the statement in the policy was a correct statement; it was his property contained in buildings held under that contract. He bought and paid for some of it as a chattel, he held chattel mortgages upon it, he bought and paid for at receiver's sale the whole title of the former owners in it, and bought and paid for their whole interest in the contract from Parish. He had an interest in it which he might legally insure. He did not state incorrectly how he held the property. The policy did not incorrectly describe it.

There was an offer by the defendant to show that the plaintiff, though he bid off the property at the receiver's sale in his own name, did in fact buy it for Thompson & Judd. The testimony was refused. It was not error to do so. By the sale and conveyance, Bicknell obtained the legal title as against the whole world, save perhaps Thompson & Judd and their creditors. As the owner of the legal title, he

could insure the property as his. In case of loss by fire, and the receipt of the damages by him, he would hold them subject to any valid, equitable claim of Thompson & Judd, or their creditors. The testimony offered was therefore incompetent and immaterial in this view.

There is another view, in which it is claimed that it was admissible. The answer alleged that Bicknell falsely and fraudulently represented to the defendant that he held the mill property and premises by contract of purchase from George Parish.

The representation proven was that made to the witness Bacon, the agent of the defendant. That was, that he held the property under contract from Mr. Parish. This we have seen was not false. For if only the holder of the legal title, under a valid agreement by which Thompson & Judd or their creditors had an equitable interest in it, still it was true that he held under that contract. The testimony offered did not tend to contradict this, and was hence immaterial.

The judgment appealed from should be affirmed with costs.

All concur.

SUPREME COURT OF NEW HAMPSHIRE.

CURRIER

vs.

CONTINENTAL LIFE INSURANCE CO.*

When a debtor delivers money to be transmitted to his creditor, in accordance with authority given him so to do by his creditor, and the money is lost upon the way, it is the loss of the creditor.

The plaintiff was authorized to send money to the defendants by express, and there were three express-carriers between the residence of the plaintiff and the place of business of the defendants in this State: the plaintiff sent the money for the last premium due upon his life insurance policy by one of these expressmen, who embezzled the money and ran away. *Held*, that this was a sufficient payment of this premium to the defendants.

Corporations are held to be subject to the same presumptions and implications

* From 53 N. H. Reports.

from their corporate acts, or the acts of their agents, without either vote, deed, or writing, as in the case of natural persons.

A corporation may waive any condition inserted in its regulations or by-laws for the benefit of the company; and the acts of such company, or of its agents, are competent evidence of such waiver.

This was a bill in equity, by John Currier against the Continental Life Insurance Co., of Hartford, Conn.

By policy dated November 14, 1865, the defendant assured the life of the plaintiff's wife, in the amount of $5,000, to be paid to the plaintiff. The plaintiff was to pay an annual premium of $572.70, on or before November 15, in each year, for five years. He paid the first four premiums in person to the defendants' agents, the first payment being made at his own house, in Salem, N. H., when he received the policy, or before that time; the second payment being made November 13, 1866, at the same place; the third, at Boston, November 15, 1867; the fourth, at Boston, November 15, 1868. Payment of the first is acknowledged in the policy; for the other three payments he received formal receipts. December 3, 1869, at East Salisbury, Mass., the plaintiff delivered the amount of the fifth premium to Laws, an expressman, to be carried to the defendants' agent; but the expressman embezzled the money. The plaintiff prays a decree that the defendants apply the amount in satisfaction of the fifth premium, and credit him with payment in full of said premium, and give the plaintiff a renewal receipt, and treat said policy as a policy paid up in full; and for general relief. It was stipulated in the policy, that if the plaintiff did not pay the five premiums when due, the policy should be void: and that when the policy should become void, all payments made thereon should be forfeited to the defendants. The plaintiff claims, 1, that he was authorized to send the money by express, at the risk of the defendants; that delivery to the express was payment to the defendants; and, 2, that the time of payment was extended a reasonable time beyond November 15, 1869, and the forfeiture waived. Upon these two points, the facts are:

I. October 28, 1869, one Loomis (an agent of the defendants, at Portsmouth, N. H.,) wrote to the plaintiff (then living at East Salisbury, Mass.,) enclosing a notice of the fifth premium, and saying,— "Please forward your prem. on pol. No. 478 to the Portsmouth office. The two past years the Boston office has charged us a com. for collecting; by paying here, or at the home office, the company saves the com. You can forward the prem. by bank check, or your own private

check, on any bank or institution, and can be collected through the bank here; or, you can send by express." The plaintiff sent the money by express, relying upon this letter, and understanding that the money was at the risk of the defendants when delivered to the express; and there was no fraud, bad faith, or want of ordinary and reasonable care on the part of the plaintiff.

[The plaintiff took no receipt or other acknowledgment of the express-carrier, and made no attempt to notify the defendants of the delivery of the money until December 11, when he wrote to Loomis stating that he had sent the money by express, and asking if it had been received. There were then three different express-carriers upon the railroad between East Salisbury and Portsmouth, and Loomis, or the defendants, did not know until some days later to which express the money had been delivered. Soon afterward the plaintiff caused the expressman, Laws, to be prosecuted in Massachusetts for embezzling the money, and on the —— day of ——, 1870, wrote to Loomis, sending a copy of a letter from the district attorney of Essex County to the plaintiff, which, with all the written and printed evidence used at the trial, may be referred to as a part of the case. The fact of the delivery of the money to the express by the plaintiff was in dispute between the parties. The plaintiff did not pay or offer the express anything for transporting the money.]

II. The first four premiums had been paid by cash and note, half each. The notice of the fifth premium was as follows: "The 5 premium, of $572.70, on your policy No. 478, will be due the 15th day of Nov. 1869; interest on outstanding notes, $68.72—$641.42; less dividend of 1868, 50 per ct. on ordinary rate, $87.30. Cash due, $554.12. Respectfully yours, SAMUEL E. ELMORE, Secretary; GEO. N. LOOMIS, Agent. ☞ Unless the renewal premium is paid on or before 12 o'clock noon, of the day on which it is due, the policy is forfeited, and the company is under no obligation to renew it; but, upon satisfactory evidence being furnished that the insured is in perfect health, the risk may be continued, at the entire option of the company."

The plaintiff was not satisfied with this notice, for two reasons. He objected, first, that it required him to pay all cash, instead of half cash and half note. His second and chief objection was to the method of computing the dividend. A short time after receiving the notice, and before November 15, 1869, the plaintiff went to Loomis, and desired explanations on those points, but Loomis could give none satisfactory to him; whereupon the plaintiff said he desired time to ex-

amine the subject and to consider what he would do, and asked Loomis if he should be particular about the time of payment. Loomis informed the plaintiff that he had no authority to extend the time, or to waive a forfeiture, and showed him his instructions and the regulations of the company to that effect.

[These regulations were contained in a small printed book, of which the plaintiff had a copy, he having before acted as an agent of an agent of the defendants in soliciting a few applications for policies. The attention of the plaintiff was expressly called by Loomis to the following section, on pages 27 and 28 of the book: "Premiums are due and payable at the office of the company in Hartford, but for the convenience of policy-holders they may be paid to an agent of the company; but no receipt is binding unless signed by the president and secretary, and should be countersigned by the agent who receives the money." A conditional receipt, similar to the following, may be used by an agent:

"CONDITIONAL RECEIPT.

"Received —— —— 186–, from —— ——, $——, stated to be the amount of a premium due this day on policy No. — issued by the Continental Life Insurance Co. upon the life of —— —— for the sum of $——, and in favor of —— ——. Said alleged premium is held by the undersigned until application can be made to the company to accept the same and forward their receipt. When obtained, this receipt is to be surrendered therefor; if not obtained, the money is to be refunded."

"Agents are not authorized to make, alter or discharge contracts waive forfeiture, or bind the company in any way," etc.

And on page 23 of the same book are the words, "Lapsed policies may be restored at the option of company, but solely as an act of grace or courtsey, upon payment of all premiums past due, with interest thereon; but, whenever renewal premiums are received after the day on which they are due, it is with the express understanding that the party is then in sound health."]

Loomis further told him that it was not the custom of the company to take advantage of a forfeiture for non-payment of premium in his class when payment was made within a reasonable time after it was due; that he had never known the company to insist upon the forfeiture in such a case; and that he then had charge of some cases in

which the premiums were overdue, which would probably be paid by the insured. The precise words of this conversation cannot now be remembered by the parties or proved by witnesses. Loomis intended to give the plaintiff to understand that it was the usage of the defendants, upon payment of overdue premiums, and a certificate of continued health, to waive the forfeiture; that the defendants were not bound to do so; that he had no authority and did not undertake to bind them, or to bargain with the plaintiff that they would do so; but that, as a matter of fact, they undoubtedly would do so in his case as they always did in other like cases. The plaintiff understood, and an ordinary man would have understood, and would have been warranted in understanding, from the statements of Loomis, that although, by the express terms of the printed regulations of the company, Loomis had no authority to make a formal bargain binding the company to an extension of time or a waiver of forfeiture, yet the uniform usage of the company was to receive premiums within a reasonable time after they were due, when there was no material change in the health of the person insured; that the plaintiff could safely rely on this usage, and take time to examine the subject and consider what he would do, and defer the fifth payment for a reasonable time after November 15, without running any risk of forfeiture if his wife should continue in good health; that the company would receive the premium under such circumstances without objection. The plaintiff understood, and was reasonably justified in understanding, the statements of Loomis, not as an absolute undertaking to extend the time, or an express promise to waive the forfeiture, but as an assurance of a uniform usage of the company that would not be departed from in his case; but this distinction was not drawn in the plaintiff's mind as distinctly as it is here stated. He testified that he understood the practice of the company, in regard to forfeitures for non-payment at the stipulated time, to be the opposite of their theory.

But for his understanding, derived from the statements of Loomis, the plaintiff would have paid the fifth premium on or before November 15. He was induced, by his understanding of Loomis's statements, to delay sending the money till after November 15. December 3, the day he sent it, was within a reasonable time.

He wrote to one Hinckley (a relative of the plaintiff and an agent of the defendants in Vermont, and who had received his application for the insurance) for the explanations which he desired, but received no satisfactory answer. November 22, 1869, he wrote to Elmore, the secretary of the defendants at Hartford, for explanation, saying at the

close of his letter,—"I have deferred the payment of my fifth premium until we come to a proper understanding of the subject. Mr. Loomis suggested that no advantage would be taken by the company while this question was being considered." November 30, 1869, Elmore answered, giving lengthy explanations on the subject of dividends, and informing him that he could pay the fifth premium in the usual way if he preferred—that is, half cash, half note—but making no other allusion than that to extension of time or waiver of forfeiture.

The plaintiff delivered to the express the whole amount in cash, relying, as to the extension and waiver, upon his understanding derived from the statements of Loomis and the letter of Elmore; and if the express had delivered the money to Loomis, the plaintiff would have received a renewal receipt, and the defendants would have treated the policy as in force without raising any objection. The plaintiff's wife continued, and still continues, in perfect health; and satisfactory evidence of that fact would have been furnished the defendants by the plaintiff, if he had understood it was desired or necessary. He would also have paid interest on the premium, if he had understood that interest was demanded or expected. In his subsequent interviews and correspondence with Loomis, no certificate or evidence of health, or interest, was demanded, but the defendants, by refusing to give him a receipt for the fifth premium, and insisting upon a forfeiture on the ground that they had not received the money delivered by the plaintiff to the express, waived their right to such certificate, evidence, and interest, if they would otherwise have been entitled thereto.

Before the commencement of this suit, the defendants, though reasonably requested, neglected and refused to do what the plaintiff now seeks by this suit to compel them to do.

The court reserved all questions of law and fact arising upon the foregoing case, and involved in these two questions:

1. Is the money, delivered by the plaintiff to the express, to be considered as paid to the defendants?

2. Is the policy forfeited by the delay from November 15 to December 3?

On the ground on which the case was tried, if the first question is answered in the affirmative and the second in the negative, there should be a decree for the plaintiff; otherwise the bill should be dismissed, unless the court should see cause for a new trial. The parts of the case enclosed in brackets are portions of the evidence inserted at the defendants' request. Case reserved.

SARGENT, C. J.

Certain facts are found by the court upon evidence which was considered. These facts are stated, and they raise certain questions of law, which are proposed for the consideration of the court. The policy by which the life of the wife of the plaintiff had been insured was to be paid for in five annual premiums, as it seems, half cash, and half note. Four of these had been paid seasonably, and receipted for; the last payment was sent, all in cash, by express, December 3, 1869, to the defendants, when by the terms of the contract, it was due the 15th of November previous.

The first question raised is, "Was this money, delivered to the express by the plaintiff, to be considered as paid to the defendants? Loomis, the defendants' agent at Portsmouth, wrote to the plaintiff notifying him of his fifth premium, and requesting him to forward it to Portsmouth instead of paying it at Boston, as he had done for the last two years, for the reason that the company would in that way save a commission for collecting. He then states to him, "You can forward the premium by bank check, or your own private check, or any bank or institution, and can be collected through the bank here; or, you can send by express." Any bank check or private check would answer, provided it could be collected through the bank at Portsmouth. We think this was evidently the intention of Loomis—that this is the interpretation of the letter: "We will receive anything in payment on which we can raise the money at a bank here, or you can send the money by express;"—and the case finds that the plaintiff did send the money by express; that he relied upon this letter, understanding that the money was at the risk of the defendants after delivery to the express; and that there was no fraud, bad faith, or want of ordinary and reasonable care on his part.

Loomis evidently assumed, and we may well assume, that without any notice and special request this premium would be paid in Boston as the last two had been, and he had a special object, which he states, for having the money paid at Portsmouth;—hence these directions. And if he (Loomis) was asking the plaintiff to put himself to an inconvenience for the sake of accommodating the company and enabling them to save a commission upon the money, they might well be willing to take a little trouble in getting a check cashed at the bank, or even to pay the expressage on the money—say seventy-five cents—rather than to pay a commission of two per cent., which

would be ten dollars, or one per cent., which would be five dollars, or even one half per cent., which would be two dollars and fifty cents.

At first there was a controversy as to whether the plaintiff sent this money by express, or paid it to the express at all; but the court find that he did so, in good faith, on the third day of December. Was that a payment to the defendant company? It is well settled that the delivery of goods by a vendor to a common carrier, in accordance with the order or directions of the vendee, operates as a delivery to the vendee, so that the common carrier becomes the agent of the vendee and not of the vendor; and a loss of the goods in the carrier's hands would be the loss of the vendee and not of the vendor. And the law went further than that, even, and held that when the vendee did not appoint or name the carrier, the same principle would hold good. Thus, in Godfrey vs. Furzo, 3 P. Williams, 185, decided in 1733, it was held that in case "a tradesman in London, by order of a tradesman in the country, sends goods to the latter who does not appoint or name the carrier, and afterward the carrier *imbezils* the goods, the trader in the country must stand the loss."

So, in Dutton vs. Solomonson, 3 Bos. and Pul., 582, (1803,) where it was claimed in the argument that if the vendee had not pointed out the particular mode of conveyance he would not be liable to the risk while the goods are in the hands of the carrier, and Vayle vs. Bayle, Cowp., 294, and Dawes vs. Peck., 8 T. R., 330, were cited. Lord Alvanley, C. J., referring to that position of the counsel, said, "When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, the whole property immediately vests in him, he alone can bring an action for any injury done to the goods, and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is that the vendor, in case of the former becoming insolvent, may stop them *in transitu.*"

So Kent states the law to be—2 Kent's Com. 499—"Delivery of goods to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be sent by a carrier or by water, is equivalent to a delivery to a purchaser; and the property, with the corresponding risk, immediately vests in the purchaser, subject to

the vendor's right of stoppage *in transitu*." See Chitty on Cont., 439, 484, and 485 ; 2 Greenl. Ev., sec. 212 ; Woolsey vs. Bailey, 27 N. H. 217, 219, and cases cited ; Smith vs. Smith, ib., 244, 252, and cases cited. In these last two cases it seems to be held that, though before the day of railroads it might be necessary that the purchaser should order the goods sent by a carrier in order to have the delivery operate as a transfer of the property to the purchaser, yet that, since railroads have been in operation, and it has become the custom to transport goods by them as a matter of course, a delivery of the goods at the depot of the railroad would complete the sale and vest the property immediately in the vendee. Garland vs. Lane, 46 N. H., 245, 248, and cases cited ; 1 Ch. Pl., 6 ; 1 Parsons on Cont., 445 ; Arnold vs. Prout, 51 N. H., 587.

The authorities also hold, that when the debtor delivers money to be transmitted to his creditor, in accordance with authority given him so to do by his creditor, the loss, if any, is the loss of the creditor. So, if money were sent by the post, in a letter properly directed to the creditor, and be lost, the debtor is discharged if he was directed so to transmit the money, or that was the usual course of business between the parties. Chitty on Cont., 750. To the same effect is 2 Greenl. on Ev., sec. 525 ;—and he cites Warwicke vs. Noakes, 1 Peake's R., 67, and Hawkins vs. Rutt, 1 Peake's, 186. So, in Wakefield vs. Lithgow, 3 Mass., 249, when the defendant had sent money to the plaintiff's attorney, in a letter by mail, which he did not receive—held that if the defendant was authorized by the letter from the plaintiff's attorney to remit that sum, in that manner, at that sime, the loss must fall on the plaintiff ; if not, the plaintiff must have judgment.

So, in Kington vs. Kington, 11 M. & W., 233, it was not doubted that a plea that the defendant had ever been ready to pay the money claimed in suit, and that on a certain day the plaintiff ordered or requested the defendant to forward the money to him by express, and that the defendant did so, and paid the same as directed, in satisfaction and discharge of the plaintiff's claim, was a good plea in bar,—though there was some informality in the plea in that case. In this case, if the agent had said, in his letter, You may send the money to me by mail, or you can send it by mail, we should probably have understood at once that if so sent it would be at the company's risk, and it is the same when he said, You can send it by express. The vendee or consignee of goods or money does not need to say, Send the goods or money by express, or by mail, at my risk. He

has only to designate the manner, or instrument, or medium of transportation ; and when thus sent they are at the consignee's risk as much as though he had said in words, "at my risk." This is implied in all such cases, and we think it was in this case. We think the first question proposed must be answered in the affirmative.

Was the policy forfeited by the delay from November 15 to December 3 ? The plaintiff was given to understand, and did understand, that though by the printed regulations of the company the agent could not, in terms, bind the company, and that the company had undertaken so to arrange it, if possible, that all their agents should be the agents of the assured, or, at least, shall be their own agents only to secure contracts in writing by which the company could hold all others, but that they should have no power to bind the company to anything, yet that the uniform usage and practice of the company was to receive premiums within a reasonable time after due, when there was no material change in the health of the person insured ; that the plaintiff could safely rely on this usage, and take time to examine the subject and consider what he would do, and defer the fifth payment for a reasonable time after November 15, without running any risk of forfeiture if his wife should continue in good health ; that the company would receive the premium under such circumstances without objection. The plaintiff understood, and was reasonably justified in understanding, that the uniform usage of the company was to waive the forfeiture in such cases, and that this usage would not be departed from in this case. But for this understanding he would have paid his premium on or before November 15.

But he had sufficient reason to ask delay. The other premiums he had paid, half note and half cash, and he expected to pay this one in the same way ; and he had probably been assured that after a few years the dividends were to be sufficient to pay and discharge these notes—were to be fifty per cent. on the amount of his premium. But he finds it only fifty per cent. on ordinary rates, which he would not be very likely to understand much of. He acts in good faith ; he desires an explanation of these two points ; he applies to Loomis, who is unable to give him any satisfactory explanation He then writes to Hinckley, in Vermont, another agent of the company, making inquiries on these points, but receives no answer. November 22 he wrote to Elmore, the secretary of the company at Hartford, making the same inquiries, and adding, I have deferred paying my fifth premium until we come

to a proper understanding of the subject. He also adds, that Loomis had suggested that no advantage would be taken by the company while this question was being settled. November 30, Elmore replied, giving explanations of the dividends, and informing him that he could pay the fifth premium in the usual way, half cash and half note, if he preferred, but saying nothing further about any extension of time or waiver of forfeiture.

The plaintiff delivered to the express the whole amount in cash, relying as to extension and waiver upon his understanding derived from the statements of Loomis and the letter of Elmore; and if the express had delivered the money to Loomis, the plaintiff would have received a renewal receipt, and the defendants would have treated the policy as in force without raising any objection. The plaintiff's wife continued, and still continues, in perfect health; and satisfactory evidence of that fact would have been furnished the defendants by the plaintiff, if he had understood it was desired or necessary. He would also have paid interest on the premium, if he had understood that interest was demanded or expected. In his subsequent interviews and correspondence with Loomis, no certificate or evidence of health, or interest, was demanded; but the defendants, by refusing to give him a receipt for the fifth premium, and insisting upon a forfeiture, on the ground that they had not received the money delivered by the plaintiff to the express, waived their right to such certificate, evidence, and interest, if they would otherwise have been entitled thereto.

The plaintiff understood, and Loomis understood, and Elmore, the defendants' secretary, understood, that the forfeiture was waived, and that, if the plaintiff paid his fifth premium within a reasonable time after November 15, it was to be received as though paid in time; and the court find that if the money which the plaintiff sent had been in fact received, it would have been accepted in payment and discharge of said premium. To all intents and purposes, then, the company had absolutely agreed to waive the payment at the day, and, if it was paid within a reasonable time thereafter, to receive it in satisfaction of the premium; and the court find that the company has waived its right to all the subsequent proofs to which it might otherwise have been entitled, and that plaintiff made a proper demand, etc.

But why do we say that the case stands as if the company had absolutely waived or agreed to waive this payment at the day appointed? It is settled, in Hale vs. Ins. Co., 32 N. H., 295, that, as a general rule, corporations have power to waive their rights, and are bound by estoppels *in pais* like natural persons. Now, suppose Loomis

could not make an agreement that should bind the company ; still he knew, and could tell, and tell truly, what the uniform usage of the company had been in similar cases, and the plaintiff would have the right to presume, perhaps, that what they had uniformly done in similar circumstances, they would do in his case. But he finally writes to the company's secretary at Hartford, and informs him that he had deferred paying this premium beyond time, and gives him the reasons, and states to him what the agent had assured him about their waiving this payment. Now, these agents and secretaries, whether they are competent to make contracts or not, are agents of the company so far that the company may be notified through them of any facts that concern the company.

If a man whose life is insured dies, they notify the company through an agent, and either Loomis or Elmore would have been a sufficient agent of the company, so that a notice to them would ordinarily be notice to the company of such fact. The plaintiff gave Elmore notice of the state of facts as they existed, and this must be considered as notice to the company ; and though he may not have had any right to bind the company by any such contract, the company, when notified through him, should speak through him, or in some other way, and give the notice that no such arrangement will be made in the specified case. But, on the contrary, when Elmore is notified of the state of the case, he gives the desired information in regard to the dividend, and then says to the plaintiff, You can pay this premium, half cash and half note, if you wish, notwithstanding you have been notified to pay all cash, and after I have received your notice that the time has passed in which, by its terms, it should have been paid. The company were called on to speak when they were notified that this plaintiff had allowed his premium to go by the time, upon the representations and assurances of their agent, and that he was still trusting those assurances. They should have denied the fact as stated, or in some way have given him to understand that he could not rely with safety upon those representations and assurances,—but instead, the company say nothing ; but their secretary says, You may thus trust, and no advantage shall be taken of you. We think the company must in that way be held to have ratified what their agent said, and to have waived all objection to that course. They are estopped to deny that they did so.

So, in Glidden vs. Unity, 33 N. H., 571, 577, it is said that in all American courts, towns and other corporations are now to be con-

sidered as subject to the same presumptions and implications arising from their corporate acts, or the acts of their agents within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons. This statement of the law is taken substantially from 2 Kent's Com., 290, and authorities there collected in note *b*. A promise may be made directly by their agents acting within the scope of their authority, or such promise may be implied against the corporation from the acts of its agents within their authority, like natural persons. Smith vs. Meeting-house, 8 Pick., 178. So, in Angell & Ames on Corp., sec. 237, it is said that a corporation may as well be bound by express promises through its authorized agents as by deed, and that promises may as well be implied from its acts and the acts of its agents, as if it had been an individual;—and see authorities in note.

So, in Pierce vs. Insurance Co., 50 N. H., 297, it was held that a condition inserted in a policy for the benefit of the company might be waived by the company, and that the declarations or acts of an agent of the company are competent evidence of such waiver by the company; and so in Lyman vs. Littleton, 50 N. H., 42; Clark vs. Insurance Co., 6 Cush., 342, and Heath vs. Insurance Co., 1 Cush., 257, as well as Lyman vs. Littleton, 50 N. H., 42, are authorities to the point, that when a particular objection to notice or to proof of loss, or to anything which is required to be done, is made and insisted on, and no others are suggested, it will be considered as a waiver of other objections. To the same point are Vos vs. Robinson, 9 Johns, 192; Insurance Co. vs. Tyler, 16 Wend., 385, 401, and McMasters vs. Westchester Co. Ins., Co., 52 Wend., 379. There must be a decree for the plaintiff.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

COE S. BUCHANAN, *Respondent*,

vs.

THE EXCHANGE FIRE INS. CO., *Appellant.**

A clause in the policy on the stock of a paper-mill prohibited the storage or use of petroleum, rock and earth oils, benzine, benzole, and naphtha without consent indorsed on policy, and provided that refined coal, carbon and kerosene oils, when stored in less amounts than ten barrels, shall be classed as extra hazardous. Another clause provided that camphene, spirit gas,—or any other inflammable liquid when used in stores, warehouses, shops or manufactories as a light, requires permission indorsed.

Held, that kerosene, though a rock oil, is not an inflammable liquid, and it was not intended to prohibit its use for lighting purposes, nor the storage of forty gallons, which was not an excessive amount for such purpose.

The policy provided that other insurance, or a conveyance of the property, or assignment of the policy, not assented to by the company, shall render the policy void. W., the insured, executed to plaintiff a bill of sale on the 20th of February. The inventory was completed, and possession was given two days later, when W. wrote an assignment on the back of the policy to plaintiff, which was then sent to a former agent of the company, who indorsed his consent to the transfer, at the same time informing the messenger that he had no authority for doing so, and would take no responsibility. On the 3d of March, the day before the fire, the policy was taken to the company's office, and the secretary said the transfer and consent were all right. The agent was not informed of the transfer of the property, and the secretary was not informed of the circumstances under which the agent's consent had been obtained.

Held, that as the transfer of the policy was part of the contract of sale, the sale might be regarded as incomplete until this had been effected, or if the sale be regarded as complete, there is authority for holding that the policy was revived by subsequent consent. There is nothing in the policy requiring the consent to be previous to the transfer to give it validity.

Held, that the agent had no authority to give assent, and notice to that effect to the messenger was notice to the principal; but the secretary ratified his act and bound the company.

Held, that the word machinery covered the tools and implements used therewith in the manufacture of paper.

Judgment affirmed.

* Argued May 13, 1874.

Appeal from the judgment of the General Term of the Supreme Court in the Second Department, affirming a judgment entered for the plaintiff upon the verdict of a jury.

The action was upon a policy of insurance to recover the amount of a loss by fire. The policy was issued to Addison Weeks, through defendant's agent at Albany, A. T. Holmes, Nov., 14, 1868. About February 20, 1869, Weeks sold out his interest in the insured property to the plaintiff. February 22d he assigned all his interest in the policy to the plaintiff. The questions raised, and the evidence, so far as important, are set forth sufficiently in the opinion.

C. Frost, *for Appellant.*

Thomas M. North, *for Respondent.*

Earl, C.

The insurance was on stock of material for manufacturing paper, and on paper manufactured and in process of manufacture, and on machinery contained in a paper mill at West Milton, Saratoga County.

The policy contained a provision that petroleum, rock and earth oils, benzine, benzole and naphtha should not be stored or used on the premises without written permission indorsed on the policy, and that refined carbon and kerosene oils, when stored in less quantities than ten barrels, shall be classed as extra hazardous.

The paper mill was lighted by kerosene, and at the time of the fire there were in the mill about forty gallons of kerosene provided for lighting the mill. The quantity was reasonable for the use for which it was provided. This kerosene was not stored, within the meaning of the policy, and hence there can be no claim that the provision against storing was violated. But it was used, and the question is whether its use for lighting violated and avoided the policy. I am inclined to think that the prohibition of the use of rock and earth oils upon the premises includes kerosene. Kerosene is not petroleum. It is made from the latter by a process of distillation and refinement. But it is a rock or earth oil. If it is not, I am unable to classify it. But I do not think that its use for lighting was intended to be prohibited; other use was intended. Kerosene is considered reasonably safe for lighting, and is in ordinary and general use for lighting buildings in all parts of the country outside of cities where gas is used, and the policy must have been made in reference to this well known fact. There is another clause in the policy which covers the subject of lighting, which

provides that camphene, spirit gas, or burning fluid, phosgene, or any other inflammable liquid when used in stores, warehouses, shops or manufactories as a light, subject the goods therein to an additional charge, and permission for such use must be indorsed in writing on the policy, otherwise the insurance shall be void. It will be seen that even the articles named are not prohibited for lighting in all cases. They could be used without violating the policy for lighting dwelling-houses. Kerosene is not named, and if it had intended to prohibit its use for lighting as it is used for that purpose more than all the other substances mentioned, it would have been named. It was proved that kerosene is not properly classified as an "inflammable liquid," and hence it is not prohibited under that name. Construing therefore the two clauses of the policy together I am of opinion that kerosene for lighting was not prohibited.

There was also a provision in the policy that if the insured property should be sold or conveyed, or if the policy should be assigned without the consent of the company obtained in writing, the policy should become null and void, and it is claimed that this provision was violated. The facts bearing upon this question are briefly these. Weeks executed to plaintiff a bill of sale of the property on the 20th of February, and the inventory was completed and possession was taken by the plaintiff on the 22d of February. Weeks promised to have the policy transferred the same evening, and on the 22d of February wrote on the back of the policy an assignment thereof to the plaintiff and then sent the same by a young man 18 years of age to A. T. Holmes at Albany, who had at some prior time been agent of the company, who issued the policy to Weeks, and he subscribed a memorandum which had been written upon the policy before it was presented to him as follows: "This policy to inure to the benefit of C. S. Buchanan. A. T. Holmes, agent." The policy in this condition was returned to the plaintiff.

On the 3d day of March, the day before the fire, the plaintiff delivered the policy to his son, who at his request took the same to the office of the defendant in the city of New York, and he there informed the secretary of the defendant that his father was the owner of the property, delivered to him the policy, and asked him if the transfer and consent were all right, and he said they were. The young man who took the policy to Holmes did not inform him of the transfer of the property; neither did plaintiff's son inform the defendant's secretary of the circumstances under which the consent had been obtained of Holmes. Holmes was at one time agent of the defendant, and I think

from the evidence, had at that time authority to effect insurances and consent to the transfers of policies and property for it. But on the 10th day of December, 1868, the defendant resolved to suspend all its agencies, including the Albany agency, and on the 22d of December, 1868, defendant's secretary, in obedience to such resolution, wrote to Holmes at Albany, informing him that the board of directors had passed resolutions suspending all agencies, and requested him not to underwrite for the company from that date, and to return all blanks and send his account to date with his checks to balance. Dec. 24th, 1868, Holmes returned all his blanks and papers, sent his account with his check to balance, expressing his sorrow that the company had passed resolutions to discontinue all agencies, and a wish that some other company might be recommended to him to take the place of defendant in his agency. Thereafter, so far as it appears, Holmes did no further business for the defendant. When he signed the consent in this case he told the young man who brought it to him, that it was not a legal transfer, that he was not the agent of the defendant, that his agency had ceased. The young man told him that he wanted him to do it because other companies had done it, and Holmes then signed it, saying that he must take the responsibility, that he would have nothing to do with it. Upon these facts the judge at the trial held that Holmes had authority to give the assent, but the secretary of the defendant having denied the interview in New York between him and plaintiff's son, the judge submitted to the jury the following question: "Did the defendant assent to the written memorandum signed by Holmes and indorsed on the policy?" And they answered in the affirmative. Upon these facts defendant's counsel claims that the policy having become void on the 20th of February by the transfer of the property, could not after that be again restored to life except by a recreation, that Holmes had no authority to consent, and that what took place at the office in the city of New York on the 3d day of March, did not constitute a ratification of Holmes's acts. I will now examine each of these claims separately.

The point that the policy was rendered void by the transfer before consent was given, and hence that it could not be again vitalized by a mere consent to the transfer afterward given, was not specifically taken at the trial, and we might for that reason refuse to consider it here. It does not certainly appear that the title to the property passed to the plaintiff on the 20th day of February. The bill of sale was executed on that day, but the inventory was not completed, and possession was not taken by plaintiff until the 22d, the day the con-

sent was given by Holmes. Upon the facts proved the sale may not therefore have been completed until the latter day. Besides this, Weeks was to transfer the policy, and that was undoubtedly part of the contract of sale, and until he had effectually done this, it may well be claimed that the sale was not fully executed. Mandy vs. Ins. Co. of N. A., 1 Lansing 20. But if we should hold that the transfer of title was made before the consent was given, the case of Sherman vs. Niagara Ins. Co., 46 N. Y., 526, would be an authority for holding that the policy was revived by a consent subsequently given. I am of opinion that by the terms of the policy a consent given subsequently to a transfer is just as effectual as one given before. The policy provides that other insurance, or a conveyance of the property, or assignment of the policy not assented to by the company, shall render the policy void. It is not provided that this assent shall be previously obtained, and there is nothing in the nature of the thing which requires that it should be previously given. The insurance company gets all the protection it seeks or needs if it shall not be held liable until its assent has been given. Hence this particular point furnishes no obstacle to a recovery.

I think the judge erred in holding that Holmes had authority to give the assent. His entire agency had clearly been revoked. He so understood it, and had surrendered up all his papers and balanced his accounts. He informed the young man who obtained his assent that his agency had ceased and that he had no authority to give it. This notice, at the very time he performed the act, to the young man who acted either for Weeks or the plaintiff (and it matters not which) was notice to his principal. Story on Agency, sec. 140; Bank of the U. S. vs. Davis, 2 Hill, 451; Jeffrey vs. Bigelow, 13 Wend., 518; Sutton vs. Dillage, 3 Barb., 529.

But this error was harmless, as the judge submitted all the evidence upon the question of ratification of the act of Holmes by the secretary of the company to the jury, with proper instructions, and they found upon that question for the plaintiff. He instructed them substantially that if the plaintiff's son called at the office of the company, and there informed the secretary that his father was the owner of the property, and delivered to him the policy, and asked him if the transfer and the consent by Holmes were all right, and he replied that they were, there was a ratification.

This instruction was clearly right. The secretary was one of the principal managing officers of the company. He was in its office in

charge of its business. He could there issue policies and give consents which would bind the company, and he could bind the company by insurance and consents in writing or by parol. Fish vs. Cattenet, 44 N. Y., 538; Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 405. He could authorize another to write the consent or he could do it himself. Hence what took place in the office may be treated either as ratification of what Holmes had done as an assumed agent, or as a consent then and there given. In either aspect the company, was bound.

The form of the memorandum was sufficient to show consent to the assignment of the policy and transfer of the property. Potter vs. O. & T. Mut. Ins. Co., 5 Hill, 149; Hooper vs. Hud. River F. Ins. Co., 17 N. Y., 424; Sherman vs. Niagara Ins. Co., supra.

It follows from these views that the plaintiff held a valid policy, and his recovery must be upheld unless the judge erred at the trial in his holding as to what constituted machinery. The insurance was in part upon the machinery in a paper mill. I think the word here was used in its most comprehensive sense, to include all the machinery and tools and implements used therewith in the manufacture of paper.

The loss upon machinery, as claimed by the plaintiff in his inventory, was $1,913.66. This was covered by insurance in this company for $500, and in two other companies each for $500, making in all $1,500, which was upward of $400 less than the loss. Even if a few of the items contained in the inventory were not actually machinery the value of such items was not $400 and hence the plaintiff was clearly entitled to recover the full amount of his insurance.

I am therefore of opinion that no error was committed on the trial, and that the judgment should be affirmed, with costs.

All concur except Reynolds, C., not voting.

SUPREME JUDICIAL COURT OF MAINE.

KENNEBEC COUNTY, 1874.

WM. H. POTTER

vs.

MONMOUTH MUT. FIRE INSURANCE CO.*

In assumpsit upon a policy of insurance the defendants, in addition to the general issue, pleaded that the plaintiff agreed in writing to accept, and did accept, one thousand dollars in full satisfaction of loss. The plaintiff contended that such agreement was obtained by fraud. The presiding justice ruled that if the jury were satisfied of the fraud, this action was maintainable without a payment back or tender to defendants of the sum paid by them. *Held*, that such instruction was erroneous.

A. LIBBEY, *for Plaintiff.*

JOS. BAKER and E. O. BEAN, *for Defendant.*

VIRGIN, J.

Assumpsit on a fire policy of insurance in the sum of $1,450, for four years from September 18, 1867. The writ is dated November 15, 1870. The property insured was totally destroyed by fire, September 1, 1869.

In addition to the general issue, the defendants pleaded, by way of brief statement, that on October 15, 1869, the plaintiff agreed in writing to accept $1,000 in thirty days in full satisfaction for the loss of his property, covered by the policy in suit, which they then agreed to pay, and did pay within the time specified; and that the plaintiff accepted the same in full discharge and satisfaction thereof.

The plaintiff introduced testimony tending to prove that he was induced to sign the agreement and accept the money by the fraudu-

* To appear in vol. 63 Maine Reports.

lent misrepresentations of the defendants, that he was deceived thereby, and should not otherwise have made the agreement or received the money. The defendants denied all fraudulent practices in the premises. The verdict was for the plaintiff for the balance. The only ground upon which it can be based, under the instructions given, is that the jury must have found the defendants guilty of the fraud imputed to them by the plaintiff's testimony. Hence, the first instruction requested by the defendants [that this action could not be maintained without a prior rescission, within a reasonable time, of the settlement alleged to have been obtained by fraud, and a return of the $1,000 paid under it] became material; and the presiding justice erred in not giving to the jury the law upon the subject of rescission.

The contract of insurance and that of accord and satisfaction could not contemporaneously exist and be in force; for the latter, if *bona fide*, would operate as a cancellation of the former. R. S., c. 82, 138. If not *bona fide*, but voidable for fraud of the defendants, the plaintiff by seasonably rescinding it, but not otherwise, might then bring the action, which he has brought upon the policy. But he could rescind only by paying or tendering back the $1,000. Bisbee vs. Ham, 47 Maine, 543, is precisely in point.

Exceptions sustained. New trial granted.

CASES DECIDED IN THE LOWER COURTS.

AGENT OF THE COMPANY OR OF THE INSURED.

New York Court of Common Pleas.

ANDES INSURANCE CO., OF CINCINNATI, OHIO, *Respondent*,
vs.
JOHN LOEHR, *Appellant*.

The policy contained a clause that the person procuring the insurance other than the insured should be deemed the agent of the insured and not of the company in all transactions relative to the business. The Brooklyn and New York agencies of the company were distinct and independent. A surveyor and solicitor employed by the Brooklyn agent procured the policy from the New York agency. The insured had not an intelligent knowledge of English, and upon the delivery of the policy desired to draw his check for the premium payable to the president, and inquired his name of the solicitor. The latter gave his own name, and afterward failed to turn over the money to the company. In a suit against the insured for its recovery, *held*, that if the solicitor was an agent of the company, payment to him was payment to the company. The question of his agency was a question of fact that should have been submitted to the jury.

u l gment reversed, and new trial granted.

This action was brought to recover the amount of a premium on a policy of insurance.

The policy contained a condition as follows :

"It is understood and agreed, as one of the conditions of this policy, that the person or persons, if any, other than the assured, who have procured this insurance to be taken by this company, shall be deemed the agent or agents of the assured, and not of this company, in any and all transactions relating to this insurance."

The defense was, that the premium had been already paid by the defendant to John P. Teale, the broker who obtained the policy from C. W. Standart & Co., the regularly authorized agents of the company, and delivered it to the defendant.

On the trial Teale testified that he was employed by the company as surveyor and solicitor, that he was paid a salary as solicitor by

the agent of the company in Brooklyn, and that he told the defendant when he asked him to take the insurance that he was engaged with the Andes Insurance Company.

The action was tried Feb. 16, 1874, before Hon. R. L. Larremore and a jury, and a verdict was rendered in favor of the plaintiff for the amount of the premium, with interest.

The judge charged that by the condition in its policy, the company held itself out as not bound by the acts of any person representing himself as its agent, "and the person who thus acts, and those dealing with him, do so at their own risk. In other words, it compels the party to come to the office of the company to be insured." That the condition was valid, and one the company had a right to make. That by accepting the policy from Teale and paying him the premium, Teale became the agent of the insured and not of the company. If the plaintiffs received the premium they are not entitled to recover, otherwise they are entitled to a judgment.

From the judgment entered on this verdict, and from the order made at Special Term denying the motion of the defendant for a new trial, an appeal was taken to the General Term.

MYRON WINSLOW, *for Respondents.*

WM. P. RICHARDSON and JOHN A. FOSTER, *for Appellant.*

The appeal was argued at General Term in November, 1874, and the judgment was reversed, and a new trial granted. The opinion delivered by Chief Justice Daly, is as follows:

DALY, C. J.

It was not, within the meaning of this clause in the policy, the procuring of the insurance by a person other than the insured; if Teale was in fact the agent of the plaintiffs, it would then be the plaintiffs who procured the insurance. *Qui facit per alium, facit per se.* Teale assumed to act for the plaintiffs when he called upon the defendant; he testified that he was serving at that time in the plaintiffs' company, in the capacity of surveyor and solicitor, which latter term, solicitor, I suppose means, in connection with insurance, one whose occupation it is to get persons to insure in the company by whom he is employed. The plaintiffs are a foreign corporation doing business in this State, and they had an office both in Brooklyn and New York. He was employed in the Brooklyn office, and his salary was paid him there by an agent of the company. The application

for this insurance, he says, was made by him, as I understand his testimony, at the office in Brooklyn, and was turned over to the New York office, from which the policy was issued. If this statement was true, and he was an employee of the company, the company, by giving him the policy to take to the defendant, held him out to the defendant as their agent, and where that is the case, the principal is responsible for the misconduct, negligence, or fraud of the agent, whilst acting, as Teale was, within the scope of his authority.

The defendant did not apply for the insurance, but Teale came to him and solicited it on behalf of the company.

The defendant preferred to run the risk of fire rather than pay the high rate—he had paid seven per cent. in another company—and Teale replied, "I think we will take you cheaper; I think we will take you for about five per cent." Whereupon defendant agreed to take a policy from the company at five per cent. When Teale brought him the policy, the defendant, who was a German, and not able either to read or write English well, asked him the name of the president to whose order the check was to be drawn for the payment of the insurance.

If, he testified, he could have read the policy, he would have taken it and found the president's name. Teale, when the defendant as stated asked the president's name, said: "Give me a blank check and I will fill it myself;" which the defendant did, and Teale drew the check payable to his own order, and the defendant signed it, after asking him particularly if the name inserted was the name of the president, to which Teale answered Yes, and he thereby obtained the money which the plaintiffs claim he never paid to them.

Two of the plaintiff's agents testified that they were the only authorized agents of the plaintiffs in the city of New York, and that Teale was never employed by the company in any capacity. But this was not conclusive. Teale testified that he was employed, and paid in the Brooklyn office by Lemuel Freeman, agent of the company, and if he was employed in that office as surveyor and solicitor, and brought the application there, which the office turned over in New York, it would make no difference as to the defendant's responsibility. At all events it was a question of fact for the jury, which the judge took from them under the impression that it was immaterial, whether Teale was an employee of the company or not. This I think was erroneous. In my judgment it was the turning point in the case, and a new trial should be granted. Costs to abide the event.

A motion was made at the January General Term, 1875, by the

attorney for the respondent for a reargument, and the General Term granted a reargument.

The appeal was argued the second time at the March General Term, before the same judges who had heard the first argument.

JUDGMENT OF REVERSAL AFFIRMED.

DALY, J.

Although defendant did not formally request the learned judge who tried the cause to submit to the jury the question whether Teale was acting as the agent—or was the agent of plaintiffs in delivering the policy and receiving the premium, and did not except to the charge of leaving but the single question of payment to the Standarts to the jury, yet as this case comes before us on appeal from the order refusing a new trial, as well as from the judgment, we may look into the whole case to ascertain if injustice has been done by a failure to submit to the jury questions proper for them to pass upon. Keyes vs. Devlin, 3 E. D. S., 523; Maier vs. Homans, 4 Daly, 168.

I think the question should have been submitted to the jury as to the agency of Teale. The policy contained a clause that "the person or persons other than the assured who have procured this insurance, to be taken by this company shall be deemed the agent or agents of the assured, and not of this company, in any and all transactions relating to this insurance."

The plaintiff is a foreign insurance company, having duly appointed agents in this city—C. W. Standart & Co.; and in Brooklyn, Lemuel Freeman.

The Brooklyn and New York offices were distinct, and independent of each other. John P. Teale was employed in the Brooklyn office by Lemuel Freeman, the agent of the company, in the capacity of surveyor and solicitor for the company and was paid a salary. The duties of surveyor need no explanation, but plaintiff's counsel insists that there is no such office as solicitor, and no description of the duties or powers of such an officer in the case. The term, however, as that of an employee of the company, is used by the witness, Teale, in describing his position in the Brooklyn office, and, what is significant, is used by the regular agent, C. W. Standart, in his denial of Teale's agency. He says "Teale was not in the employ of the company or ourselves as surveyor or solicitor.'

The name evidently refers to the nature of his duties, and the expression "soliciting," as applied to the endeavors of the agents of insurance companies to induce people to insure with them, has found its way into the books. Insurance Company vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607]. The witness, Teale, was not examined by either side as to the nature of his duties as solicitor, nor as to his appointment as such; and the use of the term without question, by both parties on the trial, together with his own uncontradicted evidence of his employment as such by the lawful agent of the company in Brooklyn, satisfies me that the office and duties of "solicitor" of the Andes Fire Ins. Co. was conceded on the trial. There is no denial in the case that he was the authorized solicitor for the company, employed by the Brooklyn agent. If in the performance of his duties he solicited insurance from the plaintiff, his acts would be the acts of the company, and if, in pursuance of an arrangement to insure the plaintiff, he went to the office of the company and put in the application of plaintiff, he did not thereby become the agent of the defendant, notwithstanding the clause in the policy, for the defendant was dealing as directly with the company in agreeing with Teale to insure, as if making such agreement with Freeman, the general agent—since Teale was acting within the scope of his authority to solicit the insurance, apply to the office for the policy, and deliver it to the defendant—all of these acts being but one, viz., the insuring of defendant according to the bargain or agreement made with him.

But it is said that Teale, who was employed by the Brooklyn agent exceeded his authority in coming to New York to solicit for the company here, and consequently did not act for the company in putting in an application for the defendant in the New York office. The answer to this objection is, that Teale swears generally that he was "in the employ of the Andes as surveyor and solicitor, and there is no proof that his authority was limited to Brooklyn; that defendant had no notice of any such limitation of Teale's authority, while he was told positively by Teale that he was engaged in the Andes Company; "that to hold that the agents of the plaintiff, by soliciting insurance and then making the application in neighboring offices and their own, constituted them them the agents of the assured, would be suffering the company to use the clause in its policy, designed to protect them against strangers, as an instrument by which they might defraud the public; and, finally, that the evidence of plaintiff's witness, H. D. Standart, that he signed the policy, and after that it went right along in the regular run of business, "was evidence that

it was delivered to defendant by Teale in the regular course of plaintiff's business. This, coupled with the fact that plaintiff's New York agents delivered the policy to Teale to deliver to defendant in March, and made no demand for the premium until October, seven months afterward, were matters which should have been left to the jury on the main question.

I have not referred to evidence given by plaintiff's witness conflicting with the testimony to which allusion has been made by me, because the conflict merely carried the question to the jury.

I am in favor of reversal and a new trial, as formerly ordered by the General Term when this case was originally submitted.

REVOCATION OF CHARTER.

Common Pleas of Dauphin County, Penn., October, 1874.

COMMONWEALTH
vs.
MANUFACTURERS' INSURANCE COMPANY.

1. The subscriptions to the stock of an insurance company were not paid in *money*, as directed by acts of Assembly, but in railroad and turnpike bonds, mortgages, etc. *Held*, that the charter of the company must be revoked.
2. A charter for a *mutual* insurance company was first obtained, and afterwards an amendment was procured, incorporating the company as a *stock* company. *Held*, that the amendment made it one company, and the *stock* charter being revoked, the *mutual* charter goes with it.

On the 22d of September, the court made a decree of dissolution in the case of the Commonwealth of Pennsylvania, *ex relatione* Samuel E. Dimmick, Attorney General, vs. The Manufacturers' Mutual Insurance Company of Philadelphia, and Hon. John R. Read was appointed receiver. A motion was made to open the decree on the part of the company. It was argued by Lyman D. Gilbert, Esq., deputy attorney general, for the commonwealth, and by D. B. Harrington, Esq., for the company.

PEARSON, P. J.

Sur application of the insurance commissioner to dissolve the corporation.

The court is asked to reconsider the decree made on the 22d day of September, 1874, dissolving this corporation, and give the defendant a rehearing. On this motion we have heard all of the evidence as fully as if a rehearing had been granted.

It is claimed that the insurance company is a *mutual*, not a *stock* company. It was chartered as the former on the 21st day of September, 1867, and after transacting considerable business, on the 20th September, 1869, obtained an amendment incorporating it as a stock company, with a capital of $100,000, with liberty to increase it to $200,000. Subscriptions were received, as reported to the insurance department of the State, to the amount of $100,000 before July 31st, 1874.

The commissioner afterward investigated the affairs of the corporation, and came to the conclusion that the stock was not properly paid in, but was made up of funds not available in case of loss, but almost worthless, and therefore suspended the business of the company.

Two grounds are now assumed: First, that the funds constituting the stock are good and available. Second, that the charter as a mutual company should not be revoked because of the fraudulent formation or insolvency of the stock corporation.

The evidence shows that no part of this stock subscription was paid for in the mode required by the third section of the act of April 2d, 1856; modified as to the kind of money by the third section of the act of March 17th, 1869, but on the contrary, was subscribed and paid in mortgages on real estate, railroad bonds and stocks, those of turnpike roads, land, mining and manufacturing companies.

The evidence on the part of the State and the defendant is contradictory as to the value of those securities when taken; one set of witnesses testifying that much of it was worthless, or nearly so, at the time; others that it was then good, and some say now is. If then good and *legally received*, it would negative the idea that the company was fraudulently concocted in the beginning, and would present a suitable case for a decree to make good the losses on the securities ; but in our opinion the whole subscription was illegal—in plain violation of the charter law.

The stock must be subscribed and paid for in *money*, as directed by the acts of Assembly, and when so paid we are satisfied that no prudent board of directors would lend it out again on the bonds or stocks of distant railroad companies, or the stock of turnpike roads—which in this State, with very few exceptions, have never paid any dividends—pump companies, land companies and silver mining com-

panies in distant parts of the United States. The intention of the legislature was to secure the people in the insurance of their property; it therefore required payment of stock subscriptions in money, and only permitted loans thereof on good securities, pretty carefully enumerated. This whole subscription and payment of stock was illegal, and the business of the company must be suspended, and the charter revoked. With the exception of the Pennsylvania Railroad bonds, we look upon these securities as worthless, or not worth more than one half of the face thereof.

Can the charter of the *mutual* company be sustained? Unfortunately it has by the amended charter united itself with a joint stock company, and both become one corporation. True, the business of the mutual company is disconnected practically from the stock company; the one is not responsible for the losses of the other; but under this statute neither the commissioner nor this court can revoke the charter in part, declare it good as to the mutual, but bad as to the stock portion. By accepting the amendment it becomes one company, and it is indissolubly united. The whole must stand or fall together. Both of the judges are of the opinion that the decree made on the 22d day of September, 1874, was properly pronounced, and must stand good.

The application to open or change it is refused.

INSANITY AND SUICIDE.—BURDEN OF PROOF.

Court of Common Pleas, of Venango County, Penn.

BANK OF OIL CITY, ASSIGNEE.

vs.

GUARDIAN MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Waiver.—When a company has notice of the death of a policy-holder, and the president tells the assignee, upon inquiry for blanks, that blanks and proofs of loss are not necessary as the claim will not be paid, this constitutes a waiver of the condition for the production of the proofs.

Insanity.—The legal presumption is that every one is sane till proved to be otherwise by sufficient evidence, and in a case where the plaintiff claims the amount of a policy, on the ground that the insured was insane when he committed suicide, the onus of proof of insanity is with the plaintiff. If the insured was impelled to the act by an insane impulse which the reason that was in him did

not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, he did not die by his own hand within the meaning of the policy.

Suicide.—Suicide is not *prima facie* evidence of insanity. It is often committed by persons in the full exercise of their reason. It is the act of malicious self murder. A suicide who has his life insured commits a fraud on the company, and there can be no recovery whether this condition is expressed in the policy or not.

Monomania.—Monomania is insanity only on a particular subject and with a single delusion of mind. If the monomania did not affect his mind as to business matters the company is not liable, unless it appears that the taking of his own life was the effect of the monomania.

McNair, *for Plaintiffs.*

Spencer & Smith, *for Defendant.*

Trunkey, P. J.

Gentlemen of the jury: This action is to recover the amount of an policy of insurance upon the life of Lewis P. M. Spencer, which the defendant agreed to pay at his death, on the conditions set forth in the policy. This contract between the parties, with all its conditions and provisions, is that by which their respective rights and obligations are to be ascertained and determined. Any stipulation, not illegal, is bin ding upon the parties, and must be enforced by courts and juries without question of its wisdon or policy. When an agreement is not unlawful, the contracting parties are the sole judges of its propriety.

The execution of the contract of insurance, the due payment of the premiums as stipulated, the death of Spencer, and that he died by his own hand, and that the policy was assigned to the plaintiff by the assured, and written notice received by the defendant, have not been controverted. Every fact, not admitted, must be found by the jury from the evidence. The burden of proof of any fact is upon party who affirms it, whether it be affirmed by the plaintiff or defendant.

The plaintiff sues as assignee. One of the conditions of the policy is, that due proofs of interest, with the proofs of death, shall be produced, and the money is not payable until sixty days after the proofs of death. No proofs of interest in the plaintiff, nor proofs of death, were formally made out and delivered to the company. Were such proofs waived? Defendant admits receipt of a letter, dated May 11th, 1872, giving notice of the assignment. The letter of May 27th, by the plaintiff, was answered May 29th by the president of the company. You will notice the contents of these letters, and, in connection therewith, consider the testimony of Mr. Beers. Are you satisfied

* Opinion June 15, 1874.

affirmatively that Mr. Beers in behalf of the bank, on the 8th of July, 1872, called at the office of the company, saw the president, stated his business to be to settle the claims on the policy, and requested blanks for proofs of death; that the president told him he knew all about it; that Spencer had committed suicide at the Merchants' Hotel; that proofs were not necessary, for the company was not liable on the policy; that he gave the blanks to Beers, and then repeated that the blanks and proofs were not necessary, that he would not pay because he committed suicide? If you find that all this was done by the president, you will consider it in connection with the letters which have been read, and may find that the stipulation for proof of interest and death was waived. The fact of waiver is for the jury, and may be found as the natural and legitimate inference of acts proved. When a company has notice of the assignment of a policy and of the death of the assured, and tells the assignee, upon inquiry for blanks, that blanks and proofs are not necessary, that the policy will not be paid for a reason which is specifically given, there is a waiver of the condition for the production of the proofs.

Another condition in the policy is, that if the party upon whose life the risk is taken, shall die by his own hand, then the policy shall be void.

The plaintiff claims that the act of self destruction by the deceased was not death by his own hand within the meaning of the words as contained in the policy; that at the time he committed the act he was insane, and so far unconscious of the nature and consequences of his act that he was incapable of understanding, and that the exercise of his reason and will were powerless by the diseased state of his mind. The defendant contends that at the time he took his life he had reason and consciousness enough to comprehend the nature and consequences of his act; that he had mental capacity to know that it was wrong, and power to control his act.

Insanity is a continued impetuosity of thought, which for the time being totally unfits a man for judging and acting in relation to the matter in question with the composure requisite for the maintaining the social relations of life. It is an abnormal condition of the mind. The legal presumption is, that every one is sane until otherwise shown by sufficient evidence; and in this case the onus of affirmatively proving the insanity of the deceased is upon the plaintiff. A man may be partially insane. Dr. Richey says he considered Spencer a monomaniac. Monomania is insanity only upon a particular subject, and with a single delusion of the mind. This exists when a person has some

single notion contrary to common sense, and to his own experience, and which seems dependent on errors of sensation. It is supposed an illusion may exist as to one subject, and the mind in other respects, on other subjects, retain its intellectual powers. If the deceased was a monomaniac, it must affirmatively appear that the act of taking his own life was the effect of monomania. What was the mental condition of Spencer at the time he took his life, as it affected the exercise of his will and his comprehension of the nature of the act he committed? If he was impelled to the act by an insane impulse, which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, he did not die by his own hand within the meaning of the condition in the policy.

If the deceased was insane or a monomaniac at the time he left Oil City, was he in such condition when he took his life? When confirmed insanity is proved, it is said that there is a legal presumption that it continues, until the contrary is shown. When the insanity is the result of disease, and such is likely to pass away when the disease is cured, there is no such presumption of its continuance. The question is submitted to you to determine as to the mental condition of Spencer at the time of his death. You may draw natural, legitimate and direct inferences from the facts proved.

You will not find insanity from the mere fact of his self-killing. There is good reason to believe that sane men, of strong intellect and high culture, have committed suicide. One may be guilty of suicide when the mind is not strong, yet of sufficient capacity to know that the act is wrong. When the act is done intentionally, by one who is capable of understanding its nature, and that it is wrong, he commits suicide.

Suicide is the act of malicious self-murder. It cannot be committed by an insane person, by one totally insane, or one partially insane when the act is solely the result of his monomania. When one takes his life accidentally by his own hand, it is not suicide, nor is it when he is mentally so imbecile that he can form no intention or design to take his own life. One guilty of suicide, who has his life insured, commits a fraud upon the company, and there can be no recovery on the policy, whether there be such a condition expressed therein or not. This fraud would defeat recovery by his assignee, or by the representative of his estate.

The defendant's counsel submitted the following points:

1. That by the terms of the policy upon which the suit is brought, if the jury find that the insured died by his own hand, the plaintiff to recover must prove affirmatively that it was involuntary and unintentional, or that at the time of his death he was so insane as not to be capable of forming an intention, and that he had not sufficient mind to concur in the act and control his actions.

2. That if the jury find that the insured intentionally and voluntarily committed suicide, he thereby avoided the policy of insurance, and the plaintiff cannot recover.

3. If the jury find this policy of insurance was assigned to the plaintiffs, or held by them as security, to enable then to recover they must show that written notice was given to the defendants and due proof of interest was produced to them, with the proof of death, according to the terms of the policy, or sufficient evidence waiving the production of the same.

4. That if the jury find that the insured committed suicide, he was guilty of such a fraud upon the insurers of his life, that his assignees cannot recover for that reason alone.

5. If the jury believe that Spencer was insane at the time of the assignment to the plaintiffs, they cannot recover for that reason alone.

These points were all affirmed. To the last was added: If he was a monomaniac, and his monomania did not affect his mind as to business matters, did not incapacitate him for business transactions, then the principle in the point does not apply. But if totally insane, or insane on such subject or in such way as to mentally unfit him for business, the principle applies.

Verdict for plaintiffs for amount of policy.

COMPROMISE OF LITIGATION.

Common Pleas of Luzerne County, Pa.

BEISECKER
vs.
ÆTNA LIFE INSURANCE CO.

1. The law favors the prevention and compromise of litigation.
2. If the legal rights of the party who gives a release be doubtful, or honestly contested, or there be an actual controversy of which the issue may be fairly considered doubtful, such release will be enforced.
3. The after discovery that one of the parties has lost by such compromise and release will not avoid them.

D. R. RANDALL and C. PIKE, *for Plaintiff.*
E. N. WILLARD, *for Defendant.*

DANA, J.

This action was brought to recover an insurance of two thousand dollars on the life of William Beisecker, late husband of the plaintiff.

The defendants resisted a recovery on two grounds, which were embodied in four written points, on which the court were requested to charge the jury.

The first ground, expressed in the first and second points, was, that the answers of William Beisecker to the questions propounded in the application, whether he had had the heart disease, or any severe disease, and been attended by a physician, were warranties on the part of the assured, and if the jury found that the answers were false, the plaintiff could not recover.

These points were affirmed, and the truth or falsity of the answers was submitted to the determination of the jury under the evidence. The testimony was conflicting. Physicians who had attended him spoke of attacks inflammatory rheumatism, palpitation of the heart,

heart disease, disturbance of the liver and kidneys, attended with dropsical effusion, for which they had treated him. The admissions of the assured, his declarations to the provost marshal, when drafted, that he was subject to the heart disease, and his subsequent discharge from the service on account of such disease, were also in evidence.

On the other hand, Mrs. Beisecker and a number of intimate associates and acquaintances of Wm. Beisecker testified that until some years after the insurance was effected he was a strong and vigorous man, and in good health.

Upon this issue between the parties the jury found in favor of the plaintiff. It was a question of fact to be determined by the weight of the evidence; it depended upon the number, the credibility of the witnesses, and their means of knowledge, of which the jury are the arbiters. A finding either for the plaintiff or the defendants on this issue could have been reached under the evidence, and such finding sustained, and with the result actually reached we cannot properly interfere.

The second ground of defense, expressed in the defendants' third and fourth written points, was, that the settlement, receipt for five hundred dollars, and discharge of the company in full from all liability, given by the plaintiff under seal, dated the 8th September, 1869, which it became necessary for her to show in making out her case in chief, was conclusive against her right to recover.

She averred that this paper was procured by fraud, surprise and misrepresentation, and there was some evidence connected with the compromise to sustain this averment, which the court was inclined to leave to the jury. The points were answered in the negative, and the jury were instructed that if they found, under the evidence, that the compromise and release were obtained through actual fraud, surprise and willful misrepresentation of facts not within the plaintiff's knowledge or means of knowledge, such compromise and release did not conclude her or defeat her right to recover the unpaid balance of the policy.

The representations of the agent consisted in stating that William Beisecker had answered falsely the questions, or certain questions, contained in the application, and that there could be no recovery on the policy against the company. The application was shown to her; the state of the assured's health was known to her, and the negotiations for settlement were continued at intervals throughout the day.

The law favors the prevention and the compromise of litigation.

If the legal rights of the party who gives a receipt or executes a release be doubtful, if they are honestly contested, if there be an actual controversy, of which the issue may fairly be considered by the parties doubtful, the release and compromise will be enforced. The question is how the facts appeared to the parties at the time, not what a subsequent trial may have disclosed. The after discovery that one of the parties has lost by such compromise will not suffice to open and renew litigation, nor to relieve from the operation of a rule of law so conducive to the peace of society and the ultimate security of individuals. 1 Pars. on Cont., 48; Bennett vs. Paine, 5 Watts, 261.

That there were grounds for controversy, of which the result might fairly be considered doubtful by the parties, is sufficiently indicated in the brief reference already made to the questions raised and to the evidence relative to the first branch of the case. We regret the necessity for setting aside the finding of a jury upon a question of fact, and hesitate long before doing it if there be any conflicting evidence; yet upon careful consideration of all the testimony, without anticipating or intimating how the case may be presented upon a second trial, we are reluctantly brought to the conclusion that upon this latter branch of the issue the verdict was against the weight of the evidence and cannot be sustained.

The rule for a new trial is made absolute.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

GUARANTEE INSURANCE.—*Dishonesty within meaning of policy.*

The Bank of Toronto was insured by the European Society against loss by the want of integrity, honesty or fidelity, or by the negligence, defaults or irregularities of its Montreal agent. The agent had certain discretion to allow overdrafts. The agent allowed a firm of brokers, large customers of the bank, to overdraw some $47,000. Credit was subsequently given them on the bank books for $46,614, including a check for $8,000 subsequently dishonored, and whose character was probably known by the clerk.

The, agent knowing the firm were in difficulties, subsequently allowed a fresh overdraft of $41,557. The firm were engaged in large gambling speculations in gold, and were employed by the agent to speculate for himself. The bank lost heavily by their failure. *Held*, that if the agent's discretion was so unsound that it could not be imputed to anything but dishonesty it came within the meaning of the policy. The act of the agent in allowing the overdraft was an act of want of fidelity within the meaning of the policy.

European Ass. Soc. vs. Bank of Toronto.

Judicial Committee of the Privy Counsel. Appeal from Court of Q. B., Eng.

FIRE.—*Waiver of premium.*

There was evidence that the City Insurance Company, instead of relying on the terms of the policy, sent it to the Allemania Insurance Company for delivery, and that the officer of the latter company to whom the policy was committed in charge so conducted the business and held out the broker, as to induce the insured or her agent to believe that he was authorized to hand over the policy on payment to him.

Held, that the effect of the evidence was to estop the City Insurance Company from asserting the rule as to payment of the premium against the insured, and to become evidence of a waiver.

City Ins. Co. vs. Zoller.

Decision rendered November 16, 1874. Pa. S. C.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

ACTUAL TOTAL LOSS.

§ 102. MARINE.—*Without Abandonment.*—Where a damaged steamboat remains *in specie*, and can be repaired at any cost, however great, no actual total loss can be claimed without abandonment.

Globe Ins. Co. vs. Sherlock.

Rep'd Jour'l. p. 515. O. S. C.

BOND OF INDEMNITY.

§ 103. FIRE.—*Liability for Invalid Claims.—What Constitutes a Valid Obligation.*—Defendant executed a bond of indemnity to

an insurance company against all claims of C. against moneys paid by the company to the sheriff, and all costs, damages, and expenses arising therefrom. *Held*, that the word "claims," included all such as were asserted by legal proceedings, whether afterward adjudged invalid or not.

Lawrence vs. Miller, 2 Comst., 245.

Held, that the company had a right to be indemnified for the expense of defending such illegal claims.

Chamberlain vs. Beller, 18 N. Y., 115.

The bond being under seal, there was a presumptive consideration which throws the onus of disproof on the obligor. The performance of a legal obligation of undoubted validity is not a sufficient consideration.

Mcdonald vs. Wilson, 2 Cowan, 139; Crosby vs. Wand, 6 N. Y., 369.

But if the obligation be doubtful a waiver of the right to contest it constitutes such consideration.

Russell vs. Cook, 3 Hill, 504; Seaman vs. Seaman, 12 Wend., 381; Palmer vs. North, 35 Barb., 382.

Home Ins. Co. vs. Watson et al.

Rep'd in August No. N. Y. C. A.

COLLISION.

§ 104. FIRE.—*Fire caused by.—Barratry.*—An insurance of a steamboat "against loss by fire only," must be held to embrace losses by fire generally without regard to the causes which produced the fire. The policy excepted from losses from certain specified causes, but collision was not named among them. *Held*, that a fire caused by collision was a loss by fire within the meaning of the policy.

United L. F. & M. Ins. Co. vs. Foote, 22 Ohio St., 350.

Held, that a failure of the pilot to comply with the rules of navigation, if the violation is not willful or fraudulent, or grossly negligent, is not barratry in the event of damage resulting.

Germania Ins. Co. vs. Sherlock.

Rep'd Jour'l, p. 531. O. S. C.

CORPORATION.

§ 105. FIRE.—*Legality of organization.—Election of Directors.*—The giving of a note to a corporation is an admission of its ex-

istence and an estoppel from denying that it is legally organized.

Society vs. Perry, 6 N. H., 164; Ang. & A. on Corp., 381.

In an action brought by a corporation, the defendant by pleading the general issue admits its capability of sustaining an action. A plea that there is no such corporation must be either in bar or statement.

School District vs. Blaisdell, 6 N. H., 197; Concord vs. McIntire, 6 N. H., 527.

The by-law of a company requiring directors to be chosen at the annual meeting does not imply that elections held at other times shall be wholly void. The law is merely directory. Irregular elections are only voidable.

Hicks vs. Launaston, Rolle's Ab. 514; The King vs. Poole, B. R. H., 27; Prowse vs. Fort, 2 Bro., P. C.; People vs. Runkle, 9 Johns., 147; Rex vs. Loxdale, 1 Burr., 447; Rev. vs. Leicester, 7 B. & C., 12; Dwarris on Statutes, 714.

The acts of such officers are binding while they retain office and the legality of their election cannot be brought collaterally in question.

Nashua Fire Ins. Co. vs. Moore.

Rep'd Jour'l, p. 494. N. H. S. C.

§ 106. FIRE.—*Action of Creditors against.*—The creditor of an insolvent corporation, for which a receiver has been appointed under article 2, title 4, of the New York Revised Statutes, must have his right to share in the distribution of its effects determined in the action or proceedings in which the appointment is made. A motion to compel the payment of a judgment by the receiver, obtained in a suit begun after his appointment, in another district, will be denied. The remedy must be sought by application to the court in the district in which the receiver was appointed and in the action in which the appointment was made.

Rinn vs. Astor Fire Ins. Co.

Report in August No. N. Y. Com. A.

EXECUTION.

§ 107. FIRE.—*Insurance Money due is attachable though the Goods insured would have been exempt.*—An insurance company will be charged as trustee in execution process when the debt

which it owes the principal defendant is solely for the amount due on a policy of insurance upon household furniture, although the furniture at the time of its destruction by fire was exempt from attachment.

Wooster vs. Page and Trustee.

54 N. H. Reports. N. H. S. C.

OTHER INSURANCE.

§ 108. FIRE.—*Whether valid or not.*—The first policy provided that "if the insured shall have existing, during the continuance of this policy, any other contract for insurance, (whether valid or not,) unless consented to etc., then this insurance shall be void." A second policy was afterward taken out, without notice, in another company, containing the usual clause against double insurance. In an action to recover on the second policy, *Held*, that the insurance in the first company was subsisting within the fair meaning of the condition in the second policy at the time that policy was obtained, and the second policy could not be held liable for property covered by the first.

Gale vs. Ins. Co., 41 N. H., 170; Jackson vs. Mass. Ins. Co., 23 Pick., 418; Clark vs. N. E. Ins. Co., 6 Cush., 342; Barrett vs. Union Ins. Co., 7 Cush., 179.

In the opinion of the court the first policy was not rendered void because a nugatory policy constitutes no contract, and any such condition concerning an invalid contract is void for repugnancy.

Gee vs. Cheshire Co. Mut. Fire Ins. Co.

Rep'd Jour'l, p. 489. S. C. N. H.

PLEADINGS AND PRACTICE.

§ 109. LIFE.—*Error in Complaint, Answer, Admission of Evidence, and Instruction to Jury.*—In a suit for recovery it was sufficient to set forth in the complaint the amount of premium paid down, and annually thereafter; it was not necessary to set forth the accruing obligations. The beneficiary agreed that the truthfulness of the insured's answers should form the basis of the contract. *Held*, that as this agreement was not the foundation

of the action it was not necessary to be set forth in the complaint and made an exhibit.

Commonwealth Ins. Co. vs. Monninger 25 Ind., 352.

Where two paragraphs of the answer were substantially the same, and allowed the same evidence to be introduced, it was no error to strike out one. Knowledge of the truth or falsity of the insured's answers by the beneficiary was immaterial. They were warranties of the insured to the company. It was not error to strike out of the answer an interrogatory intended to elicit only such knowledge.

Kaerner vs. Baldwin, 39 Ind., 474; Kacks vs. Yard, 4 Am. Law Times R., 68.

The jury along with their general verdict replied to an interrogatory whether or not the doctors examined the urine and found fibrinous casts, "the weight of evidence justified the jury in answering no." They answered the question, whether or not the insured had disease of the kidneys for which he received medical treatment, "He may have received medical treatment for that disease, but we believe if he did, he received treatment for a disease he did not have." *Held*, that it was no error to refuse to require fuller answers. Where there was conflicting evidence and the verdict was not so groundless as to startle the sense of justice, refusal to grant a new trial was not error. Any variance between any pleading and copy of a written instrument filed, as to matter of description or legal effect, may be amended at any time as of course, before judgment, without causing a continuance.

2 G. & H., pp. 104, 378; Maxwell vs. Day, 45 Ind., R.

The report of a physician adopted by both parties as examiner of the company was proper rebutting evidence against the company. A conversation between the company's agents on the subject in controversy and within the scope of their agency was proper evidence for the beneficiary. General instructions of the company to its agents not binding on the claimant are not evidence. A refusal to submit to the jury interrogatories whose decision would not control the general verdict was not error. To the question whether the insured had had dropsy or disease of the kidneys within ten years, he answered "No."

The court instructed that the answer was a warranty, and if untrue the finding must be for the company. *Held*, that a refusal to instruct that if the insured had had or been sick with these diseases during the time specified, the finding must be for the company, was not error. The instructions given amounted to the same as those asked for. The insured answered the question whether he had had any sickness during the last ten years, "Erysipelas in 1863, severe cold last spring." *Held*, that he did not warrant he had not been sick with two diseases not specified in the previous question.

Dayton Ins. Co. vs. Kelly, 24 Ohio State R., 345, (4 Ins. Law Journal, 69.)

Mutual Benefit Life Ins. Co. vs. Cannon.

Report in August No. IND. S. C.

PRACTICE.

§ 110. MARINE.—*Erroneous Instructions.*—Where the court erroneously instructed that an actual total loss can be claimed without abandonment if the cost of repairs was excessive, and the jury may have assessed damages on this false principle, although they found that the vessel remained *in specie* and was repaired by the insured, the judgment will be reversed.

Globe Ins. Co. vs. Sherlock.

—§ 102.

PREMIUM NOTES.

§ 111. FIRE.—*Assessment of.*—The charter of a mutual company provided that every person insured should deposit a note for an amount equal to the premium, to be assessed and collected as deemed expedient by the directors, and all such premiums and deposits should be considered the absolute funds of the company, and applied first to payment of expenses, second to money borrowed, and thirdly, of losses and notes given in payment of losses: and in case the absolute funds were absorbed by losses, each member should be liable during the term of his policy, not exceeding two dollars for each dollar of premium and deposit. *Held*, that the absolute funds can be collected at any time and applied to any debts and liabilities whether before or since the insured became a member.

Ins. Co. vs. Harvey, 45 N. H., 292; and Ins. Co. vs. Fitzpatrick, 2 Gray, 279, distinguished; Long Pond Ins. Co. vs. Houghton, 6 Gray, 77.

Nashua Fire Ins. Co., vs. Moore.

— §105.

REFORM OF POLICY.

§ 112. MARINE.—*Use of Two Ports instead of One.*—Application was made by letter for insurance "on the charter-party of the bark Maria Henry—voyage from Liverpool to Cuba, and to Europe via Falmouth, for orders where to discharge." After some correspondence regarding the rate, the company wrote, "We will write upon the charter of the bark Maria Henry as proposed by you, Europe to Cuba and back to Europe—at 3½ per cent., net; it is worth something, you know, to cover the risk at the port of loading in Cuba." Insurer replied, "I accept your proposition; please insure—at and from Liverpool to Cuba and to Europe via a market port for orders where to discharge." The policy was "on charter of bark Maria Henry at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe." The vessel proceeded from Liverpool to a port of discharge, and thence to another port of loading in Cuba, and was lost on her return. *Held*, that the correspondence constituted a preliminary agreement. The policy was intended to put this agreement in a more full and formal shape. The assured must be presumed to have read the correspondence with care, and to have assumed that the policy conformed to the agreement therein. The principles upon which a court of equity will reform the contract are those stated in Hearne vs. New England Mutual Marine Ins. Co. [4 Ins. Law Journal.] The correspondence implies that the port of loading might be one other than the port of discharge, and what is implied is as effectual as what is expressed.

Dickey vs. Balt. Ins. Co., 7 Cr., 327; Bond vs. Nutt, 2 Cowper, 601; Tholluson vs. Ferguson, 1 Doug., 360; Cruikshank vs. Jansen, 2 Taunt., 310.

The clear terms of the preliminary agreement warrant a court of equity in reforming the contract as expressed in the policy to allow the use of two ports in Cuba.

Equitable Safety Ins. Co. vs. Hearne.

Report in August No. U. S. S. C.

SUICIDE.

§ 113. LIFE.—"*Act and Intention.*"—"*Sane or Insane.*"—The policy provided that "in case of death by his own act and intention, whether sane or insane, the company shall not be liable for the sum insured." *Held*, that the word "intention" did not essentially vary the legal meaning of the clause, which is the same as in the case of Bigelow vs. the Berkshire Co. Life Ins. Co. (U. S. C. C., N. D. Ill.) The intention of the company was to protect itself from liability in case of suicide while the insured was insane as well as sane. The company had a right to so restrict its liabilities, and no degree of insanity will avoid the condition.

Life Ins. Co. vs. Terry, 15 Wallace, 580, distinguished.
Pierce vs. Travelers' Ins. Co. (3 Ins. Law Journal, 442.)
Chapman vs. Republic Life Ins. Co.
Rep'd Jour'l, p. 511. U. S. C. C.

SUBROGATION.

§ 114. MARINE.—*As against the Insured.*—Where in a collision both vessels were owned by the insured, the rule that an underwriter is subrogated to the rights of the insured as against a stranger does not apply if the collision was caused by mere negligence on the part of the officers and crew of the injuring vessel. If the injury was caused however by willful wrong or fraudulent act on their part, then such act was available as a defense to an action on the policy with or without an abandonment.

Globe Ins. Co. vs. Sherlock.
—§ 102.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF NEW HAMPSHIRE.

DECEMBER, 1874.

GEE

vs.

CHESHIRE COUNTY MUT. FIRE INS. CO.*

The plaintiff obtained a policy of insurance from the Niagara Insurance Co. on his house, barn, and other property, which contained a condition that "if the assured shall have existing, during the existence of this policy, any other contract for insurance (whether valid or not) on the same property, unless consented to etc., then this insurance shall be void." Afterward, without surrendering or canceling this policy, he obtained a policy from the defendants on part of the same property, which contained the usual condition against double insurance. Up to the time the property was destroyed by fire the plaintiff was not aware of the condition in either policy, and acted in good faith throughout.

Held, that insurance in the Niagara company was subsisting, within the fair meaning of the condition in the defendants' policyat the time that policy was obtained, so that the plaintiff cannot recover in this action for property covered by the Niagara policy.

Quære, whether the condition in the Niagara policy, so far as it speaks of an invalid contract of insurance, is not void for repugnancy to the contract of indemnity of which the policy is evidence.

The following facts were agreed by the parties for the purpose of obtaining the opinion of the court thereon. The action is assumpsit on a policy of insurance.

* To appear in 55 N. H. Reports. Syllabus by the official reporter, John M. Shirley.

On the first day of January, 1868, the plaintiff, Austin W. Gee, obtained a policy of insurance from the Niagara Fire Insurance Company on his house, barns, furniture, and produce in Marlow, N. H. This policy contained the following proviso: "And provided further, if the assured, or any other person or parties interested, shall have existing, during the continuance of this policy, any other contract or agreement for insurance (whether valid or not) against loss or damage by fire on the property hereby insured, or any part thereof, not consented to by this company in writing, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." On August 22, 1870, the plaintiff obtained a policy from the defendants on the same property, and also on hog-house, 14 by 19 feet, the sum of fifty dollars and on clothing in said dwelling-house and L, one hundred dollars. Sec. 10, of the defendants' act of incorporation is as follows, viz.: "And be it further enacted, that if insurance on any house or building shall be and subsist in said company and in any other office, or from and by any other person or persons, at the same time, the insurance made in and by said company shall be deemed and become void, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary." The act of incorporation of the defendants, and the proviso in the first mentioned policy, are in very fine print, and the clause against double insurance in neither of the policies was known to the plaintiff, who acted in good faith throughout, until the property was destroyed.

WAIT, *for Plaintiff.*

WHEELER & FAULKNER, *for Defendant.*

LADD, J.

In Gale vs. Ins. Co., 41 N. H., 170, the plaintiff, having a valid insurance in one company, with a condition against double insurance, obtained a policy in another company which also contained a similar condition; and it was held, in accordance with the general current of authority, that the first policy was not rendered invalid, for the reason that the second never had any vitality, and did not constitute any breach of the condition in the first.

In the present case, up to the moment when the form of a contract with the defendants was completed, the plaintiff had a valid contract of insurance with the Niagara company. But now it is said that the idle ceremony of taking out an invalid policy with the defendants was a

breach of a condition found in the policy of the Niagara company, not indeed against double insurance, but, if it amounts to anything, a condition against an attempt to procure double insurance; that thereupon the Niagara policy became void, and therefore the argument is, there was no instant of time when there was a double insurance, and so the defendants' policy is still in full force, notwithstanding their condition. In other words, that the whole force and effect of the law, as settled in this State, as well as in other jurisdictions, is avoided, or, to use a more appropriate expression, is evaded, and a policy which otherwise would have been nugatory in its inception, by virtue of an express condition incorporated into it, made valid and of binding force by four words, found inclosed in brackets, in the middle of the condition, finely printed, in the Niagara policy.

I am unable to adopt this view. Doubtless insurance companies may insert conditions in their policies to protect themselves against the mischiefs of double insurance; and, unless such conditions are repugnant to the contract evidenced by the policy, or are for some other legal cause inoperative, effect will be given to them in accordance with the intention of the parties as expressed in the instrument.

The condition in the defendants' policy is the usual condition inserted for this legal and proper purpose; and it seems to me it would be straining a point, as well as introducing a refinement which the law ought not to tolerate, to hold that the Niagara policy did not survive the execution of the defendants' policy so as to render the same invalid, within the fair and sensible construction of that condition. The construction contended for would, as it seems to me, tend to invite rather than discourage the introduction into policies of insurance of astute and perplexing conditions, and to promote rather than discountenance the worst kind of rivalry between rival companies to see which should succeed best in protecting themselves in this way against liability in case of loss, at the expense of others at least equally entitled to the equitable consideration of the court, or at the expense of the assured.

I am of opinion that when the plaintiff, without surrendering or in any way canceling or intending to cancel his policy in the Niagara company, procured another policy on the same property from the defendants, there was a double insurance within the fair meaning of the condition in that policy, and that the defendants cannot be held liable for the loss of the property covered by the Niagara policy.

This is as far as it is necessary to go in the present case. But it is not to be understood that I accept the view that the Niagara policy

was rendered invalid by the nugatory act of the plaintiff in procuring a policy from the defendants.

The condition under consideration in the Niagara policy, as already remarked, is not against double insurance, nor is it against any specified act on the part of the plaintiff, like the obtaining of an invalid policy in some other company; but it is expressed in terms very vague and very general, against the making of an invalid contract of insurance. What is an invalid contract of insurance? Obtaining a nugatory policy in some other company has been held over and over again not to constitute any contract at all. It confers no rights on the one hand, and imposes no obligations on the other. It is not a contract, it is a mere nullity. How can that which is not a contract, in any legal or even popular sense of the term properly be called an invalid contract? Suppose the plaintiff had gone through the form of making a contract with some person who represented that he had authority to act for and bind some insurance company, when in point of fact he had no such authority, and in that way obtained a policy which was void by reason of fraud or forgery, or both, on the part of the pretended agent: would that constitute an invalid contract of insurance within the meaning of this condition?

Illustrations and queries of this sort, showing the extraordinary nature of the questions that might arise in the construction of such a condition, need not be multiplied. I only desire to say, that I am not satisfied that the act of the plaintiff brings the case within the terms of the condition, even admitting that the condition is in any view a valid one. But I am not prepared to admit that the condition is a valid one. I do not suppose it would be contended that a condition that the policy should be void in case the plaintiff did nothing at all, would be a valid condition. Most certainly it would be void for repugnance. How does it change the legal aspect of the matter to say that it shall be void if he does an act which, in the eye of the law, amounts to exactly the same thing as though he had done nothing at all? The utmost that can be said of it is, that it is a condition against an attempt to procure double insurance; and is it to be held that such a condition is legally consistent with the scope and effect of the contract, as evidenced by the policy? If an attempt, resulting in total failure, may be allowed the effect to avoid a policy, why not allow a simple purpose or intention, formed in the mind of the assured but never put into action, the same force whenever such secret purpose can be discovered? I think I should hesitate before coming to the conclusion that a condition, declaring the policy forfeited if the

assured makes an abortive attempt to procure double insurance, is so consistent with the contract to which it is annexed that it can be upheld in giving construction to the whole instrument taken together.

It may be said that an invalid contract of insurance, if believed by the assured to be valid, furnishes the same temptation to a fraudulent destruction of the property by him as though it were valid; and that is doubtless true. But the answer is, that this has not heretofore been regarded as a sufficient reason for holding both policies void, as is shown by the case of Gale vs. The Ins. Co. The supposed double insurance would, of course, be evidence more or less cogent for the jury to consider upon the question whether the assured burnt his own property; but it does not furnish a legal reason why a condition which ought to be held void for repugnancy, on a fair construction of the whole instrument in which it is found, should be declared valid.

If these views be correct, they bring us to the same result already reached by another road; for, if the condition against an invalid contract of insurance contained in the Niagara policy be held in operation, the case stands in all respects like Gale vs. Ins. Co.; and there can be no recovery against the defendants, upon the fact stated in the case, except for the hog-house and the clothing, which were not covered by the Niagara policy.

SMITH, J.

The question raised in this case was settled in Gale vs. Ins. Co., 41 N. H., 170, which is in conformity with the general current of authorities. It is claimed, however, by the plaintiff, that, inasmuch as the policy of the Niagara company provides that by the existence of any other agreement of insurance, whether valid or not, the insurance in that company shall be void, that the policy must inevitably be void, and being so void, there is nothing to prevent the validity of the policy of the defendant company. Even if the first policy be void for that reason, I do not think that fact will make valid the second. At the time the plaintiff agreed with the defendants for the second policy, he had a valid policy in the Niagara company, and that, by the terms of the defendants' policy, rendered the second policy void. Jackson vs. Massachusetts Ins. Co., 23 Pick., 418; Clark vs. New England Ins. Co., 6 Cush., 342; Barrett vs. Union Ins. Co., 7 Cush., 179. If, then, the Niagara policy became void, as contended by the plaintiff, as the result of his procuring a second policy, the question arises whether both policies are not void.

I do not think, however, that the provision in the Niagara policy hat an invalid agreement for insurance shall render that policy void thas that effect, for the reasons suggested by my brother LADD, namely (1) that a nugatory policy constitutes no contract at all—it is a mere nullity; (2) that such a condition is not a valid one, being void for repugnancy, and inconsistent with the scope and effect of the contract.

FOSTER, C. J., C. C.—I entirely agree with the views and conclusions of my brethren.

Case discharged.

SUPREME COURT OF NEW HAMPSHIRE.

DECEMBER 9, 1874.

NASHUA FIRE INS. CO.

vs.

MOORE.*

The charter of a mutual fire insurance company provided that every person becoming insured therein should pay upon the execution of his policy the premium thereon, and in addition thereto deposit his written agreement to hold himself liable for an equal amount in the capital stock of the company, to be assessed and collected by the directors in such sums and at such times as they should deem expedient; that all premiums and deposits thus made should be considered the absolute funds of the company, and be applied, first, to the payment of the expenses of the company; secondly, of money borrowed; and, thirdly, of losses and notes given in payment of losses;—and in case losses should happen so as to consume the absolute funds of the company, each member should be held to pay, at the discretion of the directors, during the term of his policy, a sum not exceeding two dollars for each dollar of premium and deposit. *Held*, that such a deposit note was subject to collection at any time, at the discretion of the directors, for the purpose of discharging expenses, debts, and losses of the company; that it was not necessary to enforce payment of such notes by a general assessment; and that such note might be collected to pay losses and expenses which accrued before the maker became a member of the corporation.

One who gives a note to a corporation will not be permitted to deny that there is such a corporation.

In an action brought by a corporation, the defendant, by pleading the general issue, admits that plaintiffs are a corporation capable of sustaining an action.

A provision in the by-laws of a corporation, which requires the directors to be chosen at the annual meetings of the corporation, is directory only, and not

* To appear in 55 N. H. Rep. Syllabus and case by the official reporter, J. M. Shirley.

restrictive. Its observance is not essential to the exercise of the power of election.

The legality of the election of directors of a corporation cannot be brought collaterally in question; but proceedings must be instituted for the express purpose of evicting them, if not properly elected.

Assumpsit, on three notes signed by the defendant and payable to the plaintiffs, on demand,—one for $17.75, dated Nov. 2, 1867; one for $5, dated May 10, 1868; and one for $22.50, dated May 11, 1869. Each note contained the following stipulation: "The above note is to be paid for the purpose and in pursuance of the act incorporating said company, and the by-laws thereof, and not otherwise." Writ dated Dec. 18, 1871. The case was tried by the court, and the following facts were found:

The plaintiffs produced a book purporting to be a record-book of the plaintiffs, in which was written the following:

Office of Nashua Fire Insurance Co., 7½ o'clock, Feb., 24, 1870, P. M. The directors met at the above time and place. Present H. T. Morrill, M. W. Merrill, Geo. McQuesten, J. W. White, F. F. Kimball, J. G. Blunt, and E. B. Hammond. On motion of J. W. White, proceeded to ballot for directors. Whole number of votes cast, 7; necessary for a choice, 4. J. D. Otterson, C. F. Stetson, C. B. Hill, H. F. Courser, H. T. Morrill, M. W. Merrill, Geo. McQuesten, J. W. White, F. F. Kimball, J. G. Blunt, E. B. Hammond, had seven each, and were declared elected. On motion of M. W. Merrill, an assessment of one hundred per cent. on all notes given for policies that had not expired prior to noon of February 8, 1870, was voted; and ninety per cent. on all notes given on policies that were in force when loss or losses occurred during either of the years 1867, 1868 or 1869, but had expired prior to February, 8, 1870. On motion of J. W. White, voted adjourn. A true record:—attest—J. B. Fassett, secretary and treasurer. The assessment, if valid, would be of 90 per cent. of the first note, and 100 per cent. of the other two. The charter of the plaintiffs, passed in 1856, contains the following provisions: Sec. 1. The company may make by-laws. Sec. 2. All persons who may become insured under this act, and also their legal representatives, continuing to be so insured as is hereinafter provided, shall be members of this corporation, for and during the time specified in their respective policies, and no longer, and shall at all times be concluded by the provisions thereof. Sec. 3. The property and affairs of said company shall be controlled and managed by a board of directors, who shall be members of the same, and be chosen by ballot at the annual

meeting thereof, and shall hold their offices during one year, and until others chosen shall have accepted of the trust in their stead. All vacancies happening in said board during the interval between the annual meetings may be filled by the remaining members, and a majority of the board shall constitute a quorum for the transaction of business. This board shall elect one of their number to act as president; they shall hold their meetings monthly, or oftener, as the affairs of the company shall require, and shall keep a record of their proceedings. Sec. 4. That the directors shall, from time to time, appoint a secretary, treasurer, * * * and may remove them at pleasure. Sec. 6. Every person becoming insured by said company shall pay, upon the execution of his policy and before the delivery thereof, the premium thereon, and, in addition thereto, deposit his written agreement to hold himself liable for an equal amount in the capital stock of the company, to be assessed and collected by the directors, in such sums and at such times as they shall deem expedient. All premiums and deposits thus made shall be considered the absolute funds of the company, and shall be liable and held pledged to pay, first, the expenses of the company; second, money borrowed; third, losses and notes given in payment of losses; but in case losses should happen so as to consume the absolute funds of the company, then each member shall be held to pay, at the discretion of the directors, during the term of his policy, a sum not exceeding two dollars for each dollar of premium and deposit. The premiums and deposits shall be returned to members as a dividend at the expiration of their respective policies, in a ratable proportion, after deducting for expenses and losses such part thereof as the directors may deem proper. Sec. 12. The annual meeting of the company shall be holden at said Nashua, on the first Monday of August in each year, or such other day as the said company may appoint. Sec. 15. That this act shall be subject to all the provisions and restrictions of the laws of this State in relation to corporations.

The by-laws of the company contain the following provisions:

Art. 1. The annual meeting shall be holden on the first Monday in August annually. All meetings shall be notified by advertisement published in one or more newspapers printed in the city of Nashua, at least ten days before the time of meeting; but in case of omission to notify the annual meeting as aforesaid, the same shall not thereby be lost, but shall be adjourned for the transaction of business until the requisite notice shall be given. Special meetings may be called

by the directors, and shall be called on the request of the owners of one tenth of the property insured. At the annual meeting, it shall be in order to an act on any subject within the powers of the corporation. At special meetings, the subject to be acted on must be specified in the notice of such meetings. Art. 2. No risk in any one policy shall exceed $3,000. Art. 4. The directors shall hold their stated meetings at the company's office, on the afternoon of Saturday preceding the first Monday of each month.

The defendant objected that there was no competent evidence to prove any record of the company, or that there is or ever was any officer of the company properly chosen or qualified, or that there had ever been any legal meeting of the company or directors, or that the assessment purporting to have been made February 24, 1870, was made by persons authorized to make it, or that there was any cause for making it, or that any of the proceedings were valid or binding on the defendant.

Mr. Fassett, being sworn as a witness, produced said book, and, subject to the defendant's exception, testified that he was the secretary and treasurer of the company; that the book was the record book of the company; that the records in it purporting to be made by him were made by him, and were correct; that there was no record of notice of the directors' meeting held February 24, 1870; that he gave the directors personal notice of that meeting; that there were several losses,—one of $1,000, another of $600, and another (Dr. Moore's), $4,650, which the company were unable to pay.

At the first meeting of the grantees, under the plaintiff's charter, E. P. Emerson was chosen clerk, and duly sworn. There is no record that any one else was ever sworn as an officer of the company, and no one else ever was so sworn. The record in the book of the first and some other meetings, including the signature of the clerk, was written by the son of said Emerson, by his direction. The record of several meetings, when George Stark was clerk *pro tem.* was made by the same person in the same way, in one instance *pro tem.* after the signature being accidentally omitted. There is no record of notice of any meeting. Notice of annual meetings was formerly published; but about 1865 that practice ceased, and the only notice of any meeting afterward was by the secretary personally notifying those who were considered the directors, and by others happening accidentally to be informed. This method of giving notice was adopted in good faith, to save the expense of printing, which had been found to be practically useless, as the meetings were not attended by anybody but those re-

garded as directors. The last meeting of the company was October 3, 1866, when eleven directors were chosen. After that the directors were elected by the directors. The only time Fassett was elected secretary was by the directors, October 4, 1866. August 7, 1865, was the only time he was chosen treasurer by the company, and he never gave a bond. Dr. Moore had three policies,—one of $2,500 on his barn, one of $2,000 on his house, and one of $1,000 on his personal property. Of the persons acting as directors in making the assessment, February 24, 1870, Hammond and McQuesten were not then members of the company. McQuesten's policy expired September, 1868. He was one of the original grantees in the charter, and he had been elected director at every meeting of the company, and of the directors, when directors had been chosen. Merrill was first elected at the annual meeting, September 22, 1858, and was re-elected at every subsequent election, and his policy was in force February 24, 1870. Morrill and Blunt were elected at the annual meeting, August 1, 1859, and re-elected at every subsequent election, and their policies had not expired February 24, 1870. Otterson and White were elected at the annual meeting, August 6, 1860, and were re-elected at every subsequent election, and their policies had not expired February 24, 1870. F. F. Kimball was elected January 22, 1869, (to fill a vacancy caused by the death of his brother,) and February 24, 1870. All these were present and voted for the assessment, February 24, 1870, and the vote was unanimous.

Merrill and Blunt held partnership policies. At the annual meeting, August 7, 1865, besides those already mentioned as elected directors, L. W. Noyes, Geo. Stark, Franklin Munroe, Elijah Colburn, Alvah Kimball, H. F. Courser, C. B. Hill, E. B. Hammond, Josiah Fleeman, Luther Pollard, L. H. Clement and Charles F. Stetson, were elected directors. The whole number elected at that time was eighteen. Kimball died in June, 1869, Clement in May, 1868, and Noyes in March, 1867, and the policies of Stark, Munroe, Hill, Hammond, Pollard, and Stetson had expired before February 24, 1870. The defendant had due notice of the assessment within a week after it was voted. Upon the foregoing facts judgment is to be rendered unless the defendant elects a trial on the question whether the notes were obtained by fraudulent representations. The books and papers used at the trial may be referred to as part of this case.

H. B. Atherton, for the plaintiffs, cited Berry vs. Osborn, 28 N. H., 283; Rix vs. Ins. Co., 20 N. H., 198; Long Pond M. F. Ins. Co. vs. Houghton, 6 Gray, 77; Despatch Line vs. Bellamy Co., 12 N. H., 205;

Edgerly vs. Emerson, 23 N. H., 557; Hilliard vs.Gould, 34 N. H., 239; U. S. Bank vs. Dandridge, 12 Wheaton, 66.

W. W. Bailey, for the defendant, cited Ins. Co. vs. Fitzpatrick, 2 Gray, 279; Ins. Co. vs. Harvey, 45 N. H., 292; Gen. Stats. 276, secs. 8, 9; ib. 277, sec. 15; Charter, sec. 3; Haynes vs. Brown, 36 N. H., 545; Chelmsford Co. vs. Demarest, 7 Gray, 1 ; Ins. Co. vs. Westcott, 14 Gray, 442.

Smith, J.

Two questions are raised in this case.

1. Must the plaintiffs show that the assessment of February 24, 1870, was needed to pay losses and expenses before they can recover?

2. Can the right of those persons to hold the office of directors, who assumed to act as such, February 24, 1870, be called in question in this suit?

1. By section 6 of the plaintiffs' charter, every person becoming insured is required to pay a premium in cash, and to deposit his written agreement to hold himself liable for an equal amount in the capital stock of the company, to be assessed and collected by the directors in such sums and at such times as they shall deem expedient. The premiums and deposits thus made are considered the *absolute* funds of the company, and are made liable and held pledged to pay (1) the expenses of the company, (2) money borrowed, (3) losses, and notes given in payment of losses. In case it should happen that the absolute funds of the company should be consumed, each member is liable to pay, at the discretion of the directors during the term of his policy, a sum not exceeding two dollars for each dollar of premium and deposit.

A distinction is here made between the *absolute* funds of the company, and funds raised by ordinary assessments after the absolute funds have been expended. It has been settled, both in this State and in Massachusetts, that in assumpsit by a mutual fire insurance company against one of its members, upon his premium note promising to pay the company a certain sum of money in such portions and at such times as the directors of the company may, agreeably to their charter and by-laws, require, where such member is liable to assessment only for losses and expenses occurring during the term mentioned in his policy, the plaintiffs cannot recover unless they show an assessment duly made for such losses or expenses. Insurance Co. vs. Harvey, 45 N. H., 292; Insurance Co. vs. Fitzpatrick, 2 Gray 279.

If this suit were to recover an assessment not exceeding two dollars for each dollar of premium and deposit, it must fail, because the plain-

tiffs have failed to show what expenses and losses were included in the assessment. The case shows that there were several losses,—one of $1,000 another of $600, and another of $4,650; but when they occurred, whether before or during the term covered by the defendant's policy, is not shown. But the *absolute* funds of a mutual insurance company stand differently. They can be collected at any time under the direction of the directors, and when collected be applied to the discharge of any debts and liabilities of the company—even losses and expenses which occurred before the insured became a member of the corporation. Long Pond Ins. Co. vs. Houghton, 6 Gray 77. Whether this provision of the plaintiff's charter is a wise one, or is equitable, is a question not open to inquiry. It is the law as enacted by the legislature, and was assented to when the defendant accepted his policy.

2. The second question relates to the legality of the organization of the company, and of the election of the directors. The legality of its organization, or the fact of its existence, is not open to the defendant to question. The giving of a note to a corporation is an admission by the defendant of the existence of the corporation, and he is not permitted to deny that there is a duly organized corporation. Society vs. Perry, 6 N. H., 164; Ang. & A. on Corp., 381; and in general, when a defendant intends to insist that there is no such corporation, he must plead it either in bar or statement. School District vs. Blaisdell,6 N. H., 197; Concord vs. McIntyre, 6 N. H., 527. Whether there was a board of directors capable of acting, on February 24, 1870, presents a question of more difficulty.

By section 3 of the company's charter, it is provided that the property and affairs of the company shall be controlled and managed by a board of directors, who shall be members of the company, and be chosen by ballot at the annual meeting thereof, and shall hold their offices during one year, and until others chosen shall have accepted the trust in their stead. Vacancies happening between the annual meetings may be filled by the remaining members, and a majority is constituted a quorum for the transaction of business.

By article 1 of the by-laws, it is provided that the annual meeting shall be holden on the first Monday in August annually;—all meetings shall be notified by advertisement in one or more newspapers printed in Nashua, but in case of omission to notify the annual meeting, it shall not thereby be lost, but shall be adjourned for the transaction of business until the requisite notice shall be given. The number of directors to be chosen is not fixed by the charter or by-laws.

The case finds that the last annual meeting, which was holden in

pursuance of a published notice, as required by article 1 of the by-laws, was holden August 7, 1865. Assuming, in the absence of any intimation to the contrary, that, that meeting was legally called and holden, it appears that there were chosen, at that meeting, eighteen directors. Of this number, three had died previous to February 24, 1870, and seven had ceased to be members by reasons of their policies having expired. F. F. Kimball had been chosen, by the surviving directors, a director in place of his brother, A. Kimball, who was one of the three deceased directors. So that, on February 24, 1870, if the board elected in August, 1865, is to be considered as holding over, the board consisted of nine members, viz., Messrs. Merrill, Morrill, Blunt, Otterson, White, Courser, Colburn, Fleeman and F. F. Kimball. Five of these gentlemen, being a quorum, viz., Messrs. Merrill, Morrill, Blunt, White and F. F. Kimball, were present at the directors' meeting, February 24, 1870, and voted for the assessment. If the board elected in 1865 held over, the vote creating this assessment would seem to be legal; but if it is admitted that the board elected in 1865 did not hold over, then at the time the meeting of February 24, 1870, was held, the board of directors, acting as such, consisted of McQuesten, Merrill, Morrill, Blunt, Otterson, White, Hammond, and F. F Kimball, eight in all. McQuesten and Hammond had ceased to be members by reason of their policies having expired, which would leave a board consisting of six members, all of whom, except Otterson, were present and voted the assessment.

At the meeting holden February 24, 1870, eleven directors were chosen; but McQuesten, Hammond, Stetson and Hill were ineligible by reason of their policies having expired, which would leave the board consisting of seven members, viz., Merrill, Morrill, Blunt, Otterson, White, Courser and F. F. Kimball, all of whom, except Otterson and Courser, were present and voted for the assessment.

The plaintiffs claim that although the assessment may not have been voted by a board of directors legally elected, yet, being in office under color of an election, their acts are valid.

In Hughes vs. Parker, 20 N. H., 58, it was held—Gilchrist, C. J., delivering the opinion of the court—that the law, in requiring the directors to be chosen at the annual meeting, does not imply that elections held at other times shall be wholly void. The law is merely directory, and does not, in terms or by implication, attach such a consequence to an omission or non-observance of the prescribed modes of exercising the power of electing directors. The following authorities were cited and commented upon, in support of this position: Hicks vs. Launaston,

Rolle's Ab. 514; The King vs. Poole, B. R. H., 27; Prouse vs. Foot, 2 Bro. P. C.; People vs. Runkle, 9 Johns., 147; Rex vs. Loxdale, 1 Burr., 447; Rex vs. Leicester, 7 B. & C., 12; Dwarris on Statutes, 714.

In Hughes vs. Parker it was also held that irregular elections are voidable only, and not void; that the acts of officers in, under color of an election, are binding so long as they retain their offices; and that the legality of their election cannot be brought collaterally in question, but proceedings should be instituted for the express purpose of trying it, and of evicting them, if not properly entitled to the offices which they have assumed to exercise.

We do not, therefore, find it necessary to decide whether the nine remaining members of the board, elected in 1865, held over, or whether the election of February 20, 1870, or the election next prior to that, were valid elections. A quorum of either board was present and voted the assessment. The were in office, acting under color of an election, and the legality of their election cannot be questioned, collaterally, in this suit.

The records used on the trial were not admissible. The first clerk only was sworn. While he was in office, the records were kept by his son. He could not delegate the signing of his name to another. The present clerk never was sworn, and consequently never was qualified. There being, then, no legal records, parol evidence was admissible of the acts of the company.

We do not find any occasion to compliment the plaintiffs upon the manner in which their officers have managed the affairs of the company.

Unless the defendant elects a trial on the question whether the notes were obtained by fraudulent representations, there must be judgment for the plaintiff.

Cushing, C. J., and Ladd, J., concurred.

UNITED STATES CIRCUIT COURT.

DISTRICT OF LOUISIANA.

G. M. BAYLY & POND,

vs.

LONDON AND LANCASHIRE INS. CO.*

Keeping a small quantity of saltpetre for curing meat is not a storing within the meaning of the policy.

The Court will not set aside the verdict of the jury because it disagrees with them on an issue of fact, where there is evidence on both sides.

To void a policy prohibiting the storage or sale of certain articles, there must be a substantial violation, and it is no error to charge that if stored or sold in any considerable quantities there can be no recovery.

It is not necessary, in a civil suit involving arson, to charge the jury that the proof required is not so strong as in a criminal prosecution, if the rules of evidence applicable to the case have been properly set forth.

When the amount of loss has been assessed by a jury, it is not competent for a court, to inquire into the processes by which they arrived at the estimate, provided the result is substantially just.

R. HUNT, T. J. SEMMES, R. L. GIBSON, J. and E. AUSTIN, *for the motion.*

J. H. KENNARD, AND T. L. BAYNE, *contra.*

WOODS, C. J.

This action was a suit on a policy of insurance to recover for loss declared sustained by plaintiffs on their stock of groceries, by fire, on the 29th of May, 1874.

The amount claimed in the petition was $9,195.35, and the jury returned a verdict for $8,714.87.

1. The first ground upon which the motion is based is as follows: That under the express provisions of the policy the plaintiffs were prohibited from keeping in their store and selling saltpetre in any quantities whatever, and the evidence established clearly and beyond

* Decision rendered May 31, 1875. Cause submitted on motion of defendants for a new trial.

doubt that plaintiffs did keep in their store and sell saltpetre, in direct violation to their contract.

I do not know that it is denied that the plaintiffs under the terms of their policy might keep in their store small quantities of saltpetre, not for sale, but for the purpose of use in preserving from taint meats and other articles which formed a part of their stock. The policy forbids the storing or vending of any of the articles specified as hazardous, of which saltpetre was one. Keeping saltpetre for the purpose just indicated would not be a storing within the meaning of the policy. Dobson vs. Sotheby, 22 Eng. Com. Law, 481; O'Neill vs. The Ins. Co., 3 Comstock, 127.

The plaintiffs do not deny that a part of a keg of saltpetre, which was used for the purpose above stated, was upon their premises at the time of the fire. But does the proof establish clearly and beyond doubt that the plaintiffs kept saltpetre for sale?

The proof upon this point is confined to the evidence of two witnesses—Van Benthuysen and Pond, the latter being one of the plaintiffs.

Van Benthuysen testifies that as to the charge that the plaintiffs kept saltpetre in store upon their premises, there was nothing in it.

Pond, in an ex parte statement under oath, taken by an agent of the North British and Mercantile Insurance Company, in answer to the question put to him by the agent, "Did you keep in store and for sale coal oil, saltpetre, powder, matches, and other goods of like character?" answered: We kept saltpetre in small quantities; no powder; matches in small lots, and coal oil in cases.

When on the stand as a witness in the case, Pond testified that they had in their store part of a keg of saltpetre, for use in preserving meats, but not for sale. This was all the evidence upon this point. It cannot be denied that there was evidence on both sides the question, whether saltpetre was kept in store for sale on the premises. When this is the case, it is the province of the jury to decide upon the weight and credibility of the evidence, and the court, even should it disagree with the jury on these points, would not set aside the verdict of the jury for that reason. To do so would be to invade the premises of the jury. Ashley vs. Ashley, 2 Str., 1142; Swain vs. Hall, 3 Wils., 45; Lewis vs. Peake, 7 Taunt., 153; Hartright vs. Badham, 11 Price, 383; Carstairsvs. Stein, 4 Maule & Selwyn, 192; Woodward vs. Payne, 15 Johns., 493.

The jury are the exclusive judges of the weight of evidence.

Ewing vs. Burnet, 11Pet., 41; States vs. Lamb, 12 Pet., 1; Richardson vs. Boston, 19 How., 263; Hyde vs. Stone, 20 How., 170.

As the question was first submitted to the jury, and they have passed upon it, and there was evidence to sustain their finding, the issue is new open for the consideration of the court.

I therefore am of opinion that the first ground for the motion is not well taken.

2. But it is insisted by defendant that there was an error in the charge of the court, to their prejudice, upon defense set up, that the plaintiffs stored and sold saltpetre on the premises, contrary to the terms of the policy.

The charge of the court upon this point was as follows:

"It is claimed by defendant that the plaintiffs kept and sold upon the premises, where the insured goods where stored, saltpetre, and that this by the very terms of the policy avoided the contract of insurance.

"On this point the policy provides as follows: And it is decreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned property, or premises, or any part thereof, shall at any time after the making and during the continuence of this insurance be appropriated, applied or used to or for the purpose of storing or vending therein any of the articles, goods or merchandise in the conditions aforesaid denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for or hereafter agreed to by this company in writing, and added to or indorsed upon this policy, then and from thenceforth so long as the same shall be appropriated, applied or used, these presents shall cease, and be of no force or effect.

"By a reference to condition 3, indorsed upon the policy, the article of saltpetre is found to be classed as extra hazardous.

"Upon this branch of the case I instruct you that insurance companies are not compelled by their employment to take risks except upon their own terms. They have the right to impose such conditions, not contrary to good morals, or public policy, as they may choose, and these conditions are binding upon the parties assenting to them. When it (an insurance company) says it will not insure premises containing gunpowder or saltpetre, and inserts a condition in its policy that if gunpowder or saltpetre is stored or sold on the premises, the policy shall be void, that provision is binding on the assured; and if he stores and sells upon the premises these articles, that fact avoids the policy. And in case of loss by fire, it makes no difference that the loss

was not occasioned by the prohibited articles. The assured is bound by the terms of the contract, and the insurer has a right to stand upon the provisions of his contract.

"So if you find, from an inspection of the policy, that it was to be void and of no effect if saltpetre was stored and sold on the premises, and saltpetre was stored and sold on the premises in any considerable quantities without the assent of the assured, these facts avoid the policy, and there can be no recovery."

The criticism made by the defendants on this charge is confined to the use of the word "considerable," in the last clause. But taking the entire charge upon this subject into consideration, it seems to me there is no error in it, and the word objected to could not mislead the jury. The meaning intended to be conveyed, and it seems to me actually conveyed, is that there must be a substantial violation of the terms of the policy. To say that the storing of saltpetre in any quantity, however minute, would avoid the policy, would not be true. The storing or selling of half a pound of saltpetre would not avoid the policy; and it would not be a fair construction of the policy to so hold. The word "considerable," was therefore used as a qualifying word. The proposition submitted to the jury was that the storing or selling of saltpetre on the premises would avoid the policy; but there must be such a quantity as in the fair construction of the policy and interest of the parties would fall within its prohibition and amount to a substantial violation of the conditions of the policy.

But a charge cannot be fairly considered or construed disconnected from the evidence to which it applies.

I have already referred to the evidence in this branch of the case, but must do so again.

Van Benthuysen testified that no saltpetre was stored on the premises. Bond testified on the stand that part of a keg was kept on the premises for use in preserving meats. This, as we have already seen, was not a "storing" within the meaning of the policy.

Now, if this had been the only evidence in the case upon this point the defendant would have had no ground of complaint, for this charge would have been abstract, there being no testimony to show a storing or selling, to which the charge could apply. The plaintiff might have complained, but the defendant could not.

The only other evidence on this point in the case was the affidavit of Pond, already referred to, taken by the insurance agent and offered as an admission of one of the plaintiffs. Here are the questions and answers:

"Q.—Did you keep in store and for sale coal oil, saltpetre, powder, matches, and other goods of like character?"

"A.—We kept saltpetre in small quantities; no powder; matches in small lots, and coal oil in cans."

"Q.—Give an estimate of the quantities of these goods on hand at any one time.

"A.—We had at time of the fire only five cases matches, one keg of saltpetre and five or ten cases coal oil."

Now, what is the effect of this evidence? Unquestionably that matches, saltpetre and coal oil were kept on hand and for sale in substantial and considerable quantities. The plaintiffs are shown to be wholesale dealers, and that at the time of the fire they had a keg of saltpetre on hand for sale. Can any man say that that was not a considerable quantity? Now, what was the charge of the court as applied to this evidence? It was that if the plaintiff stored or sold saltpetre in any considerable quantities, they violated the condition of their policy, and could not recover. What is there here of which defendants could complain? Where was the error of this charge as applied to this evidence, and what was there in it to mislead the jury?'

In my judgment there is no good ground of complaint against this part of the charge, either considered as an abstract proposition or as applied to the facts of the case.

3. It is stated as a ground for a new trial that one of the defenses being that the premises where the insured goods were stored was set fire to by the plaintiffs for the purpose of defrauding the defendant, the court did not charge the jury that this being a civil action the rule of evidence in criminal cases did not apply, and that it was not necessary to sustain the defense to establish beyond a reasonable doubt the fact that plaintiffs had fired their own premises.

What the court did say to the jury was as follows:

"The defendant alleges that the fire in the premises, by which the plaintiffs allege their goods and stock in trade were lost and damaged, was caused willfully and maliciously by the plaintiffs, or others with their knowledge or connivance, and with intention of defrauding the defendant.

"It needs no judge to tell you that if these facts are established there ought not to be and cannot be any recovery on their policy. The burden of proof is on defendant to establish this branch of defense. The presumption of law is against the commission by plaintiff of so great a crime, and to make out this defense the proof offered by defendant must be clear and satisfactory to your minds. You

must be convinced from the evidence either that plaintiffs set fire to the premises or that it was done by their procurement or connivance. Even if the evidence should convince you that the fire was set by the employees of the plaintiffs, that fact would not make good this branch of the defense, unless you were also clearly convinced that the fire was set by the direction, connivance or consent of the plaintiffs. The purpose of fire insurance is to indemnify the insured against incendiary as well as accidental fires, when the insured is in no way or manner chargeable with the fire. If you shall find that this defense is established by the proof, that will bring your deliberations to a close, and your duty will be to return a verdict for the defendants. But if you should be of opinion that this defense is not proven, it will then be your duty to consider other matters of defense relied on."

No objection is made to this charge as given, but it is said that the jury should have been told that it was not necessary to establish the firing of the building by the plaintiffs with the same strength and clearness of proof as required in criminal cases.

In my opinion it is usually sufficient to state to the jury what rules of evidence do apply, without stating also the rules which do not apply. I do not think it possible that the jury could have misunderstood the charge on this branch of the case, and I have not the slightest reason to believe they were misled.

A labored and ingenious argument was submitted to the court in order to induce it to grant the motion for a new trial, to show that Bayly & Pond did in fact fire their own premises. It would be sufficient to say, in answer to the argument referred to, that substantially the same argument was made to the jury and failed to convince them of the truth of the charge made. Even were I convinced that the proof sustained the charge, it would not be my province to set aside the verdict of the jury because I disagreed with them.

But as the argument was pressed with great vigor upon the attention of the court, it is not improper for me to say that it failed to conince me, as it had already failed to convince the jury.

The fire was first discovered about 9 o'clock P. M., of the 29th of May, 1874. The theory of the defendants is that it was set by two employees of the plaintiffs. This theory is not sustained by one word of direct evidence; the defendant depends on circumstances only to establish it. These circumstances were, as the evidence shows, that it was the custom of the plaintiffs to close their stores for the day at about 6 P. M., and to warn the employees upon the premises that they were about to close by the ringing of a bell or gong. On the after-

noon of the day upon which the fire occurred these employees, as they claimed, did not hear the bell ring, when their business called them upon the third story, and were locked up in the stores. When they discovered the fact, which was not later than half-past 6, they descended to the ground floor, and finding themselves locked in they returned to the second story, got out upon the roof of the gallery, which extended over the pavement, and slid down one of the iron columns to the street. When the fire on the premises was discovered, about 9 o'clock that evening, the testimony tends to show that it was burning in three different places. The defendant claims that these employees, before they left the building, had laid and fired the match that about two hours subsequently fired the building.

This theory strikes me as highly improbable. Both these men were examined as witnesses, and they appeared to be of ordinary intelligence. It certainly seems plain that no one, unless insane, having fired a building, after it was closed for the day, for the purposes of fraud, would have left it in broad daylight, with the sun an hour high, and left it too in the most conspicuous manner, and upon the most frequented thoroughfare in this city. If the claim of the defendant is true, these men had, by the laws of Louisiana, been guilty of a capital offense, and they take pains to advertise the fact by leaving the scene of their crime in a manner calculated to excite the attention and surprise of all the passers-by upon the most crowded street of the city.

Men who commit the crime of arson do not proceed in that way when they can just as easily protect themselves by secrecy and darkness.

In my judgment there is not only an utter failure of direct proof to implicate these men, but there are the most cogent probabilities against the truth of the charge laid at their doors.

But suppose it were established that the two employees of the plaintiffs fired the building. That is not sufficient; for there must be proof that they acted by the procurement or connivance of the plaintiffs. Upon this point there is not one word of proof. An attempt was made, by proving the business embarrassments of the plaintiffs, to show a motive for burning their own premises and thereby securing the insurance money. But in my judgment the decided weight of the evidence was that plaintiffs were not embarrassed; and the proof is uncontradicted that if their insurance money had been promptly paid, nevertheless their loss by the fire, over and above their insurance, would have been a very large amount—Pond himself placing it at $100,000.

The fact which defendant essayed to prove, that the buildings were fired purposely, by showing that the fire when discovered was burning in three places, does not prove or tend to prove that plaintiffs caused the fire to be set. There are incendiary fires which are not set by the owners of the premises. Buildings are often fired by incendiaries from motives of revenge, from hope of plunder, or for the wanton purpose of simply causing a great fire and making a great excitement.

It were easy for any one so evilly disposed, with false keys or by other means to gain access to the premises and set them on fire. Whoever did it waited till after dark and left the building in as secret and unsuspicious a manner as possible.

My deliberate conviction is, therefore, that this branch of the defense had nothing to support it, and I entirely agree with the jury in the conclusion they must have reached upon it.

4. It is assigned as other grounds for a new trial that the plaintiffs by false and fraudulent statements tried to exaggerate their loss, and that the proof of the amount of loss was uncertain and unsatisfactory. The questions of the fraudulent practices and of the actual amount of their loss were fairly submitted to the jury. There was evidence to sustain the verdict of the jury, and their finding is conclusive.

6. It is insisted that the jury must have arrived at the amount of their verdict by allowing the plaintiffs' claim for profits resulting from illegally carrying on the business of rectifiers.

In answer to this it may be said that the jury report a given sum as the amount of the loss. We do not know how they arrived at that result, and we cannot ascertain, nor is it competent for us to inquire. One juryman has herein used one method of calculation, and another another. We have no right to enter into their deliberations and make their reasons or their methods a ground of objection if they have reached a substantially just result.

But it seems to me that even if the plaintiffs had made large profits by an illegal traffic, it could not be said that they insured for illegal profits. They lost no "profits" by the fire, and they make no claim for "profits." The question of profits only came into the case as a factor in the problem to be solved, namely: how many goods were left in the store at the date of the fire, and what, therefore, was the actual loss, not of profit, but of property.

Lastly, it is said that by the process carried on in the premises of plaintiffs of reducing liquors by the mixing of water and the making

of cocktails, etc., the risk was increased, and therefore there shou'd have been no recovery. The proof upon this point was not so clear as to satisfy my mind that as a question of law the risk was increased.

The high proof spirits were passed into tubs and diluted with water There was no fire or lights in that part of the building, and smoking was prohibited anywhere in the premises. I am not able to say, as a question of law, that risks were by these precautions increased, and I was not asked to say so to the jury. I do not think a new trial should be granted for this last reason assigned.

I believe I have noticed all the matters stated in writing or orally upon the argument as reasons why a new trial should be granted, and am satisfied that none of them are well taken.

The case was laboriously and ably tried by counsel for the parties. The jury was one of exceptional intelligence and experience in affairs, and in my judgment their verdict rendered substantial justice between the parties.

The motion for a new trial must be overruled.

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

EMELINE L. CHAPMAN

vs.

REPUBLIC LIFE INSURANCE CO., OF CHICAGO.

The policy provided it should become void "in case of the death of the insured by his or her own act and intention, whether sane or insane."

Held, that the addition of the word intention does not essentially vary the legal meaning of the sentence.

Held, that it was the intention of the company to protect itself from liability in case of suicide, whether sane or insane. The company had a right to exempt itself from liability, and no degree of suicide will avoid the condition.

Demurrer sustained.

CLARKSON & VAN SCHAACK, *for Plaintiff.*

BENNETT, KRETZINGER & VEEDER, *for Defendant.*

BLODGETT, J.

This is an action at law upon a policy of insurance issued by the defendant, dated on the 23d day of July, in the year one thousand eight hundred and seventy-three, whereby said company insured the life of one Dennie Chapman in the sum of twenty-five hundred dollars, for the use and benefit of his wife, the plaintiff.

The declaration was in the usual form, and alleged that the said Dennie Chapman, after the issue of the said policy of insurance and while same the remained in force, to wit, on the sixteenth day of September, in the year 1873, died, and that due notice and proofs of death were furnished to the defendant as required by said policy; and that the defendant, notwithstanding its said obligation and undertaking to pay said sum in the event of the death of the said Dennie Chapman, had refused and did still refuse so to do.

To this declaration the defendant pleaded, among other pleas, that the said policy of insurance contained the following provision:

"In case of the death of the said insured, by his or her own act and intention, whether sane or insane, or of death in consequence of the violation of law * * * * * * then and in such case it is stipulated by all the parties in interest that the company shall not be liable for the sum insured," and averred that the death of said Dennie Chapman, mentioned in the said declaration, was caused by his own act and intention; that said death was caused and produced by a pistol shot fired by the said Chapman into the head and face of him, the said Chapman, with the intention and for the purpose of then and there causing his own death.

To this plea the plaintiff replied, in substance, that at the time when the said Dennie Chapman came to his death, as stated in the said plea, he was mentally insane, and in consequence and by reason of such mental insanity was wholly incapable of exercising any intention in reference to the act which caused his death, and that said deed was wholly the result of his mental insanity, and that he was impelled thereto without any volition of his own, by an insane impulse which his mental and physical faculties were unable to resist, and that he was wholly unable from his mental insanity to comprehend the natural character, effect and consequence, of the act which resulted in his death.

To this replication the plaintiff demurred, raising thereby a question of law as to the effect to be given to the portion of the policy set out in the plea. It was contended on the part of the plaintiff that

this case differs essentially from that of Bigelow vs. The Berkshire County Life Insurance Co., decided by this court in favor of the defendant several months since, in this: That the policy in that case provided that if the assured should die by his own act, sane or insane, the policy should become void, while in this policy the provision is "in case of the death of the insured by his or her own act and intention, whether sane or insane," the policy shall become inoperative. And much stress is laid by the plaintiff upon the interpolation of the word "intention" into this policy, which was not in that of the policy in the Bigelow case.

To my mind, the use of the word "intention" in the policy before us, does not essentially vary or strengthen the legal meaning of the sentence from that of the policy in the Bigelow case. The word "act" necessarily implies intention, and it seems to me the policy in this case differs in no material import from the one already decided by this court. That is to say, you get just as strong a sentence, and it means practically just as much to say that the company shall not be liable if the assured comes to his death by his own act, sane or insane, as if you say the company shall not be liable if the assured comes to his death by his own act and intention, sane or insane.

The real question in this case is, what was the clause in question intended to protect the insurance company against, and was it lawful for it to so attempt to protect itself?

The Supreme Court of the United States, in Life Insurance Company vs. Terry, 15 Wallace, 580, had construed the clause in a policy of life insurance, providing that the company should not be liable if the assured should die by his own hand, to mean, in effect, that if the insured, being in the possession of his ordinary reasoning faculties, should from anger, pride, jealousy, or a desire to escape the ills of life, intentionally take his own life, there would be no liability. But, when the reasoning faculties of the assured were so far impaired that he was not able to comprehend the moral character, the general nature, consequences and effect, of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties, and the insurer was liable.

Evidently with a view to guard itself against the effect of this decision, the defendant has resorted to the clause in question, avoiding its liability in cases of death by the hand of the assured, in cases where the suicide was committed while the insured was insane as well as sane.

I have no doubt of the right of an insurance company to thus protect itself against liability. Certainly it is competent for an insurance company to say that it will not hold itself responsibe for the acts of the insured when in a state of insanity; and the real question is, can the court, with such a contract as this before us, attempt to measure the degree of insanity?

It is argued by this contract, that the defendant shall not be liable for the death assured, by his own act, when insane. The plaintiff, by his replication, admits that the assured came to his death by his own act when in a state of insanity, but claims that because the insanity was so extreme and complete as to entirely overthrow the moral and mental faculties, therefore the defendant remains liable. Will the court attempt to measure the degree of insanity under which the assured was laboring at the time he took his own life? It seems to me not. It is enough for the purposes of relieving the defendant from liability on this contract, that the assured took his own life, as is admitted by the pleadings. The degree of insanity makes no difference.

There are but few adjudged cases bearing directly upon this question, the clause in this form being comparatively new. The one nearest in point is the late case in Wisconsin, of Pierce vs. Traveler's Insurance Company, where the language of the condition was that the company should not be liable if the assured died by a suicide, felonious or otherwise, sane or insane, and the court hold that the intention manifested by the words of the policy was so plain as to seem incapable of further explanation, and unless there was something in the policy of the law that forbids such a stipulation, the court had nothing to do but to give effect to the contract.

As the court in that case found nothing in the policy of the law forbidding such a stipulation, and as nothing is seen in this case, or has been suggested, making it incompetent for the defendant to protect itself against the insane act of persons holding its policies, we think effect must be given to the condition, and the replication must be held to be bad.

Demurrer sustained.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1874.

Error to the Superior Court of Cincinnati.

THE GLOBE INSURANCE COMPANY

vs.

THOMAS SHERLOCK, ET AL.*

1. Where a steamboat, injured at or near its home port by a peril insured against, remains *in specie*, the assured cannot, without abandoning the vessel to the underwriter, claim indemnity as for a total loss, although the cost of repairing the vessel may exceed its value when repaired.
2. Where the jury has been misdirected in reference to a controlling question in the case, the judgment should be reversed and a new trial granted, although the weight of evidence may seem to support the verdict.
3. The rule that an insurer who has paid the loss resulting from a peril insured against, may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused, does not apply in a case where the injury was caused by the negligence of the insured himself. But if the loss was caused by the willful or fraudulent act of the insured, the same may be set up as a defense to an action on the policy, whether the subject of the insurance has been abandoned to the insurer or not.

The action in the court below was brought by the defendants in error against the plaintiff in error, on a policy of insurance for $10,000, on the steamboat United States, against loss by fire only, for the period of one year from May 1, 1868. The value of the vessel, as estimated in the policy, was $140,000, and the plaintiff claimed as for a total loss by fire, on the 4th day of December, 1868, at a point on the Ohio River about fifty miles below Cincinnati.

Among the conditions of the policy, which illustrate more or less the questions determined in the case, are the following: 1. That no loss by special average should in any case be paid, unless the necessary repairs required solely by the disaster, exclusive of certain expenses,

* From advanced sheets of 25 O. State Reports.

should amount to five per cent. on the value of the vessel as specified in the policy. 2. That the aggregate insurance on the vessel should not exceed the sum of $105,000. 3. That there should be "no abandonment as for total loss on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained be equivalent to fifty per centum of the agreed value in the policy." 4. That the liability of the insurer for all losses during the continuance of the policy should not, in the aggregate, exceed the sum therein insured. 5. In case of any loss or misfortune resulting from any peril insured against, the party insured shall use every effort for the safeguard and recovery of said vessel, and if recovered to cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, their agent or assigns, to adopt prompt and efficient measures for the safeguard and recovery of said vessel, then the said insurers are hereby authorized to interpose and recover said vessel and cause the same to be repaired for account of the insured, to the charges of which the said company will contribute in proportion as the sum herein insured bears to the agreed value in this policy; but in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable, nor sell the wreck or any portion thereof without the consent of this company; and the acts of the assured or assurers, or of their joint or respective agents, in preserving, securing, or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of an abandonment."

6. "No deduction will made from claims for repairs to the hull or machinery of said vessel during the first two years from the date of her original custom-house survey; but from all claims for repairs to the cabin or tackle, or apparel, or furniture, or for replacing the same, the assured shall deduct one third, that being the agreed difference in value between new and old materials; and the same deduction shall be made from claims for repairs to the hull and machinery after the first two years as aforesaid."

7. "Whenever this company shall pay any loss the assured agrees to assign over to said company all right to recover satisfaction therefor from any person or persons, town or other corporation, or the United States government, or to prosecute therefor at the charge and for account of the company if requested. And the said company shall entitled to such proportion of said damages recovered as the amount insured by them bears to the valuation of said vessel.

The fire, which caused the injury complained of, resulted from a collision with the steamboat America. The sharp bow of the America struck the United States about three feet from the stem, on the larboard side, cutting through her side and deck timbers diagonally some thirty feet. The United States was discovered immediately after the collision to be on fire, above and on the deck. As the America backed away from the United States, leaving a gap in the side of the latter of the width of the bow of the former, the injured boat immediately took water and sank to the bottom of the river. The deck of the boat was thus submerged and protected, but the cabins were consumed to the water's edge, within two or three feet of the deck. The testimony also shows, or tends to show, that the machinery of the United States was rendered useless by the fire, and also that the bracings of the hull were more or less injured.

The assured thereupon raised the hull of the vessel, and took it to Cincinnati, the home port, at a cost of $5,942.50; and afterward upon it, slightly modified in length, constructed a single cabin, (before the fire the United States had double cabins,) and fully completed and equipped the same, at a cost, including all expenses incurred after the fire, of $103,543.97.

The verdict, upon which the judgment below was rendered, was in favor of the plaintiffs for $9,558.82; thus showing that the damages were assessed by the jury as for a total loss—to wit, one fourteenth of the estimated value of the boat, after deducting its probable value after the fire, and the probable cost of repairing the hole made by the collision. If the damage had been assessed upon the principles of a partial loss, and deducting one third old for new material, the amount would have approximated one half of the sum found by the verdict.

On the trial below, it was made to appear that the steamboat America, which collided with the United States, was also owned and navigated by the assured; and it was claimed by the defendant, (testimony having been offered tending to prove the same,) that the collision was caused by the carelessness of the officers and crew of the America.

All the testimony, the charge of the court, and the requests to charge that were refused, are set out in a bill of exceptions.

The principal errors assigned, are: 1. That the verdict was contrary to the evidence; 2. That the court erred in the charge to the jury.

The Germania Insurance Company vs. Thomas Sherlock et al., (reported in Ins. Law Journal, p. 528,) was argued and considered by the court in connection with this case, and in so far as the question in the two cases were identical, they have been disposed of in that case, to which reference may be made.

JACOB D. COX and JOHN F. FOLLETT, *for Plaintiff in Error:*

On the question, in this case similar to those in the case of Germania Ins. Co. vs. Sherlock, the court is referred to the argument in that case.

I. The court erred in charging that "if the jury should find that this steamboat did remain *in specie*, but was so badly damaged by fire that to repair that damage would cost more than she would be worth when repaired, both as to damage by fire and collision, the repairs of the damage by fire must be considered impracticable, and the loss actually total without abandonment."

As a criterion for determining when the boat would not be worth repair, the court, in the same connection, said it would happen when a prudent uninsured owner would not attempt to repair or rebuild.

The discussion of the correctness of this charge necessitates some general examination of the doctrine of total losses in marine insurance, and a discrimination between actual and constructive total losses.

1. For what is an actual total loss, see 3 Kent's Com., 318; Arnould on Ins., 1001; Benecke on Mar. Ins., 336; Murray vs. Hatch, 6 Mass., 447; 2 Parsons on Mar. Ins., 68; 2 Phillips on Mar. Ins., 225; Sewell vs. U. S. Ins. Co., 11 Pick., 90.

Common sense and common law are entirely in harmony, and an actual total loss means a real destruction of the thing insured, so that it is in no sense a subject of repair or restoration.

2. For what a constructive total loss is, and on the question of abandonment, see 3 Kent's Com., 318; Tunno vs. Edwards, 12 East, 491; Arnould on Mar. Ins., 882, 912, 914, and authorities there cited; Anderson vs. Royal Ex. Co., 7 East, 38; Doyle vs. Dallas, 1 Moody & Rob., 48; Sewell vs. U. S. Ins. Co., 11 Pick., 90; Thomas vs. Rockland Ins. Co., 45 Maine, 116; 2 Phillips on Ins., 228, sec. 1494.

But not only is abandonment necessary to turn what would otherwise be a partial loss into a constructive total one, but even abandonment will not have this effect unless the injury to the vessel is sufficiently great to warrant it. The English rule is that the injury must be such that a prudent uninsured owner would not repair. Arnould

on Ins., 933; Benson vs. Chapman, 6 Man. & G., 810; Irving vs. Manning, 1 H. of L. Cases, 817; Granger vs. Martin, 4 Best & Smith, 9; Barker vs. Janson, L. R., 3 C. P., 303-305; Tanner vs. Bennett, Ryan & Moody, 182; Doyle vs. Dallas, 1 Moody & Rob., 48; Gardner vs. Salvador, ib., 116; Knight vs. Faith, 15 Queen's Bench, 649; Potter vs. Rankin, 5 Com. Pleas R. L. R., S. P., 356.

The American rule is that the injury must exceed half the value of the vessel. 2 Am. Leading Cases, 368, 3 ed.; Smith vs. Manuf. Ins. Co., 7 Metcalf, 448; Gordon vs. Mass. Fire and M. Ins. Co., 2 Pick., 249; Pierce vs. Ocean Ins. Co., 23 Pick., 337; Am. Ins. Co. vs. Francia, 9 Barr, 390; Bradlie vs. Maryland Ins. Co., 12 Pet., 405.

The written contract in this case fixes a rule fully as stringent as the English rule.

Opposing counsel intimate that abandonment was not regarded as necessary of late as it was formerly, and cite an extract from Lord Ellenborough, in Mellish vs. Andrews, 15 East, 13, quoted in note to 2 Phillips on M. Ins., 226, sec. 1491.

If the authorities we have already cited did not fully dispose of this, it would still be evident on examining the context in Phillips that the language was used rather to show that all marine losses were partial, if anything was saved worth abandoning, than for the purpose for which counsel quoted it. Phillips on Ins., 226; Mitchell vs. Edie, 1 Term, 608; Goss vs. Withers, 2 Burr., 683; Deblois vs. Ocean Ins. Co., 16 Pick., 303; Mellish vs. Andrews, 15 East, 13; Tunno vs. Edwards, 12 East, 16.

To the foregoing principles it is only necessary to add that the loss recovered for must be that alone which is directly caused by the perils insured against. Dyer vs. Piscataqua Ins. Co., 53 Maine, 118.

How, then, did the court below avoid the effect of the doctrines we have cited.

It was by the application, entirely erroneous as we think, of the doctrine contained in a class of cases in which the master of a vessel which has been badly injured far from home, and where no communication can be had with the owners or underwriters, has sold his vessel in a foreign port as not being worth repair. In such cases abandonment has been excused; the master has been held to act for all concerned; the loss has been treated as one for which recovery could be had of the insurers as if total without abandonment, and the proceeds of the sale have been treated as salvage.

We call the particular attention of the court to the nature of these cases of sales in foreign ports. Whatever may be the technical or

metaphysical distinctions judges have drawn in them, the fundamental consideration in every case is, that the master of the ship being beyond reach of communication with home, and under the necessity of acting promptly, and also being *ex officio* agent for both insurer and insured, does in good faith the best he can for all concerned, and his acts so done are sanctioned. He finds the ship or cargo damaged beyond repair; as agent for the owners he abandons her; as agent for the underwriters he sells her, and the money brought home is treated as the proceeds of a sale by the underwriters after a formal abandonment. It is the form of abandonment that is excused, and the case is, in fact, one in which there is constructive total loss and constructive abandonment.

To avoid the rule that in constructive loss an abandonment is indispensable, courts have invented a metaphysical distinction between an actual total loss at home and one abroad; the latter being in some instances even less than would amount to a constructive total loss at home.

To bring this doctrine back from foreign parts, and apply it so as to give owners the right to keep the vessel and still recover as for total loss, depriving the underwriters of any opportunity to elect to take the vessel or repair her, is not only making it the vehicle of the most glaring fraud and injustice, but it is to make the exception which has been recognized in peculiar cases happening far from home, completely to dominate and even overturn the original and settled rule to which the exception occurred.

A fair examination, however, of these cases of sale in foreign ports will show that the analysis we have given of them above is the correct one, and that they are in fact treated by the best authorities and in the most weighty precedents as cases of constructive and not actual total loss—of constructive abandonment with waiver or excuse of formal abandonment *ex necessitate rei*, and of constructive sale of the wreck by the underwriters, the master being the agent of all concerned. Grainger vs. Martin, 2 Best & Smith, 465; 4 ib., 10; Knight vs. Faith, 15 Adolph. & E., N. S., 658.

These principles are all that we ask to have applied to this case. To justify neglect or failure of notice of abandonment, the owners must part with the property by sale, or the loss must be total in the sense of the destruction of the thing insured, so that it no longer remains *in specie*—and the destruction must be due to the perils insured against. Roux vs. Salvador, 3 New Cases, 266; Potter vs. Rankin, 5 C. L., L. R. S., 341; Gardner vs. Salvador, 1 M. & R., 116; Farnworth

vs. Hyde, 34 L. J., 207; Arnould on Mar. Ins., 891; Stewart vs. Greenock Mar. Ins. Co., 2 House of Lords Cases, 159; Ralston vs. Union Ins. Co., 4 Binney, 386; Am. Ins. Co. vs. Francia, 9 Barr, 390; Peters vs. Phœnix Ins. Co., 3 Serg. & Rawle, 25; Fuller vs. Kennebec Mutual Ins. Co., 31 Maine, 328; Arnould on Ins., 926.

The owner must take his election promptly to abandon or not, and cannot lie by and speculate. 2 Am. L. C., 340; (3d ed.); Humphreys vs. The Union Ins. Co., 3 Mason, 435; Dickey vs. New York Ins. Co., 4 Cow., 222; 3 Wend. 658; 5 Cow., 63.

If the master of the ship actually repairs her, though at an expense beyond her value, the owners shall not abandon, nor recover for more than a partial loss. *A fortiori*, if the owners themselves repair and make no offer of abandonment. Pierce vs. Ocean Ins. Co., 18 Pick., 83; 2 H. L. Cases, 696.

The doctrine of one third allowance for difference of value between new and old material, in adjusting partial marine losses, is said by the court, in Sewell vs. U. S. Ins. Co., 11 Pick., 96, to be "inflexible, adopted for wise practical purposes, and will generally do justice."

See also Orrok vs. Commonwealth Ins. Co., 21 Pick., 456, 470, and Deblois vs. Ocean Ins. Co., 16 ib., 303–313.

II. As to the subrogation of the insurance company to the rights separate owners of the United States would have had against the owners of the America, see Rogers vs. Hosack's Ex'rs, 18 Wend., 331; Comegys vs. Vasse, 1 Pet., 213; Phillips on Ins., sec. 1711; Yeates vs. Whyte, 4 Bingham, N. C., 272.

Lincoln, Smith, Warnock & Stephens; Hoadly, Jackson & Johnson, and S. & S. R. Matthews, *for Defendants in Error:*

The points identical with this case and Sherlock et al. vs. Germania Ins. Co., have been fully argued in that case, and are here referred to.

I. The right of subrogation, when it exists, is simply this, and no more; the right, after paying the loss, to have whatever right or security the assured has relating to the subject insured, and to stand in his shoes in relation to any remedies he may have. Kernochan vs. N. Y. B. Ins. Co., 17 N. Y., 436, 441; Mer. M. Ins., Co. vs. Calebs, 20 N. Y., 176; McCormick's Adm'r vs. Irwin, 35 Penn. St., 117; Com. M. L. Ins. Co. N. Y. vs. N. H. R. R. Co., 25 Conn., 271; Rockingham vs. Boston, 39 Maine, 255; Union Bank of Maryland vs. Edwards, 1 Gill & J., 365; Dixon on Subrogation, 155, 157, 175, 177, 179; Hoover vs. Epler, 52 Penn. St., 523.

But the whole right of subrogation in insurance cases is much doubted of late. Kernochan vs. N. Y. B. Ins. Co., 17 N. Y., 436;

Mosher's Appeals, 56 Penn. St., 80. And is denied in two late cases: King vs. The State Mu. F. Ins. Co., 7 Cush., 4; Suffolk Ins. Co. et al. vs. Boyden, 9 Allen, 125.

II. The case is one of total loss, with salvage, to be settled upon the agreed value, less the salvage, and not by the actual or estimated repair bill, less one third new for old, much less the building bills of another and different boat, less one third off.

The law is clearly settled in this country and in England that whenever the vessel is so injured by a peril insured against, that it would cost more to repair her than she is worth when repaired, and a prudent, uninsured owner would not repair, it is a case of total loss.

The cases are numerous to this effect. Among them see the following. They are directly to the point, and fully establish it:

Bullard et al. vs. Roger Williams Ins. Co., 1 Curt., 152–154; Phillips vs. Nairue, 4 M. & G., 356–358; Allen et al. vs. Sagrne, 8 B. & C., 564 Cambridge vs. Anderton, 2 B. & C., 692; Same vs. Same, 1 C. & P., 214; Portsmouth Ins. Co. vs. Brazee, 16 Ohio, 87; Roux vs. Salvador, 3 Bing., N. C. 236; Young vs. Turing, 2 M. & G., 601; Irving vs. Manning, 6 M. G. & S., 419; Same vs. Same, 1 House L. Cas., 304–306; Chapman vs. Benson, 5 M. G. & S., 361; Same vs. Same, 2 House L. Cas., 721; Fleming vs. Smith, 1 House L. Cas., 533–535; Moss vs. Smith, 9 M. G. & S., 102–104, 106, 109; Adams vs. Mackenzie, 13 C. B. (N. S.,) 446; Rosetto vs. Gurney, 11 C. B., 187, (73 E. C. L.;) Knight vs. Faith, 15 A. & E. 659, (69 E. C. L,;) Sewell vs. U. S. Ins. Co., 11 Pick., 94–96; Smith vs. Man. Ins. Co., 7 Met., 453; Farnsworth vs. Hyde, 18 C. B. (N. S.,) 857; Same vs. Same, 2 B. L. R. (C. P.) 226; Grainger vs. Martin, 2 B. & S., 467; Brady vs. N. W. Ins. Co., 11 Mich., 448; 2 Parsons on Ins., 68, 69, 73, 74, 89–91; 2 Arnould on Ins. 1005–1007, 1014, 1015; Grainger vs. Martin, 2 B. & S., (Q. B.,) 467, 468; Coolidge vs. The Glous. M. Ins. Co., 15 Mass., 343; Wallenstein vs. The Columbia Ins. Co., 44 N. Y., 217, 223; Young vs. Pacific M. Ins. Co., 34 N. Y. Sup. C., 331; Potter vs. Rankin, B. L. R. 5 C. B., 371; Same vs. Same, B. L. R., 6 E. & I., App., 155; Duffield vs. Cin. Ins. Co., 6 Ohio St., 205.

I. This rule does not depend upon a sale of the wreck.

It is true that in most of the above cases there was either a sale or an abandonment; and it is claimed by the defense, that without a sale or an abandonment this rule would not hold.

1. As to a sale. The sale does not control this. On the contrary, it is held that the sale is not valid unless the case be one of total loss, without the sale. 2 Arnould on Insurance, 1014; Roux vs. Salvador,

3 Bing., N. C., 281; Cambridge vs. Anderton, 1 C. & P., 214; Gordon vs. Mass. F. & M. Ins. Co., 2 Pick., 264; Patapsco Ins. Co. vs. Southgate, 5 Pet., 621; Farnsworth vs. Hyde, 18 C. B. (N. S.,) 857; Phillips vs. Naire, 11 Jur., 455, 456; Guardian vs. Salvador, 1 Moody & Rob. 117.

And the cases do not depend upon the sale to make the loss total. On the contrary, the cases are often embarrassed by questions as to the power of the master to sell. The sale, when allowed, is for salvage purposes, to prevent expense from eating up what is left, and to turn the salvage into money; and does not change the principle upon which the case is to be settled. 2 Arnould on Insurance, 889 new ed., 1014 old ed.; Smith vs. The Man. Ins. Co., 7 Met. 453; Gardner vs. Salvador, 1 Moody & Rob., 117. If a sale is made, there is then so much money to be deducted. If no sale is made, then the value of what is left is to be deducted. Watson & Paul vs. Ins. Co. N. A., 1 Binn., 54; DeCosta vs. Newnham, 2 Term, 412; Reed vs. Sun Mut. Ins. Co., Brady vs. Nor. West. Ins. Co., 11 Mich., 445.

2. But in this case, by the terms of the policy a sale was impossiable, for the policy forbids a sale, except by the consent of the insurer, and the defendants refused to consent to a sale.

II. An abandonment is not necessary to make the loss total. Roux vs. Salvador, 3 Bing., N. C., 281; Cambridge vs. Anderton, 2 B. & C., 692; Farnsworth vs. Hyde, 18 C. B., 856; Arnould on Ins., new ed. 892; Mellish vs. Andrews, 15 East, 15; Chapman vs. Benson, 2 House L. 5 721.

An abandonment is ordinarily had for the reason that it at once entitles the insured to the full amount of the sum insured, and it frees him from any further responsibility of taking care of the salvage, and turns it over to the insurer. It also gives the underwriter an opportunity to treat the wreck as he may think best, acting, however, fairly to the insured, who still has an interest in it, where the vessel is not insured to the value. Cincinnati Ins. Co. vs. Duffield, 6 Ohio St., 204; Knight vs. Faith, 15 A. & E. (N. S.,) 660; Martin vs. Crockett, 14 East, 466; Smith vs. Manhattan Ins. Co., 7 Met., 453; 2 Phillips on Ins., sec. 1497; Potter vs. Rankin, B. L. R. 3 C. B., 568.

Instead of saying that the insured cannot recover as for a total loss without abandonment, where there are remnants in salvage, the books simply say, in guarded language, that he cannot recover the whole amount insured without abandonment. 2. Arnould on Ins., 1007, 1008; 2 Phillips on Ins., sec. 1497; Smith vs. Manhattan Ins. Co., 7 Met., 453; Watson vs. Ins. Co. N. A., 1 Binn., 54.

In Mellish vs. Andrews, 15 East, 15, Lord Ellenborough says that, as an abandonment is so common, an idea has gone abroad that it is of much more force than it is in reality.

Under the English authorities, if it were not total, without the abandonment, the abandonment would not make it so. Benson vs. Chapman, 2 H. L. Cases, 721.

Under the law of this country, if the damage equals fifty per cent. of the value, it is a constructive total loss, and the party may recover the whole amount insured, by an abandonment.

III. The benefit of abandonment to the defendants in error is waived in this case.

We maintain that if an abandonment was necessary to make a total loss, and repairs were possible, yet if the underwriters refuse to recognize the case as one of any loss, or to have anything to do with the property, or even to advise about it, they cannot insist on an abandonment as a necessity for a total loss, if an abandonment would make it such. An abandonment must, in such a case, be deemed to be waived; just as by the established rule a refusal to pay the loss is a waiver of preliminary proof expressly provided for in the policy. See specially, upon this point, N. & N. Y. T. Co. vs. W. M. Ins. Co., 34 Conn., 571; and authorities there cited: Graves vs. The Wash. M. Ins. Co., 12 Allen, 391; O'Neal vs. The Buffalo Fire Ins. Co., 3 Comst., 122; Taylor vs. The M. F. Ins. Co., 9 How. 390; The Maryland Ins. Co. vs. Bathurst, 5 Gill & Johns., 159; McMaster vs. West. Co. Ins. Co., 25 Wend., 379.

In almost all policies there is a provision that the loss is not payable until sixty days after loss and proof thereof; yet it is held that if the company deny all right of recovery, and all liability, that they waive the sixty days, and the suit may be brought at once. Nor. & N. Y. Tr. Co. vs. W. Mass. Ins. Co., 34 Conn. 571; Same vs. Same, 12 Wal. 204; Columbian Ins. Co. vs. Callett, 12 Wheat., 392, 393; Phillips vs. The Pro. Ins. Co., 14 Mo., 237; Allegree vs. The M. Ins. Co., 6 Har. & Johns., 408.

IV. That the hull existed *in specie* does not change this rule.

But it is said that the boat existed *in specie*, and was capable of being repaired, though at an expense to exceed her value when repaired, and the court was requested to give a charge to the effect, that if such was the case, the plaintiff could only recover for partial loss, and by a deduction of one third off the bills, which would have been caused in repairs.

Although the damaged and almost worthless hull existed, yet in no fair sense did the boat exist *in specie* as a steamboat; and to have given such a charge would have been an assertion by the court that there was evidence tending to prove it, and an error. Fay vs. Grimsteed, 10 Barb., 332; Bain vs. Wilson, 10 F. St., 17; Sewald vs. U. S. Ins. Co., 11 Pick., 95; Coolidge vs. Glous., M. F. Ins. Co., 15 Mass., 343; Bullard vs. Roger Williams Ins. Co., 1 Curt., C. C., 152; Adams vs. Mackenzie, 13 C. B. (N. S.,) 446; 2 Parsons on Ins., 107; 2 Arnould on Ins. (new ed.,) 883; Peele vs. Mar. Ins. Co., 3 Mass. E. E. R., 65; Young vs. P. M. Ins. Co., 34 N. Y., 331; Wollenstein vs. Columbian Ins. Co., 44 N. Y. 222; DePeyster vs. The Sun M. Ins. Co., 19 N. Y. 277.

V. The boat was not repaired, nor fit for repairs, but another boat was built. Repairs are not practicable when they would cost more than the boat would be worth when repaired. Bullard vs. Roger Williams Ins. Co., 1 Curt. C. C., 152; Coolidge vs. Glouc. M. F. Ins. Co., 15 Mass., 343; Smith vs. Man. Ins. Co., 7 Met., 453; Brady vs. N. W. Ins. Co., 11 Mich., 448; 2 Parsons on Ins., 91; 11 Pick., 95.

The government treated the boat as a new one, and required a new measurement and new enrollment. A new enrollment is never taken out for repairs. 15 Mass., 343; 11 Pick., 95.

VI. The defendants in error did not elect to repair, and the authorities cited by counsel for plaintiff in error have no application to this case.

VII. The case was one to be settled as a total loss, with salvage, for other reasons.

The real significance of the question, whether the loss be total or partial, relates to the rule one third new for old.

Outside of this rule, there is no difference between total loss with salvage and a partial loss. Smith vs. Man. Ins. Co., 7 Met., 453; Watson vs. Ins. Co., 1 Binn., 54; 2 Phillips on Ins., sec. 1497, pp. 230, 231; Roux vs. Salvador, 3 Bing., (N. C.,) 288.

VIII. The rule never applied to any but the vessel insured, when repaired.

The rule originated in reference to ships, whose sales, riggings, sheathing, and painting were injured, and made new, the new always being worth more than the old. To have a general rule, it was made applicable to the whole vessel, after the first voyage, for the reason that ordinarily the new is worth more than the old. It was based upon the idea that the thing insured was retained by or returned to the assured in a better condition than it was in at the time it was

injured. Fenwick vs. Robeson, 3 C. & P., 324; Peele vs. Mer. Ins. Co., 3 Wash. C. C., 74; DaCosta vs. Newerbaur, 2 Term., 74.

It was never applied to a case like this, where there were no repairs, but a new boat built. It would be inconsistent with the rule itself, and with the reasons upon which it was founded.

McIlvaine, J.

The plaintiff in error complains of the verdict and judgment below, for that the jury, in the assessment of the damages to the boat caused by fire, adopted the rule and measure which govern in cases of total loss.

If this were a mere question, whether the jury, upon the testimony in the case, were justified in finding that the disaster by fire, which overtook the vessel, resulted in an actual total loss, we would not disturb the verdict or judgment. And, on the other hand, the like might be said if the jury had found that the loss was only partial. We think that the question whether the loss was total or partial, was, upon the testimony as it appears in the record, a proper one to be left to the jury under instructions from the court.

This brings us directly to consider the rules of insurance law, by which total and partial losses are distinguished. Upon what principle is it to be determined, when a peril insured against overtakes a vessel, whether the loss sustained is total or partial? This question, upon the authorities, is by no means of easy solution. Indeed, it can be answered only in general terms, and by the application of general rules. It is well settled, however, that a total loss may be either actual or constructive.

An actual total loss is where the vessel ceases to exist *in specie;* becomes a "mere congeries of planks," incapable of being repaired; or where, by the peril insured against, it is placed beyond the control of the insured and beyond his power of recovery.

A constructive total loss is where the vessel remains *in specie*, and is susceptible of repairs or recovery, but at an expense, according to the rule of the English common law, exceeding its value when restored; or, according to the terms of this policy, where "the injury is equivalent to fifty per centum of the agreed value in the policy;" and where the insured abandons the vessel to the underwriter; in such cases the insured is entitled to indemnity as for a total loss.

An exception to the rule, requiring abandonment, is found in cases where the loss occurs in foreign ports or seas, where it is impractica-

ble to repair. In such cases the master may sell the vessel for the benefit of all concerned; and the insured may claim as for a total loss by accounting to the insurer for the amount realized on the sale. There are other exceptions to the rule, but it is sufficient now to say, that we have found no case in which the doctrine of constructive total loss, without abandonment, has been admitted where the injured vessel remained *in specie* and was brought to its home port by the insured.

A well marked distinction between an actual and a constructive total loss is, therefore, found in this: That in the former no abandonment is necessary, while in the latter it is essential, unless the case be brought within some exception to the rule requiring it.

A partial loss is where an injury results to the vessel from a peril insured against, but where the loss is neither actually nor constructively total.

When the loss is total, the value of the vessel as estimated in the policy constitutes the basis for the adjustment of damages. Where the loss is only partial and the vessel has been repaired, the cost of repairs, less one third new for old material, is the measure of compensation.

In the view we have taken of this case, it is unnecessary to determine the rule of damages in other cases of partial loss.

On the trial in the court below, the learned judge instructed the jury as follows:

"But the question which has been contested as the main point in this case is, whether the amount of this loss is to be ascertained by the rules applying to what is denominated a total loss, or by the rules applying to a partial loss.

"A total loss may be actual or constructive. A constructive total loss is where the loss is not actually total, but is so great as to justify the insured in abandoning the subject of insurance, or what remains of it, to the insurers, and claiming a total loss.

"It is usual for insured parties in cases of loss, whether actually or only constructively total, by abandonment to surrender what remains of the boat to the underwriters.

"This is a convenient way of making certain what in many cases would otherwise be uncertain. The surrender by abandonment of the wreck or salvage is so convenient, and so generally adopted in such cases, that the question of an actual total loss without abandonment arises comparatively seldom.

"In the present case there has been no abandonment or sale of the

part saved from the boat, but it has been used in rebuilding a new boat or in repairing the old one, and one question, perhaps I ought to say the question for the jury to determine is, which of these two things has been done. Has a new boat been built or an old one repaired?

"As there was no abandonment of the property saved, no mere constructive total loss can be claimed. But, if there was an actual total loss, the recovery may be as far as a total loss without any abandonment, crediting the expenses with the value of what was saved."

With the above instructions we find no fault; but afterward the following instruction was given, to wit:

"Now, it is not necessary that I should detail the difficulties I have found in analyzing and comparing the authorities on this subject, or in the application of the principles of the decided cases to the evidence in the present case. I may, however, in general, remark that while I find no decided case precisely like the present, in which the fact that the cost of repair would exceed the repaired value, has been held to entitle the insured to recover for a total loss without abandonment, it does appear to me that the principles of the decisions to which I have referred, logically applied to the facts of this case, as the plaintiffs claim them to be, would make it a case of actual total loss. That is to say, if the jury should find that this steamboat did remain *in specie*, but was so badly damaged by fire that to repair that damage would cost more than she would be worth when repaired, both as to the damage by fire and collision, the repairs of the damage by fire must be considered as impracticable, and the loss actually total without abandonment."

Herein we think there is error. A loss not even constructively total is held to be actually total. In other words, a partial loss is held to be a total loss.

It may be, as a general rule, that the question, whether it be practicable or impracticable to repair a vessel which has been injured, but which remains *in specie*, is to be determined by ascertaining whether or not the value of the vessel when repaired will equal the cost of repairing. The solution of that question, however, does not draw the line between cases of actual total loss, and cases of partial loss; but it does distinguish, under the rule of the English law, between cases of partial loss and those which, by abandonment, become total by construction. As we understand the rule, no case of actual loss can arise

if the vessel remain *in specie*; that is, if it remain a vessel susceptible of being repaired at any cost.

It is claimed, however, by the defendants in error, that the defendant below was not prejudiced by the instruction complained of; because, 1. The question whether the vessel was in fact repaired, or a new and different boat built, was fairly submitted to the jury. 2. That the United States did not remain *in specie*. The boat was not in fact repaired, or fit for repairs, but another boat was built. In answer, it is sufficient to say, that if the issues were not fairly submitted to the jury, this court is not authorized to look into the testimony to ascertain whether the weight of evidence was or was not in favor of the verdict. The defendant was entitled to have the jury pass upon the issues under proper instruction from the court. It is true, the question whether the boat had been repaired, or a new boat built, was left to the jury; but the court, in its subsequent instruction, made the question submitted immaterial. Suppose the jury had found that the boat remained *in specie*, and was in fact repaired, but at a cost greater than the value of the boat when repaired, still, under the instruction it was a case of actual total loss. But counsel say the boat did not remain *in specie*. That was a question of fact for the jury; but even then, it was not, under the instruction, a controlling question. Suppose the jury had found that the boat did in fact remain *in specie*; still, if the cost of repairing exceeded the value of the boat when repaired, the case, under the charge, was one of actual total loss. As we understand the charge complained of, it was in effect this: That in all cases of injury to a boat from a peril insured against, whether the vessel remain *in specie* or not, or whether it be in fact repaired or not, the loss is actually total, without abandonment, if the cost of repairing exceeds the value of the vessel when repaired. It follows, therefore, that the jury may have arrived at their verdict, and assessed damages upon the principle of total loss, notwithstanding they also found that the vessel after the fire remained *in specie*, and that it was in fact repaired by the insured.

If the vessel remained *in specie*, and the owners elected to repair and did in fact repair the same, they cannot, in our opinion, prevent the application of the rule of one third off new for old material, by showing that the cost of making the repairs was more than the value of the vessel when repaired.

It is also claimed by plaintiff in error, that an abandonment was necessary in this case upon another principle, to wit, to transfer to the

insurer the claim of the assured against the owners of the steamboat America, for negligence of the officers and crew of the latter boat, in causing the injury insured against, so that if the owners of the two boats should turn out to be the same persons, the cross actions might be litigated in this suit.

It is undoubtedly true that an underwriter, upon payment of indemnity for loss, is subrogated to the rights of the assured against a stranger whose negligence caused the injury, and that an abandonment operates as a transfer of such rights. It is conceded in this case, however, that the assured were also owners of the America, hence there was no right of action in assured, subject to the operation of the above rule.

Assuming, however, that the insured were accountable for the acts and conduct of the officers and crew of the America, it would then follow, that if the conduct of the latter whereby the United States was injured was negligent merely, the insurer had no right to complain, for the reason that mere negligence on the part of the insured does not affect the obligation of the insurer. If, however, the injury to the United States was caused by the willful wrong or fraudulent act of the officers and crew of the America, then such willful wrong or fraudulent act was available as matter of defense to an action on the policy, either with or without an abandonment to the insurer.

Judgment reversed.

Day, C. J., and Welsh, White, and Rex, J.J., concurring.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1874.

Error to the Superior Court of Cincinnati.

THE GERMANIA INSURANCE COMPANY

vs.

THOMAS SHERLOCK *et al.**

1. A policy of insurance on a steamboat against loss by fire only, covers a loss by fire caused by collision where collision is not excepted, by the terms of the policy, from the risk named.
2. Where the conduct of a pilot results in injury to the owner of the vessel, but is free from fraud, gross negligence, and willful violation of a known positive law, he is not guilty of barratry within the rule of maritime or insurance law.

The orignal action was brought by Thomas Sherlock and others against the Germania Fire and Marine Insurance Company, of Cincinnati, on a policy of insurance "against loss by fire only," issued on the steamboat America, owned by the plaintiffs, and used in navigating the Ohio River for account of the United States Mail Line Company.

The contract of insurance between the parties was written on a printed form (in blank) for a marine policy, and the portions material to this case are as follows :

"This policy of insurance witnesseth, that the Germania Fire and Marine Insurance Company of Cincinnati, by these presents, do cause *Thomas Sherlock, treasurer*, to be insured in the sum of not exceeding *seventy-five hundred* dollars, lost or not lost, upon the *Steamer 'America' against loss by fire only*, wherever she is in safety at noon of the *twenty-second* day of April, 1868, and from thence to noon of the *twenty-second* day of April, 1869, when this policy shall expire, unless sooner terminated or made void by conditions hereinafter expressed.

"With permission to navigate *the usual western rivers for account of the United States Mail Line Company against the risk of fire only. Coal-oil clause waived.* $7,500 @ 5 % $375."

* From advanced sheets of 25 Ohio State Reports.

The parts in italics are the written portions of the policy.

The perils are thus described in the formal printed portion of the policy:

"Touching the perils, which the said insurance company is content to bear, and take upon it, under this policy, they are of the seas, lakes, rivers, canals, fires and jettisons, that shall come to the damage of said vessel, or any part thereof. . . .

"Warranted by the assured that this company shall be free from all claim for loss or damage arising from or caused by theft, barratry, robbery, civil commotion, war, or piracy, or during any time said vessel shall be seized and taken possession of, or detained by any act of the United States government, or other legally excluded causes; from damage that may be done by the vessel hereby insured to any other vessel or property; from any loss or damage occasioned by the said vessel being improperly laden, by the bursting of the boilers, collapsing of the flues, explosion of gunpowder, the derangement or breaking of the engines or machinery, or any consequences resulting therefrom, unless the same be caused by unavoidable external violence; from any loss occasioned by ice, between Bissell's Point and Picotte Street, St. Louis."

About 11 o'clock on the night of December 4, 1868, the America, while ascending the Ohio River, near Warsaw, Kentucky, collided with a descending steamboat, the United States, also owned by the plaintiffs, and used in the same trade.

The United States was immediately set on fire by the collision, and afterward the flames were communicated from it to the America whereby the latter boat was wholly destroyed by fire.

The 29th section of the act of Congress, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved August 30, 1852, provides as follows:

"That it shall be the duty of the supervising inspectors to establish such rules and regulations, to be observed by all such vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of which rules and regulations, signed by said inspectors, shall be furnished to each of such vessels, and shall at all times be kept posted up in conspicuous places on such vessels, which rules shall be observed both night and day. Should any pilot engineer, or master of any such vessel neglect or willfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing shall be liable to a penalty of $30, and to all damage done to

any passenger in his person or baggage by such neglect or refusal; and no such vessel shall be justified in coming into collision with another if it can be avoided."

In pursuance of this act, the supervising inspectors of steamboats established, among others, the following rules for pilots, to wit:

"1. When steamers are approaching each other the signal for passing shall be one sound of the steam-whistle to keep to the right, and two sounds of the steam whistle to keep to the left; these signals first to be made by the ascending steamer. If the dangers of navigation, darkness of the night, narrowness of the channel, or any other cause, render it necessary for the descending boat to take the other side, she can do so by making the necessary signals, and the ascending steamer must govern herself accordingly. These signals to be observed by steamers either day or night.

"2. Should steamers be likely to pass near each other, and these signals should not be made and answered by the time such boats shall have arrived at the distance of eight hundred yards from each other, the engines of both boats shall be stopped; or should the signal be given and not properly understood, from any cause whatever, both boats shall not be again started until the proper signals are made, answered and understood."

On the trial of the cause in the court below, a verdict and judgment were rendered in favor of the plaintiffs. A bill of exceptions was taken, in which is set out all the testimony offered at the trial; the charge of the court to the jury; and requests to charge, submitted by the defendant, which were overruled, and exceptions taken.

This petition is prosecuted by the defendant below, and the principal errors assigned and relied on arise on the charge as given, and in refusing to charge as requested.

JOHN F. FOLLETT, *for Plaintiff in Error:*

I. The peril against which the defendant insured the plaintiffs, as expressed in the written part of the policy, (and it is well settled in insurance law that the written part of the policy controls the printed where there is any conflict between that which is printed and the written parts,) is "against the risks of fire only."

The first defense was a denial that, in contemplation of law, the boat was lost by fire; and we think that the court erred in the several rulings relating to this defense.

The general charge of the court upon this point is predicated upon the presumption that in the policy there is no express exception of

the perils of the river, or of collision. Whether the peril of collision is expressly excepted or not, one thing is certain, and for all practical purposes the only inquiry we need make, perils of the river, including collision, were not insured against by this policy, and if not excepted they were at least expressly excluded, and that, too, by a distinct and positive act of the parties.

The court mistook the law in charging that if "this boat was destroyed by fire, it is not a defense that the fire was caused remotely or proximately by the collision."

The term "destroyed by fire" is clearly used here in the sense of burned up.

In a legal sense, and upon this ground, our first defense was predicated. We say that it was not destroyed by fire, but by the collision.

But the whole expression, taken together, can leave no doubt upon the mind of any one, as it certainly did not upon the mind of the jury, that if the boat burned, they were not permitted to inquire whether or not the collision caused the burning.

And this brings us to the often used, and in too many instances wrongly applied maxim, "*Injuria non remota causa sed proxima spectatur.*"

The sound judicial construction of the maxim, and the one that is being adopted by our ablest courts and judges, is that the proximate cause is the *causa sine qua non.* 1 Phillips on Ins., sec. 1132; Brady vs. Northwestern Insurance Co., 11 Mich., 425: Case vs. Hartford Insurance Co., 13 Ill., 676. If the last in the train of circumstances resulting in a loss is the only one that can be considered, is it not clear that in the case last cited the removal of the goods and not the fire was the proximate cause of the loss? Roe & Kercheval vs. The Columbus Insurance Co., 17 Mo., 301; Montgomery, etc., vs. Fireman's Insurance Co., 16 B. Mon., 427 (and see 16 B. Mon., 427, as to the true method of construing a policy of insurance); Strong et al. vs. Sun Mutual Insurance Co., 31 N. Y., 103; Waters vs. The Merchants' Louisville Insurance Co., 11 Pet., 213; Peters vs. The Warren Insurance Co., 14 Pet., 99; General Mutual Insurance Co. vs. Sherwood, 14 How., 364; Insurance Company vs. Tweed, 7 Wal., 44; McCargo vs. New Orleans Insurance Company, 10 Rob., (La.) 202; Magoun vs. New England Marine Insurance Company, 1 Story, 157; Potter vs. Ocean Insurance Company, 3 Sumn., 27; Montoyu vs. Lon. Assurance Company, 6 Exch., 450; Lawrence vs. Aberdein, 7 E. C. L., 38; Gabay vs. Lloyd, 10 E. C. L., 229; Thompson vs. Hopper, 88

E. C. L., 937; Ionides vs. The U. M. Insurance Company, 108 E. C. L., 259.

II. The pilots of these boats were guilty of criminal misconduct, and these underwriters are not liable, under their policy, for any of the consequences thereof.

This criminal misconduct of the pilots is barratry.

For the definition of barratry, see Bouvier's Law Dictionary; Phillips on Insurance, secs. 1062, 1067, 1073; Patapsco Insurance Company vs. Coulter, 3 Pet., 230; Earle vs. Rowecroft, 8 East, 126.

By the express terms of the act of Congress, 1852, simple neglect to comply with its provisions, resulting in loss, is a fraud upon the owners, and is barratry. 1 Phillips on Insurance, sec. 1051; Insurance Company vs. Marsh, 41 Penn St., 394; N. Y. & Liv. U. S. M. S. Co. vs. Rumball, 21 How., 372.

W. Y. Gholson, *for Plaintiff in Error:*

In this case, in the written part of the policy, it is expressly stated that the insurance is "against the risk of fire only," and no erasure is made in the printed part. If, as is admitted, the perils of the river are not covered, it is by virtue of the express statement in the written part, and the rule that such a statement controls the printed part. It is an express exception of perils of river, shown by the intent of the parties in the writing itself. 1 Parsons on Insurance, 65, 614.

Collision is not excepted in the same clause or in the same terms as barratry, but the intent to except it is shown, and that intent, when ascertained, must have the same effect, whatever the language in which it is expressed.

The law has prescribed no form of words to except a risk from a marine policy. It is therefore a mere question of construction. Williams vs. Burrell, 50 E. C. L., 402; Masury vs. Southworth, 9 Ohio St., 340.

In the case of concurrent causes, to one of which it is necessary to attribute the loss, it can make no difference whether one of the causes is excepted, or simply not insured against. 1 Parsons on Insurance, 619.

What we desired to have put to the jury was, whether a peril not insured against (collision) did not make a *causa causans* efficacious in the production of the mischief?

To determine whether it (collision) did constitute such *causa causans*, we asked the court to apply the well established rules or tests,

copied from high authority, on the subject, in the fourth and fifth charges. 1 Phillips on Insurance, secs., 1097, 1132, 1137.

If there was an insurance against fire, and no insurance against collision, it can make no difference whether the risk of collision was expressly excepted, or simply not covered. Waters vs. The Merch. Ins. Co., 11 Pet., 213.

It will be seen from the facts of this case in 11 Peters, particularly as shown by the argument, there was no express exception of barratry.

On the question what is the predominating, efficient, real cause of the loss, we cite the following authorities. They sustain fully the idea contained in the fifth charge asked by the defendant, that nearness of time is not the test, but the efficient agency is the test. The true question is, what caused the loss, not what instrument is employed. The knife used by the assassin, in one sense causes death, but the assassin himself is the real cause. The fire may destroy the boat, but if the fire was the direct, necessary, inevitable result of the collision—if without the collision there would have been no fire—then, according to all the authorities, the collision, not the fire, is the cause of the loss. Waters vs. Louisville Ins. Co., 11 Peters, 213; Thompson vs. Hopper, 88 Eng. C. L., 447; Carballero vs. Home Mutual Ins, Co., 15 Louisiana Ann., 217; Roe & Kercheval vs. Col. Ins. Co., 17 Mo., 301; Brady vs. Northwestern Ins. Co., 11 Mich. 425; Ionides vs. Universal Ins. Co., 108 Eng. C. L., 259; Cass vs. Hartford Ins. Co., 13 Illinois, 676, 681; 16 B. Mon., 427, 440; Cargo vs. New Orleans Ins. Co., 10 Rob. (La.,) 212; Tweed vs. Ins. Co., 7 Wallace, 44.

The decision in the case of Thompson vs. Hopper, 6 E. & B. (88 E. C. L.,) 937, 947, was reversed—E. B. & E. (96 E. C. L.,) 1038, 1055; but the grounds of reversal in no way affect the purpose for which we cite it, which is to show the opinion of Lord Campbell as to the proper application, in general, of the rule "*causa proxima non remota spectatur*," and his approbation of the decision in Waters vs. Louisville Ins. Co., and his construction of that decision.

A policy which covers "fire only" is the same in effect in law, in common sense, and in common parlance, as a policy against every loss, except all losses which are caused by any other peril than by "fire only."

As to what constitutes "criminal misconduct," what is discretion, see Citizens' Ins. Co. vs. Marsh, 41 Penn. St., 386; Bentley vs. Coyne, 4 Wallace, 509; 3 Pet., 222; 2 Cush., 500; 511.

LINCOLN, SMITH & WARNOCK; HOADLY, JACKSON & JOHNSON and S. & S. R. MATTHEWS, *for Defendants in Error.*

I. The insurance was one covering the damages done to the said steamboat by fire. But it has certain exceptions to this liability expressly provided. For all damages caused by or arising from barratry, civil commotion, war, or piracy, or during the time said vessel shall be seized and taken possession of or detained by the United States government, or by the bursting of the boilers, collapsing of the flues, explosion of gunpowder, or from any loss caused by the use of an open light in the hold. It is evident that loss by fire may arise from, or be occasioned by, the above causes, or during such times; and such losses are expressly excluded from the otherwise general operation of the policy covering damage by fire. This contract in express terms is to make good such loss or damage as may occur to the boat by fire, that being a well-defined and distinct peril, differing in its nature from perils of the river and from collision, which is one of the perils of the river. The defendant, by the express terms of the agreement, is bound to make good such loss, unless the same is excepted from the operation of the general terms of the policy. And certain fires, which can be traced to specific causes, being thus expressly excepted, the rule is that no other exception can be ingrafted upon the policy and taken from under its operation.

The rule that governs cases of this kind is expressed in the cases of The Columbia Ins. Co. vs. Lawrence, 10 Pet., 517; Waters vs. Mer. Lou. Ins. Co., 11 Pet., 225; City Fire Ins. Co. vs. Corlies, 21 Wend., 371; Millandon vs. The Orleans Ins. Co., 4 La. Ann., 15; St. John vs. American Mu. F. & M. Ins. Co., 1 Kern., 518; Hale vs. The Wash. Ins. Co., 2 Story, 184; Broom's Legal Maxims, 278; The Western Ins. Co. vs. Cropper, 32 Penn. St., 356.

The view here taken is strengthened by another class of authorities. They are to the effect that the indemnity given by a policy of insurance shall be as broad as the language of the policy, upon any fair interpretation of it, will admit. 1 Duer on Ins., sec. 5—Lect. II., part 1, p. 161; Snapp & Hanger vs. the Mer. & Man. Ins. Co., 8 Ohio St., 461; Moadinger vs. M. F. Ins. Co., 2 Hall, 493; Stacy vs. the Franklin Ins. Co., 2 W. & S., 545.

The court will bear in mind that it is the written part of this policy that insures this steamer against loss or damage by fires; and these written terms are not to be set aside by equivocal printed conditions, found in the general form, but the former do in fact set aside the lat-

ter whenever there is any inconsistency. Duer on Ins., 165, sec. 11—Lect. II., 1; Angell on Ins., 11, sec. 15; Hayward vs. Liv. & Lon. Ins. Co., 40 N. Y., 457; Harper vs. The N. Y. C. Ins. Co., 22 N. Y., (3 Keys,) 443, 444; Pindar vs. The Kings Co. Ins. Co., 36 N. Y., 648; Robertson et al. vs. French, 4 East, 136.

The contract of insurance, being the language of the insurer, must be taken most strongly against the underwriter. Where there is any ground for fair doubt, this rule applies against the underwriter. Blackett vs. Assurance Co., 2 Cromp & J., 251; Snapp & Hanger vs. Mer. & Man. Ins. Co., 8 Ohio St., 461, 462; Donnell vs. The Col. Ins. Co., 2 Sumn., 381; Bullen vs. Denning, 5 B. & C., 847; Earl of Cardigan vs. Armitage, 2 B. & C., 207; 1 Duer on Ins., 161, 162, sec. 6; Western Ins. Co. vs. Cropper et al., 32 Penn., 355; Knight vs. Cambridge, 1 Strange, 581.

The maxim, *causa proxima non remota spectatur*, is especially applicable to insurance contracts and to this case.

The maxim above quoted becomes especially necessary in insurance contracts, in order that there may be a plain and intelligible rule by which the liability of the underwriters to the assured, and among themselves, can be ascertained. Suppose there had been another set of policies covering these boats against the perils of the river. What would that class of underwriters have said if sued for this loss? Would they not have replied, that the collision did no damage to the boat, but that she was burned up, and that the underwriters against peril by fire were bound for the loss?

But for this maxim, what an interminable confusion and opportunity for litigation! Except for this rule, how could any one adjust the cases, and charge to the assured and to each set of underwriters their appropriate shares of the loss? Cases of the kind are not uncommon. See Stacy vs. Frank. Ins. Co., 2 W. & S., 506; Gerodt vs. Del. M. Ins. Co., 31 Mo., 596; Madison Ins. Co. vs. Fellows, Disney, 228; The Ass. F. Ins. Co. vs. Assum, 5 Md., 168; Blake vs. Ex. M. Ins. Co., 12 Gray, 273; How. Ins. Co. vs. Scribner, 5 Hill, 301.

So complicated has the modern contract of insurance become, that it is now among the most difficult of practical affairs to adjust such losses satisfactorily; and only by strict compliance with this maxim in many of the cases can any adjustment be made.

And this maxim in fact is so applied to avoid such difficulties and such application is established by the courts. Perrin's Adm'r vs. Pro. Ins. Co., 11 Ohio, 171; 2 Arnold on Ins. 766; Dabney vs. New Eng. M. M. Ins. Co., 14 Allen, 309; Ionides vs. Uni. Mar. Ins. Co.,

14 C. B., 284; Dixon vs. Sadler, 5 Mees. & Wels., 414; Thompson vs. Hopper, 88 E. C. L., 937; Livie vs. Janson, 12 East, 653; 11 Johns. 27; Green et al. vs. Elmslie, Peake's N. P. Cas., 212; Tatham vs. Hodgson, 6 Term, 659; Powell vs. Gudgeon, 5 Mau. & Sel. 436; Norwich & N. Y. Trans. Co. vs. Western Mass. Ins. Co., 34 Conn., 561; U. F. & M. Ins. Co. vs. Foote, 22 Ohio St., 350; Boatman's Ins. Co. vs. Parker, 23 Ohio St., 95; Maryland Fire Ins. Co. vs. Whiteford.

The collision was not the immediate and proximate cause of the fire. It was two steps behind, and we look not to nearness in time, but to the order of events, though so near one another that we are unable to distinguish between them; and in reference to the rapidity with which one link in the chain follows another, see Dabney vs. New Eng. M. M. Insurance Company, 14 Allen, 309; Columbia Insurance Company vs. Lawrence, 10 Pet., 517; Dyer vs. Piscataqua F. & M. Insurance, 53 Maine, 120.

That the law does not follow back from one cause or sequence to another, in cases of insurance, but rests upon the peril which appears to have injured or destroyed the property, is well settled by the following authorities: Matthews vs. The How. Insurance Company, 1 Kern., 16; Gen. M. Ins. Co. vs. Sherwood, 14 How., 366; Ionides vs. U. M. Ins. Co., 14 C. B., 295; Gates vs. Mad. Co. Ins. Co., 1 Seld. 478; Columbia Ins. Co., vs. Lawrence, 10 Pet. 517, 518; City F. Ins. Co., vs. Corlies, 21 Wend. 371; St. John vs. The Am. Mu. Ins., Co., 1 Kern., 523; Sadler vs. Dixon, 8 Mees. & Wels. 899; Redman vs. Wilson, 14 Mees. & Wels., 482; Livie vs. Janson, 12 East, 648, 653.

The courts look at the peril assumed, and whenever they find that the property has suffered from such peril, they do not go to the cause that produced the peril. This is well expressed in the above cases.

The proximate cause is the last link, the last sequence or final result, which is the destruction of the vessel. The Ionides vs. U. M. Ins. Co., 14 C. B. (Scott,) W. S. 284, 286, 295; Dabney vs. New Eng. M. M. Ins. Co., 14 Allen, 309; Marble vs. The City of Worcester, 4 Gray, 398.

In insurance law the simple fact that the steamer was destroyed by fire not originating in the fraud of the plaintiffs, or their employees and not coming within any of the exceptions found in the policy, is all we have to look to, all we have to prove. It matters not what caused the fire, or how immediately the fire followed the cause, there being no exception excluding it, the loss is one for which the plaintiffs may recover.

The cases cited by plaintiff in error do not sustain their position, but when carefully examined strengthen our view.

The case of Thompson vs. Hopper, 88 C. L. 171, cited and greatly relied on by plaintiff in error, is not the law of this country nor of England, as will be seen by the following authorities: Perrin's Adm'r vs. The Pro. Ins. Co., 11 Ohio, 147; Johnson vs. B. M. F. Ins. Co., 4 Allen, 390; Chandler vs. Wor. M. F. Ins. Co., 3 Cush., 328; Huckins vs. The Pro. M. F. Ins. Co., 11 Fost., 247; Columbia Ins Co., vs. Lawrence, 10 Pet., 517; Shaw vs. Roberts, 6 Ad. & El., 83, 84; Brown vs. Kings Co. F. Ins. Co., 31 How. Prac., 512; Gates vs. Mad. Co. M. Ins. Co., 1 Seld., 478; Hynds vs. The Schen. Co. M. Ins. Co., 16 Barb., 127; St. John vs. The Am. M. F. & M. Ins. Co., 1 Duer, 381; Catlin vs. the Springfield F. Ins. Co., 1 Sumn., 441; Waters vs. the Louis. Mer. Ins. Co., 11 Pet., 220; Thompson vs. Hopper, 1 El. Bl. & El., 1051.

In some of these cases it was held that gross neglect of the assured himself, not amounting to fraud, was no defense.

The following cases—St. John vs. Amer. M. F. & M. Ins. Co., 1 Kern., 518; Roe et al. vs. the Columbus Ins. Co., 17 Mo., 304; Montgomery vs. Firemen's Ins. Co., 16 B. Mon., 442; Strong vs. the Sun M. Ins. Co., 31 N. Y., 113; Stanley vs. the West. Ins. Co., 3 Exch., 71; Insurance Co. vs. Tweed, 7 Wal., 44—cited by plaintiff in error, contain excepting clauses, and the decision in each case rests upon the force of the exception, and cannot avail the plaintiff here, who has no exception to go on. 12 Wal., 199.

II. There is no error upon the subject of barratry, to the prejudice of the plaintiff in error.

For a definition of barratry, see Webster; Worcester; 2 Arn. on Ins., 2 ed., 821, 825; Lawton vs. Sun M. Ins. Co., 2 Cush., 511; Earle vs. Rowcroft, 8 East, 133; 1 Starkie, 191; Parsons on Ins., 550; Marcardier vs. Chesapeake Ins. Co., 8 Cranch, 49; Nutt et al. vs. Bourdieu, 1 Term, 323; Knight vs. Cambridge, 1 Strange, 581; Stamma vs. Brown, 2 Strange, 1174; Lockyer vs. Offley, 1 Term, 259; Vallejo vs. Wheeler, 1 Cowper, 154; Wilcocks et al. vs. Union Ins. Co., 2 Binn., 580; Phyn vs. Royal Ex. Ass. Co., 7 Term, 503, 504; Soares vs. Thornton, 7 Taunt., 640; Ross vs. Hunter, 4 Term, 38; Chandler vs. Wor. M. F. Ins. Co., 3 Cush., 330.

The case of the Citizens' Ins. Co. vs. Marsh, 41 Penn. St., 394, is referred to by the plaintiff in error. It is difficult to see how the conduct complained of in that case is barratry, as the master was himself the owner, and any conduct of the owner, or with his consent,

cannot be barratry. This is universally agreed. 2 Arnould on Ins., 837; 1 Parsons on M. Ins., 571; 1 Phillips on Ins., sec. 1082; Wilson vs. Gen. M. Ins. Co., 12 Cush., 365; Marcardier vs. Ches. Ins. Co., 8 Cranch, 49; Nutt et al. vs. Bourdieu, 1 Term, 323; Ross vs. Hunter, 4 Term, 37; Barry vs. La. Ins. Co., 11 Martin, 631; Taggard vs. Loring, 16 Mass., 340; Pipon vs. Cope, 1 Camp., 436; Soares vs. Thornton, 7 Taunt., 640.

The officers and crew of the United States could not commit barratry toward the America. Cook vs. Com. Ins. Co., 11 John., 43 Kendrick vs. Delafield, 2 Caines, 71; 1 Phillips on Ins., sec. 1080.

McIlvaine, J.

The court below charged, "that if the jury were satisfied from the evidence that the steamboat America was destroyed by fire, and that no material injury was done her by the collision, then the plaintiffs are entitled to recover for said loss or damage caused by fire, notwithstanding such fire may have been caused by the collision," and refused to charge as requested by the defendant below, "that loss or damage from collision being excepted, and the defendant not liable therefor, the defendant is not liable for any loss or damage from fire where a collision was the direct, immediate, and proximate cause of such fire, and without which the loss would never have occurred; in such a case the loss is to be attributed to the collision and not to the peril of fire."

Whether there was error in the charge as given, or in refusing to charge as requested, depends solely upon the proper construction of the policy sued on. The form of the policy, as printed, assumes to insure against the perils of seas, lakes, rivers, etc.; but the contract of the parties, as evidenced by the terms therein written, which must control in its construction, clearly shows that the only risk assumed by the underwriter was loss by fire; and that the perils of rivers, etc., including collision, were not insured against at all as proximate causes of loss or damage.

The undertaking of the defendant to insure "against loss by fire only," must be held to embrace losses by fire generally, without regard to the cause or causes which produced the fire. The qualifying word "only," was not intended to limit the liability of the insurer to losses by a fire caused by any particular agency, or to exclude such liability where the fire was caused by a particular agency, but simply to show that no risk whatever was assumed except loss by fire.

Such is the scope of an insurer's liability arising upon the terms of

a contract to insure against loss by fire only. In the policy now under construction, however, the parties, by subsequent clauses, excepted from the scope of the general undertaking of the insurer, losses occasioned by certain specified causes—that is to say, losses by fire produced by the causes named in the exceptions. See the United L., F. & M. Ins. Co. vs. Foote, 22 Ohio St., 350. Among the causes of fire so excepted, however, collisions are not named.

The court below, therefore, did not err in refusing to charge as requested by the defendant, for the reason that the request assumed that "loss or damage from collision" was excepted from the risks covered by the terms of the contract; which assumption was contrary to the true construction of the policy. Nor was there error in the charge as given.

Among the losses excepted from the risks by the warranties in the policy, was loss or damage caused by barratry.

Testimony had been offered on the trial tending to prove that the pilot of the America had neglected and failed to observe the rules established under the act of Congress, by the supervising inspectors, for his observance in such case, whereby the collision was caused. And other testimony had been offered tending to prove that such neglect or failure to observe the rules by the pilot was neither willful nor fraudulent on his part; and further, that if the rules were departed from at all, it was in an emergency, in which the pilot honestly believed that is was necessary to do so in order to avoid a collision.

Upon this subject the court charged the jury as follows:

"The second defense is barratry, which may be said to comprehend not only every species of fraud and knavery committed by the master or pilot, with the intention of benefiting himself at the expense of the owners of the boat, but every willful act on his part of known illegality, whereby the owners are in fact injured. It consists of some fraudulent act intended to injure them, or of a willful violation of known positive law in the navigation or management of the vessel from which the loss resulted."

[The court here read the rules and the act of Congress as recited in the statement of this case, and continued:]

"These rules are intended to avoid collisions between boats ascending and descending the river, and they prescribe the course to be pursued by the pilots. They are made to be observed, and are binding as law upon the pilots, subject, however, to any emergencies by which it may become necessary to depart from them to escape or avoid immediate danger from collision or other perils.

"It is claimed that the pilot willfully violated these rules of navigation, established under a law of Congress, by failing to give the signals required by the rules, and by omitting to stop when the boats had come within a distance of eight hundred yards. These rules are in evidence, and the pilots are bound to obey them unless some emergency in the course of navigation occurs justifying a departure from them to avoid a collision or other danger.

"The rules require that when the boats have approached within one mile, the pilot of the ascending boat shall sound the whistle to notify the pilot of the descending boat on which side he will pass; and that if the signals are not answered and understood by the time the boats have approached the distance of eight hundred yards, he shall stop his boat until the signals are corrected and understood. Now, if the pilot of the America, on approaching the United States, when they had approached within the mile, knew or believed that they had come within the mile, and chose to omit to give the signal required by the rule; or, if when he knew or believed that they had approached within the eight hundred yards, without satisfactory signals, he did not stop, although he knew that the rules required that he should stop, but chose to risk the violation of the rule, and the result of such violation of the rule was the loss, that would constitute such misconduct of the pilot as to prevent a recovery, though he did not actually intend an injury to the owners. He is not at liberty to prefer his own judgment to the rule required by law, unless there be some emergency requiring a departure from the rule. But he must deliberately, or voluntarily and knowingly violate the rule in order to constitute such misconduct as to prevent a recovery. The rules are made to be observed by pilots; they are intended for the safety of the public and for the protection of the owners. Whether they are the best that can be made or not, while in force they must be observed, and a willful disregard of them is misconduct; and if a loss is caused thereby to the owners, it is a loss by barratry, which is excepted from this policy.

"But in establishing this defense, the burden of the proof is on the defendants. They must make it appear by a fair preponderance of evidence that the pilot of the America did violate the rules knowingly, and the loss was the consequence.

"Mere error of fact or of law is not sufficient to establish a defense on this ground. The pilot must know his duty, and decline to do it. If he supposed the distance was a mile when he gave the first signal, and intended to comply with the rule by the signal which he gave, the

fact that he may have been mistaken in his estimate of the distance is not misconduct, which is a defense. So, if when the boats approached to the distance of eight hundred yards, the pilot of the America knew it, or believed it, and knew that the signals had not been answered or properly understood, and yet failed to stop or back his boat according to the law, that would be such misconduct as would be a defense against a suit for a loss caused by it. But if by reason of the darkness of the night, or other causes not under his control, he was mistaken as to the fact of their approach to the distance of eight hundred yards, until they had approached much nearer, such mistake would not be a misconduct to defeat a recovery.

"The pilot is not to set up his judgment against the rules, unless there arises an emergency in which he should honestly believe that it was necessary to depart from the rule to avoid a collision or avoid danger. But if he, in good faith, endeavored to comply with the rules of navigation and to avoid a collision, though he may have erred in his estimate of distances, and though he may have been mistaken as to the interpretation of the rules, he cannot be held to be guilty of such misconduct as to constitute a defense.

"You will limit your inquiry on this subject to the conduct of the pilot in charge of the America, as the only barratry which can defeat this suit must be of the officers or crew of the boat, for the loss of which this suit is brought."

We find no error in these instructions of which the defendant had right to complain; nor do we find any error in the record, for which the judgment should be reversed.

Judgment affirmed.

DAY, C. J., and WELCH, WHITE, and REX, JJ., concurring.

ARBITRATION CASE.

UNAUTHORIZED INSURANCE—NON-DELIVERY OF POLICY.

Before Ex-Chief Justice Dixon, at Milwaukee, Wis.

JOHN HENRY INBUSCH

vs.

NORTHWESTERN NATIONAL INS. CO. AND ATLAS INS. CO.

The Manistee agency of the Northwestern and Atlas companies issued a policy of the first named to M., "loss if any payable to I. as his interests shall appear." M. was owner and I, mortgagee of the premises. M. afterward transferred the equity of redemption to I., making him sole owner. No notice was given to the company, but the fact became known to the agent. Afterward the company ordered the agent to cancel the policy and return the unearned premium. The policy was canceled and another policy issued to I., by the agent of the Atlas, to whose account the return premium was credited. The whole transaction was done without the knowledge of I. The policy remained in the hands of the agent until after the fire, when I. first learned of the matter and received the Atlas policy. The agent afterward drew on I. for the balance which, owing to absence of I., was returned unpaid, whereupon the company ordered the agent to demand the policy's return and to refuse further payment. The agent made no demand for the policy, but accepted the premium subsequently remitted by I.

Held, That the Atlas was liable for the loss, but no liability attached to the policy of the Northwestern.

JOHN P. MCGREGOR, *for the Northwestern National Ins. Co.*
DAVID S. ORDWAY, *for the Atlas Ins. Co.*
WINFIELD SMITH, *for Mr. Inbusch.*
DIXON, *Arbitrator.*

In the matter of the claim of John Henry Inbush against The Northwestern National Insurance Company of Milwaukee, Wis., and The Atlas Insurance Company of Hartford, Conn., submitted, to determine the question of liability only, to the undersigned, as sole arbitrator by articles of agreement signed by each of said parties.

The facts as I find them, and respecting which there is no dispute between the parties, are as follows: On the 5th day of July, 1874, policy No. 241, of its Manistee, Mich., agency for the sum of $1,500,

was issued by the Northwestern National Insurance Company to Henry Mau of Manistee as owner, "loss, if any, payable to John Henry Inbusch as his interests may appear." Mr. Inbusch, a resident of the city of Milwaukee, was at the time mortgagee to the full value of the premises, including the buildings insured, which were situated in Manistee. The policy was issued by Messrs. Secor, Shores & Douville, general agents of the company at Manistee, on the application of Mau, but without payment of the premium. On the 1st of August following, Mau, being insolvent and unable to make the payment, communicated the fact to Inbusch, who thereupon paid the premium to the company at its home office in Milwaukee, taking the receipt of the secretary. The policy never, in fact, came to actual possession or custody of either Mau or Inbusch, but remained in the hands of the agents at Manistee until it was canceled and returned to the home office as hereinafter stated.

On the 24th day of the same month, Mau, the mortgagor, conveyed his equity of redemption of the mortgaged premises to Inbusch in satisfaction of the debt, and the mortgage was thereupon extinguished and Inbusch became sole owner of the property. No notice of this change of title was given to the company; but Shores, one of its Manistee agents, acquired knowledge of it on the same day.

On the 20th day of September, following, Mr. Darrow, the general supervising agent of the company, visited Manistee, and having authority for that purpose directed the cancellation of the policy and return of the unearned premium, on the ground that the company had too much insurance in the block upon which the buildings covered by the policy were situated. This direction was given in the usual course to Messrs. Secor, Shores & Douville, the agents, and Mr. Darrow wrote to the home office that he had so directed. A few days afterward the policy was forwarded by the agents at Manistee to the office of the company in Milwaukee, marked on the back, "Canceled, Manistee, Sept. 20, 1874. Return premium $59.30. Canceled by order of Darrow." No notice of such cancellation was given either to Mr. Mau or Mr. Inbusch, nor return or offer of return of the unearned premium made, until after the destruction of the buildings by fire. After the fire, which occurred on the 7th day of the next October, Mr. Inbusch called at the company's office in Milwaukee, and was then informed for the first time that the policy had been canceled. At the time of the cancellation Mr. Mau had removed from Manistee to Milwaukee, and it seems to have been the understanding of the agents at Manistee that Mr. Darrow was to give the notice of

cancellation. The condition of the policy authorizing cancellation by the company is in these words: "This insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

Such is a history of the transactions connected with the policy issued by the Northwestern National Insurance Company until we come to other facts, which are connected also with the policy issued by the Atlas Insurance Company.

The material facts touching the issuance of this policy by the latter company may be thus stated: Secor, Shores & Douville were at the same time general agents of the latter company for the city of Manistee and surrounding country, with authority to receive applications, collect premiums, issue policies, and bind the company by contract according to the usual practice and course of dealing of such agents, and they, supposing the insurance in the Northwestern National to have been regularly terminated and believing that Mr. Inbusch, who they knew had become sole and absolute owner of the premises by conveyance from Mau, was desirous of continuing the risk in some responsible company, on the 22d day of September, two days after the supposed cancellation, "replaced," to use their own expression, "the risk in the Atlas," and wrote up the policy No. 601 of the latter company in the name of Mr. Inbusch as owner of the buildings insured. Proper entries of the transactions were at the same time made on the books of the agency, and the issue of the policy reported in the daily report made by agents to the company. The $59.37 return premium on the policy in the Northwestern National was retained by the agents, to apply in part payment of the premium on the Atlas policy, the residue thereof, $15.63, being held by the agents as a claim against Mr. Inbusch. The accounts between the agents and the Atlas company show a credit to the company of the premium on the policy, although the same has not, in fact, been paid to the company. The policy in the Atlas remained in the hands of the agents until after the destruction of the buildings by fire. No notice of these transactions was given to Mr. Inbusch, and he remained in ignorance of them until some days after the fire, when one of the agents, Mr. Secor, came to Milwaukee, bringing with him the policy in the Atlas company, and called upon Mr. Inbusch, and the following interview, as stated by himself, took place between them. Mr. Secor says: "I asked Mr. Inbusch if he had any insurance on his property in Manistee here in Milwaukee. He said he thought he had

in the Northwestern National, but had been informed since the fire that it was canceled. He had had no notice of cancellation. I told him it had been canceled at Manistee and a new policy written in the Atlas. I handed him the Atlas policy. I told him that the unearned premium of the Northwestern National had been applied as part payment for the Atlas policy, and that there was a sum due upon it—$15.63. I asked him if he wanted to pay me that. He said he wanted to first learn if it was all right. I went off and left the policy. He did not pay me." After Mr. Secor's return to Manistee, and on the 19th of October, Secor, Shores & Douville drew on Mr. Inbusch for $15.63, and on the same day wrote him that the draft had gone through the bank. The draft was protested for non-payment, owing, as is explained by Mr. Inbusch, to his absence from the city at the time of its presentation, and there being no person in his office authorized or instructed to make the payment. A few days later, and as the agents say, about the 9th or 10th of November, Mr. Inbusch remitted the $15.63 by draft on some person in Manistee, which draft was collected by the agents, and the money so received together with $59.37 return premium is still in the hands of the agents, no part of the same ever having been returned or offered to be returned to Mr. Inbusch or to any person for his use. After the protest, however, and return of the draft upon Mr. Inbusch, and before the receipt and payment of his draft, Mr. Hall, the general supervising agent of the Atlas company, came to Manistee, and learning that Mr. Inbusch had not paid the premium, instructed the agents, as he refused to do so, not to receive any payment thereafter. He furthermore instructed them to demand a return of the policy left with Mr. Inbusch in Milwaukee by Mr. Secor. These instructions were disregarded by the agents, save only that Mr. Shores says that the draft sent by Mr. Inbusch was collected by a clerk in the office, without his knowledge and with no direction to do so, while he, Shores, was intending to return it to Mr. Inbusch. No demand has been made upon Mr. Inbusch to return the policy.

It of course sufficiently appears from the statement, that the policy in the Atlas company was issued without any previous application or request on the part of Mr. Inbusch. Mr. Inbusch says: "I had not authorized, directed or asked the Manistee agents to insure in any company for me."

Such are the material facts upon which the controversy has arisen, presenting, as will be readily seen, some very interesting questions of law, which, owing to the pressing nature of other engagements, I am sorry I have been unable earlier to examine and decide. I owe an

apology to these parties, which I tender here, for the long time which has intervened between the submission and hearing and the decision I am about to make.

First, with regard to the liability of the Northwestern National, it is obvious that its liability continued at the option of Mr. Inbusch, until he chose to accept the return of the unearned premium and apply it so far as it went in payment of the premium upon the policy in the Atlas company. Until he did this, the Northwestern National was liable, or might, in my judgment, have been held liable for the loss. It is clear, as well upon the language of the policy above quoted, as upon the general principles of law, that the supposed cancellation of the policy was wholly ineffectual until ratified or assented to by Mr. Inbusch; and considering the peculiar language of the policy, I am also inclined to the opinion that his rights were not affected by the change of title which took place on the 24th of August. The latter proposition is very strongly, if not directly and positively, sustained by the adjudications in Bragg vs. New England Fire Insurance Company, 5 Foster, 289; and in Pratt vs. New York Central Insurance Company, 55 New York, 506. But be these questions as they may, I am of opinion that when Mr. Inbusch, with full knowledge of the facts, accepted the return premium, he waived his rights against the Northwestern National, and released that company from all liability upon its policy. Such waiver and release had relation to the time when the supposed cancellation was made, and the transaction became in effect the same as if Mr. Inbusch had at that time, namely on the 20th of September, been notified of the cancellation and received return of the unearned premium.

Such being my view respecting the claim asserted against the North western National, it becomes my duty next to inquire whether there is any liability under the circumstances, on the part of the Atlas company, and in approaching this branch of the case, I am fully sensible of the delicate and intricate nature of the questions, in some particulars quite novel, which are involved and which produce a strong feeling of regret that they were not presented to a judicial tribunal where probable or possible error would have been avoided, and whose adjudication of them would have been of some authority and value as a guide for future cases.

Several objections are taken to the liability of this company upon its policy, the central and most important one being that there was no contract of insurance between Mr. Inbusch and the company at the time of the loss, and this being so, that it was incompetent to enter

into such contract afterward, and especially that it was wholly incompetent for and entirely without the scope of the authority of the agents of the company to so enter or bind the company, by their action. It is true, as argued by counsel for the company, that there must be a subsisting subject of insurance at the time the contract is made, or one to come into existence thereafter, and in the preservation of which the insured is at that time interested, or there can be no valid contract. Property which has ceased to exist—been already consumed by fire—and in which no person can be said to have any valuable interest, cannot therefore in any legal or proper sense be the subject of the contract of insurance. It is also true, as urged by the same counsel, that insurance is an aleatory contract—one depending on the happening of some contingent event—and where the event has already happened and is known to the parties, so there can be no contingency, there cannot in the nature of things be a contract. Looking at the contract, therefore, as one made at the time of the actual delivery of the policy to Mr. Inbusch, or at the time of the payment by him of the residne of the premium to the agents of the company, it follows that it is wholly invalid, as well on the ground of incapacity on the part of the company itself to make it, as of a want of authority on the part of the agents to enter into it for the company. There can be no doubt, I think, of the general correctness of the proposition, all other objections and difficulties being removed, that no agent of an insurance company has authority to enter into a contract of insurance after the property insured, or supposed to be, has been destroyed, and that fact is known to him, or to the assured, at the time the c ntract is made.

But the question arises here whether the contract is to be looked upon as having been made at the time of the actual delivery of the policy, or the payment of the residue of the premium, or whether it is to be regarded as having been made on the day of the date of the policy and when it was issued and the return premium on the former policy applied in part payment by the agents. In other words the question arises, whether the doctrine of relation, so familiar to the profession and so frequently applied in the law to contracts and business transactions of various kinds, is applicable to this contract, and also whether the maxim, *omnis ratificatio retrotrahitur et mandato priori æquiparatur* should govern in determining the rights and liabilities of the parties. If the case is one where it was competent for Mr. Inbusch, after the loss by fire, to ratify the unauthorized act of another done in his name and for his benefit, before the fire occurred, and so as to save him from the loss or damage occasioned by it, then the fic-

tion of the law, which carries the act of ratification back to the time of the performance of the act ratified, and considers the latter as having been done under authority previously granted, or at the request or with the consent of the principal made or given at the time, makes it a contract perfected before the loss happened, and when all the conditions requisite to a valid contract of the kind existed, and had been complied with. "The subsequent sanction," says Mr. Broom, "is considered the same thing, in effect, as assent at the time; the difference being that, where the authority is given beforehand, the party giving it must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. Broom's Legal Maxims, 836. "That an act done for another," says Best, C. J., in Maclean vs. Dunn, 4 Bing., 727, (13 E. C. L.,) "by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from the same act done by his previous authority."

On examination of the authorities it appears that the doctrine above referred to and the maxim cited have been several times applied to the contract of insurance, and it has been held under circumstances very similar to those here presented, that the assured may, after the loss has happened, ratify the unauthorized act of another in procuring the insurance by giving his assent thereto, and that such ratification will be equivalent to previous authority conferred to make the insurance. Thus in Wolff vs. Horncastle, 1 B. and P., 316, where the plaintiffs had effected insurance for the benefit of the consignor of the goods, without any order to do so, and the consignor had afterward signified his approval, Butler, J., said: "I have doubts whether the consignor would not have been liable to pay the premium. But the plaintiffs take the opportunity to inform the consignor of their having made the insurance, and he highly approves their acts, which brings the case within the maxim that *omnis ratificatio retrotrahitur et mandato priori æquiparatur.*" And Lord Ellenborough approves the application of the maxim in Stirling vs. Vaughan, 11 East, 620, 623, where he says, "the law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit." See also Routh vs. Thompson, 13 East, 274, 280.

In Hagedron vs. Oliverson, 2 Maule & Selwyn, 485, a ship was insured by one having no personal interest in her, in his own name and for every one to whom the same appertained. This was donewithout the previous authority of the owner, for whose benefit the insurance was in fact effected. The owner gave it no sanction before the loss of the ship, but two years afterward adopted the policy; and it was held that there could be a recovery for his benefit against the underwriter.

And a late English case in the Court of Common Pleas, Watson vs. Swann, 11 J. Scott, N. S., 756. (103 E. C. L.,) which was elaborately argued, is a most emphatic recognition of the doctrine that insurance taken or obtained without the authority or assent of the owner or party in interest, may be subsequently ratified and adopted by him, so as to become valid from the date of the policy. The only limitation put upon the doctrine by that case is, that the owner or party in interest for whose benefit the policy is taken, must be known or capable of being ascertained at the time the insurance is effected.

In Miltenberger vs. Beacom, 9 Pa. St., 198, it was held that "where an insurance is made generally by one having an interest, and he receives the amount of the loss, another owner may recover from him on proving that the insurance was made on his interest, without showing a previous request to make the insurance." The court in its opinion says, "It is very clear one may insure, in his own name, the property of another for the benefit of the owner, without his previous authority or sanction; and it will inure to the party intended to be protected, upon his subsequent adoption of it, even after a loss has occurred. This doctrine is asserted in Durand vs. Thorson, 1 Porter, (Ala.,) 238; and Watkins vs. Durand, ib., 251." Again speaking of Hagedorn vs. Oliverson, supra, the court says: "This case is commented on by Hughes, in his Treatise on Insurance, p. 41. He says of it that the insurance being for the benefit of the owner, the reasonable presumption was that he would adopt the act; and although he was under no legal obligation to repay the premium to the party negotiating the policy, there was such a moral obligation as furnished a sufficient consideration to support his adoption of it, after the happening of the loss. The authorities abundantly prove that the contract of insurance, like other contracts, may be effected by the agency of a third person, without the authority of the person to be benefited, if he subsequently recognize it. It is true, that to enable the beneficiary to sue upon it directly, he must be expressly named, or the policy

must be so framed so as to cover, generally or specially, the interest of all concerned.

It follows from these authorities that it is competent for the assured or party in interest, in whose name or for whose benefit a policy has been issued upon the unauthorized application of another, to adopt, even after the loss has happened, the act of the party so applying in his behalf, and that, having adopted it, he may sue and recover upon the policy against the underwriter. In the present case, however, if a stranger to Mr. Inbusch, one having no authority or semblance of authority from him, had, verbally or otherwise, at or before the time of the policy issued, requested the agents, upon the credit of Mr. Inbusch, in whole or in part for the premium, to issue the policy, then Mr. Inbusch might have adopted the request of such stranger after the destruction of the buildings by fire, and the policy would have become a valid contract of indemnity, considered in law as having been originally made upon Mr. Inbusch's application to issue, or upon authority previously given by him to the person who made the application. It is of course understood that this privilege of the assured to ratify the unauthorized act of another, is subject to the right of the underwriter, if first exercised, to repudiate the contract as having been made without authority from the other party to it. At any time before ratification, the underwriter may relieve himself from all liability, present or prospective, by giving notice to that effect and restoring whatever he has received under the contract.

This case differs, therefore, from those which have been decided only in this particular, that the request to issue the policy, made without authority, instead of coming from a stranger to Mr. Inbusch, and the company, came from the agents of the company issuing the policy and by whom the policy was written up and reported to the company, as in the usual course of business. It is said that this circumstance marks a wide distinction, so wide in fact as to exclude the transaction from the operation of the principles above stated. The objection proceeds upon the principle, very general in its application, that no man can at the same time act as agent for two different parties who are opposed in interest, and where his duties of agent for the one, require him to exercise his best skill and judgment to promote the interests and secure the advantage of that one as against the other party. This, it is said, was the relation in which Messrs. Secor, Shores & Douville stood to the insurance company, and which precluded them from acting as agents for Mr. Inbusch to make the request. On the other

hand it is argued by counsel for Mr. Inbusch, with very great, and, as I think, convincing force and ability, that the attitude of Messrs. Secors, Shores & Douville, as agents of this company, was not such as to incapacitate them from acting for Mr. Inbusch in this particular, or from preferring in his behalf a mere request to have the policy issued for his safety and protection.

Counsel argues that the agent who replaced the risk in the Atlas company acted exclusively as the agent of the company, except in the mere matter of preserving the policy after taking for granted Mr. Inbusch's acceptance; that the decision to issue the policy, the issue, the retention of the premium, the notice and accounting to the insurance company were the material acts and were done in his character as agent of the company; that there was no employment by or acting for Mr. Inbusch that could in the least conflict with his duty to the company; that he only held the policy subject to Mr. Inbusch's order, which was no such agency as conflicts with the rights of the company, but on the contrary was all done in its interest; that the benefit to Mr. Inbusch was incidental and not the motive of the agent's action, who seized upon the occasion to do, as a stroke of business for the company, a thing for its advantage by issuing the policy which he presumed Mr. Inbusch would not reject; and that he did not on Mr. Inbusch's part solicit the company, or as the agent of Mr. Inbusch procure the company to issue the policy, but rather on the company's part entered into the contract, assuming Mr. Inbusch's assent. And counsel further, by way of illustration, argue that if one go to the office of an insurance agent and ask him to insure, and afterward to keep the policy in his safe until the assured calls for it; or if the assured asks the agent to co lect the premium from a third person who owes him; or if he asks him to select a good company out of those represented by him; or if he asks the agent to give him notice in season before the policy expires, so that he will never be without insurance, or to reinsure him in some good company in case the policy he now obtains shall become worthless, such requests on the part of the assured, it is argued, are not an employment or taking possession of the agent by the assured to that extent or in that manner that the policies thus obtained are voidable by the insurance companies. Counsel says, and I doubt not truly, that these are matters of constant practice with insurance agents, and I agree with him in the position that there seems to be no valid objection to them. As argued, it seems not to be such an employment as tends to lead the agent astray from his duty to his principal, the insurance company.

It leaves the company, through its agent, or for itself directly, to fix the rate, the time, the amount, the conditions, and all the other terms of the insurance, only limited by his duty to the assured, which arises from the latter's request, namely, that these terms shall not be unusual nor unreasonable. Such are some of the views presented by counsel for Mr. Inbusch, and I must confess that they seem to me very sound and forcible. The Supreme Court in Stewart vs. Mather, 32 Wis., 344, 351, in considering the point, identical in principle with that here presented, whether an agent, to sell the property of his principal, could himself become the purchaser of it from the principal, so as to be entitled to recover his commissions on the sale, clearly recognize the general rule that the agent cannot become the purchaser, but further says: "But the question presents itself, whether there may not be exceptions growing out of the peculiar nature of the agency, or certain special or limited agencies not falling within the reason of the rule, and so not within the rule itself. The reason of the rule is very plain. It is, that the interest of the party as purchaser, being adverse to that of his principal, supposing the agency still to continue, might most naturally and ordinarily would lead to a violation of his duty as agent. If a case can be presented, however, not within the reason of the rule, as of an agency limited to a time anterior to the purchase, or where the agency may be said to have expired, or the duties to have been performed before the purchase takes place, to such a case it is presumed the rule would be held inapplicable." Then follows in the opinion a statement of certain supposed cases to which it is said the rule would not apply, and several decisions are cited in which it was held that a person might at the same time be agent for both parties, to a contract or transaction, and recover compensation for his services from each. Now it seems to me that the agency here, so far as Mr. Shores assumed to act for Mr. Inbusch without any previous order or direction, was of that limited kind which expired before the time arrived when it became necessary for the agent to perform any acts whatever for or on the part of the insurance company. The assumed agency was limited to making a request to issue a policy in the usual form and upon the usual terms and conditions, or upon such terms and conditions as the company or the agents saw fit to require or impose, and in all that was done thereafter the agents acted strictly and exclusively as the agents of the company. If at any previous time Mr. Inbusch had authorized the agents in their discretion or whenever they deemed it necessary or proper, regard being had to his interest and welfare, to apply

for insurance in his behalf, there can be little doubt, I think, that the policies issued pursuant to such authority or request would have been valid, and, if valid when so issued, then the issue without such previous authority or request is the proper subject of subsequent ratification and affirmance so as to give original validity to the contract. I may mistake, but it certainly appears to me that the agency to make the request is the most formal and least substantial of all the acts deemed necessary in law to the validity of the contract, and I cannot perceive why the agent of the underwriter cannot also become the agent of the assured to perform this one act. I can see nothing in such agency inconsistent or incompatible with his agency or employment for the underwriters—nothing which should lead to any infidelity, or disregard of duty or violation of trust, on the part of the agent, toward the underwriters. Indeed it seems to me, as argued by counsel, rather promotive than otherwise of the true interests and advantages of the underwriter, that his agent should be thus permitted to so act and to prefer requests in behalf of persons desiring insurance. I hold, therefore, that the agent of an insurance company may so act in behalf of a person whose property is insured by the company through his agency, and that, where such act has been performed by the agent without the previous authority or direction of the assured, and there has been no fraud or unfairness, then the subsequent assent of the assured, even after the property has been destroyed by fire, cures the defect and is equivalent to an authority or direction for that purpose previously given by him.

It will be observed from the statement of facts above made, that, except as to the question of delivery, which will be presently spoken of, the policy under consideration lacked nothing essential to its completeness and validity, save only the mere formality of a request made by Mr. Inbusch to issue it. On the part of the company nothing remained to be done to make it in all respects perfect and obligatory. The issuance of it had been regularly reported to the company on the day of its date, and had been assented to and approved by the company many days before the fire took place. The money of the assured had also been paid or appropriated to the use of the company in satisfaction of most part of the premium, for the residue of which the agents were authorized, if they chose, to extend to him a credit. On the side of the company, therefore, it was a contract fully and fairly executed the same as any other, and it required only the assent of the assured to make it binding upon him, which assent, when given, operated as from the beginning or date of the execution by the company.

It is said, however, that the contract is incomplete and the policy ineffectual until it has been actually delivered to the assured. This position is not sanctioned by authority. On the other hand the rule on this subject, as I find it laid down and sustained by the adjudications, is as stated by Mr. May in his treatise on the Law of Insurance, sec. 60. The author says: "To constitute a delivery of a policy it is not necessary that there should be an actual named transfer from one party to the other. The agreement upon all the terms and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured. The delivery may be by any act intended to signify that it shall have present vitality. A policy purporting to be signed, sealed and delivered, as required by the charter, is complete and binding as against the party executing it, though in fact it remains in his possession, unless some further act be required by the other party to signify his adoption of it. No formal acceptance is necessary to complete the delivery." I think the policy in question, being ratified by him, would have been effective in favor of Mr. Inbusch without any actual manual transfer of it to him; and it seems to me also that the delivery which was made was as much within the scope of the authority of the agents as it would have been had the policy been issued directly from the office of the company on application to that office, and forwarded to the agents at Manistee for delivery to Mr. Inbusch before the fire occurred, but had remained in their hands until after its occurrence. In Ellis vs. Albany City Fire Insurance Company, 50 New York, 402, it was held that an unrestricted authority to an agent of a fire insurance company to negotiate a contract of insurance by issuing a policy, included authority to make a valid preliminary contract for such issue, and that where such contract had been made before the destruction of the property by fire, the agent was authorized to fill, countersign, issue, and deliver the policy after such destruction.

Another objection taken on the part of the company grows out of the instructions given by Mr. Hall, the general supervising agent of the company, to the agents of Manistee not to receive the balance due from Mr. Inbusch on the premium and demand a return of the policy. It would be enough, perhaps, to observe of this transaction that the instructions thus given by the general agent to the local agents were wholly disregarded by the latter, and that no notice of them was received by Mr. Inbusch until after the contract of insurance had been fully satisfied on his part. To have rendered such instructions effect-

ual, as a rejection of the contract on the part of the company, notice of them should have been given to Mr. Inbusch before ratification by him. But more than this, the instructions, if they had been carried out, would have been ineffectual as a rejection of the contract on the part of the company, for the reason that there was no direction given to return the money which had already been received and appropriated in part payment of the premium. The company could not retain Mr. Inbusch's money, and at the same time repudiate the contract or debar him of the right of ratification.

Another objection is that since the policy in question was written, to take the place of the former one which was not canceled, the property was doubly insured without the assent of the company, and the policy void on that ground. This objection vanishes when we consider the legal effect of Mr. Inbusch's acts of ratification, which were in reality performed at one and the same moment, both with respect to the cancellation of the first policy and the issuing of the second one. Such acts of ratification had relation to the time when the acts ratified were respectively performed, and the cancellation of the old and the issue of the new policy, became as if each had been done under the previous notice to or authority obtained from Mr. Inbusch. There was, therefore, in contemplation of law no double insurance.

It follows from these views that the Atlas Insurance Company is liable in damages to Mr. Inbusch upon the policy issued by it, and that there is no liability on the part of the Northwestern National Insurance Company, and I accordingly so find, award, and determine upon the issues which have been submitted to me.

Dated at Milwaukee this 12th day of April, 1875.

LUTHER S. DIXON, *Sole Arbitrator.*

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

FIRE.—*What constitutes materiality in a misdescription.*

One of the conditions of the policy was, that "any material misdescription of any of the property proposed to be hereby insured, or of any building or place in which the property to be so insured is contained, and any mistatement of or omission to state any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively." The claim was resisted by the liquidator of the company on the ground that, in the description of the property for the purpose of the policy, a portion of it was described as roofed with slate, whereas that portion was roofed with felt. To this it was replied that this description was unimportant, as the property misdescribed was only of the value of £200, and was not in fact, burnt.

Held, that if the company had known of the felt roof, they would neither have refused the risk nor raised the premium; and, this being so, the misdescription was unimportant. There is no doubt that if the description is in the form of a warranty, or amounts to a warranty, it must be strictly true, or the policy will be void. "The party proposing an insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the insured." Bates vs. Hewitt, L. R., 2 Q. B., 595.

The principle applicable to the present case was that stated in Smith's Merc. Law, 8th edition, page 405—viz., "if the description of the property be substantially correct, and a more accurate description would not have varied the premium, the error is not material." The Newcastle Insurance Company vs. M'Mullan, 3 Dow., 255; Parsons vs. Bignold, 15 Law Journal Reports, Chancery, 379; Anderson vs. Fitzgerald, 4 House of Lords, 484, 497, 502. Donald

vs. The Law Life Insurance Company, L. R., 9 Q. B., 328; Doe vs. Manning, 4 Camp., 76; Benham vs. the Guarantee Society, 7 Exch., 744; and Towle vs. the National Guardian Society, 3 Giffard, 42.

In Re the Universal Non-Tariff Fire Ins. Co., ex parte Forbes & Co.

Decision rendered Feb. 20, 1875. Vice Chancellor's Court, Eng.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

ACTION.

§ 115. FIRE.—*Removal to U. S. Courts.*—A verdict having been rendered against a corporation of another State, in the New Hampshire Supreme Court, a writ of review was sued out and a petition filed for removal of the action to the U. S. Circuit Court. *Held*, that under the 3d clause of sec. 639 of the Revised Statutes of the United States, such a petition cannot be filed after one trial has been had, although the action is one where review will lie.

Akerly vs. Vilas, 1 Abb., U. S., 284, and 24 Wis., 165; Johnson vs. Monell, Woolworth, 390; Ins. Co. vs. Dunn, 19 Wall., 214, and in Ohio S.

C.; Bryant vs. Rich, 106 Mass., 192; Badger vs. Gilmore, 37 N. H., 459; Andrews vs. Foster, 42 N. H., 379; Pike vs. Pike, 24 N. H., 397; Wetherbee vs. Johnson, 14 Mass., 412; Galpin vs. Critchlow, Am. Law Register, March, 1874.

Whittier vs. The Hartford Fire Ins. Co.

Rep'd Jour'l, p. 622. N. H. S. C.

§ 116. FIRE.—*Who may Maintain.*—The party to sue for a breach of a simple contract must be the party from whom the consideration moves. The policy insured W. against loss, payable to C. C. was mortgagee, and obtained the policy, on which he paid the premiums, with the consent of W. *Held*, that the promise, although in terms, to W., is not an assignment but a promise to pay C., and must be regarded as directly to C. *Held*, that C., and not W., is the original contracting party and the proper person to sue, according to the law of New Hampshire.

Nevins vs. Rockingham Fire Ins. Co., 25 N. H., 22; Rollins vs. Columbian Fire Ins. Co., 25 N. H., 202; Folsom vs. Ins. Co., 30 N. H., 231; Blanchard vs. Ins. Co., 33 N. H., 9; Barnes vs. Ins. Co., 45 N. H., 24; Pierce vs. Ins. Co., 50 N. H., 297; Granger vs. Ins. Co., 5 Wend., 200; Conover vs. Ins. Co., 3 Den., 254; Loring vs. Manf. Ins. Co., 8 Gray, 28; May on Ins., sec. 172, 173; Dicey on Parties, 81; Chitty on Contracts, 62; Crowe vs. Rogers, 1 Str., 592; Price vs. Easton, 4 B. & Ad., 434; Butterfield vs. Hartshorn, 7 N. H., 351: Dicey on Parties, 81-85, 117, 127, 136, 137; Lake on Contracts, 221, 313; Chitty on Con., 132; 2 Pars. on Notes and Bills, 438; Drayton vs. Dale, 2 B. & C., 293; Big. on Est., 447; 1 Pars. Con., 467, 468; Carnegie vs. Morrison, 2 Met., 381; Brewer vs. Dyer, 7 Cush., 337; Met. Con., 205-211.

Held, that as the insurance exceeded the incumbrance, C. could bring an action in his own name, as the agent of W., for the surplus.

Paley on Agency, 362; Story on Agency, sec. 394; Barnes vs. Union F. & Mar. Ins. Co., 45 N. H., 21, 28.

Chamberlain vs. N. H. Fire Ins. Co.

Rep'd Jour'l, p. 649. N. H. S. C.

AGENT.

§ 117. FIRE.—*Knowledge of.*—The agent of the company undertook to procure the insurance and do everything that was right, and had full knowledge of all the circumstances. *Held*, that the company was estopped to deny the indorsement of prior

insurance upon the policy, conformably to its conditions. *Held*, that the neglect of the agent to indorse the required consent for subsequent insurance, under the same circumstances, was evidence from which the jury might find that the company had waived the condition requiring it. *Held*, that the company was bound by the representations of the agent, although the property was misdescribed in the application.

Clark vs. Ins. Co., 40 N. H., 333; Barnes vs. Ins. Co., 45 N. H., 23, 24; Pierce vs. Ins. Co., 50 N. H., 297; Marshall vs. Ins. Co., 27 N. H., 164; Campbell vs. Ins. Co., 37 N. H., 35.

Hadley vs. N. H. Ins. Co.

Rep'd Jour'l, p. 611. N. H. S. C.

APPLICATION.

§ 118. LIFE.—*Truth or Falsity of Answers in.*—The policy was issued "in consideration of the representations made to them in the application," also upon the "express conditions and agreement—if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue," the policy should be void. The application agreed that it should be the basis of the contract, and any willful, untrue, or fraudulent answers, or any suppression of facts regarding health, should void the policy. *Held*, that the answers in the application were representations, not warranties, and if they were truthfully and honestly made the policy was not avoided by the fact that some of them were in point of fact erroneous or untrue.

Washington Life Ins. Co. vs. Schaible.

Rep'd Jour'l, p. 629. PA. S. C.

CANCELLATION.

§ 119. FIRE.—*When Complete.*—The insured on learning that the M. Ins. Co. had suspended, surrendered his policy to the agent, received the unexpired premium and took out a policy in another company. Nothing more was heard of the first policy. In an action on the second policy, *held*, that the first must be considered canceled from the time of its surrender.

Hadley vs. N. H. Fire Ins. Co.

DEVIATION.

§ 120. MARINE.—*Return of Premium in.*—Where equity declines to reform a contract to allow the use of two ports instead of one, adjudging that there was a deviation, it will not decree a return of the premium. The law annuls the contract as to the future, and forfeits the premium. Here equity must follow the law.

Hearne vs. N. E. Mut. Mar. Ins. Co.

Rep'd Jour'l p. 582. U. S. S. C.

EQUITY.

§ 121. MARINE.—*Jurisdiction of.*—Equity will reform a written contract where the terms are contrary to the common intention of the parties, and the parties will be placed as they would have stood if the mistake had not occurred. Kerr on Fraud and Mistake, pp. 419, 420. The party alleging mistake must show exactly what it is and what the correction must be.

Beaumont vs. Bramley, 1 T. & R., 41-50; Marquis of Breadalbane vs. Marquis of Chandos, 3 M. & C., 711; Fowler vs. Fowler, 4 D. G. & Jones, 265; Sells vs. Sells, 1 Dr. & S., 42; Lloyd vs. Crocker, 19 Beav., 144.

The mistake must be mutual, not on one side.

Rook vs. Lord Kensington, 2 K. & J., 753; Eaton vs. Bennet, 34 Beavan, 196; Mortimer vs. Shortall, 2 Dr. & War., 372; Sells vs. Sells, sup.

Where the minds of the parties have not met there is no contract, and hence none to be reformed.

Bentley vs. McKay, 31 L. J., Chy., 709; Baldwin et al. vs. Midleburger, 2 Hall, 176; Coles vs. Bowen, 10 Paige, 534; Caverley vs. Williams, 1 Vesey, jr., 211.

This jurisdiction is applied, when necessary and proper, to the reformation of insurance contracts.

Harris vs. Col. Co. Ins. Co., 18 Ohio R., 116; Fireman's Ins. Co. vs. Powell, 13 B. Monroe, 311; Nat. Fire Ins. Co. vs. Crane, 16 Md., 260.

Hearne vs. N. E. Mut. Mar. Ins. Co.

—§ 120.

MORTGAGEE.

§ 122. FIRE.—*Right to Recover after Foreclosure.*—The policy was issued in the name of the owner, payable to the mortgagee

to the extent of his interest. After the fire the foreclosure of the mortgage was completed. *Held*, that the mortgagee had a right to recover the amount remaining due on the mortgage, and can maintain an action in his own name.

Hadley vs. N. H. Ins. Co.

—§ 117.

NOTICE.

§ 123. MARINE.—*What is Immediate.*—The policy required immediate notice of the vacation of the premises. The tenant moved out without the knowledge of the insured mortgagee. The notice was given as soon as the occasion was found to exist, which was several months later. *Held*, that immediate notice means reasonable notice, and the notice was reasonable under the circumstances.

Chamberlain vs. N. H. Ins. Co.

—§ 116.

POLICY.

§ 124. FIRE.—*Not Voided by Vacation of the Premises in New Hampshire.*—The policy provided that it should be void if the premises were vacated without notice and permission indorsed. The policy was taken out by C., the mortgagee, with consent of W., the owner, insuring W. and payable to C. The premiums were paid by C. The building was afterward vacated by W., who gave no notice, because ignorant of the condition. C. did not notify because he was ignorant of the removal. The building was not destroyed by any risk due to the non-occupation. *Held*, that the failure to notify was a "mistake" within the provision of the General Statutes of New Hampshire, ch. 157, sec 2.

Cooley's Const. Lim., 285; Ogden vs. Saunders, 12 Wheat., 259; Baldwin vs. Hale, 1 Black., 231; Sturgis vs. Crowningshield, 4 Wheat., 199; Potter's Dwarris on Statutes, etc., 475, 476.

But as the company might have refused the insurance or charged a higher premium had they known the circumstances, the amount of liability must be diminished as indicated by the statute.

Chamberlain vs. N. H. Ins. Co.

—§ 116.

RISK.

§ 125. FIRE.—*Notice of Alteration.*—The policy provided that in case of any change in the risk not made known to the company and indorsed on the policy, it should be void. Also that no agreement, unless so indorsed, should be deemed a waiver of the conditions. The court found that steam power communicated from an engine placed in a separate building did not increase the risk. *Held*, that it was not necessary to indorse the notice of the change on the policy.

Parker vs. Arctic Fire Ins. Co.

Rep'd Jour'l, p. 609. N. Y. C. A.

§ 126. FIRE.—*Increase of.*—Plaintiff claiming for loss on a house as mortgagee, had, previous to the fire, purchased a mortgage on the furniture, and, without the general owner's consent, proceeded to exhibit it to parties desirous of purchasing, without the knowledge of the company. The court below instructed that if this were done by an innocent mistake, plaintiff would be protected by Gen. Stats. of N. H., ch., 157, sec. 2; but that the increase of premium due to the increased risk should be deducted from the amount of insurance. *Held*, that whether the statute were rightly applied or not, the rule was erroneous. The true rule would be to reduce the amount of insurance to the sum which the premium would purchase at the advanced rate.

Hadley vs. N. H. Ins. Co.

—§ 117.

REFORM OF POLICY.

§ 127. MARINE.—*Use of Two Ports instead of One.—Admissibility of Usage.*—Application was made for insurance on a charter "from Liverpool to Cuba, and load for Europe via Falmouth," etc. The company replied, "as requested we have entered $5,000 on charter to port in Cuba, and thence to port of advice and discharge in Europe." The vessel proceeded to a port of discharge in Cuba, and thence to another port in Cuba, where she loaded and was lost on her return voyage. *Held*, that the correspondence constituted a preliminary agreement. The company's answer was plain, and admitted of but one construction.

It must be presumed that the insured read and understood it. Therefore equity cannot reform the contract to allow the use of two ports instead of one, on the ground of ambiguity. It was claimed that the use of two ports was justified by an established usage. *Held*, that it was not necessary that the usage should be communicated to the insurers; they are presumed to know it.

Noble vs. Kennedy, 2 Doug., 492; 1 Duer on Ins. and cases there cited.

Usage is admissible to explain an ambiguity but never to contradict a plainly written contract.

Bracket vs. Roy. Ass. Co., 2 Cr. & J., 250; Crofts vs. Marshall, 7 C. & P., 607; Philips vs. Briard, 1 H. & N., 21.

Parol evidence is inadmissible to vary the established legal meaning of the written words, unless such meaning is inconsistent with the general terms of the contract or the extrinsic facts.

Wigram on Wills, 11-12; Yates vs. Pym, 6 Taunt., 446; Bracket vs. Roy. Ass. Co., *supra.*

Parol evidence can never be received where inconsistent with the contract.

Holding vs. Pigot, 7 Bingham, 465; Clarke vs. Roystone, 13 M. & W., 752; Freeman vs. Loder, 11 A. & E., 589; Quincy vs. Dennis, 1 H. & N., 216.

The apparent intention of the parties to be governed by what is written is sufficient to establish this inconsistency.

Hutton vs. Warren, 1 M. & W., 447: Clark vs. Roystone, *supra.*

The principle of the admissibility of such testimony is the judgment of the court as to the meaning of the parties implied and expressed by the language they employed.

1 Greenl. on Ev., § 295 a; U. S. vs. Babbit, 1 Black., 61.

Held, that the implied and expressed meaning in this case is that but one port should be visited, and proof of usage is inadmissible. The case is one of deviation.

Hearne vs. N. E. Mut. Mar. Ins. Co.

—§ 120.

WAIVER.

§ 128. LIFE.—*Of Condition as to Residence.*—The policy provided that it should be void if the insured resided within certain districts from the first of July to the first of November without

a permit. A brother of the insured incidentally informed the agent that he had removed within the limits prior to the prohibited season, and in reply to the agent's statement that he should have a permit, and intimation that he would charge nothing for obtaining it, said that he would get him one if it did not cost too much. A printed note on the face of the policy stated that no agent had a right to waive its conditions. *Held*, that this conversation could not be construed into a waiver of the condition. Subsequent to the conversation, but prior to the first of July, the agent wrote to insured acknowledging the receipt of the renewal premium, and encouraging him to maintain his insurance. *Held*, that this was not a knowledge of the agent and waiver of the condition which bound the company.

May on Ins. p. 404, § 330; The cases of Bevin vs. Conn. Mut. Life, 22 Conn., 244; and Wirtz vs. Harvey, 27 Law & Eq. R., 140, distinguished.

Lorie vs. Conn. Mut. Life Ins. Co.

Rep'd Jour'l, p. 632. U. S. C. C.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

COURT OF APPEALS OF MARYLAND.

APRIL TERM, 1875.

Appeal from the Court of Common Pleas, Baltimore.

THE KNICKERBOCKER LIFE INS. CO.

vs.

MAGDALENA PETERS.*

The policy clause providing that it shall be void if the insured "shall die by his own hand or act," is not vitiated by an unintentional or accidental taking of life. Opinions are irreconcilably in conflict as to its true construction in other respects.

The court below instructed that self-destruction in a fit of insanity which overpowered the consciousness, reason and will, from a mere blind and uncontrollable impulse, or impelled by an insane impulse which the reason left to the insured did not enable him to resist, will not avoid the policy. It must be presumed that he was not impelled by any such impulse in the absence of evidence to the contrary, and such evidence must relate to the precise time of the occurrence, if he was only subject to fits of insanity. It is not sufficient to prove merely that the insured was insane at times; he must be proved insane at the precise time when the act was committed, and in the absence of such proof it must be presumed that he was then sane, and they cannot draw an inference that he was insane from the fact that he destroyed his own life.

* Opinion filed June 3d. To appear in vol. 42 Md. Reports.

Held, that these instructions stated the law more explicitly and favorably for the insurer than any American authority brought to the attention of the court, and a finding of the jury that the insured killed himself in a fit of insanity, as stated in these instructions, if supported by evidence, must be conclusive against the insurer.

Judgment affirmed.

MARSHALL & FISHER, *for Appellant.*

J. ALEX. PRESTON, *for Appellee.*

MILLER, J.

The insurance company defends this action under the clause in the policy which makes it void if the assured "shall die by his own hand or act." It is now too well settled to admit of question that this clause is not to be construed as comprehending every possible case in which life is taken by the party's own act. For instance, all the authorities concur in the view that an unintentional or accidental taking of life is not within the meaning and intention of the clause. Thus if by inadvertence or accident a party shoots himself with a gun or pistol, or takes poison by mistake, or in a sudden frenzy or delusion tears a bandage from a wound and bleeds to death, in the literal sense of the terms he dies by his own act; yet all the decisions agree that a reasonable construction of the proviso, according to the plain and obvious intention of the parties, would exclude such cases from its operation. There is much conflict of judicial opinion as to what in other respects is its true construction. The English courts have determined that the clause includes all intentional acts of self destruction, whether criminal or not, and that insanity, in order to prevent the clause from operating, must have progressed so far, or be of such a character, as to render the party unable to appreciate and understand the nature and physical consequences of the act he was committing, and that the question whether he was at that time in a state of mind to be morally and legally responsible for his acts is immaterial. Borradaile vs. Hunter, 5 M. & G., 639; Clift vs. Schwabe, 3 M., G. & S., 437. The rejection of this latter consideration met, however, with the strong dissent of some of the ablest of the English judges. C. J. Tindall, C. B. Pollock and Cresswell and Wightman, JJ., held that looking at the words themselves, and the context and position in which they are found, a felonious killing of himself and no other was intended to be excepted from the policy.

That was the construction placed by C. J. Tindal upon the proviso in Borradaile vs. Hunter, and the clause before us is equally open to the same application of the maxim *noscitur a sociis* and to the

same answer that was given to it by a majority of the court in that case.

There is also a diversity of opinion upon the same subject in this country. In Dean vs. American Mutual Life Insurance Company, 4 Allen, 96, the court, in a very elaborate opinion by C. J. Bigelow, which is generally considered as adopting and following Borradaile vs. Hunter, use this language, "If the death was caused by accident, by superior and overwhelming force, in the madness of delirium or under any circumstances from which it may be fairly inferred that the act of self destruction was not the result of the will or intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted within the meaning of the proviso. A party cannot be said to die by his own hand, in the sense in which these words are used in the policy, whose self destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake, or accident, or of other circumstances over which the will can exercise no control. And in the more recent case of Cooper vs. Massachusetts Insurance Company, 102 Mass., 227, the same court declares that this limitation is in substance the same as that which the English cases have adopted. In Eastabrook vs. Union Mutual Life Insurance Company, 54 Maine, 224, the judge at the trial instructed the jury that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff could recover, and the jury found specially that the self destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. The court, in a well reasoned opinion by Chief Justice Appleton, after concurring in the construction of the clause and views expressed by Chief Justice Tindal in Borradaile vs. Hunter, add: But whether these views are correct or not, the defendants had the benefit of instructions in entire conformity with the law as stated by the Supreme Court of Massachusetts in Dean vs. American Mutual Insurance Company, and the jury have found the facts such as in accordance with the law of that case would justify their verdict. The Court of Appeals of New York, in Van Zandt vs. Mutual Benefit Life Insurance Company, 55 N. Y. Rep., 169, (3 Insurance Law Journal, 208,) admit the clause would not apply if the party committed the act under the influence of some insane impulse which he could not resist; but insist that no court has gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary

and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse, or want of power or will or self control, is sufficient to take the case out of the proviso; that the prevailing opinion in Breasted vs. The Farmers' Loan and Trust Company, 4 Selden, 299, did not undertake to overrule Borradaile vs. Hunter, and Clift vs. Schwabe; and that in Life Insurance Company vs. Terry, 15 Wallace, 580, the question of the capacity of the deceased to appreciate the moral character of the act was not involved, and all that is said on that subject in the opinion is *obiter*. Whether this be a just criticism upon the judgment of the Supreme Court, or whether—if that high tribunal did definitely adjudicate in the case referred to, that inability to appreciate the moral character of the act, or to distinguish between right and wrong, prevents the operation of the clause—such be its just and true construction, are questions upon which we express no opinion, because in our judgment the case before us falls clearly within the line of adjudications which have adopted and followed the law of the English cases.

The act of self destruction in this case was by hanging, and in granting the plaintiff's two prayers the court instructed the jury that the clause in question would not prevent a recovery if they found from the evidence, first, that the deceased killed himself in a fit of insanity which overpowered his consciousness, reason and will, and thus acted from a mere blind and uncontrollable impulse, or second, that he killed himself in a fit of insanity impelled by an insane impulse he could not resist. They were also further instructed, at the instance of the company, and by the court in modifying one of the defendant's prayers, first, that if they found the deceased destroyed his own life, then they should find for the defendant, unless they believe from the evidence that he was at the time of such self destruction impelled thereto by insane impulse which the reason left him did not enable him to resist, and the presumption is that he was not impelled thereto by any such impulse, in the absence of evidence to the contrary, and such evidence must relate to the precise time of the occurrence if he was only subject to fits of insanity. Second, that after they are satisfied he died by his own hand, it becomes incumbent on the plaintiff on her part to offer proof sufficient to prevent the operation of the clause, and she does not comply with such exigency by proof merely that he was insane at times; she must prove that he was insane when the act was committed, and in the absence of proof of his condition at the precise time when the act was committed they

must presume he was then sane, and they cannot draw an inference that he was insane from the fact that he destroyed his own life.

These instructions state the law more explicitly and more favorably for the insurer than is found in any of the American authorities to which we have referred or to which our attention has been called in argument. They exclude altogether the idea of any exercise of volition in the commission of the act, and the power to refrain from doing it. If a man's consciousness, reason and will are overpowered, and he is impelled to the act by an insane impulse which he cannot, or which the reason he has left does not enable him to resist, how can it be any more justly said that the resulting death was by "his own hand or act," than if he had killed himself by accident or mistake? Were it possible for one in that condition, and acting under such an impulse, to possess sufficient power of mind and reason to understand the physical nature and consequences of the act, and to have a purpose to cause his own death, still, as he is deprived of all power of resistance he does the act involuntarily, and it is impossible to call it "his voluntary and willful act." In our opinion the instructions given cover this part of the case and state the law most favorably for the defense. There was consequently no error in the rejection of the appellant's other prayers on the same subject.

But special exception was taken to the plaintiff's prayers, upon the ground that there was no evidence to sustain them, and substantially the same question is presented in some of the defendant's rejected prayers. We have carefully examined the testimony in the record on this subject, and are unable to say (as we must to sustain this objection) there was no evidence legally sufficient to authorize a jury to infer and find that the deceased killed himself in a fit of insanity, as stated in these instructions.

Judgment affirmed.

SUPREME COURT OF INDIANA.

NOVEMBER TERM, 1874.

Appeal from the Floyd Circuit Court.

THE MUTUAL BENEFIT LIFE INS. CO.

vs.

EMELINE J. CANNON.*

In a suit for recovery on a life policy it was sufficient to set forth in the complaint the amount of premium paid down, and annually thereafter, as the consideration substantially in the words of the policy. It was not necessary to set forth the accruing obligations.

The declaration of the beneficiary to the company that the truthfulness etc. of the answers of the insured should form the basis of the contract, did not need to be set forth in the complaint; it was not the foundation of the action.

Where two paragraphs of the answer were essentially the same, and allowed the introduction of the same evidence, to strike out one was not error.

Where the application of the beneficiary made the truth etc. of the insured's answers the basis of the contract, it was not error to strike out an interrogatory in the answer to the complaint intended to elicit only the beneficiary's knowledge of the truth or untruth of insured's answers. Such knowledge was immaterial.

To an interrogatory to be answered along with their general verdict, whether or not the doctors examined the urine and found fibrinous casts, the jury answered, "the weight of the evidence justified the jury in answering No."

Held, that there was no error in refusing to require a fuller answer.

To the question, whether or not insured had disease of kidneys for which he received medical treatment within a certain time, the jury replied, "He may have received medical treatment for that disease; but if he did, we believe he received treatment for a disease he did not have."

Held, that this answer was sufficient.

Where the main question concerned the bodily health of the insured, involving a question difficult to decide, and the contradictory evidence of experts, a finding that is in serious conflict with some parts of the evidence will not call for a new trial where the verdict is not so groundless as to startle the sense of justice.

Any variance between any pleading and copy of a written instrument filed, as to matter of description, or legal effect, may be amended at any time as of course before judgment, without a continuance.

The report of a physician adopted by both parties as examiner, though not the

* Decision rendered January 12, 1875.

regular examiner of the company, was proper rebutting evidence against the company.

The introduction of a conversation between the agents of the company on the subject in controversy and within the scope of their agency, by the claimant, was not error.

General instructions of a company to its agents not binding on the claimant are not evidence for the jury.

It was not error to refuse to submit questions to the jury whose decisions either way would not control the general verdict.

The answers were warranties. The insured, in answer to the question whether he had had dropsy or disease of the kidneys within ten years, said No. To the question whether he had any sickness within the last ten years, answered "Erysipelas in 1863; severe cold this spring." The court instructed that the first answer was a warranty, and if untrue they must find for the company, but refused to instruct that if insured had been sick with dropsy, or disease of the kidneys, or dyspepsia, or disease of the lungs, they must find for the company.

Held, that there was no error; the instructions covered those asked for concerning the first two diseases, while the insured does not warrant that he had not been sick with the two last.

Judgment affirmed.

GEO. V. HOWE, JOHN H. STOTSENBURY, THOMAS M. BROUSE, *for Appellant.*

J. S. DAVIS, and A. DOWLING, *for Appellee.*

BIDDLE, J.

Emeline J. Cannon, on the first day of July, 1868, being desirous of effecting an insurance on the life of her husband, John R. Cannon, for her own benefit, made a "declaration" accordingly to the Mutual Benefit Life Insurance Company, agreeing therein that the answers of said John R. Cannon, and those of his physician and friend, should be the basis of the contract between herself and the company, and that if any untrue or fraudulent allegation was contained in those answers, or in her "declaration," all moneys which were paid to said company on account of assurance made in consequence thereof, should be forfeited for the benefit of the company. The questions (among others) put by the company to John R. Cannon, and the answers thereto, were as follows:

Question 10.—Has the party had since childhood, disease of the heart, rupture, fits, dropsy, liver complaint, bilious colic, rheumatism, gout, habitual cough, bronchitis, asthma, spitting of blood, consumption, paralysis, apoplexy, insanity, fistula, ulcers, or disease of the kidneys or bladder, and which? Answer. No.

Question 11.—Has the party had any sickness within the last ten years? if so, what? Answer. Erysipelas, in 1863; severe cold this spring?

Question 12.—Has the party now any disease or disorder? if so, what? No.

Question 15.—Has any company declined to insure the party? if so, what company, when, and for what reason? Answer. No.

The question (among others) put to Peleg M. Wilcox, the examining physician, concerning John R. Cannon's condition, and the answer to it, was as follows:

Question 4.—Has he at any time had apoplexy, insanity, rheumatism, gout, dropsy, bilious colic, palsy, symptoms of disease of the heart, liver or kidneys, aneurism, rupture, spitting of blood, asthma, chronic cough, affection of the lungs, or other viscera, varicose, or other ulcers or any organic disease? Answer. No.

These were the only questions and answers put specially in issue. The pleadings were as follows:

Complaint.—Demurrer to complaint for want of sufficient facts. Overruled. Exceptions.

Answer.—1. General denial.

2. That Emeline J. Cannon applied to the company to obtain a policy on the life of John R. Cannon; that she made her "declaration" accordingly, and answered certain questions therein; that John R. Cannon made answer to questions 10, 11, 12 and 15, as above; that Peleg M. Wilcox, the examining physician, made answer to question 4, as above; that George H. Deval, the friend of John R. Cannon, made answer to certain questions; that it was agreed that said "declaration," questions and answers should be the basis of the contract of insurance; that the principal officer of said company is in the city of Newark and State of New Jersey; that the company relied on said statements and answers as the basis and warranties of said contract; that the answers of John R. Cannon to questions 10, 11, 12 and 15, were untrue; that the answer of Peleg M. Wilcox to question 4 was untrue, stating wherein;—all of which is formally alleged with proper negations.

3. Similar to 2, except that it omits question 15, and Cannon's answer thereto, and question 4, with Wilcox's answer, and alleges that Cannon well knew that his answer to questions 10, 11 and 12 were false.

4. Substantially the same as the 3d, with the allegations that the answers to questions 10, 11 and 12 were false and fraudulent, by which the appellant was deceived. With the fourth paragraph there was also filed an interrogatory, which paragraph and the interrogatory on motion and over objection were stricken out by the court. Excep-

tions. Replies and denial were filed to the second and third paragraphs of answer. Upon these issues the cause was tried by a jury. General verdict for appellee $10,627.60, and answers to special interrogatories 3 and 5. Motion by appellant for fuller answers to interrogatories 3 and 5. Objection; overruled; exception. Motion for new trial; overruled. Motion in arrest of judgment; overruled; exceptions. Judgment on the verdict. Appeal.

The errors assigned are:

1. Overruling appellant's motion to have the complaint made more specific.

2. Overruling the demurrer to complaint.

3. Striking out the fourth paragraph of answer.

4. Striking out the interrogatory filed with the fourth paragraph of answer.

5. Refusing to require the jury to more fully answer interrogatories 3 and 5 propounded to them.

6. Overruling the motion for a new trial.

In support of the first assigned error it is insisted that the consideration for the policy is not sufficiently set forth in the complaint.

The language is, "in consideration of the sum of three hundred and eighty-seven dollars in money then and there paid to her, and a like amount to be paid to her annually on the 1st day of July, in every year," etc. This is substantially in the words of the policy, and is sufficient. It was not necessary to set out the accruing obligations, if any such were separately given. It is also insisted that the "declaration" of Emeline T. Cannon, made to procure the policy, should have been set forth in the complaint. This paper was not the foundation of the action, and therefore need not to have been made an exhibit. The Commonwealth Insurance Company vs. Monninger, 25 Ind. R., 352.

In support of the second error alleged by the appellant, it is insisted that the appellee's "declaration" was a part of the contract, and therefore should have been alleged in the complaint. Let it be considered a part of the contract, it was not a part which the appellee was bound to aver in her complaint. It belongs rather to the defense. The paper was the obligation of the appellee and belongs properly to the appellant.

The "declaration" might be useful as an instrument of evidence, but it was not necessary to make it a part of the complaint. It is further shown that the copy of the policy made an exhibit in the complaint was neither signed nor countersigned. Assuming this to be a fatal defect at the time, it was afterward healed by amending the

exhibit on trial according to the original policy. There is no error in overruling the demurrer to the complaint. Striking out the fourth paragraph of the appellant's answer is insisted on as the third error. We can discover no substantial difference between the third and fourth paragraphs of the answer. It was therefore no error to strike out the fourth. The same evidence could have been introduced under either. Nor was it error, as is insisted by the fourth assignment, to strike out the interrogatory put to the appellee, and filed with the fourth paragraph of answer.

The interrogatory was in these words:

"At the time of making application for insurance with the defendant upon the life of said John R. Cannon, and at the time when the said John R. Cannon signed the answers to interrogatories which appear in Exhibit "B," did you not know that the said John R. Cannon had been, within six months before that time, affected with a disease of the kidneys which required and received medical treatment?"

This interrogatory is not adapted to seek the truth or untruth of John R. Cannon's answers made to the appellant. It could elicit only the appellee's knowledge of the truth or untruth of said answers.

As we hold the answers of John R. Cannon to be warranties to the appellant of the facts therein stated, the appellee's knowledge of their truth or untruth is immaterial. Kaerner vs. Baldwin, 39 Ind. R., 474; Cacks vs. Izard, 4 Am. Law Times R., 68.

The court was right, therefore, in rejecting the interrogatory as being irrelevant to any issue formed by the pleadings.

The fifth assigned error is refusing to require the jury to more fully answer the third and fifth interrogatories propounded to them to be answered with their general verdict. The third interrogatory is in these words:

"Did or did not Doctors Lewis and Coleman Rodgers, on May 16, 1868, examine the urine of said John R. Cannon, and find it loaded with albumen and containing fibrinous casts?"

The answer to which is in these words:

"The weight of the evidence justifies the jury in answering No." It was the duty of the jury to answer the question according to the weight of evidence, and they say that the weight of the evidence justifies them in answering *No.* We can see no objection to the form of this answer.

The fifth question, with its answer, was as follows:

Question. Within a year prior to July 1st, 1868, did or did not the said John R. Cannon have a disease of the kidneys, for which within

that period he received medical treatment?" Answer. "He may have received medical treatment for that disease, but we believe if he did he received treatment for a disease he did not have."

This answer is neither elegantly nor tersely expressed, but we think it is equivalent to saying: We believe he did not receive such treatment for a disease of the kidneys.

Though the answer is informal we think it is substantially good.

Overruling the motion for a new trial is assigned as the 6th error. It is urged that the verdict is not supported by the evidence. It must be confessed that some parts of it are in serious conflict, yet there is much that harmonizes. The main question was the bodily health and condition of John R. Cannon; a very difficult question—one that often baffles the widest experience and the highest attainments of science. Learned doctors disagreed. It is not surprising, then, that there is room for fair differences of opinion in the most candid minds. This degree of uncertainty is not sufficient to disturb the findings. The verdict is not so groundless as to startle the sense of justice. Several other points are made under this assignment of errors.

It is contended that the court below erred in permitting the appellee, upon the trial, to amend Exhibit "A" so as to conform with the policy. This point was noticed incidentally in ruling upon the demurrer to the complaint. We think there is no error here. The appellant cannot complain of surprise. She could have had inspection of the original policy, before pleading or trial at any time. "Any variance between any pleading and copy of a written instrument filed as to matter of description, or legal effect, may be amended at any time as of course before judgment without causing a continuance." 2 G. & H., pp. 104, § 78. Maxwell vs. Day, 45 Ind. R.

Refusing to allow the appellant to prove the locality of her principal office, and whence her policies issued. This is claimed to be error, but we do not see the validity of the point. Nor was there error in permitting the appellee to read to the jury as evidence the report of Dr. Andrew Neat, over the appellant's objection. Although Dr. Neat was not the regular examining physician of the company, yet there was evidence tending to show that he was adopted by both parties as the examining physician in this case; and we think it was proper rebutting evidence.

There was no error in permitting the appellee to introduce a certain conversation between the appellant's agents. It was about the subject matter in controversy, and there is strong evidence tending to show that it was within the scope of their agency. Nor was there

any error in refusing to allow the appellant to rebut a conversation testified to by Andrew Neat. The conversation itself was rebutting evidence.

The general instructions of the appellant given to her agents are not binding on the apellee. There was therefore no error in refusing them to go to the jury.

It is insisted that striking out interrogations 1, 2, 4 and 6, propounded to the jury, over the appellant's objections, was error.

The questions are in the following words:

1. Did or did not John R. Cannon, the party upon whose life the risk was taken by policy 52,503, sued on in this action, within three months prior to July 1st, 1868, consult Dr. Lewis Rodgers and Dr. Coleman Rodgers of Louisville, Kentucky, as to his, said Cannon's, health?

2. Was such conversation had and at what particular time?

4. Was or was not the said John R. Cannon informed by said Dr. Lewis Rodgers, or by said Dr. Coleman Rodgers, on May 16th, 1868, after an examination of the said Cannon's urine, that he had a disease of the kidneys?

6. Did or did not the said John R. Cannon, in the winter of 1867 and 1868, and in the spring of 1868, complain in the presence of Mrs. Angeline Rodgers, wife of John D. Rodgers, or in the presence of John D. Rodgers, that he had a very severe pain in his head, and that he had disease of the kidneys, and that his kidneys were affected?

These interrogations do not present questions vital to the overthrow or establishment of a general verdict. They could decide only as to certain parts of evidence. Their decision either way would not control a general verdict. There was no error in this ruling.

Under this assignment of error it is insisted that the refusal of the court to give the following instructions to the jury was error:

2d Instruction. If you shall find from the proof that the answer of the said John R. Cannon, to the 11th interrogatory propounded to him in exhibit "B," was untrue in this, that within ten years before the 1st day of July, 1868, the said John R. Cannon had been sick with a disease of the kidneys, or with a disease of the lungs, then you must find for the defendant.

5th Instruction. If you shall find in this case that the said John R. Cannon, within ten years before the 1st day of July, 1868, had had dropsy, or any disease of the kidneys, or had been sick within that time with dropsy, dyspepsia, a disease of the kidneys, or any affection of the lungs, then you must find for the defendant, and it will not be

material for you to consider whether John R. Cannon in fact died from any of the diseases named in this instruction or from some other cause.

The appellant insists that these instructions are particularly applicable to question 11, and the answer.

It will be seen that question 10 includes dropsy and disease of the kidneys, two of the diseases contemplated in the instructions refused.

The court instructed the jury in reference to question 10 and the answer to it, that they constituted a warranty of the contract of insurance, and that if the jury found the said answer untrue, then they must find for the defendant. This instruction covers the same ground as to the dropsy and disease of the kidneys, as that asked for in the instructions refused. John R. Cannon nowhere warrants, and nowhere says that he has not been sick with the dyspepsia or disease of the lungs within the last ten years. The effect of the instructions refused, if given, would have been to tell the jury that if John R. Cannon had been sick with the dyspepsia or disease of the lungs, however slight or temporary the attack might have been, within ten years, then they must find for the defendant. This would have been wrong. The instructions were rightly refused.

The other points made under the 6th assignment of errors have been adversely noticed.

The 7th and only remaining error assigned is overruling the motion in arrest of judgment. We have held the complaint to be good. The appellant has shown us no ground in support of this assignment, and we have been unable to find any in the record.

For the general principles decided in this case see the Dayton Insurance Co. vs. Kelly, 24 Ohio State R., 345.

The evidence is all before us. We can find no error in fact. There is no error in law.

The judgment is affirmed with costs.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

GEORGE HEARNE

vs.

NEW ENGLAND MUTUAL MARINE INS. CO.

Equity jurisdiction will be applied to reform a written contract containing or omitting stipulations contrary to the common intentions of the parties. But the mistake must be mutual, and the minds of the parties must have met. This jurisdiction is applied, where proper, to insurance contracts.

Application was made for insurance on a charter "from Liverpool to Cuba and load for Europe, via Falmouth," etc. The company replied, "As requested we have entered $5,000 on charter to port in Cuba, and thence to port of advice and discharge in Europe." The vessel proceeded from Liverpool to a port of discharge in Cuba, and thence to another port in Cuba where she loaded, and was lost on her return voyage. It was claimed that the use of two ports was justified by a well-established usage.

Held, that the language of the answer to the application was plain and admitted but one interpretation. The insured must be presumed to have understood it and therefore equity cannot reform on account of ambiguity.

Held, that usage is not admissible to contradict what is plain in a written contract and alter the evident meaning of the parties in the language used.

Held, that the case is one of deviation, where the law annuls the contract as to the future, and forfeits the premium, and equity must here follow the law.

Decree of the Circuit Court affirmed.

SWAYNE, J.

This is an appeal in equity from the decree of the Circuit Court of the United States for the district of Massachusetts.

The bill was filed by the appellant to reform a contract of insurance. He claims that the policy as made out does not conform to the agreement of the parties—supplementing that agreement with the usage or custom which he insists entered into and formed a part of it.

On the 7th of May, 1866, he made his application by letter to the company for insurance. He said: "The bark Maria Henry is chartered to go from Liverpool to Cuba and load for Europe, via Falmouth for orders where to discharge. Please insure $5,000 on this charter valued at $16,000, provided you will not charge over four per cent. premium." On the ninth of that month the company through its president replied: "Your favor of the 7th is at hand. As requested we have entered $5,000 on charter of bark Maria Henry, Liverpool to port in Cuba, and thence to port of advice and discharge in Europe, at four per cent."

The policy was made out the same day and described the voyage as follows: "At and from Liverpool to port in Cuba, and at and thence to port of advice and discharge in Europe." Thereafter the policy was delivered to the assured and received without objection. The vessel was loaded with coal at Liverpool and proceeded thence to St. Iago de Cuba. There she discharged her outward cargo. She went thence to Manzanillo, another port in Cuba, where she took on board a cargo of native woods. On the 7th of September, 1866, she sailed thence for Europe, intending to go by Falmouth for orders. Upon the 10th of that month, on her homeward voyage, she was lost by perils of the sea. Due notice was given of the loss, and it is admitted to have occurred as alleged in the bill. The company refused to pay, upon the ground that the voyage from St. Iago de Cuba to Manzanillo was a deviation from the voyage described in the policy, and therefore put an end to the liability of the assured.

On the seventh of December, 1868, two years after the loss occurred, Hearne brought an action at law against the company. The court held that he was not entitled to recover, by reason of the deviation before stated. He failed in the suit. On the 16th of January, 1871, he filed this bill, and prayed therein to have the contract reformed so as to cover the elongated voyage from St. Iago to Manzanillo.

The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent.

The parties will be placed as they would have stood if the mistake had not occurred. Kerr on Fraud and Mistake, pp. 419, 420.

The party alleging the mistake must show exactly in what it con-

sists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. Beaumont vs. Bramley, 1 T. & R., 41-50; Marquis of Breadalbane vs. Marquis of Chandos, 2 M. & C., 711; Fowler vs. Fowler, 4 D. G. & Jones, 265; Sels vs. Sels, 1 Dr. & S., 42; Loyd vs. Crocker, 19 Beav., 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. Rook vs. Lord Kensington, 2 K. & J., 753; Eaton vs. Bennet, 34 Beavan, 196. A mistake on one side may be ground for rescinding, but not for reforming a contract. Mortimer vs. Shortall, 2 Dr. & War., 372; Sels vs. Sels, *supra.*

Where the minds of the parties have not met, there is no contract, and hence none to be rectified. Bentley vs. McKay, 31 L. J. Chy., 709; Baldwin et al. vs. Midleburger, 2 Hall, 176; Coles vs. Cowen, 10 Paige 534; Calverley vs. Williams, 1 Vesey Jr., 211.

This jurisdiction is applied where necessary and proper to the reformation of contracts of insurance. Harris vs. Col. Co. Ins. Co., 18 Ohio R., 116; Fireman's Ins. Co. vs. Powell, 13 B. Monroe, 311; Nat. Fire Ins. Co. vs. Crane, 16 Md., 260.

Here the application was to insure on a charter, "from Liverpool to Cuba, and load for Europe, via Falmouth," etc. This was indefinite as to Cuba, and may have been regarded by the company as ambiguous. The answer was: "as requested, we have entered $5,000 on charter to port in Cuba, and thence to port of advice and discharge in Europe." This answer shows clearly two things: (1.) How the company understood the proposition. (2.) That they agreed to insure according to that understanding, and not otherwise.

There was no mistake or misapprehension on their part. The circumstances show there could be none.

The correspondence between the parties constituted a preliminary agreement. The answer to Hearne's proposal was plain and explicit. It admitted of but one construction. He was bound carefully to read it, and it is to be presumed he did so. In that event there was as little room for misapprehension on his part as on the part of the company. Such a result was hardly possible. There is nothing in the evidence which tends to show that any occurred. The inference of full and correct knowledge is inevitable. It is as satisfactory to the judicial mind as direct evidence to the same effect would be.

So far, the complainant's case is as weak in equity as it was at law. But it is said there was a usage that vessels going to Cuba might visit at least two ports—one for discharge and the other for reloading. It

is insisted that this usage authorized the voyage to Manzanillo; that the voyage was not a deviation; that it in no wise affected the liability of the company in equity; and that hence the contract of the parties in this particular should be reformed accordingly.

It is not necessary that the usage relied upon in cases like this should have been communicated or known to the assurers. Lord Mansfield said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and if he does not know it he ought to inform himself." Noble vs. Kennedy, 2 Doug., 492; see also 1 Duer on Ins. and the cases there cited.

Usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract. Bracket vs. Roy, Ex. Ass. Co., 2 Cr. & J., 250; Crofts vs. Marshall, 7 C. & P., 607; Philips vs. Briard, 1 H. & M., 21. If the words employed have an established legal meaning, parol evidence that the parties intended to use them in a different sense will be rejected, unless if, interpreted according to their legal acceptation, they would be insensible with reference to the context or the extrinsic facts. Wigram on Wills, 11–12. If no such consequence is involved, proof of usage is wholly inadmissible to contradict or in any wise to vary their effect. Yates vs. Pym, 6 Taunt., 446; Bracket vs. Roy. Ex. Ass. Co., *supra.*

In no case can it be received where it is inconsistent with, or repugnant to, the contract. Otherwise it would not explain, but contradict and change the contract which the parties have made—substituting for it another and different one, which they did not make. Holding vs. Pigot, 7 Bingham, 465; Clarke vs. Roystone, 13 M. & W., 752; Treeman vs. Loder, 11 A. & E., 589; Muncey vs. Dennis, 1 H. & N., 216. To establish such inconsistency it is not necessary that it should be excluded in express terms. It is sufficient if it appear that the parties intended to be governed by what is written and not by anything else. Hutton vs. Warren, 1 M. & W., 477; Clarke vs. Roystone *supra.*

The principle of the admission of such testimony is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the parties—the question being, what did they mean by the language they employed? 1 Greenl. on Ev., § 295a. What is implied is as effectual as what is expressed. U. S. vs. Babbit, 1 Black, 61. The expression and the implication in this case are equally clear. It is expressed that the vessel should proceed to a port in Cuba, and thence to Europe. It is implied that she should visit no other port in Cuba. *Expressum facit tacitum cessare.* Under these circumstances, usage can have no application, and proof

of its existence is inadmissible. But the usage relied upon is not sustained by the evidence.

It appears that a large proportion of the vessels, perhaps four fifths which go laden with coal to Cuba, take on their return cargo elsewhere on the island than at the port of discharge. A few use the same port for both purposes. But the proof is also that the contract in all such cases is expressed according to the intent. There is no proof that where the policy is upon a voyage to one port and back, the vessel may proceed to another port before her return, and that by usage or otherwise, the latter voyage as well as the former shall be deemed to be within the policy.

Viewing the case in this aspect, we find nothing that would warrant the interposition of a court of equity.

We are asked, if we decline to reform the contract, to decree the return of the premium. This we cannot do. We regard the case as one of mere deviation. It is essentially of that character. In that class of cases, the law annuls the contract as to the future, and forfeits the premium to the underwriter. Here equity must follow the law. We cannot apply a different rule.

The decree of the Circuit Court affirmed.

SUPREME COURT—DISTRICT OF COLUMBIA.

MARTHA J. DAY, *Plaintiff*,

vs.

THE MUTUAL BENEFIT LIFE INS. CO.*

Where the proofs of death furnished to the company included an affidavit from the physician, which, if true, tended to show that the policy had been reinstated under misrepresentations by the insured, *Held*, that the wife of insured, who was the plaintiff, was not absolutely concluded by such affidavit, which was not required by the terms of the policy and which she might not have seen.

The insured, on applying for a reinstatement of the policy, furnished certificates of his health and paid the premium.

* See 3 Ins. Law Journal, p. 253.

Held, that he was not obliged to inform the company of any subsequent change in his health prior to the delivery of his renewal receipt, two weeks later.

A. G. RIDDLE, and FRANCIS MILLER, *for Plaintiff.*

EDWIN L. STANTON, *for Defendants.*

MACARTHUR, J.

This is an action to recover $5,000, the amount of a policy upon the life of Richard B. Day, the plaintiff's husband. At the close of the plaintiff's testimony, the counsel for defendant prayed the court to instruct the jury that on the evidence the plaintiff was not entitled to recover; but the court refused so to instruct the jury, and to this ruling the defendant alleged its first exception. This instruction was asked because the preliminary proofs furnished to the company of the death of said Day embraced an affidavit of one Dr. White, who stated, among other things, that the deceased had been sick five months, and that he died on the 22d of January, 1871, of pulmonary consumption, which, if true, would have a tendency to show that at the time the policy was reinstated, Day was suffering from the disease that caused his death.

To make this point clear, it is necessary to understand that at the trial before the chief justice the plaintiff put in evidence the affidavits of herself and of several other persons which defendant produced and admitted were furnished to the company for the purpose of showing due notice and proof of the death of her husband to it. These affidavits were on the same paper that had been provided in blank form by the defendant's agent, and were all offered except the one made by Dr. White; but the court required that the same preliminary proofs of death should be put in evidence as an entirety, which was accordingly done. Now the counsel of the plaintiff contended that the statement made by Dr. White conclusively showed that Day had untruly represented the condition of his health when the policy was reinstated; but this was one of the defenses relied upon to defeat the action, and the burden of proving it was upon the company. In that stage of the case, the defendant could ask for no more than that the case should be submitted to the jury, and not that it should, in effect, be withdrawn from it. If the testimony had been closed on both sides, the defendant might have a right to rely upon the statement of Dr. White as an admission by the plaintiff if it had been furnished by her, and she was aware of its contents. The proof of death was ample without it and this particular statement was brought into evidence at the re-

quest of the defendant, and against the objection of the plaintiff. It was not required by the policy, nor are the circumstances or causes of death necessary to be stated under any of its provisions. It did not appear that the plaintiff had ever seen it. There might be a presumption to that effect from the circumstances that it accompanied the other proofs, but that was a matter for the consideration of the jury. In view of all this, we think the court below was right in holding that the plaintiff was not absolutely concluded by the statement of another party as to the cause of her husband's death, and therefore the prayer was properly overruled. Cluff vs. Ins. Co., 13 Allen, 308; S. C., 1 Big., 215.

After the testimony was closed, defendant asked the court to instruct the jury, that if the said Day had any derangement of health between October 1st and October 14th, 1870, and concealed that fact from the company, the plaintiff could not recover. It appears that the premium upon the policy was not paid on the 16th July, 1870, when it was due, and that on the 1st of October following, Day applied to the defendant's agent, in this city, to have it reinstated, that he then paid the premium and also furnished his own certificate that he was in sound health, and these, together with the certificate of the examining physician of the company, to that effect, were forwarded to its principal office in Newark.

The renewal receipt was delivered on the 14th. Now the instruction asked for, proceeds upon the assumption that Day was under obligation to furnish the company with further statements of any variation in his physical condition intermediate these two dates. But there was no rule of the defendant requiring such additional statements. Day had complied with every condition in regard to the renewal of a lapsed policy, and no further representations were required or contemplated. Whether the contract took effect only from the time of delivery cannot affect the rights of the plaintiff, for it was delivered upon the faith that he had paid the premium and made the required certificate, and there was no rule or contract calling for any further statement as a condition of such delivery. The grounds upon which forfeiture of these policies depend are sufficiently numerous without increasing the number by others which are not provided for. We think the exception was not well taken.

The instruction to which the fourth exception applies was, in effect, that the plaintiff was not to be responsible for any of the statements in Dr. White's affidavit, unless she had actual knowledge of its contents, and adopted them, and used them as her own declarations.

The provision in the policy is, that the company will pay the insurance within ninety days after due notice and proof of death of said Richard B. Day; upon the performance of this requirement the liability is created. The circumstance and cause of death are not called for by the contract, but the company in their printed forms have a preliminary affidavit headed "medical proof of loss, and cause of death," and this is the one made by Dr. White. This is more than the contract calls for. The plaintiff swears positively that the said affidavit was not prepared by her direction or authority; she was aware that Dr. White was preparing some paper in connection with the insurance, but it is doubtful whether she ever saw it or heard it read. If the statement had been in her own affidavit, or had it been a necessary part of the proofs, the defendant would be justified in relying upon it as an admission and according to some authority an estoppel. Campbell vs. Ins. Co., 10 Allen, 213. But it was neither required nor necessary; we are of the opinion that the company had no right to rely upon it unless she was informed concerning its contents and purpose.

The doctrine that the company was chargeable with knowledge of every fact which their physician might have discovered by examination, with the condition of Day's health, was held not to apply to the case, and the jury were distinctly told that if Day was not in sound health on October 1st, 1871, their verdict must be for the defendant. We cannot see that the defendant was injured by the remarks of the court in refusing the prayers asked for by the plaintiff, nor are we disposed to indulge in nice criticism of the language, and when it is evident that it had no effect upon the verdict.

On the whole record we think the judgment must affirmed.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1874.

THE EQUITABLE SAFETY INS. CO., *Appellant*

vs.

GEORGE HEARNE.

Application was made for insurance "on the charter-party of the bark Maria Henry,—voyage from Liverpool to Cuba, and to Europe via Falmouth, for orders where to discharge." After some controversy regarding the rate, the company wrote, "We will write upon the charter of the bark Maria Henry, as proposed by you, Europe to Cuba and back to Europe at 3½ per cent. net. It is worth something, you know, to cover the risk at the port of loading in Cuba." The insured responded, "I accept your proposition. Please insure, at and from Liverpool to Cuba, and to Europe via a market port for orders where to discharge."

The policy was "on charter of bark Maria Henry, at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe."

The vessel proceeded to port of discharge and thence to another port of loading in Cuba, and was lost on her return voyage to Europe.

Held, that the correspondence formed a preliminary agreement, and the insured had a right to assume that the policy, which was intended to put the agreement in more full and formal shape, conformed to the agreement. The language of the company, "it is worth something, you know, to cover the risk of loading in Cuba," implies that the port of loading might be one other than the port of discharge, and therefore demanded an enhanced premium.

Held, that equity will reform the contract as expressed in the policy, to allow the use of a second port in Cuba.

Decree of the Circuit Court affirmed.

SWAYNE, J.

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of Massachusetts.

The controversy grew out of a contract of insurance upon the same charter-party as the case of Hearne against the New England Mutual Marine Insurance Company, just decided. [See p.]

On the second day of May, 1866, Hearne applied, by letter of that date, to the appellant, to "insure $4,000 on the charter-party of the bark Maria Henry, valued at $16,000, if you will not charge me more

than three per cent.; voyage from Liverpool to Cuba, and to Europe via Falmouth, for orders where to discharge. She will take her registered tonnage of coal."

On the fourth of that month the company replied: "We cannot write the charter of the bark Maria Henry at your rate, viz., three per cent, including coals, from Liverpool to Cuba. Our rate will be four per cent. for the voyage, to include coals."

On the seventh of that month Hearne answered, arguing against the rate proposed, and offered "3 per cent., or 4 per cent., 1½ per cent. to be returned if no loss."

On the day following; the company responded: "We will write upon the charter of the bark Maria Henry as proposed by you—Europe to Cuba, and back to Europe—at 3½ per cent net. It is worth something, you know, to cover the risk at the port of loading in Cuba.'

On the next day Hearne wrote: "I accept your proposition in reference to the insurance of the bark Maria Henry. Please insure $4,000 at 3½ per cent. on the charter valued at $16,000, at and from Liverpool to Cuba, and to Europe via a market port, for orders where to discharge."

The contract, as expressed in the policy, is for "four thousand dollars on charter of bark Maria Henry, at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe." The facts of the case are the same in all respects, down to the close of the litigation at law between the parties, inclusive, as those in Hearne vs. the New England Mutual Marine Insurance Company, as set forth in the opinion of the court in that case. That opinion is referred to for the particulars. [4 Ins. Law Journal, 582.]

Hearne having been defeated in his action at law, filed this bill for the reformation of the contract, as stated in the policy. The Circuit Court decreed in his favor. The company has brought the case here for review.

It is not denied that the correspondence constituted a preliminary agreement. Such clearly was its effect. The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company.

They tended to prevent such scrutiny and, if it were necessary, threw him off his guard.

The principles upon which a court of equity will exercise the jurisdiction invoked by the appellee were considered in the case before referred to. What was there said need not be repeated. In this case Hearne's proposition to the company was to insure upon the charter, "voyage from Liverpool to Cuba, and to Europe via Falmouth." The company's response, as before stated, was: We will insure "as proposed by you—Europe to Cuba—at 3½ per cent. It is worth something, you know, to cover the risk at port of loading in Cuba." This is the language of the parties, and it is the essence of the correspondence. Suppose the language of these sentences had been incorporated in the policy in this form: This company hereby insures $4,000 upon the charter of the bark Maria Henry as proposed by the assured, from "Europe to Cuba and back to Europe at 3½ per cent. net,"—the premium is enhanced "to cover the risk at port of loading in Cuba,"—what would have been the legal result? Can it be doubted that the policy would be held to cover alike the voyage to a port of discharge in Cuba, a voyage thence, if necessary, to a port of loading in Cuba, and a voyage from the latter to Europe? The "port of loading" is the only one mentioned in the letter. It seems to have been uppermost in the mind of the writer. The risk is referred to as a distinct and separate one. The implication is that the port might be one other than the port of unloading. The right to go to both rests upon the same foundation, and it is not more clear as to one than the other. What is implied is as effectual as what is expressed. The intent of the parties, as manifested, is the contract. Upon any other construction the important language as to "the port of loading" would be insensible and without effect. No other interpretation, we think, can reasonably be given to it.

In Dickey vs. the Balt. Ins. Co., 7 Cr., 327, the policy insured the vessel upon a voyage "from New York to Barbadoes, and at and from thence to the island of Trinidad, and at and from Trinidad back to New York." This court held that the words "at and from" protected the vessel in sailing from one port to another in Trinidad to take in a part of her cargo. Marshall, Chief Justice, said: "It is the settled doctrine of the courts of England that insurance at and from an island such as those in the West Indies, generally insures the vessel while coasting from port to port for the purpose of the voyage insured." He refers to Bond vs. Nutt, 2 Cowper, 601, and to Thelluson vs. Ferguson, 1 Doug., 360. The case of Cruikshank vs.

Jansen, 2 Taunt., 310, is to the same effect. These authorities fully sustain the proposition laid down. We are not aware that their authority has been questioned. They show the just liability of construction which obtains where contracts of insurance are involved.

In this controversy the clear terms of the preliminary agreement warranted the court below in overruling the departure from it found in the policy.

We have examined the case only in the light of its own inherent facts. We have not found it necessary to consider the usage alleged to exist at Liverpool touching voyages in the trade from that port to Cuba. It seems clear to us that the judgment below does not need any further support. We therefore forbear to remark on that subject.

The decree of the Circuit Court is affirmed.

SUPREME COURT OF MISSOURI.

MARCH TERM, 1875.

Appeal from St. Louis Circuit Court.

EDWARD EVERS, TRUSTEE OF CATHERINE EVERS AND ELIZA H. DUNSTAN, *Respondent,*

vs.

THE LIFE ASSOCIATION OF AMERICA, *Appell't.**

Where policies on life of insured were made payable to other parties to secure payment of notes given in exchange for their interest in lands, it is not competent for the company, acquainted with all the facts at the time of making the insurance, to show the lands were worthless in order to prove that the notes were without consideration.

The policies were made payable to the insured if he survived a certain period, otherwise to the beneficiaries.

Held, that the sole interest in the policies was in the insured during his life. The

* From the *Western Insurance Review.* Statement and brief by H. E. Mills, of counsel for respondent.

legal interest of the beneficiaries did not commence until after his death. Therefore there could be no joint interest and consequently no testimony of the insured was admissible to invalidate the policies against the beneficiaries.

The suit was brought against the company in the name of the husband as trustee for his wife.

Held, that under the statutes of Missouri the sole real interest was in the wife, and she was a competent witness in the case.

Judgment affirmed.

G. P. STRONG, and G. M. STEWART, *for Respondent.*

IRVIN Z. SMITH, and JAMES R. LACKLAND, *for Appellant.*

STATEMENT.—The case was tried at the Special Term, before a jury, and resulted in a verdict for the defendant. After an unsuccessful motion for a new trial and appeal to the General Term, the case was, for error of the court at Special Term, in refusing instructions and in receiving and excluding evidence, reversed and remanded. Thereupon, the defendant appealed from the judgment at General Term to the Supreme Court.

This was a suit on two policies of life insurance issued by defendant on the life of Robert Peel Clark, payable to Edward Evers as trustee for his wife, Catherine Evers, and Eliza H. Dunstan, wife of R. W. Dunstan, made to secure to the aforesaid two wives two notes of $5,000 each, made by said Clark, payable to the order of Edward Evers, trustee for Catherine Evers, and Eliza H. Dunstan. The notes were given for the dower interest of the wives in several large tracts of land which were turned in to the firm of Evers & Co., composed originally of Evers & Dunstan, and afterward of Evers, Dunstan & Clark, who, with some money and the delivery of these notes, purchased an interest in the firm of Evers & Co.

One defense set up by the company was the fact that the business of Evers & Co. was of no value, and that neither Evers nor Dunstan had any title to the same, and that therefore there was no consideration for the notes. On this point the plaintiff offered a large amount of evidence in rebuttal. The defense offered evidence tending to prove the insolvency of Dunstan, to which the plaintiff objected, because the same was irrelevant and incompetent, but the objection was overruled and the evidence admitted, to which action of the court exception was saved.

In rebuttal, plaintiff offered as a witness Catherine Evers, the beneficiary under one of the policies and notes, and wife of the plaintiff, to the admission of whom defendant objected. The court sustained the objection, to which action of the court exception was saved.

The principal objection, however, is to the refusal of the Special Term to give certain instructions offered on the part of the plaintiff which defined the law relating to insurable interest. It was conceded that there was evidence on which to base the instructions. The theory of the refused instructions was, that the company could not set up as a defense to an action on the policy any defense which Clark himself could not have set up on an action on the notes; that the issue was not who had the better title to the lands conveyed to Clark, but there being certain deeds conveying a title to Clark, and it being shown that he had an opportunity to, and did, inquire into the title and value of the same, and satisfied himself of the same, then it was immaterial whether there were other claimants to the lands, or whether the deeds were recorded or not. That there were warranties in the deeds made by Evers and Dunstan's vendors which would protect Clark in case of failure of title to the lands, and that even if there was a failure, it would not invalidate the notes of Clark. That the company was informed of the nature of the partnership agreement between the parties, and was informed as to the purpose for which the insurance was taken, and of the nature and extent of the insurable interest of the beneficiaries, and declared the same to be sufficient, and that this estopped the company from denying the insurable interest of the beneficiaries in the policies.

BRIEF.—I. Life insurance is not a contract of indemnity by which the creditor holding a policy is to recover from the insurance company only the amount actually expended by him.

Since Dalby vs. India and London Life Ins. Co., 15 C. B., 365; 2 Big. Life Cases, 371, the doctrine has been well settled both in England and America, that the contract of life insurance is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of certain annual premiums during his life, and that the circumstance that the debt was paid before the death of the debtor did not invalidate the policy. In this case, Parke, B., says: "The contract, therefore, in this case, to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law if the plaintiff had an interest thereon or not," and the sole question in that case was whether it was rendered illegal and void by the provisions of the statute 14 G. III. ch. 48. This statute required a pecuniary interest in the beneficiary, but the statute was not extended to Ireland or the colonies,

and has never had any force in America. The court remarks on the injustice of allowing any inquiry into the amount of the debt, so as to limit the amount of recovery, because the company has for a certain premium, proportioned to the amount of risk, agreed to pay a certain sum at the death of the subject insured. The policy of life insurance is a valued policy, and there may be a great disproportion to the amount of the debt and the amount of recovery on the policy. Ashley vs. Ashley, 3 Simons, 149; Miller vs. Eagle Life Ins. Co., 2 E. D. Smith, 268; S. C. 1 Bigelow, 375; Trenton Ins. Co. vs. Johnson, 4 Zab., 576. The American cases are collected in the note to Lord vs. Dall, 12 Mass., 115, found in 1 Bigelow, Life Cas., 154.

II. The existence of a debt at the time the policy becomes due is not essential to the validity of the policy in the hands of the creditor. Rawls vs. Am. Life, 36 Barb., 357; 1 Big. 549—affirmed in the Court of Appeals, 27 N. Y., 282; 1 Big. 558. In this case the debt had been for a time barred by the statute of limitations. The court say: "The contract is not to make any loss good, or to make compensation. The debt is not insured; it is an absolute contract to pay, not the amount of loss or damage arising from a death, but a special sum of money upon a termination of the life insured."

A creditor may insure the life of an infant, although the infant may repudiate the debt. Reynolds on Life Ins., 60.

Even if the debt is not legally collectible, it gives an insurable interest. Bliss on Life Ins., § 28. To the same effect is St. John vs. Am. M. Life, 2 Duer, 419; 1 Big., 359—affirmed; 13 N. Y., 31; 1 Big., 362. In Morrell vs. Trenton Ins. Co., 10 Cush., 282; 1 Big., 170, Shaw, C. J., says: "It was enough that by the contract of the defendants, made on a valuable consideration, they guaranteed to the plaintiff that if his debtor should die within the time, and the debt remained unpaid, they would pay amount stipulated." See also, Bevin vs. Conn. M. Life, 23 Conn., 244, and the note to the case found in 1 Big., 19.

III. When the policy is directed to be paid to another, it is not necessary to prove interest. Campbell vs. N. E. Life, 98 Mass., 381; 1 Big., 229.

The reasons for requiring an interest are not very forcible. Mowry vs. Home Ins. Co., 9 R. I.; 1 Big., 698. The argument that the policy-holder would have an interest in the death of the insured is met by the restraint of the laws which punish murder and fraud. Trenton Ins. Co. vs. Johnson, 4 Zab., 576. For that matter every debtor has an interest in the death of his creditor, and in the destruc-

tion in his hand of evidences of debt against himself. The existence of promissory notes in the hands of the creditor might be presumed to furnish a tempta ion to the debtor to steal them or destroy them, but the sanction of the law is supposed to be sufficient to deter debtors from committing that species of crime, and the same punishment exists for the murder of a life insured that is meted out upon the highway robber or murderers of a common man.

The case of Cammack vs. Lewis, 15 Wall., [2 I. L. J., 679,] does not apply to this case, as there was fastened upon the creditor to pay over to the wife of the deceased the balance after a debt due the creditor was satisfied. The questions here involved have been discussed in this State in Chisholm vs. Nat. Capitol Life, 52 Mo., 213, [2 I. L. J., 461,] in case of a policy on the life of Robert Peel Clark, the deceased under these policies. Judge Wagner, in deciding the case, took the extremest grounds on the subject of insurable interest, approving the most advanced case, (Trenton Life Ins. Co. vs. Johnson, 4 Zab., 576,) and calling it a "well considered case." In the Chisholm case, the interest of Miss Chisholm in the life of her betrothed was the prospective benefit to be derived from the marriage, or the damages which might be recovered in an action for breach of promise against Clark. It would have been as consistent for the court to have allowed, in that case, evidence tending to prove that there was no sufficient engagement of marriage between the parties to justify a suit for breach of promise, or that there had been misunderstandings between them, or, on account of their incompatibility of temperament, Miss Chisholm would not have derived any satisfaction out of the marriage, and thus prove a lack of insurable interest, as in this case, to show that Clark might, under the skillful defense of the company's attorneys, have escaped from the payment of these notes.

IV. The admission of the evidence as to the pecuniary value to Clark of the business connection with Evers & Co., or of the title or value of the land conveyed, imported into the case issues entirely immaterial, irrelevant and distracting from the real issues. By so doing, the jury were called upon to decide, before they came to the merits, whether the payees in the notes could maintain an action on the same against the estate of Clark, and as to which of the vendors in the various conveyances of warranty could successfully maintain actions of ejectment for said lands. The language of Judge Wagner in the Chisholm case, *supra*, is certainly applicable here: "The defense in this case is devoid of merit, and is not creditable to defendant making it.

There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement, and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would never have occupied the time of the courts."

There is the same objection to the admission of the evidence tending to prove the insolvency of Dunstan. The amount of recovery on the life polices was in no way to be measured by the profits reasonably to be expected from the business of Evers & Co., or Dunstan's connection therewith. The instructions offered by plaintiff on the subject of insurable interest, and refused by the court, do not go to the full extent of the cases approved by Judge Wagner in Chisholm vs. Nat. Capitol Life, 52 Mo., 213, [2 Ins. Law Jour., 461,] and would have partially caused the error of the objectionable testimony admitted as to the character of the business and lands, and of the financial condition of the members of the firm of Evers & Co..

V. The 19th section of the act relating to married women, 2 Wagner, 936, expressly settles the policy of the law in this State in reference to insurable interest in policies expressed to be for the benefit of married women. The section provides that any policy issued on the life of any person for a married woman's benefit, whether effected by her or her husband, or by any third person, shall inure to the separate use of herself and her children, independent of her husband, his representatives and creditors, and also of the third person effecting the same, and the representatives and creditors of the latter.

In the case of Charter Oak Life Ins. Co. vs. Brant, 47 Mo., 419, [1 Ins. Law Jour., 38,] Wagner, J., speaks of the statute as an enabling act, as extending the common law on the subject of insurable interest. The same construction of the 18th section makes the insurance of the life of any person for the benefit of a married woman lawful, and thereby dispenses with the necessity of proving interest. The statute applies to policies heretofore or hereafter made, and furnishes the rule of the remedy on such policies. The application filed and made a part of the record shows the policy to be made for the benefit of Catherine Evers, wife of Edward Evers, and Eliza H. Dunstan, wife of R. W. Dunstan. In a recent opinion of Treat, D. J., of the United States District Court, found in a manuscript opinion in the possession of the judge, the case being entitled, In the matter of Yeager and Crangle, Mary A. Yeager, petitioner, the court construed the 18th section of the

Missouri act relating to married women as follows. Speaking of the construction of the act by the Supreme Court of the State in Charter Oak Life vs. Brant, *supra*, the court says: "True, it (the S. C. of Mo.,) speaks of the Missouri statute as an enabling act; and so it is, at least so far as sections 17 and 18 are concerned. In section 18, an insurance effected by the husband for the wife's benefit is first maintained in express terms, and then in connection with others who may effect an insurance for a married woman's benefit, not on the life of the husband alone, but also on the life of any person."

"Without elaborating the various and complicated questions which may arise under that statute, as to the many subjects of a married woman's benefit, and as to the various persons who may effect such life insurance for her benefit, it may be said that the statute, taken as a whole, has enlarged, so to speak, insurance interests of this nature far beyond any rules previously known to the general law. But for the restriction in the 15th section, it might be held that the statute was purely an enabling act, except as to so much of the 18th as refers to the husband; but the provisions of the 18th, even as far as he is concerned, are certainly enabling so far as it permits him to insure the life of any person for his wife's benefit."

The construction of the statute made by this learned jurist, especially as it conforms to the doctrine advanced in Charter Oak Life vs. Brant, *supra*, will, we doubt not, meet the approval of this court, and eliminate from future cases of insurance for the benefit of married women the inquiry into the question of insurable interest.

The judgment of the General Term reversing and remanding the case was correct, and should be affirmed.

WAGNER, J.

This case comes before us on an appeal from the judgment of the General Term of the Circuit Court, where the judgment at special term, which was in favor of the defendant, was reversed.

The suit was instituted on two policies of insurance, issued by the defendant on the life of one R. P. Clark, payable to plaintiff as trustee of his wife, Catherine Evers, and Eliza H. Dunstan, wife of R. W. Dunstan. The record shows that the notes on which the policies were issued were for $5,000 each, made by Clark in consideration of their relinquishment of their dower interest in a large quantity of lands purchased by him turned over to the firm of Evers & Co., of which firm Clark was admitted as a member.

At the trial, against the objection of the plaintiff, the defendant was permitted to introduce a great deal of testimony tending to show that the lands purchased by Clark of Evers and Dunstan were poor or worthless; that the titles were not good; that the conveyances were not made in good faith; that the partnership business was unproductive, and that therefore the consideration for the notes failed.

Evidence was also introduced of the admissions made be Clark in his lifetime, to third persons, not in the presence of the plaintiff or the beneficiaries in the policies respecting his past habits and life.

In rebuttal, the plaintiff called Mrs. Evers as a witness, but her testimony was excluded by the court.

1. It is not perceived upon what principle the evidence was admitted showing that Clark, when he bought the lands and entered into the partnership business with Evers & Co., made a bad bargain. The question of trying titles or investigating the value of lands was not before the court. If the facts as contended for by the defendant were true, Clark might well have complained; but we know of no authority by which the defendant could do it for him, and in his stead. Clark lived for some time after he made the purchase and became a member of the firm, and it does not appear that he ever expressed any dissatisfaction, and he was the only person concerned, as to whether the transaction was beneficial or advantageous. Moreover, it is shown that before the company issued the policies and assumed the risk, their agent examined the matter and was made acquainted with all the facts, and reported them to the superintendent, who declared that the insurable interest in the life of Clark and the policies were then made out and the premiums paid. It does not appear that there was any suppression or concealment of facts, and in the absence of such suppression or concealment, the company ought not to be allowed to aver anything against its previous action. The counsel for the plaintiff argued that no pecuniary interest in the life of the insured was necessary to uphold the policies. Our opinion on this subject was expressed in Chisholm vs. National Capitol Life Ins. Co., [52 Mo., 213, 2 Ins. L. J., 461,] to some extent; but it is not necessary to examine the question further in this case, as the plaintiff's own instructions assume that such an interest is necessary. He cannot be allowed to contest in this court, the propositions he advanced in the court below.

2. Did the court rule correctly in allowing the admissions of Clark to be received to invalidate the policies? The rule on this subject is very simple. To render the admissions of one party receivable

against another a joint interest between them must be established. (1 Greenl. on Ev., § 176.)

By the terms of the policies they were made payable to Clark himself in the year 1917, in case he lived to that period; but in the event of his dying previously, then they were made payable to the plaintiff as trustee for the beneficiaries therein expressed.

There was no joint interest in the polices during the continuance of Clark's life. Whilst he lived he had the sole and absolute interest, with the bare contingency resulting to the other parties. Had he survived to the designated time, when the payment of the policies was to inure to him personally, it is probable that he and he alone would have reaped their fruits, and there could have been no pretense that any one was jointly interested with him. The interest of the plaintiffs legally did not take effect till Clark's interest ceased by death, and therefore there could have been no joint interest. Hence it follows that Clark's admissions were not receivable in evidence against the parties to this suit.

3. The next question relates to the action of the court in excluding Mrs. Evers as a witness. The statute provides that no person shall be disqualified as a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event of the same, as a party or otherwise. 2 Wagn. St., p. 1372, § 1. The fifth section of the same act declares that no married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of, or against her husband, whether joined or not with her husband as a party in the following cases, to wit: First, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed. Second, in actions against carriers, so far as relates to the loss of property and the amount and value thereof. Third, in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband; provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or to third persons.

This statute permits a married woman to testify the same as any other person, regardless of her interest, if she is the main and substantial party. Tingley vs. Cowgill, 48 Mo., 291; Harriman et al. vs. Stowe, 57 Mo., 93. The fifth section maintains her exclusion as it ex-

isted at common law, and forbids her testifying to any admissions or conversations made by her husband either to herself or other persons. But the section makes her a witness either for or against, in actions upon policies of insurance, in respect to the amount of injury; in actions against carriers, as to the value of the loss of property, and in cases where she has transacted business for her husband, as his agent. These three enumerated cases in which she is entitled to testify for her husband are in the nature of enabling acts, and originated in policy and necessity, as it frequently happens in such cases that the wife is the only person who has any correct or definite knowledge in relation to them. But they do not meet the point here. The solution of the question depends on whether the husband or the wife is the real party; whilst the husband is the dry, naked trustee, and technically the party of record, it is evident that the wife is the meritorious cause of action, and the only person having any real or beneficial interest in the suit. The husband has no interest, and could have none, for our statute gives the wife the money absolutely free from all molestation or control on the part of the husband. The suit, then, is not prosecuted for the benefit of the husband, but for the wife. There could be no objection whatever to her being a witness for Mrs. Dunstan; but she was entitled to be also sworn in her own case. These are all the points it is necessary to examine on the record as it is now presented.

We think the general term decided rightly, and its judgment must be affirmed.

The other judges concurring.

COURT OF APPEALS OF NEW YORK.

BRIDGET RINN, *Respondent*,

vs.

ASTOR FIRE INS. CO, AND JAMES YEARANCE, REC'R, ETC., *Appellant.**

The creditors of a bankrupt corporation, for which a receiver has been appointed under Article 2, title 4, of the New York Revised Statutes, must have his right to share in the distribution of its effects determined in the action or proceedings in which the appointment is made.

Where, after the appointment of the receiver, a creditor obtains judgment in another district, a motion to compel its payment by the receiver will be denied. The remedy must be sought by application to the court in the district in which the receiver was appointed, and in the action in which the appointment was made.

ANDREWS, J.

Article 2, title 4, of the Revised Statutes, entitled "Of proceedings against corporations in equity, (2 R. S., 462,) authorizes compulsory proceedings to be taken for the dissolution of an insolvent corporation and the distribution of its assets among its creditors. They may be instituted by a judgment creditor of the corporation, or in cases under the 39th section by the attorney-general, or a stockholder.

The remedy given by the statute may be obtained in an action brought against the insolvent corporation, and when brought by a creditor he may make the directors or stockholders, who may be liable by law for the payment of the debt, parties to the suit. 9 Paige, 600, § 43.

The court may sequestrate the property and effects of the corporation and appoint a receiver, §§ 36, 41, who, upon his appointment and the giving of security, becomes, as the statute declares, vested with all its estate, real and personal, in trust for the benefit of the creditors and stockholders. §§ 42, 67.

The court by the 56th section may order notice to be published requiring creditors to exhibit their claims and become parties to the

* Decision rendered November, 24, 1874.

suit within a reasonable time, not less than six months, and in default thereof, that they be precluded from the benefit of the decree which shall be made in the suit, and from sharing in the distribution. The same section authorizes the court, upon the application of either party, and at any stage of the proceedings, to restrain all proceedings at law by any creditor against the defendant.

By the 44th section any creditor may make directors or stockholders, who may be liable for the debt, "parties to the suit," after a decree against the corporation, on filing a supplemental bill based on the decree.

The 42d section declares that the receiver shall possess the powers and be subject to the obligations conferred and imposed upon receivers appointed in proceedings under the third article of the title which relates to the voluntary dissolution of corporations. Power is given to the receiver by the 73d section of that article, to settle by reference contested claims against the corporation, and the referee, if not selected by agreement, is to be appointed by the officer who appointed the receiver, or by a judge of the court residing in the same district with him. 2 R. S., p. 45, § 40.

The receiver is to call a general meeting of the creditors, at which all demands against the corporation shall be adjusted as far as may be. § 74.

The 37th section provides that upon a final decree *on the petition*, the court shall cause a just and fair distribution to be made of the property of the corporation among its creditors.

The creditors who are entitled to share in the distribution are by the 79th section declared to be those who shall have exhibited their claims and whose debts shall have been ascertained.

Provision is made for a final accounting by the receiver upon a hearing of all the parties interested, and the decree of the court thereon is made final and conclusive upon all creditors and stockholders. § 87.

It plainly appears, from the provisions of the statute to which we have referred, that the right of any person claiming to be a creditor of the corporation to share in the distribution of its effects in the hands of a receiver appointed under article 2, is to be ascertained and determined in the action or proceeding in which the appointment is made. The receiver, although he may be appointed in a suit brought by a single creditor or stockholder, takes the whole estate of the insolvent corporation for the benefit of all its creditors; and before distribution is made, opportunity is to be given to creditors not

parties to the action in the first instance to come in and make themselves parties to it by the exhibition of their claims, and it is only when they make themselves parties to the suit that they can have the benefit of the decree. 45 N. Y., 310.

Under the 44th section any creditor, although not in originally, named as a party, may, in cases without it, file a supplemental bill against directors and stockholders, and the bill when filed is to be filed in the original action. It is essential to the complete and proper administration of the system established by the statute, that all questions respecting the claims of creditors upon the fund in the hands of the receiver, and its distribution and the accounting by the receiver, should be determined upon an application to the court in the action in which the receiver is appointed. Each creditor has the right to be heard in respect to his own demand, and to contest the demands of others. 9 Paige, 600; 2 Barb. Chy., 35. If the receiver can be called upon to account by any creditor, in any district of the State, and to litigate with him in a distinct proceeding the question of his right to payment out of the fund, and that too, as in this case, without notice to other creditors, it would produce great inconvenience and entail great and useless expense, and would be likely in many cases to prejudice other claimants without giving them an opportunity to be heard.

The receiver in this case was appointed under art. 2, in the suit of one *Bage* against the insolvent corporation brought in the city of New York. It is not material to the point upon which our decision rests under which article the appointment was made, but as proceedings under the third article can only be taken upon the application of the trustees, directors, or officers of the corporation, or a majority of them, it seems sufficiently certain that the proceeding was not of that character. The plaintiff having received a judgment against the corporation in the county of Monroe, after the appointment of the receiver made this motion in that county in the suit in which her judgment was recovered, to compel the receiver to pay it or its proper proportion out of the assets of the insolvent corporation. The Special Term denied the motion without prejudice to a new motion, and the General Term reversed the order of the Special Term, and made a peremptory direction that the receiver pay the plaintiff's judgment. Without considering or passing upon the question whether the plaintiff has a remedy, or was or is entitled to a distributive share in the fund which came to the hands of the receiver, we reverse the order of the General Term on the ground that her remedy, if it exist, must

be sought by application to the court in the district in which the receiver was appointed and in the action in which the appointment was made.

All concur. CHURCH, Ch. J., absent.

COURT OF APPEALS OF NEW YORK.

HOME INSURANCE COMPANY, *Appellant*,

vs.

WILLIAM WATSON ET AL., *Respondents.**

The defendant executed a bond of indemnity to an insurance company, indemnifying it against all claims of C. against moneys paid by it to the sheriff, and all costs, damages and expenses arising therefrom. *Held*, that the word claims included all such as were asserted by legal proceedings, whether afterward adjudged invalid or not, and the company had a right to be indemnified for the expense of defending such illegal claims.

Held, that the bond being under seal there was a presumptive consideration which the onus rests on the obligor to disprove, and that the waiver of a right to contest a doubtful claim constitutes a sufficient obligation. It was for the obligor to disprove the existence of such doubtful claims, not for the obligee to show their existence.

THOMAS H. HUBBARD, *for Appellant.*

MICHAEL NOLAN, *for Respondents.*

GROVER, J.

The questions in this case arise upon a statement of facts agreed upon by the parties pursuant to sec. 372, etc., of the Code. These questions are, first, whether the claim made by Campbell of the plaintiff for the money paid by it to the sheriff, having been finally adjudged invalid, was within the provision of the bond so as to enable the plaintiff to recover of the obligor the legitimate expenses incurred and paid in defending the action brought by Campbell against it for its recovery. Second, whether the bond is void for want of any consideration.

It appears from the opinion given at General Term that it was there

held that the claim made by Campbell was not within the provisions of the bond, for the reason that it was invalid, and so finally adjudged by the court before which he sought to enforce it, but that had such claim been valid, and the plaintiff had been adjudged to pay, and had paid it, it would have been included in such provisions; in short, that the bond included only a valid claim, such as the plaintiff was ultimately compelled to pay.

The language of the condition is, that the obligors, etc., do hereby promise, covenant, etc., to and with the Home Insurance Company, to indemnify, and they do by these present indemnify, and will at all times hereafter indemnify, save, defend and keep harmless the said Home Insurance Company of and from the claims of the said James T. Campbell, and of all other persons claiming or to claim the said moneys so paid by said insurance company to said sheriff, and of and from all costs, damages and expenses that shall or may happen or arise therefrom. It will be seen that the question is whether the word "claims" as used in the bond was intended to include such only as were valid, and which were in fact enforced by legal proceedings, or was intended to embrace such as were asserted by legal proceedings, causing necessary expenditures in the defense although ultimately adjudged invalid.

In Lawrence vs. Miller, 2 Comst., 245, Gardiner, J., says: "The ordinary signification of claim is that of a right or title, actual or supposed, to a debt, privileges or other thing in the possession of another."

I think that this is the general understanding of the word. When one says that another claims to be the owner of a farm, or other property in the possession of the speaker, no one understands him as admitting that he has a valid title thereto. It can hardly be supposed that one would ever indemnify another against the claim of a third which he knew to be valid, and which in all probability would be successfully prosecuted. Indemnities are usually taken for protection against claims more or less doubtful, and such as there is an expectation of successfully resisting; and where they are so resisted by the necessary expenditure of money by the party receiving the indemnity, to hold it not within the condition of the bond for this reason would defeat the very object of the parties to the instrument.

In Chamberlain vs. Beller, 18 N. Y., 115, the court held, after determining that the bond was valid, that a recovery could be had for money expended by the obligee in a successful defense against the claim made. My conclusion is that the claim made by Campbell was

embraced in the condition of the bond. This brings us to the inquiry, whether the bond was void for want of consideration.

At common law the seal of the obligors was conclusive evidence of a sufficient consideration. This in case of actions upon sealed instruments and set-offs founded thereon has been changed by statute. 2 R. S., 406, sec. 77. By this the seal is made presumptive evidence only of a sufficient consideration. The obligor under this statute has the right to avoid the instrument if he can, by showing that there was no sufficient consideration for the contract, but the onus is upon him to establish this.

From the facts agreed upon, it appears that the proceedings in the action brought by the Carolins against Campbell had been regularly prosecuted to judgment. That the debt from the insurance company had been regularly attached. That the sheriff, having an execution against Campbell, demanded payment of the debt from the company that he might apply the proceeds upon the execution. That there was no dispute as to the debt. The case states in substance that there was no other consideration for the bond than forbearance to defend an action for the recovery of the attached debt, and the payment without suit or delay by the company of so much thereof as would satisfy the judgment, and that immediately upon the execution and delivery of said bond, under the facts stated in the case, the sheriff had a right of, and it was his duty to prosecute an action for the recovery from the company of this debt it owed to Campbell. Against such action the company had no defense, unless some other person had a claim to the money valid as against the attachment.

The voluntary performance of a legal obligation, as to the validity of which there is no doubt, will not constitute a sufficient consideration for a contract. By such performance can either party be legally supposed to have derived any benefit or sustained any injury? McDonald vs. Wilson, 2 Cowen, 139; Crosby vs. Ward, 6 N. Y., 369. But if the obligation or right be doubtful, a waiver of the right to contest it constitutes such consideration. Russell vs. Cook, 3 Hill, 504; Seaman vs. Seaman, 12 Wend., 381; Palmer vs. North, 35 Barb., 382. The bond is made an exhibit in and constitutes a part of the case. It recites that said moneys are or may be claimed by parties other than Campbell, and then indemnifies the defendant against such claims as well as any that might be made by Campbell. Now it does not appear that it was at that time known that no such valid claim to the money existed. Whether so or not was probably regarded as doubtful. If there were any the defendant could interpose

them as a defense to the action. It waived this right as a consideration for the bond.

But it may be said by the counsel for the defendants that it does not appear affirmatively that any such doubtful claims were made or apprehended. The answer to this is, that the seal presumptively proves a consideration. The onus was upon the defendants to show that there was none. It was upon them therefore to show that there were no such claims, and not upon the plaintiff to establish the contrary. This they have failed to do. They are therefore liable upon the bond for the money necessarily expended by the plaintiff in defending the action of Campbell, not exceeding the penalty of the bond.

The judgment of the Supreme Court must be reversed and judgment given for the plaintiff with costs, the amount to be fixed by the Supreme Court.

All concur but ALLEN and FOLGER, JJ., who dissent. CHURCH, Ch. J., absent.

COURT OF APPEALS OF NEW YORK.

JOHN G. PARKER, ET AL., *Respondents*,

vs.

THE ARCTIC FIRE INS. CO., *Appellant.**

A policy provision that any change in the risk not made known to the company and indorsed on the policy should avoid the insurance, and a further provision that no agreement unless so indorsed shall be construed as a waiver of the conditions, does not require permission to be indorsed for the addition of steam power communicated from a separate building which does not increase the risk.

ANDREWS, J.

The judges on the trial found that the defendant was notified before the renewal of the policy that steam power had been introduced

* Decision rendered Nov. 10, 1874.

into the mill, and consented to continue the insurance after notice of the change, and thereupon the plaintiffs paid the premium for another year and received a renewal certificate from the company. The fact of notice was denied by the defendant, but there is evidence tending to support the conclusion of the judge upon that question.

The policy contained a provision that in case of any change in the risk not made known to the company by the assured at the time of renewal, and indorsed thereon in writing, the policy and the renewal "shall be null and void," and the further provision that no agreement unless indorsed on the policy shall be construed as a waiver of any of the conditions therein. It is claimed by the defendant that the parties have by their contract made an indorsement on the policy the only competent evidence of notice where there has been a change of risk, and that in the absence of such an indorsement the condition attaches and the contract of renewal is void. We do not think that this question arises in the case, in view of the further fact found by the judge, that the steam power was so annexed to the mill that the risk was not thereby increased. The evidence was that the boiler and engine were placed in a safe building, detached from the mill, and that the connection between the engines and the mill was by a shaft passing through a window, and that the wall of the mill opposite the engine-house was of stone two and a half feet in thickness. This evidence authorized the finding that the annexation of the steam power did not increase the risk. If there was no increase of hazard by reason of the annexation of the steam power there was no change of risk within the meaning of the policy, and no notice was required to be given. The object of the provision requiring notice where the risk has been changed, is to enable the company to act intelligently upon the application for the renewal of the policy. If the risk was not increased by changes in the condition of the property, the company had no interest in showing the fact that they had been made. If notice of change was not given, the assured would lose the benefit of the contract if it turned out that the risk was increased thereby.

Upon the ground that the provision as to notice did not, upon the facts found, apply to this case, and without passing upon the other question argued, we are of opinion that the judgment should be affirmed.

All concur.

NEW HAMPSHIRE SUPREME COURT.

MARCH, 1875.

HADLEY

vs.

NEW HAMPSHIRE FIRE INS. CO.*

The plaintiff, interested as mortgagee, obtained the policy in suit in the name of the general owner, with his consent, paying the premium himself; and the policy being made payable to him in case of loss to the extent of his mortgage interest, the whole amount of insurance being less than his mortgage debt, it was *held*, that he might maintain an action in his own name to recover the full amount.

Just before obtaining this policy, the plaintiff had two policies,--one in the Market company, which company had stopped payment, and one in the North American company. On receiving notice from the agent that the Market company had stopped, he surrendered his policy to him to be canceled, and received back the unexpired premium. The policy was returned by the agent to the company to be canceled, and nothing more was heard from it. *Held*, that this policy must be considered to have been canceled at the time it was so surrendered.

When the policy in suit was obtained, the agent of the defendant company knew all about the circumstances, undertook to procure the insurance, and do everything which was right. He afterward delivered the policy to the plaintiff, who, relying on the agent, accepted it and paid the premium. In an action on the policy, *held*, that the company was estopped to deny that the fact of the existence of the insurance in the North American company had been indorsed upon the policy agreeably to the terms of one of the conditions in the same.

The North American company having shortly afterward failed, the plaintiff procured from the defendant's agent another policy, in the Germania company, of which he was also agent,—and placed the policy in suit in his hands. The agent knew all the circumstances of the various insurances, but did not cause the company's consent to the second insurance to be indorsed. *Held*, that these facts were evidence from which the jury might find that the defendants had waived the condition in the policy requiring their assent to such further insurance, and this notwithstanding the defendant company had no other knowledge of these circumstances than the knowledge of the agent, which was held to be the knowledge of the company.

The defendants contending that the property was misdescribed in the application, but it appearing that the agent knew all the circumstances on which the description depended—*Held*, that the knowledge of the agent was the knowledge

* From advanced sheets of 55 N. H. Reports.

of the defendants, and that in the absence of collusion the company were bound by the agent's representation.

The plaintiff, having purchased a mortgage of the furniture and personal property in the house without the general owners' consent, took possession of the same, made preparations for selling it in the house, and exhibited it to persons desirous of purchasing. The court instructed the jury that if this were done in good faith and by an innocent mistake, the plaintiff would be protected by the provisions of Gen. Stats., ch. 157, sec. 2; but the court having also instructed them that the amount insured ought to have been diminished as much as the premium ought to have been increased on account of such increased risk, instead of in the same proportion—*Held*, that, whether the statute were rightly applied or not, this was erroneous.

The foreclosure of the plaintiff's mortgage having been effected after the fire and before the commencement of the action—*Held*, that this did not prevent the plaintiff from maintaining his action for the amount remaining due on his mortgage.

Assumpsit, by William S. Hadley against the New Hampshire Fire Insurance Company, upon a policy of insurance. It appeared that the plaintiff procured the insurance and paid the premium. He testified that he procured the policy with the consent of Mr. Philbrick, the owner of the property insured, but the defendants claimed that the policy was procured without the knowledge or consent of said Philbrick.

It appeared that the house was insured for the benefit of the plaintiff in the Market Insurance Company for $4,000, and in the North American Insurance Company for $1 000, at the time of the great Chicago fire, in October, 1871. A. F. Craig was the agent at Portsmouth of both said companies. Just before the date of the policy in suit, Mr. Craig, by the direction of the Market company, notified the plaintiff that they had suspended, and if he wished to be protected he must get insured elsewhere. The plaintiff immediately negotiated with J. M. Davis, agent of the defendant company at Portsmouth, and procured from him the policy in suit as a substitute for the Market policy, which it was understood by the plaintiff and Davis was to be canceled. At the time Davis issued the policy in suit, he had full knowledge of the facts as they existed in regard to the Market policy and the North American policy. The Market policy was, on October 14, 1871, delivered by the plaintiff, Mr. Craig, for cancellation, who, about the last of October, 1871, returned it to the Market company to be canceled. Whether this policy was ever actually canceled at the office of the Market company did not appear. The unexpired premium was allowed by Mr. Craig to Mr. Philbrick, upon a claim he had against Philbrick. At some time during the latter part of October, 1871, Mr. Craig, by direction of the North American company, noti-

fied the plaintiff that the company also had suspended, and recommended him to get insured elsewhere: and he immediately applied to Mr. Davis, informed him of this, at the same time leaving the policy in suit in Davis's hands, and procured from him a policy in the Germania Insurance Company for $1,000, as a substitute for the North American policy, which it was understood by the plaintiff and Davis was to be canceled; but the plaintiff kept the North American policy in his possession until after the property insured was destroyed by fire on January 10, 1872. He testified that at the time of procuring the Germania policy he intended to have the North American policy canceled, but by accident neglected to attend to it, and that at the time of the fire he supposed it had been returned and canceled. Mr. Craig also testified that at the time of the fire he supposed it had been returned to the North American company and canceled. The plaintiff testified that he had made no claim on the Market company or the North American company on account of the fire. It did not appear that Mr. Davis had any notice, at any time before the fire, that there had been any neglect to return the North American policy for cancellation, nor that the defendant company had any notice of the Market, the North American, or the Germania policy, except by reason of the knowledge which Mr. Davis had, as hereinbefore stated. No indorsement of either prior or subsequent insurance was ever made on the policy in suit. The plaintiff testified that he did not read the conditions in the policy in suit at any time previous to the fire, nor know that it contained such conditions. There was no evidence that Mr. Davis had any express authority from the company to waive any of the conditions or stipulations in the policy. The house insured was a large house, built for and occupied as a seaside hotel and boarding-house for summer business, with accommodations for from seventy-five to one hundred guests. The testimony of the defendants tended strongly to show that the risk would have been rejected as soon as it reached the office of the company if the property had been truly described, but it was not disputed that Mr. Davis had full knowledge of all the circumstances relating to its situation and occupancy. The property was in fact not occupied as a hotel or boarding-house during the continuance of the policy in suit. The defendants' secretary testified that he had the management of the company as to the character of the risks to be taken, and that he, a short time previous to said October 14, directed Davis not to insure any seaside hotels. The testimony of the secretary tended to show that the officers of the company, at the time

this insurance was effected, understood the profits of seaside hotels and boarding-houses to be dependent on various contingencies, and that when unprofitable they were quite liable to burn after the season for boarding had passed, and while only occupied as dwelling-houses, and that the company for that reason considered the risk as great, and intended to require as high rates during the remainder of the year, as during the boarding season, and, as a general rule, did not intend to insure seaside hotels at any rate whatever.

The defendants claimed that Mr. Davis informed the plaintiff at the time the insurance was effected that he had no authority to insure seaside hotels in the defendant company, and that in fact there was a collusion between Davis and Hadley to misdescribe the house as a dwelling-house, in order to mislead the company and avoid a rejection of the risk, or procure it to be taken at a low rate. It appeared that the premium paid by the plaintiff upon the policy in suit was much more than the ordinary rate of the defendant company for insuring dwelling-houses, though much less than the ordinary rate for insuring seaside hotels. It appeared that the interest of the plaintiff was by virtue of two mortgages of the insured property from Thomas H. Philbrick to him, one for $5,800, dated January 23, 1871, and the other for $235, dated January 28, 1871, and that the plaintiff took peaceable possession for the purpose of foreclosure, on January 30, 1871, and immediately leased the property to Philbrick, who remained in possession as tenant of the plaintiff until the fire.

At the close of the plaintiff's testimony the defendants moved for a nonsuit, because it appeared in evidence that the policy was in Philbrick's name, payable to Hadley in case of loss to the extent of his claim as mortgagee, and when this suit was brought the mortgage had been foreclosed, and Hadley had no interest as mortgagee, but was the absolute owner; also, because by the express terms of the contract the policy is made void if the assured shall have or hereafter make any other insurance on the property hereby insured without consent of this company written on the policy. The court denied this motion, and the defendants excepted.

It was proved and not denied that after the delivery of the policy in suit to the plaintiff, he, without the consent or knowledge of Philbrick, the owner and occupant of the house insured, bought up a chattel mortgage on said Philbrick's household furniture, situated in said house, for between $700 and $800, and took an assignment of an insurance policy thereon for $2,000; and that ten or twelve days before the loss he took possession of said household furniture, held

the same by a keeper until the fire, advertised it for sale at auction, allowed said furniture to be examined by strangers, and had the same packed in lots for sale ;—all of which was without the consent or knowledge of the defendant company or their agents. There was no other evidence of any increase of the risk after the date of the policy.

The defendants asked the court to instruct the jury as follows : 1. That the Market policy for $4,000 and the North American policy for $1,000 were outstanding and subsisting, there being no evidence that they were surrendered to the companies, or that the premium or any portion of it had been returned to the assured. 2. That, there being no written consent upon the policy in suit to any prior or subsequent insurance, as required by the terms of the contract, and it appearing that there was both prior and subsequent insurance, the policy is void, and the plaintiff cannot recover. 3. That over-insurance, known to be so by the insured, and not known by the company, is of itself a fraud upon the company, and such a misrepresentation of a material fact that it avoids the policy. 4. That the stipulation in the contract, that prior and subsequent insurance should be assented to by the company by indorsement upon the policy, being designed to prevent over-insurance, could not be waived by an agent who had not been expressly authorized by the company to do so. The court did not give these instructions, and the defendants excepted.

The court instructed the jury as follows : 1. That the house not being occupied as a hotel in the winter season and during the term covered by the insurance, it is for the jury to say whether it was properly described in the policy as a dwelling-house. 2. That even if the house was misdescribed in the policy, yet if Davis, the agent, supposed that it could be so considered because unoccupied as a hotel during the term of the policy, or if he gave Hadley so to understand for the purpose of obtaining the premium, or for any other purpose, and there was no fraud on the part of Hadley, then this policy is good in this respect, although the company had no notice of the character of the house ; and that if Davis or Hadley, without any fraudulent intent, mistook in this matter, the mistake is covered by our statute. 3. That the knowledge of the agent in this behalf was the knowledge of the company, and that if Davis knew the character of the house, this policy is valid in this respect, unless the jury find a fraudulent conspiracy between Hadley and Davis to deceive the company by misdescribing the property. 4. That the jury may consider the rate of premium paid, with the

other circumstances in the case, as tending to show actual knowledge on the part of the company that this was not a common private dwelling-house. 5. That there is evidence in the case from which the jury may find that the company waived the stipulations in the policy that either prior or subsequent insurance should avoid it, unless the consent of the company thereto was written on the policy. 6. That neither the prior nor the subsequent insurance, nor both, would avoid the policy, if Davis knew of and consented to such prior and subsequent insurance, but, by reason of the knowledge and consent of Davis, the jury are authorized to find a waiver, on the part of the company, of the conditions in the policy in regard to double insurance. 7. That if Davis had notice of the prior and subsequent insurance, it was notice to the company; and if Davis had an opportunity to indorse such insurance on the policy, or to send it to the company for such indorsement, the jury are authorized to consider this a waiver on the part of the company. 8. That if the plaintiff relied upon Davis to make such indorsements upon his policy as were required, and he, having knowledge of the prior and subsequent policies, and an opportunity to make such indorsements or procure them to be made, neglected to make them or procure them to be made, the jury may consider this a waiver by the company of this requirement of a written indorsement. 9. That if Hadley did not know that it was necessary to have such written indorsement upon his policy, and was in no fault for not knowing it, and neglected for that reason to have it done, it was a mistake which is covered by our statute. 10. That if the plaintiff, acting in good faith, and without any fraudulent purpose, by mistake and oversight neglected to return the North American policy to be canceled, this does not avoid the policy in suit, although Mr. Davis supposed the North American policy was to be immediately canceled, and had no knowledge, previous to the fire, that the plaintiff had neglected to have it canceled. 11. That if the risk on the property insured was materially increased by the act of the plaintiff in taking possession of the mortgaged personal property and making preparations to sell it, without the knowledge of the defendant company or its agent, before the fire, yet if the plaintiff acted in good faith, and without any intent to defraud or deceive the company, then this constitutes a mistake on the part of the plaintiff, which is covered by our statute, and does not avoid the policy, but the defendant is entitled to a reduction to the extent that an increased premium ought to have been paid in consequence of such increased risk. 12. That if the jury find that the risk was thus

increased, and that the policy was not avoided on any other ground, they must determine how much increased premium ought to have been paid in consequence of such increased risk, and deduct that sum from the amount for which they find that the defendants would otherwise be liable. To the foregoing instructions the defendants excepted.

The court, among other instructions which were not excepted to, also gave to the jury the following: 1. That there was no evidence in the case which authorized them to find that the North American policy was canceled previous to the fire, and therefore that it was a subsisting policy for $1,000 at the time of the fire, making, with the Germania policy for $1,000, other insurance to the amount of $2,000 on the house, and that if the defendant company is liable, it is liable only for thirty-eight forty-eighths of the value of the house and for the full value of the barn, not exceeding however the amount insured on each. 2. That if the jury are satisfied that Davis had no authority to make insurance on this house, and knew he had none, and concealed the fact from the company that it was a summer hotel, knowing that if the company had knowledge of this fact it would not take the risk, and are also satisfied that Hadley knew or had reason to know that Davis could not insure the property without violating his instructions, and that the company would not consent to insure it if it should be truly described, then the making of this policy was a fraud upon the company, and the acceptance of it on the part of Hadley made him a party to the fraud, and he cannot recover in this suit. 3. That if Davis, knowing he had no authority to insure this property, concealed the fact from the company that it was a summer hotel, in order to effect an insurance at less than hotel rates, and Hadley knew this purpose for which it was insured as a dwelling-house, then the act of Davis was a fraud upon the company, to which Hadley was a party, and he cannot recover. 4. That if the jury find that there was collusion between Hadley and the agent in effecting this insurance, and any fact material to the risk was concealed from the company by the agent, of which Hadley had knowledge, it was a fraud upon the company that avoids the policy.

The jury found a verdict for the plaintiff. The defendants moved for a new trial, and the questions arising on that motion were reserved.

FRINK and HATCH, *for Plaintiff.*

BRIGGS & HUSE, MARSTON and BULTER, *for the Defendants.*

CUSHING, C. J.*

The first question which arose at the trial was on the motion for a nonsuit. The first reason assigned was the fact that after the fire the foreclosure of the mortgage had been completed, and therefore the plaintiff had no longer any interest as mortgagee. It seems to me to be plain enough that the plaintiff's rights in this regard were fixed when the property was destroyed by fire. I do not see how the foreclosure of the mortgage could in any way have operated to defeat the plaintiff's right to recover the amount which remained due on the mortgage.

It is true that by our law the foreclosure of the mortgage is *prima facie* payment of the mortgage debt, and if the objection had been made in this form it would have compelled the plaintiff to go forward, and, by showing the value of the property which remained after the fire, show the amount of his debt still remaining unpaid. This being an objection which might have been removed by evidence if seasonably taken, must be considered as waived, and this branch of the motion was rightly overruled. The other branch was also rightly overruled as will be shown hereafter.

The first instruction requested by the defendants, and the instructions actually given on the same subject, may be considered together.

The case shows that at the time of the making of the policy in suit it was not intended that the North American policy should be canceled. It was not until a fortnight after the making of this policy that the plaintiff got notice that the North American company had suspended, and, on taking out the Germania policy, agreed that the North American policy should be canceled. It would be difficult, I think, according to the ordinary rules of evidence, to prove an agreement to waive that condition previous to, or at the time of, making the policy with the condition in it; but I think that it was the duty of the agent to cause the proper indorsement to be made on the policy at the time it was issued, and he not having done so, and the plaintiff having paid his premium and taken his policy relying upon this, that the defendant company would be estopped from taking the objection; so that practically the result is the same, and there would be no reason to disturb the verdict for this cause.

If these views are correct, the portion of the charge numbered ten is, in this particular, immaterial.

So far, then, the instructions of the court to the jury were well

*[SMITH, J., having been of counsel, did not sit.

enough, and the second branch of the motion for a nonsuit is also disposed of.

The evidence tended clearly to show that it was agreed that the Market policy was canceled, and that it was canceled. The term *cancel* is, I think, often used as equivalent to destroy, or put an end to, and probably is not often understood by parties who use it as meaning the actual erasure of a writing, or the destruction of the paper on which it is written. I cannot doubt, when the policy was surrendered to the agent, and the unused premium restored to the insured for the purpose of putting an end to the policy, that an end was put to it, unless it should appear that the agent assuming to do this had not the necessary authority. All we know from the case is, that he returned the policy to the company, and that nothing more was heard of it. The request of the defendants on this point was rightly denied.

The instructions numbered five, six, seven, and eight—so far as related to subsequent insurance, on the authority of Clark vs. Ins. Co., 40 N. H., 333; Barnes vs. Ins. Co., 45 N. H., 23, 24; and Pierce vs. Ins. Co., 50 N. H., 297—were, as to the necessity of indorsing the existence of the Germania policy on the policy in suit, entirely correct. On the authority of Marshall vs. Ins. Co., 27 N. H., 164; and Campbell vs. Ins. Co., 37 N. H., 35, and secs. 2 and 3, ch. 157, Gen. Stats., I think that the instructions numbered one, two, three, and four were substantially correct, with this exception,—that in so far as section 2 is relied on to prevent the consequences of a mistake, inasmuch as the evidence tended strongly to show that if the character of the house and circumstances connected with it had been made known to the secretary of the company the premium would have been much larger, the jury should have been instructed that if they found the premium would have been larger were it not for this mistake, the amount of insurance should be proportionally diminished,—that is, as I understand, the amount insured should be reduced to such a sum as the amount of premium actually paid would purchase. For example: if there was an insurance of $1,000 at one per cent., which but for an innocent mistake in the application would have been two per cent., the insurance must be reduced from $1,000 to $500. I think this a material error in the charge.

As the case finds that the agent, Davis, had full knowledge of all the circumstances about the occupation of the house, and as the agent's knowledge is to be taken as the defendants' knowledge, the instructions numbered three and four seem to be immaterial.

The instructions requested by the defendants, numbered two and

three, have been sufficiently disposed of in considering the instructions actually given.

The case does not show that any evidence was offered tending to prove over-insurance, so that the requested instruction numbered four was uncalled for.

It is not necessary to determine whether the statute,—Gen. Stats., ch. 157, sec. 2,—was rightly applied in the instructions numbered eleven and twelve, as the instruction in regard to the deduction to be made in the amount insured appears to have been erroneous. The instruction was, that the jury should deduct the amount by which the premium ought to have been increased from the amount of insurance. If, for instance, the jury had found that the premium should have been increased one dollar, they would by this rule have deducted one dollar from the amount insured, whereas, in this case the amount of insurance should be reduced by 1-21 part, which would have been nearly $200, viz., $190.48.

It is suggested in the plaintiff's argument, that, as the verdict shows that the jury made no deduction, the mistake in the charge could have done no harm, but I am not satisfied that the result would have been such if the jury had been made to understand how largely the amount insured would have been reduced by a small increase in the amount of premium.

The defendants' counsel in his brief take the position that the action cannot be maintained in the name of the present plaintiff, but I cannot find in the case any evidence that such position was taken at the trial, and it must therefore be considered as waived.

In the case of Chamberlain vs. Insurance Company, *post*, decided at this (March) term, it is held in a similar case that the action was rightly brought.

For the error in instructions eleven and twelve, the verdict must be set aside.

Ladd, J.—The instruction as to the deduction to be made in case the jury should think the risk was increased, was clearly and confessedly wrong, inasmuch as they were directed to deduct the amount they thought the premium ought to have been increased, instead of a sum proportionate to their estimate of the increase of the risk. But it is said the verdict shows conclusively that this erroneous rule was not used by the jury in assessing the damages, because they gave the full amount of the policy ; that no deduction whatever being made, it is certain the rule was not applied ; and therefore the defendants were

not prejudiced, and the verdict should not be set aside. If we were dealing with a pure matter of mathematics, this would be so, undoubtedly. But when we observe that the instruction, in its practical application, required the jury to deduct only one dollar where they should have deducted about two hundred, it seems to me impossible to say that the defendants were not prejudiced. It is not difficult to suppose that a jury might consider one dollar or five dollars as too trifling a sum to be deducted from a verdict of four thousand dollars, when, had they understood the practical effect to be a deduction of two hundred or one thousand dollars, they might have regarded the matter in quite a different light. Upon this ground I am of opinion that the verdict should be set aside, without inquiring whether the mistake, if there was one, comes within the scope and application of Gen. Stats., ch. 157, sec. 2, or not.

FOSTER, C. J., C. C.—I entirely concur in all the views expressed by my learned brethren, suggesting, as they have done, that it becomes unnecessary to consider the question of the applicability of ch. 157, sec. 1, Gen. Stats., to the present case; but, for a consideration of that matter, I refer to my opinion in Chamberlain vs. New Hampshire Fire Insurance Company, *post*.

Verdict set aside and a new trial granted.

SUPREME COURT OF NEW HAMPSHIRE.

MARCH TERM, 1875.

WHITTIER

vs.

THE HARTFORD FIRE INS. CO.*

A citizen of this State brought an action in the Supreme Court of this State against a corporation created by the legislature of the State of Connecticut, and having its principal place of business in the latter State. A trial was had before a jury, who returned a verdict for the plaintiff. Exceptions taken to certain rulings of the court by the defendants were transferred to the full bench, and overruled, and judgment was rendered for the plaintiff on the verdict. The defendants then sued out a writ of review, and at the September term, 1874, filed a petition for the removal of said action to the Circuit Court of the United States for the district of New Hampshire. *Held*, that under the third clause of sec. 639 of the Rev. Stats. of the United States, providing for the removal of a cause from a State Court to the Circuit Court of the United States upon petition filed "at any time before the trial or final hearing of the cause," such a petition cannot be filed after one trial has been had by the parties, although the action is one where review will lie.†

This is an action of review of an action of assumpsit, brought by Charles C. Whittier (defendant in review) against the Hartford Fire Insurance Company (plaintiff in review), upon a policy of insurance issued by the defendants.

The original action was tried by the jury, and on the trial exceptions

* From advanced sheets of 55 N. H. Reports.

† But it would seem that under the construction put by some courts, eminent for learning and ability, upon the act of Congress of March 3, 1875, State courts no longer have any authority to pass upon the question of removal, or even to consider the sufficiency of the petition or bond, etc. The act provides as follows:

"Sec. 2. That any suit of a civil nature, at law or equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different

were taken to the rulings of the court, and the case was reserved. These exceptions were overruled, and at the March term, 1874, of the Supreme Judicial Court for said county, judgment was rendered for the plaintiff. The defendants then sued out their writ of review, which is dated May 2, 1874, and was entered at the September term, 1874, of this court. On the first day of this term the plaintiffs in review filed their petition for a removal of said action to the next term of the United States Circuit Court under the act of Congress passed in 1866, as amended by the act of 1867. In their petition they allege that "they are plaintiffs in review; that they are a corporation duly established by the laws of the State of Connecticut, and a citizen of said State; that the said Whittier, the defendant in review, is a citizen of the State of New Hampshire, and that said parties to said writ are so described in said writ of review, and that the amount in controversy exceeds the sum of five hundred dollars, exclusive of costs." This petition is signed by the plaintiffs in review by their secretary. There is also filed the affidavit of the secretary verifying the facts stated in the petition, and also stating that "he has reason

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States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United for the proper district."

"Sec. 4. That when any suit shall be removed from a State Court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

"Sec. 6. That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal."

The record of removal need not be certified by the judge, and the petition for removal need not be verified by affidavit. The act of 1875 for the first time expressly authorized the petition and bond to be filed out of term-time. We think it was to prevent the State Court from proceeding further in the case after the proper papers were filed in the suit with the clerk. It is said there must be a power in the State court to determine whether the petition and bond are sufficient, and whether the cause is removable under the statute. It is true that the party seeking the removal of the cause must be entitled to the same, but we think that the statute did not intend to permit the State court to judge in such a case as this whether a proper case was made; that was one of the difficulties under the former statutes. This statute gives the power to the Federal court, the right to determine whether the cause is properly removable. DRUMMOND, J., in Osgood vs. The Chicago, Danville & Vincennes R. R. C. See Chicago Legal News, April 17, 1875. REPORTER.

to believe and does believe that from prejudice and local influence the said defendant company will not be able to obtain justice in the Circuit Court for the State of New Hampshire." They also file a sufficient bond, as required by said act of Congress.

The court *pro forma* denied the prayer of the petition, to which the plaintiffs in review excepted.

The questions arising upon the foregoing case were transferred to this court for determination.

MUGRIDGE (with whom were PIKE & BLODGETT), *for the Plaintiff in Review.*

WHIPPLE (with whom was BARNARD), *for the Defendant in Review.*

SMITH, J.

This is a petition to remove this cause to the Circuit Court of the United States for the district of New Hampshire, under the act of Congress passed March 2, 1867 (as claimed by the petitioner.) The enactment of the Revised Statutes of the United States, which were approved June 22, 1874, operated to repeal the judiciary act of 1789, and the acts of 1866 and 1867 regulating the removal of actions from a State to a Federal court. Under the act of 1866 an action within its provisions might be removed into the Circuit Court of the United States upon petition filed "at any time before the trial or final hearing of the cause." Under the act of 1867 an action within its provisions might be removed into the Circuit Court of the United States upon petition filed "at any time before the final hearing or trial of the suit." The difference between these two acts in this respect is marked and distinct.

We have been cited by the plaintiffs in review to the case of Insurance Company vs. Dunn, 19 Wall., 214, [4 Ins. Law Jour., 57,] decided October term, 1873, in the Supreme Court of the United States, which their counsel claims is an authority directly in point in favor of granting this petition. That would be so, provided there had been no change in the statute in the particular above noticed. It becomes important then to inquire whether Congress, in enacting the Revised Statutes, has made any change in this respect.

Section 639 contains the provisions of the judiciary act of 1789, and of the acts of 1866 and 1867, relating to the removal of actions from the State to the Federal courts. In examining to ascertain whether the act of 1867 has been changed in the particular above

mentioned, we look to the corresponding portion of said section, which is the third clause, from which it appears that Congress in revising the laws has made its legislation uniform in this respect. It provides that a petition for removal may be filed "at any time before the trial or final hearing of the suit," adopting the same language that was used in the act of 1866, and to which it still adhered in re-enacting that act in the second clause of said section.

It is apparent to my mind that this change was not the result of accident, but was deliberately made to secure uniformity upon the subject, in view of the conflicting decisions between the Federal and State courts upon this question. Akerly vs. Vilas, 1 Abb., U. S., 284; same case, 24 Wis., 165; Johnson vs. Monell, Woolworth, 390; Insurance Company vs. Dunn, 19 Wall., 214, [4 Ins. Law Jour., 57,] same case, Supreme Court of Ohio; Bryant vs. Rich, 106 Mass., 192.

In Insurance Co. vs. Dunn, 19 Wall., [4 Ins. Law Jour., 66,] Judge Swayne says, p. 226: "In the act of Congress of 1866, the language used in this connection is 'at any time before the trial or final hearing.' If the difference in the act of 1867 be material, it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act, and to make the latter more comprehensive." That the court considered that there was a substantial difference in the language of the acts of 1866 and 1867 further appears from the second head note to the case, which reads thus: "The language above quoted—'at any time before the final hearing or trial of the suit'—of the act of March 2, 1867, is not of the same import as the language of the act of July 27, 1866, on the same general subject,—'at any time before the trial or final hearing.' On the contrary the word 'final,' in the first mentioned act, must be taken to apply to the word 'trial' as well as to the word 'hearing.' Accordingly, although a removal was made after a trial on the merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a State where by statute the party could still demand, as of right, a second trial—*held*, that such first trial was not a 'final trial' within the meaning of the act of Congress, the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the State."

In Bryant vs. Rich, *supra*, Gray, J., in delivering the opinion of the court, said,—"The words 'before final hearing' in the act of Congress of 1867 would seem to be equivalent in meaning to the same words—

'trial or final hearing'—as transposed in the similar act of 1866, ch. 288; and it is at least doubtful whether a party who has once taken the chance of a decision upon the merits by a trial before the jury in an action at law, or a hearing before the court in a suit in equity, in the State court, can, if the case stands open for a new trial or further hearing, remove it into another tribunal. It has been decided by the Supreme Court of Wisconsin, in a very able judgment, that he could not. Akerly vs. Vilas, 24 Wis., 165."

The requirement of the present statute then is, that the petition must be filed before "the trial or final hearing in the suit," and not as formerly, "before the final hearing or trial of the suit." That this does not mean "final trial" is, I think, clear from the change that was made in the revision of the laws, and seem to be authorized by the stress which is put upon the difference in the language of the acts of 1866 and 1867 by the Supreme Court in Insurance Company vs. Dunn, *supra*.

The parties in this case have had a trial by jury. The original plaintiff recovered a verdict; the exceptions of the defendant were overruled by the full bench, and judgment for the plaintiff was entered upon the verdict. The judgment cannot be reversed or otherwise affected by a judgment in review. The petitioner's counsel very truly says in his brief,—"It remains, whatever the result of the review, and the party in whose favor it was rendered retains whatever he obtained by it: unless reversed by error it must ever stand as the final determination and conclusion of the suit which preceded it. Badger vs. Gilmore, 37 N. H., 459; Andrews vs. Foster, 42 N. H., 379; Pike vs. Pike, 24 N. H., 397. Such a trial answers fully the meaning of the term, as used in sec. 639 of the Revised Statutes. In limiting the time when a petition for removal must be filed to a period prior to such trial, Congress must be deemed to have intended that the party who may prevail upon such trial in the State court should not be deprived of the fruits of the trial and of the judgment rendered therein at the pleasure of the discontented party.

It is questionable whether the constitution could have been adopted if it had been understood that it conferred on Congress the power to pass an act removing an action from a State to a Federal court. In Wetherbee vs. Johnson, 14 Mass., 412, it is said that it has been held in the Supreme Court of Virginia "that it never was the intention of the constitution of the United States to consider the supreme courts of the several States as tribunals inferior to the courts of the United States; or that a privilege was given to defendant who had submitted

to the jurisdiction of a State court, taken his trial there, and finally failed in his defense, to harass his adversary by intercepting the remedy, which he may have obtained at great expense, and carrying his cause to a tribunal whose sessions would be at the seat of the national government, perhaps, a thousand miles distant from the place of his residence."

The decision is, perhaps, only valuable as showing the understanding of those who lived in the time of the early history of the republic.

There are many very strong reasons why, after the parties have submitted to one trial in a State court, the cause should not be removed to another jurisdiction. If it is not "a dangerous interference with the independence of the State tribunals," it tends "to vex and harass the citizen by a multitude of trials,—the last of which would be remote from his place of residence, where it would be always difficult and sometimes impossible for him to prove the facts upon which his cause depended; besides which it infringes one of the most ancient and cherished principles of the common law, that the trial of facts should be in the vicinage where they happened." Wetherbee vs. Johnson, *supra*, 420.

The result of my conclusions is, that the statutes of the United States do not authorize the removal of this cause to the Circuit Court of the United States for this district. The petition therefore should be denied.

LADD, J.

I think this petition should be denied. There has been a trial of the cause upon its merits in the State court, and a final and irreversible judgment rendered therein. Availing themselves of a right conferred by a statute of this State, the defendants have brought a review; and the cause may now be tried over again here, in accordance with the provisions of the statute, which imposes various qualifications and conditions upon the exercise of the right. Gen: Stats., ch. 215, secs. 10, 11, 12, 13. Unless the cause is to be tried and judgment to be rendered in the Federal court on review, the same as though it had not been tried before at all, (which I suppose nobody will pretend,) I do not see how it can be tried there at all, unless the Federal court will undertake to administer the municipal law of New Hampshire, and communicate with the State court for the purpose of ascertaining what the final judgment there shall be. But even if this difficulty were out of the way, it seems to me the reasons against the construc-

tion of the United States statute contended for by the plaintiff in review are quite strong and controlling. Undoubtedly the language of a legislative act ought to be very clear and unequivocal, before a court would be warranted in holding that the legislature intended to give parties the right to experiment in a State court by going through with a full trial of the merits there, and then, if they are not satisfied with the result, carry their cause to another court for a retrial of the same issues of fact already once settled by the verdict of a jury to which they have voluntarily submitted them. Practically it would amount to an appeal, and make the State courts inferior to any Federal court now in existence, or which may be hereafter created, to which it shall be provided that such cause may be removed. The right to a retrial in the State court is given by a statute of the State, but that statute confers no jurisdiction upon any other tribunal. I fully agree with my brother Smith, that the language of this act admits of no such construction.

Further: if such a construction were to be put upon the act, I should say that, in its spirit and practical operation it is in direct conflict with the seventh article of amendment of the constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United than according to the rules of the common law." Wetherbee vs. Johnson, 14 Mass., 412; Bryant vs. Rich, 106 Mass., 180, and cases cited on page 193. By the rules of the common law, facts once settled by the verdict of a jury cannot be tried again by another jury in the same proceeding.

The merits of this question have been recently considered by the Supreme Judicial Court of Massachusetts in the case of Galpin vs. Critchlow, Am. Law. Reg., March, 1874, p. 137, where, after a careful examination of the various acts of Congress relating to the subject, it was decided that an action cannot be removed from a State court into the Circuit Court of the United States under the act of Congress of 1867, ch. 196, after a trial on the merits, although such a trial resulted in a disagreement of the jury. With entire respect it may be said that, so far as regards the reasons upon which the question should be determined, no higher authority can be produced, and I fully agree with the reasoning of the learned chief justice in that case, and with the conclusion reached by the court. The question, however, whether the language of the act of 1867 is equivalent to that used in the act of 1866 need not be discussed because of the change of phraseology made by the Revised Statutes.

Nor is it necessary to inquire how far the case of Insurance Co. vs. Dunn, 19 Wall., 214, [4 Ins. Law Jour., 57,] could be regarded as an authority in favor of the plaintiff's contention had no such change in phraseology been made.

In view of the provisions of our statute with respect to reviews, and the amendment of the United States constitution referred to, as now advised, I should hesitate before ordering a cause removed to the Circuit Court of the United States for review, in pursuance of any statute that might be passed by Congress, until such right of removal had been determined by the Supreme Court of the United States upon error to the judgment of this court.

Exceptions overruled and petition denied.

CUSHING, C. J., concurred.

PENNSYLVANIA SUPREME COURT.

Error to the District Court of Philadelphia County.

WASHINGTON LIFE INS. CO.

vs.

SCHAIBLE.

Where the policy is "in consideration of the statements in the application," and contains a proviso that "if such statements are in any respect untrue" policy to be void, the statements in the application are representations, not warranties —Admissibility of photograph to prove appearance.

This was an action of assumpsit brought by Schaible, administrator of Eureka Randon, against the Washington Life Ins. Co., on a policy issued by them upon the life of Eureka Randon. Pleas, non assumpsit, payment with leave, etc., and a special plea of misrepresentation in the application.

* From Pittsburgh *Legal Journal*. Decision rendered April 2, 1875.

Upon the trial the plaintiff offered in evidence the policy, and the application made by Eureka Randon for the same.

The material parts of the policy were as follows:

"This policy witnesseth that the Washington Insurance Company, in consideration of the representations made to them in the application for this policy, and the sum of $212.80 * * * * * do insure the life of * * * * Eureka Randon.

"This policy is issued and accepted by the assured upon the folfowing express conditions and agreement. * * * *

" * * * * or, if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, * * * * then in any and every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall be null and void, and shall cease and determine." * * * *

The application contained the following:

"Has the party consumption, or any disorder, infirmity, or weakness, tending to impair the constitution? Ans. No."

The application continued: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statement shall form the basis of the contract for insurance, and also that any willful, untrue or fraudulent answers, any suppressions of facts in regard to the party's health, etc., will render the policy null and void."

The plaintiff then proved the death of the insured, and rested.

The defendant's witnesses testified in substance as follows: The policy was issued on October 16, 1871, and on October 24, 1871, the insured died. A post mortem examination by several eminent physicians disclosed that the cause of her death was consumption; her lungs were filled with tubercles and other organs much diseased.

The plaintiff rebutted, by evidence that the death of the insured was very sudden, and that she was attending to work with every external appearance of health to within two or three days of her death. The plaintiff also offered in evidence a colored photograph of the insured taken a short time before her death, which several witnesses testified was a good likeness. The defendant objected; objection overruled and exception.

The defendant presented the following point: "If the jury find from the evidence that any misstatement was made in answer to any of the interrogatories, whether intentional or not, such misstatement will avoid the policy, and the verdict must be for the defendant."

This point was negatived, and the court below (Thayer, J.,) charged that "under the terms of the insurance the answers to the questions contained in the application were representations and not warranties: If the answers were truthfully, honestly, and faithfully made, and nothing was suppressed, concealed, or kept back which it was material for the defendant to know, then the policy was not avoided by the fact that some of the answers were in point of fact incorrect, erroneous, or untrue."

Verdict and judgment for the plaintiff. The defendant took a writ of error, assigning for error—

1. The admission of the colored photograph.

2. The refusal of the learned judge to affirm the point above presented.

3. The charge of the court, as above given.

CARTY (with whom was HEVERIN), *for Plaintiff in Error.*

The utility of portraits as evidence of personal appearance has been seriously questioned. Wharton & Still's Med. Juris., § 1221. Especially as to the appearance of a female are they deceptive.

It is manifest from the evidence that the insured had some serious disorders when the application was made for the policy; and, there being a warranty as to the truth of the statements therein contained, the falsity of any of them being shown, the policy becomes void. Hartman vs. Keystone Ins. Co., 9 Har., 466; Ins. Co. vs. Lawrence, 10 Pet., 507; Frisbee vs. Ins. Co., 3 Casey, 325; Haguemin vs. Rayley, 6 Taunt., 186; Von Lindenman vs. Desborough, 3 Man. & R., 45; S. C., 3 C. & P., 353; Kelsy vs. Ins. Co., 35 Conn., 225; Campbell vs. Ins. Co., 98 Mass., 381; Vose vs. Ins., 6 Cush., 42; Eddy St. Foundry vs. Ins. Co., 1 Clifford, 300; Scales vs. Scanlan, 6 Irish Law Rep., 367; Anderson vs. Fitzgerald, 4 H. of Lds. Cas., 384; Macdonald vs. Law Union Co., Leg. Int., Aug. 14, 1874.

CALLOWAY, *contra.*

It is important to notice the difference in the wording of the application, and of the policy; the former contains the words willfully untrue, the latter omits the word willfully; but the application forms the basis of the contract in this case; therefore by the application the statements were made "representations" and not "warranties."

The law in this case is very simple and will be found in May on

Life Ins., 176; Bliss on Life Ins., 96; Washington Ins. Co., vs. Karney, 2 Ins. L. J., 283; Swet vs. Fairlie, 6 C. & P., 1.

The authorities cited by the other side are irrelevant.

PER CURIAM.—Judgment affirmed. WILLIAMS, J., was absent. No opinion.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF MISSOURI.

APRIL TERM, 1875.

JOSEPH LORIE, ADMINISTRATOR OF ABRAHAM LORIE,

vs.

CONNECTICUT MUTUAL LIFE INS. CO.

Incidental information by a brother to the agent that insured had moved within the prohibited limits, and in reply to an offer of agent to obtain a permit, that he would attend to it if it did not cost too much, cannot be construed as a waiver of the policy condition as to residence when coupled with a notice on the face of the policy that no agent had a right to waive its conditions.

Subsequent to the removal of the insured and the conversation with his brother, but prior to the season covered by the prohibition, the agent wrote a letter to the insured acknowledging receipt of premium and encouraging him to keep his policy in force.

Held, that this was not such a knowledge of the agent and waiver of the condition as bound the company.

This is an action on a life policy issued by the defendant on the fifth day of May, 1870, at Kansas City, Missouri, to Abraham Lorie, for one thousand dollars, containing, among others, the following conditions: "That the said insured is, under this policy, freely permitted to reside in any civilized abode in the western hemisphere lying north 32d parallel of north latitude, in the United States, lying south of said 32d parallel (except from the first day of July to the first day of November,) * * * * without the consent of this company previously given in writing." The defense is, that the insured at the time of

his death, which occurred on the 24th of September, 1871, was residing south of the prohibited line. To this defense the reply is, that the defendant, through its agent, for a valuable consideration, agreed to give deceased its written consent to remain and reside at Videlia, Louisiana; and again, that defendant, after knowing that deceased resided within the prohibited lines, received a premium, and thereby waived the conditions of the policy as to residence.

The testimony in the case is, that the premiums were paid to one E. W. Pierce, the resident agent of defendant at Kansas City, Missouri, which was also the place of residence of the insured; that between the tenth day of October and the nineteenth day of November, 1870, the insured, without notice to the company or its agent, left Kansas City to go by way of St. Louis to Videlia, Louisiana; that a day or two after he left, the plaintiff, who is a brother of the deceased, and who also resided in Kansas City, met Pierce on the street and told him that his brother had gone to Videlia; whereupon Pierce asked whether he was going to live there, and, being answered in the affirmative, said he ought to have a permit, intimating that he would charge nothing for it. Plaintiff told Pierce that he would attend to it for his brother if it did not cost much. There is a conflict of testimony as to the time deceased left Kansas City; the plaintiff, soon after the death of his brother, in the making of proof of death furnished the company, states that it was on the 19th day of November, 1870, and when he testifies on the trial, makes it between the 15th and 29th of October, while another witness whose deposition was taken, makes it between the 10th and 15th of October, 1870. The insured died at Videlia, Louisiana, on the 24th of September, 1871, of yellow fever, after an illness of four or five days. There were two letters, dated respectively May 5th and 22d, 1871, written by Pierce to deceased, the first addressed to him at Natchez, Miss., and the second at Videlia, La. The first, dated May 5th, read as follows:

"Enclosed please find renewal receipt for your life insurance policy. Your brother, Joseph Lorie, paid for it."

The letter of May 22d is as follows:

"Mr. J. Lorie handed me this day your letter dated May 16th. I mailed your receipt in a registered letter, May 6th, to you to Natchez, Miss., as Joseph Lorie directed me. In regard to the premium, I told you after the second payment it would be less. You need not

have any fears about it not being a good investment. It is the best investment you can make with the money it costs. After the second payment your dividend will decrease your payment annually. Wishing you health and prosperity, I remain yours very respectfully,

[Both signed] E. W. PIERCE."

This is all the testimony directly bearing on the issues.

JOHNSON & BOTSORD, *for Plaintiff.*

LEE & ADAMS, *for Defendant.*

KREKEL, J.

The questions to be determined are, was there an agreement, as set up in the reply, to waive the condition of the policy as to residence, and if not, was the receiving of the premium on May 5, 1871, a waiver of the condition of residence?

The testimony as to an agreement for a valuable consideration to waive in writing the condition of the policy as to residence is, that plaintiff met defendant's agent on the streets of Kansas City two or three days after the insured had left, and stated to him that his brother had gone to Videlia, Louisiana, to live, and when the agent spoke of the necessity of having a permit, he replied that he would see to it if it did not cost too much.

Such incidental talk on the streets, when viewed with reference to the allegations in the reply, and specially the policy, providing as it does that previous written consent must be obtained of the company, and by a printed note on the face of the policy, giving notice that no agent had a right to waive any of the conditions of the policy, cannot be construed into an agreement to waive the conditions of the policy as to residence.

As to the second point, was the receiving of the premium on the 5th of May, 1871, a waiver of the condition of the policy as to residence?

In support of the affirmative view, May on Insurance, page 404, § 339, is relied on, and is as follows:

"But the right to insist upon a compliance with such restrictions may be waived, and a receipt of the premium by the insurers after a known violation of the conditions against residence abroad, or of the terms of the permit granted, is a waiver of their right to claim a forfeiture by reason of such violation. And this is true whether the

knowledge be actual or constructive, as whether the violation is known to the agent of the insurers who receives the premiums."

It will be observed, in the first place, that a *knowledge* of the violation of the conditions of the policy must be brought home to the company, either direct or to the agent. The language, that the knowledge may be actual or constructive, has reference to the knowledge of the agent being the knowledge of the insurers, and does not mean to convey the idea that constructive knowledge of the agent is sufficient to bind the insurers. If the view was to prevail that constructive knowledge of the agent bound the insurers, then the date of the deceased leaving Kansas City becomes important.

An examination in the most favorable view to plaintiff of the testimony in the case seems not to furnish constructive notice to the agent even. Assuming that the insured left Kansas City between the 10th and 19th days of October, by way of St. Louis, to go to Louisiana, and that, two or three days afterward, plaintiff, meeting defendant's agent on the street, informed him that he had gone there to reside, in the absence of all testimony that he arrived within the prohibited lines before the 1st of November, would not give constructive notice. The possibility that he might have arrived certainly imparts no notice such as the plaintiff who sets up and must maintain the waiver is bound to show. It is true that the witness testifying to deceased leaving between the 10th and 19th of October, also states that she soon thereafter received a letter from him; but this fact is not brought home to the knowledge of the agent. With the knowledge which deceased had of the condition of his policy, and his failing to apply for a permit when leaving, it is not likely that he would enter within the prohibited limits for the sake of, at best, a few days earlier arrival. The letters of the agent, Pierce, of May 5th and 22d, 1871, quoted in full and relied on by plaintiff, both as showing an agreement to waive and a waiver in the view of the court, bear rather against than for him. If a written waiver has been agreed on, or a waiver was intended, what would be more likely than a reference to either or both? But instead of that, after his brother had paid the premium for him, he props up his faith in life insurance as though he was apprehensive of an abandonment—an idea in keeping with his feeling, previous to removal to obtain a permit. His failure to obtain a permit would be explained, however, if he did not intend to enter within the prohibited lines before the 1st of November, or left Kansas City late in October, or on the 19th of November, as first testified by plaintiff. The most careful examination of the testimony

fails to satisfy the court that the agent had constructive notice even of the coming of insured within the prohibited limits prior to the 1st day of November, 1870, much less knowledge of his so doing. That it is actual instead of constructive knowledge the cases in maintenance of the text cited abundantly shows. Bevin vs. The Connecticut Mutual, 22d Connecticut, 244, is a case in which the company had received three premiums one year after full knowledge of the claimed violation. In Wirz vs. Havey, 27 Law and Equity Reports, (English,) page 140, the violation was known to both agent and company for fourteen years, and the premium received each year. The other cases are of similar import. In all of them the premiums were received *after* a known violation. In the case before the court the premium of the 5th May, 1871, was received before a violation, and while insured resided at Videlia, Louisiana, as under the policy he had a right to do up to the 1st July. The statement of the plaintiff to Pierce (who is dead) in the accidental conversation on the street, that insured intended to reside at Videlia, and that he would attend to getting a permit if it did not cost too much, must be understood as saying that if deceased continued to reside there it would be in conformity of the conditions of the policy and under a permit, which failing to obtain the policy is avoided.

DILLON, J., concurs.

SUPREME COURT OF PENNSYLVANIA.

Error to Court of Common Pleas of Alleghany Co.

ADAMS

vs.

THE PITTSBURGH INSURANCE CO.*

Where a premium note for insurance was executed by the captain under the direction of a part owner on a steamboat navigating the Ohio and its tributaries, the evidence must be clear, uncontradictory and distinct, to establish such a usage in a particular port as will bind the other owners.

GORDON, J.

The court below permitted the defendant, part owner of the steamboat Glasgow, to be charged with the amount of a premium note, executed to the plaintiff by the captain, under the direction of another part owner, for the insurance of the boat. This insurance was made and the note given without the knowledge or consent of the defendant. It is conceded that under ordinary circumstances this could not be done. But the plaintiff was permitted to go to the jury on evidence of a custom or usage of the port of Pittsburgh, warranting the captain thus to bind the owner of the vessels navigating the Ohio and its tributaries. It is possible that a usage such as this, though derogatory of the rights of such owners, and not required for the advancement of commerce and trade, might be established by proper proof.

But in order to establish such custom, the evidence by which it is proposed to prove it must be clear, uncontradictory and distinct. Custom is usage so long established and so well known as to have acquired the force of law. It is obvious, therefore, that a custom not only can, but must be so proved as to leave no doubt upon the mind with reference to its nature and character.

* Decision rendered Nov. 16, 1874.

Doubt must be wholly eliminated from the evidence adduced or the usage is not well proved. In view of these principles we cannot agree that the evidence in this case was such as the court should have submitted to the jury for the purpose proposed. Four witnesses gave their evidence upon this subject. One testifies that the custom is for an owner and the captain to insure for all the owners, the captain signing the premium note. Another states simply that it was customary for the captain to execute the note, but whether under authority of one or all of the owners, he does not say. The third, that it was customary for the captain to insure for the boat and owners, but adds upon cross-examination that he knew of no case where the captain was not directed by the owners. The fourth, that it was the custom for the captain to insure for the owners, as in this case. From this testimony it is impossible to say what the custom or usage is, if indeed any such exists. Has the captain power upon his own motion to insure, or does it require the joint action of a part owner and the captain? May he insure the boat when there is but a single owner, or is he confined to cases where there are several joint owners?

These are questions which are legitimately raised from the evidence, and as that evidence does not clearly and definitely answer either of them, the court should not have permitted it to go to the jury.

The judgment is reversed, and a *venire facias de novo* awarded.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

FIRE.—*Assignment of policy without consent of company.*

The property insured was a general stock of goods, and was owned by Thomas L. Prows, and not by the plaintiff, James A. Prows, and the policy was issued to Thomas L. Prows.

Previous to the fire and while the policy was in force, Thomas L. Prows became indebted to sundry persons on sundry notes, which he describes, and the plaintiff signed or indorsed all of said notes as surety for Thomas L. Prows, and Thomas L. promised to keep said stock of goods insured for the benefit of the plaintiff.

It is alleged that on May 2d, 1868, Thomas L. Prows, to indemnify plaintiff against loss on account of said notes, gave him a chattel mortgage on the goods in the store, describing them.

It is further alleged that Thomas L. Prows had been indebted also to sundry other persons for which the plaintiff became surety to the creditors, and took another chattel mortgage on the goods to indemnify him, and that at the time of the signing of said obligations as surety, and receiving said chattel mortgage, said Thomas L. informed plaintiff that he had policies of insurance on said property, naming the policy sued on as one, and said that he would hold the said policy of insurance for the use and benefit of this plaintiff, and would cause the same to be renewed, and keep the property insured for the plaintiff's indemnity. It appears that plaintiff had to pay the said debts, and that there was due him on that account $3,287, besides interest. On the 24th of May, 1868, the property was destroyed by fire, which happened under the policy, and on the next day, May 25, 1868, Thomas L. transferred to the plaintiff the policy in consideration of the premises, and authorized plaintiff to collect the full amount of the loss of which defendant had notice, and the plaintiff holds and owns the policy.

In Cromwell vs. Brooklyn Fire Ins. Co., 39 Barb., 227, it was held

that where a purchaser agrees to insure for the benefit of his vendor, and to assign the policy as his security, and subsequently does insure but does not assign the policy, the agreement operates as an equitable assignment of the money payable upon the policy, but not as an assignment of the policy, and does not fall within the clause in the policy, making void the policy if assigned without the written consent of the company indorsed upon it.

Held, That the giving of the chattel mortgage was not a violation of the conditions of the policy against any assignment of the policy, or any interest therein, without consent of the company. [TAFT, J.]

James A. Prows vs. Ohio Valley Ins. Co.

Sup. Ct. of Cincinnati. } Special Term, Dec. 1874.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

EVIDENCE.

§ 129. LIFE.—*Of Wife under the Statutes of Wisconsin.*—The policy was payable to E. as trustee for his wife and another party. In a suit brought for recovery by E., as trustee, *held*, that the wife was the meritorious cause of action, and, under the statute of Wisconsin, was a competent witness in the case.

2 Wag. St., p. 371, § 1; Tingley vs. Cowgill, 48 Mo., 291; Harriman et al. vs. Stowe, 57 Mo., 93.

Evers vs. Life Ass. of America.

Rep'd Jour'l, p. 593. Mo. S. C.

§ 130. LIFE.—*Effect of Affidavit accompanying Proofs of Loss as.*—An affidavit accompanying proofs of loss, which was not required by the policy, and which it did not appear that the plaintiff, who was the wife of the insured, had ever seen, was put in evidence at request of the company and against the objection of the plaintiff. *Held*, that the plaintiff was not absolutely concluded by the statements of another party in that affidavit as to the cause of her husband's death.

Cluff vs. Ins. Co., 13 Allen, 308; S. C., 1 Big., 215; case of Campbell vs. Ins. Co., 10 Allen, 213, distinguished.

Day vs. Mut. Ben. Life Ins. Co.

Rep'd Jour'l, p. 586. D. C. S. C.

§ 131. LIFE.—*Admissions to be taken as Entirety.—Admissibility of Proofs of Health.*—Every admission is to be taken as an entirety, of the fact which makes for the one side with the qualifications which limit, modify, or destroy its effect on the other. The agent of the claimant testified that the officers of the company admitted that the proofs presented were sufficient as to the question of death; but they showed death by suicide. *Held*, that the whole admissions of the company should be taken together. If it was sufficient to establish the death of the insured, it was also sufficient to show the manner of such death. *Held*, that the preliminary proofs of death presented by the plaintiff are admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company.

Campbell vs. Charter Oak Ins. Co., 10 Allen, 203; Irwin vs. Excelsior Ins. Co., 1 Bosworth, 50.

The case of Cluff vs. Mutual Benefit Ins. Co., 99 Mass., 317, distinguished.

Mutual Benefit Life Ins. Co. vs. Newton.

Rep'd Jour'l, p. 685. U. S. S. C.

HEALTH.

§ 132. LIFE.—*Condition at Time of Renewal.*—The premium was not paid when due. Subsequently the policy was reinstated upon application of the insured, who furnished his own certificate, together with that of the company's examining physician, that he was in good health. The renewal receipt was delivered

two weeks later. *Held*, that the insured was not obliged to furnish any further statements as to the variation of his health between the time of applying for renewal and the delivery of the renewal receipt.

Day vs. Mut. Ben. Life Ins. Co.

—§ 130.

INSURABLE INTEREST.

§ 133. LIFE.—*Admissibility of Evidence.*—The policy was on the life of C., payable to E. as trustee for his wife and the wife of D., made to secure to the wives notes given by C. for the dower interest of the wives in lands with which C. purchased an interest in the firm of E. & D. *Held*, that evidence on the part of the company to prove a want of insurable interest by showing the worthless character of the lands, the defective character of the titles, lack of good faith in the conveyances, and unproductive character of the business was not admissible, when all the facts were known to the company before the issue of the policies. The policies were made payable to C. in case of his survival to a certain period, otherwise to E. as trustee. *Held*, that the sole interest in the policies was in C. during his life; the interest of the wives did not legally take effect until after the death of C. There could therefore have been no joint interest, and the admissions of C. were not receivable against the wives, the plaintiffs in the suit.

1 Greenl. on Ev., § 176.

Evers vs. Life Ass. of America.

—§ 129.

§ 134. FIRE.—*Equity of Redemption.—Right to Sue.*—The policy insured the interest of P., payable to C., a judgment creditor, who held an inchoate title to the premises by virtue of a sheriff's sale. When the policy was issued the right of redemption belonged to P. It had ceased at the time of the fire as to owner of the fee, but P. had still a right until after the fire to redeem, through other judgment creditors whom he might create. C. had contracted with P., that if he obtained a perfect title by lapse of time allowed for redemption, to have certain mortgage

and judgment debts of P. satisfied. *Held*, that all this constituted an insurable interest in P.

Herkimer vs. Rice, 27 N. Y., 163; Stephens vs. Ill. Mut. Ins. Co., 43 Ill. 327; Strong vs. M. Ins. Co., 10 Pick., 41; Buffum vs. Bowditch Mut. Ins. Co., 10 Cush., 540; 2 R. S., 373, sec. 51; Cheeney vs. Woodruff, 45 N. Y., 98, 100, 101, and cases there cited; Waring vs. Loder, 53 N. Y., 581; Franklin Fire Ins. Co. vs. Findlay, 6 Wheat., 483; Lagams vs. Com. Ins. Co., 19 Pick., 81.

Held, that it was not necessary to make P. a party in the suit. C. had a right to recover the whole, and held the surplus as trustee for P. The only interest of the company in the fact that C. had liens, was to ascertain if he had some such claim and was thereby entitled to sue.

Clinton vs. Hope Ins. Co., 45 N. Y., 544.

Cone vs. Niagara Fire Ins. Co.

Rep'd Jour'l, p. 729. N. Y. C. A.

PAROL CONTRACT.

§ 135. FIRE.—*Definite Time and Rate Essential to Validity of.*—A verbal arrangement with an agent for insurance, in which the time the insurance was to run and the premium rate were left subject to future adjustment, does not constitute a valid parol contract. To constitute a valid contract of insurance the minds of the parties must meet as to the premises insured, the risk, the amount insured, the time the risk should continue, and the premiums.

Baptist Church vs. Brooklyn Fire Ins. Co., 28 N. Y., 153; Audubon vs. Excelsior Ins. Co., 27 N. Y., 216; Kennebec Co. vs. Augusta Ins. Co., 6 Gray, 204; Monsur vs. N. E. Mut. Mar. Ins. Co., 12 Gray, 520; Walker vs. Metrop. Ins. Co., 59 Me., 391, distinguished.

The principle of a promissory note or check, silent as to time, cannot be applied to a contract of insurance. Proof of usage of a company, in its dealings with other parties, is immaterial when no complete contract has been made.

Strohn et al. vs. Hartford Fire Ins. Co.

Rep'd Jour'l p. 680. WIS. S. C.

POLICY.

§ 136. FIRE.—*Not necessary in Action on Contract.—Equity will compel the Delivery of Policy and complete the Remedy.*—A policy

is not necessary to enable the insured to maintain an action on the contract, and when none is issued the contract may be proved by any competent evidence.

Goodall vs. N. E. Ins. Co., 25 N. H., 192; M'Culloch vs. Eagle Ins. Co., 1 Pick., 278; Kennebec Co. vs. Augusta & Banking Co., 6 Gray, 204; Pierce vs. Nashua Ins. Co., 50 N. H., 297.

A court of equity may compel the delivery of the policy, and having taken jurisdiction for this purpose will, to avoid circuity of action, go on and afford the complete remedy.

Tayloe vs. Merchants Fire Ins. Co., 9 How., 390; 3 Pars. on Con., 374.

Gerrish vs. German Ins. Co.

Rep'd Jour'l, p. 689. N. H. S. C.

PREMIUM NOTE.

§ 137. LIFE.—*Is Complete Payment of Premium.*—The policy provided that in case of default in the payment of any premium, or interest on any premium note, the liability of the company should be limited to as many tenths of the sum insured as there had been "complete annual premiums" paid at the time of the default. The notes provided that they were given for part of the premium; that the dividends were to be applied to their payment; also that the interest should be paid annually or the policy forfeited. The company was mutual, and its charter provided that any member in default may be prohibited from sharing in the profits. The premiums remained unpaid after two years. The dividends were apportioned annually from the profits of the third year preceding, and the directors, in accordance with their custom, treated this policy as lapsed, and allowed no dividend at any time. *Held*, that it was not intended that a failure to pay the note in any year should work a forfeiture to any extent. The doctrine that the giving of a note does not operate as the payment of a precedent debt does not apply. The payment of the cash part, with interest on the notes, and the execution of the notes required, during the two years were complete payments of premium, which entitle the claimant to two tenths of the sum insured, less the amount of notes and accrued interest.

Ohde vs. N. W. Mut. Life Ins. Co.

Rep'd Jour'l, p. 702. Iowa S. C.

SUBROGATION.

§ 138. FIRE.—*Judgment Creditor insuring Interest of Debtor.*—The policy insured the interest of P., payable to C., a judgment creditor, having an inchoate title by virtue of a sheriff's sale. The time allowed for redemption by other judgment creditors lapsed after the fire, and C. obtained full title by virtue of sheriff's deed. *Held*, that the company could not be subrogated to the rights of C. against P. or the property, whether C. was more or less than indemnified.

Cone vs. Niagara Fire Ins. Co.

—§ 134.

TAXATION.

§ 139. LIFE.—*Of Premiums of Mutual Companies in Michigan.—The Acts of* 1869 *and* 1871.—The Michigan act of 1869 prescribed a tax on "all premiums received in cash or otherwise." The act of 1871 required the tax to be "upon the premiums received," and also on such sums as within the year "shall have been agreed to be paid for any insurance effected or agreed to be effected or procured." The full premiums called for by the contracts of a mutual life company in that State, were $287,019.25. In conformity with an understanding, as claimed by the company, with its policy-holders to restrict its exactions to the cost of insurance, the actual collections of that year were reduced to $163,275.58, the amount being determined by crediting on the premiums due the amount of over-payments in 1872. *Held*, that the excessive payment of 1872 was resolved into a part payment of the premiums of 1873, and as such liable to taxation, and that under either statute the whole sum collectable, $287,019.25, was liable to taxation, and not merely the amount actually collected.

Shargo's Case, L. R., 8 Ch'y App., 407 ; 5 Eng., 626 ; Owen vs. Dunton, 5 Tyrw., 360 ; Pratt vs. Foote, 5 Seld., 463-6, ib. 599 ; Domat's Civil Law, Pt. 1, B 4, Tit. 2, Cush. Ed.

Held, that the act of 1871 was meant to enlarge the scope of the act of 1869, not merely to more accurately define it.

People ex rel. Conn. Mut. Life Ins. Co. vs. Collier, State Treasurer.

Rep'd Jour'l, p. 693. MICH. S. C.

TITLE.

§ 140. FIRE.—*Assignment under U. S. Bankruptcy Act.*—The policy insured C., loss if any payable to P., the mortgagee, and provided that it should be void, "if any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance." The insured was adjudged an involuntary bankrupt under the U. S. act of March 2d, 1867 passed prior to the date of the policy, and his property was assigned by the register to the assignee in bankruptcy. *Held*, that it was the intention of the parties to include involuntary as well as voluntary transfers. *Held*, that there was a change of title within the meaning of the policy clause, and P. could not recover.

Savage vs. Howard Ins. Co., 52 N. Y., 502 (2 Ins. Law Journal, 769); Case of Starkweather vs. Cleaveland Ins. Co., 2 Abbott, U. S. Rep., p. 57 distinguished.

Perry vs. Lorillard Fire Ins. Co.

Rep'd Jour'l, p. 673. N. Y. C. A.

UNOCCUPIED PREMISES.

§ 141. FIRE.—*Knowledge of Agent.*—The agent understood when the policy was applied for, that the house was vacant and likely to remain so for some time. *Held*, that this was knowledge of the company, and was in fact an oral contract which justified a judgment below, that the written consent required should be indorsed on the policy.

Cone vs. Niagara Fire Ins. Co.

—§ 134.

USAGE.

§ 142. MARINE.—*Proof of.*—The captain of a steamboat navigating the Ohio and its tributaries, under direction of a part owner executed a premium note for insurance at Pittsburgh. *Held*, that such a usage is not required for the advancement of trade, is derogatory to the rights of the owners, and can only be established by evidence that is clear, uncontradictory and distinct, to bind the other owners.

Adams vs. Pittsburgh Ins. Co.

Rep'd Jour'l, p. 637. PA. S. C.

WARRANTY.

§ 143. LIFE.—*Construction of Policy.—What Constitutes a Breach of.*—Where the policy and application held forth the assurance that nothing but gross carelessness or fraud would avoid the policy, and that payment would be contested only in case of fraud, and by their language gave the insured every reason to believe that no unintentional misstatement would vitiate the contract, *Held*, that the answers will be construed as representations, although declared warranties in the application and policy.

Where the questions are numerous and puzzling, incorrect answers must be conclusively proved to be fraudulent to sustain a nonsuit. To the question whether he ever had any illness, local disease, or injury to any organ, the insured answered No. To the question, "Family physician, and each one who has ever given the party medical attendance," the answer was "Have none." The insured had been afflicted six years before with a temporary injury to the eye, and had received medical attendance. *Held*, that these were not conclusive evidence of fraud or breach of warranty that would sustain a nonsuit. They constituted a question of fraud for the jury.

Fitch vs. American Popular Life Ins. Co.

Rep'd Jour'l, p. 665. N. Y. C. A.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF NEW HAMPSHIRE.

MARCH TERM, 1875.

CHAMBERLAIN

vs.

NEW HAMPSHIRE FIRE INS. CO.*

The person to sue for the breach of a simple contract is the person from whom the consideration for the promise moves.

The municipal laws of a State are necessarily referred to in all contracts made within the State subsequent to the enactment of those laws, and must govern and control them in all matters affecting their validity, construction, or discharge.

The defendant corporation, a joint-stock insurance company, issued a policy insuring W. against loss or damage by fire to the amount of one thousand dollars on his house, etc.; "in case of loss, insurance to be paid to" C., who held a mortgage upon the premises to secure the payment of six hundred dollars. The insurance was obtained by C., with the consent of W. C. paid the premium, and W. had no negotiations with the company. *Held*, that C. was

* From advanced sheets of 55 N. H. Reports.

the proper party to maintain an action upon the policy, to recover not only to the extent of his own but also the interest of W. secured thereby.

The policy contained a condition that it should be void if the premises should become vacated by the removal of the owner or occupant, without immediate notice to the company and consent indorsed on the policy. The buildings were occupied by the owner at the date of the policy, and continued to be thus occupied nearly a year, when they were vacated, and remained unoccupied until their destruction by fire, nine months later. They were not destroyed by reason of exposure to any risk which it was the object of the condition in the policy to guard against. W. gave no notice to the company of the vacating of the buildings, because, not having obtained the insurance nor received the policy, he was ignorant of the condition therein; and C. gave no notice, because (without fault or negligence) he was unaware that W. had removed. *Held*, that the failure to give notice was a "mistake," within the intendment of the statute, which provides that "no policy shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made; but the party insuring, in any action brought against them on such policy, may show the facts, and the jury shall reduce the amount for which such party would otherwise be liable as much in proportion as the premium ought to have been increased if no mistake or misrepresentation had occurred," LADD, J., dissenting.

Held, also, that notwithstanding the mistake, and notwithstanding the fact that the buildings were not destroyed by reason of exposure to the risks of non-occupation, still, inasmuch as the company might have refused to insure the property, or might lawfully have charged an increased price for the continuance of the insurance if they had known of the vacating of the buildings, the amount of its liability must be diminished, as indicated by the statute.

Assumpsit on a policy of insurance issued by the defendants, insuring "John M. White against loss or damage by fire, to the amount of $1,000, on his house, shed, and barn in High Bridge village, New Ipswich; in case of loss, insurance to be paid to James L. Chamberlain." Case tried by the court.

The defense was: 1. That the action could not be maintained in the name of the plaintiff. 2. That the policy became void by reason of the following condition: "If the premises hereby insured become vacated by the removal of the owner or occupant, without immediate notice to the company and consent indorsed hereon, * * * * this policy shall be void." The policy was dated July 15, 1870. The plaintiff then owning a note and mortgage for $600 given by White with White's consent obtained the insurance on buildings owned by White, who lived in and occupied them. June 1, 1871, White, by removal, not intending to return, vacated the premises, and they remained unoccupied till destroyed by fire, Feb. 26, 1872. No notice was given of the premises being vacated, and the plaintiff and the defendants were not aware, till after the fire, that they were vacated. The buildings were burned by a fire originating in a factory, and communicating through other occupied buildings, and were not destroyed

selves by any legal contract they may choose to make, that it is not to

by reason of exposure to any risk which it was the object of the conditions in the policy to guard against. The defendants, being informed in September, 1872, that the buildings had been vacated before the fire, raised that objection. This objection was not raised in the communications between the parties soon after the fire, because the defendants were not then aware that the buildings had been vacated before the fire. White gave no notice, because he did not obtain the insurance, had no interest in it, and was ignorant of the condition in the policy; and the plaintiff gave no notice, because he did not know that White had moved. Upon these facts judgment is to be rendered.

Case reserved.

STEPHENS and PARKER, *for Plaintiff.*

BRIGGS & HUSE, *for Defendants.*

FOSTER, C. J., C. C.

By the terms of the policy the defendants insured John M. White against loss or damage on his buildings, and agreed to pay the amount of the insurance, in case of loss, to the plaintiff. The plaintiff had an insurable interest in the property as White's mortgagee to the extent of $600. It is said that White had no interest in the insurance; but this is evidently stated inadvertently, for if, in the circumstances of the case, the defendants are liable to pay the full amount of the insurance,—$1,000,—then it is manifest that White has an interest to the extent of the surplus after the discharge of the plaintiff's indebtedness to him; and if this plaintiff can recover the whole sum insured in this action, he will recover and hold that surplus as the trustee of White. See Barnes vs. U. M. F. Ins. Co., 45 N. H., 21, 28.

The insurance was obtained with White's consent, but he had really nothing to do with the transaction, and was ignorant of the terms and conditions of the policy. The plaintiff paid the premium, and was in fact the only party contracting with the company.

But the first ground of defense to the plaintiff's claim is, that the action cannot be maintained in his name.

Probably no principle in the law of insurance is more clearly settled in this State than that by the rules of the common law, where a policy issued by a mutual insurance company has been assigned, the action upon it must be brought in the name of the assignor, although the assignment is assented to and the policy is made payable in case of loss to a third party, unless, by giving a new premium note, the

assignee becomes substituted for the insured and a member of the company, in which case the action must be brought in the name of the latter. Nevins vs. The Rockingham Fire Ins. Co., 25 N. H., 22; Rollins vs. The Columbian Fire Ins. Co., 25 N. H., 200; Folsom vs. The Belknap Co. M. F. Ins. Co., 30 N. H., 231; Blanchard vs. Atlantic M. F. Ins. Co., 33 N. H., 9; Barnes vs. Union M. F. Ins. Co., 45 N. H., 24; Pierce vs. Nashua Fire Ins. Co., 50 N. H., 297; Granger vs. Howard Ins. Co., 5 Wend., 200; Conover vs. Mutual Fire Ins. Co., 3 Den., 254; Nevins vs. Rockingham Fire Ins. Co., before cited. And it makes no difference that by the express terms of the policy the insurance, in case of loss, is to be paid to the assignee or to a third person. Nevins vs. Rockingham Fire Ins. Co., Blanchard vs. Atlantic M. F. Ins. Co., and Barnes vs. Union M. F. Ins. Co., before cited.

The rule is otherwise in some jurisdictions—May on Insurance, secs. 446, 447, and cases cited in notes; but it seems to be so firmly established in this State, in accordance with the general rule of the common law applicable to personal contracts of this character, that it would seem inexpedient now to adopt a different rule. Unless this may, in some sort, be regarded as substantially the case of an assignment, chapter 30 of the Laws of 1869 is not applicable to this case. That chapter relates solely to policies which have been assigned.

Prior to that statute it was understood that where, by the terms of the charter or by-laws of a mutual insurance company, provision is made for a transfer of the policy, upon mortgage or sale of the property insured, giving to the assignee all the rights and privileges before possessed by the assignor, a suit upon the policy must be in the name of the assignee. There was privity of contract in such a case, because the company expressly agreed that the assignee should stand in the place of the assignor, possessed of all his rights and privileges. The act of 1869 provided that in such a case the party in interest might bring his action either in the name of the assignor or assignee; but that statute cannot be held to apply to a case like the present, notwithstanding it may seem to be within the spirit of the act. Loring vs. Manf. Ins. Co., 8 Gray, 28.

In May on Insurance, sec. 446, it is said,—"The general rule applicable to personal contracts is that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has promised the assignee to respond to him. But a consent to the assignment is generally held to be the equivalent of this promise. And so, if the policy is made 'payable in case of loss' to a third party." Numerous decisions in the courts of Maine, Massachusetts, and New

York are cited in support of this proposition. But, as we have seen, the policy of our own courts is different, prohibiting the maintenance of an action by the assignee, although the assignment is assented to and the policy is made payable in case of loss to a third party, unless, by the giving a new premium note, the assignee becomes substituted for the assured, and a member of the company. All the New Hampshire cases before cited, it will be observed, relate to cases of mutual companies; and in every one of them mutuality of membership seems to be made the test of capacity to sue. The anomalous doctrine is maintained, that the plaintiff has no right of action except in a certain sense against himself, that is, against the association of which he is himself a member.

This to my mind is very unsatisfactory. I fail to see how it can make any difference in the rights of these parties that the defendants here are a stock company and not a mutual company. The right of a party to recover should depend, not at all upon his association with the defendants as a member of their corporation, but, independently of that, upon his contract.

The leading principle of mutual insurance companies is, that each person whose property is insured becomes a corporator, or a member of the company, and, by reason of such association, is bound to take notice of, and is placed under obligation to observe, its by-laws. Angell on Fire and Life Insurance, secs. 10, 146. But a policy of insurance is a contract, and is to be governed by the same general principles applicable to other personal contracts. May on Insurance, secs. 172, 173.

The general rule therefore applies, and I am not aware that it admits of any exception, that the person to sue for a breach of a simple contract must be the person from whom the consideration for the promise moves. Dicey on Parties, 81; Chitty on Contracts, 62.

To entitle a party to sue upon a promise, the promise need not, necessarily, in express terms, be addressed to the party entitled to sue. In terms, it may be addressed to a party who, in law, shall be regarded as the agent of the party from whom the consideration moves, and the real party thus offering the inducement to the promise may bring the suit upon it in his own name, notwithstanding the promissor may have promised nothing to him directly. "The consideration," it is said, "must proceed from the promisee; or, more strictly, the law considers the promise to be made to the person from whom the inducement to make it comes, or, in other words, from whom the consideration moves."

As the person to sue for the breach of an agreement must be the person with whom the agreement is made, or in other words, to whom the defendant has made a promise, it follows that the person to sue for the breach of a simple contract must be the person "from whom the consideration moves," since, as already explained, he is the person to whom the law considers the promise to have been made.

A stipulates with X, that in consideration of a payment made by A to X, X shall build a house for M. A made the payment, and so the consideration moved from him. The person to sue X, therefore, is not M, but A. Here, the party entitled to sue is the party to whom the promise was directly made.

But, another example: A, the plaintiff, had a claim against M for a debt of £70. X, the defendant, undertook, in consideration of M's making a title for X, to pay A the £70. A was held to have no right of action against X. Crowe vs. Rogers, 1 Str., 592; Price vs. Easton, 4 B. & Ad. 434; Butterfield vs. Hartshorn, 7 N. H., 351. Here, the promise was made to A, but he had no right of action against X, because the consideration moved from M and not from A. But the person really interested in the contract, and for whose benefit it is made, is the person with whom the law considers it to be made; "for though a person who has expressly contracted with A cannot treat the contract as not being with A, on the ground that another person, P, is really interested, yet when a contract is made expressly with A, either by word of mouth or in writing, (provided the written instrument be not a deed,) it is allowable for P, the person really interested, to show that the contract is, though on the face of it with A, yet in reality with him, and that he, therefore, has a right to sue upon it."

In short, the principle always holds good, as now settled and established, that no stranger to the consideration can take advantage of a contract, even though made for his benefit, and the consideration must move from the party entitled to sue upon it. Dicey on Parties, 81–85, 136, 137; Leake on Contracts, 212, 313.

Even the cases of negotiable promissory notes and bills of exchange in which the holder may sue, although he was never a party to the original contract evidenced by the note or bill, are not really to be regarded as furnishing an exception to the general rule, since not only are such choses in action governed by the doctrine of equitable assignments which courts of law, from regard to public policy and in the interests of commerce, always recognize and protect, (Chitty on Con. 132,) but the possession of negotiable paper is regarded as

prima facie evidence of consideration and title in the holder. 2 Pars. on Notes and Bills, 438; Dicey on Parties, 117.

Upon the familiar principles of estoppel, also, the maker of negotiable paper is estopped to question the capacity of the payee to indorse it. Drayton vs. Dale, 2 B. & C., 293; Big. Est., 447.

"In some cases," says Prof. Parsons, "the actual promisee would be considered only the agent of the beneficiary, and in others the beneficiary would be regarded as the trustee of the party to whom the promise was directly made, and, as such trustee, might maintain an action in his own name. In this country the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted, and we think it would be safe to consider this a prevailing rule with us; indeed, it has been held that such promise is to be deemed made to the third party, if adopted by him." 1 Pars. Con., 467, 468. The cases cited by the learned author seem to fully sustain the propositions of the text. Carnegie vs. Morrison, 2 Met., 381; Brewer vs. Dyer, 7 Cush., 337; Met. Con., 205–211.

This rule, of course, does not hold in the case of a deed or other specialty. The person to sue for the breach of a contract by deed is the person with whom the contract is expressed by the deed to be made, *i. e.* the covenantee.

A covenant is an agreement by deed. In every covenant, therefore, there is a covenantor who promises, and a covenantee to whom the promise is made. The person to bring an action for a breach of the covenant must be the covenantee. This rule holds good, because a covenant differs from a simple contract in this, that it is good without the existence of any consideration to induce the covenantor to enter into the covenant, whilst a simple contract is not valid if made without a consideration. Dicey on Parties, 101, 102,—where the following illustrations of the distinction in this respect between specialties and simple contracts, and of the general rules applicable to both, are given:

"X covenants with A to pay him £10. A can sue X if the covenant be broken, even though there were no consideration whatever to induce X to enter into the covenant. Suppose, again, that it were perfectly well known that the covenant was made with A simply as agent for M, and was intended for M's benefit: still, if it appeared on the face of the deed to be a covenant with A, an action for the breach of it would have to be brought by A, and could not be brought by M.

But in the case of a simple contract, M, as the principal really interested, could sue." 1 Pars. Con., 468.

From all these considerations, it would seem to follow conclusively, that the plaintiff Chamberlain, and not White, is the proper person to sue for a breach of the defendants' contract. Although the promise is in terms to White, it is also in terms a promise to pay to Chamberlain; and in law, it is to be regarded as a promise directly to Chamberlain. The entire consideration moved from Chamberlain—White was, in fact, as well as in law, a total stranger to the contract—and, although White may ultimately derive a benefit from the contract, such a result can only be reached through the medium of the plaintiff, as his trustee, between whom and the defendants is the sole privity of contract.

None of the New Hampshire cases, I think, will be found to uphold a doctrine contrary to these views. The cases cited by the defendants are nearly all cases of assignments, and governed by the general principle stated in the outset, that in such a case the suit must be brought in the name of the original contracting party; whereas, in the case before us, the plaintiff is not an assignee, but is, in fact as well as in law, the original contracting party.

In Nevins vs. Ins. Co., 25 N. H., 28, the policy issued to Nevins was made payable in case of loss to Holland & Lane. It was held that Nevins properly brought the action, and not Holland & Lane, because, said Perley, J., "the contract of the defendants was with this plaintiff; * * * * he gave the premium note, and was the member of the corporation; * * * * Holland & Lane do not appear to have had any insurable interest in the goods," etc.

In Rollins vs. Ins. Co., 25 N. H., 200, it was held that under the peculiar provisions of a by-law of the defendants, an assignee of a policy might maintain a suit in his own name; but it appearing that the policy was not in fact assigned, the action was properly brought in the name of the party originally insured; his contract with the defendants and his insurable interest remained; he was the member, and not his creditor, and it is to be inferred that he and no other gave the premium note.

In Folsom vs. Ins. Co., 30 N. H., 231, membership was regarded as the sole test of the right of action on the policy. It was held that "in the absence of any provision in the charter or by-laws of a mutual fire insurance company whereby the assignee becomes a member of the company, the action in case of loss must be in the name of the

assured, with whom the contract was made." To the same effect is Pierce vs. Ins. Co., 50 N. H., 297.

In Blanchard vs. Ins. Co., 33 N. H., 9, the policy issued to Gates was made payable to Blanchard. Eastman, J., said: "The application was the foundation of the insurance. This was made by Gates. He also gave the premium note and agreed to pay the assessments, and the policy was issued to him upon the faith of the application. There was no mutual contract between Blanchard and the company. He was not known to the defendants except through Gates. By the request and direction of Gates, and in consideration of the payments and undertakings made by him, the insurance was made payable, in case of loss, to Blanchard. There was no consideration paid by Blanchard, and no engagements entered into by him; and he was not a member of the company," etc.

There is another aspect of this case already alluded to which seems to indicate quite clearly the right of this plaintiff to maintain the suit in his own name for the recovery, not alone of his own, but also of White's interest in the policy. He obtained the insurance with White's consent for an amount greater than the value of his incumbrance upon the property insured. As to this surplus, therefore, he may be regarded as the agent and trustee of White; and it is well settled that an agent may bring an action on a policy of insurance in his own name, upon the ground that the promise of the underwriter is made directly to the agent, and that he is a direct party to the contract. Paley on Agency, 362; Story on Agency, sec. 394; Barnes vs. Union M. F. Ins. Co., 45 N. H., 21, 28.

It now remains to consider the effect of the vacating of the buildings insured, without notice to or the consent of the insurers.

The policy contained the following clause: "If the premises hereby insured become vacated by the removal of the owner or occupant, without immediate notice to the company and consent indorsed hereon, * * * * this policy shall be void."

Provisions of this character may be, very properly, annexed to a contract of insurance. They tend to protect the insurer against the results of negligence and fraud. A dishonest owner may be more easily tempted to burn his own buildings during their non-occupation than when his goods are stored therein. The risk is usually regarded as greater, and a larger premium required to be paid in the case of buildings unoccupied, if the insurer consents to take such risk at all.

Still, since the provision, when applied as in this case to a state of

things not existing at the date of the policy, tends to the subversion of the contract by an occurrence after its execution and partial performance, it is in the nature of a condition subsequent, and, like all such conditions, is not specially favored in law, and it will be construed and interpreted most strongly against the party imposing the condition.

The circumstances of this case call upon us to avoid the effect of this condition, if we may do so consistently with sound and established legal principles. The buildings remained occupied nearly a year after the date of the policy, and were then vacated, and so continued until their destruction, nearly nine months afterward.

Notice was not given because the party who obtained the insurance had no knowledge that the buildings were vacated, and the owner, who did not obtain the insurance, had no knowledge of the condition inserted in the policy; and "the buildings were not destroyed by reason of exposure to any risk which it was the object of the conditions in the policy to guard against."

The defendants have not claimed or suggested that the failure to give the prescribed notice arose from any willful negligence or fault of anybody. It resulted from a condition of things which may well be regarded as a mistake on the part of the plaintiff; in other words, it arose from the plaintiff's honest reliance upon a mistaken condition of things. He knew that the buildings were occupied at the date of the policy, and had no suspicion that an abandonment of them was contemplated, nor that it had occurred before the period of their destruction.

The Gen. Stats., ch. 157, sec. 2, were intended to afford relief for cases of this kind; and we may properly seek for aid in the interpretation and construction of this condition, under the light of this enactment. The terms of the statute are: "No policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made; but the party insuring, in any action brought against them on such policy, may show the facts, and the jury shall reduce the amount for which such party would otherwise be liable as much in proportion as the premium ought to have been increased if no mistake or misrepresentation had occurred."

The plaintiff's counsel, in argument, suggest that "it may be contended that the mistake or misrepresentation intended by the statute must be one occurring prior to or at the time of issuing the policy," and then the counsel go on to argue that "this is too narrow a con-

struction, and that it may be one happening during the life of the policy, and referring to all its substantial conditions, limitations, or prohibitions, as well as to facts arising before the issuing of the policy. It would (the plaintiff contends) properly include a mistake or misrepresentation occurring in the assignment or transfer of the policy or of the property insured; and this construction, he says, is especially proper in relation to policies issued by stock companies, where, as he understands, no formal or written application is made or signed.

These suggestions evoke no reply from the defendants, who waive and ignore entirely the statute referred to as applicable to the case. And yet the plaintiff's proposition and argument seem to me forcible, and such as to compel and require attentive consideration.

The terms of the statute are very broad: "No policy shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made."

Now the "misrepresentation" may refer solely to representations made in the original application for insurance, or to representations inducing an assignment of the policy; but the "mistake" is not thus limited,—and, pray, why should it be? The terms "mistake" and "misrepresentation" are not conjoined, and made identical or cumulative or aggregate; they are separated by the disjunctive "or,"—and necessarily so, for they are totally unlike. A misrepresentation may be "intentionally and fraudulently made," but a mistake cannot be intentionally or fraudulently made. We hear of culpable negligence, but who ever heard of an intentional and fraudulent mistake? Therefore the law properly and necessarily distinguishes between the two contingencies, and declares that the policy shall not be avoided by a misrepresentation "unless it appears to have been fraudulently made," nor "by reason of any mistake."

The policy and purpose of the law were, to promote honest and open fair dealing, to do equal justice, to protect the confidence reposed by the insured in those with whom he may contract, and (especially disclaiming any reference to this defendant company) to spring the traps "concealed in a mass of rubbish" before the unwary traveler shall have put his foot in them; to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper, was uninsured by the conditions involved in the "insurance typography" indorsed upon the other side of the same piece of paper.

I am unable to doubt that the statute was intended to apply, not merely to a mistake in matters antecedent to the execution of the contract of insurance, but to any and all matters affecting its continuing vitality.

The statute cannot be well said to interfere with the rights of parties to bind themselves by such stipulations and conditions as they may choose deliberately and fairly to make. As equity will generally afford relief to a party in jeopardy by reason of a mistake, so courts of law, I trust, will be reluctant to give a narrow and semi-effectual construction to a statute intended to aid the application of equitable principles. More than fifteen years before the date of this policy the legislature of 1855 enacted the substance of the law which is now expressed in sec. 2 of ch. 157, Gen. Stats., and every subsequent contract of insurance made in this State has been made in view of and in subordination to this law, which has thus been practically incorporated into the contract; for "the obligation of a contract," it is said, "consists in its binding force on the party who makes it. This depends upon the laws in existence where it is made; these are necessarily referred to in all contracts." Cooley's Const. Lim., *285. "The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, whenever its performance is sought to be enforced." Washington, J., in Ogden vs. Saunders 12 Wheat., 259.

Contracts relating to the traffic in spirituous liquors are very stringently limited by force of State laws which bear upon them, but such contracts are not within the category of those whose obligation is forbidden to be impaired by the Federal constitution.

A bankrupt or insolvent law of a State, which discharges both the debtor and his future acquisitions of property, has been held not to be a law impairing the obligation of contracts so far as respects debts contracted subsequently to the passage of such law. Baldwin vs. Hale, 1 Black., 231; Sturgis vs. Crowningshield, 4 Wheat., 199; Potter's Dwarris on Statutes, etc., 475, 476. I am therefore of the opinion that the statute should be applied to the correction of this mistake.

But aside from these considerations, I am not clear that a reasonable interpretation of the condition will not relieve the plaintiff from

the forfeiture contemplated by its terms. The condition makes the policy void unless immediate notice of the vacating of the premises be given; but the policy is not voided *eo instanto*, by the act itself of non-occupation. There is a period of time after the occupation ceases in which the policy still remains in force.

What is immediate notice? In construing this contract, I think we must hold, as matters of law, that "immediate" notice means reasonable notice,—reasonable in all the circumstances of the case. What is reasonable, is a question for the jury; but, by the provisions of the case, upon the facts transferred to this court, judgment is to be rendered.

We have then this fact: the tenant moved out of the premises without the knowledge of the insured, and the premises remained unoccupied until their destruction, without the knowledge of the insured; and, although several months thus elapsed, still, I think, as jurors and as lawyers both, we should hold that notice to be reasonable, and therefore within the legal intendment of this condition, which was given as soon as the occasion for giving the notice was found to exist. That occasion never became apparent to the plaintiff, (no laches are imputed to him for his non-observation or ignorance of the occasion,) and therefore the obligation to give the notice contemplated by the condition was never, in fact, cast upon him.

The risk contemplated by vacating the buildings never, in fact, occurred in this case, since they "were not destroyed by exposure to any risk which it was the object of the conditions in the policy to guard against."

Nevertheless, since it is apparent that the defendants might not have insured the buildings upon the terms contracted for if they had known the buildings were unoccupied, and that upon notice of non-occupation they might have made an increased premium the condition of their consent to the continuance of the risk, I am of the opinion that the amount of their liability must be reduced "as much in proportion as the premium ought to have been increased if no mistake * * * * had occurred."

We are unable, therefore, to render a judgment, as contemplated by the provisions of the case, and the cause must be sent to the Circuit Court for the determination of the question of damages only.

Cushing, C. J., concurred.

Ladd, J., *dissenting.*

Upon the facts stated, I think judgment should be entered for the

defendants. The policy upon which the suit is brought contains this condition: "If the premises hereby insured become vacated by the removal of the owner or occupant, without immediate notice to the company and consent indorsed, this policy shall be void." The case shows that the premises were vacated about nine months before the fire, and remained unoccupied until burnt; that no notice thereof was ever given to the company, and their assent to a continuance of the contract, under the changed condition of the property, was never obtained.

It is not contended that there was anything illegal or unconscionable in the condition. No one will contend, I suppose, that such a stipulation is not both legal and proper, for the protection of the insurer against fraud, etc. It certainly formed an integral and essential part of the contract of insurance, at the time the policy was written.

Waiving for the present the inquiry whether a failure for nine months to give any notice whatever should be regarded as a failure to give "immediate" notice within the meaning of the policy, no question is left but that there was an entire failure by the plaintiff to perform this express and important stipulation in the contract. My brethren hold that the defendants are liable notwithstanding this failure of performance by the plaintiff, on the ground that his failure was the result of a mistake, against the ordinary and legitimate consequences of which he is protected by Gen. Stats., ch. 157, sec. 2. In this I have not been able to agree with them. The statute is as follows: "No policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made." The question is, What does this mean? I confess it seems to me the meaning lies on the surface of the language used, and that the provision relates to the making of the contract and not to its performance. The whole import and effect of the statute is to guard against the consequences of a mistake; for a misrepresentation not intentionally nor fraudulently made is simply a mistake, and nothing more. To protect the insured against a forfeiture by reason of an innocent mistake in making the contract of insurance accords with natural justice, and seems to be little more than introducing a familiar branch of equitable relief; but to release him entirely from the performance of a legal and wholesome condition in the contract, which he has entered into fairly, with his eyes open, when there is no pretence of fraud or mistake in the making of the contract, seems to me such an extraordinary interference with the right which all men have to bind them-

be inferred except upon such evidence as leaves no other conclusion possible.

If I am wrong in supposing that the statute is so plain as not to admit of interpretation, then we must look for the just rule of construction to be applied in determining what it means. It is said to be the duty of courts so to construe statutes as not to violate fundamental principles—Potter's Dwar. on Statutes, 144; and, again, statutes are to be interpreted with reference to the principles of the common law in force at the time of their passage, except when the statute itself or the courts have otherwise determined. Ib., 145. If there be doubt, and one construction leads to manifest absurdity and injustice while the other accords with natural equity and reason, the latter should obtain. It seems to me contrary to fundamental principles, as it clearly is contrary to the principles of the common law, that one party to a legal contract should be released from performance of a condition upon which the liability of the other is expressly made to depend, and the other still be held liable. It certainly seems to me little less than annulling a contract which the parties have made for themselves, and substituting for it a different one such as somebody may suppose they ought to have made; and this neither the legislature nor the court can do.

The alleged mistake here is, that the plaintiff did not know the premises had been vacated. Was it not his duty to have known that fact? Or, if he did not know it personally, ought he not to have provided for the fulfillment of his contract in this respect, as he easily might, without his personal knowledge? He deliberately bound himself, under penalty of forfeiting his policy, to inform the defendants "immediately" in case the premises were vacated. It was an indispensable requisite to the literal performance of this stipulation that he should inform himself of the fact he thus bound himself to communicate. If he failed to inform himself, and also failed to provide that notice should be given without his personal knowledge, it seems to me clear that he omitted the very thing he had bound himself to do; and I am unable to discover anything to distinguish the case from any other where a person, from negligence or forgetfulness, fails to discharge a legal obligation which he has voluntarily assumed. I cannot comprehend the ground upon which his failure can be said to have resulted from mistake, in any legal or proper sense of that term. The whole amount of it seems to be, that he undertook to do a certain thing as a condition upon which his policy should continue in force,

and then utterly neglected to take a single step in the direction of performing the condition.

The reasons for my dissent, then, are: 1. That, admitting this to be a mistake, it does not come within the statute, inasmuch as the statute has relation to mistakes in the making of the contract, and not to a clear failure of performance like this. 2. That this cannot properly be called a mistake, but simply a negligent want of knowledge by the plaintiff of a fact which, by the express terms of the contract, he was bound to know and communicate to the defendants.

It is further suggested as not impossible that a reasonable interpretation of the condition may relieve the plaintiff from the forfeiture contemplated by its terms; that the word "immediate," as there used, means substantially the same as within a reasonable time, and that a reasonable time had not elapsed during the nine months that intervened between the vacating of the house and the fire. It will not be contended, I suppose, but that we must give to the word "immediate," as used in this contract, its natural and commonly received signification and effect. The word is defined as "having nothing intervening, either as to place, time, or action; direct, proximate." Doubtless, in the common use of the language, "immediate" does not always mean without the intervention of an instant of time, or the smallest conceivable extent of space. In a certain sense, I should say the plaintiff here would be entitled to a reasonable time within which to give the notice; but the notice must still substantially answer the terms of the contract. It must be immediate, according to the idea conveyed by the word in the common language of the country. It seems to me impossible to hold that a failure to give the notice for a space of nine months was not a failure to give "immediate" notice, within any fair and reasonable construction of the policy.

Case discharged.

SMITH, J., did not sit.

COURT OF APPEALS OF NEW YORK.

SARAH L. FITCH, *Appl't*,*

vs.

AMERICAN POPULAR LIFE INS. CO., *Resp't.*

Where the language of the application and policy is such as to give the insured every reason to believe that nothing but gross carelessness or deliberate misrepresentation will avoid the policy, and that if the answers are given in good faith the claim will not be contested, and where the questions are numerous, puzzling, any very difficult to answer correctly, the answers will be regarded as representations although declared in the policy and application to be warranties.

To sustain a nonsuit the answers must be shown not only untrue, but fraud must be so conclusively proved that there is no question for a jury.

The question whether he had ever had any illness, local disease or injury in any organ, was answered no.

Held, that a temporary injury to the eye six years before, and then healed, was not conclusive evidence of fraud or breach of warranty. The question of fraud was for the jury.

To the question, "Family physician, and each one who has ever given the party medical attendance," the answer was, "Have none."

Held, that the suppression of physician's name who had given temporary treatment several years before was not conclusive evidence of fraud, but a question for the jury.

Order of General Term reversed and judgment entered upon the verdict.

RAPALLO, J.

The exceptions mainly relied upon on the argument are those taken to the refusal of the judge to grant the motion for a nonsuit; to his refusal to charge the jury that "if they believed that Fitch had had any disease of the eyes such as to require care and attention, no recovery could be had;" that "if they believed that Fitch had had any injury of the eyes, there could be no recovery;" and that "if they believed that there existed at any time prior to the application, either a disease, or any injury of the eye, there could be no recovery." Also to the exclusion of evidence that Fitch committed suicide. Other exceptions were taken and appear in the case, but if the positions

* Trial of same case, in court below, reported on p. 716.

upon which they are founded are sound, they are available under the motion for a nonsuit, and have been so treated on the argument, and will be here considered in that connection.

The motion for a nonsuit was made upon the ground that by the undisputed and uncontradicted evidence it appeared that Fitch, in the application he made for the policy, made misrepresentations as to certain facts, and concealed and withheld certain other facts, which under the terms of the policy and of the application necessarily made it void.

It is claimed on the part of the defendant that the statements contained in the application were warranties, and must be absolutely true; that it was not for the jury to pass upon the question whether they were material to the risk, nor whether the applicant made any intentional misstatement; that the only question is whether or not the statements were true, and that if any untrue statement (except as to ancestry) was made in the application, the plaintiff cannot recover, and that it is wholly unimportant whether or not the matter as to which the untrue statement was made had any tendency to increase the risk, or any connection with the cause of death, or whether the statement was known to the applicant to be untrue.

The first question to be considered is, whether the statements contained in the application were absolute warranties or were representations, and whether, under the terms of the policy and application, the warranty therein mentioned was not in effect simply that the statements were made in good faith. Although the term warranty is used in both instruments, it must be construed with reference to the other language employed in the same instruments. These instruments were prepared by the defendant, and themselves explain the degree of responsibility to be assumed by the applicant in answering the questions, propounded to him. Although the word warranty is employed, yet if the explanations accompanying that term show that a strict warranty was not intended, these explanations given by the defendant itself in the papers, and which induced the applicant to undertake to answer the questions and enter into the contract, must govern.

The application begins with a preamble, headed "Explanation." This explanation describes the nature of life insurance and defines the terms "insured" and "assured." It then proceeds to state that the policies of this company are made in entire, unconditional, honest good faith, and that it is required as a condition that the application be made in equal good faith. That if it is, and the conditions fulfilled,

premiums paid when due, etc.,—"all of which is easily done when the intention is good, the assured may confidently rely upon the prompt payment of the assurance by this company as one of the most certain of human events. The assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant, since each question and answer is easily made correctly, if only truthful, 'I do not know' is as proper at one time as 'Yes' or 'No' at another. * * * * The sole object is to protect the honest from the effects of misstatements not only of themselves but of others, by having everything so plain that it will be clearly evident that a misstatement can be made by intention only."

It then proceeds to propound questions as to the grandparents, parents, uncles and aunts on the paternal and maternal sides, whether living or dead, their health when living, ages at death, causes of death, weight, height, complexion, color of hair, beard and eyes, and various other questions concerning them. Then follow a great number of questions of the most minute character touching the insured, his constitution, habits etc., and among others as to his weight, how much increase or diminution in weight in one year and in five years, what diseases he has had, including those of childhood; whether any place where he has ever lived was subject to any disease, and what; as to his habits, how often he bathes, whether he rises and retires regularly, whether late or early, what he wears next his skin, what kind of stimulants he uses, if any; whether he takes his tea or coffee weak or strong; the extreme number of glasses of ale, beer, cider or wine he takes in a day, the quantity he takes in a month; whether he has ever been intoxicated, and how often; whether the action of his bowels is regular every day; whether he has any practice tending to impair health, etc; whether his vocation endangers life or health, what it will be; whether he has reason to think his residence, vocation or any circumstance affecting him will be more hazardous to life and health than is at present the case; whether his hands and feet are usually warm or cold; whether any kind of food usually produces ill health or indigestion; whether he has ever had any of a long catalogue of diseases, many of which are of a character which he might well have had without knowing it, and which he might naturally deny ignorantly; whether he has ever had any diseases of or injury to any organ, or has ever had any symptoms of disease of any organ; whether he is acquainted with the laws of health, and whether he takes pains to observe them, and a host of other questions which no human being could with safety undertake to answer accu-

rately and warrant the correctness of his answers. Then follow questions as to his knowledge of the conditions of the insurance, and among these whether he is aware that any fraud will vitiate the insurance, but he is not asked whether he is aware that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty and vitiate his policy.

The applicant is required to answer the questions thus propounded by making upon or over each question conventional marks, one of which signifies yes, or good, or positive; one no, or bad, or negative; double of either, very or decidedly; one medium, and the other, do not know.

This document, which the applicant is required to sign, concludes with a declaration that his answers to the questions and the written statements in the preceding statement, declaration or warranty, together with the statement made to the examining physician and signed, are warranties correct and true, and that there is not concealed, withheld nor unmentioned therein any circumstance in relation to the past or present state of health, habits of life, condition nor intentions of the applicant, nor any fact concerning his relatives or ancestry with which the company ought to be made accquainted, (without specifying what is the nature of such last mentioned facts,) also that the statements etc. shall be the basis and form part of the contract or policy, and if not in all respects true and correct the policy shall be void.

This application was signed by Fitch, the questions being wholly or in part answered by means of the stipulated hieroglyphics, and a policy was thereupon issued on his life in favor of the plaintiff as assured for $3,000. This policy contains a declaration on the part of the company that it is issued in entire unconditional honest good faith, and with the just intent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainty, and then proceeds to state that fraud or intentional misrepresentation violates the policy, and that the statements and declarations made in the application are warranties and in all respects true, and do not suppress or omit any fact relative to the insured affecting the interest of the company, or which, whether material or not, would tend to influence the company in taking the risk. To this policy is annexed a notice to the policy-holders of the conditions of the insurance, one of which is, that proofs of loss may be presented at any time, but that as the payment will be contested only in case of fraud, it is agreed and pro-

vided, in order that the facts may be fresh and attainable, that no action on the policy shall be sustainable unless commenced within twelve months after the decease of the insured.

It seems to us—looking at all these papers together, considering the character of the minute inquiries made of the applicant, the extravagance of supposing as to many of them that any one could undertake to answer them categorically as required, and warrant the answers, or at most do more than express an opinion concerning the subject of them, coupled with the repeated professions of good faith on the part of the company and exhortations to like good faith on the part of the applicant, and the declarations, that if the application is made in good faith, equal to that professed by the company, and the conditions fulfilled, premiums paid etc., the assured may confidently rely upon the prompt payment of the assurance by the company as one of the most certain of human events; that the assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant; that the sole object is to protect the honest from the effects of misstatements by having everything so plain that a misstatement can be made by intention only; that fraud or intentional misrepresentation violates the policy, and that the payment will be contested only in case of fraud—the true construction of the papers is that the policy is to be void only in case of intentional and fraudulent misrepresentation or suppression of facts by the applicant, and that although the term warranty is used, yet its legal effect is so modified by the explanations and declarations by which it is accompanied, that it imports no more than an assurance that the statements are made honestly, in good faith, and are believed by the applicant to be correct and true. These explanations and declarations are so inconsistent with the legal effects of warranty, in the strict legal sense of the term, that both cannot stand together; and to hold the applicant to the strict rules applicable to warranties would be to entrap him into an agreement which he never intended to make.

The statement, that payment of the loss will be contested only in case of fraud, is one easily comprehended by every man of ordinary understanding, and together with the other plain declarations, explations and and assurances contained in the papers must have been intended and were calculated to inspire confidence in applicants for insurance, and to induce to believe that an unintentional and honest mistake or omission on their part, in traveling through the maze of complicated questions put to them, would not be taken advantage of by the company. Where a warranty is understandingly and clearly

given by an insured, no matter how immaterial the fact warranted may be, he will be held strictly to his contract. But when thrown off his guard and induced to enter into such a contract by declarations of the insurer, such as appear in this case to have been contained in the papers prepared by the defendant and evidencing the contract, the declaration in the same papers that the statements are warranties and the basis of the contract etc., must be so construed, if possible, as to harmonize with the explanations and declarations of the insurer, and if this is not possible they should be rejected.

Under this view of the contract it was necessary, in order to sustain the defense, to show not only that the statements were untrue, but that they were known by the insured so to be, and that they and the alleged omissions were made intentionally and with a fraudulent design, and to entitle the defendant to the nonsuit asked, it was necessary that this fraud should be so conclusively proved that there was no question for the jury.

There was some evidence tending to show fraud in the statement and in omitting to mention certain facts; but this evidence was in our judgment far from being of that conclusive character and so uncontroverted as to have justified the judge in nonsuiting the plaintiff.

The main facts relied upon were that some six years before the policy was applied for the deceased had had an inflammation of the eyes, termed by the physicians conjunctivitis. The evidence tended to show that this was caused by some sand being thrown in his eyes while in the army in 1864, and that he had been discharged from the army for this cause. That this conjunctivitis was merely a temporary inflammation of the eye, of which he had been long since cured, and that it was not calculated to affect the duration of his life. That he had been confined in the hospital in Virginia by reason of this inflammation of the eyes in October, 1864, when he was furloughed, and that he was treated for the same complaint by Dr. Benson, in November, 1864, and was finally discharged from the army in May, 1865.

It was attempted to be proved that his eyes bore traces of his having had iritis at some period of his life, but this proof was controverted by evidence and therefore would not have justified a nonsuit. The policy was issued in November, 1870, and it is not claimed that he then had any disease of the eyes. The application contained an inquiry whether the deceased "had ever had any illness, local disease, or injury in any organ," which question he answered in the negative.

This is claimed to have been a misrepresentation and breach of warranty by reason of which the plaintiff should have been nonsuited.

The president of the defendant, who appears to have been a physician, enumerates about fifty parts of the human body which come under the denomination of organs, including among others the eye, the nerves, bones, cartilages, veins, glands of the skin, etc., and it is claimed by the defense that an injury to or disease of any of these organs at any previous period necessarily rendered the answer given by the deceased a breach of warranty, or a misrepresentation which should avoid the policy. If a finger had been broken, the skin injured, or a vein cut at any period of the applicant's life, the policy would according to this doctrine be void.

We think that, according to the construction which we have put upon the contract in question, the judge would not have been justified in holding that the omission to mention a temporary injury to the eye by sand being thrown into it, which had produced inflammation, six years before the policy was applied for, and which was then cured, was conclusive evidence of fraud, or breach of warranty sufficient to avoid the policy. If of any importance it was at most evidence of fraud to be submitted to the jury.

These policies are provision made usually by persons of slender means for the benefit of their families in case of death. They sometimes devote their small savings for many successive years to paying the premiums. To justify us in holding that all the answers given to the multitude of questions asked in the case before us are warranties, and that a mistake or unintentional omission as to any of them should avoid the policy, the clearest, most unequivocal and unqualified language should be employed in the policy and conditions.

A company cannot be permitted in the same papers to say to the assured, to induce him to enter into the contract, that nothing but fraud or intentional misstatement shall avoid his policy, or that payment will be contested only in case of fraud, and when the claim for payment is presented, to set up as a defense a merely technical breach of warranty in relation to some trivial matter. In a case like this, considering the number and character of the inquiries made of the insured, if the answers were all held to be warranties it would in substance be optional with the company whether to pay or not, for it would be a marvel if some flaw could not be found in the application. No intelligent person would knowingly invest his earnings in so precarious a security.

Another alleged ground of nonsuit was the response of the applicant to the question: "Family physician, and each one who has ever given the party medical attendance? if neither exists, name some

medical man, an acquaintance who knows the party well." The answer was, "Have none."

This answer was upon its face incomplete. It applies only to the call for the name of the family physician. Whether the suppression of the name of Dr. Benson, who had attended the applicant for inflammation of the eyes in November, 1864, and again in 1867, for some other complaint not mentioned, and of the doctor who was called in to visit his boy in 1870, and attended him twice at Troy, were fraudulent suppressions, were questions for the jury. If the defendant had desired a fuller answer to the question it should have insisted upon it at the time.

The same remarks apply to the statements of the applicant as to his vocation, his residence, and to the question whether he had been medically examined for the army or navy, or with reference to insurance; and to his omission to mention the fact of his discharge from the army. There was no such conclusive evidence of fraud or intentional misrepresentation as required the court to pass upon the fact. The refusals to charge as requested are covered by the remarks already made, and this disposes of all the material exceptions, except the rejection of evidence that Fitch, the deceased, committed suicide.

The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy. We have examined the various grounds upon which the defendant claims that this evidence was admissible, but are of opinion that they are not sufficient.

The order of the General Term should be reversed, and the judgment entered upon the verdict affirmed with costs.

All concur, except CHURCH, Ch. J., and FOLGER, J., not voting.

COMMISSION OF APPEALS OF NEW YORK.

OCTOBER TERM, 1874.

CHAUNCEY PERRY, *Appellant*,

vs.

LORILLARD FIRE INSURANCE CO., *Respondent.**

The policy provided that it should be void "if any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance." The insured was adjudged a bankrupt under the U. S. Bankrupt Act of March 2d, 1867, and his property assigned by the register to the assignee in bankruptcy. The policy was issued subsequent to the passage of the act.

Held, that this was a change of title within the policy clause, and the mortgagee to whom the loss was payable, being subject to the rights of the insured, could not recover.

Judgment affirmed.

This is an appeal by the plaintiff from a judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, entered after hearing exceptions ordered to be heard in the first instance at General Term.

The action was brought by the plaintiff to recover a loss for damage by fire to a dwelling-house in the city of Rochester, insured for one year by the defendant, in and by a policy to the amount of $2,000, issued to James Cochrane, then the owner thereof, bearing date the 14th day of December, 1869, on the face of which, and beneath the clause effecting the insurance, was written: "Loss, if any, pay Chauncey Perry," the plaintiff, who at that time held a mortgage on the property insured exceeding the amount of insurance. The policy contained this provision or condition: "If the property insured shall be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance," * * * * then "this policy shall be void." The fire

* Argued May 25, 1874.

occurred on the 23d day of May, 1870, damaging the property beyond the amount of the insurance. Cochrane being then, and up to the time of the trial, February 28th, 1871, in possession thereof.

Previous to the fire involuntary and compulsory bankruptcy proceedings were commenced in the District Court of the United States for the Northern District of New York, against the said Cochrane, which resulted in an adjudication, made on the 1st day of April, 1870, declaring and adjudging him a bankrupt within the true intent and meaning of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and thereupon such further proceedings were afterward had that Vincent M. Smith was, by the choice of the required number of creditors of the said Cochrane, appointed his assignee by Joseph D. Husbands, register in bankruptcy, who, on the 30th day of April, 1867, by virtue of the said act, conveyed and assigned to the said assignee all the estate, real and personal, of the said bankrupt, including all the property, of whatever kind, of which he was then possessed or in which he was interested or entitled to have on the 26th day of January, 1870, the time when the bankruptcy proceedings were commenced, with all his deeds, books, and papers, relating thereto, excepting such property (not including that in question) as was exempted from the operation of the assessment by the provisions of the 14th section of the said act. The above facts appeared on the trial, and it was admitted that the proceedings in the court of bankruptcy were regular so far that the court acquired jurisdiction of the person and estate of the said James Cochrane.

The evidence then closed and thereupon the defendant moved for a nonsuit on the ground that the involuntary proceedings in bankruptcy against the said James Cochrane produced such a change of title in the property insured as to render the policy void by the terms thereof. The motion was granted and an exception taken thereto was ordered to be heard in the first instance at General Term, who ordered judgment thereon for the defendant, and from that judgment the plaintiff appealed to the Court of Appeals.

George F. Danforth, *for Appellant.*

F. B. Perkins, *for Respondent.*

Lott, C.

The act of Congress, entitled "An act to establish an uniform system of bankruptcy throughout the United States," approved March

2d, 1867, (U. S. Statutes at Large, vol. 14, p. 517,) and by section 14 thereof declares that as soon as an assignee in bankruptcy is appointed and has qualified, the judge of the court of bankruptcy, or, where there is no opposing interest, the register in bankruptcy, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his books and papers relating thereto. Such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal (except certain property exempted from its operation, not embracing or including that in question,) shall vest in the said assignee. It then further declares as follows: "All the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patents and patent rights and copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking or detention, or for injury to the property of the bankrupt, and all rights of redeeming such property or estate, with the like right, power, title, and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee."

The bankrupt, Cochrane, at the time of the adjudication of the court of bankruptcy declaring him to be such, and at the time of the assignment by the register in bankruptcy, under and in pursuance of the above mentioned provision, to the assignee appointed by him, owned and was in possession of the dwelling-house insured and covered by the defendant's policy, and it by the assignment passed to the said assignee subject to the plaintiff's mortgage. The policy, after insuring the property, declared on its face that the loss, if any, was payable to the said plaintiff, and his interest as mortgagee was not specifically insured. He therefore stood in the same relation to the defendant as Cochrane the insured did, and his rights were subject to all the conditions and provisions contained in the policy, to the same extent as if the clause declaring the loss, if any, to be payable to him had not been inserted. See Grosvenor vs. Atlantic Fire Insurance Company, 17 N. Y., 391. One of these conditions and provisions was that if the insured property should be sold or transferred, or any change take place in title or possession, whether by legal pro-

cess, or judicial decree, or voluntary transfer or conveyance, then and in every such case the policy should be void. The question is then presented whether the policy in question had become void at the time the fire occurred, which was on the 23d of May, 1870, more than a month after Cochrane, the assured, was adjudged to be a bankrupt, and twenty-three days after the date and execution of the said assignment by the register to the assignee in bankruptcy. There can be no doubt that Cochrane had then ceased to be the owner of the premises, and that there had been a transfer and change of title effected by the bankruptcy proceedings, although he himself had not made a sale or voluntary transfer or conveyance thereof. Is the transfer and change of title so made a violation of the condition or provision of the policy above referred to?

I cannot doubt that it is. The bankrupt act above referred to declared the several district courts of the United States to be "constituted courts of bankruptcy," with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they were thereby "authorized to hear and adjudicate upon the same," according to the provisions of the said act.

The policy in question was issued after that act took effect, and the language used is sufficiently broad and comprehensive to include a transfer and change of title by or under a decree of a court of bankruptcy. It not only declares that if the property insured shall be sold or transferred, but also that if "any change take place in title" or possession, "whether by legal process, or judicial decree, or voluntary transfer or conveyance," then and in every such case the policy shall be void. The adjudication of the court of bankruptcy adjudging and declaring Cochrane a bankrupt was a judicial decree, and the bankrupt act declared that all his property was, "in virtue of the adjudication of bankruptcy and the appointment of his assignee, at once vested in such assignee." And it further declared that a copy duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case might be, to him as assignee, should be conclusive evidence of his title as such assignee to take, hold, sue for and recover the property of the bankrupt. These provisions clearly show that there was a transfer and change of title to the dwelling-house insured by the policy under and by virtue of such adjudication. There is no ground for saying, as is claimed by the appellant's counsel, that the words "judicial decree," used in the policy, have a "technical meaning." He says, using his own language, that they express a judgment in a court of equity,

and were so used in the policy, referring undoubtedly to some proceeding, the result of which was a decree acting upon property directly, as by direction to convey or to enforce a mechanic's lien, or vendor's lien, or foreclosure of a mortgage. There is no authority or reason for such a limitation. The terms are general, and not in any manner restricted to a decree of any particular court or tribunal competent to render a judgment or decree which, in its effect, or by its result, operates as a transfer or change of title. They were used in contradistinction to "a voluntary transfer or conveyance," which are also specially mentioned as a means of effecting a change of title, —terms which have by construction of the courts been held not to extend to and apply to a transfer of title by operation of law, and which, consequently, were not considered to be a violation of the covenant against alienation in policies of insurance and leases containing them. Judgments of a court of equity, which he concedes to be within the terms, do not *per se* so effectually transfer the title to the property affected thereby as the adjudication in bankruptcy does, as declared by the provisions of the bankrupt act, herein-above particularly referred to. They are the foundation and authority for executing conveyances as prescribed and directed thereby, and it is clear that an alienation by or through a judgment or decree of any and every competent act, was prohibited, and that it was intended to declare that such an alienation of the property insured, as well as that by a conveyance executed by the owner himself, should render the policy void. That is the fair and proper construction of the terms used to express the intention of the parties, with the view and object, unquestionably, that a change of title by operation of law, in the cases designated, as well as voluntary conveyances, should be a violation of the covenant against alienation in the policy, and render it void; and, as the counsel of the respondent well says, to hold that the title has not been changed by the decree in bankruptcy, is to nullify the agreement of the parties, which is to be construed and have the same effect when expressed in a policy of insurance as in any other instrument. See Savage vs. Howard Ins. Co., 52 N. Y., 502. (2 Ins. Law Journal, 769.)

The case of Starkweather vs. Cleaveland Ins. Co., 2 Abbott, U. S. Reports, p. 67, decided by the District Court of Northern District of Ohio, is not inconsistent with the views above expressed in relation to the covenant and its effect, but in perfect and entire harmony therewith. By a reference to the facts therein, it appeared that the covenant against alienation contained in the policy then in question

was in these words: "if the title to the property is transferred or changed, this policy shall be void." No mention is made as to the manner of effecting such transfer, and Sherman, J., in his opinion, says that "the covenant against the change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is 'sold or conveyed in whole or in part,' in others, 'shall not be alienated by sale or otherwise,' or, as in this, 'the title shall not be changed or transferred.'" He adds, "all these expressions are in substance the same. * * * * These covenants therefore on the part of the assured are that he will not assign the policy, or in any manner change his title to or the ownership of the property insured." His last remark clearly shows that he considered and construed the covenant, then the subject of consideration, to be limited and restricted to a transfer or change of title by the assured himself, and not to extend to or include a change of title by mere operation of law. This is more fully shown by what he subsequently says after a review of certain cases cited by him, "upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance and other like contracts." He concludes as follows: "On these authorities it seems clear to me that the clauses in this policy, forbidding its assignment and the change and transfer of the title to the property, have no more effect than similar words in leases. Both are contracts between two persons, with this difference, that leases are under seal and therefore of a higher nature." The authorities referred to by him related to general covenants against alienation, construed to be limited in their effect to a voluntary alienation by the parties themselves, and none of them appear to have extended the covenant, as the policy now the subject of consideration does, to a transfer or change of title "by legal process or judicial decree," and not limiting it to a "voluntary transfer or conveyance." The difference in the terms of the covenant in the case of Starkweather vs. Cleaveland Ins. Co., from this, shows that it cannot be considered as an authority against the construction here given by me to the covenant in question.

The learned judge in that case also advanced the doctrine (not necessary to the decision made by him as above stated, as to the meaning of the policy) that the assignee in cases of involuntary bankruptcy, has the mere control of bankrupt property. "as the agent of the law to sell the same and pay his debts," saying, "that the law does not give to or vest in him the absolute ownership, in his own right, to the property. He is a mere trustee, accountable under the

law to the *cestui que trust.* He holds the property assigned to him in trust of all leases and policies as well as other property," and claims that the property, notwithstanding the adjudication adjudging him a bankrupt, and the assignment of his property by the register in chancery, is still in law the bankrupt's property, but by operation of law in the hands of the assignee for the sole purpose of selling and applying the proceeds for the bankrupt's benefit. I concede that the property does not become vested in the assignee as his own individual property, to be held by him in his own right and for his personal use and benefit, and that it is held by him in trust, but for the benefit, primarily, of the bankrupt creditors, and so far for his use in the payment of his debts. I however do not agree with him that the title to the property does not become vested in the assignee, but, on the contrary, as I have shown, the title thereto, and not the mere control thereof, is, by the clear and unequivocal language of the bankrupt act, to which reference has hereinbefore been particularly made, declared to be vested in the assignee. He becomes the owner thereof, in trust, I admit, for the purposes declared in the said act, but nevertheless the owner does not stand in the mere relation of agent for the bankrupt, who, both in fact and law has, by the proceedings, become divested of the legal title. It follows from the views above expressed that the judgment appealed from should be affirmed with costs.

All concur.

SUPREME COURT OF WISCONSIN.

A. A. STROHN ET AL., *Appellants*,
vs.
HARTFORD FIRE INS. CO., *Respondent.*

An agreement with an agent to insure, in which neither the rate of premium nor time the insurance was to run were fixed upon, but were left subject to future adjustment, does not constitute a valid contract of insurance.

The principal of a promissory note or check silent as to time, cannot be applied to a contract of insurance.

Usage of the company as to its practice in its insurance with other parties is immaterial where no complete contract has been made.

Judgment affirmed.

COLE, J.

The court below nonsuited the plaintiffs upon the ground that as there was no time fixed for the expiration of the policy, or continuance of the risk, no complete contract of insurance was entered into between the parties. The correctness of this view of the case is the main question before us, for, if sustained, it ends the cause.

The complaint states three separate parol agreements for insurance made by H. N. Comstock for the benefit of himself and the plaintiffs, with O. J. Dearborn as agent of the defendant company. These agreements, as set out in the complaint, are explicit and definite as to the amount insured; the continuance of the risk; and the rate of premium to be paid; and did the proof in regard to the contract come up to and sustain these allegations, there would be no doubt as to the plaintiffs' right to recover under the former decision. Strohn vs. Hartford Ins. Co., 33 Wis., 650, [3 Ins. L. Jour., 288.] But it seems to us that the proof fails to show a valid contract of insurance. The verbal arrangement relied on to show a contract was in substancethis.

Comstock, who effected the insurance, if any contract was made, testified that in the spring of 1872, he contemplated establishing a tobacco warehouse for the storage of tobacco and when ready receive

it, and when he had received some he went to Dearborn in relation to insurance. He told Dearborn that he had received some tobacco in his warehouse and had advertised to receive and store tobacco for other parties, and keep it insured and sell it or hold it, subject to the order of the owners, as the case might be, and that he wanted to effect some insurance. He says that Dearborn told him that an open policy would be best. The amount perhaps would be increasing or diminishing as time passed along, and he thought it would not be best to issue an ordinary policy of insurance specifying the amount for a specified time, but that the witness had better have what was called, in insurance parlance, an open policy, allowing the amount to be increased or diminished as witness thought proper. Before the conversation closed the witness said to Dearborn, "Insure me $400.* * Insure $400 on tobacco in my warehouse belonging to me and held by me in store for others. * * * * Finally he said he would give me $400 insurance in the Hartford in that way. * * * * Finally he said he would give me $400 upon any tobacco I had then in the warehouse. I asked him what per cent.? He said 1 3-4. I said all right; how about the premium being paid? Well, he didn't know how much it would be, because we didn't either of us know how long the insurance would continue on that amount, and he said 'I will call on you when I want the premium; you can pay me when I call for it.' I said All right." This is all that was said in regard to the first contract made on the 23d of April. On the 3d of May the witness testified that he went to Dearborn and said to him "that I wanted $1,500 more insurance on tobacco in the rick or warehouse. He said 'Put it in the same open policy as the others,' and I said 'That will be satisfactory to me. With the same premium?' 'Yes sir.' I asked him if that was all right. He said 'Yes, make it the same as the others.'" The conversation in regard to the third agreement was substantially the same as that in respect to the second, except the witness did not remember whether at that interview anything was said about the payment of premium; but the witness testified that Dearborn said "he would make the entries and issue a policy in proper time; or he would give me a policy, or would make out the papers." In the conversations, when anything was said about payment of the premium the witness said that Dearborn told him he would call upon him for it when he wanted it; witness tendered no money but said he would pay it if Dearborn wanted it. "His excuse was, that he did not know exactly how much to take, and would not take it just then." And the witness closes his testimony with the statement that "there was no-

thing said between me and Dearborn as to how long this insurance should run." This is really all the evidence in relation to the several contracts set out in the complaint, and it seems to us it fails to show that the negotiations resulted in a valid agreement, or that the parties came to an understanding upon all the material conditions of the contract. The amount of premium to be paid and the continuance of the risk are not agreed upon, nor is there any stipulation in the agreement from which these important elements of the contract could be fixed and determined. The rate of premium and continuance of the policy are certainly important terms in a contract of insurance. Perhaps a contract which either party could terminate at any time by a notice to the other, might be a valid contract, as intimated by Comstock, J., in Trustees of the Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305, until the notice was given. However this may be, the general rule is, that to constitute a valid contract of insurance the minds of the parties must meet as to the premises insured and the risk, as to the amount insured, as to the time the risk should continue, and as to the premium. Same case in 28 N. Y., 153. Where parties verbally agreed upon all the terms of the insurance, except the rate of premium, and a previous insurance was referred to in the conversation upon the same kind of property in the same place as the property sought to be insured, nothing being said about any change of rate, it was held to be fair inference of fact that the rate was to be the same as that paid for the previous risk, and that the minds of the parties met upon the amount. Audubon vs. Excelsior Ins. Co., 27 N. Y., 216. In Kennebec Co. vs. Augusta Ins. Co., 6 Gray, 204, where under an open policy of insurance on property on board a vessel from New Orleans to Boston, the cotton was insured for the voyage, and also in addition against fire, from the time of its deposit in a warehouse until it was shipped, the objection was taken that the agreement fixed no certain time when the risk was to commence or terminate. But the court held that the risk commenced the day the cotton was first put in store by the plaintiffs at New Orleans, and that the termination of the whole risk, which included both the hazard of fire on shore and the perils of the sea on the voyage to be performed, was to be upon the safe arrival of the cotton at Boston, the place of its ultimate destination. In marine insurance, where a cargo is insured for a particular voyage, the policy "to continue on the property until landed," (Monsur vs. New England Mut. Mar. Ins. Co., 12 Gray, 520,) there is no difficulty in determining when the risk terminates. In Walker vs. Me-

tropolitan Ins. Co., 56 Maine, 371, the evidence showed an application for builder's risk and a permanent yearly risk for a given amount, and though no specific premium was agreed upon, yet it was understood that the amount of premium should be deducted from the sum due the plaintiff from the defendants. The court said enough was done to make a complete contract of insurance. But all these cases, and others of the same character which might be cited, are manifestly in their features distinguishable from the one before us. Here, Comstock says, the rate of premium was to be 1 3-4 per cent.; yet this, it is admitted, had reference to the annual rate. But the more serious defect in the contract is that no time was fixed for the continuance of the risk. Suppose a bill in equity had been filed, as is sometimes done to specifically enforce the performance of the contract to issue a policy. How could the courts determine the essential elements of the contract which it was called upon to enforce? How long was the risk to continue?—one month, two months, six months, or a year? All is uncertain and indefinite upon the point. Again, suppose the company had brought an action to recover the premium due on the contract, how much could it have claimed and recovered? It seems to us it is impossible to say. The property was destroyed on the 21st day of May, and it is assumed that this was the termination of the risk. But suppose the property had been destroyed a month later, or not destroyed at all, what then would have been its termination? These tests clearly show, as it appears to us, that while the parties negotiated about insurance, still that they did not agree upon all the terms, and that no contract was ever completed so as to become binding upon them. For this was a case in which the duration of the risk might and should have been fixed. It was not one where the period is left indefinite, as it is in a voyage policy. It is true the parties speak of the policy as an "open policy." Precisely what meaning they attached to these words is not readily perceived. Mr. May, in his work on insurance, defines an open policy to be one in which the sum to be paid as an indemnity in case of loss is not fixed, but is left open to be proved by the claimant in case of loss, or is to be determined by the parties. Sec. 30. Angel on Fire and Life Ins., sec. 253. In Watson vs. Swann, 103 Eng. C. L., 755, such a policy is spoken of as a "running policy," but we do not understand that such policies have the duration of the risk indefinite and indeterminable. These are elements by which the continuance of the policy can be ascertained.

The counsel for the plaintiffs insisted that a policy of insurance, silent as to the duration of the risk, should be placed upon the footing of a promissory note or check upon a bank which expresses no time for payment and yet is held payable immediately on demand. But we do not see how that principle can be applied to a contract of insurance. The continuance of the risk is an important element in determining the rate of premium; and how can the company fix its rates when that factor is left entirely indeterminate? A parol contract of insurance, indefinite as to time and indefinite as to rate of premium, is, as appears to us, incapable of enforcement.

This view renders the rulings of the court, on the offers made to prove the usage of the company as to open policies, immaterial. If no complete contract of insurance was made there can of course be no recovery, whatever may have been the practice of the defendant in their insurance with other parties. In this case the parties did not come to an agreement upon all the terms of the contract, and in order to sustain it as a valid contract the court must supply conditions and act upon conjectures.

We think the judgment of nonsuit was correct and must be affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

Error to the Circuit Court of the United States for the Eastern District of Missouri.

THE MUTUAL BENEFIT LIFE INS. CO.,
Plaintiff in Error,

vs.

HALLIE NEWTON.

1. Every admission, upon which a party relies, is to be taken as an entirety, of the fact which makes for his side with the qualifications which limit, modify, or destroy its effect. When, therefore, the agent and officers of an insurance company stated to the agent of a party claiming upon a policy of insurance that the preliminary proofs presented were sufficient as to the death of the insured, but that they showed that the insured had committed suicide, the whole admission must be taken together; if sufficient to establish the death of the insured, it was also sufficient to show the manner of his death.
2. The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as prima facie evidence of the facts stated therein against the insured and on behalf of the company.

FIELD, J.

The policies upon which this action is brought stipulate for the payment of the insurance money within ninety days after due notice and proof of the death of the party insured, but they provide also that the policies shall be void if the insured shall die by his own hand.

In answer to the action the company avers that the insured did thus die by his own hand, and that the policies thereupon ceased to be binding.

The insured died at Los Angeles in California, in June, 1870, and proofs of his death were delivered by the father of the plaintiff to the agent of the company in August following. These proofs showed that the deceased committed suicide. They consisted of several

affidavits giving the time, place, and circumstances of his death, and the record of the finding of the jury upon the coroner's inquest. The finding was that the deceased came to his death "by a pistol shot, fired by a pistol in his own hand, through the heart."

On the trial the father of the plaintiff testified that he was the agent, in the matter of these policies, of his daughter, and that, acting in that capacity, he had delivered the written proofs mentioned to the agent of the company at St. Louis and had demanded payment of him, and afterward also of the officers of the company at the home office in Newark, New Jersey; that at neither place was any objection made either by the agent or the officers of the company to the form or fullness of the proofs of the death of the insured; that the agent had said that they were sufficient as to form; but that at both places objection was made at the same time that the proofs disclosed a case of suicide, and on that account payment of the insurance was refused.

The court allowed the statement to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but by its charge to the jury in effect separated the admission of that fact from its accompanying language, that the proofs disclosed a case of suicide, and held that this latter statement was an independent fact to be established by the company. In this particular we think the court erred. Every admission is to be taken as an entirety, of the fact which makes for the one side, with qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. Here the admission related to the two particulars which the proofs established, the death of the insured and the manner of his death, both of which facts appear by the same documents. They showed the death of the insured only as they showed that he had committed suicide, and all that the officers of the company evidently intended by their declaration was that they were satisfied with the proofs of the one fact because they established the other. The whole admission should, therefore, have been taken together; if it was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the company from responsibility.

But the court also erred in excluding from the jury the proofs presented of the death of the insured when offered by the company. When the plaintiff was permitted to show that the agent and officers of the company admitted the proofs established, it was competent for

the company to produce the proofs thus referred to and use them as better evidence of what they did establish.

But independently of this position the proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that the representations were made under a misaprephension of the facts, or in ignorance of material matters subsequently ascertained.

There are many cases which hold that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated. The case of Campbell vs. Charter Oak Ins. Co., 10 Allen, 213, decided by the Supreme Court of Massachusetts, and the case of Irwin vs. Excelsior Ins. Co., decided by the Superior Court of the city of New York, 1 Bos., 50 are both to this effect. It is not necessary, however, to maintain any doctrine as strict as this in the present case; and possibly the rule there laid down is properly applicable only where the insurers have been prejudiced in their defense by relying upon the statements contained in the proofs. Be that as it may, all that we now hold is that the preliminary proofs are admissible as prima facie evidence of the facts stated therein against the insured and on behalf of the company. No case has come under our observation, other than the present, where the preliminary proofs presented by the insured have been entirely excluded as evidence when offered by the insurers, the question being in all the cases whether these proofs estopped the insured from impeaching the correctness of their statements, or from qualifying them, or whether they were subject to be explained and varied or contradicted on the trial.

The case of Cluff vs. Mutual Benefit Ins. Co., in the Supreme Court of Massachusets, 99 Mass., 317 cited by the plaintiff, is far from sustaining his position. There the beneficiary had submitted in connection with the preliminary proof certain slips cut from news-

papers showing reports that the insured had died in known violation of law. On the trial, upon the issue whether the plaintiff had, ninety days previous to the commencement of the suit, furnished the company sufficient proof of the death of the insured, the plaintiff put in evidence certain affidavits by which that proof had been made, but did not offer the slips; the latter were then offered by the company and were excluded, and the Supreme Court, in reviewing the case, held that the exclusion was not a valid ground of exception unless it plainly appeared that the insurers were prejudiced thereby, and that they were not so prejudiced because the fact of death was otherwise sufficiently shown. "When an apparent ground of defense," said the court, "is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the conditions imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue, subject to the usual rules of evidence."

In the present case the proofs presented were sworn to; they consisted, as already stated, of affidavits and the record of the finding of a jury under oath. Here the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable. The fact that the proofs were presented by the father of the plaintiff and not by the plaintiff herself cannot change their character. They were the only proofs presented, and without them there was no attempted compliance with the condition of the policies. He was the agent of the plaintiff with respect to the policies, intrusted by her with the presentation of the preliminary proofs. Presented in her name and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true until at least some mistake is shown to have occurred in them. As already said, no suggestion is made that these proofs do not truly state the manner of the death of the insured. It is sought, however, to avoid their effect in favor of the company by taking a part of the statement of its officers as to what the proofs showed, and rejecting the balance, and then excluding the proofs

themselves. This position cannot be sustained without manifest injustice to the company.

The judgment must therefore be reversed, and a new trial ordered.

SUPREME COURT OF NEW HAMPSHIRE.

MARCH TERM, 1875.

GERRISH

vs.

GERMAN INSURANCE COMPANY.*

When a bill in equity is brought to compel a specific performance of an agreement, the court having jurisdiction will, to avoid delay and expense to the parties, proceed and give such final relief as the circumstances of the case demand.

The plaintiffs agreed with the defendants' agent to insure their wool against loss by fire in the sum of three thousand five hundred dollars, for the period of one year, commencing at 12 o'clock noon, September 30, 1873, for the sum of forty-three dollars seventy-five cents premium, which was paid their agent, who agreed to procure and deliver to the plaintiffs a policy therefor. Said wool was destroyed by fire October 1, 1873, no policy having been made out or delivered. The plaintiffs notified the defendants of the loss, furnished them with the requisite proofs thereof, and demanded a policy and payment of the sum insured, which the defendants refused. The plaintiffs brought a bill in equity to compel delivery of the policy and payment of the loss. Upon demurrer to the bill, assigning as cause that the plaintiffs had a plain and adequate remedy at law—*Held*, that the plaintiffs might resort to a court of equity to compel a delivery of the policy, and the court, having jurisdiction to compel specific performance, would, to avoid circuity of action, decree payment of the loss as if a policy had been issued.

In Equity.—The bill alleges that the plaintiffs, Joseph W. Gerrish, and George B. Nichols, John D. Parker, Jr., and William R. Dupee, of Boston, Mass., under the firm name of Nichols, Parker & Dupee, September 30, 1873, applied to John L. Spring, of Lebanon, a duly appointed and constituted agent of the German Insurance Company, for additional insurance upon some fleece wool stored in a two-story

* Decision rendered March 12, 1875.

framed storehouse near the railroad freight depot in said Lebanon owned by Joseph W. Gerrish, to the amount of thirty-five hundred dollars, said wool being owned, one half by the said Joseph W. Gerrish, the other half by the said Nichols, Parker & Dupee, which was stated to said agent; that they informed said agent that there was other insurance on said fleece wool, to the amount of three thousand dollars, in the Hartford Fire Insurance Company, with the right to have other or additional insurance; that said agent thereupon agreed with the said plaintiffs that he would insure said fleece wool for the plaintiffs for one and one fourth per cent. for the term of one year, said insurance to take effect September 30, 1873, at twelve o'clock noon, to the amount of thirty-five hundred dollars, in the said German Insurance Company, which proposition the said plaintiffs accepted, and paid to said agent the premium, being forty-three dollars and seventy-five cents, which proposition said agent was authorized by said defendants to make, and to receive the premium therefor. Said insurance was against loss or damage by fire or lightning, to the amount of thirty-five hundred dollars on the fleece wool aforesaid, situated as aforesaid: other insurance was to be permitted. The plaintiffs further represent, that the written portion of the policy in the Hartford Fire Insurance Company above referred to is as follows: "Three thousand dollars on their fleece wool contained in said Gerrish's two-story framed storehouse building, situated near the railroad freight depot in Lebanon, N. H.,—other insurance permitted. Three thousand dollars, at one and a quarter, amounts to thirty-seven dollars and fifty cents, (said Gerrish owning one half of said wool, and Nichols, Parker & Dupee one half.") They further represent, that afterward, to wit, on the first day of October, 1873, the said fleece wool was destroyed by fire; that at the time of the fire the actual cash value of said fleece wool was six thousand eight hundred and twenty-five dollars and eighty-six cents, and the amount saved was less than seven hundred and fifty dollars, making the actual loss on said wool the sum of six thousand seventy-five dollars and eighty-six cents; that said wool at the time of the fire was in the building aforesaid. The lower story of said building was used for storing flour and groceries by George M. Smith & Co., and by C. H. Hildreth for storing nails and hardware, and the second story was used for storing said wool. The origin of said fire is unknown to the plaintiffs, and was without fraud or fault on their part. They further represent, that on November 17, 1873, they gave written notice to said German Insurance Company of their loss by fire of said fleece wool, the

amount of their loss, and all the information required by the charter and by-laws of said German Insurance Company, being a proof of loss; that they also furnished to said insurance company the written certificate of a notary public and justice of the peace, to the effect that, to the best knowledge and belief of said notary public, he resided the nearest to the place of the fire mentioned above of any such magistrate; that he was not concerned in said loss as a creditor or otherwise, nor a relative to either of the parties; that he had examined the circumstances attending the loss; that he knew the character and circumstances of the plaintiffs; and he believed that the plaintiffs had sustained loss on the wool aforesaid, without fraud on their part, to the amount of six thousand seventy-five dollars and eighty-six cents. They further represent that this certificate was furnished with the proof of loss on November 17, 1873, and that said proof of loss aforesaid was made by said Joseph W. Gerrish, and furnished as aforesaid, at the time aforesaid, under oath. The plaintiffs further represent that on November 17, 1873, they made a demand on said insurance company to make out and deliver to the plaintiffs aforesaid a policy for the amount of thirty-five hundred dollars, the written part to be as follows: "On their fleece wool contained in said Gerrish's two-story framed storehouse building, situated near the railroad freight depot, in Lebanon, N. H., other insurance permitted," and have the same bear date September 30, 1873, and to take effect at twelve o'clock noon, on said 30th day of September, 1873, according to their previous contract and agreement with the said plaintiffs, and were further requested to settle and pay the loss by fire on said wool, to the amount of three thousand two hundred and seventy-two dollars, being their just share upon the loss of said wool, and to settle the same within sixty days from October 1, 1873. They further represent that said German Insurance Company have neglected and refused to deliver to said plaintiffs a policy according to the contract and agreement aforesaid, and that they have neglected and refused to settle and pay the loss aforesaid to the plaintiffs. They therefore pray that said insurance company may be required to execute and deliver a policy according to the terms of their aforesaid contract and agreement, and to settle and pay their part of the loss that said plaintiffs have sustained on said fleece wool, and for such other relief as may be just.

The defendants demurred to the bill upon the ground that the plaintiffs have a plain and adequate remedy at law.

The questions of law thus raised were reserved.

EASTMAN, PAGE & ALBIN, for the defendants, cited Walker vs. Metropolitan Ins. Co., 56 Me., 371; M'Culloch vs. Eagle Ins. Co., 1 Pick., 280; Rockwell vs. Hartford Ins. Co., 4 Abb., N. Y. Rep., 179; Kennebec Co. vs. Augusta Ins., etc., Co., 6 Gray 204; Goodall vs. Ins. Co., 25 N. H., 169, 192.

MURRAY, for the plaintiffs, cited Tayloe vs. Merchants Fire Insurance Co., 9 How. 390; Constant vs. Insurance Co., 1 American Law Reg., New Series, 116; M'Culloch vs. Eagle Ins. Co., 1 Pick., 280; Hamilton vs. Lycoming Ins. Co., 5 Barr., 342; Delaware Ins. Co. vs. Hagan, 2 Wash. C. C., 4; Commercial Mut. Marine Ins. Co. vs. Mut. Ins. Co., 19 How. 318; Trustees of First Baptist Church vs. Brooklyn Fire Ins. Co., 19 N. Y., 305; Palm vs. Medina Fire Ins. Co., 20 Ohio 529; Motteux vs. London Assurance Company, 1 Atk., 545; Perkins vs. Washington Insurance Co., 4 Cow., 645; May on Insurance, sec. 565, and cases there cited; Story's Eq. Jur., sec. 722, 8th ed.; Neville vs. Merchants, etc., Ins. Co., 19 Ohio 452; Carpenter vs. Mutual Safety Ins. Co., 4 Sand. Ch., 408; Hill vs. Bank, 44 N. H., 568; Pickering vs. Pickering, 38 N. H., 400.

SMITH, J.

A policy is the usual evidence of a contract of insurance. It is not necessary, however, in order to enable the assured to maintain an action upon the contract. If issued, it is the best evidence of what the contract was, and parol evidence would not be admissible to contradict it; but when none is issued, the contract may be proved by any competent evidence. Goodall vs. N. E. Ins. Co., 25 N. H., 192; M'Culloch vs. Eagle Ins. Co., 1 Pick., 278; Kennebec Co. vs. Augusta Ins. & Banking Co., 6 Gray, 204; Pierce vs. Nashua Ins. Co., 50 N. H., 297.

But the cases are numerous where a party may resort to a court of equity to compel the delivery of the policy, and in proper case, the court having jurisdiction to compel a specific performance, will, to avoid circuity of action, decree payment of the loss as if a policy had been issued. May on Insurance, sec. 565. Tayloe vs. Merchants' Fire Ins. Co., 9 How., 390, is a case directly in point, where Nelson, J., says,—"No doubt a count could have been framed upon an agreement to insure so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon a policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceedings, in

order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand." See, also, authorities cited in the plaintiffs' brief.

It is not material, therefore, to inquire whether it would or not have been more difficult for the plaintiff to prove the facts essential to enable him to recover in a suit at law, than it would be to maintain this bill. The facts to be proved are essentially the same in either case, and must be shown by the same witnesses or words of proof. But for the reasons above given he will not be driven to commence a suit at law.

CUSHING, C. J.—The doctrine seems to be well settled, that a court of equity has jurisdiction to decree specific performance of an agreement to insure, and that, having taken jurisdiction for this purpose, it will go on and afford complete remedy. 3 Pars. on Con., 374, and authorities cited.

Demurrer overruled.

LADD, J., concurred.

MICHIGAN SUPREME COURT.

JANUARY TERM, 1875.

THE PEOPLE, EX REL. CONNECTICUT MUT. LIFE INS. CO.

vs.

VICTORY P. COLLIER, STATE TREASURER.*

By the Michigan act of 1869, the tax was to be upon "all premiums received in cash or otherwise." By the act of 1871 it is authorized and required to be "upon the premiums received," and also on such sums as, within the year, "shall have been agreed to be paid for any insurance effected or agreed to be effected or procured.

The maximum premiums due in that State on life policies of a mutual life company in 1873, were $287,019.25. In conformity with an understanding, as claimed by the company, with its policy-holders, to restrict exactions to the cost of insurance, the actual collections of that year were reduced to $169,275.58,

* To appear in 3d Mich.

the amount being determined by crediting on the premiums due $117,743.67, over payments made in 1872.

Held, that the excessive payment of 1872 was resolved by the company into a part payment of the premium of 1873, and as such liable to taxation, and under either statute the tax was due on the whole premium collectible and not merely on the amount actually collected during that year.

Held, that the act of 1871 was not meant simply to more accurately define the act of 1869, but also to enlarge its scope.

Application for mandamus denied.

C. I. WALKER & A. POND, *for Relators.*

ISAAC MARSTON, Attorney-General, *for Respondent.*

GRAVES, J.

This application for mandumus has originated in a difference of opinion between the treasurer and the relators, respecting the amount of special tax which was by law demandable from the company for the year 1873.

The company is a Connecticut corporation doing business in this State under the regulations prescribed by the legislature, and it claims to be working as mutual company without capital stock issued to shareholders, but embracing the holders of policies as members, who are rendered proportionably interested in the property and profits.

It further claims that it "aims" to afford life insurance to the members at actual cost, and in keeping with this aim that it sets down in each policy what amounts to a maximum annual premium to be paid, but subject to an "understanding" that no more shall be exacted for any year than is found necessary to pay the cost of insurance for that year. That the aggregate of such maximum premiums for the year 1873, against Michigan parties, was $287,019.25, but that the company, conforming to the "understanding" and "aim" before mentioned, to restrict exactions from the policy-holders to the cost of insurance, reduced the collections for that year to $169,275.58, by crediting on premiums due from policy-holders $117,743.67, the latter sum having been collected in the preceding year and being the balance left beyond the cost of insurance. The point of the case is, whether the tax of 3 per cent., imposed by the legislature, should be calculated on the sum of $169,275.58, actually paid in hand in 1873, or upon the amount made up of that and the sum credited to policy-holders.

The treasurer insists that the tax was required to be on the larger and the relators that it should be on the smaller of these amounts.

The question is one of strict law, and does not depend upon equities or any individual judgment in regard to State policy in matters of taxation.

We cannot ascertain from the record the precise nature or form of what is generally and vaguely referred to as the "aim" of the company, and the "understanding" that the exactions from policy-holders should be cut down from the definite and certain sums written in the policies to amounts not predetermined, and depending upon fluctuating circumstances. Whether the "understanding" is something in a shape to invest the policy-holders with a legal right to resist a call inconsistent with what is said to be the "aim" and "intention," or whether it is a bare expectation, encouraged by the company, that its controlling agencies, acting upon a sense of what is politic and expedient, will not absolutely retain the excess of collections on premiums over and above the necessities of the company, is in no manner explained. This point of the case is extremely dubious and uncertain.

It was observed in argument by relators' counsel that in carrying out this scheme of keeping the collections from the policy-holders in each year down to the cost of insurance for the same year, the company get at the cost for the current year by referring to the preceding year, and adopting the ratable difference between the cost of insurance thereof and the aggregate of maximum premiums.

Without stopping to see what consequences ought to be drawn from this exposition, if well based, it cannot, of course, be expected that in dealing with the case we should espouse any theory or explanation not appearing to us to be fairly warranted by the facts, and upon consideration we find it quite impossible to reconcile this argumentative explanation with the interior and implicit nature of the transaction as depicted by the record.

The reasoning referred to assumes or requires that the sum of $117,743.67 was the real difference between the aggregate of maximum premiums and actual cost of insurance in 1873, though ascertained by a standard afforded by the experience of 1872, and that this sum of $117,743.67 was an actual deduction on account of actual operations in 1873, whereby, as insisted, the sum demandable in that year was reduced to $169,275.58.

In this view the account for 1873 could not have been affected at all by carrying to it and allowing to policy-holders a claim in their favor, actually produced by the operations of 1872; on the contrary,

it must have been complete in itself and been dealt with as exclusively embodying the operations of 1873.

It could neither have been saddled with any demand created and established in 1872, or carried out of the transactions of that year, nor could it have produced any demand to be carried over to 1874. When we recur, however, to the explicit stipulation made in the case, we find that, by whatever name called, the deduction, credit, or rebate in 1873, was not caused or brought about in this way. The fact, as there set forth, appears to be that in making up the account for 1873 the balance was not ascertained by relinquishing what there was between the aggregate of written premiums and the cost of insurance for 1873, but by deducting from the aggregate of written premiums for that year the balance in favor of policy-holders brought over from the previous year.

Passing this feature for the present, we observe that relators insist that the right to tax them rests in the act of 1869, L. 1869, vol. 1., p. 124, and that by the provisions of that law they were only taxable in the sum of their actual cash receipts on premiums in 1873, and therefore only on the sum of $169,275.58. They contend that the act of 1871, L. 1871, vol. 1, p. 172, could not influence the question, because, first, as they urge, that act does not assume to change the pre-existing rule, or re-declare the rule as to the basis of taxation. And, second, that if the terms could be considered adequate for such purpose, no such effect could be sanctioned, since to allow the law that operation would be to disappoint the object, as expressed in the title, and introduce into the body of the statute an incongruous element.

But even if these difficulties were overcome, they still argue that this act will only permit a tax on actual receipts, and such additional amounts, if any, as policy-holders are under agreement in the same year to pay on premiums; that the facts in the record show that the time contract relations between the policy-holders and the company involved nothing further than an agreement that the policy-holders should pay in 1873 whatever sum should be ascertained, according to the course of the company, to be sufficient to meet the cost of insurance for that year, and that the sum was so ascertained to be $169,275.58, and that in paying it the policy-holders paid all they were under agreement to pay, and all the company had any right to exact.

Without admitting what is contended for by relators, in regard to

the scope of the act of 1869, the attorney-general urges that the terms of the act of 1871 distinctly establish that the relators' tax for 1873 was required to be computed, not only in the cash receipts paid in hand in 1873, but also in that portion of the premiums written as payable in that year, and which portion the relators treated as compensated by the equal cash claim against the company held by the policy-holders for excessive collections made and retained in 1872; and he likewise maintains that the statute is susceptible of valid operation in that way, and is not obnoxious to the objection and difficulties drawn by relators' counsel from the provisions of the constitution.

This reference to the opposite and conflicting positions taken renders it apparent that independent of the diversity of views in other particulars, the parties are widely at variance concerning the construction due the transaction which terminated in fixing the balance to be paid in 1873, and in the payment of it by the policy-holders; and the true nature of that transaction as developed by the facts stipulated, appears to be called for as an important preliminary, because, if it should turn out on the facts in this record, that in paying the $169,275.58 in 1873, the policy-holders paid precisely the whole sum they were under agreement to pay, and that the company in receiving that sum received all it had any right to claim on account of the premiums of 1873, the ground on which the State rests its claim must, at the least, be materially affected, and the process of examination must be shaped to meet that state of things; and on the other hand if it should be considered that the credit of $117,743.67 was a compensation to the company for an equal amount due on premiums for 1873, and in substance and effect a payment, it must operate decisively against the relators.

Turning now to the agreed facts we find that the stipulation states "that the nominal premiums due the company from parties residing in Michigan, during the year 1873, amounted to $287,019.25. That this sum was secured by the policies issued, but in no other way, and that the company had the right to collect during said year, in case the business of said company required the same, the whole of said sum. That the policy-holders of said company were entitled to certain rebates or credits upon the amount paid said company in 1872, being the amount of premiums paid over and above the cost of insurance, which said credits or rebates were deducted from said $287,019.25, leaving a balance of $169,275.58, which was the actual amount in cash paid to said company by its policy-holders in 1873,

the balance of said first named sum of $287,019.25 being $117,743.67 having been rebated as above."

The transaction then was this: The company having the right to avail itself in 1873 of the whole $287,019.25, if the business required it, considered it necessary to do so, and effected the object in this way. Having collected in 1872, in cash, from its policy-holders, $117,743.67 more than it was entitled to retain, the company actually kept the money, and became debtor to its policy-holders for the amount. This money remained in its treasury, and the company continued to be debtor for it until 1873, when the policy-holders became debtor to the company for the larger sum of $287,019.25, the difference between the two sums being $169,275.58. That the account was then adjusted and settled by deducting the $117,743.67, which the company had already covered into its treasury and retained and stood debtor for, from the $287,019.25, which the policy-holders had come to be debtors for to the company, and by the payment of cash in hand from the policy-holders to the company of the ascertained balance of $169,275.58.

The facts admitted will authorize no other construction. Was the disposition made of this fund, which had come from the policy-holders in money, and for which the company had become their cash debtor, a payment in 1873, when it ceased to be a debt of the company or a credit of the policy-holders?

The formality was not observed, of passing the funds specifically by the company to the policy-holders, and then taking it back again. Instead of this the whole process was worked out on paper, but the effect was precisely the same.

When two parties are mutual cash debtors, in the same right and at the same time, and desire to avoid circuity of payments and to bring about a reciprocal acquittal of debts, they avoid the ceremony and trouble of as many actual payments as there are debts, and instead of one of the two paying to the other what he owes him, and then receiving back that which is due to him, they proceed upon the principle of compensation, and each one retains in payment of what is due to him that which he owes to the other, whether it be for the whole debt, if the sums are equal, or by deducting a lesser debt out of a greater. These compensations, when they fairly and properly occur, are reciprocal payments.

In Shargo's case, L. R. 8 Ch'y, App., 407; 5 Eng., 626, it becam a question whether certain transactions between a company and a shareholder amounted to "cash payments," within the meaning of the

"Companies Act," 30 and 31 Vic. In discussing the point, Lord Justice James said, "If a transaction resulted in this, that there was on the one side a bona fide debt payable in money at once for the purchase of property, and on the other side a bona fide liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property. It did appear to me in Fothergill's case, and does appear to me now, that this act of parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other, the shares have been paid for in cash. If it came to this that there was a debt in money payable immediately by the company to the shareholder, and an equal debt payable immediately by the shareholder to the company, and that each was accepted in full payment for the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded 'payment in cash,' in a corresponding action by the company against him for calls." Mellish, lord justice, concurred, and added: "Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side, on that account, and these accounts are settled by both parties, it is exactly the same thing as if the sum due on both sides had been paid; indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and the handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backward and forward." See also Owen vs. Denton, 5 Tyrw., 360; Pratt vs. Foote, 5 Seld., 463-6, ib., 599, Domat's Civil Law Pr., B. 4, Tit. 2. Cushing's ed.

Without going further it may be well said, both upon reason and authority, that the excessive collection in 1872, and which the company retained and finally applied in 1873, was then resolved into a payment upon the premium of that year, and that for the purpose of the 3 per cent. tax it was as much a payment on the premium as the $169,275.58.

Such being the result reached upon the facts, the legal questions concerning the statutes become unimportant in their bearing on the case. Because under the view taken as to what was payment on premiums in 1873, whether we contemplate the act of 1869 or that of

1871 as the law to govern, the event must be the same. If the sum credited to the policy-holders in 1873 was money drawn from them in 1872, and though due to them was still retained by the company, as the circumstances agreed show, and if this sum is to be considered, as the court think it must, as a payment on premiums in 1873, then the terms of either act would apply to it as a basis for taxation for that year. Still, it may be considered best to indicate very briefly, without enlarging on the subject, the impressions now felt concerning the main questions relating to the statutes.

After much reflection we are inclined to think that the seventh section of the act of 1871 does, in terms, prescribe a basis for taxation, differing in substance from that given by the act of 1869, and that the legislature designed, in framing that section, to do something more than recognize and perpetuate the basis of the last named act.

The terms of the first paragraph of the section unquestionably indicate a purpose in the legislature to preserve or keep alive whatever taxing rights had attached under the former law, and this was probably considered as a reasonable precaution to guard against objections that the changes wrought an extinguishment or alteration of the rights which had already obtained. But be this as it may, the succeeding and remaining portions of the section appear to be positive regulations for the future, and in regard to the basis of taxation they are not only variant in phraseology from the corresponding provision in the law of 1869, but different in substance. The terms used clearly appear to enlarge the ground and to authorize a tax against transactions which the former act did not take in.

By the act of 1869, the tax was to be upon "all premiums received, in cash or otherwise," but by the act of 1871 it is authorized and required to be "upon the premiums received," and also on such as, within the year, "shall have been agreed to be paid for any insurance effected or agreed to be effected or procured."

The form of this provision is positive and not by way of allusion. It purports to institute a new rule, and not merely to denote, describe, or recognize an old one to be retained.

There is reason then for concluding that the legislature designed that this provision should supplant the corresponding one of the act of 1869 in regard to the future.

The only way to escape from this result without doing great violence to the language and to settled rules of interpretation, is to suppose a double tax was intended, but this is not deemed an admissible opinion.

The constitutional provision in regard to the titles of acts, and in regard to the union of separate subjects in the same act, has been so often and so fully considered in this and other States as to render it quite unnecessary to enter upon a general discussion of the subject in connection with this act of 1871.

There is nothing in the nature or framework of the law to suggest any real grounds for excluding it from the class of enactments uniformly sustained against such objections as are raised here.

If this act is obnoxious to these objections, the prior one of 1869 must certainly be so, and we do not understand that counsel regard that law as open to them.

The provisions in the act of 1871, relating to taxation, appears to be neither foreign to the object of the residue of statute, nor insufficiently expressive in the title.

In declaring, in the language of the title, that the act was one "to establish an insurance bureau," the legislature must be understood as saying that it was made up of such provisions and details as were deemed suitable for the object, and under such title, and in keeping and in furtherance of the single object expressed, it was competent to go further than to enact more organic provisions.

It was certainly admissible to include any just and pertinent regulations respecting the course of action to be observed by the bureau or a State agency, toward those engaged in the business of insurance, and it was equally admissible to include any just and appropriate provisions for prescribing the duty due to the State in the matter of taxation from insurance companies. The fundamental principle of the law was the marking out of the reciprocal rights of the State and those carrying on insurance, and to provide the machinery for administration, in so far as the State, by a political agency, might properly supervise.

It is unnecessary to add anything further. The subject is fully treated in the work of my brother Cowley and the view there taken will not support the objections to the statute. Cowley on Con. Lim., 141 to 151, text and notes. See also the People vs. The State Ins. Co., 19 Mich., 392; Swartout vs. Mich. Air Line R. R. Co., 24 Mich., 389; and the opinion of my brother Christiancy in The People vs. Hurlbut, 24 Mich., 54.

The application for mandamus should be denied.

CHRISTIANCY and COWLEY, JJ., concur.

SUPREME COURT OF IOWA.

Appeal from Dubuque Circuit Court.

CHARLES OHDE, ADM'R, ETC.,

vs.

NORTHWESTERN MUT. LIFE INS. CO., *Appellants.**

A part note policy provided that in case of default in the payment of any premium, or interest on any note given for premiums, the company should only be liable for as many tenths of the sum insured as there had been complete annual premiums paid at the time of default.

The company was mutual, and its charter provided that any member in default in payment due may be prohibited from sharing in the profits.

The premiums after two years remained unpaid. The dividends were apportioned annually from the profits of the third year preceding, and in conformity with their custom the directors allowed no dividends at any time on this policy, which was treated by them as lapsed.

The notes given by assured provided that the interest should be paid annually or the policy forfeited, that the note was given for part of the premium, and that dividends are to be applied to payment of the notes.

Held, that the whole instrument and terms of the notes must be looked to in ascertaining the meaning of the contract.

Held, that it was not intended that a failure to pay the notes in any year should work a forfeiture to any extent.

Held, that the doctrine that the giving of a note does not operate as the payment of a precedent debt does not apply.

Held, that the payment of the cash part, with interest on the notes, and the execution of the notes required, was a complete payment of premium, which entitled the claimant to two tenths of the sum insured, less the amount of notes and accrued interest.

Affirmed.

This is an action by the plaintiff as administrator of Charlotte Warnecke deceased, upon a life insurance policy issued by the defendant upon the life of Wm. Warnecke deceased, for the use and benefit of said Charlotte, in the sum of fifteen hundred dollars.

Verdict and judgment for plaintiff. Defendant appeals. The further facts appear in the opinion.

* Decision rendered June, 22, 1875.

SHIRAS, VAN DUZEE and HENDERSON, *for Appellant.*

WILSON and O'DONNELL, *for Appellee.*

MILLER, C. J.

The policy on which suit is brought is as follows:

No. 11299. Age 43. Amount $1,500. Premium $92.93. The Northwestern Mutual Life Insurance Company, by this policy of assurance, in consideration of the representation made to them in the application for this policy, and of the sum of twenty-four dollars and eighty-four cents to them in hand paid by Charlotte Warnecke, wife of William Warnecke, wood-dealer, and of the annual premium note of of forty-three dollars and twenty-five cents, and the semi-annual cash premium of twenty-four dollars and eighty-four cents, to be paid at or before noon, on or before the twelfth day of July and January in every year during the first ten years of the continuance of this policy, do assure the life of William Warnecke, of Dubuque, State of Iowa, for the sole use of the said Charlotte Warnecke, in the amount of fifteen hundred dollars, for the term of his natural life.

And the said company do hereby promise and agree to pay the said sum assured, at their office, to the said assured or her executors, administrators or assigns, in ninety days after due notice and proof of death of the said person whose life is hereby assured, (the balance of year's premium, and all notes given for premiums, if any, being first deducted therefrom,) and in case of the death of the said assured before the death of said person whose life is assured, the amount of the said insurance shall be payable to the heirs at law of said William Warnecke.

And the said company further promise and agree that if default shall be made in the payment of any premium they will pay as above agreed as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the time of such default.

This policy is issued and accepted by the assured on the following express conditions:*

2. If the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company or to agents when they produce receipts signed by the president or secretary, then, in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above.

* Conditions 1st, 4th, 5th and 6th, not relating to the point at issue, are omitted.—ED.

3. In every case where this policy shall cease and determine, or become null and void, for other reason than non-payment of premium, all payments thereon shall be forfeited to this company.

The following statement of facts was admitted in evidence on the trial:

1. The policy sued on was issued July 12, 1865, at which time the semi-annual payment was made.

On the 12th of July, 1866, the semi-annual payment of twenty-four dollars and eighty-four cents, was made; also the year's interest on the note above described, and a second note of like form and tenor, for the sum of forty-three dollars and eighty-four cents, being exhibit "C," was executed by Warnecke and delivered to the defendant, and a proper renewal receipt was delivered to Warnecke, in the following form. (Exhibit "A.")

On the 12th of January, 1867, the semi-annual cash payment of twenty-five dollars and eighty-four cents was duly made.

On the 12th day of July 1867, Warnecke failed to pay the semi-annual cash payment then coming due, and failed to pay the annual interest then due for the past year, upon the two notes above described. No payments have since been made on said policy, or on the notes above described.

William Warnecke died at Dubuque, Iowa, on the 25th of October, 1869, of a natural death. His widow, Charlotte, intermarried with one Whitman, and died subsequent to the institution of this suit. The present plaintiff has been appointed administrator of her estate by the Circuit Court of Dubuque Co., Iowa.

Proofs of death were furnished and notice of his death given to defendant on or about July 12th, 1871.

Facts touching the payment of premiums. By section 13 of charter of the company, it is provided:

"That the officers of said company may cause a balance to be struck of the affairs of the company, annually, biennially, triennially, or once in five years, as the board of trustees may determine, and shall credit each member with an equitable share of the profits of said company."

The company commenced business in 1858. The first division of surplus was made in 1864 on the business of the five preceding years; the next in 1867, on the business of 1864; in 1868 on the business of 1865; in 1869 on business of 1866; in 1870 on the business of 1867. From 1858 to 1869, when a change was made in the note system, it

was the established rule and custom of the company to collect the annual interest coming due on the premium notes in cash, the dividends being applied exclusively to the payment of the principal of the notes.

By section 13 of the charter of the company it is provided that "Any member who would be entitled share in the profits, who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company."

In apportioning the surplus in the shape of dividends, the trustees have uniformly refused to allow dividends to those persons who, at the time the dividend was declared, were in arrears to the company. Under this rule, when, in 1868, a dividend on the business of 1865 was made, no dividend was allowed on the policy to Warnecke, because of his not paying his premium notes in cash, and also on account of his not paying his second premium note for forty-three dollars and twenty-five cents, given July 12, 1866, and the interest thereon (as well as on the first note) coming due July 12, 1867. For the same reasons, when, in 1869, a dividend was declared on the business of 1866, no dividend was allowed on said policy to said Warnecke, and for the like reasons none was allowed on the dividend declared in 1870, on the business of 1867.

In figuring up the dividends for the years 1865, 1866 and 1867, and since that date, the policy of Warnecke and all others similarly situated were treated by the company as lapsed policies, and no longer binding upon the company.

The per cent. of dividends declared and paid to policy-holders in the year 1868, on the business of 1865, was thirty (30) per cent. on the total amount of each annual premium; on the business of 1866, declared and paid in 1869, thirty-five per cent. on the total amount of each annual premium; and a like percentage on the business of 1867, declared and paid in 1870.

The defendant is a corporation duly organized under the laws of the State of Wisconsin, is a mutual company, and the headquarters of its business, or home office, is at Milwaukee, Wisconsin.

There was never any surrender of the premium notes by the company to the insured, nor offer so to do; neither was there a surrender of thepolicy by Warnecke. No demand was ever made upon Warnecke at any time for payment of the principal of either of the two premium notes given July 18, 1865, and July 12, 1866. Wilson and O'Donnell, *for Plaintiff.* Shiras, Van Duzee and Henderson, *for Defendant.*"

The two notes executed by William Warnecke are as follows:

$43.25. Dubuque, July 12, 1865. For value received I promise to pay to the Northwestern Mutual Life Insurance Company forty-three dollars and twenty-five cents, with interest at the rate of seven per cent. per annum, which interest shall be paid annually, or the policy be forfeited. This note being given for part of the premium on policy No. 11,299, is to remain a lien upon said policy until the death of William Warnecke, when it shall be deducted from the amount of said policy unless sooner paid. The dividends on the policy are to be applied to the payment of the note. No. 1. W.

$43.25. Milwaukee, July 12, 1866. For value received I promise to pay to the Northwestern Mutual Life Insurance Company forty-three dollars and twenty-five cents, with interest at the rate of seven per cent. per annum, which interest shall be paid annually, or the policy be forfeited. This note being given for part of the premium on policy No. 11,299, is to remain a lien upon said policy until it becomes due by limitation, or by the death of William Warnecke of Dubuque, when the note shall be deducted from the said policy unless sooner paid.

The dividends on the policy are to be applied to the payment of the note. Note No. 2. William Warnecke.

The policy was issued in consideration of the representations made to the company in the application made for the policy, and of the sum of twenty-four dollars and eighty-four cents, cash paid in hand, an annual premium note for forty-three dollars and twenty-five cents, and the semi-annual cash premium of twenty-four dollars and eighty-four cents, to be paid on the twelfth days of July and January of each year during the first ten years of the continuance of the policy. For this consideration the company promise by the policy to pay the amount of the policy at the death of the assured upon proper proof and notice thereof, less the balance of the year's premiums, and all notes given for premiums, if any. In ascertaining the true interpretation of the contract of insurance, the whole instrument and the terms of the notes executed in pursuance of the contract must be looked to and considered. One of the conditions of the policy is that if the premiums, or the interest upon any note given for premiums, should not be paid on or before the days mentioned in the policy for the payment thereof, then in every such case the company should not

be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated in the policy. This express stipulation is, follows: "And the said company further promise and agree that if default shall be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the time of such default."

What then is to be considered as the payment of complete annual premiums?

It is, we think, quite clear from the whole contract that the entire premium for each year was to be ninety-two dollars and ninety-three cents, payable in two semi-annual cash payments of twenty-four dollars and eighty-four cents each, on the 12th days of July and January, and the execution of a note to the company for the sum of forty-three dollars and twenty-five cents, with interest at seven per centum; that these cash payments were to be made, and such a note executed each year for the first ten years of the policy; that it is not contemplated that these annual premium notes are to be paid each year as a condition to the continuance of the policy. On the contrary the second condition in the policy expressly provides for and requires only the interest upon these notes to be paid, together with the cash premiums. This condition exonerates the company from liability to pay the whole sum in case the premiums or the interest upon any notes given for premiums shall not be paid, etc. This language is utterly inconsistent with the idea that a failure to pay the principal of these notes annually should work a forfeiture of the policy to any extent. The agreement is to pay money and give notes bearing interest each year, and to pay the interest accruing upon these notes. It is beyond question that the assured would have no right to insist that the company should receive the entire premium in cash, for that they have not agreed to do; they have stipulated for interest-bearing notes instead. More than this, the assured was under certain circumstances entitled to have his share of dividends applied on the notes, which also proves that these notes were to be made annually, the interest to be paid annually by the assured, and the principal to remain unpaid except as dividends were applied to that end, and to be liens on the policy until they should become due by limitation, or death of the assured, when they should be deducted from the policy.

The doctrine is well settled in this State that the giving of a note does not operate as payment of a precedent debt, unless it be so agreed by the parties, but that doctrine does not apply to this case.

Here the agreement on the part of the assured was to make certain semi-annual cash payments, and execute annual notes, and to pay the interest falling due upon such notes—the payment of the principal of the notes being otherwise provided for, first by dividends due the assured, and second, by deduction from the amount of the policy when that became payable. It follows, therefore, that when the assured had made the semi-annual cash payments in July and January, executed and delivered his note for the balance of the premiums as stipulated in the policy, and paid the interest due, if any, on the previously executed note or notes, then a complete annual premium was paid. This the assured performed for two years, which entitled his widow, upon his death, to two tenths parts of the whole sum named in the policy, deducting therefrom the amount of the two premium notes and their accrued interest. In accord with this view the court charged and the jury found their verdict. The judgment thereon will be affirmed.

All concur.

COURT OF APPEALS OF NEW YORK.

HENRY F. SMITH, *Respondent*,

vs.

GLEN'S FALLS INSURANCE CO., *Appellant.**

In an action upon a parol contract, after the loss, between the company and the insured, to pay a specified sum in liquidation of the claim, the agreement operates as a waiver of any limitation of time or breach of warranty in the policy unless the contract was procured by fraud.

Where there has been no request to find as to the fact of a breach of warranty, and no exception to a refusal so to find, a court of review will not look into the evidence to reverse a judgment.

CHURCH, CH. J.

The judge before whom the action was tried found the facts as stated in the complaint, except that the amount agreed to be paid for

* Decision rendered May 25, 1875.

the loss was slightly less than the sum stated. The evidence is sufficent to justify the findings, and we cannot review them.

According to the facts thus found, the action is upon a special contract made subsequent to the loss, by which the defendant agreed to pay a specified sum in consideration that the assured would cancel the policy, which he did. If such a contract was made, as we are bound to assume, the objections to the judgment cannot be sustained. The answer to the limitation of time provided in the policy for commencing the action, is that the action is not upon the policy but upon the special agreement. True, the agreement is founded upon the policy, but the claim for the loss under the policy has been liquidated and changed into a different form, to wit, the promises of the company to pay a specified sum, and this upon a new consideration. Suppose the agreement had been reduced to writing, or a note given for the amount, would the limitation of time for bringing actions upon the policy have applied to these obligations? Clearly not. The circumstances that the new contract rested in parol, does not affect this question.

The objection that there was a breach of warranty as to title and incumbrances is not available for two reasons. 1. There was no request to find the fact of a breach, and no exception to a refusal so to find. One of the exceptions states that it is for the refusal and omission to so find, but it nowhere appears that any such request was made. If a referee or judge refuses upon request to find a material fact, and an exception is taken, and such fact is conclusively proved, the exception will be available in this court; but if not conclusively proved, the remedy is by motion to the court below to require a finding as to the fact, and an order denying such motion will be reviewed in this court upon an appeal from the judgment. Here there appears to have been no request to find, and it has been repeatedly held that we will not look into the evidence to reverse a judgment.

2. The settlement and contract to pay a specified sum operates as a waiver of any warranty in the policy unless the settlement and contract were procured by the fraud of the assured, and this is not found, and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is that when the claim was made for the loss, the company was required to ascertain the facts as to any breach of warranty. If they saw fit to pay the claim, or compromise it, or to make a new contract without such examination, it must be deemed to have waived it, and in the absence of fraud it cannot afterward avail itself of such breach. It cannot

urge payment or settlement by mistake on account of a want of knowledge of such breach. The time for investigation as to breaches of warranty is when a claim is made for payment, and if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterward, in the absence of fraud, retract or fall back upon an alleged breach of warranty. 53 N. Y., 144.

There is no finding upon which an allegation of fraud in obtaining the new contract can be predicated.

The judgment must be affirmed.

All concur. GROVER, J., absent.

CASES DECIDED IN THE LOWER COURTS.

WARRANTIES—UNTRUE ANSWERS.

Supreme Court of New York.

SARAH L. FITCH
vs.
AMERICAN POPULAR LIFE INS. CO.*

The policy provided that the statements and answers in the application are warranties, and in all respects true.

Held, that if the answers were shown to be false or untrue, from whatever cause, whether material or not, the policy was void.

PARKER, J.

This action is brought by the plaintiff on a policy of insurance issued by the defendants, by which the life of her husband, Oliver C. Fitch, was insured for the sum of $3,000.

The defendants, by their answer, and at the trial, denied their liability, on the ground that there was a breach of warranty, misrepresentation, and concealment, which, by the terms of the policy, rendered the contract void; and also on the ground that the insured committed suicide.

At the trial, the evidence bearing upon the last defense was excluded, because the policy contained no clause upon that subject. The jury found a verdict for the plaintiff for the amount insured by the policy, with interest. The plaintiff moved upon the minutes for a new trial, which was denied. Judgment was entered upon the

* Decision General Term, 3d Department, directing a new trial, Feb., 1874. Appealed and argued in Court of Appeals, Dec. 7, 1874. Decision on Appeal reported p. 665.

verdict, from which, and from the order denying a new trial, the defendants appealed. It appears by the written application for the insurance, that the insured was asked, by written interrogations, whether he ever had any illness, local disease, or any injury in any organ? to each of which inquiries he answered "No."

He was in the same way required to name his family physician, and each one who had ever given him medical attendance, and if neither existed, some medical man and acquaintance who knew him well, to which his answer was, "Have none." He was also asked to state his vocation, what it then was and what it had been, and his answer was, "Traveling agent."

He was in like manner inquired of as to his birth-place, and answered "Tolland, Connecticut." He was then asked where he had lived since, and how long in each place; his answer was, "In New York."

It was shown on the trial, without any contradiction, that he had, about six years before, a disease of his eyes known as conjunctivitis, which required and received the care and skill of a physician for about a month, at Kinderhook, N. Y., his then residence. The attendance of the physician, Dr. Benson, was from 7th of November to the 1st of December, 1864. It was also found that in September, 1864, he was in the army in Virginia, and was then attacked with some disease or received some injury to his eyes, so that he was confined to his tent, and subsequently was sent into hospital. This commenced as early as September 25th, and he was in hospital as late as October 24th. When he was attended by Dr. Benson he was home on furlough, and was soon after transferred to the hospital in Albany, where he remained until the spring of 1865. Subsequent to the above attendance upon him, of Dr. Benson, and in 1867, the same physician was again once called to visit him professionally. It was proved by the testimony of the plaintiff, his widow, that the insured was by trade a painter; that after his marriage, in 1860, he worked at his trade till he went into the army in 1864; and after his discharge from the army, in 1865, he again worked at the same trade, more or less, making it his business as late as during the summer of 1867. The fact that he had been in the army during the fall of 1864 was also proved and not disputed.

It is claimed, on the part of the defendant, that these discrepancies between the statement in the written application and the facts proved, invalidated the policy, and that plaintiff was therefore not entitled to recover upon it.

There can be no doubt that the statements made in the application and under this policy are warranties, for it is declared in the policy that "the statements and declarations made in the written application for this policy, and on the faith of which it is issued, are warranties, and in all respects true; and subjoined to all the questions and answers in the application is the following: "I, the undersigned applicant, do hereby declare that the preceding written answers to the annexed questions, and the written statements in the preceding statement, declaration, and warranty, together with the statement made to the examining physician, and signed by him, and the next above person, [insured,] and presented to the company, are warranties, correct and true; and that there is not concealed, withheld, or unmentioned therein, any circumstance in relation to the past or present state of the health, habits of life, condition, nor intention of the next above-named person * * * * with which the directors of said company ought to be made acquainted. And it is further agreed that the preceding written answers, given to the annexed questions, shall be the basis and form part of the contract or policy between the undersigned applicant and the said company, and if not in all respects true and correct, the policy shall be void."

If it is possible to render the written answers to the questions, in the paper called, generally, the application, which, when filled up, contains what is called the statement, declaration, and warranty, warranties, it is done here. See Kelsey vs. Universal Life Ins. Co., 35 Conn., 225; Jennings vs. Chenango M. Ins. Co., 2 Denio, 75; Miles vs. Conn. M. Ins. Co., 3 Gray, 580; Miller vs. Mutual Benefit Life Ins. Co. (Supreme Court of Iowa, 1871), 2 Bigelow Life and Accident Ins. Rep., 693; [1 Ins. Law Jour., 25, 747.]

If, then, the answers above specified are shown to be false, untrue, in fact, from what cause soever it happened, whether from intention, forgetfulness, or mistake, no matter from what cause, the policy is void.

I think each one of the answers to the interrogatories above specified, is shown to be untrue. The proof that he had disease of or injury to his eyes, continuing for the space of at least two months, so severe as to disable him from duty while in the army, and to require medical treatment while on his furlough, is undisputed. His answer in the negative, then, to the inquiry, whether he had ever had local disease or injury to any organ, was false. So his answer to the effect that no physician had ever given him medical attendance was also false.

His answers, too, in respect to his vocation and where he had lived since his birth, contained covert falsehoods—which, if not intended to deceive, were likely to do so. The inquiry as to his vocation was what it then was and what it had been. His answer, traveling agent, was true as to what it then was, but untrue as to what it had been, for the inquiry as to his past vocation obviously called for the statement that it had been a painter and a soldier, as well as a traveling agent. The answer was false, from the clear and manifest failure to tell the whole truth.

The same is true of his answer to the inquiry where he had lived since his birth in Tolland. His answer, "New York," was not the whole truth; he had lived in Virginia also.

It being agreed between the parties to the policy that the "written answers to the annexed questions shall be the basis and form part of the contract or policy between them, and if not in all respects true and correct the policy shall be void," it follows that the falsity of the answers in the particulars above stated renders the policy void.

The learned counsel for the plaintiff insists the answers above referred to were in respect to immaterial matters and therefore should not be deemed warranties within the true intent or meaning of the contract, and also that the whole is qualified by the declaration in the application that the policies of this company are made in entire, unconditional, honest, good faith, and that it is expected that the application be made in good faith, and the assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant. I do not think the actual warranties agreed upon in the contract are prevented from taking effect by this preliminary disquisition in the beginning of the application upon the importance of honesty and carefulness on the part of the applicant. After all this comes the agreement that the answers to the annexed questions are warranties; that they form part of the contract or policy, and if not in all respects true, the policy shall be void, and after such caution and the accompanying explanation that if the assured cannot answer "yes" or "no" he can properly say, "I do not know." It is inexcusable carelessness, at least, to say "yes" or "no" untruly.

Nor will it do to say that the immateriality of the answers prevents their being warranties. Such construction would do away with the distinction between representations and warranties. In Daniels vs. Hudson River Fire Ins. Co., 12 Cush., 416. Shaw, Ch. J., said, the "difference [between a warranty and a representation] is most es-

sential. If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy. If it be construed as a representation and is untrue, it does not avoid the contract, if not willful, or if not material. To illustrate this, the application in answer to interrogatory is this: 'Ashes are taken up and removed in iron hods,' whereas should it turn out in evidence that ashes were taken up and removed in copper hods, perhaps a set recently purchased and unknown to the owner. If this was a warranty, the policy was gone, but if a representation it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms."

The question of warranty then does not depend upon that of materiality, as seen by Judge Shaw's illustration; a very immaterial thing may be the subject of a warranty, and, if a warranty, a breach of it will avoid the policy.

"It is a matter of no moment then, whether the warranty is material or not, as regards the risk; it must be complied with before the assured can maintain an action against the underwriters." Jennings vs. Chenango M. Ins. Co., 2 Denio, 75, 81. See also Anderson vs. Fitzgerald, 4 H. of L. Cases, 484. In this case the question was, after mature examination and deliberation, decided in the House of Lords—overruling the courts of exchequer and exchequer chambers in Ireland, in regard to statements made in the proposal for insurance that "some of the relatives of the insured had died of consumption or any other pulmonary complaint, and that his life had not been accepted or refused at any other insurance office"—that they were warranties, and that being warranties it was of no consequence whether they were material to the risk or not; if they were untrue the policy was thereby rendered invalid, and no recovery could be had upon it. In the course of his opinion in that case the lord chancellor said "nothing can be more reasonable than that the parties entering into a contract of life insurance should determine for themselves what they think to be material, and if they choose to do so, to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, and his false answer will then avoid the policy. Upon this view of the case the defendants were entitled to the nonsuit asked for at the close

of the evidence. The same view leads to the conclusion that the court erred in refusing to charge as requested by defendants' counsel, "that if the jury believed that Fitch had any disease of his eyes, such as to require care and attention, no recovery can be had."

The judgment must be reversed and a new trial ordered.

OTHER INSURANCE.—TRANSFER OF PROPERTY.—ASSESSMENT OF POLICY.

Superior Court of Cincinnati.—Special Term.

JOHN BATES

vs.

COMMERCIAL INSURANCE CO, MAGNOLIA INSURANCE CO., CENTRAL INSURANCE CO., and BUCKEYE INSURANCE CO.

These four actions were each founded on a policy of insurance for $2,500, on the theatre in Louisville formerly owned by the plaintiff, but owned when the original policies, of which these are renewals, were issued, by George F. Fuller.

The petitions were all alike, and severally set out that the plaintiff sold the theatre to George F. Fuller, reserving a small rent of $100 per annum and a lien for $26,250 of balance of the purchase money, and that the deed of transfer also contained a clause providing that Fuller should keep the property insured for four years in the sum $10,000, and assign the policy to plaintiff to secure the payment of Fuller's indebtedness to him. Fuller procured the insurances in the several companies of the several defendants, $2,500 in each.

Subsequently Fuller sold the property to Mark Munday and two others for $75,000, retaining a lien for $50,000 of unpaid purchase money, and providing that the said purchasers should procure insurance in $10,000, loss if any payable to Fuller, which was done without notice to defendants, in violation of the provision against other insurance. Again, Munday, soon after the purchase from Fuller by the three, (himself and two others,) bought out the other two purchasers, and at the time of the fire owned the whole of the property subject to the lien aforesaid in favor of Fuller.

The companies set up as a defense the procurement of other insurance without permission, and the Buckeye Insurance Company, as a fifth defense, alleged that the transfer of the property from Fuller to Munday, etc., was in direct contradiction with the condition of its policy, which stated that in case of any transfer or change of interest of the insurer, either by sale or otherwise, without consent of defendants, the policy shall thenceforth be void and of no effect. The the policies of the other three companies did not contain the clause, and their answers did not contain the defense.

Judge TAFT said substantially:

I find no evidence that the risk was in any measure increased by the change of ownership. There is nothing in the character of the purchasers or of Munday to make the moral risk or any risk greater than it would have been if the property had not been sold. Fuller remained interested in the property so largely beyond all the insurance, that there could not be supposed to be any appreciable increase of risk on the ground of his want of interest. Nor can I find that the failure of Fuller to represent the fact of his sale to Munday, and the further fact that Munday procured the insurance in his own name under the circumstance stated, was a misrepresentation or a concealment of a fact material to the risk. Nor do I find any such want of representation of Bates relative to the property and to Fuller as to impair the validity of these policies.

The word assignees as used in the clause of the policy—which reads as follows: "If the said insured or assignees shall hereafter make any other insurance upon said property"—means not assignees nor transferees of the property, but of the policy; this construction is reasonable and has been settled by authorities. Holbrook vs. American Ins. Co., 1 Cur. 193; Wilson vs. Hill, 3 Met., (Mass.) 66–68.

The question of other insurance is not in this case affected by the word assigns, as there are no assigns of these policies who have obtained other insurance. The precise facts of this case are not to be found in any of the adjudicated cases, and present the question of "other insurance" under novel circumstances, and in a way perhaps to leave it not quite clear of doubt; but having regard to the principle upon which courts uniformily construe these conditions in a policy favorably to the insured, to avoid a harsh and inequitable forfeiture, I conclude that the policies obtained by Mark Munday on his interest in the property, loss if any payable to Fuller, "to secure the payment of purchase money, were not other insurance made by Ful-

ler or assigns upon the said property, and therefore do not fall within the prohibition of the clause in the policy. I think this conclusion is sustained by principle, and not inconsistent with the precedents. It remains to consider the fifth defense in the case against the Buckeye company, that the policy is forfeited by a transfer or change of interest of the insurer, either by sale or otherwise, without consent." Regarding the real objects of the parties, and their relation to each other, we can not find such a change of interest here, by sale or otherwise, as to avoid the policy. Courts have held that where the property insured was sold and conveyed by a deed absolute in form, and at the same time a mortgage was made back to secure the purchase money, the two deeds are to be regarded as one, and the vendor is to be regarded as holding his title unchanged so far as his insurance was concerned. There are many cases which may be regarded as authorities to this point. Hitchcock vs. Northwestern Ins. Co., 26 N. Y., 68; Ætna Ins. Co., vs. Jackson & Co., 16 B. Mon., 255; Kitts vs. Massasoit Co., 56 Barb., 177.

I find then for the plaintiff in each case for the full amount of policy and interest.

At the general term of the Superior Court of Cincinnati the first three decisions were affirmed, and in the case of the Buckeye Co.'s policy, HAGANS, J., said, substantially, that, where Fuller sold to Munday the insured property for $75,000, retaining a lien for $50,000 of the purchase money, the interest of Fuller was transferred or changed within the meaning of the said clause, and that the policy was therefore void.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

LIFE.—*Day of grace.*

The terms of a non-forfeiting life policy, premium payable semi-annually, provided that the insured should have thirty-five days of grace within which to pay his premium.

The insured died with the premium twenty-four days overdue, which was then paid by his brother. The company defended on the ground that the thirty-five days' grace was personal to the insured, and could not be available to any other person.

Held, that the terms of the policy was a practical insurance for six months and thirty-five days, and that the premium being in this case paid within that time the plaintiff was entitled to recover on the policy.

Worden vs. Guardian Mutual Life Ins. Co.

N. Y. S. C.

FIRE.—*Removal of suit from a State court.*

Upon filing petition and bond, within time, under act of Congress, for the removal of a suit from a State to the United States Circuit Court, the State court and State judges have no discretion but to order the removal, and direct that no further proceedings be had in said suit in the State court.

O'Malia vs. Home Ins. Co. of Columbus.

C. P. Luzerne Co. Pa.

LIFE.—*Payment of premium by note—true or false answer.*

On the day the premium became due, a note was drawn up by a former agent of the company, payable in thirty days, which was collected through a bank. The policy provided that agents have no authority to receive anything except money on the annual premiums. The form of the note shows that they did in fact receive other things. The form of this note shows that agents had authority to take notes for

the annual premiums as they became due. There was evidence that credit had been given by notes on the former premiums. Left to the jury to determine whether the company had authorized the premiums by note instead of money, the note being paid before the death.

In answer to a question whether the party had any other insurance upon his life, the answer was "Yes, $5,000 in some Chicago company," when in fact there had only been a proposal. There had been no insurance on his life, but it was left to the jury to say whether the answer was true or not true in the sense of the policy. The court say: "It will be for the jury to say whether that answer was not prejudicial to the party applying for insurance, and not injurious to the company at all." If it would be prejudicial to him, and lessen his chances of obtaining a policy, and yet the company issued the policy, then although the answer may literally be false, it may be true in the sense explained to the jury. If the truthful answer of the applicant would have made him a more acceptable subject to the company for insurance than the answer actually given, the answer, though not literally true, may be considered as such by the jury.

Inman vs. Globe Mutual Life Ins. Co.

U. S. C. C. Ky. Ch. to jury by Ballard, J.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 144. FIRE.—*Power of.—What Acts constitute a Waiver.*—A person authorized to accept risks, settle the terms of insurance, and issue and renew policies, must be regarded as the general agent of the company.

Post vs. Ætna Ins. Co., 43 Barb., 351.

The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of such agency.

Carroll vs. Charter Oak Ins. Co., 40 ib., 292.

The power of such agent of a stock company is plenary as to the amount and nature of the risk, rate of premium, and gen-

erally as to the terms and conditions of the contract. He may make such modifications in the policy conditions before delivery, and sometimes even afterward, as in his discretion seems proper.

May on Ins., § 129; Gloucester Manfg. Co. vs. Howard Fire Ins. Co., 5 Gray, 498.

Where such an agent filled the application, and at the time of doing so existing policies of a company for which he was also agent were handed to him at his request, he must be supposed to have read them and known their contents, and such knowledge will be a waiver of a condition in the subsequent policy requiring the indorsement of other insurance.

Van Bories vs. United Ins. Co., 8 Bush., (Ky.,) 133; Horwitz vs. Equitable Ins. Co., 40 Miss., 557; Hubbard vs. Hartford Fire Ins. Co., 33 Iowa 325; Couch vs. City Fire Ins. Co., 37 Conn., 248; Pechren vs. Phœnix Ins. Co., 6 Lansing, 411; Carroll vs. Charter Oak Ins. Co., 10 Abb., N. S., 166; Rowley vs. Empire Ins. Co., 36 N. Y., 550; Plumb vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 392; May on Ins., § 369-370.

Pitney vs. Glen's Falls Ins. Co.

Rep'd Jour'l, p. 765. N. Y. Com. A.

§ 145. FIRE.—*Of the Insured by Terms of Policy.*—The application was incorrectly filled by the agent from correct representations by the insured. But the policy made the agent the agent of the insured, and not of the company under any circumstances. The truthfulness of the application was a warranty. *Held*, that the terms of the contract must be enforced, and the breach of warranty was not avoided by the knowledge or acts of agent.

Plumb vs. Catt. Ins. Co., 18 N. Y., 392, distinguished; Chase vs. Ham. Ins. Co., 20 N. Y., 52; Rowley vs. Empire Ins. Co., 36 N. Y., 550, excepted; Owens vs. Holland Purch. Ins. Co., 56 N. Y., 565-76.

Rohrback vs. Germania Fire Ins. Co.

Rep'd Jour'l, p. 787. N. Y. C. A.

BARRATRY.

§ 146. MARINE.—*The Wrong must be Willful to constitute.*—Mere negligence or an innocent breach of duty will not constitute barratry. The act must be willfully or fraudulently wrong. A fraudulent intention to injure the owner is not necessary; it is

sufficient that there is a deliberate and palpable breach of duty toward the owner.

2 Arnold on Ins., 821, note *h*; 1 Phillips on Ins., § 1062-1074; 2 Pars. on Mar. Law, 236, 239, 246; 3 Kent, Com., 306; McCullough's Dictionary of Com. & Nav., tit. "Barratry;" Cook vs. Com. Ins. Co., 11 J. R., 40-46; Am. Ins. Co. vs. Bryan, 26 Wend., 578.

The policy insured against the "barratry of the master and mariners." The bill of lading required the cotton to be stowed below deck. The master, without the knowledge of the owner and against the remonstrance of the ship-owner's agent, stored a portion on deck, whence it was jettisoned into the sea during a storm. *Held*, that the act of the captain was in itself wrongful and a violation of his duty toward the owners; if wrongfully intended it was barratrous. *Held*, that the question of intent was for the jury, to whom the whole question of barratry should have been submitted as a question of mixed law and fact. *Held*, that the wrongful act of the captain was the direct cause of loss.

Phyn vs. Royal Ex. Ass. Co., 7 Term R., 501; Wilson vs. Rankin, 6 Best & Smith, 208; S. C., L. R., 1 Q. B., 166; Earl vs. Rowcroft, 8 East, 126; Salonica vs. Johnson; Park on Ins., ch. 18; Moss vs. Bryan, cited in Earl vs. Rowcroft; Boehm vs. Combe, 2 Mau. & Sel., 172; Lawton vs. Sun Mut. Ins. Co., 2 Cush., 500; Patapsco Ins. Co. vs. Coulter, 3 Peters, 231; Burk vs. Royal Ex. Ins. Co., 2 Barn. & Ald., 82; Parkhurst vs. Gloucester Mut. Fishing Ins. Co., 100 Mass., 301; Grim vs. Phœnix Ins. Co., 13 Johns., 451; Heyman vs. Parish, 2 Camp., 149; Knight vs. Cambridge, Strange, 581; Mod. Rep., 230, and 2 Ld. Raym., 1349; Vallego vs. Wheeler, Cowper, 143; Goodman vs. Harvey, 4 Adol. & Ell., 870.

Atkinson vs. Gt. Western Ins. Co.

Rep'd Jour'l, p. 751. N. Y. C. A.

CARRIER.

§ 147. MARINE.—*Responsibility of.*—In the case of a vessel wrecked against a bridge on the Mississippi, *Held*, that the burden of proof is on the carrier, and nothing short of a clear proof, leaving no room for controversy, should be permitted to discharge him from the duties which the law has annexed to his employment.

Steamboat Mollie Mohler vs. Home Ins. Co.

Rep'd Jour'l, p. 794. U. S. S. C.

CONTRACT.

§ 148. FIRE.—*Parol after the Loss.*—In an action upon a parol contract, after a loss, between the company and the insured to pay a specified sum in liquidation of the claim, the agreement operates as a waiver of any limitation of time or breach of warranty in the policy, unless the contract was procured by fraud.

53 N. Y., 144.

Smith vs. Glen's Falls Ins. Co.

Rep'd Jour'l, p. 708. N. Y. C. A.

DESCRIPTION.

§ 149. FIRE.—*Not a Warranty of Title.*—The policy insured plaintiff "on his two buildings." *Held*, that the phrase was merely descriptive, not a warranty of ownership.

Niblo vs. Ins. Co., S. C. R., 531; Traders' Ins. Co. vs. Roberts, 9 Wend., 404; Tyler vs. Ætna Ins. Co., 12 Wend., 507.

Rohrbach vs. Germania Fire Ins. Co.

—§ 145.

INSURABLE INTEREST.

§ 150. FIRE.—*Of General Creditor.*—A general creditor of the estate of one deceased whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

1 Arnold on Mar. Ins., 229; Bun. on Life Ins., 16; Hughes on Ins., 30; 1 Marshall on Ins., 115; 1 Phillips on Ins., 2, 107; Sherman on Ins., 93; Parsons on Merc. Law, 507; Parsons on Cont., 438; Angel on Ins., sec. 56; Flanders on Fire Ins., 342; May on Ins., 76; Hancock vs. Ins. Co., 3 Sumner, 132-140; Putnam vs. Merc. Mar. Ins. Co., 5 Met., 386; Wilson vs. Jones, Law Rep., 2 Exch., 139; Buck vs. Ches. Ins. Co., 1 Peters, 151-163; Mapes vs. Coffin, 5 Paige, 296; Mickles vs. Rock City Bk., 11 Paige, 118; Ins. Co. vs. Allen, 43 N. Y., 389-95-6; Herkimer vs. Rice, 27 N. Y., 63; Savage vs. Howard Ins. Co., 52 N. Y., 502; Clinton vs. Hope Ins. Co., 45 N. Y., 454; Waring vs. Loder, 53 N. Y., 581.

Distinguishing Gravemeyer vs. Ins. Co., 62 Penn. St., 740; Conrad vs. Ins. Co., 1 Pet., 386; Cover vs. Black, 1 Barr., 493.

Rohrbach vs. Germania Fire Ins. Co.

—§ 145.

NAVIGATION.

§ 151. MARINE.—*Responsibility of Vessels on Western Waters.* —In the case of a vessel wrecked against a bridge in the Mississippi, *Held*, that railroad bridges, though to a certain extent impediments to commerce, are themselves highways of commerce, and officers of steamers plying on Western rivers must be held to the full measure of responsibility in navigating streams crossed by bridges.

Steamboat Mollie Mohler vs. Home Ins. Co.

—§ 147.

OTHER INSURANCE.

§ 152. FIRE.—*Separate Interest.*—P. owned an undivided interest in wool, which he insured without any reference to joint ownership. He afterward insured in another company, with the policy clause attached, "loss, if any, one half payable to George N. Pitney, as his interest may appear,"—George N. Pitney being the joint tenant. *Held*, that the policies attached to the same subject matter of insurance, and the second policy was other insurance with reference to the first.

Mussey vs. Atlas Ins. Co., 14 N. Y., 84; Ogden vs. East River Ins. Co., 50 N. Y., 389: case of Howard Ins. Co. vs. Scribner, excepted.

A renewal is not other insurance, and where the act of the agent amounted to a waiver of the required indorsement when the policy was issued, the indorsement is not required by the renewal.

Pitney vs. Glen's Falls Ins. Co.

—§ 144.

POLICY.

§ 153. FIRE.—*Construction of.*—The application was filled in blank by the agent from the representations of the insured. The

policy was upon wool, covering the interest of P. only. Subsequently the agent, on the representation of P. that he had forgotten to mention that his son had an undivided interest in the wool, inserted the clause in the policy, "in case of loss, if any, one half payable to George N. Pitney as his interest may appear." *Held*, that parol evidence is admissible to show the nature of George N. Pitney's interest, and the intent of the parties to have that interest insured.

Clinton vs. Hope Ins. Co., 45 N. Y., 454; Aff. S. C., 51 Barb., 647; Bidwell vs. Northwestern Co., 19 N. Y., 182; Arnold on Ins., note 25; 1 Phil. on Ins., 163; Golpoys vs. Colpoys, 6 Jacob, 451; Burrows vs. Turner, 24 Wend., 277; Newsom vs. Douglas, 7 H. & John., 417; Turner vs. Burrows, 5 Wend., 541; Mussey vs. Atlas Mut. Ins. Co., 14 N. Y., 79; case of Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391, distinguished.

Testimony showed the son's interest as tenant in common. The agent had sufficient authority for making the alteration. *Held*, that the clause may be regarded as a new contract with the real party in interest, for which there was sufficient consideration in the otherwise equitable right of P. to a proportionate return of premium, and P. was entitled to recover for the whole amount as assignee of George N. Pitney.

Solms vs. Rutgers Fire Ins. Co., 40 N. Y., 416.

Questions as to the meaning of particular words used in a special sense in a written instrument, are questions of construction for the jury. If it be assumed that the contract to insure the interest of George Pitney was made not with himself, but with P., in his behalf, P. still has a right to recover, as trustee, under § 113 of the Code.

Considerant vs. Brisbane, 22 N. Y., 389; Sargent vs. Morris, 3 Barn. & Ald. 280; Somes vs. Equitable Ins. Co., 12 Gray, 532; Williams vs. Ocean Ins. Co., 2 Metc., 306; 2 Phillips on Ins., 1958.

Pitney vs. Glen's Falls Ins. Co.

—§ 144.

PRACTICE.

§ 154. FIRE.—*Request to Find.*—Where there has been no request to find as to the fact of a breach of warranty, and no ex-

ception to a refusal so to find, a court of review will not look into the evidence to reverse a judgment.

Smith vs. Glen's Falls Ins. Co.

—§ 148.

TITLE.

§ 155. FIRE.—*Agreement to Sell.*—A verbal agreement to sell, payment to be made by crediting on an existing debt, without any visible outward act in furtherance of the transaction, is not a change of title which avoids the policy.

Archer vs. Zeh, 5 Hill, 294; Schindler vs. Houston, 1 N. Y., 261; Mattice vs. Allen, 3 Abb., Ct. App. Dec., 248; S. C., 3 Keyes, 492; Clark vs. Tucker, 2 Sandf., 157; Ely vs. Ormsby, 12 Barb., 570; Walrath vs. Ritchie, 5 Laws., 362; Teed vs. Teed, 44 Barb., 96; Brabine vs. Hyde, 32 N. Y., 519.

Pitney vs. Glen's Falls Ins. Co.

—§ 144.

WARRANTY.

§ 156. FIRE.—*Breach of.*—Where plaintiff made no representation as to his interest further than to show the agent the instrument by virtue of which he claimed an interest, *Held*, that the policy phrase, "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible. Plaintiff in his notice of loss stated his ownership as that of "legal heir of his deceased wife;" he was in reality a general creditor of her estate, by virtue of an instrument executed by her before her decease. *Held*, that this was no intentional deception, or anything calculated to mislead.

Rohrbach vs. Ætna Ins. Co.

Rep. Jour'l, p. 749. N. Y. C. A.

§ 157. FIRE.—*Statement of Interest.*—The nature of the insured's interest was not expressed as required in the policy. The policy was "on his two buildings." The policy made the application a warranty. The application stated that plaintiff had disclosed all the facts. To the question as to the nature and amount of his interest, he replied "his deceased wife held the

deed," which was true, but his actual interest was as general creditor of the estate, in virtue of an instrument executed to him by his wife before her death. *Held*, that this was a breach the warranty which avoided the policy.

Chaffee vs. Ins. Co., 18 N. Y., 376; Brice vs. Lorillard Ins. Co., 55 N. Y., 240.

Rohrbach vs. Germania Fire Ins. Co.

—§ 145.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

COURT OF APPEALS OF NEW YORK.

SALMON G. CONE, *Respondent*,

vs.

THE NIAGARA FIRE INSURANCE CO., *Appellants.**

The policy provided that any interest not absolute or less than a perfect title must be specifically represented.

This clause was not specifically set up as a defense in the answer. There was a general denial of ownership and of insurable interest, and an allegation of insufficient facts to sustain an action specifying the particulars. There was no finding of fact or conclusion of law involving it. It nowhere appears in the case.

Held, that the clause cannot be set up as a defense on appeal.

The policy insured the interest of P., payable to C. C. was a judgment creditor of P., holding an incomplete title of the premises by virtue of sheriff's sale. The right of redemption belonged to P. when the policy was issued, but had ceased when the fire occurred. C. had agreed with P. if he obtained a full title to have certain mortgage and judgment debts of P. satisfied. *Held*, that all this constituted an insurable interest in P., who had still the right, until after the fire, to create other judgment creditors who would have power to redeem.

The agent knew, when the policy was applied for, that the house was vacant and likely to remain so for some time. He also informed the company of the existing condition of the premises.

* Decision rendered Feb. 23, 1875.

Held, that the company is estopped from setting up that the policy is void for want of consent indorsed.

Held, that C. is entitled to the amount of his policy notwithstanding he may have obtained full indemnity elsewhere, free from any claims of the company to subrogation against P.

Held, that it was not necessary to make P. a party to the suit. C. would hold after recovery, as trustee for P. for all in excess of his loans, and the company was only interested in ascertaining whether C. had such a claim as entitled him to sue.

Judgment affirmed.

CHAS. TRACEY, *for Appellants.*
JAS. E. DEWEY, *for Respondent.*

FOLGER, J.

The first point made by the appellant is, that the title of Palmer, the insured, at the time of making the contract of insurance, was not absolute, and that the policy did not express that Palmer's interest was less than a perfect title, and that consequently the policy was void by its terms. This point is based upon a clause in the policy as follows: "Any interest in property insured not absolute, or that is less than a perfect title, * * * * must be specifically represented to the company and expressed in this policy in writing, otherwise the insurance shall be void."

The answer does not specifically set up this defense. The appellant relies upon the general denial in the answer of all the allegations of the complaint not admitted. This would meet the allegations of the complaint that Palmer was the owner of the dwelling-house insured and had insurable interest, and there is also an affirmative averment in the answer, that Palmer was not the owner and had not an insurable interest. But as he might be the owner in law and in fact, and still it be contended, as it is contended, that he had less than a perfect title, and that his interest was not absolute, the general denial of that allegation of the complaint does not raise an issue upon a violation of this clause in the policy, nor does this affirmative averment in the answer. The answer also alleges that the complaint does not state facts sufficient to constitute a cause of action. But it then specifies wherein the complaint fails in this regard, and this is not one of the particulars named. The complaint also alleges that the plaintiff has duly performed, and that Palmer has duly performed all the conditions of the policy on their part. The general denial meets this allegation, and perhaps in the letter of the pleadings it may be in issue and a liberal construction of the pleadings might allow that this defense was intended in them, though there is no mention of or allusion to this condition in the policy. But no-

where else in the appeal-book does the point appear, until it is noticed in the opinion at General Term, and then only to say that it is there for the first time raised.

Undoubtedly the proofs do make manifest all the facts upon which the appellant now claims that it appears that Palmer had not a perfect title, and that his interest in the property insured was less than absolute. But there is nothing to show that these facts were brought out to sustain a defense which is contained in the point now raised, or that the trial court, or the respondent while before that court, were apprised thereby or otherwise of that defense. Nowhere does it appear in the case that these facts were marshalled or used to maintain that position. There is no finding of fact made or conclusion of law arrived at that involves it. The finding of fact is that Palmer was the owner in fee; and so he was. The conclusion of law is, that he held the legal title and had an insurable interest; and so he did. When motion was made to dismiss the complaint, the only specification which is of kin to this point is the one that there was no insurable interest in Palmer at the time of the fire, and the one that the complaint does not state facts sufficient to constitute a cause of action; neither of which present the question now mooted, or make reference to this condition in the policy.

In the exceptions to the findings there is none to that which states that Palmer became the owner in fee of the premises on a given date; nor any to the findings and conclusions of law, whereby is manifested this point as being contained in them.

In the requests to rule and decide, where surely it should crop out if it was in the case, there is no more like it than that Palmer had no insurable interest at the time the policy was issued, nor when the fire occurred.

In the requests to find certain propositions of fact, there is none which even vaguely presents their question.

The opinion at Special Term, which is somewhat elaborate, does not discuss nor notice the proposition now urged, and, as before said, it is mentioned at General Term only to be dismissed as not in the case.

We have held, that though the answer does not present a particular defense, relied upon on appeal; yet, if the facts on which it may be based have been brought out without objection, and there are findings and exceptions upon which it may be presented, we will not assume from the silence of the answer, or even of the opinions in the courts below, that it was not there raised so as that the opposite

party had notice of it. McKechnie vs. Ward, MS. opinion, decided 1874. Here, however, while it is not easy to discover that the defense is set up in the answer, it is not at all to be seen that it afterward appears in the case, where it could be met and answered by proof. For this reason it cannot now be entertained. The second and third points of the appellant are dependent upon his first, and fall with it. The fourth point is, that at the time of the fire Palmer had no insurable interest in the premises burned. Without stopping now to consider whether, if this were so, the interest of Cone would not sustain the policy and this action on it, we state our opinion to be, that when the policy was issued Palmer had an insurable interest in the premises which continued until after the fire occurred. An insurable interest is that property or right of the assured, in respect to which he is liable to loss. The assured has an insurable interest when he has an interest in the subject insured, and the happening of the event insured against might bring upon him pecuniary loss. Herkimer vs. Rice, 27 N. Y., 163, goes as far as or further than this. It is not necessary that the event would of a certainty inflict loss; it is enough that it might so do. This is general language, but with limitation by the facts of this case it is sufficiently particular. Now when the policy was contracted for and issued, insuring the interest of Palmer his right to redeem the premises from the sale by the sheriff had not lapsed. This was a right of some value. Stephens vs. Ill. Mut. Ins. Co., 43 Ill., 327; Strong vs. M. Ins. Co., 10 Pick., 41. Its value was made up in part by the existence of the insured building upon the lands. A destruction of that building lessening the value of the premises, would lessen the value of that right to redeem. Buffum vs. Bowditch Mut. Ins. Co., 10 Cush., 540. And so when the fire came, although the right of Palmer to redeem as owner of the fee had gone, there was a right to redeem in subsequent judgment creditors, if any. Palmer's title had not yet been divested. 2 R. S., 373, sec. 51. And though all the subsequent heirs made known by the proofs had centered in Cone, who also held the sheriff's certificate, there was yet a possible right and power in Palmer to create other judgment creditors. It was possible for him at any time within the fifteen months (Cheney vs. Woodruff, 45 N. Y., 98-100-101, and cases cited) to procure an advance or loan from some friend or speculator, and confessing to him a judgment, thereby create in him a power and right to redeem from Cone. This was an interest affected by the continuance of the insured building on the one hand, or by its loss by fire on the other. Again, by the agreement with Cone, the latter

was bound, if he acquired title, to discharge Palmer from his personal liability for certain mortgage and judgment debts by having them satisfied of record, and thus to relieve Palmer. The inducement and consideration for Cone to make perfect his inchoate title, and to carry out the other parts of his agreement, was greater or less, as the premises remained unimpaired in value, or were injured by fire. All this constituted an interest in Palmer in this building which was an insurable interest. If the loss of the building by fire should turn away Cone from the fulfillment of his agreement, to effect the release of Palmer from his personal liability, then there might be, almost assuredly would be, a damage to Palmer. Waring vs. Loder, 53 N. Y., 581 ; Franklin Fire Ins. Co. vs. Findlay, 6 Whart., 483. Palmer did not, by the agreement with Cone, in terms give up his own right to redeem or his right and power to create a judgment creditor who might redeem. He probably did not have any purpose to do either, and sought, by the agreement, somewhat of an equivalent for them. But either by the possession of this right and power, or by the benefit contracted for in the agreement, he had a beneficial interest in the preservation of the building, which was an insurable interest. The contingency gave him an interest in the continued existence of the buildings, which was an insurable interest. It thus appears that Palmer had not, at the time of the fire, been divested of all interest in the premises. He had an interest similar to if not as great and as perfect as a possessor of the legal title to real estate, who has entered into a valid contract of sale with a responsible vendee put into possession, who has not yet paid over the purchase money. Be the vendee ever so responsible, the vendor has still an interest in the premises sold, which is the subject of insurance. Palmer had this interest certainly until the last day of the fifteen months for judgment creditors to redeem, for until the expiration of that last day it was a possibility for him to send some one who would make an advance of money, take a judgment, and make immediate redemption from Cone ; and he also had the security of the additional inducement to Cone to fulfill his agreement. See Lazarus vs. Com. Ins. Co., 19 Pick., 81.

It is not sound to style the agreement between Cone and Palmer a conveyance of the title to Cone. It expressly looks to other action by Cone or lack of action by others, by which Cone should get title, and by the terms of the instrument it was looked upon as a possible contingency, not an assured event that Cone should get title.

It is apparent that Palmer retained the legal title to the premises

until the expiration of the fifteen months. As these did not expire until after the fire, his title continued until after the fire, and he, till after that event, had a pecuniary interest in the premises, which was affected by their destruction by fire, without the indemnity of insurance.

The sixth point of the appellant is, that the reformation of the policy, by requiring the indorsement upon it of a consent to the house being vacant, was error.

On this question, the conclusion of law made by the trial court is, that the indorsement of consent upon the policy was waived by the defendant and its authorized agent, and that the defendant is estopped from setting up that the policy is void, for that consent was not indorsed. The proofs and the findings of fact sustain that conclusion, and would sustain one that it was not contemplated between the parties that there should be any such clause in their agreement. It is plain that the condition of the building as being vacant at the time when the policy was applied for and when it was issued, was well known to the agent of the defendant, who was a general agent, having power to take applications, to issue and deliver policies, and to receive premiums. He also knew that it was likely that the building would remain unoccupied for an indefinite time. This agent informed the defendant of the existing condition of the premises. There is no question made of the authority of this agent; so that his knowledge was the knowledge of the defendants, and his act their act. Now if these defendants were an entity, and could have stood near to that building when the oral negotiation for insurance was made and completed, and have seen that it was vacant, and have heard that it was likely to remain so for a time then uncertain, dependent upon the success of the plaintiff in finding for it a tenant of a certain kind, could it be fairly contended that they would have offered to the plaintiff, or that he would have knowingly received as the correctly written evidence of the contract, this policy, with the condition in question contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendants would do the absurd thing of making with deliberation and knowledge a contract which was void from its inception, and which was in contradiction of the facts and statements of the negotiation. It is plain that the plaintiff and the agent meant to contract, and did orally contract for the insurance of that building as a vacant building, and which would probably be a vacant building beyond the lapse of ten days named in the policy. The agent was that entity, in the place and stead of

the defendants, and did for them all that which has been supposed as to them. And the result is the same. There is not room for doubt that this usual clause in the policies of the defendants was not to be insisted upon by them; that they waived its insertion in their written contract with the plaintiff; and that the policy is to be taken and read as if practically the clause was not in it. The judgment of the trial court was, that the defendants indorse upon the policy their consent to the building being and remaining vacant, unoccupied, and not in use for a space longer than ten days; and the judgment in that respect is to be sustained, for that is the practical expression of all that took place between the plaintiff and the defendants in this regard. The seventh point is, that the plaintiff having realized the whole or a larger part of his interest in the property, the defendants are entitled to a deduction from the sum claimed on the policy, or a subrogation to the plaintiff's securities.

It is not found, specifically found, that the plaintiff has realized as in this point assumed. On the contrary, it is found that none of the claims or liens upon the property have been paid. It is found that the plaintiff has received $3,000 of insurance money from another company. There is proof that the whole premises before that building was burned were worth from $14,000 to $15,000, and that the plaintiff received a sheriff's deed of them after the fire. It is found that the building destroyed was worth $8,000. And there is proof of the amount (about $7,000) of the liens held and owned by the plaintiff, so that there is matter in the proofs from which can be made an estimate whether the plaintiff, by the premises which he obtained by the sheriff's deed, and by the money from the Glen's Falls Ins. Co., is more than made good for the amount of his claims against the whole property. And it would result that he is.

But if it is proper for this court to enter into such an inquiry and to arrive at that conclusion, are the relations of the plaintiff, the defendants, and Palmer, such as that the defendants can maintain the position assumed in this point? The policy did not insure Cone; it insured Palmer and his interest. It was the loss sustained by that interest which is to be paid to Cone, not that sustained by his own. Had he failed of a full indemnity the defendants would not have been affected by that; that he may have obtained more than a full indemnity gives them no right to resist his claim upon them. Had they insured his interest as a lien, or independently of any consideration of the interest of Palmer as the owner, and without the aid, concurrence, or acquiescence of the latter, they would be in a

better position to limit the amount of his recovery against them, and to set up a right of subrogation to his claims against the property subject to them, left undestroyed by the fire. But having insured Palmer on his interest, with an agreement binding upon him and them to pay to Cone the loss which that interest should sustain, there is no equity which will permit them to succeed to the right of Cone against Palmer or the property, nor to make inquiry into the state of the debits and credits between Cone and Palmer.

The ninth point is, that Palmer should have been joined as a party, and that his presence was absolutely necessary to determine the interest of Cone as against Palmer. It does not appear that Palmer has made any claim upon the defendants in hostility to Cone. If he had the defendants could have interpleaded. Moreover he was called as a witness upon the trial by the defendants, and made no dispute of the claims made by Cone. And an ample answer to the point is that the loss was, by the terms of the policy, payable only to Cone, and he alone could sue upon it. As between him and the defendants and Palmer, Cone had the right to recover the whole loss sustained by the insurable interest of Palmer. After recovery he would hold the amount obtained, for himself to the amount of his liens upon that interest, and as trustee for Palmer for all above that amount. The only interest the defendant had in the fact that Cone had or had not liens, was to have it ascertained on the trial whether or not he had some such claim and was thereby entitled to sue. See Clinton vs. Hope Ins. Co., 45 N. Y., 544.

The declaration of Broad were not admissible against the plaintiff. He was not the agent of the plaintiff. He was in the employment of Barnes, the agent of the defendants, soliciting applications for insurance.

The conversation of the plaintiff with the agent Barnes was admissible in evidence. The premium had not then been paid by Cone, and he was doubting whether the contract was such as he would enter into. He had not yet accepted delivery of it. It had been sent to him by mail; on its receipt, not being satisfied with the written part of it, he communicated to Barnes his desire to confer with him, and then, before the premium was paid or the contract accepted, the conversation objected to was had.

The testimony of Barnes, as to the receipt by him of a letter from Cone, was not objectionable; it had before been testified to in substance without objection. It was collateral to the main issue.

We see no reason for disturbing the judgment of the court below, and it must be affirmed, with costs.

All concur. GROVER, J., in result; RAPALLO, J., not voting; MILLER, J., not sitting.

COURT OF APPEALS OF NEW YORK.

JOHN ROHRBACK, *Respondent*,

vs.

GERMANIA FIRE INS. CO., *Appellant.**

A creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditors thereby.

The policy insured plaintiff on "his two buildings."

Held, this was merely descriptive, and not a warranty of ownership, or material misrepresentation.

The policy provided that any interest less than absolute ownership should be expressed in the policy, and the interest truly stated, or the policy should be void. The nature of the insured's interest was not expressed in the policy. The policy made the application a warranty. The application stated that plaintiff had disclosed all the facts. In answer to the question as to the nature and amount of his interest he replied, "His deceased wife held the deed," which was true, but the interest of insured was as general creditor of the estate.

Held, that this was a breach of the warranty which avoided the policy.

The facts were truly represented to the agent who filled up the application, but the policy agreed that the agent should be considered the agent of the insured, and not of the company under any circumstances.

Held, that the agreement must be enforced, and the company cannot be concluded as to forfeiture by the knowledge of the agent.

B. C. CHETWOOD, *for Appellant.*

J. A. THOMPSON, *for Respondent.*

FOLGER, J.

The plaintiff cannot maintain this action unless he had an insurable interest in the buildings which were the subject of the risk taken

* Decision rendered May 25, 1875.

by the defendants, and which were destroyed by fire. He seeks to found such an interest upon the instrument in writing executed by his wife, after her marriage to him.

Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is sufficient to say that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman, it was in due form to affect her separate estate, and though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her had she lived, and will enforce it against her estate now that she is dead. By it he was an equitable creditor of her estate at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase, "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the buildings, than would have stood a creditor of the deceased wife who held a judgment duly rendered and docketed against her, which would thus become a general lien upon her real property. He did not stand in so good plight but for other facts, now to be mentioned. She had died, after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration thereon; the personal estate was by much insufficient to pay the debts against her; and this real estate, including the insured buildings, would in the due course of administration, for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities; and it was the only fund to which the plaintiff could look for payment. The plaintiff was in the possession of the buildings, occupying them at the time of the fire. Judgment creditors, if any, would have had a preference in payment from the personal estate. 2 R. S., 87, sec. 27, sub. 3, 4; and of course the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate for the payment of debts, and the obtaining of permission to do so; but yet the plaintiff had a right to compel an accounting by the administrator, (2 R. S., 192, sec. 52,) and a sale of the real estate (ib., 108, sec. 48,) for the payment of his other debts. Thus the real estate was to a degree subject to the payment thereof, and was in

fact, from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that right, and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable but not more direct in the end.

The general definitions of the phrase "insurable interest," as given in the text-books, are quite vague and not always concordant. See 1 Arnold on Mar. Ins., 229; Bunyon on Life Ass., 16; Hughes on Ins., 30; 1 Marshall on Ins., 115; Phillips on Ins., 2 ib., 107; Sherman on Ins., 93; Parsons on Merc. Law, 507; ib. on Contracts, 438; Angell on Ins., sec. 56; Flanders on Fire Ins., 342; May on Ins., 76. The last cited author says that an insurable interest sometimes exists where there is not any present property, any *jus in re* or *jus ad rem*, and such a connection must be established between the subject matter insured and the party in whose behalf the insurance has been effected, as may be sufficient for deducing the existence of a loss to him from the occurrence of an injury to it; and that the tendency of modern decisions is to admit to the protection of the contract, whatever act, event or property bears such relation to the person seeking insurance as that it can be said, with a reasonable degree of probability, to have bearing upon his prospective pecuniary condition; while on the other hand, the statement is, that the interest must be founded on some legal or equitable title, and if it be inconsistent with the only title which the law can recognize it will not be deemed an insurable interest. Marshall on Ins., *supra*. But the result of a comparison of the text-writers above cited, is that there need not be a legal or equitable title to the property insured. If there be a right in or against the property which some court will enforce upon the property—a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, is said not to have an insurable interest in them. The interest of the first is said to be specific; the interest of

the latter general. As a general rule the distinction may be sound; but I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two, if the mortgagor and judgment debtor should die leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings upon it, and they should be burned. Each must then look to the real estate, the land alone, for a security for his debt; and if that be insufficient, each must, with equal certainty, suffer a pecuniary disaster resulting directly from the fire. What legal reason is there, why the one may not, as well as the other, protect himself by a contract of insurance? In Gravemeyer vs. So. Mut. Ins. Co., 62 Penn. St., 740, it was held that a judgment creditor, whose judgment was taken for the purchase money of the property burned, had no insurable interest. (See also Conrad vs. At. Ins. Co., 1 Pet., 386.) The reason given is that his lien was general, and not specific; that he was not interested in the property, but in his lien only. His judgment was distinguished from a mortgage, in that the latter is a specific pledge of definite property, and the mortgagee has necessarily an interest in it, while the judgment is a general and not a specific lien, so that if there be personal property of the debtor it is to be satisfied out of that; if there be not, then it is a lien on all his real estate without discrimination. And citing Cover vs. Black, 1 Barr., 493; it is said that a judgment creditor has neither *jus in re* nor *jus ad rem* as regards the judgment debtor's property. It seems to me that the decision there goes very much upon the fact, or the assumption, that the judgment debtor had other property, real and personal, to look to than the real estate damaged, and that it does not touch the case of a judgment creditor whose only or principal reliance for payment was upon the property destroyed. That there need not be an existing *jus in re* or *jus ad rem* is declared by Story, J., in Hancock vs. Fishing Ins. Co., 3 Sumner, 132-140; and also that the right to pursue the debtor personally does not deprive the creditor of an insurable interest. Ib. In Putnam vs. Mercantile Mar. Ins. Co., 5 Met., 386, which was an insurance for a commission merchant upon his expected commissions, from a sale of a cargo consigned to him to be sold, but in which cargo he had no other ownership or interest, it is said that such an interest in property connected with its safety and its situation, as will cause the insured to sustain a direct loss from its destruction, is an insurable interest. The question is one of damages rather than title or possession; and it will be enough in general to show such a relation between the insured and the property, that injury to it will, in natural consequence, be loss to

him, and it is not necessary to show that the insured is the legal or equitable owner. Wilson and Jones, Law Rep., 2 Exch., 139; Buck vs. Ches. Ins. Co., 1 Peters, 151, 163. It will be perceived that between the case cited from 62 Penn. St. (*supra*) and the case in hand there are some features of distinction. Here the debtor was dead; there was no longer any personal liability, nor sufficient personal property to satisfy the debt, nor, as may be inferred, any other real estate than that insured. A fund for the payment of the debt was to be found only in this estate, and principally in the buildings insured. By force of these circumstances, and by operation of the statutes above referred to, this real estate was for a certain length of time bound for the payment of this debt. As it was bound, as it alone was bound, as there was naught else, nor any person, liable for the debt, it is difficult to see why, in effect, the debt was not as if a specific lien upon this real estate. A lien in its most extensive signification is a charge upon property, for the payment or discharge of a debt or duty. A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner. It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest because a loss of the particular property is at once seen to affect disastrously the specific lien. But when a right to the payment of a debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause? If I have a debt against another, and he have but one piece of real estate from which my debt may be paid, and he die leaving no personal estate, though my lien may not be specific upon that real estate in technical language, it is true in fact that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it, and I am practically just like one to whom that piece of real property has been specifially pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an interest as that he may insure against that burning, I have such an interest also, and I too may insure. The probability, nay the possibility, of the payment of the plaintiff's debt out the property of the deceased debtor rested entirely upon the contingency of this real estate remaining without serious impairment in value. The reports of this State are meagre upon this precise question. In Mapes vs. Coffin, 5 Paige, 296, the complainant had levied upon chattels in the hands of an executor of the

judgment debtor, which had been insured by the testator in his lifetime, and which were destroyed by fire after the testator's death, and after the levy. The chancellor, in a contest between judgment creditors, gave the avails of the insurance to the creditors who had made the first levy. Perhaps the levy upon the property made a specific lien upon it, and so the case does not much aid us. In Mickles vs. Rock City Bk., 11 ib., 118, the defendants were judgment creditors of a manufacturing corporation, had issued several executions, had sold and bid in personal property, and advertised for sale the real estate. Pending the advertisement they took out insurance on the buildings and fixtures, in the joint names of themselves and the corporation. A few days after, the real estate was sold and bid in by the defendants. After that occurred a fire, with damage to the buildings and fixtures. The insurers repaired the buildings, and paid for the damage by fire to the fixtures. The real estate was never redeemed. There seems to have been no doubt made of there being an insurable interest in the creditors. By advertising the premises for sale they came nearer making their judgment a specific lien thereupon, though it was still a general lien upon all other like property. In Springfield F. and M. Ins. Co. vs. Allen, 43 N. Y., 389-95-6, it is said by Allen, J., "An insurable interest may exist without any estate or interest in the corpus of the thing insured." It was enough that "there be" a pecuniary interest in preservation and protection of the property, and "one might sustain a loss by its destruction." I know of no decision in this State bearing more directly upon this precise question than that in Herkimer vs. Rice, 27 N. Y., 63. The propositions advanced there are sufficient, if sustainable, or if to be taken as authority, to uphold an insurable interest in the plaintiff in the case in hand. Ch. J. Denio there says: "It is certain that the creditors had no estate whatever in the real property. In a technical sense they had no lien. But they had important rights connected with it, and a pecuniary interest in its preservation. * * * The law does not require that the assured shall have an estate or property in the subject of the insurance. * * No property in the thing insured is required. It is enough if the assured is so situated as to be liable to loss if it be destroyed by the perils insured against. Creditors having no other means of enforcing their debts, but having a direct and certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself. * * * The creditors, whether by simple contract or specially under our laws, are parties interested in the real estate,

when there is a deficiency in the personal, for they have power to subject it to the payment of their debts."

It is urged that these remarks are *obiter dicta*, and that the real question to be decided, and which was decided in the case, was whether an administrator of an insolvent estate had such an interest in the real estate of his intestate as was insurable. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point —are not the professed, deliberate determination of the judge himself. 4 Bur. 2064-8. *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, (Rouse vs. Moore, 187 R., 407, 419,) as if turning aside for the time from the main topic of the case to collateral subjects. I think that no one who reads the opinion in Herkimer vs. Rice can doubt that all which was said on the subject of a creditor of an insolvent estate having an insurable interest in the real property thereof, was the professed and deliberate determination of the learned chief justice, not hastily formed nor carelessly expressed; not by the way, or on a collateral question to that awaiting decision, but deemed essential to lead up to the solemn judgment rendered. The direct question was, indeed, whether an administrator of an insolvent estate might insure its real property. But the reasoning of the opinion shows that this was deemed to depend upon whether the creditors of that estate had such an interest. After stating the question he says: "It will be convenient to consider, in the first place, whether the creditors themselves have such an interest, and then whether the administrator can be said to represent that interest so as to enable him to make the contract for the benefit of the creditors." Again: "The creditors of an insolvent estate are generally numerous, and, having no opportunity for concerted action except through the executor or administrators, they could scarcely ever avail themselves of the advantage of insurance unless by the agency of the representatives. If the administrators cannot insure the parties interested, the creditors will be excluded from a remedy which all other persons having a similar interest possess." He then proceeds to show that an agent or trustee may insure the interest of a party beneficially interested, and that the administrator though not the trustee of the land is a trustee of a power over it such as is recognized by law, and says: "In this case it was sufficiently apparent from the language of the receipt for the premium that it was the interest of the creditors which was designed to be covered by the contract;" "the beneficiaries of the administrator were the parties intended to be protected;" "the insurers therefore

must have seen and known that it was the interest of the creditors * * * which it was the object of the policy to protect * * * and which was the subject of the contract." There is more to the same effect, and the opinion is based upon the ground that the administrator is the representative of the creditors. Indeed, but for there being creditors the administrator would have no concern in the land, and the concern he has with it is that they, through him, may dispose of it for the payment of their debts. Herkimer vs. Rice was a case in which there was full argument and consideration. I consider it as a reason as well as an authority for the determination of the question now in consideration. It has often been cited as an authority, and at times as authority for the power of an executor or administrator to insure as having or as representing an insurable interest, holding it for the beneficiaries under the will, or in the intestate's estates. Savage vs. Howard Ins. Co., 52 N. Y., 502; [2 Insurance Law Journal, 769.] In Clinton vs. Hope Ins. Co., 45 N. Y., 454, it is cited by Andrews J., as holding that when the personal estate of an intestate is insufficient to pay the debts, the administrator has an insurable interest in buildings, on the ground that he is the trustee of a power to sell the land for the benefit of creditors, and that as the interest of the creditors is the subject of the insurance, the administrator may insure for their benefit. The decision is there put aside as not a precedent for that then in hand, inasmuch as in that the personal property was sufficient to pay the debts, and therefore the administrator had no insurable interest. See also Waring vs. Loder, 53 N. Y., 581, where it is cited as authority for the proposition that a mortgagor after he has sold the mortgaged premises has still an interest in it which is insurable, inasmuch as it stands between him and personal liability for the mortgaged debt. The distinction is not perceptible, so far as this question is concerned, between a power to obtain indemnity against loss from being obliged to pay a debt owing to another, and against loss from failure to obtain payment of a debt owing to one's self.

I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby. The policy runs to the plaintiff, and by its terms insures him "on his two buildings." The defendant now insists that it appeared upon the trial that the plaintiff was not the owner of the property insured at the time of the insurance, and

that the complaint should for that cause have been dismissed on its motion. If I appreciate the point made, it is, that as the policy purports to insure "his two buildings," and as he did not then own the two buildings which were afterward burned, it cannot now be that the policy was upon the two buildings destroyed. There is no doubt what property of the plaintiff's defendant meant to insure, or that it was that which was subsequently burned, which was from the beginning of the transaction to the time of the fire in his possession. Simply as a description of property, in which light alone I am now treating the phrases, it was not a warranty of ownership nor a material misrepresentation. Niblo vs. North American Fire Ins. Co., 1 Sandf., S. C. R., 531; Traders Ins. Co. vs. Roberts, 9 Wend., 404; Tyler vs. Ætna Ins. Co., 12 Wend., 507. And simply as a phrase of description it indicated the purpose of the parties and what property was in their minds. The policy is not avoided, in their view of it. There is nothing in Springfield F. & M. Ins. Co. vs. Allen (*supra*) in conflict with this.

There is another view of the matter, however, in which the phrase and the circumstances in which it was used may be of more advantage to the defendant. By the fourth condition of the policy it is provided "that if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership, for the use and benefit of the assured, * * * * it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." By the first condition it is provided "that any omission to make known every fact material to the risk, or any misrepresentation whatever, or if the interest of the assured in the property * * * * be not truly stated in the policy, * * * * it shall be void." It is plain that these conditions have not been observed and kept by the plaintiff. The nature of his interest in the property was not expressed in the policy, and it was other than the ownership of it. The application was referred to in the policy, and by the first condition of the policy in such case the application became a warranty. In it it is stated that the plaintiff has disclosed all the facts in relation to the property so far as the same are known to him. But in answer to the question, "Is your title to the property absolute? If not, state its nature and amount?" The only answer given is, "His deceased wife held the deed." There is in that answer no affirmation of a falsehood, for his deceased wife did in fact hold the deed; but there is not a just, full, and true exposition by the answer of all the facts and circumstances. The purport of

the question, and of the answer to it, would imply and convey the idea that he was in equity the owner, though the formal legal title was in the wife. The facts of his interest in or connection with the property were quite otherwise. The written application did not by its representations put the defendant in possession of the exact facts of the case; it did thereby tend to mislead as to the real situation of the property, and the real interest of the plaintiff in it. The application, in this respect, was a warranty. Chaffee vs. Catt. Co. Mut. Ins. Co., 18 N. Y., 376. The truth of that warranty became a condition precedent to any liability to the plaintiff from the defendant Bryce vs. Lorillard Ins. Co., 55 N. Y., 240; [3 Ins. Law Jour., 89, 92.] And it was a warranty and a condition precedent, not to be avoided by any consideration of whether it was essential to the risk or not, or whether or not it was an inducement to the defendant to enter into the contract. Bryce vs. Lorillard, *supra*. It is very evident that the plaintiff did not intend a deception upon the defendant; nay, it is evident that he laid open to Brand, the agent of the defendant, to procure and submit applications, and to issue policies when signed by the proper officers of the defendant, and transmitted to him all the facts of his connection with and interest in the property, and that the statements in the application were of Brand's conclusions from those facts, and the omissions from it were of matters not deemed essential by Brand. It is hereupon urged by the plaintiff that the errors and omissions were those of the defendant. But the plaintiff and defendant have, in the policy, the contract between them, expressly agreed that Brand should be deemed the agent of the plaintiff, and not of the defendant under any circumstances whatever. It is true that in Plumb vs. Catt. Ins. Co., 18 N. Y., 392, a rule is held which tends to the shielding of the plaintiff in this case from the effect of his contract; but since then it is held that under such a contract as this, the knowledge of such an agent, of facts not stated in the application, is immaterial in the absence of fraud or perversion of the statement of them by the applicant. Chase vs. Ham. Ins. Co., 20 ib., 52, and the case in 18 N. Y., *supra*, is considered and distinguished. As to Rowley vs. Empire Ins. Co., 36 N. Y., 550, cited in General Term opinion, it is much shaken in Owens vs. Holland Purchase Insurance Company, 56 N. Y., 565-70; [3 Insurance Law Journal, page 737.] It is to be regretted that corporations of the power and extended business relations with all classes in the community which insurance companies have, should prepare for illiterate and confiding men, contracts so practically deceptive and

nugatory, and should, in cases as free from fraud and wrong on the part of the insured as this is, hold their customers to the letter of an agreement so entered into. I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that is to refuse to be bound by the acts of agents of their own selection, when dealing with simple and unlettered men. If there should be less greediness for business, and such care in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion, and integrity, it would not need that there be laid upon unwise policy-holders an agreement to take the burden of the opposite qualities, in those put forward to them as actors for the insurers. But we must take the contracts of the parties as we find them, and enforce them as they read. By the one before us the plaintiff has so fettered himself as to be unable to retain, as the case now stands, the real essence of his agreement. Though he has frankly and fully laid before the actor between him and the defendant all the facts and circumstances of the case, he is made responsible for error in legal conclusions which he never formed and which were arrived at by one in whom he trusted and whom he supposed to stand in the place of the defendant. The plaintiff claims that the answer of the defendant contains no allegation which will permit it to avail itself of the defense just noticed. Without determining what is the condition of the pleading in that respect, it is enough to say that the facts upon which the point is now made were before the court without objection from the plaintiff, based upon the lack of averment in the answer, nor does it appear that any ruling of the court was put upon a deficiency in the allegations of the answers. See McKechnie vs. Ward, in MS.

Held to the letter and substance of the contract, the plaintiff made a breach of a warranty and condition precedent, upon the truth of which his contract rested, and for that reason may not recover in this action as the facts now stand.

The complaint in this case contains certain allegations, and a prayer for judgment thereupon of a reformation of the contract. Whether upon a new trial these allegations and the proof which can be made under them will be sufficient for such a judgment we do not now declare.

The points made upon the averments in the proofs of loss we need not closely consider at this time. The condition of the policy which is claimed to be violated is, that if the interest of the assured be other than the entire and sole ownership, the names of the respective

owners shall be set forth in the proof of loss, with their respective interests therein, and that all fraud or attempt at fraud by false swearing shall cause a forfeiture of all claims on the company under the policy. The facts are not distinctly brought out on the trial as to the state of the title at the time of the fire; though it appears that at the death of the plaintiff's wife she held all the title to the premises; it does not positively appear but that the title may have become the plaintiff's after her death and before the fire. The deed to the deceased wife having been shown, there is the presumption of the continuance of the title thereby created, no change having been shown, as I read the testimony, though the defendant's points state that it is claimed that the plaintiff bid in the premises at an auction sale just before the fire.

His statement in his proofs of loss is that the property insured belonged to him. It is not plain that this would be a fraudulent and false statement if there had been a judicial sale at auction before the fire and he had bid in the premises. As there is to be a new trial it is better to leave this question to be determined on a fuller state of the facts.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event.

All concur. GROVER, J., absent.

COURT OF APPEALS OF NEW YORK.

JOHN ROHRBACH, *Respondent*,

vs.

THE ÆTNA INS. CO., *Appellant.**

Where plaintiff made no representation as to his interest further than to show agent the instrument by virtue of which he claimed an interest:

Held, that a policy phrase, "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible.

The policy provided that the claimant for a loss should give notice and render an account stating the ownership of the property insured. Plaintiff stated that the property belonged to him as legal heir of his deceased wife. His claim was that of general creditor of her estate.

Held, that this was no intentional deception, or anything calculated to mislead.

Judgment affirmed.

B. C. CHETWOOD, *for Appellant.*

J. A. THOMPSON, *for Respondent.*

FOLGER, J.

This appeal was argued at the same time with that of the same plaintiff against the Germania Fire Ins. Co., and as one case; but they are quite different in some important facts.

The questions raised by the appellant, whether the plaintiff had an insurable interest, and whether the description of the property in the policy as "his two buildings," would avoid the policy, are fully discussed in the other case, and our conclusions in this are the same as there expressed.

The error for which the other case has been sent back for a new trial is not presented in this. It does not here appear that prior to the issuing of the policy the plaintiff made any representation as to his interest in the property further than to show to the agent of the de-

* Decision rendered May 25, 1875.

fendant the instrument, in writing, by virtue of which he claimed an interest. Even if the phrase "on his two buildings" was more than a description of the property, it does not appear that it originated with him. It was the creation of the defendants or their agent, from the truthful information furnished them by the plaintiff. It was not a warranty, nor was it the basis of the insurance. It does not appear, therefore, that the plaintiff has made any breach of the conditions of the policy which were precedent to the issuing of it.

It is claimed by the defendants that there has been a breach of a condition subsequent. It is provided by the policy, that all persons having a claim thereunder shall give immediate notice and render a particular account thereof, stating the ownership of the property insured. The plaintiff did render an account, in which he stated that the property belonged to him as the legal heir of his wife Margaretta Hartman, deceased, and by purchase at auction on a certain day. The policy also provides that any fraud, or attempt at fraud, on the part of the assured shall forfeit all claim under the policy. If "fraud" here means a designed deception, there was none. The defendant's agent knew all that the plaintiff knew. The disclosure, by the latter, of all the facts known to him was full and frank. Nor was there anything untrue in the statement, save that he was the legal heir of his deceased wife. This was not the statement of a fact so much as of a legal conclusion. I do not perceive that it did mislead or could mislead; rather I think that it would excite inquiry as to how a surviving husband could be the legal heir of his deceased wife, for there must be other facts existing than her marriage to him and her death to make him her heir. I do not appreciate how there could have been any imposition upon the defendants by this statement, nor any throwing of them off their guard. It does not appear, as a fact, that there was any. And I think that the statement was made use of upon the trial, not so much to show a fraud subsequent to the issuing of the policy, as to show that when the policy was issued the plaintiff was not the owner of the buildings having any title thereto, and that there was a misrepresentation, and a warranty which was broken thereby. But that we have spoken of and disposed of.

There seems no error in this case calling for a reversal of the judgment. It should be affirmed with costs.

All concur. GROVER, J., absent.

COMMISSION OF APPEALS OF NEW YORK.

RICHARD ATKINSON, ET AL., *Appellants*,

vs.

THE GREAT WESTERN INS. CO., *Respondent.**

Mere negligence or a wrongful act innocently done will not constitute barratry. The act must be wrong in itself, and willfully and intentionally done. It is not necessary that there should be a fraudulent intention to injure the owner. It is sufficient that there is a deliberate and palpable breach of duty toward the owner.

The policy insured against the "barratry of the masters and mariners," upon cotton from the interior of Georgia to Great Britain. The bill of lading required the cotton to be carried below deck. The master, without the knowledge of the owner, and against the remonstrance of the shipowner's agent, who warned him of the consequences, stowed a portion on deck.

Held, that the action of the captain was in itself wrongful, and if wrongfully intended was barratry, and the whole question whether the act amounted to barratry should have been referred to the jury as a question of mixed law and fact.

DWIGHT, C.

The present action is brought upon a policy of insurance upon cotton from a point in the interior of the State of Georgia to a port in Great Britain.

The policy contained a clause insuring against losses occasioned by the "barratry of the master and mariners." Under its terms, 202 bales of cotton were shipped at Augusta, Georgia, to Charleston, S. C., in October, 1866. In November, on arrival at Charleston, 125 bales were transferred to the bark Victoria, for Liverpool.

There was a clause in the policy to the effect that "all approved indorsements on the pass-book given by this company, under this policy, are to apply in all respects to this policy, the same as if indorsed hereon, and not otherwise."

* Argued May 10th, 1875. Decided June, 1875.

The entry in the pass-book was as follows: "By S. C. R. R. from Augusta to Charleston, thence to Liverpool by bark Victoria." The bill of lading, signed by the master, was put in evidence, and is a clean bill of lading and not for goods stored on deck. Ninety bales of the cotton were, however, stowed on deck by the master and without the knowledge or assent of the plaintiffs or their agents. The agent of the ship-owner, Thaddeus Street, having discovered that the master was carrying cotton on deck opposed it, and wanted him to send it on another vessel. He stated to him, substantially, what responsibility he was assuming: that as he had signed bills of lading he was bound to carry the cotton under deck, and that the insurance taken on a clean bill of lading would not cover the cotton on deck. The master took the cotton on deck, notwithstanding the objection of the witness. Mr. Street, the cotton having been so shipped, urged the master to write to the agent of the ship-owners at London to insure 80 bales of cotton on deck. The letter was written by the supercargo by advice of Mr. Street and the approval of the master. There was no evidence that any such insurance was ever taken out, nor that the supercargo had any reason to expect that it would be.

Under this state of facts, and other circumstances not detailed, I think that there was a continuous insurance from Augusta to Liverpool. Reference should also be made to the fact that there was a clause in the policy, "that it was to cover the risk of fire on cotton in transit while waiting shipment." This certainly leads to the conclusion that there was no break in the continuity of the insurance, though there is a recognition of the fact that the risks are not the same while awaiting shipment as when in transit, either by land or water. If this conclusion is correct the cotton while in the course of shipment was covered by the policy, unless there had been some act on the part of the assured, or for which he is responsible, relieving the insurer. It is said by the defendant that there is such an act, viz., the misconduct of the master in lading the goods on deck. To this the plaintiffs reply, that the act of misconduct is an act of barratry, and against that on the part of the master they are insured. The whole controversy is thus narrowed to the inquiry whether the act of the master is barratry.

The defendant, however, urges that the rights of the plaintiff were affected by some expressions in the certificate issued to them by the defendants on the 12th of November. In this certificate there is a statement of the insurance and of the fact that the loss, if any, is payable to the plaintiffs, with the following clause appended: "It is

understood and agreed that this certificate represents and takes the place of the policy, and conveys all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums."

I do not think that this certificate has any effect upon the general rights of the plaintiffs under the policy. It was shown by Mr. Atkinson, one of the plaintiffs, that the office of the certificate was to give some evidence of the existence of the insurance when drawing sterling bills of exchange. This was necessary, as the policy itself was retained by the company in its office; and entries of the subject matter insured were made there, from time to time, by the company. It must be supposed to be of the same general nature as the policy itself. Accordingly, I do not think it necessary to consider its clauses, or to determine whether it is in all respects consistent with the language of the contract as embraced in the policy.

The sole question then to be discussed is, was the act of the master, in lading the goods upon deck, barratry?

This word has not yet acquired an absolutely stable meaning, generally recognized by law-writers or lexicographers. Some of the definitions found in the books will be stated.

"Barratry is an act of wrong done by the master against the ship and goods." 2 Arnould on Insurance, 821; note *h*.

"It is that unlawful, fraudulent, or dishonest act of the master, mariners, or other carriers, or of gross misconduct, or every gross and culpable negligence contrary in every case to their duty to their owner and that might be prejudicial to him or to others interested in the voyage or adventure." 1 Phillips on Ins., § 1062.

A gross and palpable violation of trust by the captain, and a reckless disregard of his duty, is barratry, (though without any view to his own particular advantage,) to the prejudice of his principals.' § 1074.

Parsons says: "We hold barratry to be any wrongful act of the master, officers, or crew, done against the owner. * * * * If an unlawful act be done without intention, or through inadvertence or ignorance, it is not barratry. The act must be wrongful in itself and wrongfully intended." 2 Parsons on Mar. Law, 239.

Chancellor Kent says, that "the term means a fraudulent breach of duty on the part of the master in his character of master, or of the mariners, to the injury of the owner of the ship or cargo, and without his consent, and it includes every breach of trust committed

with dishonest views." 3 Comm., 306. He adds, "barratry is used by French writers in its legal sense as comprehending negligence as well as willful misconduct, therefore no illustration can be safely drawn from the French authorities, where the term is used in the English and American law in a more limited sense, and applicable only to the willful misconduct of the master or mariners."

From these and many other authorities which might be cited, I think it beyond dispute that an ordinary act of negligence never can be barratry. It is not necessary to consider whether there may be negligence so extreme as to raise a presumption of willful misconduct.

Judge Daly, in the court below, has shown, with great affluence of learning, that mere negligence never constitutes barratry. This seems to be settled law. I do not, however, think that this question arises in the present case. The testimony shows conclusively that the act complained of was not an act of negligence. The master's act was deliberate and willful, and after full and sufficient warning of the effect of it. This information came to him from the agent of the owner, in whose statements he would be expected to place confidence. If he could be supposed to have been so unfit for his business and grossly ignorant as not to be aware of the consequences of his act, that excuse cannot be urged in his favor after the clear statements and urgent opposition of the agent. If such an act were not deliberate and willful, it is difficult to conceive what would be. I think accordingly that the master's act contained all the elements required to make it proper to submit to the jury the question whether his intent was fraudulent. The act, as has been seen, was willful and deliberate; it was done against the interest of the owner of the ship, which by some authorities is held to be a necessary ingredient in the case.

The owner, according to all analogies, is liable to the owner of the goods for his loss. The master, by his unwarranted act, thus struck a heavy blow against his employer's interest. If it were enough to constitute barratry that the interest of the freighter were wrongfully assailed, then no one will dispute that the requisite ingredient was present in an act which caused the jettison of eighty or more bales of cotton. Having then plainly the presence of a wrongful act directed against the interest both of the owner and of the freighter, the only possible doubt that can arise in the case is whether, if a wrongful intent be necessary, that were present. The only mode of ascer-

taining that point is to draw the inference of fraud from the attendant circumstances.

The counsel for the plaintiffs requested the court to submit the question whether the act amount to barratry to the jury. This was refused under due exception. It is claimed that this request was not sufficiently explicit, but that if any question was submitted it should have been that of fraudulent intent. However, as the intent with which an act is done is a question of fact, I think it was proper to ask the judge at the trial to submit the whole subject to the jury as a mixed question of law and fact, with appropriate instructions upon the matters of law. In Phyn vs. Royal Exchange Assurance Co., 7 Term R., 501, the court left it to the jury to determine whether deviation by the master was innocent or fraudulent, as an element in determining whether the act was barratrous.

It is now proper to show that these views are sustained by the authorities. There can be no doubt that if the act of lading the goods upon deck had been prohibited by statute it would have been a barratrous act on the part of the master. There can be no difference in principle whether it is opposed to a statutory rule or to one of the common law, provided that the other necessary ingredients of the case are present, such as an act against the owner and one wrongfully intended.

In Wilson vs. Rankin, 6 Best and Smith, 208; S. C., L. R., 1 Q. B., 166; the master stowed a portion of goods on deck, and sailed without a certificate from a clearing officer that the whole cargo was below deck, contrary to 16 and 17 Vict., c. 107, 171, 172. It was decided in the Exchequer Chamber, that though the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute. The court said: "If it had been shown that the master, without the express knowledge or authority of the owner, had committed the unlawful act, though for the owner's benefit, it would have been a barratrous act on his part, and if it had involved a forfeiture of the ship the underwriter would have been liable for the loss by reason of the barratry."

It is to be observed that in this case stress is laid solely upon the point, whether the act was unlawful. It was considered to be perfectly immaterial whether the owner sustained an injury or not, or whether the act was intended for his benefit or not; so long as the owner did not authorize it, the act was barratrous. He never can be assumed to authorize an act which is in its nature unlawful. To take

the case out the class of barratrous acts, there must be express knowledge or authority.

Much stress was laid upon the case Earl vs. Rowcroft, 8 East, 126, as showing the meaning of the word "fraudulent" as used by the judges and text-writers, who make that a part of the definition of "barratry." In that case the master of the vessel traded with the enemy, making his ship liable to capture. It was held that the act was "fraudulent," though he intended to benefit the owner. The term "fraudulent" as thus used seems to be substantially synonymous with breach of duty. Thus, it was said by Mr. Justice Buller, in Salonica vs. Johnson, cited in Park on Insurance, ch. 18, that he had no doubt that if resistance of a neutral ship to be searched by a belligerent were a breach of neutrality, (as it is now settled that it is,) such resistance would be barratrous, being contrary to the master's duty.

Moss vs. Byron, cited with approval in Earl vs. Rowcroft, is much in point. In that case it appeared that the master deviated from his course to make prizes. Lord Kenyon said it was barratry, because it was contrary to his duty to the owners. "It was contrary to his duty and to the prejudice of the owners, because they stipulated to the charter-party that the ship should sail directly to Liverpool, and therefore they were liable to the freighters for any damage that might happen in consequence of that deviation." Lawrence, J., said, "if the captain did any act that increased the risk, that was barratry." This case distinctly holds that a mere willful violation of a common law duty injurious to an owner, and without his consent, is barratrous. The principle of this case is in no respect shaken by Phyn vs. Royal Exchange Assurance Company, 7 Term, 501. The real controversy in that case was whether the deviation was innocent or fraudulent. That question having been left to the jury, and it having been found that it was innocent, the court in the face of such a finding could not presume fraud or a deliberate act in violation of duty. The remarks of the court are to be interpreted from this point of view.

In the case of Boehm vs. Combe, 2 Maule and Sel., 172, an attempt was made to extend the word "barratry" to land carriage in a policy partly on land and partly marine. Lord Ellenborough said, "The word barratry is large enough to include every species of fraud or *malus dolus* committed by the wagoner or his servants."

The meaning of the term under discussion was carefully considered in Lawton vs. Sun Mutual Ins. Co., 2 Cush., 500. The court, per Shaw, Ch. J., there said, "Barratry consists in willful acts or conduct of the master or mariners, done for some unlawful or fraudulent

purpose, contrary to their duty to the owners of the vessel. The act must be willful, and not accidental or caused by negligence, unless the negligence be so gross as to amount to evidence of fraud. It has been held not to be necessary that there should be fraud in the sense of an intention on the part of the master to promote his own benefit at the expense of the owners; but any willful act of known criminality or of gross malversation, operating to the prejudice of the owner, is, in legal contemplation, barratry. Every willful act on the part of the master, of known illegality, every gross malversation in his office, or criminal negligence, by whatever motive induced, whereby the owner is damnified, comes within the legal definition of barratry." Pp. 511-512.

The case of Patapsco Ins. Co. vs. Coulter, 3 Peters, 231, sheds some light upon this perplexing question. Johnson, J., in delivering the opinion of the court, points out that much of the confusion attending it is derived from the want of precision in the use of the term "fraudulent," and that all that is meant by that is "an act contrary to the master's duty."

In the language of Bayley, J., in Burk vs. the Royal Exchange Insurance Co., 2 Barn. & Ald., 82, the term "barratry" is an equivalent to the expression, willful misconduct." A still better form of expression is given by Lord Ellenborough, in Earl vs. Rowcroft, *supra*, in treating of breach of trust between the master and owners as an equivalent to barratry: "Now I conceive that the trust reposed in a captain of a vessel obliges him to obey the written instructions of his owners, where they give him any; and where the instructions are silent he is at all events to do nothing but what is consonant to the laws of the land, either with or without a view to their advantage."

In commenting upon these expressions, Johnson, J., adds, that here it is seen that an act "inconsistent with written instructions," and an act "not consonant to the laws of the land," are brought within the description of fraud upon the owners as applied to the definition of barratry, and that it appears from this that the meaning of the word "fraud" is not confined to moral fraud, or that the term is not well chosen. 3 Peters, 231-2. In accordance with these doctrines, willful deviation from the regular course of the voyage by the master, in fraud of his owners, for purposes of his own, is barratry. Vallego vs. Wheeler, Cowper, 143. So dropping anchor and going ashore to find a market for a private adventure is barratry, and it commences with the act of stopping the voyage. Ross vs. Hunter, 4 Term R., 33. The same result was reached as to an intentional delay of the

voyage for an unlawful purpose. Rosson vs. Corson, 8 Taunton, 684.

For the purposes of the present case we must accordingly hold, that the willful act of the master in loading the cotton on deck, after full knowledge of the consequences of the act to his owner and the freighters, was an act known to be contrary to a settled rule of law and to his duty, and might well lead the jury to find that it was done with that species of fraudulent intent which has been considered requisite by the court in this class of cases, and that it was not only a wrongful act but was also wrongfully intended.

If these views are sound the goods were, while on deck, covered by the policy. The result is precisely the same as though the following words had been written in the policy. "This policy shall attach to — bales of cotton laden on deck," etc. That being so, when the jettison took place the loss occurred by the perils of the sea, and the insurers are of course liable. But if this were not so, and if the barratry must be the direct cause of the loss, the same result would be reached. The case is not at all like a loss occasioned remotely by negligence and directly by a sea peril, where the proximate loss must be regarded. Barratry is itself a sea peril, included in a general description in a policy of marine risks or sea perils, in the absence of any stipulation to the contrary. Parkhurst vs. Gloucester Mutual Fishing Ins. Co., 100 Mass., 301. That peril in the present case did not spend its force until all its consequences were reached, one of which was the jettison, made necessary by the wrongful act insured against. The barratry was accordingly the direct cause of the loss.

The act of the supercargo in writing the letter, referred to already in this opinion, cannot avail the defendants. It was not an act within the scope of his authority, or that of the master. It cannot be said in any proper sense that Mr. Street assented to the act of loading the cotton on deck, since he strenuously objected to it, and warned the master of its consequences in distinct and emphatic terms. His subsequent advice to the master to address the letter to the assured representative in England of the owner of the vessel, can only be properly regarded as a well meant effort on his part to mitigate, if possible, the effect of the master's wrong. There is no evidence to the contrary, and we cannot assume, in its absence, that he intended to sanction an act wholly unwarranted by usage and so highly detrimental both to the owner of the ship and of the cargo.

The act of the master and supercargo was plainly not binding on the owner of the ship, as he cannot be supposed to have given either

of them authority to do an act in violation of his own duty to the owner of the cargo. This point was considered in Earl vs. Rowcroft, 8 East, 140. It was there argued that the captain united in himself the two characters of master and supercargo, and that in the character of captain he must be considered as obeying the directions of his owners, given to himself as captain by himself in his character of supercargo. The court said: "It is sufficient to state such an argument to show that it can have no weight. The directions of the owners as to the conduct of the voyage * * * * are to be looked for in their instructions, which, coupled with their duty to their country must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where the trade might be carried on without violating the laws of the country." It is only necessary to substitute for the expression "duty to their country," the words "duty to the owner by the law of the country," to make the cases exactly parallel.

The defendants finally urge the ill consequences of a ruling that the present act may be treated as barratry, and that by analogy all cases of bad stowage must be regarded as barratry. This by no means follows. As has already been said, we have no disposition to hold that negligence, except in extreme cases, is barratry. See Grim vs. Phœnix Ins. Co., 13 Johns., 451. It is only necessary for the purposes of this case to hold that when a wrongful act is willfully done by the master, with knowledge of its wrongfulness and of his breach of duty, and it is injurious to the freighters and owners, it is error for a judge at the Circuit to rule, as matter of law, that it is not barratrous in its nature, and to withdraw the question of the master's intent from the jury.

The judgment of the court below should be reversed.

All concur.

REYNOLDS, C.

It is conceded by the learned counsel for the plaintiffs that mere negligence is not barratry, and that negligence generally includes every breach of duty not clearly intentional, and to constitute barratry there must at least be made out an act of willful wrong or fraud done by the master against the ship and goods, and after a careful examination of the elementary works, and the best considered cases that have been adjudged in the courts of this country and England, I think that

no act of the master of a vessel can be deemed barratry unless it proceed from a criminal or fraudulent motive. 2 Arnold on Ins., 821, note (*h*); McCulloch's Dictionary of Commerce and Navigation, title "Barratry;" Cook vs. Com. Ins. Co., 11 J. R., 40-46; Am. Ins. Co. vs. Bryan, 26 Wend., 578; 1 Phillips on Ins., sec. 1062, 1074; 2 Parsons' Maritime Law, 236, 246.

So far, we think, counsel in this case entirely agree upon the general principle of the law which must control our judgment, and the only question is whether the court below properly disposed of it in favor of the defendant as a question of law, or whether, as claimed by the plaintiffs, the case should have been submitted to the jury upon the whole evidence as a question of fact.

In determining this question it will be important to refer to some adjudged cases in which certain acts and omissions of the master of a vessel injurious to the vessel and its cargo have been held to amount to the offense of barratry as a matter of law, or as tending to prove it as a matter of fact. We think there can be no rational doubt but that the crime or *quasi* crime of barratry may be insured against, not only by the owners of the vessel but also by the owners of the cargo

Lord Mansfield, whose authority on all points connected with the law of insurance is very great, appears at one time to have thought that it would be well to exclude barratry entirely from policies, and to cease "making the underwriter become the insurer of the conduct of the captain, whom he does not appoint and cannot dismiss, to the owners, who can do either." "But," adds a learned writer, "though it were expedient to prevent the owners from making an insurance of this sort, nothing can be more reasonable than that third parties, who freight a ship or put goods on board, should be allowed to insure against such a copious source of loss." McCulloch, *supra*. In Lawton vs. Sun Mutual Ins. Co., 2 Cushing, 500, 511, 512, Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, says: "But we think that they (the English and American authorities) all agree substantially in holding that barratry consists in willful acts of the master or mariners, done for some unlawful or fraudulent purpose, contrary to their duty to the owners of the vessel. The act must be willful, and not accidental or caused by negligence, unless the negligence be so gross as to amount to evidence of fraud. Patapsco Ins. Co. vs. Coulter, 3 Pet., (U. S.,) 222, 234. It has been held not to be necessary that there should be fraud in the sense of an intention on the part of the master to promote his own benefit at the expense of the owners, but any willful act of known criminality, or of gross mal-

versation, operating to the prejudice of the owners, is in legal contemplation barratry. Earle vs. Rowcroft, 8 East, 129; Heyman vs. Parish, 2 Campbell, 149. Every willful act on the part of the master, of known illegality, every gross malversation in his office, or criminal negligence, by whatever motive induced, whereby the owner is damnified, comes within the legal definition of barratry."

The case in which these observations were made was that of the master of a whaling vessel, who, instead of cruising for whales, went into the port of Tahiti, on one of Society Islands, where the master sold a part of the ship's apparel and supplies. The crew deserted and the vessel in consequence became so far disabled as to be unable to pursue her voyage, and was taken possession of by the United States consul at Tahiti, and sent to her owners to prevent a total loss. But the question came before the court upon a report of the whole evidence given on the trial, and the question as to what acts constituted barratry was open for consideration and judgment.

We are unable to assent to a remark in the opinion of the learned chief justice of the common pleas, that the meaning of the word barratry, from what has been said respecting it in comparatively recent cases, "has become nearly as uncertain now as when the question was first agitated in Westminster Hall, one hundred and fifty years ago." We think the result of the more recent and best considered cases give a reasonably accurate view of the law. The great difficulty that seems in the first instance to have arisen, was whether a mere act of negligence was barratry; and it is now not only well settled, but in the present case conceded, that it is not. It must be some act in a degree willful or fraudulent—a reckless disregard of duty—palpable violation of trust to the prejudice of the ship and cargo. The earliest case in the English courts of common law relating to barratry is that of Knight vs. Cambridge, reported in Strange, 581; also in Modern Rep. 230, and 2 Ld. Raym., 1349. In that case it was held that the neglect of the captain in not doing his duty by paying port duties before the ship went out of port, was adjudged to be barratry as a matter of law, (Vallego vs. Wheeler, Cowper, 143,) and I do not find that the correctness of this judgment was ever questioned in any subsequent case, although the definitions of barratry given in some of the reports of the case have been largely questioned.

In the case of Moss vs. Byron, 6 T. R., 379, the vessel was by the charter-party to sail from the Bahama Islands directly to Liverpool. The master took out letters of marque, but irregular in form. He stopped an American vessel on the high seas, and robbed her. He

then took a prize and sent her into Bermuda, where he libeled her in his own and his owner's name. While in Bermuda a storm arose and the vessel was lost, with the goods belonging to the charterers on board, which were insured. The action was against the underwriters to recover the loss, and they were held liable. Lord Kenyon and the whole court said that the act of stopping and robbing the American vessel was an act of barratry because it was contrary to his duty to his owners. It was also held that the deviation was an act of barratry which entitled the plaintiffs to recover.

This case was obviously very much criticised at the bar, as appears from the report of Phyn vs. The Royal Exchange Assurance Company, 7 T. R., 501. In the latter case it appeared that the vessel was to sail from London to Jamaica, but was driven by unfriendly currents out of her course. Upon recovering her reckoning she was found to be between the Grand Canaries and the island of Teneriffe. In this location it was agreed that her course was southwest, instead of which the captain bore up for the island of Santa Cruz, which lay northwest, and in sight about thirty miles distant, and there came to anchor, as was supposed to get refreshments or in some way for his own accommodation. In this condition an embargo was laid upon the vessel by the Spanish government, and on the news of the declaration of war between Spain and Great Britain, the vessel and cargo were afterward condemned as a prize. The action was brought to recover of the underwriters, either by reason of a loss by capture or by barratry. Lord Kenyon, before whom the cause was tried at Guildhall, in 1793, thought it could not be barratry without a fraudulent purpose in the captain at the time, and he left the questions to the jury with that direction, who found that the captain's going to Santa Cruz "was a deviation, and was either owing to ignorance or something else, but that it was not fraudulent," and found a verdict for the defendant. A new trial in that case was refused simply because the jury had found the fact that the deviation was not fraudulent, and therefore there was no barratry, which, as Ashurst, J., said, had been negatived by the verdict of the jury that there was no fraud in the case.

Mr. Justice Johnson, in the case of the Patapsco Ins. Co. vs. Coulter, 3 Peters, 222, 234, said: "Certainly a master of a vessel who sees another in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is, *prima facie* chargeable with barratry. Although a mere misfeasance it is a breach of trust, a fault, an act of infidelity to his owners. So, if in the height of a storm the cap-

tain and crew turn in without resorting to the nautical precautions of lying to, and otherwise prepare her to overcome the peril, it will be left to a jury to determine if such conduct be not barratrous."

These references serve to indicate the nature of some of the acts of the master of a vessel which have been or may be adjudged barratrous, and it is apparent that to constitute the act of barratry, the act of criminality or fraud need not necessarily be very gross in its character; but, as was said by Ch. J. Shaw, in Lawton vs. Sun Mutual Ins. Co., *supra*, it is not "necessary that there should be fraud in the sense of an intention on the part of the master to promote his own benefit at the expense of the owners; but any willful act of known criminality or of gross malversation operating to the prejudice of the owner is, in legal contemplation, barratry." It seems to follow also, that generally, unless the act of the master is of such a character that the presumption of criminality arises from the act itself, the question of motive and intent is for the jury, as in the case of a deviation, which is barratrous or not, as the intent of the master is found to have been evil or innocent. In our law it is now quite settled that most questions of mere negligence are for the consideration of a jury, and where the result depends upon the question whether any given act is fraudulent or criminal, or otherwise, the fact must be determined by a jury, and to this rule there is scarcely any exception.

It has been attempted to abolish all degrees of mere negligence, but the effort in a practical sense is idle, as would be an attempt by the courts to abolish human stupidity or depravity. Where a case depends upon mere negligence, in a high or low degree, the legal rule may be applied without regard to degree, or stupidity, or neglect, but no judge will fail to observe the real difference between some very trivial fault and the very grossest inattention. It has often been decided that gross negligence, while not *mala fides per se*, is yet evidence of it. Lord Denman said, in Goodman vs. Harvey, (4 Adol. & Ell., 870,) "the question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where a party has given consideration for the bill; gross negligence may be evidence of *mala fides*, but it is not the same thing."

The cotton, to recover the value of which this action was brought, was insured by the defendant on a voyage from Columbus, Georgia,

via Charleston to Liverpool, among other things against the "barratry of the master and mariners."

On or about the 3d of November, 1866, 125 of the 202 bales of cotton covered by the policy of insurance were put on board the bark Victoria, at Charleston for Liverpool, and previous to this time the master had given a clear bill of lading for the entire shipment. It is agreed that this required that the cotton should be stowed under deck, a fact which the master was not only bound to know but did know. He, however, stowed 90 bales of the cotton on deck, and in that condition sailed for Liverpool. In a violent storm at sea on the passage, this cotton was thrown overboard to save the vessel, and lost. I find it difficult to invent any excuse for the act of the master in stowing the 90 bales of cotton on deck, under the circumstances of this case. As it turned out, it was quite as disastrous to the interest of the plaintiffs as if he had scuttled and abandoned his vessel and cargo at sea. He violated his duty and he knew it, and was also admonished of the fact. It seems a little difficult to distinguish the act from that of sailing without the payment of port duties, save perhaps that in the latter case the act was illegal, and in this, perhaps, the act was only a gross violation of duty.

The question whether any given act of the master of a vessel is barratrous or not generally depends upon the intent with which the act was done. Illegal acts are often committed without any intent to do wrong, as by ignorance, mistake, or inadvertence, or other cause, not having any semblance of criminality. Unless, therefore, it be held that every illegal act of the master is, *per se*, an act of barratry, without any regard to the intent, the circumstance that the act was illegal does not appear greatly to distinguish it from any gross violation of duty or fraudulent conduct to the prejudice of the ship or cargo.

I do not see that an insurance of the cotton on deck at all changes the character of the wrongful act of stowage. If of any use, it could only be for the benefit of the owners. The owners of the cotton did not choose to rely upon the responsibility of the owners for the misconduct of the master and mariners, and therefore secured themselves by insurance on the cotton, and it was quite immaterial to them whether the owners effected an insurance for their own protection or not. No insurance of that character was effected, and the efforts in that direction do not appear to be entirely satisfactory, and if the question was at all important it was one for the jury, and the question of the assent of any one assuming to represent the owners, to the master's act of stowage, was obviously of the same character.

It may be true that the cotton on deck was not, by reason of the improper stowage, covered by the policy against the sea perils insured against, but it is equally true that if the wrongful stowage of the cotton on deck was an act of barratry, it was insured against under the barratry clause, or otherwise such a clause in a marine policy is without sense or meaning. The question whether the act was barratrous or not was one of fact, and I think in this case ought to have been submitted to the jury. If, as is argued on the part of the defendant, the act of the master in stowing the 90 bales of cotton on deck was to carry all the cargo and earn all the freight he could for his owners, inasmuch as he knew he was violating his duty and taking the hazard of uncommon perils, it rather tends to show his conduct was not free from suspicion of its entire innocence.

It is argued that the proximate cause of the loss was the jettison of the cotton to save the vessel, which was not barratry. There is nothing tending to show that the jettison was an act of barratry, but that is quite unimportant if, upon the evidence, a jury could properly say that the stowage on deck was willful and fraudulent, for then it was barratry and the proximate cause of the loss.

The case should have been submitted to the jury.

All concur.

COURT OF APPEALS OF NEW YORK.

NORMAN PITNEY, *Respondent*,

vs.

THE GLEN'S FALLS INSURANCE CO., *Appellant.**

The policy was originally made to cover the interest of P. only. Subsequently the agent, on the representation of the insured that his son also had an interest in the subject matter, inserted the clause in the policy, "in case of loss, if any, one half payable to George N. Pitney, as his interest may appear."

Held, that parol evidence is admissible to show what was the nature of George N.

* Argued Sept. 29th, 1874. Decided Jan. Term, 1875.

Pitney's interest. The clause may be regarded as a new contract with the real party in interest, for which there was sufficient consideration in the otherwise equitable right of P. to a proportionate return of premium.

Held, that P., as assignee of George N. Pitney, may recover to the full extent of his loss.

Held, that the complaint, setting forth the above clause, averring the interest of George as owner, that all the policy conditions were fulfilled, that the policy was assigned to P. for a valuable consideration, and that the company is justly indebted to him, is a sufficient pleading.

Questions as to the meaning of particular words used in a special sense in a written instrument may be submitted as questions of construction to the jury.

Held, that P. may also be entitled to recover as trustee of George N. Pitney.

The plaintiff had other insurance on the same property, insuring his interest without reference to joint ownership.

Held, that this was other insurance within the meaning of the policy clause prohibiting the same.

A person authorized to accept risks, settle the terms of insurance, and issue and renew policies, must be regarded as the general agent of the company. His power in a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions of the contract.

Where such an agent acting for two companies, upon an application for insurance in one company had the policies of the other, on the same subject matter, handed to him at his own request, he must be presumed to have read them and known their contents, and such knowledge will act as a waiver or estoppel where the application was filled by the agent and the policy issued did not have the existence of other insurance indorsed as required.

A renewal is not "other insurance," and where notice of other insurance was given when the policy was issued, it need not be repeated when the policy is renewed.

A verbal agreement to sell, payment to be made by crediting on an existing debt, without any visible outward act in furtherance of the transaction, is not a change of title which avoids the policy.

Judgment affirmed.

Appeal from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment entered at the Circuit, upon a verdict.

The action was brought against the defendant, a stock insurance company, to recover upon a policy of insurance upon wool. The defense was that certain warranties in the policy had not been complied with. It was also claimed that the ownership of the goods insured had been parted with, so that the insured had no interest at the time of the loss.

The defendant has its place of business at Glen's Falls, in Warren County. On November 2d, 1866, it issued the policy in question to "insure Norman Pitney against loss or damage by fire to the amount of $1,200 on 2,400 pounds of wool in horse-shed on George McKies' farm, Cambridge." The policy was issued by the defend-

ant's agent, one Bowen, living at Cambridge, who was supplied by the defendant with blank applications and with blank policies.

There was a clause in policy to the the following effect: "provided that if any other insurance had been or should thereafter be made on the property, and not consented to by the defendant in writing on the policy, then the same shall be void."

The policy was granted upon an application of the insured, partly written and partly printed, which was in terms made a part of the contract and a warranty on the part of the insured.

In the application there was the following interrogatory: "Is the property now insured?" To this the answer was "No." Another question was, "Have you the title to the premises?" The answer was, "The applicant owns the wool." To another interrogatory, "Is there any other party interested in the property, or who claims any title to or interest therein?" there was no answer.

It appeared in evidence that this application was signed in blank by Pitney, the plaintiff, and was afterward filled up by Bowen.

After the policy was issued to the plaintiff it was shown, under the defendant's objection and exception, that he (plaintiff) sent it back to Bowen, the agent who issued it, to have it corrected. This was on account of the fact that George N. Pitney, son of the plaintiff, owned an undivided portion of the wool as tenant in common with the plaintiff and others, amounting to about 1,050 pounds, and he (plaintiff) had forgotten to have the son's name inserted. Bowen thereupon inserted the following clause in the policy: "In case of loss, if any, one half payable to George N. Pitney, as his interest may appear." The policy as thus corrected was returned to the plaintiff.

The plaintiff had no wool which he owned alone. He had a share of four different lots of wool, one quarter of 2,005 pounds; one half 1,324 pounds; one half of 1,065 pounds; one half of 1,173 pounds. His whole interest as calculated in pounds was about 2,282¼.

There was evidence that the plaintiff had, at time of issuing the defendant's policy, other insurance on wool in the same building, without any mention in the policies of joint ownership. There were two policies issued to him by the City Fire Insurance Company of Hartford, Conn., amounting to $1,300. It was claimed by the defendant that these policies attached to the same property as was covered by their own contract, and that it was a case of "other" insurance within the meaning of the condition in its policy. One of the Hartford policies was issued Oct. 13th, 1865, for $800, for a period of six months, and was renewed until April 13th, 1867, three

days after the fire. The other was issued July 10th, 1866, for $500. It was renewed after the policy now in question was issued, viz., January 10th, 1867, for six months. The insurance was then renewed without the defendant's consent or knowledge, other than that possessed by Bowen.

There was also evidence that at the time of the application to the defendants for insurance, the plaintiff delivered to Bowen, at his request, three policies, two in the City Fire Company and one in the defendant's company; the latter being issued through the agency of one Bristol. Of this the policy in litigation was substantially a renewal.

This was the only evidence to show that Bowen knew that the defendant had other insurance on the property. Bowen was the agent of the City Fire Company to take applications, and had taken them in the case of these policies, though he had no authority to and did not issue the policies or the renewals. He requested the plaintiff to leave these policies with him. At the same time the plaintiff did not tell Bowen that the Hartford insurances were on the same property as that of the defendant, and Bowen testified that he did not know it.

In March, 1867, and prior to the fire, an oral agreement was made by the plaintiff with Francis L. Thayer, to the effect that Thayer should purchase the plaintiff's wool at fifty-six cents a pound. The price was not to be paid in money, but to be credited on a debt due to Thayer from the plaintiff, larger in amount than the price of the wool. The wool was to be weighed and sacked. This was not done, nor was any receipt or other evidence of payment given by Thayer to the plaintiff. It was claimed by the defendant that the result of this transaction was to divest the plaintiff's title. The plaintiff supposed that his title and interest passed to Thayer, and that he had no interest at the time of the fire.

The wool in the building, with the exception of 1,090 pounds, was burned on April 9th or 10th, 1867.

After the fire, and before the commencement of the action, George N. Pitney assigned all his claim against the defendant to the plaintiff.

At the close of the plaintiff's case a motion was made for a nonsuit. The motion was denied and the defendant excepted. The case was submitted to the jury under a charge of the judge, to which sundry exceptions were taken. These, as well as certain exceptions to evidence are considered in the opinion.

A verdict was found for the plaintiff for $969.44, with interest and costs.

An appeal was taken to the General Term from the judgment entered on the verdict, as well as from an order denying a motion for a new trial.

The judgment and order having been affirmed, the defendant appeals to this court.

— BROWN, *for Appellant.*

J. G. SHERMAN, *for Respondent.*

DWIGHT, J.

No question was made on the argument in this court as to the sufficiency of the preliminary proofs in this cause, nor was there any claim of fraud. The questions in controversy between the parties were narrowed down substantially to three :

1. Can the plaintiff recover as assignee or in behalf of his cotenant, George N. Pitney ?

2. Can he recover the insurance on his own individual interest, assuming that he was owner at the time of the fire ?

3. Does the proof show that he was owner, or did he by his oral contract transfer his interest in the subject matter of the insurance to Thayer ?

1. The policy, as originally drawn, was made to cover solely the interest of Norman Pitney, the plaintiff. There appears at that time to have been no intimation of joint ownership of the wool. Subsequently an interview was had with Bowen, the defendant's agent, in which it was stated to him that the plaintiff had forgotten to mention that his son had an interest in the wool, and that his interest was to be covered by the insurance. Bowen at first thought that it would be necessary to make out a new policy. He finally determined to insert the clause : "In case of loss, if any, one half payable to George N. Pitney, as his interest may appear." The policy, as corrected, then read as follows, as far as the insuring clause is concerned : "By this policy of insurance * * * * the Glen's Falls Insurance Company do insure Norman Pitney, of Cambridge, against loss or damage by fire to the amount of $1,200 on twenty-four hundred pounds of wool in horse-shed on the George McKie farm, Cambridge. In case of loss, if any, one half payable to George N. Pitney, as his interest may appear."

The court at the trial admitted evidence, under objection of the

defendant, to show that George N. Pitney was tenant in common, and that the intent of the parties was to have that interest insured. It was claimed that such parol proof was inadmissible as affecting a written instrument.

The defendant in this contention overlooks the words, "as his interest may appear." If the words had simply stood "in case of loss, if any, one half payable to George N. Pitney," the meaning would apparently have been that the insurance was made solely on Norman Pitney's property, and that one half of the loss was to be paid over to the plaintiff's nominee instead of to himself. But when the words "as his interest may appear," are added, something more seems to be intended. The language, though informal, points to an ownership in the wool of some kind. What interest is intended is not specified. The entire clause must be construed, and parol evidence is admissible to place the court in the situation of the parties, so as to be able to ascertain what interest George Pitney had, and then what interest belonging to him was intended to be covered by the policy.

It will readily be conceded that there are authorities to the effect that if one joint owner insures for himself and his co-owner, without mentioning the latter's name, and without any knowledge of him on the part of the insurers, no action will lie in that person's favor. Dumas vs. Jones, 4 Mass., 647. In that case no representation was made to the underwriter by the insured, that he had a partner. The contract being made with the insured, and apparently on his sole account, it was held that it was not competent for him to recover on the policy beyond the value of his own interest. This case went upon the ground, which it is unnecessary to impugn, that the insured had a right to know for whom as well as with whom he contracts, his calculations depending not unfrequently on a knowledge of the character of those whom he undertakes to indemnify.

The reason of this case does not apply if there be anything on the face of the policy to indicate that a party has an interest in the subject matter of the insurance. If the words thus employed be ambiguous, or if the designation be so imperfect that it cannot be understood standing alone, extrinsic evidence may be resorted to in order to ascertain the meaning. Those persons are deemed to be included in the policy who were in the minds of the parties when the contract was made. Clinton vs. Hope Ins. Co., 45 N. Y., 454. Aff. S. C., 51 Barb., 647.

It is said by Denio, J., in Bidwell vs. Northwestern Co., 19 N. Y., 182, "that there is much greater latitude in applying a policy of in-

surance to the interest intended to be covered by it, than in other written contracts; and in general if it is said to be on account of a person as agent, or for whom it may concern, the party who really procures the insurance, and whose property it was intended to cover, may be shown." (Citing Arnould on Insurance, note 25.) See also 1 Phillips on Ins., 163; Colpoys vs. Colpoys, 5 Jacobs, 451; Burrows vs. Turner, 24 Wend., 277; Newsom vs. Douglas, 7 H. & Johns., 417.

It was conceded by all parties in Turner vs. Burrows, 5 Wend., 541, that if the insurance had been in truth in joint account, and the policy had been "on account of whom it may concern," the fact might have been shown by collateral proof, and the policy then have the effect intended by the joint owners and understood by the insurer. The rule is clearly laid down in the case of Sunderland Marine Ins. Co. vs. Kearney, 16 Ad. & Ell., N. S., 925. The court there held that though there was no precise description in the policy, yet the insurers in point of law covenanted to pay the persons interested in the subject matter and for whom the policy was effected, and that the true party in interest could be ascertained by extrinsic evidence under the rule, *id certum est quod reddi potest.*

The case of Bidwell vs. Northwestern Co., 19 N. Y., 179, is not opposed to these views. The rule already considered was recognized, but there was no extrinsic evidence to be applied. In the same case, 24 N. Y., 302, extrinsic evidence was admissible in accordance with the remarks of Denio, J., cited *supra.* Grosvenor vs. Atlantic Fire Ins. Co., 17 N. Y., 391, also turned on an express clause in the policy without any extrinsic evidence. The policy named the owner of goods as the person insured, and made the loss, if any, payable to the mortgagee. It was held that the contract was with the owner alone, and that the mortgagee was a mere nominee to receive the money. This case is no authority for the one at bar, where the additional words, "as interest may appear," are found, and extrinsic evidence was introduced to show the interest intended to be insured.

In Mussey vs. Atlas Mutual Ins. Co., 14 N. Y., 79, the policy was issued to Mussey on account of himself and others, as their "interest may appear." It was held that it covered those by whose direction it was effected and for whose benefit it was intended to be made. Pp. 83-4. Assuming that the evidence was admissible, it was abundant to show the intent of the parties to insure the interest of George N. Pitney.

The application had been signed in blank and was filled out by Bowen in the plaintiff's absence. When Norman Pitney went for

the policy he saw that it did not cover that of his son George, and then told him that part of it belonged to him. Bowen suggested that he could buy his son's wool. He made an effort to do so, but failed. He then sent the policy back by Harvey Bench, his son-in-law, to Bowen to have the necessary alteration made. Bench testified that he handed the policy to Bowen and stated to him that Norman and George N. Pitney requested him (Bench) to take the policy to Bowen, and to state that they wanted to have the policy so fixed that George's interest would be insured. Bowen at first thought that he would have to send it to the office, but finally said that he could fix it, and inserted the clause already quoted from the policy. The testimony also showed that George's interest was that of a tenant in common with his father, and its amount and value were fully proved.

In the subsequent portions of the opinion it will appear that Bowen was a general agent of the defendant, and had sufficient authority to make the alteration under consideration. The clause may be regarded as a new contract with the real party in interest. Solmes vs. Rutgers Fire Ins. Co., 4 Abb., Ct. Appeals Dec.; S. C., 3 Keys, 416; opinion of Grover, J. There was sufficient consideration for this agreement, as had it not been made the plaintiff would have had an equitable right to a return of a proportionate part of the premium, as he would not have had sufficient interest for all the policies to act upon, and the over-payment would be regarded as a mere mistake in the haste of transacting the business.

On these grounds the plaintiff, as assignee of George N. Pitney, may recover to the full extent of his loss, there being no other insurance on his interest. His cause of action and the assignment of the same were sufficiently set forth in the complaint. That commences by stating that for another and further cause of action against the defendant, under and by virtue of the policy of insurance, which was annexed and referred to, there is a clause in the following words, etc. The clause in question is set out. It is then averred that George had an interest in the property as owner to a specified amount; that it was destroyed by fire; that all the conditions of the policy were fulfilled, including notice and preliminary proof of loss; that the policy was assigned to the plaintiff for a valuable consideration, and that the defendant is justly indebted to the plaintiff, as such assignee, in a specified sum. This pleading is sufficient under § 162 of the Code, which allows a party to set forth a copy of the instrument under which he claims, and to specify the amount due.

The objection to a passage in the charge of the judge to the jury, on this branch of the case, is not well founded. He said: "Taking the words of the contract alone, independent of surrounding circumstances, the fair and legitimate construction of the language of the contract would be, not that George Pitney was insured for his own property, but he would receive a portion of the money going to Norman Pitney, according to any interest that George Pitney may have in the property." This sentence was not objected to by the defendant, as it was more favorable to him than he had any reasonable ground to expect. The judge added, "But in giving construction to this instrument it is proper for you to look at the surrounding circumstances for the purpose of seeing what the parties intended, and if the defendant intended to contract that George Pitney's interest in the wool, together with the interest of the plaintiff in it, should be insured, and if the circumstances surrounding the transaction satisfy you that that was the intention, you will have the right to say so, and to give such construction as those circumstances require.

This part of the charge was objected to as leaving a question of construction of a written instrument to the jury when it should have been disposed of by the judge. This passage must be read in connection with other parts of the charge, where he stated that he charged, as matter of law, that if from the surrounding circumstances they believed that it was the intention of the parties that the contract should be read as an insurance of both Norman and George Pitney's interest in the wool, they had a right to say so and the plaintiff could recover. Taking the whole subject together, the judge, when he said that the jury could give "such construction as the circumstances might require," only meant that they could give such construction to the circumstances as they thought proper, as modifying the legal construction of the instrument which they must take from him, independent of those circumstances. It was one of those frequent instances of unguarded use of language to which every judge is subject in the haste and excitement of a trial at Circuit, and to which attention should be called specifically, by counsel pointing out the precise bearing of the objectionable matter, in order to found an exception upon it. Instead of that the defendant simply excepted "to so much of the charge as stated that if the jury were satisfied from surrounding circumstances and the words of the contract, the meaning of which the judge had already laid down to the jury independent of those circumstances, that it was the intention of George Pitney and the defendant to insure George's interest, then they may

find that fact." The defendant's counsel claiming that no question of construction could be submitted to the jury.

This last proposition of the counsel was much too large. It is well settled that questions as to the meaning of particular words used in a special sense, in a written instrument, are for the jury,

The judge might well refuse to follow the counsel upon a statement so broad and unqualified. It is not true that no question of construction can be submitted to a jury.

This subject may also be considered from another point of view. Assume that by force of the policy, taken as a whole, the contract of the company to insure George Pitney is made, not with him but with Norman Pitney in his behalf, and that it was so understood by the parties; Norman Pitney is then but an agent for an unnamed though known principal to the extent of George Pitney's interest. Norman Pitney then becomes trustee of an "express trust," under § 113 of the Code, as being one "with whom a contract is made for the benefit of another." Considerant vs. Brisbane, 22 N. Y., 389. Bayley, J., in Sargent vs. Morris, 3 Barn. & Ald., 280, says, "An action on an insurance policy may be brought either in the name of the party by whom or for whom it is made." The same ruling is made in Somes vs. Equitable Ins. Co., 12 Gray, 532; Williams vs. Ocean Ins. Co., 2 Metc., 306; 2 Phill. on Ins., 1958. The defendant is thus placed in this dilemma: If the contract was made with George Pitney, the plaintiff may sue as assignee; if made with Norman Pitney in behalf of George, the action may still be brought by the plaintiff, Norman. The present complaint would suffice for that purpose, the allegations as to assignment being rejected as surplusage, and all the necessary facts being before the court. The evidence on the subject of George Pitney's interest would in that view be legitimate, as the plaintiff would recover as matter of law on the very terms of the contract, as acting for his principal with the knowledge of the insurer.

From every point of view the claim of Norman Pitney, whether as assignee or trustee of George Pitney, is to be sustained.

2. The next question is as to the effect of that clause in the policy which provides that if any other insurance had been or should thereafter be made on the property, and not consented to in writing on the policy, then the same should be void.

The plaintiff claimed on the argument that this clause is not applicable to the case. He insisted that the interest insured in the Hart-

ford companies was not the same interest as that insured by the defendant. The ground was, that the one simply insured the plaintiff's interest without any reference to joint ownership, while the other applied to undivided property.

I do not think that this view is sustainable. All the interest which the plaintiff had for the Hartford insurance to affect was an undivided interest, so that as a matter of fact each policy attached itself to the same subject matter. A clause prohibiting double or over insurance means nothing else than the interest of the insured, whatever that may be. Springfield F. and M. Ins. Co. vs. Allen, 43 N. Y., 396; 2 Phil. on Ins., 1250. But here the interest of the plaintiff under the two sets of policies was the same. All of the wool in the building owned by the plaintiff was held by him in undivided shares. It is impossible by any juggle of words to make his separate undivided interest different from the joint interest to which, so far as the plaintiff is concerned, he and his associate are entitled.

This point was directly involved in Mussey vs. Atlas Mutual Ins. Co., 14 N. Y., 84. Mussey and Reid were joint owners. The court said: "If the policy in suit was on Mussey's interest, and the two first mentioned policies were upon the interests of Mussey and Reid, a case of double insurance exists. Mussey's interest is twice insured, and if both policies could stand and be enforced according to their tenor, and unaffected by the special stipulations in respect to double and over-insurance, he would be entitled to double compensation." The same principle under a somewhat different state of facts was applied in Ogden vs. East River Insurance Company, 50 N. Y., 389, [2 Insurance Law Journal, 134.] In that case a specific parcel of property was insured by a policy containing a clause as to other insurance, and the same property was covered by another policy, which also included other parcels, all being insured for an entire sum. It was held that this was "other" insurance, and the case of Howard Insurance Company vs. Scribner, 5 Hill, 298, to the contrary was there overruled.

As the Hartford policies and the defendant's insurance thus cover the same "property" so far as the plaintiff is concerned, the condition in the policy is applicable, and it is void unless there is something in the attendant circumstances to prevent the application of the rule. It is clear that the consent of the company was not given in writing on the policy. The question to be considered is whether such consent was waived, or whether the defendant is estopped from setting up noncompliance with the condition.

It will be observed that the agency of Bowen in the present case was very broad. He was supplied by the defendant with blank applications and blank policies. He effected insurances and returned them to the company. At the time this contract was made, November 2, 1866, he issued policies, including that in litigation. In this case the plaintiff signed a blank application which Bowen filled up, then issued him a policy on the same or a subsequent day, and then transmitted the application to the company as an accepted application. At the time of the application the plaintiff delivered to Bowen, according to a prior request from that person, the Hartford policies as well as the one of which the policy in litigation was substantially a renewal. The Hartford policies had been previously issued by Bowen. The judge on this state of facts refused to nonsuit the plaintiff, holding that if notice was given to Bowen of the former insurance that was sufficient, even though the required entry upon the policy was not made, and that Bowen was such an agent as to have the same power of waiver as if he were president or other authorized officer of the company, and that the whole matter must go to the jury. The charge maintianed substantially the same ground, and the defendant excepted to so much of it as instructed the jury that if they believed notice of the Hartford policies was given to Bowen at the time of the application the plaintiff could recover. There was also a request to find a verdict for the defendant on these causes of action.

This state of facts fairly presents an inquiry as to the power of such an agent as Bowen.

It will be observed that the defendant is a stock company, in which, according to some authorities, the agents are to be construed to have larger powers than those which appertain to mutual companies. Some of the defendant's authorities, cited from the reports of Massachusetts and other States, are to be explained by this distinction, being special cases involving the powers of agents of mutual companies in which exceptionally strict rules of construction were followed. See Brewer vs. Chelsea Mutual Fire Ins. Co., 14 Gray, 208.

It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company. Post vs. Etna Insurance Company, 43 Barb., 351. The possession of blank policies and renewal receipts signed by the president and secretary is evidence of a general agency. Carroll vs. Charter Oak Insurance Company, 40 ib., 292.

The power of such an agent of a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions of the contract, and he may make such memoranda and indorsements modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered and accepted, and in some cases even afterward. May on Insurance, § 129. He may also insert, by memorandum or indorsement, a description of the property insured inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all the conditions named in the application are to be fully complied with, and that the application shall be a part of the policy, and a warranty on the part of the insured. May on Insurance, § 129; Gloucester Manuf. Co. vs. Howard Fire Ins. Co., 5 Gray, 498.

In the case at bar, Bowen was agent both for the Hartford company and the defendant. When the Hartford policies were handed to him, at his own request, he must have known what the object was, and had full opportunities to acquire information by reading the policies. He was clearly put upon inquiry to know their relation to the subject in hand. The plain presumption is, that he read the policies and acquired full information of their existence and contents. The notice thus supplied to him was, on general principles of the law of agency, notice to the defendant. It must be assumed, accordingly, that owing to his general agency the defendant knew that there was other insurance on the property, and with that knowledge made no statement of the fact on the policy. This act may be called a waiver, or may be treated as an estoppel.

The case of Van Bories vs. United Insurance Company, 8 Bush, (Ky.) 133, is very near to that under discussion. In that case, Shea and O'Connell obtained from the insurance company defendant a policy upon merchandise and fixtures. On the following day they obtained further insurance in Kenton Insurance Company. Both policies were issued by one George T. Moore, who was a general agent for both companies. The policy of the first named company provided that any subsequent insurance should be made known and indorsed in writing. Consent was not indorsed, and no actual notice, as far as appeared, given by Moore, living in Louisville, to the defendant, doing business in Covington.

The court said that it could not be claimed that the defendant

company did not have notice. Both policies were issued by the same person, who was general agent. If Moore did not notify the defendant that was a fault of an agent toward his principal, and did not exonerate the insurer. It was further held that the failure to take the steps requisite by the policy did not in any event make the policy absolutely void. At most it only makes it voidable, so that the insurer in that view had an election either to cancel the policy or to retain the premium. This election should have been exercised within a reasonable time after notice. It had notice from the moment the general agent issued the policy, and by retaining the premium has become estopped or has waived any right which it may have had to cancel the policy.

This case is supported by Horwitz vs. Equitable Insurance Company, 40 Miss., 557; Hubbard vs. Hartford Fire Insurance Company, 33 Iowa, 325, [1 Ins. Law Jour., 178;] Couch vs. City Fire Insurance Company, 37 Conn., 248; Peckren vs. Phœnix Insurance Company, 6 Lansing, 411; Carroll vs. Charter Oak Ins. Co., 10 Abb., N. S., 166. In all of these cases it is maintained that these conditions concerning other insurance if broken made the policy at most only voidable, and that there may be a waiver by parol of a condition requiring writing.

The effect of the agent of the company filling up a blank application has been already considered by this court in Rowley vs. The Empire Insurance Company, 36 N. Y., 550. It was there held that an agent authorized to take applications for insurance should be deemed to be acting within the scope of his authority when he fills up the blank application for an insurance, and if by his fault or negligence it contains a material misstatement, not authorized by the instructions of the party who signs it, the wrong should be imputed to the company and not to the assured. This is a direct authority for the disposition of the case at bar, the only difference between the cases, so far as that branch of it which relates to the blank application is concerned, being that in the one there is a case of negligent omission to state a fact of which Bowen had notice, and in the other there was a positive misstatement. This distinction does not affect the principle. See also Plumb vs. Cattaraugus County Mutual Insurance Company, 18 N. Y., 392.

There is a number of authorities, some of which are cited by the defendant, which take a different view of the subject under discussion from that which has been maintained herein. Some of them are

cases in which statute law required "other" insurance to be indorsed in writing on the policy, and the courts considered that they had no power to dispense with a statute requirement. Others depend upon special rules applied to mutual as distinguished from stock companies; others still are from States that are known to adhere to constructions of peculiar security: *e. g.*, Massachusetts and Rhode Island. May on Insurance, § 145.

The weight of opinion is now throughout the country with these later New York cases and the results of this opinion. The very recent writer just quoted, Mr. May, sums up all the cases as follows, and his generalization after a careful examination of the authorities is believed to be accurate: "In many policies the notice of other insurance is required to be in writing and indorsed on the policy, and it has formerly been frequently held to be essential that these particulars should be literally complied with, and that verbal notice, or anything short of the notice and the formalities subsequent thereto, required by the condition, would subject the delinquent to forfeiture. Thus where the insured, after procuring subsequent insurance, gave a memorandum of it to the agent of the company which issued the prior policy, to be entered on the records, the policy not being at hand, the agent saying that such entry would answer every purpose, and the agent afterward told the insured that he had made the entry, it was held that the condition was violated," (citing many cases.) "But," he adds, "the courts have become more liberal in favor of the assured in their construction of this sort of stipulation in policies of insurance. While, as we have seen, the old rule required the consent to be in writing and indorsed on the policy, it is the decided tendency of the modern cases to hold that if the notice be duly given to the company or its agent of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent thereto was not indorsed as literally required by the stipulation, and where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company." May on Insurance, § 369, 370.

Other sections of this work show that by the term "agent" in this statement is meant "general agent." § 118, 154. These authorities are sustained by this text-writer, by a large array of very recent decisions, some of which have already been noticed in this discussion. It has been plausibly objected that the view of the subject herein taken is that it is opposed to the rule that parol evidence is inadmissible to affect a written instrument. The objection however proceeds

upon a misconception of the effect of that rule. That is but a canon of construction applied to ascertain the meaning of an instrument conceded to be valid. This has no bearing upon the point now under discussion. That concerns the validity or existence of an instrument.

The defendant urges that there is a condition precedent in the instrument, which, by reason of non-performance, makes the contract utterly void. The plaintiff says, in substance, "That I admit; but it has been dispensed with, and the instrument is valid." The question is accordingly not one of construction, but of validity. Nothing is better settled than that the existence of a written instrument may be established or overturned by parol evidence. There is no question of construction in such a case. It is a preliminary one whether there is any contract to interpret or construe. It is of the nature of a condition precedent to be subject to waiver, and that may be in general either oral or written. When the waiver is established the contract takes effect free from the condition.

The result is that as Bowen was a general agent to issue policies, and was authorized to fill up blank applications, any omission to follow the company's rules is imputable to his neglect and is not the fault of the plaintiff. The company had constructive knowledge of the prior insurance through express or implied notice to Bowen, and are now, under all the circumstances, estopped from making any claim that the policy is void by reason of the non-observance of the requisite conditions. The defendant further insists that if this be all true, it is inapplicable to the renewal of the Hartford policies. One of these (for $500) was renewed after the policy in suit was issued, viz., January 10th, 1867. Bowen was not the agent at this time, and it is claimed that the plaintiff was bound to give notice of this renewal under the clause in the defendant's policy. It is urged that the renewal is a new contract.

This position is untenable. A renewal is in one sense a new contract, but it is not "other" insurance, within the meaning of the policy. It is but a continuation of an existing insurance. It would be in the highest degree inconvenient to hold that notice must be given on every renewal to other insurers, on the theory that it was a new insurance. If the notice of the original insurance is properly given, it must be held to continue through all true renewals of it. This position agrees with the views of this court in Brown vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 391. It is there held that the taking of a policy of insurance in renewal of the prior insurance mentioned in

the application for another policy, is not within the terms or spirit of the provision in the latter policy, requiring notice in case of making other insurance. This doctrine is deemed to be perfectly sound, and is re-affirmed in this case.

3. The defendant's claim that the title to the wool had been changed by the oral sale to Thayer is unfounded. At most it could only affect that portion of the wool which plaintiff owned prior to the fire, and not that to which he had title as assignee of George Pitney. The evidence showed that the whole transaction of sale rested in words. Thayer orally agreed to give the plaintiff fifty-six cents for the wool, which was to be weighed, sacked, and delivered at a specified place, and the unwashed wool was to be shrunk. Payment was to be made by crediting the amount of the sale on an existing debt. No visible outward act was done in furtherance of this transaction. It is true that the plaintiff and Thayer owned the property to a certain extent in common, though this was not the case as to all the lots of wool. Even if it was so held, it was still necessary that some act should be done to comply with the statute of frauds. Per Cowen, J., in Archer vs. Yeh, 5 Hill, 295; Shindler vs. Houston, 1 N. Y., 261. The authorities are so fully collateral in the case last cited, that it would be a waste of time to refer to them. The eminently sound doctrine is there affirmed that there must be, to comply with the statute of frauds, something over and above what would be sufficient to make the bargain valid at common law. There must be some overt act done subsequent to the sale, unequivocally indicating the intention of the parties. Per Gardiner, J., p. 265; Shindler vs. Houston, *supra*.

Reference may be made to the following cases, as applying this principle to cases resembling that at bar. Mattice vs. Allen, 3 Abb., Ct. App. Dec., 248; S. C., 3 Keyes, 492; Clark vs. Tucker, 2 Sandf., 157; S. P. Ely vs. Ormsby, 12 Barb., 570; Walrath vs. Richie, 5 Laws., 362; Teed vs. Teed, 44 Barb., 96; Brabine vs. Hyde, 32 N. Y., 519, revg. 30 Barb., 265.

The case last cited is quite in point. The price of the goods sold was there to be applied in payment of an existing debt, but no receipt or other evidence of payment was given to the seller. As in the present case, all that passed between the parties was mere words. The court held that the payment or discharge must be consummated at the time so as to bind both parties by their acts rather than by mere words. In that case there was an entry of payment (corresponding to the price of the goods) made on the books of the buyer (the

creditor) though that was not communicated to the seller (or debtor). The court held that this was not sufficient to take the case out of the statute.

There was no evidence of delivery in the case at bar, in accordance with the terms of the contract, and no writing. To establish the sale, reliance must be had solely on the proposed payment, and that, as has been shown, was not sufficient. It is immaterial that the plaintiff supposed that the title was in Thayer. That was a mere mistake of law, having no influence on the rights of the parties. It is claimed that this supposition on his part may have diminished his watchfulness and lulled to sleep his vigilance, and that the act thus tended to "increase the risk," under a clause in the policy relating to that subject. This argument is, however, remote and speculative, and has no practical bearing upon the case. If these views are correct, it is unnecessary to consider in detail any exceptions to the charge of the judge bearing upon this branch of the cause.

The whole case was disposed of rightly in the court below, and the judgment should be affirmed.

DWIGHT, C., reads for affirmance; GRAY and REYNOLDS, CC., concur; LOTT, Ch. C., and EARL, C., dissent.

Judgment affirmed, with costs.

COMMISSION OF APPEALS OF NEW YORK.

ISIDORE PECHNER, *Respondent*,

vs.

PHŒNIX INSURANCE COMPANY, *Appellant.**

A petition for removal to the United States court simply alleged that the defendant was a citizen of Connecticut and the plaintiff a citizen of New York, but did not assert that at the time of commencing the action they were citizens of the respective States.

* Argued Jan. 7th, 1875. Decided May Term, 1875.

Held, that there must be an allegation of citizenship at the time of commencing the action, and the averment is therefore fatally defective.

The policy provided that it should be void in case of other insurance without written consent indorsed.

Held, that an agent having power to indorse consent could, by express words or implication, give oral consent that would be a valid waiver of the required condition.

Held, that the power of a general agent to receive notice of other insurance, to indorse consent, and issue policies, includes the power to waive strict compliance with the terms of the contract.

Judgment affirmed.

Appeal from an order made at the General Term of the Supreme Court, Third Department, denying a new trial, and ordering judgment for the plaintiff upon a verdict.

The action was brought to recover the amount of a policy of insurance for $2,000, issued to D. Straus & Co., on a stock of goods and merchandise at Elmira, and assigned by them, with the defendant's consent, to the plaintiff, who was the owner of such goods when the loss occurred.

The defendant is a corporation created and doing business under the laws of the State of Connecticut, but having an office and transacting business at the city of Elmira, in this State.

The original complaint in the action was verified by the plaintiff May 21st, 1867, and served June 1st. The verification was made in Chemung County, and stated that the plaintiff was "of said county." An amended complaint was verified June 5th, 1869.

In June, 1867, the defendant filed a petition with the court, praying for a removal of the cause from the Supreme Court to the Circuit Court of the United States; that the "petitioner is a citizen of the State of Connecticut, and that Pechner, the plaintiff, is, as the petitioner is informed and believes, a citizen of the State of New York." The petition was accompanied with the usual bond and approval. The petition was denied, and the order affirmed at General Term.

The defendant answered the amended complaint on June 21st, 1869, setting up that there was a clause in its policy providing that if the assured should have, or should thereafter make any other insurance on the property thereby insured, or any part thereof, without the consent of the defendant written thereon, the policy should be void. It was then averred that, notwithstanding the said provision, and in violation thereof, the insured, after the issuing of the policy, procured other insurance, in designated companies, to the amount of $5,500, without notice to the defendant and without its consent being

written on the policy, except that by an indorsement thereon it had consented to other insurance to the amount of $2,000, and no more.

At the trial the plaintiff offered evidence, under exception, which it was claimed tended to prove a waiver of the condition above set forth concerning other insurance. The facts bearing upon this point are sufficiently stated in the opinion, as well as upon exceptions to the judge's charge to the jury.

A verdict having been rendered for the plaintiff, and the exceptions having been brought on for argument at General Term, a motion for new trial was denied and judgment ordered for the plaintiff on the verdict, with costs. The defendant thereupon appealed to this court.

JAMES BROCK PERKINS, *for Appellant.*

S. B. TOMLINSON, *for Respondent.*

DWIGHT, C.

The petition for the removal of this cause to the United States court was properly denied. It simply alleged that when the petition was filed, (June 15th, 1867,) the defendant is a citizen of Connecticut, and the plaintiff (as the defendant is informed and believes) is a citizen of the State of New York. It is not asserted that at the time of the commencement of the action the parties were citizens of the respective States named. Such a statement is fatally defective. Holden vs. Putnam Fire Ins. Co., 46 N. Y., 1. In that case the only proof of the citizenship of the plaintiff made upon the application for removal was found in the petition of the defendant, made and verified April 5th, 1867, and which recited that the action was commenced March 25th, 1867. After stating the nature of the action, and that the defendant is a citizen of Connecticut, it proceeded as follows: "Delos L. Holden, the plaintiff in said action, is a citizen of the State of New York." The Court of Appeals said that this was simply an averment that when the petition was drawn the plaintiff was a citizen of this State, but that no legal presumption arose from that fact, that he was a citizen at the time of the commencement of the action. The rights of the parties, under the law of Congress providing for removal of causes into the Federal courts, are governed by the facts existing when the action was commenced, and a subsequent change of residence or citizenship does not confer or defeat a right to proceed under it. Clark vs. Matthewson, 12 Peters, 164; Mollan vs. Torrance, 9 Wheat., 537. Accordingly, in the present case, as

far as the statements in the petition are concerned, the court below properly denied the application for removal. People vs. Chicago, 34 Ill., 356; Savings Bank vs. Burton, 2 Metc., (Ky.,) 242.

The defendant, however, claims that this case is taken out of the operation of the rule in Holden vs. Putnam Fire Ins. Co., by the fact that there was in the verification of the plaintiff's original complaint the caption "Chemung County," and that the plaintiff stated that he was "of said county." His argument is, that the petition and complaint are to be read together, and if so, that the words "of said county" are equivalent to an assertion of residence at the time of the commencement of the action, and that residence is *prima facie* evidence of citizenship.

This argument cannot be sustained. It is not necessary to inquire whether, under the circumstances, the allegations in the petition can be connected in the way suggested with the complaint. There was no evidence that the complaint was before the court, or that it was even on file. Assuming, for the sake of the argument, that its statements and verification could be read with the petition, it cannot fairly be claimed that the words "Chemung County, SS., Isidore Pechner, of said county," are a sufficient allegation of the citizenship of Pechner to oust the jurisdiction of the State court. It is clear beyond dispute that the State court had jurisdiction over the parties and the subject matter until the terms of the 12th section of the United States judiciary act of 1789 were complied with. This jurisdiction is not to be subverted until clear proof is made that the act of Congress has been complied with. This is all the more so since it has been determined that if the proper proof is made, the further proceedings before the State court are *coram non judice*, wholly without jurisdiction, and void. Stevens vs. Phœnix Ins. Co., 41 N. Y., 149.

The words on which the defendant relies are perfectly consistent with the fact that the plaintiff was, when he made his verification, a resident alien, has since become naturalized, and at the time of filing the petition was a citizen. It is expressly held in Parker vs. Overman, 18 How., U. S., 137, that an averment of residence in the petition is not enough. There must be an allegation that the party was a citizen when the action was brought. If the statement on which the defendant relies had been incorporated in the petition itself, to the effect "that when the complaint was filed the plaintiff was 'of Chemung County,' and that he is (now) a citizen of the State," etc., it would have been plainly insufficient on the rulings in the cases of

Holden vs. Putnam Fire Ins. Co. and Parker vs. Overman. Of course it does not improve his case that the one statement was in the petition and the other in the verification of the complaint.

The main question in the cause is, whether the policy is void because there was other insurance upon the property without the written consent of the defendant.

The policy provided that if the insured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * * then, and in every such case, the policy shall be void.

The appellant in regard to this clause asserts two propositions: one is, that its provisions cannot be waived by mutual consent, proved by oral evidence; the other is, that there was in any event no valid waiver in this case.

It appeared on the trial that the policy in question was issued at Elmira by Thos. Perry, agent for the defendant. It was in force from the 31st day of March, 1866, to the same date in 1867, and was issued to Henry D. Straus, upon a stock of goods in that city. Pechner, the plaintiff, bought the goods of Straus, who had three other policies upon them, issued by one Ayres, amounting in the aggregate to $5,500. When the sale to Pechner took place, the plaintiff and Straus called at the office of Perry and stated the terms of the transaction. Scott, Perry's partner, looked at all the policies and wrote a consent to the transfer on that of the defendant, saying to the plaintiff, "You are all right; this is all you want." Afterward, and while the policy of the defendant was in force, the plaintiff surrendered the policies issued by Ayres and took out three new policies in other companies. The amount of insurance was the same. In April the plaintiff removed to another store. He thereupon saw Scott and got his consent in writing to the removal. At the same time he exhibited to him the new policies, and Scott had them in his hands and opened them. The plaintiff then asked Scott if these insurances were good and all right, and Scott having opened and looked them over, said they were all right. The renewal of the defendant's policy took place in March, and the facts just detailed occurred thereafter. Scott denied that he ever knew that the plaintiff had other insurance to the amount of $5,500, or that he was ever asked to consent to that amount, or did consent to it. He, however, said that he had assented to $2,000 other insurance, and that when Straus and the plaintiff called on him to get consent to the assignment, they had papers in an envelope, and handed him the package, which was said to contain po-

licies written by Ayres, and that he took out one policy and gave consent to the assignment. It was proved by Scott's testimony that he had been an agent for the defendant for about nine years, and was such at the time, and that he had been doing a large business for the company, had issued hundreds of policies and renewals, and had been notified of hundreds of cases where there was other insurance, * * * * and that such things as consents to transfers and renewals of policies are of frequent occurrence in his business.

Under this testimony the judge declined to direct the jury to find a verdict for the defendant, and charged the jury that if Scott saw the policies, and knew the meaning of them, and said "it was all right," the plaintiff can recover. Under this instruction the jury found a verdict for the plaintiff.

The defendant, in claiming that this ruling was erroneous, insists that all this evidence was, in point of law, immaterial. It could have in his view no influence on the contract, since it was parol evidence, and as that cannot be resorted to for the purpose of varying a written instrument, it could not be applied to show a waiver of the condition in question. This claim is, however, a misapplication of that rule, which is a cardinal one in construction, and simply designed to ascertain the true meaning and intent of a contract, which all parties concede to be valid. It has no application when the validity of the contract itself is in question. It is familiar law that a written instrument may be shown to be void by parol evidence. It may be thus attacked and overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the instrument. If it can be so attacked, it can be sustained in the same manner. This doctrine applies to the case at bar. What the defendant says to the plaintiff is substantially this: "Your policy is void, because when you took out insurance with Ayres you did not observe a clause in it which requires the notice of other insurance to be indorsed in writing on the policy." "True," the plaintiff replies, "but you have by your conduct relieved me from complying with that rule, and the policy is valid."

The whole contest is upon the validity or invalidity of the contract, and the sole point is, can a condition precedent be waived by the words or acts of the parties? That is simply an inquiry whether a party can by his own acts be precluded from setting up a condition inconsistent with his acts, to the injury of an opposite party whom he has thus misled. The requirement that the consent should be indorsed on the policy is simply a provision that a prescribed act of a

formal nature should be done. Suppose that the policy had provided that the consent should be published in the city newspaper, or posted on a bulletin board at a court-house door, could that not be dispensed with by mutual agreement? Could not the defendant so act as to be estopped from insisting upon it? How would such a case differ in principle from that existing here? The provision that an indorsement shall be made on a policy is nothing but a direction that an act shall be done, and falls into the class of ordinary conditions precedent.

The most that the defendant could contend for under any hypothesis is, that the contract provides for a specific mode of proving consent, and that this precludes all other modes, even by mutual consent. It is plain that this indorsement could not have been contemporaneous with the execution of the contract. The new policies were not taken out until after it went into operation. The defendant must then contend that if the parties, when they enter into a contract not required by law to be in writing, provide for a particular mode of proving the performance of an act, they cannot by subsequent acts or arrangements vary from it. The contract thus becomes an iron bond, binding both parties even against their joint will. Such a conclusion is little less than absurd. An illustration may be found in the law of grants, or other dispositions of property. Suppose that a father had given an estate to his daughter, to revert to himself in case she married during her minority without his written consent, and subsequently she married with his oral consent, would that not be a substantial performance of the condition? In a case where a father by his will had required the consent of trustees after his death, and had subsequently given his own consent, it was held that the condition was dispensed with.

There is also a class of cases in which even trustees, who were required to give a consent in writing to a marriage, have been held to do so by an oral consent which had been acted upon. These cases are extremely strong, as it might be plausibly claimed that they could not exceed the authority conferred by the instrument creating the trust. Lord Strange vs. Smith, Amb., 263; Worthington vs. Evans, 1 Sim. & Stuart, 165; Pollock vs. Croft, 1 Meriv., 181; Campbell vs. Netterville, 2 Ves., 534. In Lord Strange vs. Smith, the consent of a mother to a marriage was required to be in writing, and if there were a marriage without that consent certain estates in land were to be forfeited by the daughter. In other words, the title was to be divested by the non-performance of a condition subsequent. The mother pro-

posed and encouraged the marriage. After a time she took offense and would not consent. The court held that her conduct was equivalent to a consent, and held that there was no forfeiture. This decision has been frequently approved. It is clearly sustainable on the doctrine of equitable estoppel.

In Worthington vs. Evans, a legacy was given on condition of the legatee marrying with the consent in writing of the executors. He afterward married with their approbation, but they did not express their consent in the manner required by the will. It was held, notwithstanding, that the legatee was entitled to the legacy. The court held, inasmuch as the trustee had expressed his approbation, and only failed to sign the consent from a reason personal to himself, that the condition was substantially complied with.

If these cases are sound as applied to the act of a trustee having specific powers conferred upon him by a conveyance or a will, how much clearer is the rule where the opposite party to a contract chooses to dispense with a condition introduced into the contract solely for his benefit, and who may have substantial reasons for waiving strict performance.

I am aware that there are some cases which have held that a condition in a lease that a lessee shall not assign, etc., without the consent of the landlord in writing, is broken by such assignment, notwithstanding a subsequent parol license given by the landlord. Roe vs. Harrison, 2 Term R., 425. The same rule was applied in Littler vs. Holland, 3 ib., 590, to a covenant in written articles of agreement. See also, Martin vs. Foundling Hospital, 1 N. & B., 191.

These cases, however, turn upon special doctrines applied by the court to sealed instruments. In both these cases there was a contract under seal, and the decision was rested on that ground. In the last case the court suggested that there might be another remedy in equity. The court held, in Roe vs. Harrison, that even the breach of such a condition may be waived by a subsequent acceptance of rent by the landlord with knowledge of the breach. In other terms, while the condition in the sealed instrument could not be dispensed with by mere words, it might be by acts inconsistent with the enforcement of the forfeiture.

This doctrine was affirmed in Martin vs. Foundling Hospital, 1 V. and B., 191, (A. D. 1813.) This was also the case of a lease under seal. There was a condition requiring the previous written consent of the landlord to the use of the premises leased for the purpose of carrying on a trade. The premises having been used for certain

trades without written consent, an ejectment was brought to cause a forfeiture. A bill in equity was thereupon filed for an injunction to restrain the prosecution of the action. The court hesitated to say that these acts would constitute a general license to carry on all sorts of trades; but that the good sense was, and the law ought to be, that you must infer from the lessor's conduct that he would have given that sort of license which it would have been prudent to give, and that the real question was, whether the lessor stood by and permitted expenditure on the faith of the lessor's conduct. P. 191, 192.

So in Richardson vs. Evans, 3 Maddock, 218, (A. D. 1818,) where there was a similar clause, the court said that though in a lease with a condition requiring written consent, a parol license to underlet is not sufficient in equity any more than in law, yet if such parol license is used as a snare, and under circumstances which amount to fraud, the court will grant relief, and added, there is no proof here that the original lessee was induced by the conduct of the original lessor to underlet these premises without a written license, or that the plaintiff, relying upon this parol license, has suffered any injury or inconvenience. The court is here plainly of opinion that the doctrines of equitable estoppel may be applied to licenses of this kind.

As a result of all the cases, and of sound principle, I think it clear that a condition required by a written instrument, not under seal, that an act be performed or evidenced by a statement in writing, may be waived by parol, and that from necessity the acts going to establish waiver may be shown by parol evidence; and that while on technical grounds this doctrine has not been extended in some cases in courts of law to such clauses in sealed instruments where a mere parol license has been given, yet that even in such cases a parol license may be upheld in equity on the theory of an equitable estoppel.

There is every reason why these doctrines should be applied to insurance policies. The language of the Supreme Court of the United States, in Insurance Company vs. Wilkinson, 13 Wallace, 236, [1 Ins. Law Jour., 607,] leads to the same general conclusion as is maintained in the present case. "The principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be

lawfully used against the party whose name is signed to it," or whose contract it may be deemed to be.

It is freely admitted that some of the earlier cases are opposed to these views. Thus in Carpenter vs. Washington Ins. Co., 16 Peters, 495, it is held that the requirement of written consent cannot be waived by parol, but that there must be an indorsement on the policy. This case, however, and others resembling it, must be deemed to be overruled upon this point. See the cases collected in May on Insurance, § 369, 370.

The only further point to be considered in the case at bar is, whether the facts were sufficient to justify the conclusion that a waiver had taken place.

Scott, with whom the plaintiff dealt, was by his own showing the general agent of the defendant. This is proved by the fact that he issued policies and their renewals, received in the regular course of business notice of insurance in other companies, and gave the usual consents. The power of such an agent of a stock company is plenary as to the terms and conditions of the contract, and he may make such memoranda and indorsements modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion may seem proper. Gloucester Manuf. Co. vs. Howard Fire Ins. Co., 5 Gray, 498. Pitney vs Glen's Falls Ins. Co., Comm. Appeals, Jan., 1875, [reported *ante*, p. 765;] May on Ins., § 129. The same rule will be applied to consents to assignments made after the execution of the policy, provided that the agent is entrusted with that branch of the business.

It is clear in the outset that notice to the agent is notice to the company. Thus in Gale vs. Lewis, 16 L. J., N. S., Q. B., 119, it was decided that the knowledge by an agent of the assignment of a policy prior to the declaration of the assignor's bankruptcy is the knowledge of the company in such a sense as to make the assignment complete under the English law, and prevent the policy from passing to the assignee in bankruptcy. The case was distinguished from that of *ex parte* Hennessy, 2 Dru. and War., 355, because in that the agent, though general, was not under the special circumstances of the case authorized to receive notice so as to affect the company.

The same general rule must be applied to power to give consents to further insurance, particularly where the company knows or has reason to know the practice of the agent, as in the present case, who testified without contradiction that he had issued hundreds of them.

The general power to receive notice of further insurance, to indorse consents and to issue policies, includes the power to waive strict compliance with the terms of the contract. In other words, what the company itself can do at its home office can in general be done by such agent, who, in the place where the contract is made, represents the company in respect to it. Any other rule would be inconvenient and would greatly interfere with despatch in business. A recent writer expresses the rule as now understood in these terms: "The tendency of the courts is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy and bind the company by such waiver, and that his promises and acts, both of omission and commission, representations, statements and assurances made within the scope of his agency, and after knowledge of a breach of condition, or of the inaccuracy of the statements in the application, if relied on by the insured, who is himself without fault, may be set up by the insured, either on the ground of waiver or of estoppel, in answer to a claim of forfeiture." May on Insurance, § 143.

The case of Insurance Co. vs. Wilkinson, 13 Wall., 222, [1 Ins. Law Jour., 607,] is highly satisfactorily upon this point. In that case the powers of general agents of life insurance companies acting at a distance from the home office were much considered. The court said, "that the powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and will not be removed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from his principal." P. 235.

Had the company itself at its principal office treated the plaintiff as Scott did, assuring him that the transaction was right, I think it clear, both upon principle and authority, that it would have been estopped from setting up in its defense that the condition requiring a written indorsement on the policy had not been complied with. The plaintiff must have relied upon such a statement. It is not conceivable otherwise that he would have left matters in the informal condition in which they stood when the loss occurred. Within all the authorities cited, a practical fraud would be perpetrated upon him if the insurers were then allowed to repudiate the policy. The act of the general agent must be regarded as of like character, and as being of the same effect.

This branch of the subject has been recently fully discussed in this court. See Pitney vs. Glen's Falls Insurance Company, *supra*. It is not necessary again to go over the ground there reviewed. It was there held that if at the time of issuing the policy notice of other insurance was given to the general agent of the insurers, and no objection was made, the company will be estopped from insisting on a forfeiture of the policy because their consent was not indorsed as literally required by the stipulation. See also Thompson vs. St. Louis Mutual Life Ins. Co., 2 Ins. L. J., 422; Peck vs. New London Mutual Ins. Co., 22 Conn. 575; Van Bories vs. United Life etc. Ins. Co., 8 Bush, (Ky.) 133. May on Ins., § 370, and cases cited.

A rule is laid down by Mr. Bliss, in his work on life insurance, to the effect that if at the time the acts are done, or the declarations made by the company which are alleged to constitute a waiver or estoppel, the assured could not in consequence thereof by any possibility have been damaged, there is in law no waiver. § 267. Conceding this to be sound law, the present case is brought within his rule. It is plain that the plaintiff might have been, and is, seriously damaged if the policy is avoided by want of compliance with the condition. The general principle applied in Pitney vs. The Glen's Falls Ins. Co., *supra*, must govern the case at bar. The only difference between the two cases is, that in the former the waiver or estoppel took place when the contract was entered into, while in the present case the transaction occurred while the policy was in operation. This fact is not material. Scott testified that he had given consents in hundreds of instances. From the nature of the case many must occur after the contract went into operation. To these the rules of agency will apply in the same manner as in the other case. Brockelbank vs. Lagrue, 5 C. & P., 21 ; Bliss on Life Ins., § 304. In other words, the contract of insurance being made voidable and not void by a failure to comply with the conditions precedent, at whatever stage of the contract such failure may occur, the doctrines of waiver and estoppel will be applicable unless there is something special in the circumstances to prevent their application.

There was no error in the disposition of the cause in the court below, and the judgment should be affirmed.

All concur.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

STEAMBOAT MOLLIE MOHLER,

vs.

HOME INSURANCE CO.*

In the case of a barge wrecked by collision with a bridge on the Mississippi, in which the insurance company filed a libel to recover against the carrier under its right of subrogation, the carrier insisted that the loss occurred through a peril of navigation, which was excepted in the bill of lading.

Held, that the burden of proof is on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from the duties which the law has annexed to his employment.

Held, that railroad bridges, though to a certain extent impediments to commerce, are themselves highways of commerce, and officers of steamers plying Western rivers must be held to the full measure of responsibility in navigating streams where bridges are built across them.

Decree of Circuit Court affirmed.

DAVIS, J.

This is an appeal in admiralty from a decree of the Circuit Court for the Eastern District of Wisconsin.

The appellee was the insurer of a cargo of wheat shipped on a barge appurtenant to the steamer Mollie Mohler, on the 12th of May, 1866, at Mankato, in the Minnesota River, in the State of Minnesota, and destined to St. Paul, on the Mississippi. The barge was wrecked by collision with a bridge pier just above the city of St. Paul, and the cargo became a total loss, which the insurance company paid, and filed its libel in the District Court to recover the amount under its right of subrogation.

It is insisted that the loss occurred through a peril of navigation

* The steamboat Mollie Mohler, her boats, etc., the Northwestern Union Packet Co., claimant, Peyton S. Davidson and Joseph A. Shepherd, stipulators, *appellants*, vs. the Home Insurance Company of New York.

which was one of the exceptions contained in the bill of lading, and that therefore the carrier was excused from delivery of the wheat. Both the lower courts held that this excuse was not justified by the evidence, and that the officers of the steamer were guilty of a wrongful act in attempting to pass through the piers of the bridge in the state of the weather at the time. The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment. The burden has been assumed by the carrier, and the case was heard on the testimony introduced by the respondents, the libellant having called no witnesses. The answer sets up that the accident occurred through a sudden and unexpected gust of wind which overtook the boat as she was about passing through the piers, and that she is, therefore, not answerable for the consequences of the collision. It may be true that the boat would have safely made the passage if the wind had not driven her against the pier, but this does not solve the difficulty. The inquiry is, whether the passage should have been undertaken at all in the general bent of the weather on that day. If the carrier had sufficient warning to put him on his guard, and chose to neglect it and take the chances of a venture when common prudence told him there was danger in it, he cannot escape on the ground that the particular peril which finally overcame him was a sudden gust of wind. The genral doctrine that a carrier is not answerable for goods lost by tempest has no application to such a case.

It is undeniable that the weather was boisterous during the afterpart of the day on which the loss occurred, and that the boat was laid up at Mendota, near the mouth of the Minnesota River, on account of the wind. After sundown she proceeded on her voyage, the wind having "abated," the master says, or, according to the testimony of the mate, having "calmed down some." There is a singular discrepancy in the testimony of these two officers as to the condition of the wind after the boat left Mendota. The master swears there was no wind to affect the boat until the Julia, an ascending boat, got near the Mohler; while the mate says the wind rose after the Mohler left Mendota, and blew hard by spells all the way down. They also disagree as to the point where the Julia was met. The master says it was not more than a quarter of a mile above the piers, while the mate fixes the distance at one and a half miles. Both had equal opportunities of judging, and there is nothing in the record affecting the

credibility of either. In such a case the defense fails, for the respondents have no right to ask the court to prefer the testimony of one witness over the other when there is nothing in the record to show that one is more reliable than the other.

Apart from this there is enough in the evidence to establish satisfactorily that the weather had not cleared, nor the direction of the wind changed, and that the boat should either not have left her moorings at Mendota, or have landed at some proper point before the piers were reached. It won't do to say that the wind had moderated and that the officers of the boat thought they could get through without trouble. They had no right to think so, for on such a day squalls were likely to arise at any moment, and it was bad seamanship, being forewarned, to attempt to go through such a dangerous place in the river. It is difficult at all times to make the passage of these piers, and especially so in sudden gusts of wind blowing from the south, which was the case on that day. And this difficulty is enhanced in the night time, and when the current, by reason of high water, is increased.

Any prudent officer would have stopped until the weather became calm. At any rate, it was the duty of the master of the boat in question to have done so, and, failing in this duty, he is chargeable with the consequences of his negligence, which, in this case, were lamentable, for not only was property in his charge destroyed, but a human life lost. The officers of steamers plying the Western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them. These bridges, supported by piers, of necessity increase the dangers of navigation, and river men, instead of recognizing them as lawful structures built in the interest of commerce, seem to regard them as obstructions to it, and apparently act on the belief that frequent accidents will cause their removal. There is no foundation for this belief. Instead of the present bridges being abandoned, more will be constructed. The changed condition of the country, produced by the building of railroads, has caused the great inland waters to be spanned by bridges. These bridges are, to a certain extent, impediments in the way of navigation, but railways are highways of commerce as well as rivers, and would fail of accomplishing one of the main objects for which they were created—the rapid transit of persons and property—if rivers could not be bridged. It is the interest as well as the duty of all persons engaged in business on the water routes of transportation to conform to this necessity of commerce. If they do this, and recognize railroad bridges as

an accomplished fact in the history of the country, there will be less loss of life and property, and fewer complaints of the difficulties of navigation at the places where these bridges are built. If they pursue a different and contrary course, it rests with the courts of the country, in every proper case, to remind them of their legal responsibility.

The decree of the Circuit Court is affirmed.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

FIRE.—*Reformation of contract.*

The policy covered five thousand dollars for the term of one year on his merchandise, hazardous or not hazardous, and on his machinery, tools and fixtures, contained in the five-story brick building, occupied by him as a tobacco factory and warehouse, Nos. 19 and 21, situated on west side of Hammond Street, between Third and Fourth Streets, Cincinnati, adding that the premises were heated by a furnace in the cellar, and connected with the building by wooden bridges from the upper story.

The case went up on a petition in error, and the plaintiff in error was plaintiff below.

There was no dispute as to the amount of the loss. The question was, whether the policy covered the property lost, which consisted of tobacco situated in the fifth story of a building on Main Street, which was used by the plaintiff in connection with a five-story brick building, fronting on Hammond Street, the connection being by wooden bridges across an area. The policy was originally issued to C. W. Roback, and transferred to the plaintiff.

Defendant in answering denies that it insured any property of the plaintiff at any other place than at Nos. 19 and 21 Hammond Street, and denies any loss of the property insured under its policy.

The plaintiff proposed to prove, and it was admitted that it could be proved, that when the policy of insurance was obtained, the tobacco in the fifth story of the Main-street building was shown to the agent of the defendant as part of the subject of insurance, and that a surveyor on behalf of the defendant examined it all, including that in the fifth story of the building on Main Street, which was occupied as part of the factory and warehouse by the insured, and that the said fifth story was used entirely and exclusively in connection with the said

five-story building as a part of said factory and warehouse, and was accessible only by and through its connection with said five-story brick building fronting on Hammond Street. The court below has ruled the evidence as inconsistent with the policy, and instructed the jury that the plaintiff was not entitled to recover.

It was held by this court that the plaintiff should not be made to suffer loss of his insurance by reason of failing to show a mutual mistake in a suit for reformation of contract; that the intent of the policy evidently was, to cover the tobacco in the fifth story of the building fronting on Main Street, which was described in the policy as being connected with the five story brick building fronting on Hammond Street by wooden bridges.

Parol evidence was admissible to show that a room, connected by the wooden bridges with the main building, and used as part of the tobacco factory, was included in the premises described. Judgment reversed. [TAFT, J.]

Harris vs. Ætna Ins. Co.

Sup. C. of Cincinnati.

FIRE.—*Limitation clause.*

Suit brought May 15, 1874, and filing of claim for a loss occurring February 22, 1873.

Defendant answered, setting out the year and clause in its policy, which was as follows:

"12. It is furthermore hereby provided and mutually agreed, that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after the award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

Plaintiff replied, denying that his claim was debarred by limitation, as alleged in defendant's answer, and alleged that his cause of action accrued and became due upon the 30th of June, 1873, and that under the terms and conditions of said policy the said plaintiff had commenced his action within the time allowed him therein. Defen-

dant demurred and the court sustained the demurrer, and case was dismissed.

In plaintiff's petition it was stated that defendant failed to have an award properly made, and that defendant's agent abused and insulted plaintiff, and refused to point out any defects in the proofs of loss, or to recognize them in any manner. The court said, in sustaining the demurrer, that the company's agents were not compelled to recognize the claim of plaintiff.

Kuchenmeister vs. Brewers' Fire Ins. Co.

Sup. Ct. of Cincinnati.

FIRE.—*Fraudulent subscription to stock, and loan of securities.*

Where an alleged stockholder in an insurance company deposits with the company in payment of his subscription valuable securities, for the purpose of having the same reported by the company as part of their assets, and of exhibiting the same to the Insurance Commissioner as such, and they are so reported and exhibited, he is estopped from denying the validity of his subscription to the stock, and from recovering back the securities because of the invalidity thereof.

Nor can he allege any informalities in the organization of the company, or that his subscription was conditional merely.

Commonwealth vs. Manufacturers' Ins. Co.

Decision Feb., 1875. C. P. Dauphin Co., Pa.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 158. FIRE.—*Power of.*—The power of a general agent to receive notice of other insurance, to indorse consent, and issue policies, includes the power to waive strict compliance with the terms of the contract. The power of such agent is plenary as to the terms and conditions of the contract, and he may make such memoranda and indorsements modifying the general provisions, and even inconsistent with them, as in his discretion may seem proper.

Gloucester Mfg. Co. vs. Howard Fire Ins. Co., 5 Gray, 498; Pitney vs. Glen's Falls Ins. Co., Com. A., 1875; May on Ins., § 129-143; Ins. Co. vs.

Wilkinson, 13 Wall., 222; Thompson vs. St. Louis Mut. Life Ins. Co., 2 Ins. L. J., 422; Peck vs. New London Mut. Ins. Co., 22 Conn., 575; Van Bories vs. U. S. Life Ins. Co., 8 Bush., (Ky.,) 133; May on Ins., § 370, and cases cited.

Pechner vs. Phœnix Ins. Co.

Rep'd Jour'l, p. 782. N. Y. C. A.

§ 159. FIRE.—*Right to Investigate a Fire.—Responsibility of Company for Criminal Proceedings by.*—Agents have an implied right to investigate concerning the incendiary origin of a loss, and the exercise of such a right is binding on the company. But agents acting simply in their general employment as adjusters have no right to commence criminal proceedings unless authorized by the companies, and the companies will not be bound by such act unless authorized or subsequently indorsed by them.

Norman vs. Ins. Co.

Rep'd Jour'l, p. 827. U. S. C. C. S. D. ILL.

BY-LAWS.

§ 160. FIRE.—*Knowledge of Insured.*—One previously insured in the same mutual company is chargeable with notice of its by-laws and business conditions.

Angel § 146; Mitchell vs. Ins. Co., 51 Penn. St., 402; Simeral vs. Ins. Co., 18 Iowa, 319; Coles vs. Ins. Co., ib., 425.

Fuller vs. Madison Mut. Ins. Co.

Rep'd Jour'l, p. 841. WIS. S. C.

CHARTER.

§ 161. LIFE.—*Repeal of by Legislature.*—In the case of a charter subject to amendment or repeal, *Held*, that one department of the government is bound to presume that another has acted rightly, and the right of the judiciary to declare a statute void will not be exercised without the clearest proof.

Erie R. R. Co. vs. Casey, Penn., 217.

If no power of repeal is reserved none can be exercised, but where the charter is subject to repeal without restrictions, the legislature may exercise its power summarily, and such action

will not be subject to judicial review unless so wantonly exercised as to violate the principles of natural justice.

Loan Ass. vs. Topeka, 20 Wall., 663. Cases of Erie R. R. Co. vs. Casey, 26 Penn. St., 287; Commonwealth vs. Pittsburgh, 58 Penn. St., 46; Allen vs. McHeen, 1 Sumner, 276, distinguished.

The finding of a court, under direction of a general statute, adverse to a petition for the appointment of a trustee, on the ground of insolvency, does not debar the legislature from taking action on the same grounds. The legislature cannot so direct the disposal of the assets as to impair the obligations of the contracts.

Curran vs. State of Arkansas, 15 How., 312.

The legislature has the right to appoint a trustee to administer the affairs of a corporation whose charter is repealed.

Curran vs. State of Arkansas, *supra.*

The legislature has the right to state the reasons which led to the repeal, and the statement of such reasons, like the repeal, is a legislative, not a judicial act.

Elmendorf vs. Carmichael, 3 Littell, 472; and Parmalee vs. Thomson, 7 Hill, 80, distinguished.

The legislature enacted that the charter should be repealed, provided an event did not occur in the future, and the occurrence of this event was to be judged by an officer and designated committee. *Held*, that this is not a delegation of the power to repeal. It is a law *in presenti* to take effect *in futuro.*

Barlow vs. Himrod, 8 N. Y., 483.

The legislature has the power, without a repeal of the charter, to place the assets in the hands of an officer of the State as custodian, pending an investigation.

English vs. N. H. & Northampton Co., 52 Conn., 243; Commissioners, etc., vs. Holyoke Water-power Co., 104 Mass., 446.

It is not necessary that a resolution for this purpose should be styled an amendment.

Bishop vs. Brainerd, 28 Conn., 298.

An act empowering the custodian simply to hold the assets and pay them back or else dispose of them subject to the gen-

eral statute for the dissolution of such insolvent corporations, is not unconstitutional or deserving of judicial censure.

Lathrop, etc. vs. Commissioner Stedman.

Rep'd Jour'l, p. 829. U. S. C. C., Ct.

CONTRACT.

§ 162. FIRE.—*What Constitutes.*—An application when accepted does not itself constitute the binding contract between the parties exclusive of the policy. The application and acceptance constitutes an inchoate and executory contract, executed and completed by the policy.

Angel on Ins. § 22 : May on Ins., § 44, 159, 168 ; Kolmer vs. Ins. Co., 1 Wash., 93 ; McCulloch vs. Ins. Co., 1 Pick., 278 ; Perkins vs. Ins. Co., 4 Cowen, 645 ; Lightbody vs. Ins. Co., 23 Wend., 18 ; N. E. Ins. Co. vs. Robinson, 25 Ind., 536 ; Taylor vs. Ins. Co., 9 Howard, 390 ; Ætna Ins. Co. vs. Iron Co., 21 Wis., 458 ; S. C., 26 Wis., 78 ; case of Falvey vs. Transportation Co., 15 Wis., 129, distinguished.

Fuller et al. vs. Madison Mut. Ins. Co.

—§ 160.

CONTRIBUTION.

§ 163. FIRE.—*Between General and Special Policies.*—Contents were insured by a special policy in upper stories, and by general policies in lower and upper stories. Loss in the lower stories exceeded the general policies, and in the upper stories exceeded the special policy. *Held*, that the general policies must be paid in full on the loss below, and not so contribute with the special as to relieve each from a portion of a total loss.

Sloat vs. Royal Ins. Co., 13 P. F. Smith, 146.

Royal Ins. Co. vs. Roedel.

Rep'd Jour'l, p. 840. PA. S. C.

FORFEITURE.

§ 164. FIRE.—*Notification of Subsequent Incumbrance.*—A proviso requiring notification of subsequent incumbrance, under penalty of forfeiture, is not captious, but important in the interest of the company and of public policy.

Columbian Ins. Co., vs. Lawrence, 2 Peters, 25; Hinman vs. Ins. Co., S. C., Wis., June Term, 1874, [3 Ins. Law Journal, 813.]

A known breach of such condition amounts to a voluntary abandonment of the insurance. A breach through ignorance is an involuntary and negligent ignorance which avoids the policy.

Edwards vs. Ins. Co., 1 Allen, 310; Brown vs. Ins. Co., 41 Penn. St., 187; Penn Ins. Co. vs. Gottsman, 48 Penn. St., 151; Dodge Co. Ins. Co. vs. Rogers, 12 Wis., 337; Wustum vs. Ins. Co., 15 Wis., 138; Keeler vs. Ins. Co., 16 Wis., 523.

Fuller vs. Madison Mut. Ins. Co.

—§ 160.

OTHER INSURANCE.

§ 165. FIRE.—*Waiver of written Consent by Agent.*—An agent having power to indorse written consents may, by express words or implication, give oral consent to other insurance on a policy which requires the consent to be a written indorsement, whether such consent be prior or subsequent to the attachment of the risk.

Lord Strange vs. Smith, Amb., 263; Worthington vs. Evans, 1 Sim. & Stuart, 165; Pollock vs. Croft, 1 Min., 181; Campbell vs. Netterville, 2 Ves., 534; Ins. Co. vs. Wilkinson, 13 Wallace, 236. Cases of Roe vs. Harrison, 2 Term Rep., 425; Littler vs. Holland, 3 ib., 590; Martin vs. Foundling Hospital, 1 N. B., 191; Richardson vs. Evans, 3 Maddock, 218, distinguished.

Case of Carpenter vs. Washington Ins. Co., 16 Peters, 495, excepted to. May on Ins., § 369-370.

Pechner vs. Phœnix Ins. Co.

—§ 158.

POLICY CONDITIONS.

§ 166. FIRE.—*Ignorance of.*—Inability to read a policy, through ignorance of the English language, is no excuse for ignorance of its terms, and the insured cannot be heard to complain that his ignorance misled him.

Fuller vs. Madison Mut. Ins. Co.

—§ 160.

PRACTICE.

§ 167. FIRE.—*Removal to United States Court.*—A petition for removal to the United States court simply alleging that the defendant is a citizen of Connecticut, and the plaintiff a citizen of New York, is fatally defective. There must be an allegation of citizenship at the time of commencing the action.

Holden vs. Putnam Fire Ins. Co., 46 N. Y., 1; Clark vs. Matthewson, 12 Peters, 164; Mollan vs. Torrance, 9 Wheat., 537; People vs. Chicago, 34 Ill., 356; Savings Bank vs. Burton, 2 Metc., (Ky.,) 242; Parker vs. Overman, 18 How., U. S., 137.

The verification of the original complaint contained the caption "Chemung County, SS., Isidor Pechner of said county." *Held*, that this was not a sufficient allegation of citizenship to oust the jurisdiction of the State court.

Pechner vs. Phœnix Ins. Co.

—§ 158.

PREMIUM.

§ 168. FIRE.—*May be Recovered from Agent in case of Bankruptcy if not paid to the Company.*—Shortly after payment of premium to the agent the company was bankrupt. The agent had not paid the money over to the company. *Held*, that the money not having reached the company, and the consideration having failed, the company could not maintain an action for its recovery.

Farmers' and Mechanics' Ins. Co. vs. Smith, 63 Ill., 187.

Held, that a failure to surrender the worthless policies by the insured, in the absence of any intention to hold the company liable, would not affect his right. *Held*, that if the money be paid over by agent to the company before any demand is made by the insured, the agent will not be personally liable, but the mere passing of such money in account with his principal, without any new credit given, or further sums advanced in consequence, will not operate as a payment to the principal.

Chitty's Pleadings, vol. 1, p. 36; Story on Agency, § 300; Hearsy vs. Pruyn, 7 John., 179.

Held, that the agent being notified by the insured that he claimed the money, was bound to return it to him.

Smith vs. Binder.

Rep'd Jour'l, p. 809. ILL. S. C.

PREMIUM NOTE.

§ 169. LIFE.—*A Valid Payment of Premium.—A Lien on the Policy.*—A ten year non-forfeiture life policy, with participation in profits, provided for the payment of premium part in cash and part in a note for the amount of the premium "loaned by the company to the assured," upon interest; also "after two annual payments, should the party wish to discontinue, the company will issue a policy for as many tenths of the amount originally assured, as there have been annual premiums paid in cash;" also, whatever balance due, less dividends there may be at the time of the death of the assured, will be deducted from the tenths assured." The dividends were to be applied toward payment of the notes. Four annual payments, including notes, were made. *Held*, that plaintiffs were entitled to a paid-up policy for $4,000, without previous payment of the notes. *Held*, that the notes with accrued interest, less dividends, are a lien upon the policy, to be deducted when it shall become a claim.

Dutcher vs. Brooklyn Life Ins. Co.

Rep'd Jour'l, p. 812. U. S. C. C. Mo. E. D.

PROOF OF DEATH.

§ 170. LIFE.—*Notice does not constitute Waiver of.*—A mere informal notification of the death of the insured is sufficient as a notice of death. Proof of death, if seasonable, might serve for both proof and notice, but a mere notice cannot supply the place of a formal proof. The two are entirely distinct. The form of proof, where not prescribed by the policy, must be such reasonable evidence as the party can command at the time, that the event has happened upon which the liability of the insurer depends.

1 Greenl. Ev., § 1; Wash. vs. Mar. Ins. Co., 32 N. Y., 427; 2 Arnold on Ins., 1200; Lenox vs. W. S. Ins. Co., 3 J. Cas. 224; Talcott vs. Marine

Ins. Co., 2 J. R., 130; Munson vs. N. E. Mar. Ins. Co., 4 Mass., 88; Taylor vs. Ætna Life Ins. Co., 13 Gray, 434.

What is proof must be determined by the rules of evidence so far as they can be applied to extra-judicial proceedings. A condition requiring proof is not waived by neglect to notify the claimant that a mere notice of death is not such proof.

O'Reilly vs. Guardian Mut. Life Ins. Co.

Rep. Jour'l, p. 843. N. Y. C. A.

WAIVER.

§ 171. FIRE.—*After the Contract has gone into operation.*—The contract of insurance being made voidable and not void by a failure to comply with the conditions precedent, at whatever stage of the contract such failure may occur, the doctrines of waiver and estoppel will be applicable unless there is something special in the circumstances to prevent their application.

Brockelbank vs. Sugren, 5 C. & P., 21; Bliss on Life Ins., § 304.

Pechner vs. Phœnix Ins. Co.

—§ 168.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1874.

Appeal from the Circuit Court of La Salle Co.

NATHANIEL SMITH

vs.

FREDERICK BINDER.*

The company was bankrupted by the Chicago fire, shortly after the premium had been paid to the agent. The agent had not paid the premium over to the company.

Held, that the money not having reached the company, and the consideration having failed, the company could not maintain an action for its recovery.

Held, that the agent, being notified by the insured that he claimed the money, was bound to return it to him.

Judgment affirmed.

CRAIG, J.

This cause was originally commenced before a justice of the peace by Frederick Binder against Nathaniel Smith, to recover a certain

* Opinion filed June 16, 1875.

sum of money which was paid to appellant as agent of an insurance company, as the premium for two policies of insurance issued to appellee upon certain property. From the judgment of the justice of the peace an appeal was prosecuted to the Circuit Court, where a trial was again had, which resulted in a verdict in appellee's favor.

The appellant brings the record here and seeks a reversal of the judgment, first, on the ground the verdict is contrary to the evidence, and second, that the court erred in giving one instruction for appellee, and in refusing an instruction as asked by him.

On the 7th day of September, 1871, appellant, who was agent of the Fireman's Insurance Company of Chicago, agreed with appellee to insure his property, valued at $3,500. An application was sent to the company, and two policies were returned—one in the Fireman's and the other in the Mutual Security of Chicago, which were delivered to appellee and he paid appellant the premium, which amounted to $127.

The property was insured for one year. The great fire in Chicago, of October 9, 1871, rendered both of the companies insolvent.

A few days after the fire, appellant informed appellee that he had not sent the premium paid for the insurance to the company, but still held it in his hands, and as the companies had failed, appellee claimed the money. Appellant declined to pay the money back to appellee, and the evidence fails to show that he ever paid it to the company. After the commencement of this suit, it appears he made a settlement with the assignees of the company, and obtained a receipt in full, but paid less than twenty dollars of the money. The balance he testifies was applied in payment of a debt the company owed him. The policies were retained by appellee, although not regarded by him or appellant of any value, as appears from the interviews between them relative to a settlement of the matter, until after the suit was brought, when they were delivered to appellant.

It was held by this court, in Farmers and Mechanics' Insurance Company vs. Smith, 63 Ill., 187, that an insolvent insurance company could not recover from the holder of one of its policies upon a promissory note given for the insurance, upon the ground that the consideration for which the note was given had failed. It was there said: We do not understand on what ground a bankrupt company can continue to claim an annual payment for protection against fire which it does not pretend to be able to furnish.

Had appellee given a promissory note for the insurance, it is clear no recovery could have been had upon it by the company.

Upon the same principle, the money of appellee paid for the insurance not having reached the company, and the consideration for which it was to be paid to the insurance company having failed, we perceive no ground upon which the company could maintain an action for its recovery.

If, then, the insurance company is not entitled to the money, the only remaining question to be considered is, whether the insured has a right of recovery against the agent.

The policies held by appellee were worthless, and while it would been well for him to have surrendered them for cancellation, yet his failure to do this could not materially affect his rights. It does not appear that appellee held the policies for the purpose of holding the insurance companies responsible in case of a fire; on the other hand, it is apparent from all the testimony that the policies were regarded of no value by all concerned. It is, however, insisted that appellant was acting as the mere agent of the insurance company, and on that account could not be made personally liable. This is not, however, an action brought against an agent to recover damages for the non-performance of a contract; but the theory upon which the action can be sustained is, that it is an action to recover back a specified sum of money received by him, and wrongfully withheld.

The rule of law that must control the question is clearly stated in vol. 1 Chitty's Pleadings, page 36, as follows: "When a contract has been rescinded, or a person has received money as agent of another who had no right thereto, and has not paid it over, an action may be sustained against the agent to recover the money, and the mere passing of such money in account with his principal, or making a rest, without any new credit given to him, fresh bill excepted, or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal; but in general, if the money be paid over before notice to retain it, the agent is not liable. See also Story on Agency, sec. 300, Hearsy vs. Pruyn, 7 John., 179."

Appellant had incurred no new liability to the company after he received the money. No bills were accepted or money advanced on account of it, and when the insolvency of the companies occurred, the company of which appellant was agent had no just or legal right to insist upon its payment, and when appellee notified appellant that he claimed the money, appellant became bound to pay it over to him. The objection taken to the instruction given for appellee is that it was not justified by or based upon the evidence. The instruction

was not perhaps fully warranted by the evidence and should have been modified, but we do not think this instruction misled the jury. The verdict of the jury was right on the evidence, and although slight errors may have intervened, we cannot on that ground reverse. The same may also be said of the modification made by the court to appellant's sixth instruction. The judgment of the Circuit Court will be affirmed.

Affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

SEPTEMBER TERM, 1874.

CLINTON O. DUTCHER AND ANNIE C., HIS WIFE,

vs.

BROOKLYN LIFE INSURANCE CO.

A ten year non-forfeiture life policy, with participation in profits, provided that in case of non-payment of any premium, or any note given in part payment, "whatever balance due, less dividends, there may be at the time of the death of the assured will be deducted from the tenths assured." The dividends were to be applied toward payment of the notes. A paid up policy was to be issued for as many tenths as there had been annual premiums paid in cash.

Four annual payments, including notes, were made.

Held, that the plaintiffs were entitled to a paid up policy for $4,000 without previous payment of the notes.

Held, that the notes, with accrued interest, less dividends, are a lien upon the policy to be deducted when it shall become a claim.

This is a bill in equity against the company to enforce the issue and delivery to the plaintiff of a paid up policy for $4,000. On February 29, 1868, the defendant issued its policy to Mrs. Dutcher, in which, for the annual premium of $615.40, for ten years, the company insured the life of the husband for $10,000, " with participation

in profits." This amount was payable "within sixty days after due notice and proof of death." The other terms of the policy appear in the opinion of the court. After the payment of four annual premiums, the plaintiffs (Mr. and Mrs. Dutcher) file the present bill, claiming that under the terms of the policy they are entitled to a paid up policy for $4,000. This is resisted by the company. The other necessary facts appear in the opinion of the court.

KRUM & PATRICK, *for Plaintiff.*
SHARP & BROADHEAD, *for Company.*

TREAT, J.

This is a bill filed for specific performance.

On the 29th day of February, 1868, the defendant issued a non-feitable policy. The sum insured was $10,000; annual premium $615.40; number of premiums to be paid, ten; term, natural life of the insured, "with participation in the profits." Payment of the $10.000 was to be made within sixty days after death and proof thereof—"the balance of the year's premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom." This seems to contemplate that there would be, or might be, a part of a year's premium and other indebtedness due at the death of the insured.

The policy further provides that "in case" "the premium as aforesaid" shall not be paid "on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due," the policy shall become void.

It further provides that "the dividend of profits which may become payable by virtue of this policy to the holder thereof shall be applied toward the payment of the note, taken for part premiums aforesaid, and that if this policy "shall become void, said holder of the policy "shall be liable to pay to said company the amount of all notes taken for premiums which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date, and that the said last mentioned note is to be canceled by said company on the surrender and cancellation of said policy."

There is also a clause absolving the company from liability if the insured becomes an inebriate, "on paying to the holder thereof * * *

the amount of all unearned premiums actually received thereon up to the time of such payment."

The next and last provision is as follows: "After two annual payments, should the party wish to discontinue, (notice to the company being given before the next premium becomes due,) the company will issue a paid up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash."

In this case the required notice was given after four payments had been made, and a paid up policy was demanded for the prescribed four tenths of the amount insured. The defendant refused the request, unless the plaintiffs would first pay their notes for premiums held by the company; contending that the last clause, cited above, contemplated a previous payment of the annual premiums in cash. The plaintiffs, on the other hand, insist that those notes are mere loans to them, to be paid out of their share of dividends, should their share equal the amount of said notes, at the death of the assured,—said notes being a lien on the policy for the sum finally due thereon, —or, if that be not the true construction of the policy, then the defendant should issue a paid up policy for $4,000, less the amount of said notes.

The terms of the policy, as to notes quoted above, are not very clear; for they seem to imply in one phrase that many notes for premiums may be outstanding, and in another phrase, that there can be only one outstanding note of the kind, and that for a part of the last premium due.

The course of dealing between the parties, however, has put a practical construction on the contracts. The receipt for each annual premium paid (as for the last in this case) is as follows:

"Received from Clinton O. Dutcher $615.40, which continues in force policy No. 3718, issued by this company, until the 29th day of February, 1872, in accordance with the terms and conditions of said policy.

"Old note returned herewith, the indebtedness being debited against the policy, ... $547.48

Amount of premium loaned this year, . . 246.16 — $793.64."

The original agreement, it is admitted, was that of the $615.40 for the annual premium, $369.24 should be paid in cash, and $246.16 in a note at twelve months at seven per cent. interest, whereupon a receipt for payment of the whole premium should be given, the amount

of said note to be a permanent loan by the company until paid by dividends, and that at the maturity of said note, a new note, at the same rate of interest, should be given, including the $246.16, and the amount of the former note less the dividend applicable to its payment. This was the mode pursued each year.

It is further admitted in this case that defendant had always, prior to January 20th, 1871, issued paid up policies on demand without deducting the loans on outstanding notes, holding such notes as a lien against the paid up policy; and that since that date the defendant has uniformly refused to issue a paid up policy unless the holder first paid the outstanding loans or notes.

As there are many like suits pending against this defendant on somewhat similar policies, issued at different times, it may be well to examine them with reference to any changes made by the company in the terms of its subsequent contracts. Thus, policy No. 6060, issued March, 1869, is the same as that with reference to which this suit is instituted, except that on the back thereof, in print and writing, the cash surrender value of the policy is stated for successive years—that value being "exclusive of the value of any dividend, deposits, or reversions, which the company will pay in addition;" also that "the above amounts, less any outstanding loans or notes, will be paid on the surrender of this policy, duly receipted, within two months after being forfeited by non-payment of premiums."

The policies of the defendant were stated from the first to be non-forfeitable; yet they contained clauses of forfeiture. Subsequently, as above, the non-forfeitable provisions were attempted to be defined—that is, a surrender cash value was stated, if the policy was surrendered within two months after forfeiture. Still, in the body of the policy the forfeiture clause for non-payment of premium and notes when due was retained.

Policy 5633, issued in January, 1869, omits the words "non-forfeiture policy," and substitutes for the provision above quoted as the last in the policy No. 3718, (that in question,) these words:

"On the surrender of this policy, while in force, after the full amount of two or more annual premiums have been paid in cash, including the payment of any note or notes given on account of premiums, the company will issue a paid up policy for the amount of premiums paid, less any and all dividends paid on said policy."

On the back of policy (No. 5633) was the same agreement as to cash surrender value as that indorsed on policy No. 6060.

The company had thus added to the new policies, subsequent to plaintiffs', the requirement of previous payment of notes given on account of premiums; indicating on its part that there was previous uncertainty on that point.

It thus appears that the policies issued by this company at the commencement were designed to induce the holders to understand that they included several distinct provisions favorable to the insured, viz.:

1. They were non-forfeitable. Afterward they defined, under the head of cash surrender value, the precise meaning of their non-forfeitable qualities, and limited to two months the condition of non-forfeiture; still retaining on the face of the policy their non-forfeiture designation, and among the conditions, a forfeiture clause. Such seemingly inconsistent and conflicting provisions exact a construction against the company most favorable to the insured.

2. They gave to the insured a participation in the profits. For what period of time? When he was insured for his natural life, would not his participation in the profits continue until his death? It matters not that the annual premiums were to cease at the expiration of ten years, if the insurance was for life. The participation in profits may be in various ways,—either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without accumulations of interest, to the principal sum assurred.

3. The defendant's policies determined the mode of participation in profits when part payment of annual premiums was by note. At the time of the next annual premium, which would be the same time the previous note fell due, there would be credited on the note the dividend of profits to which it was entitled. Then the balance, together with the amount payable by note for the next premium, would be included in the new note, and the former note would be canceled. In that way there would be only one note outstanding. Such was the practical construction given and assented to; yet serious difficulties might have arisen if a forfeiture had been claimed; for it is provided that the holder, when forfeiture occurs, shall be liable to pay all unpaid notes taken for premium, "except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date," and said last note is to be surrendered and cancelled on surrender and cancellation of the policy. If that was the only note which could, in the routine of business, be outstanding, and that was to be surrendered and canceled, for what

would the holder be liable? It would seem he would lose only the cash paid on the premiums, and that his notes would be surrendered. But under the clause concerning inebriates, when the company cancels a policy, it must pay back the amount of all unearned premiums actually received. What is meant thereby? Actually received only in cash, or both in cash and notes? The main question in dispute here is, whether the defendant is bound to issue a paid up policy except when the annual payments are actually paid in cash, or the notes given are also first paid in cash. Under the clause concerning inebriates, the company must pay back the amount of unearned premiums actually received. How received? In cash merely? Certainly, it cannot be fairly contended that the company would absolve itself under that clause by returning the cash payments and holding the assured liable on his notes for premiums. The payment of premiums includes both cash and notes given. Why, then, should not the phrase in the last clause as to annual premiums, "paid in cash," receive equally as broad and favorable a construction?

4. The policies contemplated part payment by note, and indicated how the notes should be treated in connection with the profits, and also how the sum due on said notes should be met when the policy became payable, viz., that the sum insured should be paid, less the amount due on the notes.

5. If the ten annual payments had been made, the original policy would have stood as a paid up policy, and the last note would have been outstanding, payable in twelve months, by its terms, less dividend accrued. Was it contemplated that it should be paid at the end of twelve months, when it is admitted that the sum named therein was to be a permanent loan at seven per cent., debited against the policy? If so, what was the inducement as to part payment by note, and as to participation in profits to be applied to the payment of the note? How was the participation of profits to be thereafter enjoyed?

The theory of the plan proposed and acted on was a receipt for the annual premiums as for cash, while actually, cash was to be paid for part, and a note was to be received as a cash payment for the balance. Throughout the ten years no actual payment, even of interest on the notes, was expected, but the balance due thereon was carried into a new note.

Practically, it seems, the plan offered to the insured was found not to work satisfactorily to the company, and hence it changed not only the phraseology of its later policies but its own interpretation of the

earlier policies. It changed the last clause concerning paid up policies for tenths, as to "annual premiums paid in cash," so that it should read, "including the payment of any note or notes given," etc.

Through all the various provisions concerning the non-forfeiture, cash surrender, issuing of paid up policies for tenths, the giving of notes, the way those notes should be treated on cash surrenders, or cancellation in case of inebriates; in short, throughout the various contingencies attempted to be provided for, the notes are treated as sums to be accounted for on the final payment of the policies, and not before. It is impossible to reconcile the various provisions with each other, or with the manifest theory on which the earlier policies were based, or with the practical construction given, unless it is held that paid up policies were to be issued for the tenths named, without the previous payment of the notes, or the deduction of them from the amount of said tenths. If deducted, what was to become of the participation of profits, and what of the interest they bore? The conclusion is, that plaintiffs are entitled, on the facts agreed, to their paid up policy. The company will hold the notes bearing seven per cent. interest, and whatever balance due, less dividends, there may be at the time of the death of the assured, will be deducted from the tenths assured.

The defendant agreed that plaintiffs should participate in the profits during the natural life of the assured; that they should give notes for part of annual premiums; that at the expiration of ten annual premiums the policy should be considered paid up; that the dividends should be applied toward payment of the notes; that the amount payable at the death of the assured should be $10,000, less the balance due on the final note given as above stated. It could not be determined until the death what would be due on that note, for while it bore seven per cent. interest annually, it was subject to reduction for dividends. It was uncertain whether the dividends would exceed the interest, or amount to the whole note, principal and interest. Hence, when the paid up policies for tenths were demanded, the plaintiffs were entitled thereto, without previous payment of the notes.

DILLON, C. J.

The policy here in question is dated February 29th, 1868. The payment of the premiums was to be made each year, part in cash and part in a note for the amount of the premium "loaned by the com-

pany to the assured, upon interest. After making four annual payments, the assured elected to avail herself of the last provision of the policy, which is in these words: "After two annual payments, should the party wish to discontinue, the company will issue a paid up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The company holds the note of the assured, given for previous premiums, less dividends, for $793.64, drawing seven per cent. interest.

The assured now demands a paid up policy for $4,000, which the company refuses to issue, unless she will first pay in cash her note for $793.64, held by the company. The assured concedes, if the company issues the policy for $4,000, that her outstanding note for $793.64, with interest to the death of the person whose life is assured, less dividends, is, by the terms of the policy, then to be deducted from the $4,000.

As shown by my brother TREAT, the provisions of the policy bearing upon the question now to be decided are far from being harmonious or clear. Under the circumstances, it seems to me that we cannot go far wrong if we hold the company in the case to the same measure of liability that down to January 20, 1871, it voluntarily admitted. It is peculiarly a case, as it seems to me, in which the practical construction put upon the same kind of contract by the company for years should be adopted by the court.

Among the agreed statements of fact is the following: "That from the time the defendant began business to the 20th day of January, 1871, it was the course of business of the defendant to issue paid up policies to policy-holders on demand, without deducting the loans of the defendant to the policy-holder, and to hold the same as a lien against the paid up policy; but on and after said date the defendant refused to give a paid up policy to any policy-holder without the payment first of any loans due defendant by such policy-holder." I give to this course of dealing a controlling influence in my judgment, and accordingly am of opinion that the plaintiffs are entitled, on the agreed facts, to a paid up policy for $4,000, payable at the time and on the terms specified on the present policy as here expounded.

Decree accordingly.

SUPREME COURT OF ILLINOIS.

Error to the City Court of Alton.

ILLINOIS MUTUAL FIRE INSURANCE CO.

vs.

ANDES INSURANCE COMPANY.*

1. In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, but not the measure of the claim of the assured. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled when it is less than the sum insured.
2. Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that reinsured, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered of the second company.
3. And where the policy of reinsurance contained this clause: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company," in case of a loss the reinsurer will only be bound to pay at the same rate the reinsured shall pay; so that, if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay at the same rate on the amount of its policy.

CHARLES P. WISE, *for Plaintiff in error.*

STUART, EDWARDS and BROWN, and J. H. YAGER, *for Defendant in error.*

SHELDON, J.

The only question here presented for decision is, as to the amount of the recovery.

The original insurer became liable to pay to the first assured the sum of $6,000 in consequence of the loss of the subject matter of the first insurance; but it actually paid only $600 in full discharge of the liability. The amount of the reinsurance was $2,000. Shall the re-

* From advanced sheets of 69 Ill. Reports.

insured recover the full $2,000, or only $600, or a *pro rata* part of the latter sum?

So far as we are aware, the contract of insurance, or of reinsurance, against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled where it is less than the sum insured. So, if the assured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage.

Although the original insurer here did become liable to pay the sum of $6,000, that did not turn out to be the amount of its actual loss. The actual loss and damage which it sustained was $600, the sum which it paid in full discharge of its liability. That sum, given to the reinsured, would make good the loss sustained by reason of the original insurance; whereas, to allow a recovery of $2,000 would enable it to realize a gain of $1,400 over and above the actual damage it has sustained. It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to idemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance.

In Bainbridge vs. Nelson, 10 East, 346, it was said by Bayley, J.: "A policy of insurance is only a contract of indemnity, and anything which tends to show that an assured can recover beyond his indemnity, is against the very principle of the contract."

Of like import was the language of Lord Mansfield, in Hamilton vs. Mendes, 2 Burr., 1210, in reference to an action on a policy of insurance, as follows: "The plaintiff's demand is for an indemnity; his action, then, must be founded upon the nature of the damnification as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the court has decided that the damnification, in truth, is an average, or perhaps no loss at all." "Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction, in terms, to bring an action for indemnity where, upon the whole event, no damage has been sustained."

The precise point here involved is quite barren of the authority of adjudged cases. As the contract of reinsurance was virtually prohibited in England more than a century ago—it having been there forbidden except where the insurer shall be insolvent, become bankrupt or die, by the statute (19 Geo. 2, ch. 37, sec. 4)—that may account for the absence of authority in the English reports upon the point.

What little authority is to be found, it must be confessed, is in support of the view that, where the first insurer becomes insolvent, and on a compromise with his creditors pays only a certain percentage of the loss sustained by the insured, the reinsurer is, nevertheless, bound to pay the reinsured the full amount of the reinsurance. Such was the decision of a French court of admiralty at Marseilles, made in 1748.

In Howe vs. Mutual Safety Insurance Co., 1 Sandf. R., 137, this subject is quite elaborately considered, and the authorities bearing upon it adduced, and the doctrine laid down by the above French decision is recognized and adopted as the true rule of law which governs the extent of the liability of a reinsurer.

There are treatises on insurance where the same doctrine may be found laid down, but so far as they have, for its support, the authority of adjudications, they seem to depend upon the two cases above cited.

In Eagle Insurance Co. vs. Lafayette Insurance Co., 9 Ind., 443, the case in 1 Sandf. is with seeming reluctance barely recognized as authority.

This comprises the sum of the authority of adjudged cases to which we have been referred or which have been brought to our notice in support of this doctrine of the reinsured, as contented for by the appellee.

We can understand how the reinsured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But where the liability has become actually discharged by the payment of a sum less in amount, it is difficult to perceive, on principle, why the sum paid in discharge of the liability should not be taken as the amount of damage sustained, and as the measure of indemnity to be recovered under a contract which is confessedly one of indemnity.

Notwithstanding, then, the adverse authority that is to be found, we are disposed to hold, on principle as we regard it, that $600, the sum paid by the reinsured company in discharge of its liability for $6,000, was the actual loss it sustained and the extent of the recovery which should be had. And in view of the following special clause in this policy of reinsurance, we are of opinion that the recovery in this case should be reduced even below that sum. The clause is this: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company."

The only construction we can well put on this clause, and give it practical effect, is that the Andes Insurance Company, the reinsurer, was only to pay at the same rate as the Illinois Mutual Fire Insurance Company, the reinsured, should pay; and as the latter company paid only ten cents on the dollar of its insurance, the former company is only liable to pay at the same rate—that is, ten cents on the dollar of the amount of its reinsurance, which would be $200.

Appellee's counsel suggests that the clause has reference only to cases of double insurance. There is no warrant in the language of the clause for giving it such a reference.

The policy of reinsurance is not before us. The case comes before us as a certified question of law, and this clause is the only portion of the policy which is put into the case, so that we have nothing, aside from the language itself, of the clause, to aid in its construction.

We are of opinion the judgment should have been for $200 instead of $2,000.

The judgment is reversed and the cause remanded.

Judgment reversed.

UNITED STATES CIRCUIT COURT.

DISTRICT OF KANSAS.

JAMES E. TERRY

vs.

IMPERIAL FIRE INS. CO. OF LONDON.

The members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, must be presumed to be citizens of that kingdom, and as such entitled to have their cause removed to the Federal Circuit Court.

THACHER and STEPHENS, *for Plaintiff.*

NEVISON and ALFORD, *for Defendant.*

DILLON, C. J.

The plaintiff, James E. Terry, commenced his suit in the District Court of Douglas County against said defendant, the Imperial Fire Company, to recover a loss by fire upon a policy of insurance issued by that company. The defendant, on entering its appearance, filed a petition for a removal of the case to this court under the provisions of the 12th section of the judiciary act of 1789, claiming that it is an alien. On that petition the case was sent to this court.

Now the plaintiff files his motion to remand the case to the State court.

The Imperial Fire Insurance Company of London is a corporate body, organized under and by virtue of the laws of Great Britain. The only question presented to this court for determination is whether or not the defendant is an alien within the meaning of the Constitution and the judiciary act.

It is a question of no little moment, and one upon which there appears to be no reported cases directly in point. Its solution, however, is not difficult in the light of the several decisions of the Supreme

Court establishing the right of corporate bodies of other States to litigate in the Federal courts as if citizens of such other States. Perhaps there is no one subject in the litigation of the highest court of the land which has given rise to so much controversy, and which has brought out so many able and fearless expressions of opinion from the bench and the profession, as the question whether or not corporations come within the jurisdictional right given to citizens of different States to sue and be sued in the United States courts. But however interesting that discussion may be to the legal student, or however weighty may be the arguments and reasons urged against the conclusion to which the Federal courts have arrived, it may now be regarded as no longer an open question, and we are bound by the maxim, *stare decisis et non quieta movere*. The reasoning upon which those decisions rest applies with equal force to the question involved in this case, and is decisive of it. It has been repeatedly decided that a body corporate, organized under the laws of a State, is to be treated as a citizen of that State, so far as the question of jurisdiction of this court is concerned.

In other words, when a corporation is created by the laws of a State, the legal presumption is that its members are citizens of that State; and a suit by or against a corporation in its corporate name must be conclusively presumed to be a suit by or against citizens of the State which created the corporate body. Louisville, Cincinnati and Charleston Railroad Co. vs. Letson, 2 How., 497; Marshall vs. Baltimore and Ohio Railroad Co., 16 How., 314; Covington Drawbridge Co. vs. Shepherd, 20 How., 232; Ohio and Mississippi Railroad Co. vs. Wheeler, 1 Black, 286; Railway Co. vs. Whitton, 13 Wall., 270.

If, then, it is conclusively presumed that the members of a corporation created by the laws of a State of this Union are citizens of that State, *a priori* it follows that the members of a corporation created within the sovereignty of Great Britain and under the laws of that country are presumed to be citizens or subjects of that kingdom. In the case of Bank of Augusta vs. Earle, 13 Pet., 585, it was decided that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only by force of the law. It must dwell in the place of its creation and cannot migrate to another sovereignty; yet it does not follow that its existence will not be recognized in other places, or that it may not have the power of contracting in other States under the comity between States and nations. On the contrary, that power is therein distinctly affirmed. In

the case of Bank of the United States vs. Devaux, 5 Cush., 61, Chief Justice Marshall, speaking of the apprehension of suitors as to the local influence of the State courts, classes aliens and citizens together as coming within the rule, and says: "Aliens or citizens of different States are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be one or the other." * * * "Substantially and essentially the parties in such a case, when the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." Although that case has been modified by late decisions on other points, the rule therein established, classing aliens of foreign corporations, has yet to be questioned. In Louisville Railroad Co. vs. Letson, the court, after speaking of the case in 5 Cushing, say: "Let it then be admitted, for the purpose of this branch of the argument, that jurisdiction attaches in cases of corporations in consequence of the citizenship of their members, and that foreign corporations may sue when the members are aliens; does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another State, that all of the corporators must be citizens of the State in which the suit is brought?" And the court then hold that the members of the corporation must be presumed to be citizens of the State in which the corporation was created and domiciled.

The court rest their decision upon this broad ground, and say: "A corporation created by, and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purpose of its incorporation, capable of being treated as a citizen of that State as much as a natural person."

Resting upon the analogy of these decisions, we hold in this case that the members of this insurance company, defendant, must be presumed to be subjects of Great Britain, and, as such, entitled to bring their case to this court.

Motion to remand overruled.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF ILLINOIS.

JANUARY TERM, 1875.

NORMAN

vs.

INSURANCE CO. OF NORTH AMERICA ET AL.*

Agents have an implied right in case of loss to investigate the question of its incendiary character, and the exercise of such right is binding on the company.

Companies are not responsible for criminal proceedings begun by their agents, unless authorized or subsequently indorsed by them.

These companies, in December, A. D. 1872, had insurance on Mr. Chapman's store at Carbondale, Illinois, in which Norman was a clerk, which was burned. Upon the advice of a detective, Norman was arrested as the incendiary, but the information inculpating him subsequently proved false. Norman therefore brought suits against all of the above named companies for a conspiracy to arrest him and for false imprisonment. The question as to whether the agents of the companies authorized the arrests, or whether the detective acted upon his own responsibility, was a disputed fact, but in reference to the liability of the companies in case the jury should find the arrest to have been authorized, Judge Treat charged the jury as below.

JOSHUA ALLEN, and DUFF & LEMMA, *for Plaintiff.*

LEONARD SWETT, and EDWARDS & KNAPP, *for Defendant.*

TREAT, J.

I wish to say to counsel, that there is an important proposition in this case which I am called upon to decide, and I hope, if my views

* The Insurance Company of North America, the Franklin Fire Insurance Company of Philadelphia, and the Ætna, Phœnix and Hartford insurance companies, of Hartford, Conn.

do not meet theirs, exceptions will be made so that the question can be reviewed hereafter.

My view in brief of the case is that the agents of these insurance companies had the implied right, when this fire took place, to investigate the question of whether it was an incendiary fire or not. The companies of course would be interested in such an investigation, because, if it should turn out that the place was set on fire by the insured, or anybody by his connivance, it would avoid the policies, and that would relieve them from paying the amount. I think, too, in that connection, that these agents had the right to employ a detective to make that investigation, and that their acts in making the investigation and employing the detective would be binding on the company.

But the question of instituting criminal proceedings, I think, is a very different thing. These insurance companies have no more interest than any citizen in the question, whether criminal proceedings are to be instituted or not; they are not any more bound than any other citizen to institute any such proceedings. And my opinion clearly is, that these agents, from their general employment as adjusters, had no right of themselves to institute such proceedings, unless they had authority from the company. If the company had authorized them to institute criminal proceedings, whenever they thought it necessary in their discretion, then their act would bind the companies, or if the companies authorized them to make the arrest in this particular case, the companies would be bound. Perhaps the companies might be bound in another way. If, after the arrest was made, all the facts were reported to the companies, they might approve and ratify the acts of their agents, and make themselves liable for what they did not originally authorize.

In this view of case I shall instruct the jury that they cannot find a verdict against these defendants, or any of them, unless they were authorized to commence these criminal proceedings by the companies, either by general or special instructions. Or if the jury should believe, from the evidence, that these agents set this prosecution on foot, and they afterward reported their acts to the companies, and that they indorsed or ratified their acts, that would make the companies liable.

UNITED STATES CIRCUIT COURT.

DISTRICT OF CONNECTICUT.

WILLIAM K. LATHROP ET AL., *New York Policy-holders of the American National Life and Trust Co.,*

vs.

INSURANCE COMMISSIONER STEADMAN.*

In the case of a charter subject to amendment or repeal, in a State where charters are granted by special legislation,

Held, that one department of the government is bound to presume that another has acted rightly, and the right of the judiciary to declare a statute void will not be exercised without the clearest proof.

When a charter reserves the power to repeal, the legislature may exercise it summarily, and such action will not be subject to judicial review unless wantonly exercised.

The legislature cannot so direct the disposal of the assets as to impair the obligations of the contracts.

The legislature has the right to appoint a trustee to administer the affairs of a corporation whose charter is repealed.

The legislature has the power to state the reasons which led to the repeal, and the recitals of such reasons, like the repeal, are a legislative, not a judicial act.

The legislature enacted that the charter should be repealed provided an event did not occur in the future, and the occurrence of this event was to be judged by an officer and committee designated.

Held, that this is not a delegation of the power to repeal. It is a law *in presenti* to take effect *in futuro*.

Held, that without a repeal of the charter the legislature has power to place the assets in charge of a custodian pending an investigation into its condition.

Held, that an act empowering the custodian simply to hold the assets, and pay them back or dispose of them subject to the general statutes for the dissolution of insolvent corporations, is not unconstitutional or deserving of judicial censure.

Statement of the Case [*by Ed. of the Ins. Law Journal.*]

Pursuant to the provisions of an act passed by the legislature of Connecticut, and approved July 27, 1871, the insurance commissioner

* Decision filed Oct. 1, 1875.

applied to the Probate Court of New Haven for the appointment of a trustee to take possession of the assets of the American National Life and Trust Company for the benefit of its creditors, alleging that the assets were less than three fourths of the liabilities. The finding of this court was adverse to the petition. The commissioner then presented a special report to the General Assembly of the State, setting forth the alleged facts. The Assembly thereupon adopted the following preamble and resolution :

" *Whereas,* The American Mutual Life Insurance Company of New Haven has transferred its assets to the American National Life and Trust Company of New Haven, and has ceased business, said last named company assuming the liabilities of said American National Mutual Life Insurance Company ; and whereas it appears from the report of the insurance commissioner relating to the affairs of said American National Life and Trust Company that the liabilities of said company exceed its assets more than $400,000; and whereas said company has neglected and refused to render to the insurance commissioner a report of its condition and affairs as required by law ; therefore,

Resolved, By this Assembly, that the charter of said American Mutual Life Insurance Company, and the charter of said American Life and Trust Company, shall, on the 1st day of September, A. D. 1875, be and become wholly and absolutely repealed and annulled ; provided, however, that if said American National Life and Trust Company shall before said first day of September, 1875, supply the deficiency existing in its assets, and receive from the insurance commissioner a certificate showing that the assets of said company are sufficient to satisfy all outstanding and unpaid debts and claims, and to provide a full reinsurance reserve upon its policies in force, to be ascertained as now required by law, then the charters of said companies shall remain in full force, and shall not by this session be repealed or annulled."

A further provision was added, that in case of a disagreement between the commissioner and the company as to the amount of its assets, the chief justice and his associate shall determine the amount to be paid in, and if so paid within thirty days the resolution shall be inoperative. The commissioner was to hold the assets subject to the order of the chief justice. The further facts appear in the opinion on a motion to restrain the commissioner from interfering with the assets.

SHIPMAN, J.

* * * * * * The general principles of law which are involved in this case are of great importance, and concern pecuniary interests in this country of no ordinary magnitude, and would justify me in taking more time for the consideration of this motion than I am now able to give. It is proper that the hearing which will soon take place before Judge Park and his associate in regard to the value of the assets of the company should not be embarrassed by the precedency of any undecided motion in this court, and it is due to the policy-holders in this company that they should be speedily apprised of the decision of the courts in regard to the management of its property. These considerations demand a prompt decision, and prevent anything more than a succinct statement of the principles which I deem applicable to the case.

It is obvious at the outset that the general question which I am asked to determine has always been considered by courts one of grave importance. The right of the judiciary to declare a statute void, and to arrest its execution, is one which in the opinion of all courts is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. One department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving beyond doubt that it is so. Erie R. R. Co. vs. Casey, Penn., 217, Black, J. It should be a very clear case to justify a court in deciding that an act of the legislature is invalid upon a motion for a provisional injunction, a proceeding which addresses itself particularly to judicial discretion.

The defendant corporation is a stock corporation authorized to issue life policies upon the mutual plan of insurance, but it is not strictly a mutual insurance company, and the policy-holders are not necessarily members of the corporation, and have no right to participate in its management. The complainants appear before the court only as creditors of the company. Being citizens of the State of New York, they have a right to bring in this bill against the defendants, citizens of Connecticut, and their interests as creditors of the corporation and *cestuis que trust* of the fund which is now in the control of the directors of the corporation, entitles them to maintain their suit if they have suffered injury. The principle that a stockholder of a company cannot maintain a bill in equity against a wrong doer to prevent an injury to the corporation, unless it should be averred and

shall appear that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor.

It is suggested that the questions in this case are the same as those which are stated in the petitions of the insurance company now pending in the Superior Court, and that they have already been virtually passed upon by the decision of Judge Beardsley. While a decision of any judge upon a motion for a temporary injunction is not a controlling authority, yet it is true that the same general questions which are here presented were discussed in the argument before Judge Beardsley; and the fact that an eminent judge of this State had in effect refused the injunction when it was urged by the insurance company, should properly lead me to exercise caution before I granted it on an action which, though brought by the policy-holders, the affidavits on file in this case tend to show was instituted at the instance of the company. The counsel in the case are not seriously at issue as to the principles which are applicable to the repeal of charters by legislatures. A charter is a contract between the State and the corporators, and the corporation takes the grant subject to the limitations which are contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but when the charter itself, or a general statute, provides that the charter is subject to repeal by the legislature at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will, and its action being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and carelessly as palpably to violate the principles of natural justice; and in such case a repeal, like other legislative acts which do thus palpably violate the principles of natural justice, may be reviewed by courts. The power of the legislature, therefore, is not unlimited, for the private rights of persons are not subject to an unjust and despotic exercise of power by a legislature without means of redress. "The theory of our government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined power." Loan Association vs. Topeka, 20 Wall., 663. It is always to be presumed that the legislature has exercised its great powers for adequate cause, and the extreme caution with which legislatures ordinarily act upon the subject of the repeal of charters fully warrants such a presumption. It is to be observed that this charter, like the majority of Con-

necticut charters, provides that it may be repealed "at the pleasure of the General Assembly." It is unlike the charters in the Pennsylvania cases of Erie R. R. Co. vs. Casey, 26 Penn. St., 287, and Commonwealth vs. Pittsburgh, 58 Penn. St., 46, which provide that if the companies should abuse or misuse their franchises the charters should be subject to repeal. There is no question here whether the legislature is or is not the final judge whether the contingency upon which the authority to repeal is based has occurred. The language of this charter is also unlike the charter which was examined in Allen vs. McHeen, 1 Sumner, 276, which provided that the legislature could alter, limit, restrain or annul the powers conferred, and in which case the court held that a right of absolute repeal was not reserved. The right of appeal is here expressly reserved, is to be exercised at the pleasure of the General Assembly, and is subject only to the limitation which I have suggested.

It is not material whether the court of probate had or had not decided that it was not expedient to appoint a trustee. That court simply found that the company was insolvent, but that its assets were not less than three fourths of its liabilities. The finding or the opinion of the court did not debar the legislature from taking such legislative action as it deemed just.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied. A law distributing the proceeds of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person to the exclusion of his creditors would impair the obligation of his contracts." Curran vs. State of Arkansas, 15 How., 312.

The legislature has also the right as an administrative measure to appoint a trustee to take the assets and manage the affairs of a cor-

poration whose charter has been repealed in conformity with the general just rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the legislature, "a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation the legal title to the property has been changed." Curran vs. Arkansas, cited *supra*.

The complainants do not controvert in the main the principles which have been stated, but they contend that while the legislature had the right to repeal this charter, that it has not been in fact repealed, it and if has been repealed, that the provisions by which the commissioner was appointed to hold the assets, subject to the order of the chief judge, who does not act as a judge, but merely as a committee, and whose directions are not subject to appeal or review, and the provision that the title to the assets shall be vested in the commissioner, are invalid, and that the resolution is void.

1. It is contended that the preamble is void because the legislature has no power to find facts which may affect private rights, and the preamble is so interwoven with the resolution that being void, the resolution is void also.

It is true that the facts recited in a preamble of a private statute are not evidence as between the person for whose benefit the act was passed and a third person, and that a legislature has no power to find facts by legislative enactment so as to be evidence in suits against persons who were not applicants for the act. Elmendorf vs. Carmichael, 3 Littell, 472; Parmalee vs. Thompson, 7 Hill, 80. This is an obvious rule of evidence. But it has no application here. If, as is admitted, the legislature had power to repeal the charter, it had the power to state the reasons which induced it to act. A statement of the reasons was not indispensable to the validity of the repeal, but was proper for the information of the public and of the corporation. This resolution is not a judicial act, finding that a forfeiture of the charter has taken place. If it was, it could well be urged that a legislature has not ordinarily judicial powers, and that the attempt to exercise judicial functions is void, but the resolution is a legislative act declaring the repeal and not the forfeiture of the charter, and the recitals are not in the nature of judicial findings of facts, but the statement of the reasons which operated upon the legislative mind. "The inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is not a judicial act. No issue is formed, no decree or judgment is passed, no forfeiture is adjudged, no fine or

punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exercise legislative power, or to learn whether a contingency has happened upon which legislative action is required." Crease vs. Babcock, 23 Pick., 344.

2. The complainants insist that the legislature must of itself determine whether an enactment shall or shall not be a law, and cannot delegate the power to make or repeal laws; that the attempted repeal of this charter is delegated to the insurance commissioner, and is therefore void.

The resolution provides that the charter shall be repealed on September 1, 1875, provided, if the company shall before that day receive a certificate that deficiency in its assets has been supplied, then the charter shall remain in full force, and, in case of a disagreement between the commissioner and the company as to the amount of its assets, the chief justice and his associate shall determine and state the amount to be paid in, and if the amount so found shall be paid within thirty days the resolution shall be inoperative and void. I am inclined to the opinion that by this resolution the charter was repealed, but the repeal was not to take effect or be operative if a specified event should thereafter take place, which event was uncertain. The commissioner, subject to an appeal to the chief justice and another member of the court, was to determine whether that event had taken place. The legislature, for itself, determined and enacted that the charter should be repealed provided an event did not occur in the future; the ascertainment and announcement that the event had happened, the legislature entrusted to an officer or a committee whom it designated. The legislature delegated to no one the power to determine whether the charter should or should not be repealed. It delegated the duty of ascertaining whether a fact existed upon the existence of which it had determined that the repeal should not go into effect. A valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. It is a law *in presenti* to take effect *in futuro*. The event or change of circumstances must be such as in the judgment of the legislature affects the question of the expediency of the law. The legislature in effect declares the law inexpedient, if the event should not happen; expedient it should happen. They appeal to nobody to judge of its expediency. Bartow vs. Himrod, 8 N. Y., 483, per Ruggles, J.

3. The complainants further say that the charter is not repealed until after the decision of Judge Park and his associate, that either

before or after the repeal the legislature has no power to take the assets of an insurance company out of the hands of its officers and to transfer the custody of the property to a third person, who is to hold them subject to the order of an individual acting not as a judge, and exercising no judicial functions, and not necessarily guided by the principles of law, and from whose order there is no appeal—that the resolve is a special and personal statute, prescribing an exceptional and peculiar rule of conduct upon this single corporation, and therefore unjust and in violation of legislative power.

The orginal resolution which was reported to the legislature contained the first proviso only. As reported, it manifestly provided that the charter should be repealed September 1, 1875, unless, upon the happening of a certain event, the repeal should not go into effect. An amendment was added, by which in case of a disagreement between the commissioner and the insurance company, another committee was appointed to ascertain the amount of deficiency, if any, and if the amount so ascertained should be paid in, the resolution should be inoperative and void. It is a question which it is not now necessary to determine, whether the charter is already repealed or whether its repeal occurs at the expiration of the time which is limited for payment of the deficiency, if any there be, which may be found by the two judges, and upon non-payment of the amount. I have already suggested that the true construction is that the charter is repealed, to take effect or not to take effect upon the happening of an uncertain event. If the charter is repealed there can be no doubt of the power of the legislature to appoint some person to act merely as custodian of the assets of the corporation. But assuming that the charter is now in existence, and unrepealed, I am of the opinion that the legislature has the power, if in their opinion the public interests and the rights of creditors of a particular corporation demand it, to take away the custody of the assets of such corporation from its directors and entrust the custody to an officer of the State pending an investigation into the company's solvency, and the determination of the fact whether the event has happened upon which a repeal of the charter will take place. It is apparent, from an inspection of the resolution, that the legislature deemed the corporation insolvent, and that the liabilities exceeded the assets $400,000, and also was of opinion that the corporation had not complied with the requirements of law, and that the affairs of the company were in so precarious a condition that it was proper to take the unusual step of repealing the charter. But the legislature was also willing to give the company an opportunity of mak-

ing good the deficiency, and further was willing not to permit the decision of the insurance commissioner upon the question whether the deficiency had been supplied, to be final, but to entrust the final hearing and determination in regard to the sufficiency of assets to two persons whose judicial position peculiarly adapts them to pass upon disputed questions of facts, whose official character precludes the suspicion that injustice might be done, and should assure the creditors that their rights are to be guarded. That investigation would necessarily consume time. The question presented itself: Do the interests of the *cestuis que trust* in the property of the company require that during the investigation the assets, which in our opinion have become seriously impaired, shall remain in the hands of the directors? The legislature decided to place the assets, for the time being, in the custody of an officer of the State, and derived their power so to do from the general power which had been reserved over the affairs of this particular corporation—that of amendment of its charter at its pleasure. "Whatever might be true if the charter was a close one, the General Assembly could impose upon the defendants any additional conditions or burdens connected with the grant which they might deem necessary for the protection or welfare of the public, and which they might originally and with justice have imposed." English vs. N. H. & Northampton Co., 32 Conn., 243; Commissioners, etc. vs. Holyoke Water Power Co., 104 Mass., 446. It is not necessary that the resolution should be styled an amendment. Bishop vs. Brainard, 28 Conn., 298. The legislature has reserved to itself the control of this charter, and can modify it to meet any exigency which may arise in the affairs of the corporation, and where the legislature has determined that the pecuniary interests of the creditors are so imperiled that the necessity of repealing the charter may arise, it would seem that the legislature has the power to provide that the officer who has the oversight of all the insurance companies of the State is the proper person to have the exclusive custody of the assets of this corporation and act as its treasurer for the time being. The legislature could originally have imposed this condition upon the company; they can impose it at any time when they deem it necessary for the protection or welfare of the corporation.

It is earnestly contended that the resolution directs the commissioner to hold the assets subject to the order or a committee not acting judicially, and from whose order there is no appeal, and who in his directions is not necessarily acting in conformity with principles

of law. It is true that the chief justice will act as committee or agent of the legislature, and not strictly in his judicial capacity, and if the resolution and the general statute in regard to life insurance corporations whose charters have been repealed, placed the assets under the control of a committee, to be disposed of as the committee pleased, and without the control of the courts of the State, such acts would properly be the subject of severe critism, and might be declared to be inoperative. This resolution simply empowers the commissioner to hold the assets. He cannot sell or dispose of them under the resolution, but is merely their custodian. The chief justice has only authority to notify the commissioner either to return the assets to the company, or that the event has not taken place upon which the repeal of the charter is avoided, after which the commissioner is to be governed by the general statute. He then becomes a trustee under the exclusive direction and control of a court of equity, and subject to its decrees. The assets are not to be managed or disposed of, and the avails are not to be paid in accordance with the order of a committee, but in pursuance of the general statute, and under the direction of the Superior Court, a court of general jurisdiction and of full chancery powers.

The weight of the complainant's argument bore upon the clause of this resolution, which they consider most unjust and prejudical to their interests. I think that they misapprehend the nature of the powers of the chief judge over the assets, which is so limited that there is no interference with the rights of creditors.

Upon the argument of the motion the provisions of the general statutes were criticised by the complainants. The bill does not ask for the interference of the court upon the ground of the invalidity of the statute, but the court is asked to prevent the commissioner from taking possession of the assets under the authority of a resolution of the General Assembly which is alleged to be void. I do not deem it, therefore, incumbent upon me at this time to consider the character of the statute.

The suggestions which have been made in regard to the control of the legislature over those charters in which a power of amendment or repeal has been reserved, apply to the objection that this resolution is a special and peculiar law, by which the rights of this corporation are to be jeopardized, differing from the law applicable to all other corporations in like condition. All insurance companies in Connecticut are created by special charter. Each company is under the particular supervision of the legislature, and is liable in case of

insolvency or malfeasance to be controlled by such action applicable to the special case as shall serve to protect creditors or shareholders or the public.

Sundry affidavits were read for the purpose of showing that Mr. Steadman had not informed the company prior to September 1st, of the amount of the alleged deficiency, and had not given the company an opportunity to supply the required amount—and had not acted justly toward the company since the passage of this resolution. Counter affidavits were presented by the commissioner. If any steps were to be taken by the commissioner in advance of the action of the company, prior to September 1st, in regard to which I express no opinion, I am not satisfied that the commissioner failed to do whatever the resolution or the statutes, or the duty which he owed to the corporation or to the public, imposed upon him. The corporation does not seem to me to have suffered in consequence of a neglect of the commissioner to keep them informed of his views and wishes.

The motion for a provisional injunction is denied, and the restraining order now in force is vacated.

[ERRATA.—The following misprints occur in the preceding pages of this case: On p. 830, line 12, omit "National;" line 21, insert "National" after "American;" line 31, for "session" read "resolution." Page 831, line 8, for "precedency" read "pendency;" line 24, insert "26" before "Penn."—ED. JOURNAL.]

SUPREME COURT OF PENNSYLVANIA.

ROYAL INSURANCE COMPANY
vs.
ROEDEL ET AL.*

Contents in the upper stories were insured by a special policy, and the contents in the lower and upper stories by general policies. The loss in the lower stories exceeded the general policies, and the loss in the upper stories exceeded the special policy.

Held, that the general policy must be paid in full, and not so contribute with the special as to relieve each of a portion of a total loss.

Judgment affirmed.

M. P. HENRY, *for Plaintiff.*

E. G. PLATT & SAMUEL DICKSON, *for Defendant.*

BY THE COURT.

This case is ruled by that of Sloat vs. Royal Ins. Co., 13 P. F. Smith, 14. The loss in this instance exceeds the entire insurance in all the policies, general and special. The loss in the first and second stories of the building, which was not covered by the special policy in the subject in the third and fourth stories, largely exceeded the entire amount of the general policies. So the loss in the third and fourth stories exceeded the amount of the special policy, which was confined to the subject in those upper stories. It is clear, therefore, that the general and special policies covered in fact different subjects, and that the loss under each was more than sufficient to exhaust its entire amount. A rule of average which would exempt the general policies from a portion of their peculiar loss below, in order to carry it to the relief of the special policy above, and thus to exonerate each from a portion of a tolal loss of different subjects, would directly

* Decision rendered Feb. 1, 1875.

contradict the very spirit and intent of the contract of insurance; the subjects being different, and the loss upon each being greater than the insurance on such specially applicable to it, it is evident that the average would effectuate no equity it was intended to cover. We do not think Merrick vs. Germania Ins. Co., 4 P. F. Smith, 277, is sufficiently clear on this point to overrule Sloat vs. Ins. Co.

Judgment affirmed.

SUPREME COURT OF WISCONSIN.

JANUARY TERM, 1875.

Appeal from Circuit Court of Dane County.

M. E. FULLER AND OTHERS, *Appellants*,

vs.

THE MADISON MUTUAL INS. CO., *Respondent.*

An application when accepted does not constitute the binding contract between the parties exclusive of the policy. The application and acceptance constitute an inchoate and executory contract, executed and completed by the policy.

One previously insured in the same mutual company is chargeable with notice of its by-laws and business routine.

Inability to read a policy, through ignorance of the language, is no excuse for ignorance of its terms.

A proviso requiring knowledge of subsequent incumbrance, under penalty of forfeiture, is a very proper one.

A known breach of this condition by the insured amounts to a voluntary abandonment of his insurance. If ignorance of the condition, it was involuntary and negligent ignorance which avoided the policy.

Judgment affirmed.

SLOAN, STEVENS & MORRIS, *for Appellants.*

B. E. HUTCHINSON, *for Respondent.*

RYAN, C. J.

The position of the learned counsel for the appellants, that Detar's application for insurance, accepted by the respondent, constitutes the binding contract of insurance between the parties to it, exclusive of the policy, appears to us wholly untenable. The application is, in effect, for insurance by policy, and the premium note is in terms in consideration of a policy. If the application were accepted otherwise than by the policy, then the application and acceptance constituted an inchoate and executory contract, executed and completed by the policy. Angel on Ins., sec. 22; May on Ins., secs. 44, 159, 168; Kolmer vs. Ins. Co., 1 Wash., 93; McCulloch vs. Ins. Co., 1 Pick., 278; Perkins vs. Ins. Co., 4 Cowan, 645; Lightbody vs. Ins. Co., 23 Wend., 18; N. E. Ins. Co. vs. Robinson, 25 Ind., 536; Taylor vs. Ins. Co., 9 Howard, 390; Ætna Ins. Co. vs. Iron Co., 21 Wis., 458; S. C., 26 Wis., 78. We cannot see the application of Falvey vs. Transportation Co., 15 Wis., 129.

The application was for such a policy as the respondent was in the habit of issuing in the usual course of business. Detar had been previously insured in the same mutual company, and is chargeable with notice of its by-laws and routine of business. Angel, sec. 146; Mitchell vs. Ins. Co., 51 Penn. St., 402; Simeral vs. Ins. Co., 18 Iowa, 319; Coles vs. Ins. Co., ib., 425. Having made his application, paid his premium, and accepted his policy, he is bound by it.

There is no pretence that he was overreached or deceived, otherwise than in the fact that he could not and did not read the policy. That was his own negligence. His want of knowledge of English is no excuse. Had he desired to understand the policy in detail, he could and presumably would have had it translated to him by some competent person. But like many who can read English, he neglected to make himself acquainted with the terms and conditions of the policy on which he slept so long. And he cannot he heard to complain that his ignorance misled him.

We are not disposed to quarrel with the criticism of counsel on some captious conditions of modern fire policies. Phœnix Insurance Company vs. Slaughter, 12 Wallace, 404, [1 Insurance Law Journal, 666.] But we cannot regard the proviso of this policy now in question as being of a censurable character. It is little to say that the very general habit of insurance against fire has led to great carelessness. The destruction of property by fire, and the consequent loss to the commonwealth, have been probably increased largely by insurance. It is the interest of insurance companies, as

it is public policy, that the insured should largely share the risk with the insurer. And to that end it is important not only that the insurer should know the amount of incumbrance on property when insured, but should have notice of subsequent incumbrance. See Columbian Ins. Co. vs. Lawrence, 2 Peters, 25; Hinman vs. Ins. Co., 3 Ins. Law Jour., 894. Hence the proviso in question, that if the property insured should be additionally encumbered, without notice to the respondent, the insurance should be void.

If Detar knew of the proviso, his subsequent mortgage without notice to the respondent, operated as a voluntary abandonment of the insurance. If he did not know of it, it was a disregard of the terms of the contract, involuntary and negligent ignorance of its effect, which avoided his insurance. That is the effect of the subsequent incumbrance, without notice, under such a policy. Edwards vs. Ins. Co., 1 Allen, 311; Brown vs. Ins. Co., 41 Penn. St., 187; Penn Ins. Co., vs. Gottsman, 48 Penn. St., 151; Dodge Co. Ins. Co. vs. Rogers, 12 Wis., 337; Wustum vs. Ins. Co., 15 Wis., 138; Keeler vs. Ins. Co., 16 Wis., 523.

The judgment of the court below must be affirmed.

COURT OF APPEALS OF NEW YORK.

ELLEN O'REILLY, *Respondent,*

vs.

GUARDIAN MUTUAL LIFE INS. CO.,* *Appellant.*

A mere informal notification of the fact in a letter is sufficient as a notice of the death of the insured to the company.

Seasonable proof of death might serve for both proof and notice, but a mere notice cannot supply the place of a formal proof. The two are entirely distinct.

When the form of proof is not prescribed by the policy it must be such reasonable evidence as the party can command at the time, that the event has happened

* Decision rendered Feb. 23, 1875.

upon which the liability of the insurer depends. What is proof must be determined by the rules of evidence so far as they can be applied to extra-judicial proceedings.

Neglect to notify a claimant that a mere notice of death is not proof, is not a waiver of a condition requiring such proof to be furnished.

Judgment reversed.

S. HAND, *for Appellant.*

JAS. TROY, *for Respondent.*

ALLEN, J.

The sum insured upon the joint lives of the plaintiff and Michael O'Reilly, was, upon the death of either, payable to the survivor in sixty days after due notice and proof of such death. It is objected by the defendant that no proof of the death of either of the insured was made to the company, and for that reason the action is premature. By the terms of the contract the insurers have the full time of sixty days after proof of death within which to pay the money, and no action can be maintained upon the policy until after the expiration of that time.

It is conceded that notice of the death of Michael O. Reilly was given. The notice was in the form of a letter from the plaintiff to the defendant, dated June 3, 1872, commencing, "I hereby inform you," and stating that Michael O'Reilly, the husband of the writer, and one of the insured, had died in Providence, R. I., on the 15th of May preceding, after a short illness.

As a notice, the letter was a full compliance with the requirements of the policy, and gave all the information the company could require under the condition that notice should be given. It was held upon the trial that it served the purpose of and was proof of the death of Michael, sufficient as the preliminary proof also required by the terms of the policy, so as to give an action after the lapse of sixty days from the time of its receipt by the defendant. The notice and proof of death required as conditions precedent to a right of action upon the contract were distinct and separate acts. "Proof" of death, if seasonably made, might serve for both the proof and notice contemplated, as the more authentic and verified information contained in the "proofs," would ordinarily include all the particulars which would be communicated by the informal notice. But the converse is not true. A mere notice cannot supply the place of or dispense with the more formal proof provided for in the policy. The two are entirely distinct in their character, and are mentioned as two distinct

acts to be performed by one who claims the benefit of the insurance. A notice may be, and usually is, as in this case, an informal, unverified, and uncorroborated assertion of the claimant, the party in interest. It is ordinarily given immediately after the happening of the event. There need be no delay in notifying the insurers, while the making of formal proofs may be a work of time. What the character of the "proof" should be, when not prescribed by the terms of the policy, must depend very much upon the fact to be proved, and the evidence by which it is ordinarily established, or of which it is susceptible. But that proof, as that term is used, means something more than the unverified declaration of the party in interest, whether formal or informal, may be laid down as a self-evident proposition. Else why require "proof," in addition to "notice?" If "notice," information, or advice by the party in interest is proof, the one word would have sufficed, and the second word has no place in the condition, or office to perform.

"Proof," as in addition to notice, must mean evidence in some form, such form as is usual and customary in such cases, or as is recognized by law, and is calculated to convince or persuade the mind of the truth of the fact alleged. The bare statement of one of known character for truth might convince one who knew him of the reality of the fact stated by him, but it would not be proof in any proper sense. Proof is frequently used as the synonym of "evidence," (1 Greenl., Ev., § 1,) and it was probably so used in this instance. The condition can only be performed by furnishing evidence in some form, of the truth of the fact stated in the notice, and upon which the right of action depends. It need not be that full, clear, and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time to give assurance that the event has happened upon which the liability of the insurers depends. Walsh vs. Marine Ins. Co., 32 N. Y., 427. The purpose of the condition is that the insurer may be able, intelligently, to form some estimate of his rights and liabilities before he is obliged to pay, and some proof must be exhibited. 2 Arnould on Ins., 1200.

In Lenox vs. United Ins. Co., 3 J. Cas., 224, it was held that the protest of the master was sufficient as preliminary proof of the loss of a vessel, as it was proof in the customary form. The court did not pass upon the question whether proof by affidavit or under oath was contemplated or necessary in all cases, but the protest was held sufficient as the customary evidence in such cases, and that was proof

under oath, and so stated to be by the court. The same evidence was held sufficient in Talcott vs. Marine Ins. Co., 2 J. R., 130. It was the usual documentary evidence of the fact alleged. See also Munson vs. New England Marine Ins. Co., 4 Mass., 88.

Taylor vs. Ætna Life Ins. Co., 13 Gray, 434, was an action on a life policy, and the court, by Metcalf, J., say, commenting upon a similar condition, that "such notice and proof were pre-requisite to the maintenance of this action." Proof had been furnished the company, and the defendant admitted that there was no defect in the proof of death, unless in order to constitute due proof thereof it was necessary to produce a sworn certificate of the attending physician. The court held that the insurer not having made the production of such certificate a condition of the policy, could not insist upon it, but that any proof which was reasonably sufficient in law would be a compliance with the condition. What is proof must be determined according to the rules of evidence so far as they can be applied to extra-judicial proceedings. The parties may prescribe the character of the proofs to be made, but in this case they have not done so, and it is left to be determined by general principles applicable to like cases. As no proof of the death of Michael O'Reilly was furnished, or attempted to be furnished, we are not called upon to say what proof would answer the call of the policy. There being no proof of any kind furnished, the condition precedent to an action was not performed. The defendant did not waive the condition or the furnishing of proof of death by omitting to notify the plaintiff that the notice was not proof. The notice was sufficient as a notice, and did purport to be more than a mere notice.

It would have been impertinent to have notified the plaintiff that a paper, not purporting to be proof, was not sufficient proof of the death of the party.

The judgment must be reversed, and a new trial granted.

All concur.

SUPREME COURT OF MISSISSIPPI.

OCTOBER TERM, 1874.

In Error to the Circuit Court of Hinds Co.

PLANTERS' INSURANCE CO.

vs.

D. B. COMFORT.*

In a mutual fire company the expiration of the surrender and cancellation of the policy relieves the assured from all assessments on his premium notes except such as were previously made.

It rests on the underwriters to show that the assessment, according to the terms of the charter, is for a loss during the term of the policy, and has been ratably proportioned.

Where a failure to pay assessments involves serious consequences to the insured, the underwriter must be held to a fair and substantial compliance with the terms of the assessment.

Where the charter provides that the asssessments shall be limited to losses incurred during the continuance of the policy; that they shall be made equitably; that they shall be liens on the property that may be compulsorily collected; and that the insurance should be void while they remained unpaid.

Held, that strict accuracy is not essential, but there must be a substantial compliance with the rule of equality in the assessment.

Held, that an assessment involving previous losses, and in which subsequent assessments were levied on paying members to make up for the defaults of those who did not respond, without first endeavoring to secure compulsory payment, was not an equitable assessment in which failure to pay would forfeit the insurance. It was the duty of the company to have enforced the collections from delinquents.

The proofs of loss are competent evidence of a compliance by insured with his covenant, and a condition precedent to his right of recovery, but they are not evidence as to the amount of loss.

A repudiation of the company's liability by the secretary in reponse to a letter from the insured notifying of the loss is a waiver of the policy requirements of preliminary proofs.

Judgment affirmed.

* Decision rendered April 5, 1875. To appear in 50 Mississippi Reports.

W. L. NUGENT and T. J. and F. A. R. WHARTON, *for Plaintiff in Error.*

MESSRS. HARRIS & GEORGE, *for Defendant in Error.*

TARBELL, J.

This suit was brought by D. B. Comfort against the Planters' Insurance Company, (a corporation created by the laws of this State,) on a policy of insurance to recover three thousand dollars, ($3,000,) the amount of the risk taken by the defendant on the plaintiff's dwelling house, against damages and loss by fire. The house was destroyed by fire during the term of the policy. It was not controverted that the assured was owner of the property, nor that it was of equal or greater value than the sum named in the policy. But the defense is rested mainly on two grounds: First, that the assured was in default, at the time the loss occurred, in the payment of thirty-six dollars ($36) which had been assessed by the company on his desposit note of one hundred and eighty dollars, ($180,) and that the effect of such default by the underwriters' charter of incorporation and covenant in the policy was to make invalid and of no effect the policy, so long as the assured suffered the assessment to remain unpaid.

The Planters' Insurance Company was organized on the mutual plan, which has certain characteristics common to all companies doing an insurance business on that theory. Among the features which distinguish such a company from those who insure upon a capital paid up, or secured, are these: Each person who insures his property becomes a member of the association. The capital is made up of premiums, earnings in the business, and deposit notes. The deposit notes constitute, as it were, a reserved fund, to be called in as the necessities of expenses and losses require. The insured become the mutual indemnifiers of each other against damage and loss from the elements insured against. The funds out of which damages and losses are to be paid are the premiums, the earnings, and deposit notes. The mode of obtaining contributions from the makers of deposit notes is to assess upon each liable for the losses and expenses of the company a *pro rata* assessment of a just proportion, and require its payment on due notice.

An examination of the charter of the company, (Session acts, 601 to 609,) will discover that its scheme of insurance contained all of these features. Deposit notes may be received from the insured, which notes shall be paid at such times and in such sums as the directors may from time to time require for the payment of losses or expenses.

The directors or executive committee shall fix the amount each person shall pay, at the time of making application for insurance. Sect. 6. Every person who shall become insured, also his heirs, executors * * and assigns continuing to be insured therein, shall be deemed and taken to be members thereof, during the time specified in their policies, and no longer. Sect. 7. The members shall be bound to pay their proportion of all losses during the time for which they were insured, to amount of their notes. Sect. 8. In case there shall not be sufficient money in the treasury to pay any loss, the directors may settle and determine the sums to be paid by the several members thereof, as their respective portions of such loss, according to the amount of their several deposit notes, notice of which shall be sent. The amounts thus assessed shall be paid into the treasury within ninety days after notice sent. Sect. 15.

A refusal to pay an assessment for thirty days, which has been duly ordered, shall cause a loss of all benefit or advantage of the insurance, for and during the term of such default. Sect. 16.

The cash premiums and deposit notes shall constitute the capital stock, but a guarantee capital not exceeding $500,000 may be added. Sect. 18.

Every person who effects an insurance becomes a member of the company, and is bound to pay his proportion of losses happening during the time he was insured. The amount thus to be paid is settled by an assessment on the deposit notes. For a refusal promptly to respond to this assessment duly made, after notice, the policy is suspended and becomes of no effect so long as the particular member is in default. The defendant, through Van Hook, its chief officer, placed its refusal to pay Comfort the amount of the risk it had taken on his dwelling-house, upon the ground that, at the time the house was consumed by fire, Comfort was recusant in paying the assessment of $36, his due proportion of his deposit note, and that under the 16th section of its charter, the policy was suspended and inoperative. The plaintiffs attempted to obviate that defense in two modes.

First, that the assessment was illegal, and therefore he was under no obligation to pay it. Second, that he made a tender of the money, or made reasonable efforts to pay at the defendant's chief office of business.

The engagement of the members (all the insured are members) to and with each other, is that they will make good to another all damages and losses, arising from the element insured against.

That is the obligation of the insured with each other contemporaneously holding policies. But this mutual obligation is worked out by the company in the mode prescribed in the 15th and 16th sections, viz., when a loss happened, if there be no money in the treasury, then assessment shall be made and collected.

The deposit notes are made by the charter of the nature of a reserved fund, to meet expenses and losses whenever there is not money enough in the treasury, derived from premiums, which are primarily devoted to those purposes. The members of the company are perpetually changing by the expiration of policies, and new insurances. When the contingency arises to make and collect an assessment it must be settled on these principles: First, the directory are to determine the amount to be called in. Second, that the sum must apportioned ratably upon the deposit notes of all the insured whose policies were in existence unexpired at the date of the loss. The person who effects an insurance to-day is not liable for a loss which occurred yesterday. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires. It would follow, therefore, that whatever would dissolve the connection of the insured with the company would absolve him from all assessments, except such as had been previously made. Such would be the effect of the surrender and cancellation of a policy, when the policy, with the consent of the underwriter, is given up and cancelled. The deposit note goes with it. Both are constituent parts of one transaction. Flanders on Fire Ins., 23.

The officers of the company have at all times information, from their papers and records, of the data necessary to be considered in making the assessment. They have information of the times and amount of of losses, of whom are insured at such dates, and of the deposit notes. They can readily make proper apportionments. It would rest upon the underwriter properly to show that the assessment was one to which the assured is bound to contribute. Atlantic Insurance Co. vs. Fitzpatrick, 2 Gray, 297. Since the insured is only liable for his proportional part, in common with others, for a loss which happened whilst his policy continued, and is not responsible for losses which occurred before he became a member, or after his policy expired, it would seem to be a logical consequence that the underwriter must show a state of facts which authorizes the assessment to be made. One of those facts is, that the loss took place during the term of his policy. Insurance Company vs. Harney, 45 N. Y., 298. Long Pond Insurance Company vs. Houghton, 6 Gray, 77, 82. Another fact to be shown

is, that all the members under a duty to contribute must be assessed. This is necessary in order that the burden, which is common to all, shall be equitably and equally distributed. Herkimer Co. vs. Fuller, 15 Barbour, 375. Bangs vs. Gray, 15 Barbour, 272. Ohio Company vs. Marietta Co., 3 Ohio St., 350. Insurance Company vs. Harvey, 45 N. H., 298. Hart vs. Achilles, 28 Barber, 576. Dana vs. Munro, 38 ib., 528. Van Hook, the secretary of the defendant, explained the circumstances connected with the assessments. First, a resolution of the directors of August 2, 1870, to the effect that each deposit note given after April 1, 1869, and not heretofore assessed, be assessed twenty per cent. to meet losses and expenses incurred etc., on December, 1870. Another resolution was passed, making a further assessment of twenty per cent. on all deposit notes held by the company, payable within thirty days after the 15th of December. Notice was given to Comfort of his assessment, which expired the 15th of January, 1871. These assessments had been made to meet losses which had occurred. The assessments were made on all the mutual policies * * without reference to the dates of the losses. More than half the members refused to pay the first assessment. No compulsory efforts by suits were made to compel payments. The second assessment was made with a view of raising the funds needed from the policy-holders other than those who were delinquent in the first assessment. The witness also said that the second assessment was made on all the deposit notes held by the company.

The 16th section of the defendant's charter already referred to, by way of penalty upon the member who refuses to pay promptly his assessment, excludes and debars him of all benefit and advantage of his insurance during the term of such default, but nevertheless he shall continue liable to contribute to losses until his policy expires by limitation. In addition, by the terms of the preceding section, upon failure to pay the assessment the company may sue for and collect the whole amount of the deposit note, and the money shall be subject to the payment of losses and expenses which have or may thereafter accrue. Where such serious consequences are visited upon the insured for a failure to perform his part of the contract, the underwriter ought to be held to a fair and substantial compliance on his part.

Comfort, as already observed, was under an obligation, if the necessity arose, to pay his proper proportion to the funds of the company. The rule by which his share of the contribution is to be ascertained is distinctly pointed out in the charter. First the gross sum, the

aggregate of losses, or of losses and expenses accrued since each became a member by insurance of his property. That sum is distributed ratably among all mutual policy-holders, who were such during the time the losses and expenses accrued. If therefore the company sustained a loss before Comfort became a member, he cannot be assessed for it, but the money must be raised from those who were at that time insured. Each insured may be made assessable to the full amount of his deposit note for losses happening during the term of his policy, but for no other.

It appears that both assessments, of August and December, were made to cover losses and expenses that had been sustained as well before as during the term of Comfort's policy. If for prior losses, he is in no wise liable for them. It is incumbent on the defendant, in order to sustain this branch of its defense, to show a proper assessment, authorized by its contract with Comfort, and its charter and by-laws. The term of the deposit note did not bind Comfort to pay the $180, the sum named in it absolutely. The words are "in such portions and at such times as the directors of said company may, agreeably to their charter and by-laws, require to pay the expenses and losses." The charter, and the by-laws made in agreement with it, are the criterion to determine the validity of a particular assessment.

In order, then, that the defendant may claim the benefit of the forfeiture denounced by the charter, and repeated in the policy, it must show that losses had accrued for which Comfort was liable. That proof was not definitely made by the defendant. But the charter plainly intends, and it is expressed, that those who share the burden must equally (proportioned to their insurance and deposit notes) contribute to it. But it was proved that not half of the members paid the first assessment; (Comfort, however, paid his.) That made the second assessment larger than would have been necessary, and increased the amount demanded from those who were prompt. We do not mean that if the apportionment is not made with strict accuracy that it will be vitiated.

But the charter requires that the rule of equality must be substantially observed. We do not doubt that insolvent makers of these notes may be altogether rejected from the computation, and the assessment be made with reference to those that are solvent.

But great injustice is done to those who pay punctually, if the company does not avail of the means it has of compulsory payments. The charter gives the company the extraordinary security of a lien on the buildings insured, and premises, for the deposit notes. It is

highly probable that the failure to collect from the delinquents under the first assessment increased the last assessment upon all who had paid five per cent. Upon refusal to pay within thirty days the first assessment, the company could have recovered the entire amount of the deposit notes from delinquents, and would have had the right to appropriate out of that fund to liquidate future assessments as to such parties.

It was plainly the duty of the company to have enforced collections from the delinquents by suits if necessary. If that be not done, it becomes impossible to equally apportion losses and expenses among the the members. We are of opinion that it was not shown in evidence that the assessment in December upon Comfort was imposed according to the charter of the defendant. The company had no right to demand its payment, and it does not have the effect upon his policy of insurance denounced by the 16th section of the charter. If the assessment was improperly made, and could not be collected by suit, manifestly it ought not to have the effect of suspending and annulling the policy so long as the default continues. It has been argued for the plaintiff in error, though not much pressed, that Comfort did not supply the requisite proof of loss, and that it was error to have admitted in evidence on the trial the preliminary proof of loss, being his own affidavit, and the certificate of Webb the clerk.

One of the covenants in the policy is that the insured shall within thirty days make out a full statement of his loss, and procure the certificate of a notary public, clerk of a court of record, reciting certain matters pointed out in the policy. These papers were competent evidence of a compliance by the assured with his covenant. Although they are meant for the information of the underwriter, to enable the company to make full investigation as to the cause and amount of the loss, so as to determine whether it will adjust it or not, yet they are also a condition precedent to the right of the assured to recover, (Flanders on Fire Insurance pp. 527, 528,) and competent evidence of a compliance with the policy, but are not evidence of the quantity and quality of the goods or property lost. In response to Comfort's letter notifying the company of the loss, the secretary promptly replied, repudiating liability of the company, on the ground of non-payment of the assessment. That relieved the assured of the duty of presenting preliminary proofs. They could be of no value to the underwriter, and such act is accepted as a waiver of them. Post vs. Ætna Ins. Co., 43 Barb., 351. Clark vs. Insurance Co., 6 Cush., 340. But the plaintiff, in his testimony, stated that his house was burned the

9th of June, 1871, and that it was of the value of $5,000, and the day after the fire he sent the preliminary proofs to the secretary. Mr. Van Hook promptly replied, expressing sympathy for the loss, but refusing to entertain the question of adjustment, for the reason already stated. The building in the application for the insurance was valued at $5,000. Lucas, in his testimony, mentions incidentally that the plaintiff's house was burned. It is manifest from the record that defendant did not by testimony controvert, in the Circuit Court, that the building was consumed by fire, and was of greater value than the risk assumed. The defense was placed in that court upon the position originally taken by Van Hook. If the proofs on these points were not as full as they might have been, it was because the real controversy was over the position originally taken by the defendant.

In view of the result reached in the first question it is unnecessary to consider the other points made by the defendant, viz., the decision of the Circuit Court overruling demurrer to the first count of the declaration, and whether a tender was actually made of the $36, to Webb, agent, and if made, whether it would have availed the plaintiff; and also, whether the efforts to pay that sum at the principal office in Jackson had the effect of relieving the plaintiff from a suspension or temporary annulment of the policy. The defendant had the benefit of these matters on the trial. The testimony was admissible under the second as well as under the first count. The only difference between the counts was that the first averred a tender of the $36 to Webb, the agent, and also the offer to pay it at the principal office. No prejudice has incurred to the defendant by reason thereof. We think there is no error in the judgment. It is therefore affirmed.

NOTE.—The foregoing opinion has reference solely to policies issued under the mutual plan.

By reference to the 6th section of the charter it will be seen that "any person applying for insurance, so electing may pay a definite sum of money for such insurance and incur no further liability." In consequence of absence from Jackson, I have taken no part in the consideration of this case. TARBELL, J.

[SIMRALL, J., and not TARBELL, as misprinted, delivered the opinion of the court.—ED. JOURNAL.]

SUPREME COURT OF MICHIGAN.

JANUARY TERM, 1875.

Error to Bay Circuit.

CLAY FIRE AND MARINE INS. CO., *Plaintiff in Error,*

vs.

HURON SALT AND LUMBER MANUF. CO. FOR THE USE AND BENEFIT OF GEORGE C. SMITH, *Defendant in Error.**

That the declaration counted on a policy of a corporation existing under the laws of another State, and the execution of the policy had not been proved, was not a valid objection to its admission as evidence by the insured.

Nor was it incumbent on the insured as preliminary to introducing the policy, to show that the company was not acting illegally in insuring.

Nor was it fatal to the admission of the policy that a special count in the declaration stated, under a videlicet, that the contract was made in B., whereas the true place was in another State, where nobody was misled.

The Michigan statute against unauthorized insurance does not prohibit an unauthorized company from contracting in another State for insurance on Michigan property.

The policy insuring P., a corporation, described the property as "their three story," etc. "Loss, if any, payable to S., as his interest may appear." The policy contained a provision that it should be void if the insured did not own the property by a sole unconditional and entire ownership, so expressed in the written portion.

Held, that where the whole declaration was constructed on the theory that the corporation plaintiff possessed the entire interest, the introduction of the expression, "for the use and benefit" of S. in the declaration had no effect to vary the issue from what it would have been if the phrase had been omitted.

Held, that the occurrence of the phrase in the policy did not necessitate proof of any interest by S. in the insured property.

Held, that the possession of a bare legal title by the insured, while the equitable estate and interest, and the right to be immediately invested with the legal title, belonged to another, was not the unconditional ownership contemplated in the policy and avoided the insurance.

Judgment reversed.

HOLMES; HAYNES and STODDARD, *for Plaintiff in Error.*

McDONALD & COBB and HOYT POST, *for Defendant in Error.*

* To appear in 30 Mich.

GRAVES, J.

The last named company sues the former to recover on a policy of insurance against loss by fire, and having succeeded in the court below, the insurance company now seek a review by this court of several rulings at the trial. The trial was before a jury, and the re-examination is asked upon a bill of exceptions brought up on writ of error.

The suit was begun by declaration which embraced the general counts in assumpsit and one special count, in which the defendant in error assumed to set forth the true main features of the contract of insurance. The commencement of the declaration was in these terms: "County of Bay, ss. The Huron Salt and Lumber Manufacturing Company, a corporation formed and existing under the laws of the State of Michigan, plaintiff herein, for the use and benefit of George C. Smith, by McDonald & Cobb, its attorneys, complains of the Clay Fire and Marine Insurance Company, a corporation formed and existing under the laws of the State of Kentucky, defendant herein, of a plea of trespass on the case on promises, filing this declaration as commencement of suit."

This statement in the commencement that the Salt and Lumber Company was plaintiff, was not departed from in setting out the cause of action. The general counts were in the usual form, and the special counts set out a contract between the companies and averred no transfer.

The special count alleged that "on the 2d day of April, A. D., 1873, to wit at Bay City, in said County of Bay, the defendant made a certain policy of insurance in writing, by and through its agent, H. Martin, whereby the said defendant, in consideration of the sum of thirty-seven dollars and fifty cents, to it paid by the plaintiff, did insure the said plaintiff against loss or damage by fire to the amount of fifteen hundred dollars on its one-story frame salt block, and on kettles, pumps, steam-pipes and such tools and implements as were used in the manufacture of salt, contained therein, situated about forty feet from its steam saw-mill at Salisbury, Bay County, Michigan, (said plaintiff being the owner and in possession of said property,) and the said defendant, in consideration of the said sum of thirty-seven dollars and fifty cents, did in said policy of insurance promise and agree with the said plaintiff to make good to the said plaintiff all such immediate loss or damage by fire, not exceeding in amount the said sum of fifteen hundred dollars, on the interest of the plaintiff in said property, as should happen to the said property from the second

day of April, A. D. 1873, at twelve o'clock, noon, to the second day of April, A. D. 1874, at twelve o'clock, noon, the amount of such loss or damage to be paid sixty days after due notice and proof of the same, according to the terms and conditions of said policy."

The court then proceeded to aver that "On the 22d day of June, A. D. 1873, the said policy or contract of insurance being then in full force, and the plaintiff being then the owner and in possession of said property," the same was burned, whereby "the plaintiff" suffered loss and damage to wit, $30,000, of which the defendant had due notice and proof, etc., in accordance with the provisions of the policy, and that by reason of the premises the defendant, to wit, on the 1st day of October, A. D. 1875, at Bay City in said County of Bay, became and was indebted to the plaintiff, etc., according to the terms of said contract, and in consideration thereof, then and there undertook, and faithfully promised to pay to said plaintiff, etc.; that nevertheless the defendant neglects and refuses to pay said plaintiff, etc., to the great damage of the plaintiff," etc.

No copy of the policy appears to have been given with the declaration, but it may be well, before alluding to the defense, to notice some of its provisions. After describing the property insured as "their one story frame salt block," etc., and stating that other insurance was permitted, it went on to say: "Loss payable to George C. Smith, of Chicago, Illinois, as his interest may appear;" and further on it contained the following clause: "If the assured is not the sole and unconditional owner of the property insured, or (if said property be a building or buildings,) of the land on which said building or buildings stand, by a sole unconditional and entire ownership and title, and is not so expressed in the written portion of the policy, then and in every such case this policy shall be void."

The instrument concluded as follows: "This policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the only authorized agent of the Clay Fire and Marine Insurance Company at Chicago. In witness thereof the said Clay Fire and Marine Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Newport and State Kentucky. Wm. Robson president; D. Wolf, secretary. Countersigned at Chicago, Illinois, this 2d day of April, 1873. H. Martin, general agent." The ownership of defendants in error, or their interest, was no otherwise expressed in the policy than by the pronoun "their" in the description.

The insurance company pleaded the general issue to the declara-

tion, without any affidavit denying or questioning the execution of the policy, but added a notice that they would prove and insist that when the policy mentioned in the declaration was issued the plaintiff corporation was not the entire unconditional and sole owner of the property insured; also that the interest of the plaintiff corporation in the property was not expressed in the written part of the policy whereby the policy was void on delivery; that on or about the 1st of April, 1868, the plaintiff corporation, by Charles M. Smith, its president and agent, by writing in his or its name, sold the property described and intended to be insured by the policy in question, to John W. Babcock, who went into possession under the contract, and at the date of the policy, and when the loss happened, was equitable owner and entitled to conveyance and possession; that the plaintiff corporation was fully paid by Babcock for the property, and at the date of the policy, and at the time of the alleged loss, had no interest except that of trustee of the naked legal title; that none of said facts were described in the application or expressed in the written part of the policy; that the contract of sale was made and executed in the individual name of said Charles M. Smith, but was made by him with the knowledge and assent of the plaintiff corporation, and for its benefit; that said Babcock paid for the property within the times as written or as extended by said Charles M. Smith on behalf of his corporation, and that said George C. Smith had full notice of all the facts; and further, that said George C. Smith had no insurable interest at the date of the policy, or at the time of the loss, and that no proof or statement of any interest of his in the property, or in the policy, or in the money claimed in the policy, has been furnished to the insurance company. The plaintiff corporation, at the trial, first produced Mr. Rogers as a witness and he testified that he took charge of the plaintiff's business on the fifth of September, 1872, and at the same time took possession of the insured property, and so continued until it was destroyed by fire on the 21st of June, 1873; that he operated the property during that interval in the interest of the plaintiff corporation, and knew of the insurance, and he identified the policy.

This instrument was then offered in evidence, when the insurance company objected on three grounds. First, that the declaration counted on a policy made by a corporation formed and existing under the laws of Kentucky, and the execution of the policy had not been proved. Second, because no proof had been given of authority of such company to do business in this State; and third, that the policy did not appear to have been made in Bay County, but

in Illinois. The court admitted the policy against these objections and an exception was taken. It is not important to pass upon these objections, but I shall briefly notice them. The law is distinctly settled against the ground first stated. The Peoria Marine and Fire Ins. Co. vs. Perkins, 16 Mich., 380. The People vs. John, 22 Mich., 461.

The second ground is not explicit, but we suppose the point intended was that it was incumbent upon the plaintiff below as a preliminary to the introduction of the policy to show that the defendant insurance company, when it assumed to insure the property in question, and took from the assured the money for so doing, was not acting in plain derogation of our laws, and at the same time committing a gross fraud. The statement of the proposition contains its own refutation. It was not admissible for the insurance company to insist upon a preliminary express showing by its contractor that in insuring it acted honestly, and where it was lawful for it to act. It was to be presumed, and certainly as against itself in the absence of contrary proof, that in making the insurance it acted at a place where it would be lawful rather than unlawful, and in good rather than in bad faith. In saying thus much it is not admitted that the point could be maintained upon any reasonable theory, or any proper view of the facts, and it is not deemed needful to spend time multiplying reasons against it. The third ground of objection is obscure. We can only suppose that it was meant to claim that the contract was alleged to have been made in Michigan, whilst the instrument offered purported to have been made in Illinois, and hence there was a variance. The point is extremely technical and does not commend itself to the court.

Whenever the contract was made, the right to sue upon it was not local. That right was transitory. If in fact, as the objection claimed, the insurance was effected in Illinois, the contract was liable to be sued upon here. But the essence of the objection would seem to be found in the terms of the special count of the declaration. It is there stated under a videlicet that the contract was made at Bay City, in the County of Bay, and a statement of the true place was not inserted before the videlicet.

If the latter had been done the entire ground of objection would have been wanting.

As it was, it is most certain that nobody was misled or surprised. This is evident from the notice of defendant, and from the whole course of the trial, and one rule in regard to declaring on policies was intended to get rid of such refinements in this class of cases.

The ancient doctrine of pleading in regard to venue in transitory

causes of action originating abroad was highly artificial, and stuffed with fictions. Mustyn vs. Fabrigas, and notes, 1 Smith's L. C.; Tidd's Prac., 4th ed., 363; 1 Spencer's Eq. J., 699.

Without laying down any general rule, I am of opinion that the ruling of the court upon the point here afforded no cause for complaint. The policy having been admitted, proof of loss was made, and evidence given, from the records of deeds which served to show that the legal title of the insured property was in the plaintiff corporation, and the case was rested.

The defense then produced John W. Babcock as a witness, who identified and proved the written contract of sale mentioned in the notice annexed to the plea. He also testified that he went into actual possession under the contract on the 3d of April, 1868, and continued in possession until about the 4th or 6th of September, 1872; that he made valuable improvements, and among others built about $7,000 worth of docks.

The defense then offered the contract in evidence, and along with it offered to make proof of the facts stated in the notice of defense as to the equitable title of Babcock. The offer was rejected, and, as would seem, on the broad ground that the retention of the legal title, although Babcock had the complete equitable interest, and was positively entitled to have the legal title transferred to him, was sufficient, and that the right ascribed to Babcock would not be any matter of defense in view of the terms of the policy.

After this rejection the insurance company sought to defend by showing that when it insured, and when the loss happened, it had not complied with our laws, prescribing the terms on which agents of foreign companies may act here, and this was refused. The defense, in a request to charge, also insisted that as by the terms of the policy any loss occurring was made payable to George C. Smith, as his interest might appear, and as the suit was prosecuted for his use and benefit, no recovery could be had without proof of some legal or equitable interest by him in the property insured at the time of the loss. Although the two latter points are not material to the disposal of the case it may be expedient to notice them briefly, because they may be agitated hereafter.

In regard to the first of these it is sufficient to say, without looking further or seeking other grounds, that the contract of insurance here purported to have been made in another State, and that the defense explicitly assumed such to be the fact. The contract was personal and not real, and, although it had relation in a certain sense to realty,

it was not operative upon the estate, but merely as an agreement to pay money in case the erections or other property specified should be damaged by fire. The circumstance that the liability to pay was made to depend upon an event to real property here, did not make the contract a Michigan contract, or in any legal sense make this State the place of performance by the insurance company, and the further circumstance that the contractee was a Michigan corporation did not impress upon the contract the quality of locality so as to cause our laws in regard to business done here by agents of foreign companies to affect it in point of law.

The statute does not assume to forbid the making of contracts of insurance abroad upon property here, nor does it assume to invalidate such agreements. What it enacts is, that "it shall not be lawful for any person or persons to act within this State as agent or otherwise in prosecuting or receiving applications for insurance, or in any manner to aid in transacting the business of fire or marine insurance for any company, association or individual, not incorporated in this State without," etc. § 1683, C. L. Another provision provides for punishing by fine any person violating this law. § 1689, C. L. The law applies to operations within the State, and against the representatives of foreign incorporated and unincorporated interests, and of domestic unincorporated ones. The defense suggested, attempted on the ground suggested by the offer of proof, is a very ungracious one, and it is more than questionable whether it could have prevailed, even if the contract had appeared to be a Michigan contract. Without assuming to decide the point, and without touching upon the possibility of shutting out the defense as an attempt by the insurance company to take advantage of their own misconduct, it lies in our way to remark that there is much room for claiming that our statute was not intended to make void at the election of insurers, and does not make void at their election, such insurances as they may effect here without having complied with the regulations in question.

The point raised by a request to charge as before mentioned is not well taken. The proof was silent as to any right or interest in any one but the plaintiff.

It is not very plain what object the pleader had in introducing the expression, "for the use and benefit of George C. Smith, into the declaration. It appears only in the commencement, and then only as an adjunct to the description of the plaintiff. No assignment is set forth, and there is no allusion in the body of the declaration to any other interest or title than such as the plaintiff held. On the contrary,

the whole declaration was constructed on the theory that the corporation plaintiff possessed the entire interest, and was exclusively entitled. As matter of pleading the epithet in question would seem to have no force whatever. It might possibly be contended that in point of fact, as between the plaintiff and Smith, the latter was entitled, by some arrangement short of an assignment, to the benefit of what might be recovered, and that this phrase was intended as notice on the face of the record, to the insurance company, that the suit was for his benefit, so as to preclude any collateral dealing between the two corporations to his prejudice. Be this however as it may, the two companies were the litigants upon the record, and the expression in question was not of force to make the issue different from what it would have been if the phrase had been left out.

The occurrence in the policy of the direction to pay to George C. Smith, as his interest might appear, did not necessitate proof of any interest by him in the insured property. The insurance was not made with him, but with the Salt and Lumber Company. They paid the consideration and were the promisee. The expression in the policy in regard to paying to Smith as his interest might appear seems to have been chosen as a mode of appointing that payment should be made by the insurance company to him to the extent of some claim he had, or was expected to have, against the assured. Bates vs. Equitable Ins. Co., 10 Wall., 33. Whatever might be paid to him consistently and in accordance with his claim against the assured which this appointment contemplated, would be a payment to the assured.

No interest of Smith appears to have been contemplated as the subject of insurance, and no interest by him in the property insured was made a condition of the right of the assured to assert a remedy on the policy. His chance and the right of the assured were not intended to depend upon his having an insurable interest in the property, but upon the requisite ownership of the assured.

We come now to the offer of the defense to prove that Babcock held the entire equitable estate and interest, and the right to be immediately invested with the legal title, and that this bare legal title then due to Babcock was the only badge of ownership which the assured possessed.

As the offer was refused, we must consider the case as though the fact proposed to be shown had been established; and it must borne in mind that the question is not whether the Salt and Lumber Company, as lawful possessor for the time being of the bare legal title,

had a scintilla of insurable interest, but it is whether the claim which insisted that it should be stated in the policy, if the fact were so, that the assured was not the sole and unconditional owner by a sole unconditional and entire ownership and title, was satisfied by the facts as we must assume them to have been under the offer of proof and the statement in the policy that the property was "their" property.

If it was not, then the policy by its own terms was made ineffectual, and the plaintiff corporation was not entitled to recover.

After much consideration I am unable to concur with the Circuit Court upon this point. No reasonable interpretation of the policy has been intimated, or has suggested itself, which will harmonize the requirements of the policy, the statement as to ownership in the clause describing the property and the condition of things contemplated by the offer of proof.

The express statement in regard to ownership was not, when viewed in connection with the subsequent clause, a correct statement. It gave no intimationof any outstanding right in Babcock, or in anybody else. It conveyed no other idea than that of complete and exclusive ownership by the Salt and Lumber Company. There was no qualification whatever.

The matter will appear in the clearest light by reading the statement in the beginning of the policy, that the property was "their" property, in connection with the clause before quoted, requiring it to be stated, if true, that it was not their property by entire ownership and title, etc. When thus examined the policy will be seen to import that the Salt and Lumber Company was not merely owner, but owner by a sole unconditional and entire ownership and title.

At this very time, however, as must be conceded for the purpose of the question, Babcock's right was in every way so ample and complete that a statement in the policy that the property belonged to him would have been warranted. Certainly it cannot be claimed that a party holds by a sole unconditional and entire ownership and title, when in truth another at the same time has so complete a right and interest that he may be rightly considered owner.

The point appears too clear to justify elaborate discussion. Among a number of cases having some bearing, only two will be noticed.

The first is the Columbian Insurance Co. vs. Lawrence, in 2 Pet., 25. The question arose there upon the offer of insurance by the applicants, the policy having followed it. The property was mentioned as "belonging to Lawrence & Poindexter."

It was in fact occupied by them, but they held one half of one third

under a lease for three lives renewable forever, and one half of the other two thirds as mortgagees, and the other moiety under a contract of purchase which had not been complied with. The court, by Chief Justice Marshall, said: "The offer describes the property as belonging to Lawrence & Poindexter, and states it afterward to be the stone mill. It contains no qualifying terms which should lead the mind to suspect that the title was not complete and absolute," and he afterward adds, "the assured, then, have not proved such an interest as is described in the original offer of insurance."

The other case is Hough vs. City Fire Insurance Company, in 29 Conn., 10.

There the applicant, Samuel H. Hough, described the property as "his dwelling-house," and it was likewise so described in the policy.

The policy contained the following condition: "If the interest in the property to be insured is not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." It appeared at the trial that Hough's ownership was similar to that claimed for Babcock in the case at bar. The legal title was in another, with whom Hough had made a part contract to purchase for a fixed price. He had agreed absolutely to pay, had paid part, had entered as purchaser and made valuable improvements.

The court were of opinion that as he had a right to the property, and the power by law to enforce that right, it might properly be denominated his.

Among other observations the court said: "The evidence conduced to prove that the plaintiff's interest in that property was an absolute interest. That is an absolute interest in property, which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent; and by this contract with Eliakim Hough, and its part performance, the plaintiff had acquired a right to the whole property, of which he could not be deprived without his own consent. So, too, he is the owner of such absolute interest who must necessarily sustain the loss if the property is destroyed."

If Hough, as held in this case, had an absolute interest, and was so far owner that the property could rightfully be described as his property in an application for insurance, and in a policy, most clearly Babcock, if in the position contemplated by the offer of proof, held an absolute interest, and was in a situation which would have justified describing him as owner in the policy in suit, and the Salt and

Lumber Company was not at the same time holding by a sole unconditional and entire ownership and title.

The view taken disposes of the case, and renders a new trial necessary. The judgment should be reversed with costs, and a new trial awarded.

CAMPBELL and COOLEY, JJ., concur.

SUPREME COURT OF IOWA.

JUNE TERM, 1875.

Appeal from Scott Circuit Court.

ROYAL INS. CO., OF LIVERPOOL, *Appellant*,

vs.

L. S. DAVIES, ADM'R OF J. DAVIES, *Appellee.*

An agent and his surety bound themselves, their heirs, executors, and administrators, jointly and severally, the condition being that the agent should promptly pay his balances during the time he officiated as agent.

Held, that the heirs and legal representatives of the surety were bound for deficiencies in the agent's accounts occurring during his agency after the death of the bondsman.

Judgment reversed.

The plaintiff's petition states that on or about January 26th, 1872, W. F. Kidder, as principal, and John L. Davies, as surety, executed and delivered to the plaintiff their bond as follows:

"Know all men by these presents, that I, William F. Kidder, of the town of Davenport, county of Scott, State of Iowa, as principal and John L. Davies, of the town of Davenport, county of Scott, State of Iowa, as surety are held and firmly bound unto the Royal Insurance Company, of Liverpool, a corporation authorized by act of Parliament and located at Liverpool, England, in the sum of one thousand dollars, to be paid unto the said company, their certain attorneys or

assignees, to which payment, well and truly to be made, we jointly and severally, bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

"Sealed with our seals and subscribed at Davenport, Iowa, this 26th day of January, 1872.

"The conditions of this obligation are such, that whereas the above named W. F. Kidder has been appointed by the aforesaid company, their agent for the city of Davenport, county of Scott, and State of Iowa, during the pleasure of the manager and attorney thereof, by reason whereof and as such agent he will receive into his hands and possession divers sums of money, policies, chattels and other effects, the property of said company, and is bound to keep true and accurate accounts of said property and of receipts and disbursements, and to deliver, account for, and pay over the same when demanded and directed according to the instructions of the directors of said company:

"Now, therefore, if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and shall well and truly perform all and singular the duties as agent of said company as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as said agent, to his successor in office, or to such other person as the said company or its authorized officers may direct, then this obligation shall be null and void, otherwise remain in full force and virtue. W. F. Kidder, John L. Davies.

Signed, sealed and delivered in presence of H. Goodrich."

It is further alleged that Kidder was duly appointed agent of plaintiff, January 26th, 1872, and continued to act until his death, December 19, 1872; that at the time of his death he was indebted to the plaintiff in the sum of $219.58, for premiums collected by him in October, 1872, and that plaintiff had expended $11.50 in an effort to collect said sum from the estate of said Kidder.

The defendant answered admitting substantially the allegations of the petition, and alleges as an affirmative defense thereto, that John L. Davies, the surety, died on the 23d day of April, 1872; that thereby his estate was discharged from any further liability on said bond, and that up to the time of his decease the conditions of said bond had

not been broken, but that the breaches thereof alleged in the petition happened after the death of said Davies.

To this answer the plaintiff demurred, which being overruled and plaintiff standing thereon, judgment was rendered for defendant. Plaintiff appeals.

BROWN, CAMPBELL & GOULD, *for Appellant.*

DAVIDSON & LANE, *for Appellee.*

MILLER, C. J.

The question presented in the record is whether the death of Davies, the surety, in the bond, operated in law as a discharge of his estate from liability for the default of the principal, happening after the death of the surety; in other words, the death of the surety operated to terminate the obligation assumed by him when he executed the bond on his part. It is not claimed on the part of the defendant that the liability of the surety, or his obligation as such, was terminated by reason of any act or omission of the plaintiff, but it is claimed that the obligation of the surety ceased and the bond became defunct, as to every act done after the death of the surety, by reason of such death alone. By the terms of the bond the surety, Davies, bound himself, his "heirs, executors and administrators" as surety for his principal, Kidder. This language shows no intention to limit the liability to the lifetime of the surety; on the contrary, it imports that the liability shall continue after his death and bind his heirs and personal representatives. This intention is further manifested by the subsequent language of the bond in defining more particularly the obligation assumed by the obligors therein. It is, that, "if the said W. F. Kidder shall promptly pay to said company the amounts received from time to time, and shall well and truly perform all and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, for and during the time he officiates as said agent * * * then this obligation shall be null and void, otherwise, remain in full force and virtue." The language clearly shows that the obligation of the sureties to the bond was to continue for and during the time Kidder, the principal, should officiate as agent of the company. Of course the death of Kidder would terminate the obligation of the sureties, for thereby the agency of Kidder would terminate. The terms of the bond continue the liabili-

ty of the sureties as long as Kidder should act as agent of the company, and this liability, likewise by the terms of the bond, extends to the heirs and legal representatives of the sureties. They are bound by as clear and unmistakable language as that which binds the sureties personally. Instead of there being any intent manifested to limit the obligation of the sureties to the terms of their respective lives, it is clearly shown that it was intended the obligation should extend to and bind the heirs and personal representatives of the sureties, and that binding force of the bond, and the sureties' liability should continue as long as Kidder should act as the agent of the company.

No case exactly in point has been cited by appellant, and no authorty whatever is cited by appellee. We are clear, however, that upon the general principles regulating contracts, and the terms of the bond in this case, the death of the surety, Davies, did not terminate the binding force of the bond upon his heirs and legal representatives for the failure of Kidder, while he was the agent of the plaintiff, to pay over money coming into his hands as such agent. The case of Gordon vs. Calvert, 4 Russ., 581, cited by appellant, supports the view we have here taken.

The court erred in overruling the plaintiff's demurrer to the answer.

Reversed.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas of Luzerne Co.

AMERICAN LIFE INS. AND TRUST CO.

vs.

ROSENAGLE AND WIFE.*

1. Where a deposition is taken in a foreign country, evidence derived from letters not produced by the witness is competent, if the non-production is reasonably accounted for.
2. The evidence of the custodian of church records in Baden, as to the manner of keeping the same, is competent evidence of authenticity, and so is an abstract of pedigree taken therefrom and proved by the oath of such officer.
3. In questions of pedigree and identity, the testimony of relations is competent.

H. M. Hoyt and Isaac Hazlehurst, *for Plaintiff.*

J. Stanley Woodward & M. Abbott, *for Defendant.*

Woodward, J.

The first error assigned in this record is based on the rejection of that part of the deposition of Francis Joseph Debold, in which he said: "By the letters which Rosenagle and wife addressed to me from Scranton, I came to know that she (Mrs. Maria Katherine Kring) died in the said town. Rosenagle and his wife did write to me many times, but I have not now their letters." The decision of the court below was apparently controlled by the rule stated in 1 Greenl. Ev., § 88, that "if a witness, being examined in a foreign country upon interrogations sent out with a commission for that purpose, in one of his answers states the contents of a letter not produced, that part of the deposition will be suppressed, notwithstanding, he being out of the jurisdiction, there may be no means of compelling him to produce the letter." The authority for the text in

* Opinion May 10, 1875. From the Philadelphia *Legal Intelligencer.*

Greenleaf was the case of Steinkeller vs. Newton, 9 Carr. & P., 313. In rejecting the statement of the witness, Tindall, C. J., said: "I think it would be a most inconvenient and a most dangerous rule to hold, that it should rest in the option of the party examined, whether he will produce the document or not. We have no power to compel the witness to give any evidence at all, but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence." It is to be observed that in that case no explanation whatever was given of the absence of the paper. Here, the witness said he had not preserved the letters of which he spoke—in his own words, he had "not now their letters." The defendants below were resisting a recovery on a policy of insurance on the life of Maria Katharine Kring, which it was alleged had been obtained by false and fraudulent representations by the plaintiffs. The immediate question related to the identity of Mrs. Kring, who had been represented in the application as having been born in 1807, and who was alleged by the defendants to have been born in 1798. The actual date of her birth was offered to be shown by other proof, and the establishment of the identity of the Maria Katharine Hermann who was born in the parish of Odenheim on the 17th of October, 1798, with the Maria Katharine Kring, who died in Scranton on the 19th of April, 1867, was of vital importance to the defense. The fact stated was one which the witness had learned through a correspondence with his cousin Mary Ann Rosenagle, and her husband, who were the plaintiffs. No question was made as to the authenticity of the letters. The witness had personally known both Mrs. Rosenagle and Mrs. Kring. The stringency of the rule requiring search for documents and proof of their loss, in order to make parole evidence of their contents admissible, is proportioned always to the character and value of the documents themselves. These letters were between relatives, and do not appear to have had any such obvious importance as to require care for their preservation. Slight proof of loss, therefore, was sufficient. This principle has uniformly been applied, where documents which from their very nature would have transitory interest have been in question. In the United States vs. Doebler, 1 Bald., 519, on the trial of an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivery of one note, it was held that parol evidence of the contents of a letter from the defendant to an accomplice on the subject of counterfeit notes, for which the accomplice could not account, and had not searched, but believed to be lost, was admitted. The principle extends to docu-

ments of more grave significance, if it appears, when the witness is examined, that no rational motive for keeping them existed. A deposition will not be rejected became the witness speaks of papers not produced, if it appears that the papers are such as would not probably be preserved for so great a length of time as had elapsed when the testimony was taken, or are not in the possession or power of the witness or the party offering the deposition: Tilghman's Executors vs. Fisher, 9 Watts, 441. The principle is especially applicable to the contents of family letters proved by a witness in a foreign country. The evidence should have been admitted.

The court rejected that part of the deposition of Alexander Bauer, in which he said the church records at Odenheim, as well as in the whole of the Grand Duchy of Baden, "are now kept by authority of the Badish common law, established since the year 1810, and enacted by the Grand Duke then being, and of the edict of the 29th of May, 1811. Before this time they were kept according to the laws of the country then established." This ruling is the ground of the second error alleged. Mrs. Kring was born before 1810, and as the transcript called Exhibit No. 2, which the defendants offered, contained no entry later than 1805, the significant portion of the rejected paragraph was the last sentence. Why was not the sworn statement that these records, showing the births, baptisms, marriages and deaths of the parish, had been kept before the year 1810, "according to the laws of the country then established," admissible? The witness said he was the Catholic dean and parson at Odenheim, that "these records have already existed many centuries, and each parson receives the church books from his predecessor, which altogether form one continued series;" and that he was the proper keeper and custodian of the records. The law of a foreign country on a given subject may be proved by any person, who, though not a lawyer, or not having filled any public office, is or has been in a position to render it probable that he would make himself acquainted with it: Vanderdunk vs. Thelluson, 8 Q. B., 812. Here the witness was the custodian of records which had existed for centuries, and which he swore had been kept in accordance with the laws in force when the entries were made. It was his duty to know, and he testified that he did know, the law relating to the records in his charge. His knowledge was just that which the responsible head of a public office would be assumed to have of the law which had controlled the past operations of his department; just that which would be imputed to a surveyor-general in the year 1875 of the law that governed the land office in the year

1800. His position and the facts to which he testified made the rejected evidence competent.

The third error assigned consisted in the striking out, on demurrer, of the transcript made by Parson Bauer from the parish records, showing the dates of the births of Mrs. Kring and her brothers and sisters, children of Joseph and Elizabeth Hermann. This should have gone to the jury. It is manifestly a tabulation of several entries, but the witness had sworn that he had extracted the details from the records. It was evidence entirely aside from the meaningless certificate signed "Fischer vde Scheider," at the end. If its competency depended upon that, a literal exemplification of each entry would have been requisite; but it depended on the oath of the witness that he had copied the entries in the transcript. "Where the proof is by a copy, an examined copy duly made and sworn to by any competent witness is always admissible." 1 Gr. Ev., § 485. That the facts embodied in the transcript were competent, is clear from the cases of which Hyam vs. Edwards, 1 Dall., 2, and Kingston vs. Lesley, 10 S. & R. 383, are representative.

The error specified in the fourth assignment was the rejection from the deposition of Francis Joseph Debold, of his statement of the birth of his uncles and aunts, with the exception of that of his aunt Mrs. Kring. The purpose of the defendants was to show that the facts relating to his uncles and aunts, as stated by the witness, were identical with the facts relating to the children of Joseph and Elizabeth Hermann, as stated by Parson Bauer, the testimony of each fixing the 17th of October, 1798, as the date of the birth of Maria Katharine Hermann (Mrs. Kring). The question was one of identity, and it was sought to establish this by proof of Mrs. Kring's pedigree. The term pedigree includes not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. These facts may be established by general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree. 1 Greenleaf's Evid., §§ 103, 104. For the purposes of this case this evidence was legitimate.

What is called in the record the "exemplification of the common and statute laws of Baden," was properly rejected. The instrument declared "that the sections of the common and statute laws of the Grand Duchy of Baden, and of the statute of the Grand Duke, passed on the 29th of May, 1811, contained in the above extracts, agree verbally with the copies of these laws as they are recognized by the courts." The extracts themselves are not on the paper books. At the

foot of the paper are the words: "The Circuit and Supreme Court of the Grand Duchy, section of the Common Pleas. Berger." And the seal of the court is affixed. Another indorsement follows in this form: "I certify the above document. Carlsruhe, October 31st 1868. Ministerium of the Exterior, Grand Duchy of Baden. Bortch. Yost." The seal of the Secretary of Foreign Affairs is added to this remarkable paper. And then the United States Consul certifies that Mr. Leopold Yost, whose name is subscribed to the paper annexed, is chief clerk of the Department of Foreign Affairs for the Grand Duchy of Baden, duly commissioned to execute such acts, and that his signature is genuine. This answers to fix the status of Mr. Yost, but it does not help to explain the authority of "Berger," nor what the document which he signed was certified by Yost to be. The exemplification proves nothing, except certain peculiarities of official form. The fifth assignment of error is unfounded.

The sixth specification relates to a mere casual detail of the trial, which can have no future significance and requires no remark.

Judgment reversed, and a *venire facias de novo* awarded.

CASES DECIDED IN THE LOWER COURTS.

SURVEY AND DESCRIPTION.—WARRANTY.

Supreme Court of New York.—First Department.—General Term, May, 1875.

JOHN STEWARD, *Respondent*,
vs.
PHENIX FIRE INS. CO., OF BROOKLYN, *Appellant*.

Plaintiff applied for insurance to the People's Ins. Co., and for that purpose a survey was presented and filed in the office of that company. The People's procured a policy for a portion of the insurance in the Phenix, which contained a condition that when a policy is issued upon a survey and description, they shall be deemed a part of the policy, and a warranty on the part of the insured, and a further clause that it was made and accepted in reference to the terms and conditions annexed, which were to be resorted to to explain the rights and obligations of the parties.

Held, that the reference to the survey was not merely for the purpose of securing a definite description, but the insurance was based upon the survey.

This appeal is from a judgment recovered on the verdict of a jury.

ALVIN C. BRADLEY, *for Appellant.*

WALDO HUTCHINS, *for Respondent.*

DANIELS, J.

The verdict on which the judgment appealed from was entered was directed by the court for the sum unpaid on a policy of insurance issued by the defendant to the plaintiff, on his flouring mills, situated at Mackford, in Marquette County, Wisconsin. It appears that he applied for insurance in the "People's Insurance Company," of New

York, and for that purpose a survey was presented to and filed with the company. It did not issue the insurance applied for itself, but took $2,000 of the amount, and procured a policy for the same amount from the defendant, and another for a like amount from a third company; but all the policies were accepted and received by the plaintiff. That which was issued by the defendant contained the statement that it insured the plaintiff against loss or damage by fire to the amount of $2,000, on his four-story stone building, 30 by 60 feet, shingle roof, and on fixed and movable machinery therein, occupied as a flouring mill, situated at Mackford, Marquette County, Wisconsin, and known as the Mackford Mills, per survey No. 18,611, filed in the office of the People's Insurance Company, N. Y. By the thirteenth condition of insurance attached to the policy, it was declared that "when a policy is made and issued upon a survey and a description of certain property, such a survey and description shall be taken and deemed to be part and portion of such policy, and warranty on the "part of the assured;" and the policy contained the clause, that it was made and accepted "in reference to the terms and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." The survey referred to in the policy was produced upon the trial, and the defendant's counsel proposed to prove that it was taken by a person connected with the People's Insurance Company of New York, and by him shown to the secretary of the defendant, who was requested to issue a policy upon it, and that pursuant to that request the policy was made out and issued, and that it was done on that survey only. It was conceded that it was not expected to connect the plaintiff with the statement, and thereupon the court rejected the evidence, and the defendant's counsel excepted. The survey referred to in the policy was then offered in evidence by the defendant's counsel and excluded by the court, and to the decision so made the defendant's counsel excepted.

The survey seems to have been excluded upon the construction that the reference was made to it in the policy only for the purpose of securing a definite description of the property insured; but as the preceding part of the policy contained a complete description of the property before any reference to the survey was made, that construction cannot be sustained. The clause in the policy required a broader construction in order to secure the effect for it which the ordinary import of the words made use of indicated to be intended by it, and

that was, that the defendant insured the plaintiff against loss by fire to the property described per survey No 18,611, filed in the office of the People's Insurance Company, N Y.—not merely that it was as described in that survey, but that the insurance was based upon it, and that construction is confirmed by the condition referred to, which made the survey a part of the policy and a warranty of the truth of its statements.

The case in this respect does not appear to be capable of any substantial distinction from that of Leroy vs. Market Ins. Co., 39 N. Y., 90, where it was held that a similar reference and condition rendered the survey a part of the policy, and that principle was re-affirmed in the same case on another occasion by the same court. 45 N. Y., 80. See also Ripley vs. Ætna Ins. Co., 20 N. Y., 136.

The case of Clinton vs. Hope Ins. Co., 45 N. Y., 454, is relied upon in favor of the plaintiff as an authority establishing a different principle ; but it does not conflict with the other cases referred to upon this subject, for although the policy which was there under consideration mentioned the survey of the property as being on file in the office of its agent at Utica, the condition declaring the survey to be a part of the policy, described the one it referred to as being on file in the office of company, and that was at Providence, in Rhode Island. No survey was on file in that office, and consequently none was made a part of the policy.

The present case affords no such avenue for escape from the construction already indicated. The policy and its conditions form but one instrument or contract, and by it the intention was clearly shown that the survey on file in the office of the People's Insurance Company should form a portion of the agreement made for the insurance of the plaintiff's property, and that was entirely consistent with the object and design of the plaintiff in making the survey itself. For apparently it was supplied and furnished as a basis of insurance to the amount of $6,000, and it was used to accomplish that object, not precisely as it was expected to be, by a policy for the entire amount from the People's Insurance Company, but by three aggregating that amount, issued on the faith of the statements contained in the survey. And by the acceptance of the policies the plaintiff ratified the departure so made from the original plan of insurance.

It was error to exclude the evidence and survey offered by the defendant, and for that the judgment should be reversed and a new trial ordered, with costs to abide the event.

SUICIDE.—FORFEITURE OF POLICY.

Common Pleas of Crawford County, Pennsylvania.

EMILY L. STRATTON
vs.
NORTH AMERICAN MUTUAL LIFE INS. CO.

The policy provided that if the insured died by his own hand it should be void. *Held*, that if he committed suicide knowing and intending the physical effect and result of the act by which he died, the policy is forfeited and void.

Action of debt on a policy of insurance taken out by Edwin W. Stratton, for the benefit of his wife, to which the defendant pleaded payment, with leave, etc.

The policy was for $5,000, and dated May 5th, 1870, and renewed annually till May 5th, 1873, and it was proved that Stratton died by his own hand Nov. 30th, 1873, by cutting his throat with a razor. Evidence was also given tending to show that he had seriously and permanently injured his health and induced delirium tremens by the use of intoxicating drinks. And one instance of delirium tremens was proved by his attending physicians, and another instance when he was very nearly in that state. He was ill some time before his death, and there was evidence that his brain was somewhat affected, that he had pain in the side of his head, a drumming in the ear, full pulse, tongue brown, and occasional hallucinations, such as hearing the voices of absent persons, and yet he conversed naturally.

CHESTER & CHURCH, *for Plaintiff.*
— McCOY, *for Defendant.*

LOWRIE, J.

Gentlemen: By the plea of payment the defendant admits the contract, and its regular renewals, and the death of Stratton, and the

proof of loss; and under it they undertake to show that their duty to him has in some way been discharged, and especially that it was so by his breach of the duties required of him in the policy, to wit: That if he should become so far intemperate as seriously and permanently to injure his health, or induce delirium tremens, or should die by his own hand, then the policy should be void.

By the very terms of the contract, therefore, the duty of the defendant to the plaintiff was to be at an end on the happening of either of these events. There was no other relation between the parties than that which is defined by the contract, and therefore we have no other law to judge them by than the contract properly interpreted. The evidence gives that to you as the rule, and the only rule by which you are to judge them, and you are sworn to judge their acts according to it; and both honesty and self respect require us to respect that rule and to admit no other in deciding upon the effect of their acts in relation to each other. Let no insidious tendency to refinement of interpretation, to which many active minds are prone, tempt you to depart from the reasonable common sense of the contract, for you have no authority to judge the parties by your own disposition, or by a rule which you would think right, but only by the one by which they have agreed to be bound, and as they must reasonably be supposed to have intended it.

Surely we all know the meaning of the expression, "died by his own hand." And surely common sense says that a man who gets his life insured is not insured for his own benefit against his own intentional act of self destruction, however it might be if another should have it insured, or if he should have it insured for the benefit of another. And surely the common law puts this interpretation on other contracts when it says that no man shall take any profit out of his own wrongful act, and that a policy on a house or a ship is forfeited when the loss is caused by the wrongful and intentional act of the insured. And, with this expression in the policy, it is plain that if Stratton committed suicide knowing and intending the physical effect and result of the act by which he died, the policy is forfeited and void, and the plaintiff cannot recover.

No doubt there are cases in which such contracts require a very careful interpretation in order to save them from being changed or forfeited by a too literal reading of them. For a man literally dies by his own hand and in a very usual way, when he occasions his own death by an incautious or unskillful handling of deadly weapons,

or implements involving great mechanical or chemical power, or in trying experiments in the investigation of science.

But life insurances are usually intended to protect against all the natural risks of every occupation, except those arising from acts forbidden by law, and such as are specially excluded in the policy. Under this principle of interpretation, no act is called accidental if it be an intentional act of the owner of the thing insured, or if it be forbidden by law, unless it be excused by some superior necessity, or in the common case of the sacrifice of tackle or cargo on a ship, for the sake of what may be saved thereby. In this case Stratton has no such excuse for turning a really willful act of his own into a mere accidental one.

Now turn to the other conditions of the contract. He cannot hold his policy if he become so intemperate as to injure his health or induce *delirium tremens*. No one can suppose that an intemperate life is as worthy of insurance as that of a temperate man, or that insurers would fail to classify men according to this difference of character.

They think such conditions important and put them into their contracts, even though we may put a low estimate on their importance. But how can any of us differ about their importance? When we see the habit of intemperance started in a man, and the public symptoms of it growing more and more marked, and the shame of it becoming gradually blunted, especially among associates in the vice, and those who made common cause among themselves against all who invade their rights by warning them of their danger; then the course of events carries its own warnings with it.

Blue Mondays multiply; catarrhs, dizziness of head, bilious affections, nervous irritability, and other ailments hurry on and waste much of their time and substance. Perhaps they become alarmed, yet without confessing to others their danger; because they knew not yet the power of a vicious habit, and are yet too proud to admit their humiliation and to accept wisdom from their friends.

They see what their habits are leading to, and warnings crowd upon them, and they stop, it may be, a few days or weeks, with repeated and most earnest resolutions of reform; but their resolutions break down, because long subjection to a vicious habit has deprived the will of its power. Each of such men sees his health, and skill, and respectability wasting away. His wife withering away under a sense of her own loss of social standing by her participation in his fate and of the unknown disgrace and scorn that awaits the children of a

drunken father ; and the declining years of parents are deprived of the crown of rejoicing which comes from worthy descendants. But all this does not cure him. The good that he would, he does not ; but the evil that he would that he does.

Here is insanity, but not an irresponsible insanity. He confesses, deplores, weeps over his sins, humbles himself that others may lift him up. But who can do this? The best the law can do for such a one is, perhaps, hopeless, because too late. It can withdraw from him the means of following his vicious course, by putting him under guardians, but this is usually very ineffectual. As against the insurers there can be no excuse for Stratton for bringing himself into the state in which we find him. If he did seriously and permanently injure his health by intemperance, or did by intemperance induce *delirium tremens*, if he did either, the policy is forfeited and plaintiff cannot recover.

Verdict for defendant.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

AGENT.

§ 172. FIRE.—*Obligation of Surety on the Bond.*—An agent and his surety bound themselves, their heirs, executors and administrators, jointly and severally; the condition being that the agent should promptly pay his balances, "during the time he should officiate as agent.' *Held*, that the heirs and legal representatives of the surety were bound for deficiencies in the agent's accounts, occurring during his agency and after the death of the bondsman.

Gordon vs. Calvert, 4 Russ., 581.

Royal Ins. Co. vs. Davies.

Rep'd Jour'l, p. 865. IOWA S. C.

ASSIGNMENT.

§ 173. LIFE.—*By Married Women under coercion.—Under Act of* 1840.—No valid title to a chose-in-action is acquired by the *bona fide* purchaser from a vendee who has procured it from the vendor by coercion, compulsion, and undue influence.

Loomis vs. Ruck, N. Y. C. A., May 26, 1874.

The assignment of a life policy by a married woman under coercion of her husband is invalid.

In the case of a life policy expressed to be issued in conformity with the New York act of 1840, *Held*, that that act, exempting the policy issued in accordance with its provisions from the claims of personal representatives and creditors of the husband, is still in force.

N. Y. Laws of 1870, ch. 277 ; Laws of 1873, ch. 821.

By it the wife may insure the life of her husband for any sum, and the contract may be continued in favor of the children of the insured wife after her death, and the wife may not traffic with her policy as though it were realized personal property, or an ordinary security for money.

Eadie vs. Slimmon, 26 N. Y., 9.

Subsequent legislation enlarging the powers of married women under the act of 1840, does not supersede it nor give them other power in dealing with a policy issued under it than they had by it.

Barry vs. Equitable Life Ins. Co.

Rep. Jour'l, p. 920. N. Y. C. A.

§ 174. FIRE.—*Of Policy on House and Furniture covers Furniture of Assignee.*—The policy insured A., "his heirs and assigns." A. sold his house to B., and assigned his policy, covering house and furniture and clothing therein, to B., with consent of company indorsed. A. moved his furniture and clothing away, and B. moved his furniture and clothing into the house. *Held*, that insurance is a contract of indemnity, and appertains to the person or party to the contract and not to the thing which is subjected to the risk. It is not a contract running with the land in the case of real estate, nor with the personalty in case of a chattel interest.

Lucena vs. Crawford, 2 Bos. & Pul., (N. R.,) 300; May on Ins., § 1, 2, 6; Bl. Com., 458; Carpenter vs. Ins. Co., 16 Pet., 495; Angel on Ins. § 1; Sadlers Co. vs. Babcock, 2 Atk., 554; Wilson vs. Hill, 3 Metc., 66; Ellis on Ins., 1; Williams on Pers. Prop. *179; 1 Phillips on Ins., 1; Lane vs. Maine M. Fire Ins. Co. 12 Me., (3 Fair.,) 44, 49.

Held, that the assent of the insurer to the assignment constituted a new and valid contract with the assignee to indemnify him in the same manner as the original insured, for which the unexpired premium, already paid, and exemption from liability to the vendor, were sufficient consideration.

Wilson vs. Hill, 3 Metc., 66; Rollins vs. Ins. Co., 25 N. H., 207; Folsom vs. Ins. Co., 30 N. H., 240; Fogg vs. Ins. Co., 10 Cush., 337.

Held, that the policy covered B.'s furniture and clothing.

Cummings vs. Cheshire Co. M. F. Co.

Rep'd Jour'l, p. 832. N. H. S. C.

CONTRACT.

§ 175. FIRE.—*Where made.*—The contract of insurance is personal and not real. It is not operative on the estate, but merely an agreement to pay money in a certain contingency. Neither the fact that the contingency is on Michigan property nor that the insured is a corporation of that State, makes Michigan the place of performance, so as to determine the policy of a company of another State to be a Michigan contract.

Clay Fire and Mar. Ins. Co. vs. Huron Salt and Lumber Mfg. Co.

Rep'd Jour'l, p. 855. MICH. S. C.

§ 176. LIFE.—*By what Law governed.*—In a suit before a New York court, on a contract of a New York company, made in New York, brought by the assignee, who received his assignment in another State from New York through the mails, *Held*, that the case is to be decided by the law of New York.

Barry vs. Equitable Life Ins. Co.

—§ 173.

CORPORATION.

§ 177. FIRE.—*Citizenship of.*—The members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, must be presumed to be citizens of that

kingdom, and as such entitled to have their causes removed to the Federal Circuit Court.

Louisville, Cincinnati, and Charleston Railroad Co. vs. Letson, 2 How., 497; Marshall vs. Baltimore and Ohio Railroad Co., 16 How., 314; Covngton Drawbridge Co. vs. Shepherd, 20 How., 232; Ohio and Mississippi Road Co. vs. Wheeler, 1 Black, 286; Railway Co. vs. Whitton, 13 Wall., 290; Bank of Augusta vs. Earle, 13 Pet., 585.

Terry vs. Imp. Fire Ins. Co.

Rep'd Jour'l, p. 824. U. S. C. C.

EVIDENCE.

§ 178. LIFE.—*Taken in a Foreign Country.*—A deposition taken in a foreign country in which the witness speaks of papers not produced, is competent testimony if the papers are such as would not probably be preserved or are not in the possession or power of the witness offering the deposition.

United States vs. Doebler, 1 Baldwin, 519; Tilgman's Executors vs. Fisher, 9 Watts, 441. Cases of Steinkeller vs. Newton, 9 Carr. and & P., 313, and 1 Greenl. Ev., sec. 88, distinguished.

The testimony of the custodian of foreign church records is competent testimony as to the manner of keeping the same.

Vanderdunk vs. Thelluson, 8 Q. B., 812.

A transcript of the dates of birth made from the records and sworn to by such officer as a correct abstract is competent evidence.

1 Greenl. Ev., § 485; Hyam vs. Edwards, 1 Dall., 2; Kingston vs. Lesley, 10 S. & R., 383.

Facts concerning may be established by general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree, including dates of birth.

1 Greenl. on Ins., § 103, 104.

American Life Ins. & Trust Co. vs. Rosenagle and Wife.

Rep'd Jour'l, p. 869. PA. S. C.

§ 179. LIFE.—*Estimation of by Jury.—Agent's Instructions.—Admission of Policy.*—A jury is not at liberty to disregard the uncontradicted testimony of a witness of fair fame.

Harding vs. Brooks, 5 Pick., 244; Newton vs. Pope, 1 Cowen, 109.

But they are not obliged to blindly follow such testimony, but to judge of its credibility, and act on it only so far as it seems reasonable and true.

Harding vs. Brooks, *supra;* Printing Co. vs. Hickborn, 4 Allen, 63.

Where the uncontradicted testimony as to instructions from the company to its agent, to withhold policies forwarded when the life had meanwhile become unsound, was not so definite and positive that the jury, in the exercise of a sound discretion, might not deem it insufficient to prove that the agent, in withholding a policy, acted under alleged instructions from the company, the court will not interfere with the finding. Such instructions would naturally be of sufficient importance to appear in the printed instructions of the company, and a jury have a right to consider the non-production of such printed instructions in judging of the credibility of the parol evidence offered in its place.

Goodrich vs. Weston, 102 Mass., 363.

Where the answer denied the delivery of the policies only, but there was no denial of the execution or the signatures, *Held*, that the policy was on its face competent evidence, and the refusal to exclude it for want of proof of the signatures of the officers under the general objection, as "incompetent and immaterial," is not error.

Gen. St. Minn., ch. 73, § 82, Laws, 1867, ch. 67; 18 Minn., 448; Sargeant vs. Kellogg, 5 Gilen, 280; Buntain vs. Bailey, 27 Ill., 406; Rindskoff vs. Malone, 9 Iowa, 540; Atkins vs. Elwell, 45 N. Y., 753.

Schwartz vs. Germania Life Ins. Co.

Rep'd Jour'l, p. 924. MINN. S. C.

MISREPRESENTATION.

§ 180. LIFE.—*By General Agent voids the Policy.—Insured entitled to a return of Payments.*—It appeared from the evidence that the insured were induced by the general agent to take out policies on the ten year life plan, on the representation that after the fourth year the notes would be successively canceled by dividends, and that after two annual payments they would be entitled to paid-up participating policies for as many tenths, on equally favorable terms. On finding, after the fourth annual pay-

ment, that the first note had not been canceled by the dividend, paid-up policies were demanded of the agent in accordance with the understanding Instead of participating policies, simple paid-up policies for reduced sums, together with the notes, were returned to them, which were repudiated after discovering their true character. *Held*, that if participating policies had been returned, as demanded, it would have been a waiver of all questions of fraud in the procurement of the first policies by the agent. But the insured had a right to decline a subsequent offer of participating policies fron the company. *Held*, that necessary ignorance of the agent as to the future dividends of the company did not relieve his representations of their fraudulent character.

Knuckolls vs. Lea, 10 Hum., 577.

Held, that the act of receiving the paid-up policies accompanied with an immediate repudiation of them, was not a waiver of the rights of insured to rely upon the fraud in the original transaction.

Knuckolls vs. Lea, 10 Hum., 582.

Held, that if the alleged misrepresentation had arisen through the agent's reference to another class of policies, the contracts were invalidated by a mutual error.

Story, Eq., 134.

Held, that as the original contracts were procured by fraudulent representations, they were void *ab initio*, and the complainants have a right to have them so declared, and to have a decree for the money paid by them respectively.

Martin et al. vs. Ætna Life Ins. Co.

Rep'd Jour'l, p. 899. S. C. Tenn.

PLEADINGS.

§ 181. Life.—*Issue not raised in.*—An answer in an action upon a policy of insurance set up failure of consideration, and the fact that payment of the premium had not been made, which, under the terms of the policy, would defeat it. The court instructed the jury that they could inquire if waiver of payment by defendant was made, and if found, the non-payment would constitute no defense. *Held*, that the instruction was incorrect because the

issue of waiver was not raised by the pleadings; following Lambert vs. Palmer, 29 Iowa, 104.

Bernhard, administrator, vs. Washington Life Insurance Co.
April Term, 1875. S. C. Iowa.

PLEADING AND PRACTICE.

§ 182. FIRE.—*As to the Policy in the Declaration.*—It is not a valid objection to the admission of the policy as evidence by the insured, that the declaration counted on a policy of a corporation existing under the laws of another State, and the execution of the policy had not been proved.

Peoria Mar. & Fire Ins. Co. vs. Perkins, 16 Mich., 380; The People vs. John, 22 Mich., 461.

Nor was it incumbent on the insured as preliminary to introducing the policy to show that the company was not acting illegally in insuring property within a State where it was not authorized. It was to be presumed as against the company, in the absence of proof to the contrary, that the contract was effected legally and in good faith. Nor was it fatal to the admission of the policy that a special count in the declaration stated under a videlicet that the contract was made in the city of B., whereas the true place was in another State, so long as nobody was misled.

Mistyn vs. Fabrigas, and notes; Smith's L. C. Tidd's Prac., 4 ed., 363; Spencer's Eq. J., 699.

Where the policy insured P. as sole and unconditioned owner, "loss, if any, payable to S., as his interest may appear," and further provided that it should be void if P. was not such sole and unconditioned owner, *Held*, that where the whole declaration was constructed on the theory that the plaintiff P. possessed the entire interest, the introduction of the expression, "for the use and benefit of" S. in the declaration had no effect to vary the issue from what it would have been if the phrase had been omitted. *Held*, that the occurrence of the expression in the policy did not necessitate proof of any interest by S. in the insured property.

Clay Fire & Mar. Ins. Co. vs. Huron Salt and Lumber Mfg. Co.

§ 183. LIFE.—*Parties to suit.—Denials not on Oath.*—Where the money paid by insured for policies through the misrepresentation of the agent was decreed to be returned on account of the fraud, *Held*, that as it never became the property of the company in consequence of the fraud, the beneficiaries acquired no interest and are not proper or necessary parties to the suit. *Held*, that where the answers of the company and agent were not on oath, their denials of the allegations of fraudulent misrepresentations, and as to the acceptance of paid-up policies, only make up an issue.

Martin et al. vs. Ætna Life Ins. Co.

—§ 180.

PREMIUM NOTE.

§ 184. FIRE.—*Liability for Assessment on.*—The charter provided that assessments on premium notes should be limited to losses incurred during the continuance of the policy, that they should be made equitably, that they should be liens on the property that may be compulsorily collected, and that the insurance should be void while they remained unpaid. *Held*, that the expiration, or surrender and cancellation of the policy relieves the assured from all assessments on his premium notes, except such as were previously made.

Flanders on Fire Ins., 23.

It rests on the underwriters to show that the assessment was one to which the insured was bound to contribute.

Atlantic Ins. Co. vs. Fitzpatrick, 2 Gray, 297.

The underwriter must show that the loss took place during the term of the policy, and all the members liable were ratably assessed.

Ins. Co. vs. Harney, 45 N. Y., 298; Long Pond Ins. Co. vs. Houghton, 6 Gray, 77, 82; Herkimer Co. vs. Fuller, 15 Barb., 375; Bangs vs. Gray, 15 Barb., 272; Ohio Co. vs. Marietta Co., 3 Ohio St., 350; Ins. Co. vs. Harvey, 45 N. H., 298; Hart vs. Achilles, 28 Barb., 576; Dana vs. Munro, 38 ibid., 528.

It is not necessary that the assessment be levied with absolute accuracy, but there must be a fair and substantial compliance with the requirements of the charter. An assessment involving previous losses, and in which subsequent assessments were levied on members who had paid to make up the deficiency of those

who had not, without first endeavoring to secure compulsory payment, was not an equitable assessment in which failure to pay would forfeit the insurance. It was the duty of the company to have enforced the payment from solvent delinquents.

Planters Ins. Co. vs. Comfort.

Rep'd Jour'l p. 847. Miss. S. C.

PROOF OF LOSS.

§ 185. FIRE.—*As Evidence.—Waiver of.*—Proofs of loss are competent evidence of a compliance by insured with his covenant and a condition precedent to his right of recovery.

Flanders on Fire Ins., § 527, 528.

But they are not evidence of the quantity and quality of the property lost. A repudiation of the company's liability by the secretary in response to a letter from the insured, notifying of the loss, is a waiver of the requirement of preliminary proof.

Post vs. Ætna Fire Ins. Co., 43 Barb., 351; Clark vs. Ins. Co., 6 Cush., 340.

Planters Ins. Co. vs. Comfort.

—§ 184.

§ 186. MARINE.—*Conclusive as to Insurer's liability.*—Where the policy required due proofs of loss, and suit to be commenced within a limited time, these conditions must be substantially complied with. The proofs of loss must show the nature and extent of the insurer's liability upon which the latter may rely.

Irving vs. Excelsior Fire Ins. Co., 1 Bosw., 507; Phillips on Ins., sec. 1805; Angel on Ins., sec. 228, etc.

Where the policy provided that there should be no liability for a loss of less than five per cent., and the proofs as furnished by insured, prior to the trial, claimed damages of less than five per cent. *Held*, that additional damages cannot be shown for the first time upon the trial for the purpose of bringing the loss up to the required amount.

De Grove vs. Metrop. Ins. Co.

Reported Jour'l p. 909. N. Y. Com. A.

RECEIPT.

§ 187. MARINE.—*Not a complete Contract.—Status of Insurance*

under.—Agent gave the insured a receipt acknowledging $100 premium on their application for $8,000 insurance, on 41 bales of cotton, from Macon to Alexandria by railroad, and by steamer from Alexandria to New York. No specified risk was mentioned in the receipt. It was customary for the agent to give such receipts as sufficiently binding, but afterward to give policies in exchange for them when desired. No policy in this case was asked for or given. The insurance was treated by the agent, and company as a marine risk.

Held, that the receipt cannot be regarded as a complete contract of insurance. It would be in excess of the agent's authority to bind the company by a contract in which the nature of the risk was not specified. Every policy must specify the peril insured against.

Phillips on Ins., sec. 35; Baptist Church vs. Brooklyn Ins. Co., 28 N. Y., 153, 161, 164; Tyler vs. New Amsterdam Ins. Co., 4 Robt., 151.

Held, that the receipt must be treated as a mere application, and evidence of a title to insurance.

Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402.

The insured must be presumed to have known the character of the company's business, to have expected an appropriate policy, and to have expected insurance on the usual terms imposed by the company. The insurance must be governed by the conditions imposed by such a policy as the insured was entitled to upon his application.

De Grove vs. Metrop. Ins. Co.

—§ 186.

RE-INSURANCE.

§ 188. FIRE.—*Measure of Liability.*—In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, but not the measure of the claim of the assured. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled when it is less than the sum insured.

Bainbridge vs. Nelson, 10 East., 346; Hamilton vs. Mendes, 2 Burr., 1210.

Where an insurance company, after having taken a risk and re-insured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that re-insured, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered of the second company.

Howe vs. Mut. Safety Ins. Co., 1 Sandf. R., 137; Eagle Ins. Co. vs. Lafayette Ins. Co., 9 Ind., 443, excepted to.

And where the policy of reinsurance contained this clause: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company," in case of a loss the reinsurer will only be bound to pay at the same rate the reinsured shall pay; so that, if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay at the same rate on the amount of its policy.

Ill. Mut. F. Ins. Co. vs. Andes Ins. Co.

Rep'd Jour'l, p. 820. ILL. C. A.

TITLE.

§ 189. FIRE.—*What constitutes sole Ownership.*—The possession of a bare legal title by the insured, while the equitable estate and interest, and the right to be immediately invested with the legal title, belonged to another, is not sole and unconditioned ownership, and where the policy provided that it shall be void if the insured be not such owner, the insurance is void.

Columbian Ins. Co. vs. Lawrence, 2 Pet., 25; Hough vs. City Fire Ins. Co., 29 Ct., 10.

The rejection of an offer to prove such equitable title on the part of the company is erroneous.

Clay Fire and Mar. Ins. Co. vs. Huron Salt and Lumber Mfg. Co.

—§ 175.

UNAUTHORIZED INSURANCE.

§ 190. FIRE.—*What constitutes in Michigan.*—The Michigan statute against unauthorized insurance does not prohibit an unauthorized company from contracting in another State for insurance on Michigan property. *Quere*, whether an unauthorized

company may defend against an action brought in a Michigan court on a Michigan contract, by pleading its own misconduct.

Clay Fire & Mar. Ins. Co. vs. Huron Salt & Lumber Mfg. Co.

—§ 175.

VACANT AND UNOCCUPIED.

§ 191. FIRE.—*Construction of the Policy Phrase.*—The tenant had removed some two months before, and was no longer occupying or paying rent for the house. He only held the key to deliver to the owner on his return. The owner had been notified of his removal and had requested him to leave it to some one else, but had afterward countermanded the order. There was a table, crib, and straw tick in the house, for which no ownership was claimed. *Held*, that the fair and reasonable construction of the policy clause "vacant and unoccupied," is that it should be without an occupant, without any person living in it; the language is not used in a technical, but in a popular sense. *Held*, that the house was vacant and unoccupied within the meaning of the policy. *Held*, that mere legal possession is not occupancy.

American Ins. Co. vs. Padfield et al.

Rep'd Jour'l, p.[893. ILL. S. C.

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES SUPREME AND CIRCUIT COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION.

JANUARY TERM, 1875.

Appeal from St. Clair Circuit.

THE AMERICAN INS. CO., GARNISHEE OF MARTIN ANDERSON, *Appellant*,

vs.

JAMES H. PADFIELD AND ANDREW PADFIELD, *Appellees.*

A fair and reasonable construction of the language, "vacant and unoccupied," in a policy, is that it should be without an occupant, without any person living in it. The language is not used in a technical but in a popular sense.

The tenant had removed some two months before, and was no longer occupying or paying rent for the house. He only held the key to deliver to the owner on his return. The owner had been notified of his removal and had requested him to lease it to some one else, but afterward countermanded the order. There was a table, crib, and straw tick in the house for which no ownership was claimed.

Held, that the house was vacant and unoccupied within the meaning of the policy.

J. M. BAILEY and J. I. NEFF, of Freeport, Ill., *for Appellant.*

Said policy was void by reason of the premises insured being vacant and unoccupied at the time of the loss.

The condition of the policy here involved is as follows: "If the above mentioned premises, or any portion thereof, shall be occupied or used so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any means whatever, without the assent of the secretary of this company indorsed hereon, then and in every such case, this policy shall be void, and the assured shall not be entitled to recover from the company any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof."

In the application, the assured, to the following question in relation to the occupancy of the premises to be insured, viz., "For what purpose occupied, and by whom?" answered, "Dwelling by tenant."

The proof is, that a very short time after the application was made, if not before, the tenant, who for a year or more had had the possession of the house, moved out, leaving it vacant and unoccupied, in which condition it continued up to and at the time of the fire.

It will be insisted, because the last tenant still held the key to the house, and because there remained in it three articles of personal property, viz., a table, a crib and a straw tick, the house was neither "vacant" nor "unoccupied."

It should be observed that the testimony nowhere discloses the ownership of these three articles. It does not appear that they belonged to the outgoing tenant, or if they had belonged to him, whether they had not been thrown away and abandoned by him as worn out and valueless. On these subjects the testimony is silent.

In the estimation of the tenant the house was vacant, and he so swears. The understanding of all the other witnesses who had knowledge of the situation of the house is precisely the same. That situation, according to the common understanding of men, and the ordinary use of language, was a "vacant and unoccupied house." If it was occupied, who was the occupant? Not the former tenant, certainly. Such occupancy is expressly disclaimed by him. Not only does he swear it was vacant, but he swears that so far as he was concerned, "he didn't consider he had anything more to do with the house than to keep the key, and when the owner came, to give it to him." He certainly was not holding it as a place of storage of a portion of his household goods. The only affirmative inference that can be drawn in relation to the three articles of personal property shown to have remained in the house, is, that the tenant regarded them as no

longer his, but that when he moved out, he left them behind as not worth the moving.

The presence of these articles in the house did not constitute an occupancy, nor do they relieve the house from the charge of being vacant, either in the popular or in the legal and technical sense of that word.

The words "vacant and unoccupied," as used in the policy, should be construed with reference to the subject matter of the contract and the obvious purposes for which such a stipulation was inserted therein. The design of the stipulation was manifestly to secure the insurance company against such change in relation to the occupancy as might tend to increase the liability of the building to destruction by fire.

At the time the policy was issued the insured warranted the insurer that the building was occupied as a dwelling by a tenant. Such occupancy involved necessarily the presence of furniture and other personal property of value to the assured, and which he would be presumed likely to care for and to seek to preserve from destruction. It also involved the presence of a tenant inhabiting the building, and exercising over it such care and vigilance as might be expected from ordinary men.

The occupancy here stipulated for is something substantial and actual. There is no room for constructive occupancy, if such a thing is possible. The occupancy which the parties to the contract must be deemed to have had in view, was one which would have some substantial and tangible relation to the safety of the property. A mere constructive possession would not be such occupancy.

We submit, that holding an entire abandonment of the building, and of all care over it, and a removal substantially of all furniture and property from it, not sufficient to render it "vacant and unoccupied," in the meaning of this contract, because, forsooth, two or three unimportant, worthless and abandoned articles of furniture are suffered to remain in it, would be a mere evasion of the stipulation.

Doubtless so long as a tenant holds the key to a building he holds possession of the building, not actually, but by construction and in contemplation of law. The same may be said of his leaving two or three trifling and unimportant articles of property in it. In neither case is the possession anything more than nominal and constructive. Occupancy, however, in the very nature of things cannot be constructive. It must be actual and real. The words, *ex vi termini*, import actual, as contradistinguished from constructive, possession.

"An occupant is one who has the actual use or possession of a thing." Redfield vs. Utica and Syracuse R. R. Co., 25 Barb., 54, 58; Bouv. Law Dict., title, Occupant.

We submit, then, that the dwelling house in question being vacant and unoccupied at the time of the loss, the policy, by its own express terms, was void.

The court erred in giving to the jury appellees' second instruction.

That instruction was as follows: "The court further instructs the jury, that if they believe, from the evidence, that Anderson's tenant had the actual possession of said premises and the key of said house, and had a portion of his household goods in said house, and with the right to occupy the same until Anderson should move back into said house, then said house was not 'vacant and unoccupied' within the meaning of said policy of insurance."

Most that need be said in relation to this instruction has already been stated.

It should be remembered that there was no attempt whatever to show any actual possession of the premises by Anderson's tenant beyond having the key, and what may be inferred from the further fact that three articles of personal property were allowed to remain in the house. Beyond this, so far as this instruction directs the minds of the jury to the inquiry whether the tenant was in the actual possession, it is based upon no evidence, and directed the minds to any inquiry not arising from the testimony.

We cannot see how the right to occupy the house could make any difference if it existed. The right to the occupancy was immaterial. The fact of the occupancy was the only relevant inquiry. It matters not how clear and incontestable may have been the right of this tenant to hold the premises. If he in fact abandoned them and left them vacant, the right in no way avoids the forfeiture which the policy imposed.

This instruction then, viewed in the light of the testimony on which it is based, must be either regarded as directing the jury to consider the questions not in proof, or as telling them in effect that if the tenant held a key and a table, a crib and a straw tick remained in the house, it was not "vacant and unoccupied" within the meaning of the policy. That such latter proposition was erroneous, we think we have sufficiently argued already.

WM. H. UNDERWOOD, *for Appellees.*

WALKER, J.

In this case appellees sued out a writ of attachment against Martin Anderson from the Circuit Court of St. Clair County. It was issued on the 28th day of February, 1872, and was served on the same day by levying on lots eleven and twelve in Williams' first addition to the town of Lebanon in that county, and by summoning James R. Padfield as garnishee

On the first day of the following July, Anderson applied for and obtained a policy of insurance on a dwelling-house on the premises. The policy was for insurance for five years from that date. Early in September following the house was destroyed by fire, and on the 20th of the same month a further affidavit was filed in the attachment suit, that by reason of the destruction of the house by fire, that the property attached had thereby become insufficient to satisfy plaintiff's debt, and thereupon an alias writ of attachment was issued and served on appellants as garnishees.

On the 2d day of April, 1873, a trial was had in the attachment suit, which resulted in a judgment in favor of plaintiffs for $1,196.43, and costs of suit. Interrogatories were filed, which were answered by appellants, denying all indebtedness to Anderson, and all liability on the policy. At the September term, 1874, a trial was had upon the interrogatories and answer, by the court and a jury. A verdict was found for the plaintiff for six hundred dollars. A motion for a new trial having been overruled, judgment was rendered on the verdict, from which this appeal is prosecuted.

The defense relied on consists of the breach of three conditions in the policy: First, that Anderson warranted the premises to be free from incumbrances, when he made his application for insurance, when it was at the time subject to the levy of the writ of attachment. Second, that the house had become vacant, and had so remained for about two months before, and was vacant at the time it was burnt, and Anderson had notice thereof; whilst the validity of the policy was, by a condition therein, made to depend upon its continuous occupancy, and it provided that if the house should become vacant and unoccupied, the policy should become void, and the assured should not be entitled to recover for loss. And third, the assured did not make and furnish the proofs of loss, as required by the policy, within the time or in the manner specified.

In the view we take of this case, it becomes unimportant whether or not the levy of the attachment was an incumbrance until followed

by a judgment, or whether the property seized was defendant's homestead, and not liable to attachment; other questions control and are decisive of the case.

The evidence incontestably shows that no person was residing in this house, or had been for about two months prior to, or at the time of the fire. The tenant in possession at the time the insurance was effected, testified that he had removed from the house that length of time before, and notified the assured of the fact, who requested him to lease it to some one else, but afterward countermanded the directions, and it had remained unoccupied until it was burnt.

He says that he did not consider that he had anything more to do with the house, that he was not occupying it or paying rent for it; he only had the key to deliver to Anderson when he came back from Missouri. That there was a table, a crib, and a straw tick in it, in the house when it burnt. A number of persons testified that the house was vacant.

We think there cannot be the slightest room to doubt that the house was vacant and unoccupied when the fire occurred, and had been for two months previously. A fair and reasonable construction of the language, "vacant and unoccupied," is that it should be without an occupant, without any person living in it. This is the popular meaning of the language as appears from the evidence. Several witnesses knowing that no one was residing in it, testified that it was vacant, and so would the great majority, if not all persons, say the same thing. The language is not used in a technical, but in a popular sense. If the house had been situated when insured as it was when it was burned, and the assured had answered that it was occupied by a tenant, would any one doubt that such representation was false? Or suppose assured had owned the property in fee, had been, as he was, absent in Missouri, and had received the key from the tenant, and he had answered that he was occupying the house, although it had been situated as it was when it was burned, would any one suppose that the technical rule that the fee draws to it for some purposes the possession, have made the answer true, or that he could have answered his warranty, that the house was occupied by him? We suppose no one would so contend. For some purposes the law might regard the leaving a few such articles in a house as carrying with them possession in their owner. But in such cases there must be an intention to thus take and hold possession, but here there was no such intention by the tenant; on the contrary he disclaimed all possession. But such possession is not occupancy in its popular sense.

We think it clear, from the evidence in the case, that the house when burnt was vacant and unoccupied. That Anderson was notified of the fact and acquiesced in it, and that the condition that it should remain occupied was broken, and the policy became void, and the company [were not obligated] to pay any portion of the loss.

This disposes of the case, and renders the discussion of other questions unnecessary. The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

SUPREME COURT OF TENNESSEE.

DECEMBER TERM, 1874.

NATHAN MARTIN, NATHAN CLINE, AND L. BERNHEIM,

vs.

ÆTNA LIFE INSURANCE COMPANY.

It appeared from the evidence that the general agent induced the insured to take out policies on the ten year life plan by representing that the dividends after the fourth year would cancel the notes successively, and after two annual payments they would be entitled to paid-up participating policies for as many tenths on terms equally favorable.

On finding after the fourth payment that the first note had not been canceled by the dividends, paid-up policies were demanded from the agent in accordance with the understanding. Instead of participating policies, simple paid-up policies for reduced sums, together with the notes, were returned to them, which they repudiated after discovering their character.

Held, that if the policies demanded had been returned it would have been a waiver of all questions of fraud in the procurement of the first policies. But after the tender and refusal, the plaintiffs had a right to decline a subsequent offer of participating policies.

Held, that the fact that the agent could not know what would be the further dividends of the company did not relieve his representations of their fraudulent character.

Held, that as the original contracts were procured by fraudulent representations they were void *ab initio*, and complainants have a right to have them so declared and to have a decree for the money paid by them respectively.

Held, that as the money paid by insured never became the property of the com-

pany in consequence of the fraud, the beneficiaries acquired no interest and are not proper or necessary parties to the suit.

Held, that as the answers of the company and agent were not on oath, their denials of the allegations of fraudulent misrepresentations, and as to the acceptance of paid-up policies and the notes, only make up an issue.

Decree of chancellor affirmed.

NICHOLSON, C. J.

Complainants, Nathan Martin, Nathan Cline and L. Bernheim, filed separate bills, in the Chancery Court at Nashville, against the Ætna Life Ins. Co., and W. D. Talbot, to have three life policies, issued to them respectively, rescinded for fraud, and the amounts of premiums paid refunded. The three policies were issued on the same day, were in all respects the same except as to amounts; the allegations of the several bills were substantially the same, as well as the statements of the answers—for which reasons they were consolidated and heard together, the proof in the several cases, by agreement, being used in all the cases.

Nathan Martin's life was insured for $5,000, for the sole and separate use of his wife, Rosalie Martin; Nathan Cline's for $10,000,—of which $8,000 was for the benefit of his wife, Emma and her children, and $2,000 for Abram and Kerry Cline, brother's children; and L. Bernheim's for $10,000, of which $7,000 was for his wife, Ida, and $3,000, for three (3) sisters.

The several policies were dated at Hartford, Conn., on the 2nd day of March, 1867, and countersigned at Nashville, Tenn., on the 18th of March, 1867, by W. D. Talbot, the agent of the Ætna Life Ins. Co. at Nashville. The policies were all on the "ten year plan, of participating policy." In each policy it is provided, that the annual premium specified is payable on the 2nd of March, each successive year, for ten (10) years. And among other stipulations are the following: "In case the said assured shall not pay the said annual premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine; but it is agreed, that in the event this policy lapse from the non-payment of premiums after two (2) payments of premiums have been made, to issue a paid-up policy for 2-10 of the amount insured; three payments, 3-10 and so on; and it is farther agreed that in every case where this policy shall cease, or be, or become void, all payments made thereon shall be forfeited to the said company," etc.

Instead of requiring the several complainants to pay the amounts of their annual premiums in cash, it was agreed that one half thereof should be paid in cash in advance, and a note for the other half payable at twelve (12) months, with interest. This process of paying one half of the premium in cash and the other half by note, was to be repeated every year, during the ten years. In pursuance of this agreement, the several complainants paid their premiums, by cash and notes, for the first four (4) years.

The difficulty arose about the time the fifth (5th) annual premium was failing due. Complainants all allege that "said Talbot in his character of general agent stated, among other things, that upon the said ten year scheme the insured would have it in his power at any time after two (2) of the annual payments agreed upon should have been made, to take what was known and described as a paid-up participating policy in lieu of the one then conditionally accepted, and that the contract of insurance would stand upon as favorable ground in every respect, to the full extent of the investment, as if the whole amount had been paid—explaining that by this statement he meant that the insured would realize, after he should have made the fourth (4th) payment agreed on, and at the time when the fifth (5th) payment should become due, the full benefits of a participating policy—that is to say, that the profits accruing from the contract would be sufficient to extinguish the first note, and that at each succeeding payment each successive note, according to the order in which they had been given, would, in like manner, be extinguished by accruing profits; so that after the fourth (4th) payment there would be no increase or accumulation of the debt incurred, and at the end of fourteen (14) years the dividend on the whole sum thus understood to be invested would be paid in cash, or, at the option of the insured, was, as he allowed, to operate as an enlargement of the policy. This, they allege the said Talbot described as an especial feature of the scheme, and was with complainants a prevailing consideration.

Complainants further allege, that while preparing to make their fifth (5th) payment of annual premiums, they were furnished by the agent, Talbot, with a statement, showing that the first notes, instead being recognized as paid up by receipts of profits, and canceled as had been agreed on, would be entitled only to be credited with some small amounts.

Complainants say that upon getting this statement they immediately made up their minds to accept the alternative proposition before mentioned, as offered by said Talbot at the inception of the con-

tract of insurance, and to take a paid-up participating policy for the (4-10) four tenths of the whole amount of the policy, thereby altogether abandoning the original policy, and taking in lieu thereof a participating policy for four tenths (4-10) of the original amount, and that they so notified said agent. Of course, they say, this scheme contemplated leaving outstanding the four (4) notes which were to be paid up in the manner already stated.

Complainants allege that soon after notifying the agent of their purpose to abandon the original policy and to accept a paid-up participating policy for four tenths (4-10) thereof, the company, through their agent, Talbot, returned to complainants their several notes for the first four (4) years, and sent or handed to them severally paid-up non-participating policies;—that to Martin for about $680, and those to Cline and Bernheim for about $1,700, each; but complainants charge that on receiving these non-participating paid-up policies and their several notes, they at once charged the proceeding to be a gross fraud, and indignantly refused their acquiescence therein; and they now tender the several policies, together with their several notes, as parts of their respective bills. These papers, they say, as policies of insurance are a fraud, not only because of their being of too small an amount, but by reason of their not being participating policies, and giving no interest to complainants in the profits, as well as because the company delivered up the notes instead of canceling the one first due, and holding the others subject to cancellation as agreed on.

It appears from the allegations of the bills, that the fraud complained of consists in this—that Talbot induced complainants to enter into the contracts of insurance upon the representation that upon the ten year participating plan, after the fourth (4th) annual payment, the dividends coming to complainants would pay up each year one of the notes given for half the premium, so that at the end of ten years all the cash portion of the premiums would be paid, and four (4) of the premium notes would be outstanding, which, by the fourteenth (14th) year would be paid by their dividends. And that as further inducement the agent agreed, that after two (2) annual payments of premiums, if they chose to pay no more cash, they might surrender their original policies and take in lieu thereof paid-up participating policies for 2-10 or 3-10 or 4-10 of the original amount, according to the number of premiums they had paid; and that their outstanding premium notes would be paid up by their dividends,—whereas they allege that when the fifth premium became due, instead of their first premium notes being paid up by dividends and canceled as provided,

only a small credit was entered on each of the notes agreed to be canceled. The misrepresentation alleged consisted, therefore, in the statement that after the fourth (4th) year the dividends would be sufficient to pay a premium note—or one half of the annual premium, which would be 50 per cent. on the amount of the premium. It was this representation, in which complainants say they confided, which induced them to make the contract, and they charge that this representation was made falsely and fraudulently.

Complainants charge that the company was guilty of further fraud in issuing and sending to them paid-up non-participating policies, when they notified the agent, upon the falling due of the fifth (5th) annual premium, that they would abandon the original policies, and require paid-up participating policies.

The insurance company and Talbot answer, but not on oath. They admit the making of the contracts for insurance, but insist that the policies were issued to the beneficiaries named therein and not to complainants themselves, and hence that the beneficiaries ought to be parties. It is admitted that after the payment of four (4) annual premiums, in cash and notes, complainants would have been entitled to participate in the dividends, until the tenth (10th) annual payment should be made in cash and notes; and afterward the dividends would have been appropriated to the principal and interest of the notes until both should be absorbed; but it is denied that Talbot pretended to know or say when this would be; though he may have said, that if the dividends continued to be as large as they were the year previous, that it would be but a few years before the notes would be paid by the dividends.

It is answered, that after the four premiums had been paid, complainants elected to take in lieu of the first policy a paid-up policy; but defendants say that complainants did not want a paid-up participating policy, and only demanded a paid-up policy; that accordingly the premium notes and paid-up policy were delivered to complainants, and these were accepted in lieu of the first policies. Talbot answers, that he made no misrepresentations, was guilty of no concealment, and practiced no fraud, and that every allegation and insinuation to the contrary is false.

Defendants say that they are now willing to return the old policies, or issue new paid-up participating polices, if complainants will pay the interest already accrued, and will continue to pay the interest until the notes are paid in full by the dividends. The allegation in the

bills that the paid-up policies and notes were not accepted, is denied as false.

As the answers were not on oath, the denials by defendants of the allegations of fraudulent misrepresentations, and as to the acceptance of the paid-up policies and the notes, only make up an issue.

The depositions of all three of the complainants were taken. They concur in proving that they were engaged in business in Nashville—that they had no knowledge of the business of life insurance, and were disinclined to embark in it—that they were repeatedly called on at their business houses by the agent, Talbot, and urged to take policies—that they derived all their information on the subject of life insurance from him, and that he explained the operation of various plans, and specially recommended the ten year plan—showing by tables and figures its advantages as an investment.

These three witnesses prove that they were induced to enter into the insurance contracts in consequence of the positive representation of Talbot, that upon the ten year plan, after the fourth (4th) year the dividends would amount to at least 50 per cent. and would be sufficient each year, during the ten years, to pay and satisfy one of the notes for half the annual premium, leaving four (4) notes outstanding at the end of ten years, which would be paid off in dividends in four (4) more years.

Several other witnesses prove that they had conversed with Talbot in reference to the ten year plan, and that he had made similar statements to them as to the dividends being sufficient, after the fourth (4th) year, to pay each one of the premium notes.

The deposition of Talbot, agent and defendant, was taken. In the course of his examination for defendants the following interrogatories and answers occur :

Q. Did you misrepresent any fact or conceal or withhold any fact to induce either of complainants to enter into the contract? A. I did not.

Q. Did each of said parties fully understand their contract with the Ætna Co.? A. I thought they did in full.

Q. Did you truthfully and fully explain to each of said parties, before the contract was made, the terms and meaning thereof? A. I did, or at least believed that they fully understood it.

Q. Did you say to either of said parties that the dividends would equal 50 per cent? A. I say emphatically I did not.

Q. Did you say to either of the parties, that after they had made ten

(10) payments, the dividends would absorb their unpaid notes in four (4) years, or within any specified time? A. I did not.

Q. Did you say to either of said parties, that when they had executed the fifth (5th) note, the first note would have been paid by dividends, and would be delivered up; or did you specify any time within which any of the notes would be paid by the dividends? A. I did not; I informed each of the parties that if they would take 50 per cent. of an annual life-rate in notes, instead of 50 per cent. of the ten year life-rate, and the dividends continued in the future as in the past, that the dividends would pay the first note on the fifth (5th) payment, as the dividends were then 50 per cent. on the annual life plan, and that all the dividends on life policies were declared on the annual life rate, whether the payments were made in ten years or paid annually for life.

Q. Was it possible for you to specify when either of the notes would be paid by the dividends? A. It was not, nor any other mortal man. * * * * *

Two witnesses were examined for defendants, who proved that they had been connected with Talbot in his office, and that they never heard him represent that on the ten year plan the dividends would be 50 per cent. or would pay off the first note after four payments. Some other witnesses proved that they had taken policies from Talbot, and he made no such representations to them.

The characters of the complainants and of Talbot are shown to be good. It is true that defendants are Jews or Israelites. It can scarcely be necessary for us to remark that this court can look neither to the nationality nor to the peculiar religious tenets of witnesses in determining the weight of their testimony. These witnesses all stand before us on the same level as to credibility, and their testimony must be weighed according to fixed rules. According to these rules we are bound to hold that the testimony of the three complainants, corroborated as it is by other witnesses, outweighs the testimony of Talbot, and that the allegation is sustained, to the effect that, on the ten year plan, the agent represented to complainants that the dividends after the fourth (4th) payment would be sufficient to pay off the first premium note, and that upon the payment of the fifth (5th) premium and the execution of the fifth (5th) note, the first note would be paid off and canceled by the dividend; and so on, each year, during the ten years.

But it is said that this was not such misrepresentation as could have misled complainants, and therefore that it was not fraudulent, be-

cause complainants must have known that it was impossible for Talbot to know what future dividend would be declared by the company. It is necessary to keep in view the relation between these parties. Talbot was the agent of a foreign corporation, which he represented as having assets to the amount of twenty millions of dollars. He was thoroughly informed as to all the intricacies and mysteries of the life insurance business, as well as with all the operations of his company. He was seeking patronage for his company, and was soliciting it from persons who were ignorant of all the workings of the life insurance machinery. They were dependent on him for the knowledge and information on which he advised them to invest their money. What they desired was not only to make a safe, but a paying investment. and their decision was to be made by confiding in his integrity and his superior knowledge. He knew what his company had been doing in the way of dividends for many years—he knew its ability and the manner of making profits. Complainants prove that he said the dividends would be at least 50 per cent. He says himself that he told them that "the dividends were then 50 per cent. on the annual life plan," but he says it was impossible for him to tell what they would be in the future. Yet these credible witnesses prove that he did undertake to state, from his knowledge of what the company had done in the past, and of its ability at that time, with c nfidence that its dividends in the future would be at least 50 per cent. This statement made to complainants, in their situation, would naturally have all the force of the statement of a fact, and we have their testimony that they confided in it and were induced by it to enter into the contract.

But it is said that the representation was no more than the expression of the agent's opinion as to the future profits of the company. The proof, however, does not sustain the assumption that Talbot merely expressed his opinion as to the future dividends of the company. It is proved that he represented what the dividends would be and what would be the result at a given time. The representation is shown to have been false in fact, and could have been for no other reason than to influence complainants, and that it did influence them to enter into a contract which they would not have entered into but for the representation. Knuckolls vs. Lea, 10 Hum., 577.

It is suggested in argument that the conflict in the testimony may be reconciled, upon the hypothesis that when Talbot represented to complainants that the dividends on their premiums paid in, after the fourth (4th) year, would be sufficient to pay off their first premium notes, and so on year after year, he was referring to the rate of divi-

dends declared on the annual life plan, upon the assumption that complainants would give their notes each year for 50 per cent. of the premium on the annual life plan instead of 50 per cent. on the ten year plan. It is true that Talbot in his deposition voluntered such an explanation of his representation, although in his answer he is content with general and broad denials of the allegations of the bills. But the testimony of the three complainants is so directly and irreconcilably in conflict with this hypothesis that we are unable to accept it.

One of the complainants, Cline, on cross-examination by defendants, was asked the question, "Did you understand him (Talbot) to guarantee that the dividends would be equal to 50 per cent. of the amount paid in?" To which he answered: "His language was that your dividends will be 50 per cent. I don't know that he used the word guarantee, but I took it to be a guarantee from him. My reason is, that he said to me positively, as I understood, that my first note would be returned to me by my making the fifth (5th) payment, and so on by the sixth (6th) and so on." The other two witnesses testify substantially to the same effect.

But if we could adopt the hypothesis, it would result that the contract was entered into under mutual error as to its terms, and in that view the contracts were invalid. 1 Story, Eq., 134.

It is next insisted for defendants, that if Talbot was guilty of procuring the contracts by fraudulent representations, complainants waived the consequences of the fraud by accepting paid-up policies after discovering the fraud. It is certainly true that if a party, with a full knowledge that he has been defrauded and cheated, ratifies his contract, it is afterward too late to ask a remission. Knuckolls vs. Lea, 10 Hum., 582.

In their answer defendants rely upon the defense that complainants accepted the new paid-up non-participating policy in lieu of the first ten year participating policies. And Talbot in his testimony says that when complainants notified him that they had abandoned the first policies, he explained to them the difference between a paid-up policy simply, and a paid-up participating policy, and that they preferred the former, whereupon he procured simple paid-up policies, and delivered them together with the premium notes, all of which complain ants accepted.

Complainants all state, that as soon as they discovered that their first premium notes were not satisfied and canceled by their dividends, they notified Talbot that they would abandon the first ten

year policies, and demanded paid-up policies for 4-10 of their amounts, in pursuance of their understanding as to their rights when they entered into the insurance contracts. They state that in a few days Talbot, instead of giving to them paid-up participating policies, for 4-10 of the original amounts, as promised, delivered to them simple paid-up policies, at the same returning to them their premium notes. They all deny that they accepted these policies in lieu of the original policies, but as soon as they discovered the character of the policies, they refused to accept them in lieu of their original policies, but charged Talbot at once with having swindled them in giving them simple paid-up policies, instead of paid-up participating policies, according to their agreement. They admit that soon afterward Talbot offered to take back the last policies, and substitute for them paid-up participating policies, if complainants would pay the interest on the notes, and so continue to pay until they were satisfied by dividends. But they state that when this offer was made, they had determined to commence suit, and for that purpose had placed the policies and notes in the hands of their counsel. Having been swindled, as they charge, in the attempt to impose upon them the simple paid-up policies instead of the paid-up participating policies, they were unwilling to have any further transactions with the company or their agent, but determined to rely upon getting their rights at law.

The proof is satisfactory, that when complainants determined to abandon and surrender their original ten year policies, they were willing to take in lieu thereof paid-up participating policies for 4-10 thereof, according to the original understanding with Talbot; and if such policies had been delivered to them, as they demanded, there would have been a waiver of all questions of fraud in the procurement of the first policies. But the proof shows that the policies furnished were not those which they had demanded, and hence their receiving of these policies (but at the same time repudiating them as unsatisfactory) cannot be regarded as a waiver of their rights to rely upon the fraud in the original transaction. Upon discovering that the policies demanded had not been furnished, they had a perfect right then to decline to accept any other policies, and to resort to the courts for redress.

It follows that as the original contracts of insurance were procured by fraudulent representations, the same were void *ab initio*, and complainants have a right to have them so declared, and to have a decree for the money paid by them respectively. As the money paid by complainants never became the property of the company, in conse-

quence of the fraud, the several beneficiaries, for whose benefit the investment was sought to be made, acquired no interest in the policies, and therefore are not proper or necessary parties.

The Chancellor arrived at the same conclusions, and we affirm his decree with costs.

NEW YORK COMMISSION OF APPEALS.

QUINCY C. DE GROVE, *Respondent,*

vs.

METROPOLITAN INS. CO. *Appellant.**

An agent's receipt, showing no specified peril insured against, cannot be regarded as a complete contract. It must be treated as a mere application and evidence of a title to insurance.

Where it was customary for the agent to issue such receipts as sufficiently binding but afterward to exchange them for policies when requested, and no policy was asked for by insured;

Held, that the insured must be presumed to have known the character of the company's business, and to have expected insurance on the usual terms. The insurance must be governed by the conditions imposed by such a contract as the insured was entitled to upon his application.

Held, that the proofs of loss are conclusive as to the company's liability, and additional damages cannot be shown for the first time upon the trial for the purpose of bringing the loss up to the five per cent. required by the policy.

Judgment reversed.

Appeal from the judgment of the General Term of the Supreme Court in the Second Department affirming a judgment at the circuit in favor of the plaintiff upon the decision of a judge without a jury.

The action was upon an insurance policy. The complaint alleged an insurance of plaintiff's assignors by defendant, a domestic corporation, on the 12th of December, 1865, through its agent at Macon, Georgia, upon forty-one bales of cotton, for the amount of $8,000 against loss or damage by fire or otherwise during its transportation from Macon to New York city, and alleges damage by fire on the 18th day

* Argued Sept. 28, 1874. Decided January Term, 1875.

of December, to four bales, to the amount of $600.04, and that due proof of such loss had been made and payment thereof demanded, and also alleges an assignment of the claim to the plaintiff. The answer, after admitting the incorporation of the defendant, and the Macon agency, and denying all the allegations not admitted, contains the following:

Third, these defendants aver that on the said 12th day of December, 1865, the said Grannis held an agency inland navigation policy of this company, upon which he indorsed risks taken for the account of persons other than himself, which policy was the usual inland navigation policy issued by these defendants, by the terms of which it was among things provided that no suit or action against this company, for the recovery of any claim for loss or damage, upon, under, or by virtue of this policy, shall be sustained in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced after the expiration of twelve months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And by said policy it is further provided, that no partial loss or particular average shall in any case be paid unless amounting to (5) five per cent. And they further aver that said Grannis had no right or authority to bind these defendants upon any inland risk, except by a proper indorsement on such agency policy, and not otherwise.

Fourth, these defendants further aver that more than twelve months have elapsed since the making of any claim for loss or damage upon any risk insured against and indorsed upon the said policy of insurance issued to the said Grannis, the agent of the said defendants.

On the trial it appeared that the defendant company had two branches of business: one insurance against fire, and one marine and inland navigation insurance. These two branches were in separate departments.

That in July, 1865, one Grannis had been appointed the defendant's agent at Macon, Georgia, by written power "to receive proposals for insurance against loss or damage by fire, to act as a surveyor of buildings or other property offered for insurance in Macon and vicinity, and to make insurance thereon by policies signed by the president and secretary, and countersigned by the said E. C. Grannis, and generally

to do and perform all other acts necessary to the successful prosecution of the business of fire insurance."

Under this commission he was engaged until the 19th of August, 1865, when he suggested to the company he could do well in their marine branch, and requested them to send him papers for that purpose. To this the company assented by letter, September 9th, 1865, sending him, on one open policy, one hundred notices of indorsement to be forwarded as each risk was taken on the said open policy, and twenty-five blank marine policies.

That the open policy insured Grannis, for whom it may concern as hereon indorsed, and was dated September 8th, 1865. This policy and all the blank marine policies sent Grannis contained a condition of no loss payable if not over five per cent., and the twelve months limitation as alleged in the answer. Grannis was also furnished with fire policies to countersign from July, 1865, in all of which the twelve months condition was contained.

The marine and inland insurance business done by Grannis for the company was mainly by indorsements on his open policy, he sending on the notices of indorsements to be made to the company.

The agency being thus arranged, on the 12th of December, 1865, Grannis, in consequence of the application of the defendant's assignors "for a policy," delivered to them the following paper:

"E. C. Grannis, General Insurance Agency, No. 16. Macon, Georgia. $8,000. Received of Johnson, McMahon & Co., of Macon, Georgia, $100, premium on their application to the Metropolitan Insurance Company of New York, for insurance on $8,000 for the term of trip from Macon, Georgia, to New York, on the following property, to wit, on forty-one bales of cotton from Macon to Alexandria by railroad, or box car, and by steamer from Alexandria to New York. Dated at Macon, this 12th day of December, 1865. E. C. Grannis, agent."

The existence of this receipt was never known to the company. Grannis said to plaintiff's assignors he gave it "in place of a policy," and it was intended that one of the defendant's regular marine policies should be given by him when demanded on return of the receipt. At the time he gave this receipt he forwarded to the defendants with the premium one of the notices or requests of indorsement of this risk on his open policy, and it was accordingly indorsed thereon, and this was the only knowledge the defendants ever had of their taking the risk.

Johnson, McMahon & Co. shipped forty-one bales of cotton on the 14th December, 1865, from Macon to Alexandria by rail, and thence

by steamer to New York, consigned to Powell, Green & Co. The Western and Atlantic Railroad transported the cotton to Dalton Georgia, and it was partially injured by fire on the route. At Dalton, the connecting line to the East Tennessee and Georgia Railroad refused to take the two bales as damaged by the fire. No notice of any injury seems to have been given to Grannis until after the arrival and sale of the rest of the cotton in New York, when in May, 1866, McMahon notified Grannis of the damage to the two bales, and in June Grannis wrote to the company. They suggested that the damaged cotton be appraised and sold. This was done, and the loss ascertained at $306.84, and the plaintiff's assignors on the 11th of August, 1866, made out their proofs of damage at that sum, and on the thirteenth these were forwarded to the defendants by Grannis as their claim "on the marine risk." The defendants immediately replied refusing payment on the ground the loss was not five per cent. of the amount of insurance, $8,000. Subsequently, long after this refusal and in December, 1866, McMahon gave to the defendants an affidavit of one Bard, railroad superintendent, that four bales were damaged, and that two only were rejected by the East Tennessee and Georgia Railroad at Dalton, and also a statement of Powell & Co. that one of the injured bales that went to New York was damaged $78.14. No other formal proof of loss, however, than those sent August, 1866, claiming but $308.74, were ever furnished. It was claimed on the trial that Powell & Co. never received but thirty-eight bales, but the fourth bale was in no way accounted for.

The learned judge who tried the cause among other things found that the insured at the time of the insurance requested a written policy for such insurance, which the agent did not give, because, as he said, it was unnecessary expense, but he gave a receipt for the premium paid, and informed the insured that it was his custom to give this receipt in place of a policy in such case; that on the trip on the 10th day of December, 1865, four of the bales of cotton were damaged by fire, and one of the four was lost in transit and never arrived at its destination; that on two of said bales the loss was, after examination by defendant's agents, and determination by them of the cause of the damage, fixed by agreement at $306.84, about August 13, 1866; that the loss on a third one of the damaged bales was admitted on the trial, and was at least $78.12, and that the loss on the fourth damaged bale was equal to the loss on said third damaged bale. He also found that it was no part of the said agreement of December 12, 1865, between defendant's agent and the insured, that no loss should be paid

unless it exceeded a certain amount, or that a suit should not be brought except within a limited period other than as provided by law; that due proofs of loss were furnished to the defendants, were considered by it, and retained for a long period and until January 5, 1867, when it returned them, and rendered to the insured its decision not to pay anything on said agreement, on the ground that the loss did not amount to five per cent., and that defendant never raised any other objection to paying the loss; that a five per cent. loss would amount to $400. He also found that if the limitations alleged in the defense were contained in the conditions of any one of the policies in use by defendant, such conditions were not communicated to the insured before the loss occurred, but were waived by it even if ever assented to by the assured by implication, and he ordered judgment for the plaintiff for $463.08, and interest from February 5, 1867, thirty days after defendant's final refusal to pay.

The defendant excepted severally to each finding of fact and of law.

S. HAND, *for Appellant.*

HENRY BRODHEAD, *for Respondent.*

EARL, COM.

The defendant is a domestic corporation organized under chapter 308, laws of 1849 ; chapter 2, laws of 1853 ; and chapter 106, laws of 1863, and was authorized by its charter to engage in fire insurance, and in marine and inland transportation and navigation insurance.

It was engaged in both kinds of insurance, kept each kind separate, in separate books, and had different policies for each. Grannis defendant's agent at Macon, was authorized to engage in both kinds of insurance, and had blanks for both kinds.

On the 12th of December, 1865, McMahon, one of the assured, applied to Grannis for an insurance upon the cotton, and asked him for a policy, Grannis informed him that it was not his custom to give a policy, that it was unnecessary expense, and that it was his custom to give such a paper as the receipt dated December 12, 1865, which was binding, and he as a witness for plaintiff testified that in all cases where a policy was asked for, one was made out and given to the party insured, and the receipt was taken up if one had previously been given, as he invariably told parties insuring that it was better to have the company's policy in case of loss. He reported the insurance to the company as a marine risk, and it was entered upon the open marine policy which had been issued to him for the purpose of such risks,

and was manifestly understood by him and the company as a risk in the marine department.

The plaintiff claims that the receipt embodies the whole contract of insurance, and hence that the conditions set up in the answer have no application. The defendant claims that this was a mere application for a policy, and that the contract of insurance must be looked for in the form of marine policy used by the company, upon which the risk was indorsed. The judge at special term upheld the plaintiff's claim and the important question for us to determine is whether this holding was correct.

According to plaintiff's claim this was a general insurance against every kind of risk, an insurance that the cotton would safely reach its destination. There were no limitations or conditions in the contract. It was an absolute unconditional insurance against everything. Such an insurance Grannis had no authority to make. He was authorized to engage in the two kinds of insurance which the company by its charter was authorized to make, and he was to insure upon the terms, conditions and limitations mentioned in the blank policies with which he was furnished. Neither was it within the scope of his apparent authority to make such an insurance. It is not probable that any agent ever had such authority, or that any company was ever authorized to engage in such insurance. He was the known agent of a company engaged in fire and marine insurance, and such an agency gave him apparent authority only to insure in the modes authorized by the company's charter, and upon the terms and conditions inserted in their policies in ordinary use.

No one could presume from the fact of his agency for such a company that he was authorized to make such an insurance as is claimed. Hence if we assume that the receipt is a complete contract of insurance, and that it embodies the whole contract, it would not, being in excess of the agent's authority, bind the company.

But the receipt is not a complete contract of insurance. It does not purport to be. It is evidently inchoate. It does not even state that the insurance is against loss or damage from any cause. It does not specify the peril or risk insured against, and this every insurance policy must do. 1 Phillips on Ins., sec. 35; Baptist Church vs. Brooklyn Ins. Co., 28 N. Y., 153, 161, 164; Tyler vs. New Amsterdam Ins. Co., 4 Robt., 151. Hence if the plaintiff was obliged to stand upon this receipt as his only policy he would fail in the action for the want of a complete contract in which the minds of the parties had met. This receipt must therefore, when considered in connection

with parol evidence, be treated as a mere application for insurance, as evidence that the assured had paid the premium and were entitled to be insured from its date. Ellis vs. Albany City Fire Ins. Co., 50 N. Y., 402. The assured must be held to have known the general character of business done by defendant. They went to the agent to be insured on their cotton in transit from Macon by railroad and water to New York, and for that purpose needed and must have expected a policy appropriate to the subject matter, and the perils to be insured against, and hence they must have intended to procure an inland policy, or what is sometimes mentioned in the evidence as a marine policy. Such an insurance was intended by the agent, and was understood by the defendant, and it was such an insurance which the assured must have expected. Every business man knows that all insurance companies have forms of policies in common use, which contain the terms, limitations, and conditions to be inserted in all contracts of insurance. They must have expected an insurance upon these usual terms. It cannot be presumed that they expected a special contract variant from the usual terms imposed by the company. The assured went to the agent, asked for a policy, paid the premium, mentioned the subject matter of insurance and the route and destination of the cotton, and left it to the agent to see that their insurance was entered in the proper department of the company, expecting to be insured in the ordinary way. They were assured that the receipt was binding, as it really was. Binding to what? Binding to an insurance in the usual form. Suppose the assured had returned the receipt and demanded a policy; what kind of a policy could they have compelled the defendant to issue? Clearly one in its usual form, and no other. Angell on Ins., sec. 37 ; Phillips on Ins., sec. 15 ; Ellis vs. Albany City Fire Ins. Co., *supra*. It is said in Phillips that a memorandum that a subject "is insured," or "shall stand insured," means that it is "insured, or shall be so according to the ordinary form of policy used in the office when the memorandum is made." We must therefore look to the marine and inland policies used by the company, upon one of which this risk was indorsed, for the limitations and conditions contained in the contract of insurance. The plaintiff in drawing his complaint treated proof of loss as a condition precedent, and alleged that it had been made, and the referee found that it had been made, yet this condition, a usual one in most if not all insurance policies, is not found in the contract as claimed by plaintiff. The judge at special term also found that plaintiff was entitled to interest on his claim only from thirty days after the final proof of loss had been delivered to the defendant, and

passed upon by it, and this finding was based upon nothing found in the contract as claimed by the plaintiff, and this condition must have been taken from one of defendant's policies proved upon the trial.

I am unable to discover how force could be given to these conditions, and not to the two other conditions set up in the answer; I think they were part of the contract of insurance.

According to the one condition the plaintiff could not recover unless his loss was at least $400—five per cent. of the whole sum insured. I am satisfied upon the evidence and the findings of the judge that the entire loss was upwards of four hundred dollars. The loss upon three bales of cotton was agreed upon at $384.96, which is only $15.04 less than $400. Two of the bales were so badly burned that they could not be forwarded to their destination. The other two bales were exposed to the same fire, and were both burned and were both forwarded, and one of them reached its destination and was found to be damaged $78.12. The other one, the fourth one, did not reach its destination, and it is not shown what became of it. There is no positive proof how much it was damaged; all the proof seems to have been given that was practicable. It was in the same car with the others. The person who saw the two bales which were forwarded mentions no difference in their appearance, and it may be inferred that he discovered none. Both were so much burned as to attract attention and be observed. The value of a bale was at least $200, and a small exposure to fire would cause damage to at least $15 or $20. Hence I am not prepared to say that the judge erred in holding that the fourth bale was damaged as much as the third. But if I were not satisfied that it was, as I am quite well convinced that the whole damage was at least $400, I should apply the rule of *de minimis* to any error as to the uncertain amount of damage above that sum at this stage of the case. This condition of the policy was therefore, so far as concerned the proof upon the trial, complied with. Rogers vs. Mechanics Ins. Co., 1 Story, 603.

As to the condition that suit must be brought within twelve months after the loss or damage shall occur, the defendant averred in its answer that twelve months had elapsed "since the making of any claim for loss or damage." Upon the trial the defendant asked leave to amend the answer by inserting that the time had elapsed prior to the commencement of the action, and this was denied, and defendant did not except to the denials. Whether this amendment should have been allowed was within the discretion of the judge; and even if it was not, we cannot review his decision here, as there was no exception. I do

not agree with the judge, who held at special term that this condition was waived. The plaintiff under this condition had twelve months from the time his cause of action accrued—to wit, from January 5, 1867, in which to commence his action. Ames vs. N. Y. Union Ins. Co., 14 N. Y., 253; Wager vs. Hamilton Ins. Co., 39 N. Y., 45. And after that date I cannot perceive that the defendant did or said anything from which a waiver can be inferred. At or before that date the time had not arrived for the defendant to say anything about that condition, and its mere silence about it can have no significance. At and before that date it placed its objection to pay upon the only condition then available. Between that date and the commencement of the action there appears to have been no interview or intercourse between the parties. There is no evidence that the assured were ignorant of this condition. Even if they had been it would have made no difference with the rights of the parties. The defendant is in no way responsible for their ignorance. It was their duty to know what was contained in their contract of insurance, and they had been informed in time that the defendant claimed that the insurance was upon the terms contained in their marine policy, and it did nothing to mislead them.

I think the defense was sufficiently set up in the answer, and was available to the defendant. The summons and complaint were both dated August 26, 1869, and the suit was commenced on the next day, more than two years and a half after the cause of action accrued, and more than three years and a half after the loss. The condition was set out at length in the answer, and it is entirely plain that the defendant meant to rely upon it as a defense and the plaintiff must have so understood it. The condition appears in the contract, upon which the plaintiff must recover if he recover at all, and hence there is no room to presume that the plaintiff was misled by the form of the answer as to this defense. The whole answer shows clearly that defendant meant to rely upon this condition, and the non-compliance therewith by the assured, as a defense. The allegation in the answer as to the lapse of time must under the circumstances be construed as having reference to the time of the commencement of the action. The rule which requires that pleading should be liberally construed, with a view to substantial justice between the parties, should be applied. Code, sec. 159. The courts have decided that such conditions are valid. It is quite essential to insurance companies doing business in all parts of the country, at places distant from their location, that

claims should be promptly made, and, if disputed, promptly prosecuted.

Such a condition is not against public policy, and there is no reason why it should be looked upon with disfavor by the courts. A defense based upon it should be treated like any other meritorious defense which the law allows. Hence I think there was error in not allowing the defendant the benefit of this condition.

There was one other condition precedent which the assured did not comply with. It was provided in the policy that "in case of loss such loss to be paid in thirty days after proof of loss and proof of interest in the said property are furnished this company." The plaintiff in his complaint alleged due proof of loss, and the judge in his findings of fact found that due proof of loss had been furnished to the company. To this finding defendant excepted, and if there was an entire want of evidence to show that such proof was furnished to the company, the question is before us for consideration upon the exception. The furnishing of proof was a condition precedent to the maintenance of the action.

This is an ordinary condition contained in policies of insurance. It must be substantially complied with by the assured. The proof must show the character and extent of the loss, and the amount claimed. And upon the trial the assurer can recover no more than the amount shown and claimed in his proof of loss. This condition would be of little use if the assured could show and claim one amount in his preliminary proof, and then upon the trial recover more. The object of this proof is to give the insurer notice of the nature, circumstances and amount of the loss as a basis of amicable adjustment, and it should be such as to show the insurer's liability and the extent of it. Irving vs. The Excelsior Fire Insurance Company, 1 Bosworth, 507. In that case it was held that the assured was barred by his proof of loss as delivered, and that he could not upon the trial impeach its truth, and recover upon testimony showing a different state of facts; that the insured had the right to take and rely upon the facts as the assured stated them. See also Phillips on Ins., sec. 1805, etc.; Angell on Ins., sec. 228, etc. In this case the assured first made their proofs of loss about August 13th, 1866, and then claimed for damage to two bales of cotton only, the sum of $306.84. The defendant promptly objected to paying this loss, because it did not amount to five per cent. of the sum insured. Afterward, in December, the assured furnished further proof of loss, which consisted of the affidavit of Bard that the four bales were damaged by fire, that two were re-

jected by the connecting line of railroad, and that the other two bales were partially burned, or somewhat damaged were received and forwarded, and also a statement of the consignees that one of the bales received by them, which was one of the four bales, was damaged by fire to the extent of $78.12.

No proof was furnished or claim made as to the fourth bale. No proof was made that it did not reach its destination, and it does not appear that the assured at that time claimed any damage on account thereof. If they claimed any damage on account thereof, they could then have made it as well as upon the trial, and could have stated how much they claimed the damage on that bale to have been. The defendant again declined to pay, distinctly on the ground that the loss was not five per cent. of the sum insured. No further claim or proof was made or presented to the defendant before the commencement of this action, more than two and a half years afterward. They should therefore be held concluded by the amount of loss which they claimed in their proof. They should not be permitted to lead the defendant into a litigation, and then upon the trial for the first time seek to recover by showing that their loss was greater than the amount claimed in their preliminary proofs. In this aspect of the case, it matters not that the margin between the loss as claimed and the $400 was so small. The assured took upon themselves by the contract the risk of all loss below $400. The truth probably is, that at all times before the commencement of the action the assured acted upon the theory that they were not bound by the five per cent. condition, and the judge at special term tried and decided the cause upon the same theory.

Upon the two grounds above mentioned, therefore, I favor a reversal of the judgment and a new trial, costs to abide event.

All concur, upon ground that plaintiff's rights are to be governed by such a policy as he was entitled to have upon his application.

COURT OF APPEALS OF NEW YORK.

ROSALIE C. BARRY, *Respondent*,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY, WM. H. BOWNE AND H. L. WHITREDGE, (*the last two*) *App'ts.**

No valid title to a chose in action is acquired by the *bona fide* purchaser from a vendee who has procured it from the vendor by coercion, compulsion, and undue influence.

The assignment of a life policy by a married woman under coercion of her husband is invalid.

The New York act of 1840, exempting the policy issued in accordance with its provisions from the claims of personal representatives and creditors of the husband is still in force. By it a married woman could insure for any sum, and the contract may be continued in favor of the children of the insured wife after her death, and the wife may not traffic with her policy as though it were realized personal property or an ordinary security for money.

Subsequent legislation enlarging the powers of married women, under the act of 1840, does not supersede it nor give them other power in dealing with a policy issued under it than they had by it.

In a suit before a New York court on a contract of a New York company made in New York, brought by the assignee, who received his assignment in another State from New York through the mails, the case is to be decided by the laws of New York.

S. P. NASH, *for Appellants.*

E. R. ROBINSON, *for Respondent.*

FOLGER, J.

The judgment must be affirmed. The learned justice at Special Term has found that the assignment of the policy was obtained from the plaintiff by undue influence, she being in fear and under the compulsion of her husband, and acting under duress and coercion. He further finds that she did not freely or voluntarily sign the printed blank, which was afterward filled up so as to form an assignment.

* Decided January 26, 1875. For additional facts in regard to this case, see Barry vs. Mut. Life Ins. Co., N. Y. S. C., 3 Ins. Law J., 74.—ED. INS. LAW JOURNAL.

We have examined the testimony. We cannot say that there is not in it that which will warrant those findings.

We do not agree, however, with the learned justice, that a *bona fide* purchaser for value acquires a good title to a *chose in action* which he has bought from one who has procured it from the owner of it by undue influences, compulsion and coercion. There is a class of cases which hold that where the owner of property, induced by false representations, sells it and parts with the possession of it, with the intention of passing the title to the vendee, then the *bona fide* purchaser for value from the fraudulent vendee obtains a title which he can defend. In such cases there is a voluntary parting with the possession of the property, and with the uncontrolled volition to pass the title. But where there exist coercion, threats, compulsion and undue influence, there is no volition. There is no intention or purpose but to yield to moral pressure for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired. See Loomis vs. Rusk, in this court, May 26, 1874.

We cannot doubt but that this policy was contracted for and issued under the provisions of the act of 1840. Laws of 1840, chap. 80, as amended; Laws of 1858, chap. 187; 1862, chap. 70; 1866, chap. 656. It is expressed in it that it is in conformity to the statute. The terms of the contract, to pay on the termination of the life insured, are in close pursuance of the provisions of the act. That act as amended is still in existence and operative, notwithstanding the subsequent legislation enlarging the legal status of married women. The legislature has practically so declared by repeated amendments of it. See, in addition to those above cited, Laws of 1870, ch. 277; 1873, ch. 821. We know of no subsequent legislation which can take the place of that in the act of 1840, exempting the insurance money from the claim of the personal representatives and creditors of the husband, whose life has been insured in accordance with its enabling provisions.

This being so, the majority of the court taking part in the decision feel not only bound to follow Eadie vs. Slimmon, 26 N. Y., 9, on the principle of *stare decisis*, but as convinced that the decision of that case was correct in its result. That decision went (in its denial of a motion for a re-argument) on several grounds. 1. That by the common law, a person could insure the life of another person only for the interest which he had in it; if he undertook to insure a gross sum, and the contract was not susceptible of a construction which would

limit the recovery to the actual damages sustained, the contract would be void under the statute against gaming and betting; that this principle was relaxed in favor of a married woman by the act of 1840, so that she could insure for any sum for which she could obtain a contract from an insurance company. 2. That by the general rules of law a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of *cestui que vie;* or if it could be enforced as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act the contract may be continued in favor of children of the insured wife after her death.

And it was further remarked that the act was special and peculiar, and looks to a provision for a state of widowhood and orphanage, and that it would be a violation of the spirit of the provision to hold that a wife insured under that act could sell or traffic with her policy as though it were realized personal property or an ordinary security for money. Upon this latter ground the majority of the judges taking part in the decision now put their assent to Eadie vs. Slimmon, and upon that ground are for the affirmance of the judgment in this case. Without that act, when this policy was issued the insurance money, being for premiums paid out of the funds or property of the husband, could not have been retained from the personal representatives or creditors. That act sought that result, not for the sake of the woman while a wife, but when a widow; not that she might sell or assign the contingency which was created by the policy, but that it should be kept for her until by the death of her husband, she surviving, it became realized personal property; or for the children, when, by his death, after surviving her, it became realized personal property to them surviving.

The majority of the judges taking part think that this is the policy and intention of the act, and that it still exists; that this contract for insurance was issued under it and is controlled by it, and that the power of disposition over it is and should be restricted so as to be in accordance therewith. They further think that the subsequent legislation enlarging the legal capacity of married women does not supersede the act of 1840, nor give them other power to deal with a policy issued under it than they had by it, for reason that the act is an enabling act, confers a special privilege, and is in the nature of a law exempting goods from execution; that the privilege is given in view of an especial legislative intention and policy, which would be subverted if the con-

tingent interest arising under it could be treated and dealt with as the separate property of a married woman, to be disposed of or affected by her subsequent contracts.

The appellants claim that the case is to be decided upon the law as it is in the State of Maryland. This is not tenable. The contract was not made there. The insurance company is a corporation of this State, having its place of business here. The contract was made here, and is payable here, and this action is here. Nor was the assignment delivered out of this State. The appellant Bowne received the policy in the city of New York. The assignment was then committed to the public mails, his agent for him, and received by him through the public mails.

The point that the plaintiff was not competent as a witness under section 399 of the Code is not tenable. Bowne was not an assignee of John S. Barry, the deceased person.

The insurance company has not incited nor protracted this litigation. It has been ready to pay the money to whomsoever should by the judgment of a court be declared entitled. It should not be mulcted in costs for the differences of parties whom it could not control. Its costs should be paid by some one, and reasonably by whomsoever begun and carried on the unsuccessful litigation.

The judgment appealed from is affirmed with costs.

All concur. Agree to whole opinion, CHURCH, CH. J., ALLEN and ANDREWS, JJ. GROVER and FOLGER, JJ., to that part of opinion which put affirmance on ground of coercion. RAPALLO, J., not voting, not having heard the whole argument.

SUPREME COURT OF MINNESOTA.

APRIL TERM, 1874.

Appeal from Common Pleas of Ramsey County.

MARY SCHWARTZ, *Respondent,*

vs.

GERMANIA LIFE INS. CO., *Appellant.**

A jury is not at liberty to disregard the testimony of a witness of fair fame, uncontradicted by other testimony or by any circumstances.

But they are not obliged to follow blindly such uncontradicted testimony, but to judge of its credibility, and only to act on it so far as it seems reasonable and true.

Where the uncontradicted testimony as to the issuing of instructions by a company to its agent to withhold policies forwarded where the health has meanwhile become unsound, was not so definite and positive that a jury in the exercise of a sound discretion might not deem it insufficient to prove that the agent, in withholding a policy, acted under alleged instructions from the company, the court will not interfere with the finding.

Such instructions would naturally be of sufficient importance to appear in the printed instructions of the company, and a jury have a right to consider the non-production of such printed instructions in judging of the credibility of the evidence.

Where the answer denies the delivery of the policy only, but there is no denial of the execution or the signatures:

Held, that the policy was on its face competent evidence, and the refusal to exclude it for want of proof of the signatures of the officers under the general objection as "incompetent and immaterial" was not error.

[The following statement of the case is made up from the decision of this same court on its first appeal ordering a new trial, and reported in the Insurance Law Journal for June, 1873.—ED. INSURANCE LAW JOURNAL.]

The application of plaintiff for insurance on the life of her husband provided that the policy should not be binding until the premium

* Decision rendered January 11th, 1875. Will probably appear in 21 Minn. See 2 Ins. L. J., 449, for decision on first appeal.

was paid. The policy returned by the company contained the same condition, and also provided that the first premium should be paid in hand, and the others annually; also, that the agents are authorized to receive premiums, but not in any way to alter the terms of the contract. The husband of plaintiff refused to receive the policy and pay the premium on the ground that the solicitor had agreed to take the premiums in board.

Afterward, at his request, the policy was returned to the company and another, similar in all respects, except that it provided for semi-annual payments, was sent to the agent. On the same day the plaintiff called upon the agent and tendered the premium, but he refused to deliver the second policy because the husband was then dangerously ill. The husband died a few days after. There was evidence tending to show that the company's instructions to the agent were to deliver policies on payment of the premium, provided that the insured was in health at the time of the delivery. There was no evidence that these instructions were known to the plaintiff.

It was held on the first appeal that plaintiff's refusal to accept the first policy placed the company where it would have stood if it had never accepted the application. If the agent had no discretion save to deliver the policy on payment of premium, the plaintiff was entitled to the benefit of the second policy unconditionally on her tender of premium. But if this company's instructions, general or special, to the agent were to deliver the policy only on condition of good health, the only effect of the transmission of the policy to the agent was an acceptance by the company conditioned on continued good health.

On the ground that the instructions below were at variance with these rulings a new trial was granted, and the case now comes up on an appeal from the second trial.

HENRY J. HORN, *for Respondent.*

MORRIS LAMPREY, *for Appellant.*

YOUNG, J.

Upon the former appeal in this action (18 Minn., 448,) it was determined that by the execution of the second policy and its transmission from the home office at New York to the company's agent at St. Paul, the company, defendant, signified its acceptance of the plaintiff's application for insurance upon the life of her husband, Fridolin Schwartz.

If upon receipt of the policy and down to the time when the plaintiff tendered the premium and demanded the policy, the agent had no other authority or duty in the matter than simply to deliver the policy on payment of the first premium, then the defendant's acceptance was conditional upon such payment alone. The tender by the plaintiff on the 25th of October, being legally equivalent to a payment, was a performance of this condition, and thereby a contract of insurance according to the terms of the policy was effected between the parties, notwithstanding the refusal of the agent to deliver the policy. But if by general or special instructions from the company the agent was not authorized to receive the permission or deliver the policy unless the person insured was in good health at the time, then the acceptance signified by the transmission of the policy to the agent was conditioned upon the state of health of the person insured at the time of delivery of the policy. And as Fridolin Schwartz was dangerously ill and near his end at the time the plaintiff tendered the premium and demanded the policy, the agent was justified in his refusal to deliver the one or receive the other, for the condition of the plaintiff's acceptance was not complied with.

In that case no contract was ever concluded between the parties and the plaintiff has no cause of action against the defendant.

At the second trial the company attempted to prove the existence of such instructions by the parol testimony of Ferdinand Willins, its agent, and of Gustav Willins, his brother. No counter evidence of any kind was offered by the plaintiff on this point, but the jury found a verdict in her favor. The principal question on this appeal is whether the verdict can be sustained in the face of the evidence for the defendant.

Ferdinand Willins, after stating that he had been the company's agent with restricted authority for ten years, testified on this point as follows: "I did (have instructions to) deliver the policy only upon payment of the premium, and provided the parties were good health at the time, if not in good health a new examination by a physician must be made. I am positive I had these instructions from the company. I have always acted under them during all my agency. Gustav is my brother. In 1870 we were in business together and are still. He knew of my instructions from the company and I suppose he acted under them." On cross examination he said: "The instructions I suppose were in print. They may have been verbal. They may have been in writing. We have had six different sets of instructions of that kind in print. I have been hunting for printed instruc-

tions but cannot find them. Must have been verbal. Have had printed instructions so long as I have had the agency. These printed instructions have been changed by other printed instructions perhaps half a dozen times during the agency. Couldn't say for certain how many times. Couldn't tell when they were last changed. Believe I received some new instructions and blanks about four weeks ago. Could not tell when the next one before was made. Some of the printed instructions related to the manner and circumstances under which the policies were to be delivered. I have searched among the papers for these printed instructions. Searched this morning and about a week ago. Think I could find two of the previous instructions which were sent prior to the last. The old instructions were generally destroyed when the new ones were received. I don't find the instructions which relate principally to this case. I suppose the instructions under which I acted in refusing to deliver this policy were printed, but printed instructions are sometimes explained and defined in writing or verbally. I have not the printed instructions under which I acted in refusing to deliver the policy in question. I have looked for them without being able to find them." On his redirect examination he said, "I made search for those printed instructions in my office where they ought to be. I searched this morning, and about a week ago, among my papers where these instructions ought to be. I searched thoroughly; I wouldn't say for certain whether I had these instructions verbally or in print. My impression was, they were in print. They may have been verbal or in print. Don't recollect whether the instructions in this case were accompanied by any written communication. There were no special instructions accompanying the second policy except such as were found in the letter accompanying it. There were none accompanying the first policy except what were contained in the letter."

Gustav Willins testified as follows: "I told her (the plaintiff) I could not deliver the policy to her; that in the meantime I had received information of the sickness of Mr. Schwartz, and that I had no right to deliver the policy. I think I stated to her that our instructions were not to deliver the policies in such cases where the parties had been taken sick. I knew of such instructions from the company.

On cross examination he said, "I cannot say positively as to these very instructions, we had so many different ones in writing, printed and verbal. I was not the agent of the company. These instructions were direct to my brother." And thereupon the last sentence in his testimony on the direct examination was stricken out on the

plaintiff's motion. The direct examination being resumed, he said: "I knew of printed instructions to the agent Ferdinand Willins as to this business. I have made search for them at our office at the time of the first trial, and a few days ago. I couldn't find them. Some of the printed circulars have been destroyed when new ones came. I think I can state the contents of these printed instructions as to the delivery of policies. I don't recollect of any verbal instructions given to Ferdinand Willins, my brother. I recollect printed instructions given to F. Willins in reference to the delivery of policies to persons not in good health. I can't tell where those printed instructions now are. So far as I know they should be in the place where Ferdinand Willins keeps the papers of that company. We had general printed instructions relating to all policies at the time of this transaction and prior thereto in regard to the delivery of policies. I think I can remember their contents. I don't know where they are now; I have looked for them and can't find them. I know and can state the substance of their contents, but not the very words."

On re-cross examination: "Those printed instructions were in pamphlet form. Think they were not circulars. They were headed 'General Instructions to Agents.' My brother has received printed, written, and verbal instructions during his agency. I may have been present when verbal instructions were given. They may have been in force at this time. I don't remember their contents. I do remember that there were certain general printed instructions in regard to the delivery of policies in general. We had printed instructions; he had also general verbal instructions. I can't tell whether he acted under the printed instructions, or partly under the printed and partly under the verbal, in reference to these policies."

On re-direct examination: "The contents of the general printed instructions were that the agent should not deliver policies unless the party (applicant) was in good health, unless he should be re-examined by a physician."

On further cross-examination: "I don't recollect the exact language; I give the substance as I recollect it. Think it contained instructions to physicians and agents, eight to ten pages of printed matter. Think the instructions as to delivery of policies took about one half page. I can't identify the appearance of these particular instructions. There were some printed instructions in form of circulars and pamphlets. Circulars were partly filed away and partly destroyed. The circulars have not all been destroyed. Probably some there yet. It would take several days to find them among ten years

correspondence. The books did not come regularly. Think the new ones always contained some additions to the old ones. Maybe some changes. Perhaps received new ones four or five times during the agency. Don't remember when I received the last book. Can't say how long ago; guess it was over a year ago."

It is contended that the jury were not at liberty to disregard this testimony, but were bound to find the existence of the instructions alleged, and we are referred to cases holding that "when a fact is sworn to by a witness of fair fame, and who is uncontradicted by other testimony or any circumstances in which he may stand, the jury are not at liberty to disregard his testimony." Harding vs. Brooks, 5 Pick., 244; Newton vs. Pope, 1 Cowen, 109. This is undoubtedly true as a rule, admitting however of many qualifications growing out of the nature or subject matter of the testimony. Thus in Harding vs. Brooks, the court say that "if it relates to declarations or conversations happening some time before the witness is called to testify, and the precise words are important to the point in issue, and the witness, though confident, is not positive in his testimony, the jury are at liberty to refuse such entire credit as may be necessary to satisfy them that the words in question are fully proved." And in a later case in the same court, the general rule as to the power and duty of the jury in weighing evidence is thus stated by Bigelow, C. J.: "The jury are not obliged to receive evidence which is laid before them passively, and follow it blindly, because it is not controlled or contradicted by counter evidence. They are to examine it with care, subject it to the scrutiny of their judgment and experience, and act on it only so far as it seems to them to be reasonable and true." See Printing Co. vs. Hickborn, 4 Allen, 63.

In the charge of the court the attention of the jury was particularly directed to the question of the existence of the alleged instructions as the single important issue in the case. Upon this issue the only evidence was that of the agent and his brother. The jury could not through negligence or inadvertence have omitted to consider this evidence, nor is there any reason to believe that they willfully or wantonly disregarded it. That must be a strong case which will justify an interference by this court with the exercise by the jury of their undoubted right of determining the credibility and weight of evidence. The testimony of the brothers Willins is by no means so clear or positive that the jury might not, in the exercise of a sound discretion, deem it insufficient to prove that agent in withholding the policy acted under the alleged instructions of the company. The witnesses

are not agreed (either with themselves or with each other) as to whether the instructions under which it is claimed the agent acted were printed, written or oral.

The testimony of Ferdinand Willins is especially vague and uncertain, amounting to little more than a statement of his impressions and suppositions. Gustav is rather more positive that the instructions were in print. They agree that there were no special instructions for the case; that whatever instructions the agent acted under were general instructions. They do not profess to give the tenor of those instructions, but merely the substance. Gustav says they occupied half a page of a printed pamphlet; but his statement of their substance is given in one or two lines.

Aside from these objections to the weight of this testimony, it is highly probable that if such instructions as those in question were given at all, they would from their importance be assigned a prominent place in the general printed instructions to agents. Now this case had been tried once before, and the defendant was fully advised that its defense could be successfully maintained only by proof of these instructions. It was certainly within the power of the company to show by plenary proof whether general instructions of this kind were in fact given in print to its agents, and if such were the fact it is difficult to believe that a copy of the pamphlet containing them could not have been readily procured either at the home office at New York or at some of the agencies of the company. The question is not before us whether (the instructions being in print) a copy of the same impression would not as a duplicate original be better evidence of their contents than the oral testimony of witnesses; but concerning ourselves merely with the credibility and weight of the evidence received, there can be no doubt that such a printed copy would be, if not technically better, certainly far more satisfactory evidence than the vague and uncertain impressions of witnesses testifying to their recollection of the substance of documents they had not seen for many months, and which they do not appear to have ever carefully studied.

The circumstance that this satisfactory evidence was not produced by the defendant was one which the jury had a right to consider in judging of the credibility and weight of the parol evidence offered in place of it (Goodrich vs. Weston, 102 Mass., 363); and if they drew the very natural inference that printed instructions were withheld because if produced they would not have sustained the defendant's case, and for this reason decline to give the parol testimony even the weight to

which they might otherwise have thought it entitled, it is not for the defendant to complain of a conclusion which (if erroneous) it might have prevented by the convincing proof that would have been afforded by the documentary evidence in its possession. It is contended that the second policy should have been excluded for want of proof of the signatures of the defendant's president and secretary thereto. But the answer (verified by the agent F. Willins) denies the delivery only, and not the execution of this policy, nor is there any denial by oath or affidavit of the execution or the signatures. Gen. Stat., chap. 73, § 82; Laws 1867, chap. 64. Moreover, the policy was in itself and on its face competent evidence (18 Minn., 448,) and the general objection to its admission as "incompetent and immaterial" was not sufficiently specific to apprise the court or the opposing counsel of the particular ground of objection now taken. Sergeant vs. Kellogg, 5 Gilm., 280; Buntain vs. Bailey, 27 Ill., 406; Rindskoff vs. Malone, 9 Iowa, 540; Atkins vs. Elwell, 45 N. Y., 753.

The question put to the plaintiff on cross-examination, "Who attended to this business for you?" was properly excluded. It was not a proper cross-examination, for the witness had only testified to matters she had personally attended to, and it was, so far as we can see, wholly immaterial.

The answer of F. Schwendler to the fifth interrogatory was clearly inadmissible. It purports to be merely his conclusion from facts afterward to be stated in his deposition. His answer to the sixth interrogatory was properly excluded. It related in part to the contents of a letter which would itself have been better evidence; moreover, all this part of the answer was immaterial, for the plaintiff's rights could not be affected by anything done by the company or its agent after the tender was made.

In regard to the other objections taken to the exclusion of testimony, it is enough to say that in each case the error was afterward cured by the testimony of the same witness.

The objections to the first instruction given at the plaintiff's request, and to the refusal of the first, second, and sixth instructions asked by the defendant, were considered and disposed of on the former appeal. 18 Minn.

The fourth, fifth, seventh and eighth instructions requested, severally assume the existence of the alleged instructions as a fact proved, and withdraw from the jury whether the evidence in the case is sufficient to support this conclusion.

The remainder of the numerous points made by the defendant were considered and disposed of on the former appeal.

Order affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

CUMMINGS

vs.

CHESHIRE COUNTY M. F. INS. CO.

Insurance is a contract of indemnity, appertaining to the person or party to the contract, rather than to the property subjected to the risk against which its owner is protected.

The assent of the insurer to an assignment of a policy of insurance, upon a sale of the property named therein, constitutes a new and original promise to the assignee to indemnify him in like manner as the original insured was indemnified; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee.

A mutual fire insurance company insured A, "his heirs, executors, administrators, and assigns," on his dwelling-house a certain sum, and "on furniture and clothing therein" a certain other sum. During the life of the policy, A sold the real estate to B, and assigned the policy to him, with the consent of the insurers. A did not sell his furniture and clothing to B, but removed it. B took possession of the house, and placed therein his own furniture and clothing, of equal character and value, and it was burned with the house. *Held*, B may recover of the insurers the amount of the original insurance upon the furniture and clothing of A.

ASSUMPSIT, on a policy of insurance issued by the defendant to Stephen Pettigrew, dated May 11, 1868, for the term of five years ending May 11, 1873, insuring said "Pettigrew, his heirs, executors, administrators, and assigns," in the sum of $1,425, "on his buildings and other property situated in Claremont, owned and occupied by himself; that is to say,—on dwelling-house, woodshed, and carriage-house, $500; on furniture and clothing therein, $200; on provisions

* From advanced sheets of 55 N. H. Reports. Decision rendered June, 1875.

in said house, $100 ; on the east barn, $175 ; on hay and grain therein, $150 ; on south barn, $200 ; on hay and grain therein, $100."

The property insured was burned June 13, 1872. The land and buildings were sold by Pettigrew to Paul Cummings, the plaintiff, March 12, 1870. On the same day Pettigrew executed the following assignment, using a printed blank upon said policy for that purpose :

"Having sold and conveyed the buildings within insured, and the land whereon they stand, to Paul Cummings, I hereby assign to him the policy of insurance within written ; to hold the same, subject to all the liabilities and entitled to all the rights and privileges to which I am liable or entitled by virtue thereof. Stephen Pettigrew."

"The directors consent to the above assignment. Albro Blodgett, Agent. May 12, 1870."

Pettigrew did not sell his furniture and clothing to Cummings, but removed them ; and Cummings moved his furniture and clothing into the house ; and it was Cummings's furniture and clothing that were burned.

The action was brought to recover for loss of the furniture and clothing that Cummings brought to the house. Pettigrew never owned it, nor did Cummings ever own the furniture originally insured. The plaintiff claimed that this was an insurance on the furniture and clothing that might be in the house at any time during the existence of the policy. The defendant claimed that a naked assignment of the policy, without also assigning or conveying the property insured, or some interest therein, is not a valid assignment.

The loss upon the buildings has been paid.

The action was tried by the court ; and it was agreed that if, upon the foregoing statement of facts, the Superior Court should be of the opinion that this action can be maintained, judgment shall be rendered for the plaintiff for $157, and interest from the time the same became payable, and costs ; otherwise, judgment to be rendered for the defendant for his costs.

WAIT and PARKER, *for Plaintiff.*

ALLEN and WHEELER *for Defendant.*

FOSTER, C. J., C. C.*

What is the nature of the contract of insurance? In Lucena vs. Craufurd, 2 Bos. & Pul. (N. R.) 300, Mr. Justice Lawrence gives pre

* CUSHING, C. J., having been of counsel, did not sit.

cedence to the definition of Grotius in his Introduction to the Jurisprudence of Holland, published in 1631, the English translation of which definition is,—"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them."

This definition commends itself to the judgment of Mr. May, "alike by its brevity, its logic, and its comprehensiveness." May on Insurance, sec. 1. These commendable qualities, however, seem to me even more conspicuous in the language of Sir Wm. Blackstone: "A policy of insurance is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event." 2 Bl. Com., 458.

Insurance, then, is a contract of indemnity, and it appertains to the person or party to the contract, and not to the thing which is subjected to the risk against which its owner is protected. It is not a contract running with the land, in the case of real estate, nor running with the personalty, so to speak, in the case of a chattel interest of the insured. Carpenter vs. Ins. Co., 16 Pet., 495. "The principle of indemnity," says Mr. Angell, "is the general principle which runs through the whole contract of insurance. A contract of indemnity is given to a person against his sustaining loss or damage, and cannot properly be called one that insures the thing, it not being possible so to do; and, therefore, as Lord Hardwicke has said, it must mean insuring the person from damage; that is, damage to the thing or to his property." Angell on Insurance, sec. 1; May on Insurance, sec. 2, 6; 2 Bl. Com., 459; Lucena vs. Craufurd, 2 Bos. & Pul., (N. R.,) 300; Saddlers Co. vs. Badcock, 2 Atk., 554; Wilson vs. Hill, 3 Met., 66; Ellis on Insurance, 1; Williams on Pers. Prop., *179; 1 Phillips on Insurance, 1; Lane vs. Maine M. Fire Ins. Co., 12 Me., (3 Fairf.,) 44, 49.

The original contract in this case was, that, in consideration of a sum of money advanced by Pettigrew, and his agreement to be assessed at a certain rate upon another sum, the defendants would indemnify him and assigns against loss by fire, to the amount of $1,425, for the term of five years,—to wit, on his dwelling-house $500, on furniture and clothing therein $200, and on other property the remainder of the gross sum of $1.425. The defendants were paid for insuring the whole property during the entire period of five years; and they agreed, upon this consideration, to keep the whole property insured,

whoever might during that time be its legal owner, by force of their expressed obligation to indemnify Pettigrew and his assigns.

An alienation of the property, with the consent of the defendants, was therefore contemplated and provided for by the parties to the original contract. Pettigrew sold his house, removed his furniture, and assigned the policy to Cummings, (the defendants assenting thereto,) who bought the house and placed therein other furniture of equal character and value. If he had sold his own furniture, or left it somewhere else, and bought the furniture of Pettigrew and retained it in the house, the defendants would unquestionably be liable for its loss. It makes no difference, in reason, equity, or common sense, whether the furniture which they were paid for insuring was bought of Stephen Pettigrew or anybody else; and I apprehend it makes no difference in law.

The contract of insurance, we have seen, does not, unless by extraordinary and express stipulation of the parties, run with the subject-matter of insurance. Satisfaction is to be made to the person insured for the loss he may have sustained. In fulfillment of the defendants' agreement with Pettigrew that they would insure his assigns, on the 12th of May, 1870, the defendants, in writing, signified their consent to the assignment by Pettigrew to the plaintiff of "the policy of insurance within written; to hold the same subject to all the liabilities and entitled to all the rights and privileges to which I am liable or entitled by virtue thereof." The liabilities referred to were, the obligation of the plaintiff to pay assessments; the rights referred to were, the rights of suit and recovery against the defendants, in case of a loss of the property covered by the policy during the period of its existence. The assignment was of the whole policy. The obligation of the assignee was, to pay assessments upon the whole valuation of all the property described in the policy.

The intention and contract of the defendants, in consenting to the assignment of the policy, were, to indemnify the owner for the time being,—that is, at the time of its destruction,—not for any specific urniture, but for any furniture which might be in the house during the time specified. As the plaintiff's counsel suggest,—"There can be no question but that Pettigrew might have brought in furniture and clothing not there when the policy was underwritten, and it would be covered by it. He might have replaced what he then had by this very furniture which was burned, and no question would have been made but that it was insured to him." After the premises were sold to the plaintiff and the policy assigned to him, why may he not have

done the same thing and been entitled to the same benefit? The insurers are put in no worse condition; their risk was not made greater nor different."

There is, however, another aspect of this case in which the defendants' liability is very clearly apparent. The consent to Pettigrew's assignment may well be regarded as a new and independent contract made directly with the plaintiff,—an agreement to indemnify the plaintiff against loss upon his house and his furniture and clothing therein.

"If, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner while he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee.

"But such undertaking will be binding, not because the policy is in any way incident to the estate or runs with the land, but in consequence of the new contract." Shaw C. J., in Wilson vs. Hill, 3 Met. 66, at page 69.

So, also, Perley, J., Rollins vs. Ins. Co., 25 N. H. 207: "The assignment and assent of the corporation make a new contract, upon which * * the assignee might maintain an action in his own name; and the action in this case would be founded on this new contract made with him." And, said Eastman, J., in Folsom vs. Ins. Co., 30 N. H., 240, assent to the assignment is "a new contract made with the assignee."

We have therefore in the case before us a new contract made between the parties to this suit, whereby the defendants, for a full and sufficient consideration, have undertaken to insure the plaintiff against loss by fire on the house which he bought of Pettigrew, and the furniture and clothing therein which he bought of—no matter whom.

The party insured, whether by an original policy or a supplemental contract, under the form of an assignment, must of course have an insurable interest in the property which is the subject of the contract; but it can be of no importance to the insurer whence or how the other party acquired his title.

If these views are correct, there must be judgment for the plaintiff according to the provisions of the case transferred.

LADD, J.

The consent of the directors to the assignment of the policy by Pettigrew to the plaintiff constituted a new and original contract and promise to indemnify him according to the terms of the policy; and this new promise rested upon a sufficient consideration, namely, the exemption of the company from any further liability to Pettigrew, and the premiums already paid and secured for the unexpired term which the policy had to run. Wilson vs. Hill, 3 Met., 66. It can hardly be claimed that, by any fair construction of the policy, the insurance was only on such furniture and clothing as was in the house, and on such hay and grain as was in the barns, at the time it was executed, so that no change therein could be made by Pettigrew. Common experience teaches that such changes must of necessity be constantly taking place; and the contract was made in view of that fact. The language used shows plainly enough that such changes were in contemplation of the parties. The insurance is not "on the furniture and clothing now therein," but, in general terms, "on furniture and clothing therein."

It is too clear for argument that the policy would cover other furniture and clothing with which Pettigrew might replace worn-out clothing and furniture that was in the house at the time it was made, or any furniture he might have therein to the amount of the insurance during the term.

It follows, conclusively, as it seems to me, that, when the defendants entered into the new contract with the plaintiff, identical in its terms because evidenced by the same identical instrument, the rights of the plaintiff under that contract must be the same as were those of Pettigrew. That being so, it was as much an insurance of his furniture and clothing as it was of the furniture and clothing of Pettigrew.

SMITH, J.

In general, at common law, where one party assigns his interest in a contract, and the other party agrees to the assignment, this constitutes a new contract between the assignee and such other original party, the terms of the original contract regulating those of the new contract. Fogg vs. Insurance Company, 10 Cush., 337.

The defendants agreed to insure Pettigrew, his heirs and assigns, "on his buildings and other property situated in Claremont," etc. Pettigrew, during the existence of the policy, sold the buildings to the plaintiff, and assigned to him the contract of insurance, and all the

rights and privileges to which he was entitled by virtue thereof, and then surrendered to the plaintiff the possession of the buildings, removing his clothing and furniture. Cummings thereupon commenced to occupy the premises with his own furniture and clothing. The defendants assented to this assignment, and thereby entered into a new contract with the plaintiff, the terms of which were regulated and fixed by those of the original contract,—that is, they agreed to insure him "on his buildings and other property situated in Claremont, etc.,—that is to say, on dwelling-house, woodshed, and carriage-house, $500; on furniture and clothing therein, $200," etc. This undertaking is not binding because the policy is incident to the property insured, but because it is a new contract. Wilson vs. Hill, 3 Met., 66. The defendants were paid for insuring the full sum of $1,425, for five years, and their contract was to pay that sum to Pettigrew's assigns as well as to him. When they consented to the assignment, they agreed to insure Cummings the same as they had Pettigrew: they in fact substituted the former for the latter, and agreed that the policy should represent to him just what it had to Pettigrew. No specific furniture and clothing was named in the policy beyond that it was such furniture and clothing of the insured as he might have in the house for the time being. If Pettigrew had not assigned the policy, and had remained in the occupation of the premises, he might have substituted other furniture for that originally insured, and no one would have questioned that it would have been covered by the policy. Any other construction would practically prevent the insurance of provisions, clothing, and family stores, as well as stocks of goods, and such property as is worn out, consumed, or otherwise changed several times during the term of a policy. If Pettigrew then could have replaced the furniture and clothing originally insured, with other property of similar character and value, without affecting his rights under the policy, there does not seem to be any reason why Cummings might not have done the same thing.

The contract was to insure him (Cummings) on his furniture and clothing, and it could make no difference with the defendants whether he procured his furniture of Pettigrew or of some one else. The risk was not increased, nor was it in any respect different; and, besides, there was a good consideration for this new undertaking. Cummings purchased the real estate and became the assignee of the whole policy; and having become assignee of the whole policy, and having become substituted, with the consent of the defendants, for Pettigrew, I think

he is entitled to all the benefits that his assignor could claim under the policy, and could do whatever he could do. It must follow, then, that by the new contract between these parties the defendants insured the plaintiff's furniture and clothing, and consequently the plaintiff is entitled to judgment, according to the finding of the court below.

MISCELLANEOUS.

The following summary of cases, chiefly in the lower courts, is from various sources, not official.

FIRE.—*Premium note given to an unauthorized corporation of another State.*

It is a good defense to a premium note to a mutual insurance company of another State, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana statute respecting foreign corporations. Mutual insurance companies are clearly within the statute.

A State allowing a foreign corporation to do business within it limits, may impose such reasonable conditions as it sees fit. Payson vs. Withers, distinguished.

The order of assessment by the court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it.

Wilmer S. Lamb, assignee of the Winneshiek Ins. Co., vs. Michael Lamb.

U. S. D. C. Ind., August, 1875.

FIRE.—*Agent—Power to bind the company to a director.*

A custom or understanding of insurance companies as to the power of their general agents to bind the company to an agreement for insurance, even if established, would be of no avail to a director of the company, as he is conclusively presumed to know the powers of the agent and the rules and usages of the company.

Whatever may be the implied powers as to strangers, a director of the company must stand upon the actual powers of the agent, and must abide by the rules and usages of his company.

Patterson et al. vs. Ben Franklin Ins. Co.

C. P. of Allegheny Co.

FIRE.—*Bankruptcy—Loss after.*

A loss upon a policy issued by a fire nsurance company, happening after such company is thrown into bankruptcy, and before the final dividend, is a debt provable against such company.

In re Pl. Glass Co.

U. S. Dist. Court, N. J. 12 N. B. R., No. 2.

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